Annex 1

Cohen, Darren B.

From: Chris LaHatte <chris.lahatte@icann.org>
Sent: Friday, March 15, 2013 6:47 PM
To: Cohen, Darren B.
Cc: ombudsman@icann.org
Subject: Re: ICC gTLD Community Objections and Technical Difficulties

Dear Mr Cohen,
Thank you for the emails. Perhaps before I start a more formal investigation you could see if your objection has been accepted and this will determine my next steps
Regards

Sent from my iPhone

On 16/03/2013, at 9:50 AM, "Cohen, Darren B." <DCohen@ wrote:

> Dear ICANN Ombudsman/Mr. Lahatte,
>
> On behalf of one of our clients, we attempted to file a couple of Community Objections to certain newly applied for gTLDs last night prior to the filing deadline. During the course of submitting the two objections to the ICC, we experienced a lengthy Internet outage, which resulted in our email submissions being sent 10 and 11 minutes respectively past the 8PM EST deadline (we resent a supplement submission as soon as we could). Is there a process available for finding out whether the Community Objections were nonetheless accepted for processing? The fees had already been paid earlier on the day via wire transfer, and the only reason for the 10 and 11 minute delay was due to technical issues beyond our control. If the submissions will not be accepted, is there a process for appealing based on unforeseen and uncontrollable technical/internet outage issues? A good faith effort was made to reach the deadlines and the fees paid, and the difference was only roughly ten minutes.
>
> I think you very much for your consideration and reply.
>
> Darren Cohen

Annex 2

Jessica Kutter

Von:	Torsten Bettinger
Gesendet:	Dienstag, 20. August 2013 20:16
An:	'ombudsman@icann.org'
Cc:	david.taylor@h 'Jonas.Koelle@ 'martin.andre@ 'Harris, Judith L.'; 'akram.atallah@icann.org'; 'john.jeffrey@icann.org'; 'TUEMPEL Hannah'
Betreff:	AW: Rejection of Merck & Co.'s Community Objections
Anlagen:	ICANN Email_Merck Co. Objections.pdf

Dear Mr. LaHatte,

I am writing to you in connection with the attached file, which appears to be a copy of an email communication between ICANN staff members, and which was copied to Ms. Judith Harris of Reed Smith LLP. I am extremely concerned that I was not made aware of this communication, nor of any potential ongoing discussions in the matter of Merck & Co.'s improperly-filed ICC actions.

As you are aware, given the content of my message of July 29, I represent Merck KGaA, the potential respondent in the untimely actions previously filed by Ms. Harris' firm. If, in contravention of the published filing deadlines, the actions submitted by Merck & Co. were to be reconsidered for acceptance by the ICC, my client would suffer substantial and irreparable harm. Therefore, I am very concerned that I was not copied to your communications, and have not been made aware of any ongoing discussion in this matter.

As noted, there are no grounds for any "reconsideration" of the ICC's proper rejection of Merck & Co.'s improperly submitted materials. The ICC considered several rounds of discussions between the parties in reaching its conclusion. Your office has not provided my client with an opportunity to submit copies of its materials, nor allowed it to be heard in the course of your decision-making process. There are indeed grave concerns with the "evidence" submitted by Ms. Harris, and discrepancies in the alleged timeline concerning the supposed technical issues experienced by Mr. Cohen in filing the materials. As confirmed by a member of the senior legal staff at WIPO, Mr. Cohen was able to file pleadings for Merck & Co. with the WIPO Center at 23:56 and 23:58 on March 13. Thus, the alleged time line proffered by Reed Harris is inaccurate, and merely constitutes an attempt to secure an improper extension of the mandated filing deadline.

In my previous email, I kindly requested the opportunity to submit additional evidence, demonstrating why it would be inappropriate to reopen this discussion or to consider accepting Merck & Co.'s untimely pleadings. Accordingly, I am quite distressed to learn that, apparently, these discussions have gone on without providing notice to the putative respondent. It is inappropriate for ICANN to carry on communications with only one party to a dispute, and to prevent said party from submitting evidence and argumentation on its behalf.

The ICC was in full possession of these facts when it reviewed the case, and it came to the proper conclusion in rejecting the untimely pleadings. There is no scope for the "reconsideration" of this rejection, as it was both in line with the mandated filing requirements and undertaken after a full and complete review of all available evidence.

Accordingly, I would kindly request to be provided with full and complete copies of all unilateral communications which have taken place with regard to this matter, and that any further discussion concerning the potential untimely acceptance of Merck & Co.'s pleadings be ceased. The ICC's ruling, which was appropriate and well-informed, should remain.

With best regards,

Torsten Bettinger

Dr. Torsten Bettinger, LL.M.
Rechtsanwalt

Fachanwalt für Informationstechnologierecht
Fachanwalt für gewerblichen Rechtsschutz

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Annex 3

Jessica Kutter

Von: Chris LaHatte <chris.lahatte@icann.org>
Gesendet: Dienstag, 20. August 2013 23:08
An: Torsten Bettinger; 'ombudsman@icann.org'
Cc: david.taylor@ 'Jonas.Koelle@ 'martin.andre@ 'Harris, Judith L.'; Akram Atallah; John Jeffrey; 'TUEMPEL Hannah'
Betreff: RE: Rejection of Merck & Co.'s Community Objections
Signiert von: chris.lahatte@icann.org

Dear Mr Bettinger

I am not sure how this email reached you. Normally when someone complains to the Ombudsman, the communications are confidential, and this is a primary feature of my office. It would be wrong of me to communicate to any other person, without the specific consent of the affected parties. So the reason you were not notified of this email, is that I did not have permission to send this to you or anyone else. I should add that I did not seek such permission, because the default position for me, is always confidentiality. Obviously my recommendation is now out in the open. It would not be appropriate to engage in the debate any further, because the limit of my jurisdiction is the recommendation. Beyond that, it is not appropriate for me to enter into the dispute any further, unless a matter specifically within my jurisdiction arises. I hope this clarifies the position of the ombudsman.

Regards

Chris LaHatte
Ombudsman
Blog https://omblog.icann.org/
Webpage http://www.icann.org/en/help/ombudsman

Annex 4

ICANN Ombudsman Blog

August 18, 2013

Investigation report on Civil Discourse Case 13-00058

Filed under: Uncategorized — Chris LaHatte @ 4:45 pm

Office of the Ombudsman

Case 13-00058

In a matter of a Complaint by AB

Report dated August 2013

Introduction

This investigation has become a complicated mixture of a complaint about comments made on an ICANN mailing list, which on further investigation also resulted in a complaint about an election process, from the person the subject of the mailing list complaint. I deal with those separately, but the two matters are to some extent intermingled. The second complaint however appears to have resolved by other means.

I quote, with redactions to avoid identification of the individuals and organisation, the message which was posted on the mailing list.

"Having worked with the (name of body) and the (government department) in the past, and having maintained a relationship with senior members of each subsequently, I'm certain that whatever CD is up to is unlikely to be consistent with the public interest in public health in the (name) market of ideas and names.

C has always struck me as one of the least intelligent, and least principled persons to have ever been on the (name) Council."

The complainant found this offensive and asked for the posting to be removed from the archive because it breached the relevant rules of procedure. I have not identified the rules of procedure from the supporting organisation, again because it identifies the individuals without difficulty. The complaint was made on behalf of the person identified.

Facts

The essence of the complaint is whether the comments made are offensive, and whether they should be removed. I understand the comments have already been removed in any event. So the issue is whether it was appropriate for the comments to have been made and whether they are offensive.

Investigation

It is my common practice on issues involving personalities to strongly urge the parties to join in a mediation. The first part of my investigation therefore consisted of an attempt to persuade the person who made the statement, to join in such a mediation. This was a protracted exercise, because the statement maker did not focus on the specific issue, and chose only to respond to certain parts of my enquiries. This is a pity, because of people do not engage in the process, it is difficult to achieve a resolution that restores some degree of harmony within the supporting organisation.

The statement maker was invited to retract and apologise for the statements, by a community leader, in a message which said as follows:-

"Upon the request of XY, Chair of the (Organisation), your posting rights to the (name) mailing list and (name) wiki have been suspended.

Per the Chair, your account can be reactived if the following conditions are met:

1. You apologize for the (date) comment to the aggrieved party CC'ing the Chair and Secretary of (name);

2. You re-apply for unaffiliated (name) membership following the proper procedures; and

3. (name) review this case and reach a consensus.

Please also find attached a copy of the (name) Code of Conduct for your review."

Regrettably, there has been no apology, although the membership issue appears to have been resolved by other means. His initial response was to question who had make the complaint, and when and where. I then specifically put the comment to him, identified by date, person and place. He declined to discuss the matter, and I was not able to persuade him to join a mediation. His primary response was that he thought that there was no complainant, but subsequently would not engage in a discussion about the comment posted on the mailing list, nor would he discuss whether the offensive comment was something which should be removed or apologise. This effectively frustrated any attempt to reach a more conciliatory settlement of the issue. I therefore notified him that I would prepare a formal report about the complaint and send him a copy in due course.

For the avoidance of any doubt, I consider it quite clear that the comment made was offensive by any standard. There is no doubt that on many mailing lists, there is often robust discussion about the issues currently before the organisation. But there are specific rules about content and standards of behaviour, which have been in place for some time.

Jurisdiction

This is a matter where I clearly have jurisdiction. An unfairness results when someone is offensively criticised in a mailing list within part of an ICANN supporting organisation. The unfairness is compounded when the statement maker refuses to engage in a conciliatory process.

Reasoning

The complainant's issue is the statements made on the mailing list were offensive. The identification and investigation of this as being offensive was not difficult. Normally, as I have cited earlier, a mediation or conciliation process should resolve issues like this. Comments made in the heat of debate are sometimes inappropriate, but usually the parties can be persuaded to withdraw and apologise. I am conscious from my work as a mediator, that parties under stress sometimes act inappropriately. I would have liked to investigate whether there was some stress factor which influenced the statement maker to make the offensive comments. I am confident that if there had been some explanation based on some background, that the complainant would have been satisfied with a retraction and apology. The statement maker however has chosen not to engage in the process. I have little difficulty therefore in finding that the statements were offensive, and hopefully by now removed. The resulting suspension of the statement maker is understandable in the light of such refusal. I do not consider that the suspension was unfair and no circumstances. I would strongly suggest to the statement maker, that engaging in the mediation process would be more productive in the future. It may be that he has some views about the mediation process, but he is also aware of the standards of behaviour expected, when making postings on this mailing list.

Result

As a result of this investigation, I consider the reaction of the organisation in suspending the posting privileges was an appropriate response and not unfair. I will be posting this report on my website, because it is appropriate to remind those within the ICANN world, that there are standards of behaviour and that they should be respected. It is also important to note that such interpersonal criticism is in my view, best resolved with a mediation process, where the parties can engage in constructive discussions, and apologise where needed. It is important to be inclusive, but where there are breaches of the standards of behaviour, then sanctions do need to be made.

Chris LaHatte

Ombudsman

Comments (0)

July 19, 2013

Reappointment to second term as Ombudsman

Filed under: Uncategorized — Chris LaHatte @ 9:41 pm

I am re-posting the resolution from the Board

1. **Reappointment of Ombudsman**

   Whereas, the Ombudsman's initial term concludes on 27 July 2013.

   Whereas, the Compensation Committee, which is responsible for overseeing the Ombudsman performance and compensation, has recommended that the Board reappoint Chris LaHatte as the Ombudsman for another two-year term.

   Whereas, the current Ombudsman has agreed to serve another term if appointed.

   Resolved (2013.07.17.11), in accordance with Article V, Section 1.2 of the ICANN Bylaws, the Board hereby reappoints Chris LaHatte as the ICANN Ombudsman for a second two-year term from 28 July 2013 through 27 July 2015, and authorizes the General Counsel and Secretary to execute an agreement with Mr. LaHatte.

   Rationale for Resolution 2013.07.17.11

   ICANN's Bylaws require ICANN to maintain an Office of the Ombudsman. See Article V of the Bylaws at http://www.icann.org/en/general/bylaws.htm#V. Having an ICANNOmbudsman positively affects the transparency and accountability of ICANN as the Ombudsman is one of the three main accountability mechanisms within ICANN. ICANN's current Ombudsman is familiar with and well versed in the complex issues now facingICANN, including the New gTLD Program and other initiatives currently under way. Mr. LaHatte's caseload continues to increase over time, as both the nature of ICANN's activities and the breadth of the ICANN community expand. Maintaining continuity in the Ombudsman's Office with Mr. LaHatte, who is known and respected by members of theICANN community, is important to ICANN's accountability.

As there has been a budget for an ICANN Ombudsman since 2004 when the first Ombudsman was appointed this decision does not have any financial impact on ICANN, the community or the public that was not already anticipated or included in the budget. This decision will not have any impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

Comments (0)

June 26, 2013

Ombudsman Recommendation on Late Objection

Filed under: Uncategorized — Chris LaHatte @ 5:27 pm

Thia is a letter which I sent to the Board on 31 May 2013:-

Steve Crocker

Chair

ICANN Board

Scott Seitz

dotgay LLC

Christopher R Barron

Chairman Emeritus, GOProud

Objections for String .gay by GOProud

I have received a complaint in relation to the rejection of an objection to the string .gay lodged by the community group called GOProud. The objection was filed within time but then rejected because it exceeded the prescribed word length, by approximately 500 words. The notice of the rejection was sent to an email address which was not the one used to file the objection, and therefore notice of the rejection arrived later than expected, which meant that the amended objection was then not filed on time. GOProud made some enquiries about progress of their objection and assert they did not get any response until they were told the objection had been rejected. They make the point that if the rejection had been sent to the correct email address, they could have easily lodged the amended objection within time.

I am concerned about the fairness of such a decision to reject the objection, when there appears to be a valid reason why notice of the initial rejection was not received. It is of course possible for the objector and the applicant to meet to discuss the objection, which is contemplated by the objection process outlined in the guidebook. However my concern as the ombudsman, is that there is some unfairness in the subsequent rejection given the apparent error in the use of the wrong email. It seems to me that it would be relatively easy to unwind that decision, and permit the late filing of the objection. I can of course only make a recommendation, but in this case where there is some unfairness I think the matter should be revisited.

Please contact me if you have any queries about this matter. I believe a quick decision does need to be made.

I have sent a copy of this letter to the objector and to the applicant. I have already offered to facilitate or mediate the objection, but the position of GOProud is that they want the objection in place before they would consider such a process. Given the unfairness in the rejection, that does not seem to be an unreasonable position.

Yours faithfully,

Chris LaHatte

ICANN Ombudsman

Comments (0)

June 10, 2013

Ombudsman Report on Late Objections

Filed under: Uncategorized — Chris LaHatte @ 1:12 am

Office of the Ombudsman

Case 13-00111

In a matter of a Complaint by AB

Report dated 10th June 2012

Introduction

This investigation began with a complaint about the objection process to the new gTLD Programme, and specifically a complaint that an objection was actually filed late, in that it was filed after midnight, and received late by the complainant (despite some amelioration of the strictness of the time limit). The significance of the objection process is that the Applicant Guidebook and procedure for the programme factored in the ability for affected individuals to object to applications for particular new gTLDs on a number of grounds. These include string confusion, legal rights objections, limited public interest objections and community objections. Once the objection had been filed then the applicant must respond to the objection, because otherwise the objector would prevail by default. Provided the objection was correctly lodged, and the applicant responded, then the objection would be handled by a panel of qualified experience depending on the category of objection.

Facts

The essence of this complaint is that objections were filed late, and it is the position of the complainant that it should not face an objection where the objector was unable to file an objection within the required time. The complainant said that when the objection was copied to them, it was clear the objection had been received at 12:01 a.m. on 14 March 2013 although the Applicant Guidebook stated that the objection had to be filed by midnight on 13 March 2013. On investigation, the applicant then discovered that the dispute resolution provider, in this case ICC, had conferred with other dispute resolution providers and agreed to permit a five minute window after midnight on 13th March, and that it would accept objections during that window. The applicant says specifically about the timing of the objection-

"That means, the employee tasked with the job of filing the objection pressed the send button after midnight, to be precise at 00:01:02 Thursday 14 March 2013 (UTC). I attach the report from (expert) which clearly shows this. The objection was then received by us at 00:04:54 Thursday 14 March 2013 (UTC)."

The complainant was concerned that I note that the objection was actually sent after the filing deadline, and not immediately before and then received late due to the process of sending taking more time.

The complainant then contacted ICANN and subsequently discovered that the providers had conferred among themselves, and was later advised that ICANN did not intervene or give any advice about the five minute window. The complainant has also expressed some frustration that it endeavoured to make enquiries to ICANN about the decision, but had no response. The complainant indicates that this is why it has chosen to ask the ombudsman to investigate this issue.

It should be noted that the objector is a competing applicant, and this needs to be factored into what has happened. The complainant considered that this meant the objector acted in bad faith, by lodging the objection at the very last possible time.

I have discussed this with ICANN staff and was told decisions about the window were left entirely to the dispute resolution providers, and that ICANN did not participate in the decision, and accepted the decision. The perception seems to be from outside observers, that ICANN endorsed this decision, but certainly my investigation indicates that ICANN staff accepted a decision rather than say that it was right or wrong, which would be my understanding of endorsement. The complainant noted to me

"As we have already indicated, we did receive insight from Christine Willet as to ICANN's decision making process, during webinars and presentations in which Ms. Willet was involved. Essentially the DRSPs asked ICANN for its view on late filed objections, ICANN responded that the DRSPs should decide amongst themselves, but be consistent. The DRSPs then unilaterally decided to extend the previously communicated deadline (after it had passed), presented this solution to ICANN, which agreed."

Investigation

To undertake this investigation I have undertaken a number of steps. In particular I discussed this with the applicant with an exchange of emails, I have talked to Christine Willett (VP gTLD Operations) and legal staff at ICANN, and I have also made a call for comments on my blog and Twitter feed. I believe it is important that the community should comment on this issue, both from the perspective of applicants and of objectors. I am grateful to those who have made comments, which have been thoughtful and useful. I am conscious that there have been very substantial investments in the applications, but also of course recognise that objectors also consider that they have economic and other interests affected by awarding a new gTLD to applicants.

Issues

The issue which I am required to investigate is the fairness of the decision to permit the filing of the objection within the additional window and beyond the limit prescribed in the Applicant Handbook.

Jurisdiction

This is a matter where I do need to carefully consider the jurisdiction to investigate the complaint. My jurisdiction is limited to issues between ICANN and the ICANN community. The issue is therefore whether a dispute resolution provider, contracted by ICANN to evaluate objections, can be subject of an investigation by the ombudsman in relation to fairness. Put in another way, is the dispute resolution provider a member of the ICANN community? My jurisdiction is excluded for certain types of contractual relationship with the bylaws says "or issues related to vendor/supplier relations". However that sort of contractual relationship is intended to deal with issues of procurement rather than the more complex arrangements made in the context of the gTLD programme. The complainant did make the point that ICANN was consulted during the course of the discussion about loosening the rigour of the time for objection. So in the context of the purpose of the exclusion, I do believe that I have jurisdiction. Certainly the applicant/ complainant submitted that I did, and should investigate the decision.

Reasoning

The modern test for dealing with issues of fairness also encompasses the concept of proportionality. In his correspondence with me, the applicant/complainant did say, quoting from the NTAG meeting in Beijing ""The DRSP's amongst themselves discussed this issue. And due to their own system issues, the synchronization of clocks around the world, and concerns they had, they elected to extend their window by five minutes and accept objections that were filed, according to some clocks in some parts of the world, five minutes after the deadline." The point that needs to be emphasised is that the objection is not by any means fatal to the success of any of the applications. It is simply a step which has to be undertaken and answered during the course of a long and complex process. In the context of proportionality, and considering the issue of fairness I would pose the question, is it better for the community that applications are properly challenged and debated and succeed therefore on the merits, or should a more prescriptive approach be adopted?

There have been a number of comments made in relation to this issue on blog sites which make it clear that some members of the community have strong views about a prescriptive approach. One comment was "people have spent years and hundreds of thousands of dollars on their applications. A technicality should not determine the outcome." But another comment was that filing an objection late was not a technicality. Other objectors have agreed commenting that a strict approach should be adopted.

However I also need to bear in mind that my jurisdiction is limited to making a recommendation about the process, which would be to recommend that either a strict approach be adopted or that the decision of the dispute resolution providers is proportionate to the issue. Even if I were to recommend the strict approach, it is open to the dispute resolution providers to maintain their position about the five minute window.

It would also be open for me to suggest to the board that they suspend the objection process, a course urged upon me by this applicant. While I cannot predict what they would decide, I think it likely that they would respect the decision of the dispute resolution providers. The dispute resolution providers are independent, and make their own decisions. For the board to interfere would be controversial.

Of course it would be open to me to comment on the fairness or otherwise of such decisions. Given the circumstances described by the providers and discussed at Beijing, it is my view that a five minute window is a proportionate response and does not create unfairness for the applicants, but does provide fairness given that it is only five minutes. I am told that some objections received later were in fact rejected. I am directly aware of least one. That is perhaps not surprising, in the context of a decision about a five minute window.

There is no doubt that sending an objection by the competing applicant for the same string is perhaps a different matter from an objection by a detached observer. I do not believe that this somehow taints the objection because the very process anticipates objections from competing applicants. They had a right to object, and exercised that right, if a little tardily. But in the context of the decision to accept within a five minute window, then the objection is properly lodged.

Result

As a result of this investigation, I consider that the decision of the dispute resolution providers to permit the five minute window does not create unfairness for the applicant and is a proportionate response. In addition I do not consider that the sending, and for the DRP to accept the objection, of the objection, within the window is unfair.

Chris LaHatte

Ombudsman

[Comments (0)]

May 15, 2013

Objections to new gTLD Applications

Filed under: Uncategorized — Chris LaHatte @ 5:06 pm

I have had a number of complaints about the action of the dispute resolution providers in accepting some objections past the deadline. It appears that these come into two categories, some with very large attachments to emails which were sent before the deadline, but which took some time to transmit, meaning the final parts were sent late. In addition some were sent minutes after the deadline due to technical difficulties. Two complainants have both made a formal complaint to my office stating that I should recommend to the board that late complaints should not be received on the basis that the deadlines were well advertised and achievable. It appears from my discussions that there appears to have been a window of a a few moments permitted by the dispute resolution providers. It should also be added that ICANN did not approve or disapprove the leeway given by the dispute resolution providers. I am interested to hear community comments on this issue. One of the complainants specifically suggested a blog entry, and I have also made a Twitter comment. I look forward to hearing from you either here, on Twitter or to ombudsman@icann.org. Full confidentiality is of course assured if you wish this.

Comments (2)

April 15, 2013

The voice of the crowd-ICANN Public Forum

Filed under: Uncategorized — Chris LaHatte @ 8:13 pm

One of the features of the regular ICANN meeting is the public forum which is now held on Thursday afternoon, the last day of the meeting. This is an occasion where the voice of the people can be heard, and the only restriction on the topic is that the speakers must limit their address to 2 minutes and comply with the ICANN rules about Expected Standards of Behaviour. These are “Treat all members of the ICANN community equally, irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age, or sexual orientation; members of the ICANN community should treat each other with civility both face to face and online.”

So provided the speaker respects those standards, then they are free to speak. This means that the speaker can discuss anything of concern to them. This is perhaps a poignant issue, when the meeting is held in a country where the freedom to speak is not given the same importance as some other participant countries in the ICANN community.

There is often an issue of not wishing to offend a host. But underlying this is sometimes the need to respect freedom of speech. During the ICANN meeting there was an incident where someone tried to speak inappropriately at an earlier meeting, where they were off topic. This resulted in two complaints to my office, over the next day. One of those was from the speaker and the other from a participant in the meeting, who was concerned about a perception that the speaker had been treated badly by not being able to speak. I explained carefully both to the speaker, and to the other complainant, that the initial forum at which he tried to speak was the wrong place, because he was off topic. I explained that we did have the public forum where he could express his views freely. I then made a specific arrangement so that he would be able to speak at the forum and that he also understood the rules about expected standards of behaviour. He completely understood this issue and did explain to me why he wanted to talk.

So in due course on Thursday, he arranged for someone to talk for the 2 minutes on this topic and was pleased to have been given the opportunity.

Sometimes things like freedom of speech are taken for granted, when it is an accepted part of our community. Not all places offer the same freedom, and within the world of ICANN, we can assist in ensuring that there is free and open discussion. I was pleased to be able to assist this person. Otherwise of course this would have been unfair.

Comments (0)

April 8, 2013

Beijing ICANN 46

Filed under: Uncategorized — Chris LaHatte @ 12:52 am

Today is the 1st official day of the full ICANN meeting in Beijing. We began with the traditional opening ceremony and another aspirational and inspiring speech from Fadi Chehade on the management tools which he is developing to ensure our bottom-up stakeholders model works with the open and transparent knowledge of what ICANN staff are actually doing. I am not part of that management system of course, because of the confidential nature of the complaints which come into my office. My new case management software however will do much the same for me, to more efficiently handle the increasing workload and respond better to my visitors. It has already been a little busy in my office with a range of complaints, some possibly quite controversial. I am shortly closing my afternoon clinic, to attend the Internet governance update. This proves to be a very topical issue and I am keen to see the latest developments. The ICANN ombudsman does have a role in the governance of ICANN, because of the particular function of fairness in the way in our multi stakeholder organisation works, and as a symbol to the community that they have an independent outlet if they feel the structure is not working. So I am keen to learn from the latest developments.

Comments (0)

March 18, 2013

Engineering Ethics and Codes of Conduct

Filed under: Uncategorized — Chris LaHatte @ 6:41 pm

On Monday 18th March I had the privilege of listening to Professor John Uff QC talk about engineering ethics. He is a civil engineer with a specialty in geotechnics, an Emeritus Professor of Engineering Law at King’s College, London, a global authority on construction law and a Queen’s Counsel. He has served as Vice President of the London Court of International Arbitration and as President of the Society of Construction Arbitrators. I cannot think of many who are as well qualified to discuss this issue! My interest was sparked because I have been asked to comment on ethical issues from time to time. The whole concept of fairness must ultimately be based on ethical considerations, which for professionals, are often described in codes. Professor Uff was invited to address the New Zealand Institute of Professional Engineers, who extended the invitation to lawyers and members of the Arbitrators and Mediators Institute.

The reason Professor Uff was invited was the discussion of ethical duties of engineers arising from the 2 major disasters in New Zealand, relating to engineering failure. The 1st was the Christchurch earthquake and subsequent after-shocks, and the 2nd was the Pike River coal mine explosion. The fact this has caused the

New Zealand engineers to reappraise the duties which engineers owed to the public as expressed in their code of ethics, and Professor Uff has written extensively on the subject.

At ICANN we do not have a formal code of ethics for the operation of the domain name system. There are a number of elements however which collectively are the start of such code. The very creation of ICANN as a not-for-profit multi-stakeholder organisation separates it from purely commercial enterprises. The existence of the office of the ombudsman to deal with issues of fairness, delay and diversity does make ICANN different, and the Ombudsman have also adopted the standards of practice for online dispute resolution. Frank Fowlie also developed the statement for respectful communication. ICANN also has similar guidelines within the communities which make up ICANN. More recently, ICANN has proposed a new draft of Registrants' Rights and Responsibilities, which is akin to a code of ethics. I have suggested the Ombudsman should have a specific role in this code. Professor Uff did warn the meeting however, that we should not create codes of ethics as a reaction to a problem or in the case of the engineering disasters, as a response to such major calamities. Fortunately at ICANN there has not been a significant issue, except of course this draft was developed because of the new GTLD program. This is different from the engineering code issues, but is analogous because it is a reaction to the event. I am hoping there will be some debate, at Beijing and further, on the use of such a code and perhaps a wider debate.

Comments (0)

March 13, 2013

Case Management

Filed under: Uncategorized — Chris LaHatte @ 3:40 pm

A case management system is probably not something which attracts much discussion or interest among my readers. ICANN itself has recently moved into the use of a sophisticated project management system to assist with collaboration and planning of work. The office of the ombudsman has had a useful case management system, but unfortunately it has become somewhat outdated. So I have been spending a considerable amount of time recently in researching new systems, and evaluating the products available.

I have now had my new system approved by ICANN and also by our security team, an important element because of my need for confidentiality. I have been spending time with the vendor to create the different alternatives and tools to work with the system, which I hope will enable faster handling of complaints and better reports as to the issues which I am handling. I am incorporating within the system a project management option so that when more complex complaints are received they can be handled with appropriate templates and milestones to assist in a better product.

The interface, for people who want to lodge a complaint, will not change greatly. What I hope to achieve is a system which will enable much more information to be provided, and which will process the complaints more actively. While many of my complaints continue to be outside my jurisdiction, nonetheless they needed to be considered and appropriate referrals made to the correct place to consider the issue. I believe my visitors prefer to know quickly whether I am able to deal with their complaint or whether it has to go somewhere else.

So on the face of it nothing will have any substantial changes, but within about two months we should have a new system with greater analysis and efficiency available.

Perhaps this is not very exciting, but I am sharing this so that my visitors know that the engine is being lifted and replaced by the 2013 model. The driver remains however as the 1954 model.

[Comments (0)]

March 7, 2013

[Trolls]

Filed under: [Uncategorized] — Chris LaHatte @ 4:50 pm

It is not unusual for me to receive complaints about intemperate or rude comments made within the ICANN community. Some years ago Frank Fowlie produced a most useful paper on the subject which is now placed on my pages at http://www.icann.org/en/help/ombudsman/respectful-communication. There are of course other policies within ICANN which consider similar issues. It is quite understandable when people are passionate about their ideas and policies, that they will occasionally step over the line and send an email or make a post, which often they will subsequently regret. Sadly the nature of the Internet is that sometimes these comments become embedded and impossible to remove because they have been repeated. I suspect in a number of cases the person who made the intemperate comment greatly regrets having done so, but is powerless to remove the trail.I have been following articles about someone who deliberately chooses to make critical, controversial and often very hurtful comments, and sadly this person is located in my own country of New Zealand. Apparently he is aged eighteen. I have a certain experience with teenagers, and understand how the mouth is often engaged before the brain is placed into gear. But one of the lubricants which makes society work is respect for the views of others. Perhaps politeness is regarded as an old-fashioned virtue, and certainly my parents told me that I must be polite. In the dark ages when I was a teenager, I am sure that I did not comply with the requests to be polite. But fortunately any comments I made were not embedded in the darker interstices of the Internet. Now this young New Zealand troll has achieved notoriety throughout the world by intemperate and hurtful comments, which apparently he claims are social experiments.I expect that he is pleased with all of the attention but I rather doubt that we are to see a considered academic consideration of his experiment. I am all for strong debate. But Frank Fowlie's paper has a continued relevance, although I doubt that the eighteen-year-old has read this in preparation for his social experiment.

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Annex 5

Supreme Court of Virginia.
John CASEY, Individually and as Administrator of the Estate of Ora Casey, et al.
v.
MERCK & CO., INC.

Record No. 111438.
March 2, 2012.

Background: Prescription drug users brought products liability actions against drug manufacturer, which were later consolidated, asserting claims under Virginia law for, inter alia, strict liability, failure to warn, breach of express and implied warranty, and negligence in the design, testing, development, manufacture, labeling, marketing, distribution, and sale of drug. The United States District Court for the Southern District of New York, John F. Keenan, J., 694 F.Supp.2d 253, granted manufacturer's motion for summary judgment. Drug users appealed. The Court of Appeals, 653 F.3d 95,Lohier, J., certified questions to the Virginia Supreme Court.

Holdings: The Supreme Court, S. Bernard Goodwyn, J., held that:
(1) Virginia's two year statute of limitations applicable to prescription drug users' products liability actions against manufacturer of a nitrogenous bisphosphonate was not equitably tolled due to the pendency of a putative class action in another jurisdiction, and
(2) two year statute of limitations applicable to prescription drug users' products liability actions against manufacturer of a nitrogenous bisphosphonate was not statutorily tolled during the pendency of a putative class action in another jurisdiction.

Certified questions answered in the negative.

West Headnotes

[1] Limitation of Actions 241 126.5

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k126.5 k. Class actions, matters peculiar to. Most Cited Cases
Virginia's two-year statute of limitations applicable to prescription drug users' products liability actions against manufacturer of a nitrogenous bisphosphonate, allegedly linked to osteonecrosis, was not equitably tolled due to the pendency of a putative class action in another jurisdiction. West's V.C.A. § 8.01–243(A).

[2] Limitation of Actions 241 199(1)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k199 Questions for Jury
241k199(1) k. In general. Most Cited Cases
The applicability of the statute of limitations is a purely legal question of statutory construction.

[3] Limitation of Actions 241 5(1)

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k5 Construction of Limitation Laws in General
241k5(1) k. In general. Most Cited Cases
Statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application.

[4] Limitation of Actions 241 5(1)

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k5 Construction of Limitation Laws in

General
241k5(1) k. In general. Most Cited Cases

Limitation of Actions 241 ⚿43

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k43 k. Causes of action in general. Most Cited Cases

A statute of limitations may not be tolled, or an exception applied, in the absence of a clear statutory enactment to such effect; any doubt must be resolved in favor of the enforcement of the statute.

[5] Limitation of Actions 241 ⚿126.5

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k126.5 k. Class actions, matters peculiar to. Most Cited Cases

Virginia's two-year statute of limitations applicable to prescription drug users' products liability actions against manufacturer of a nitrogenous bisphosphonate, allegedly linked to osteonecrosis, was not statutorily tolled during the pendency of a putative class action in another jurisdiction, where the drug users were not named plaintiffs in the putative class action that they claimed triggered the tolling, but were merely members of the putative class that included every single American who took the drug in question, whether he or she sought a refund, medical monitoring, or an award for personal injury. West's V.C.A. §§ 8.01–229(E)(1), 8.01–243(A).

[6] Limitation of Actions 241 ⚿130(5)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k130 New Action After Dismissal or Nonsuit or Failure of Former Action
241k130(5) k. Dismissal or nonsuit in general. Most Cited Cases

For the filing of an action that is subsequently abated or dismissed without a determination on the merits to toll the statute of limitations from running on a subsequently filed action, there must be identity of the parties in the two lawsuits; in other words, for the statute of limitations to be tolled for a subsequent action, the party who brought the original action must be the same as the plaintiff in the subsequent action or a recognized representative of that plaintiff asserting the same cause and right of action. West's V.C.A. § 8.01–229(E)(1).

[7] Action 13 ⚿13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so.

[8] Action 13 ⚿13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

Limitation of Actions 241 ⚿118(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k117 Proceedings Constituting Commencement of Action
241k118 In General
241k118(1) k. In general. Most Cited Cases

When a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity, and thus cannot toll the statute of limitations.

[9] Limitation of Actions 241 ⚷130(8)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k130 New Action After Dismissal or Nonsuit or Failure of Former Action
241k130(8) k. Failure for defects as to parties. Most Cited Cases

To toll the statute of limitations by bringing a legal action in a prior lawsuit, the plaintiff in the first suit must have legal standing to assert the rights that are at issue in the second lawsuit. West's V.C.A. § 8.01–229(E)(1).

[10] Parties 287 ⚷35.13

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.13 k. Representation of class; typicality. Most Cited Cases

A "putative class action" is a representative action in which a representative plaintiff attempts to represent the interests of not only named plaintiffs, but also those of unnamed class members.

[11] Judgment 228 ⚷677

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k677 k. Persons represented by parties. Most Cited Cases

Parties 287 ⚷35.13

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.13 k. Representation of class; typicality. Most Cited Cases

A class representative who files a putative class action is not recognized as having standing to sue in a representative capacity on behalf of the unnamed members of the putative class; thus there is no identity of parties between the named plaintiff in a putative class action and the named plaintiff in a subsequent action filed by a putative class member individually.

[12] Limitation of Actions 241 ⚷126.5

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k126.5 k. Class actions, matters peculiar to. Most Cited Cases

A putative class action cannot toll the running of the statutory period for unnamed putative class members who are not recognized as plaintiffs or represented plaintiffs in the original action. West's V.C.A. § 8.01–229(E)(1).

****843** Monica Taylor Monday (James J. O'Keeffe; Timothy M. O'Brien; Gentry Locke Rakes & Moore; Levin Papantonio Thomas Mitchell Echsner & Proctor, on briefs), for appellants.

Dino S. Sangiamo (Paul F. Strain; David J. Heubeck; William D. Dolan, III; Venable, on brief), for appellee.

Present: All the Justices.

OPINION BY Justice S. BERNARD GOODWYN.

***413** Pursuant to Article VI, Section 1 of the Constitution of Virginia and our Rule 5:40, we accepted the following certified questions from the United States Court of Appeals for the Second Circuit:

> (1) Does Virginia law permit equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction?

***414** (2) Does Va.Code Ann. § 8.01–229(E)(1) permit tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction?

Background

On September 15, 2005, a putative class action, *Wolfe v. Merck & Co.,* was filed in the United States District Court for the Middle District of Tennessee. The putative class included “[a]ll persons who consume or have consumed FOSAMAX, whether intravenously or by mouth.” The representative plaintiffs****844** in the class action asserted claims of strict liability, negligence and medical monitoring against Merck & Co., Inc. (Merck).

The *Wolfe* putative class action was transferred to the United States District Court for the Southern District of New York by the Judicial Panel on Multidistrict Litigation, which consolidated certain Fosamax cases. The Southern District of New York denied class certification and dismissed the *Wolfe* class action on January 28, 2008.

Prior to the dismissal of the *Wolfe* putative class action, four plaintiffs, all residents of Virginia, filed individual state law based actions against Merck in the Southern District of New York, asserting federal diversity jurisdiction. All four plaintiffs allegedly suffered from osteonecrosis of the jaw as a result of taking Fosamax. The district court noted that “[i]t is undisputed that all four plaintiffs filed suit more than two years after the latest possible date that they sustained their respective alleged injuries,” and that Virginia law applied to the claims.

Merck moved for summary judgment, alleging that the four plaintiffs' actions were untimely under Virginia's two-year statute of limitations for personal injuries. In response, the plaintiffs claimed that the *Wolfe* putative class action, which was filed within the two-year limitation period, tolled the running of the Virginia statute of limitations on their individual actions because they would have been members of the proposed class had certification been granted. The district court granted Merck's motion, finding that the pendency of the *Wolfe* putative class action did not toll Virginia's limitations period for the four plaintiffs' state law claims.

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit determined that Virginia law governed whether the *Wolfe* putative class action tolled the running of the statute of limitations on the plaintiffs' individual claims, and ***415** asked this Court to determine whether Virginia law permits equitable or statutory tolling of a Virginia statute of limitations due to the pendency of a putative class action in another jurisdiction.

Facts

The relevant facts, as set forth in the certification order, are not in dispute. Merck manufactures Fosamax, a prescription drug that falls within a class of drugs known as bisphosphonates, which are used to treat bone conditions such as osteoporosis. Fosamax, a nitrogenous bisphosphonate, has allegedly been linked to osteonecrosis —bone death—of the jaw.

The four plaintiffs were prescribed and consumed Fosamax. Rebecca Quarles was diagnosed with osteonecrosis of the jaw and failure of dental implants in 2003 and sued Merck in 2007. Dorothy Deloriea was prescribed and took Fosamax in 1999, developed osteomyelitis and osteonecrosis of the jaw in 2004, and filed her complaint against Merck in 2008. Ora Casey began taking Fosamax in 2000 and was diagnosed with osteonecrosis of the jaw in 2004. She died in 2007 and her estate initiated this action in 2008. Roberta Brodin was prescribed and took Fosamax in 2001 and was diagnosed with osteonecrosis of the jaw in 2005. She initiated her action in 2007.

[1] The plaintiffs' complaints against Merck assert exclusively Virginia state law claims: strict liability, failure to warn, breach of express and implied warranty, and negligence in the design, testing, development, manufacture, labeling, marketing, distribution and sale of Fosamax. As a result, it

is agreed that Virginia law governs the question of whether the filing of the putative class tolled the running of the statute of limitations on their claims.

Analysis

[2] The two certified questions of law relate to Virginia's statute of limitations for personal injury actions.FN* "[T]he applicability of the statute of limitations is a purely legal question of statutory construction." *Conger v. Barrett,* 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010).

> FN* Code § 8.01–243(A) provides: "every action for personal injuries, whatever the theory of recovery ... shall be brought within two years after the cause of action accrues."

***416** The plaintiffs contend that Virginia law permits equitable tolling of a Virginia statute ****845** of limitations based upon the filing of a cross-jurisdictional putative class action. Plaintiffs also argue that the pendency of a putative class action in another jurisdiction statutorily tolls Virginia's statute of limitations under Code § 8.01–229(E)(1). Merck responds that Virginia law does not permit equitable tolling of a statute of limitations, and that Code § 8.01–229(E)(1) does not provide for tolling due to the pendency of a putative class action in another jurisdiction.

Certified Question (1)

[3][4] It is well-established that "statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application." *Rivera v. Witt,* 257 Va. 280, 283, 512 S.E.2d 558, 559 (1999). A statute of limitations may not be tolled, "or an exception applied, in the absence of a clear statutory enactment to such effect." *Arrington v. Peoples Sec. Life Ins. Co.,* 250 Va. 52, 55–56, 458 S.E.2d 289, 291 (1995). "[A]ny doubt must be resolved in favor of the enforcement of the statute." *Id.* at 55, 458 S.E.2d at 290–91.

Given these principles, there is no authority in Virginia jurisprudence for the equitable tolling of a statute of limitations based upon the pendency of a putative class action in another jurisdiction. Certified Question (1) is answered in the negative.

Certified Question (2)

[5] Code § 8.01–229(E)(1) provides that "if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period." The plaintiffs contend that Code § 8.01–229(E)(1) statutorily tolled the statute of limitations for plaintiffs' claims during the pendency of the putative class action. The plaintiffs assert that this Court's decision in *Welding, Inc. v. Bland Cnty. Serv. Auth.,* 261 Va. 218, 541 S.E.2d 909 (2001), indicates that Virginia should recognize cross-jurisdictional putative class action tolling.

In *Welding,* the plaintiff originally filed a breach of contract action in the United States District Court for the Southern District of ***417** West Virginia, but that court found it lacked jurisdiction because of a forum selection clause in the contract between the parties. *Id.* at 222, 541 S.E.2d at 911. Subsequently, the same plaintiff filed suit in Virginia state court on the same cause of action. *Id.* This Court stated "[t]here is no language in Code § 8.01–229(E)(1) which limits or restricts its application to a specific type of action or precludes its applicability to actions filed in a federal court." *Id.* at 224, 541 S.E.2d at 912. This Court also noted that "[t]he term 'action' refers to civil litigation in both the state and federal courts." *Id.* Therefore, Code § 8.01–229(E)(1) tolled the running of the statute of limitations on the plaintiff's action and its suit in Virginia was timely filed. *Id.* at 226, 541 S.E.2d at 913.

It is clear that under Virginia law, an action filed in a foreign jurisdiction may trigger tolling under Code § 8.01–229(E)(1). *See id.* at 224, 541 S.E.2d at 912. There is no particular type of action that must be filed and no particular jurisdiction in which that action must be brought for the commencement of an action to trigger tolling under Code § 8.01–229(E)(1). However, for tolling to be permitted, the subsequently filed action must be filed by the same party in interest on the same cause of action in the same right. *See McDaniel v. North Carolina Pulp Co.,* 198 Va. 612, 619, 95 S.E.2d 201, 206 (1956), *overruled on other grounds* by *Harmon v. Sadjadi,* 273 Va. 184, 192–93, 639 S.E.2d 294, 299 (2007) (permitting tolling where “the real party in interest remained the same; the suit was instituted in the same right; and the cause of action was the same”).

Welding differs from the instant case because it concerns a situation where the same plaintiff initially sued in federal court on the same cause of action he subsequently pursued in state court. The plaintiff in both actions was clearly the same. Whereas, in the instant matter, it is undisputed that the four plaintiffs were not named plaintiffs in the putative class action that they claim triggered the tolling. They were merely members****846** of a putative class that included every single American who took Fosamax, whether he or she sought a refund, medical monitoring or an award for personal injury.

[6] For the filing of an action to toll the statute of limitations from running on a subsequently filed action pursuant to Code § 8.01–229(E)(1), there must be identity of the parties in the two lawsuits. In other words, for the statute of limitations to be tolled for a subsequent action, the party who brought the original action must be the same as the plaintiff in the subsequent action or a recognized representative***418** of that plaintiff asserting the same cause and right of action. *See McDaniel,* 198 Va. at 619, 95 S.E.2d at 206. We must rely upon Virginia law to determine if this identity of parties and rights exists.

[7][8][9] “An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so.” *W.S. Carnes, Inc. v. Board of Supervisors,* 252 Va. 377, 383, 478 S.E.2d 295, 300 (1996). “Our jurisprudence is clear that when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity,” and thus cannot toll the statute of limitations. *Harmon,* 273 Va. at 193, 639 S.E.2d at 299; *see also Harbour Gate Owners' Ass'n v. Berg,* 232 Va. 98, 107, 348 S.E.2d 252, 258 (1986) (holding original motion for judgment filed by plaintiff who lacked standing “did nothing to toll the running of the statute of limitations” as to the second suit brought by subsequent plaintiffs with standing); *Braddock, L.C. v. Board of Supervisors,* 268 Va. 420, 426, 601 S.E.2d 552, 555 (2004) (action brought by party lacking standing was a “nullity” that could not be resurrected by adding parties with standing). In essence, to toll the statute of limitations, the plaintiff in the first suit must have legal standing to assert the rights that are at issue in the second lawsuit.

[10][11][12] A putative class action is a representative action in which a representative plaintiff attempts to represent the interests of not only named plaintiffs, but also those of unnamed class members. *See American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 550, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Virginia jurisprudence does not recognize class actions. Under Virginia law, a class representative who files a putative class action is not recognized as having standing to sue in a representative capacity on behalf of the unnamed members of the putative class. Thus, under Virginia law, there is no identity of parties between the named plaintiff in a putative class action and the named plaintiff in a subsequent action filed by a putative class member individually. *See Fowler v. Winchester Med. Ctr., Inc.,* 266 Va. 131, 136, 580 S.E.2d 816, 818 (2003) (noting plaintiff could not be “substantially the same party” as the plaintiff in the first suit because she was not qualified as a personal representative anywhere); *Brake v. Payne,* 268 Va. 92, 95, 597 S.E.2d 59, 60 (2004) (holding a plaintiff without standing and a proper plaintiff are not suing in the same right). Consequently, a putat-

ive class action cannot toll the running of the statutory period for unnamed putative class members who are not recognized under ***419** Virginia law as plaintiffs or represented plaintiffs in the original action. *See Harmon,* 273 Va. at 198, 639 S.E.2d at 302.

We hold that Code § 8.01–229(E)(1) does not toll the statute of limitations for unnamed putative class members due to the pendency of a putative class action in another jurisdiction. Certified question (2) is answered in the negative.

Conclusion

For these reasons, this Court holds that Virginia recognizes neither equitable nor statutory tolling due to the pendency of a putative class action in another jurisdiction.

Certified questions answered in the negative.

Va.,2012.
Casey v. Merck & Co., Inc.
283 Va. 411, 722 S.E.2d 842, Prod.Liab.Rep. (CCH) P 18,788

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Annex 6

MIONE v. McGRATH

NO. 05 CIV. 2211(WCC).

435 F.Supp.2d 266 (2006)

Peter MIONE and Anne Mione, as parents and natural guardians of Alexis Mione, an infant and John Mione, an infant, Plaintiffs,
v.
Kevin McGRATH, Tonya Hernia, Sullivan County Sheriff's Department, Villa Roma Resort Hotel, Sullivan County and "John Doe" and "Jane Doe," full names unknown but believed to be individuals involved in the acts complained of herein, Defendants.

United States District Court, S.D. New York.
June 1, 2006.

Peter Mione and Anne Mione, Old-bridge, NJ, Plaintiffs Pro Se.

Napierski, VanDenburgh & Napierski, L.L.P., Shawn T. Nash, Esq., of Counsel, Albany, NY, for Defendants Kevin McGrath, Tonya Bernitt and Villa Roma Resort Hotel.

Michael Frey, Esq., Barryville, NY, for Defendants Sullivan County Sheriffs Department and Sullivan County.

OPINION AND ORDER

WILLIAM C. CONNER, Senior District Judge.

Plaintiffs Peter Mione ("Mione") and Anne Mione, on behalf of themselves and apparently their minor children, A.M. and J.M., bring the instant action against defendants Sullivan County (the "County"), the Sullivan County Sheriff's Department (the "Department"), the Villa Roma Resort Hotel (the "Hotel"), Hotel employees Kevin McGrath and Tonya Bernitt, as well as John Doe and Jane Doe for alleged violations of plaintiffs' civil rights under 42 U.S.C. §§ 1981, 1983, 1985 and 1986. Defendants now move to dismiss the action for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6). For the following reasons, defendants' motion is granted.

BACKGROUND

According to the limited information that can be gleaned from the woefully deficient Complaint, plaintiffs' action stems from "the unlawful and improper detention of plaintiffs child and subsequent prosecution" of plaintiff on charges of abuse and endangering the welfare of a child in Sullivan County Court. (Complt. ¶ 1.) The Complaint states that on November 27, 1998, while plaintiffs were guests of the Hotel, Mione "was caused to reprimand" J.M. *(Id.* ¶ 13.) His actions prompted McGrath and Bernitt to notify the Department and, after an investigation, the Department, in conjunction with the County, instituted neglect and endangerment proceedings against Mione.[1] *(Id.* ¶¶ 15-16.)

The Complaint alleges that defendants proceeded to prosecute these charges despite lacking probable cause to believe any harm had befallen Mione's son and despite "the existence of clear exculpatory evidence." *(Id.* ¶¶ 18-20, 22, 25.) Defendants are accused of failing "to properly investigate the facts surrounding the injury to" J.M. *(Id.* ¶¶ 23-24.) As a result of the continued prosecution, "[p]laintiffs were forced to make numerous appearances in Court." *(Id.* ¶ 27.) On February 5, 1999, the charges against Mione were dismissed by the county court. *(Id.* ¶ 29.)

Plaintiffs, with the assistance of counsel, subsequently filed two separate actions in state court. The first, filed on or about February 23, 2000, alleged libel, slander, emotional distress, false arrest and false imprisonment. That action was dismissed by Decision and Order of Judge Meddaugh of the New York State Supreme Court for Sullivan County, dated January 8, 2003, for failure to timely serve the defendants in accordance with C.P.L.R. 3012(b). (Nash Decl., Ex. E.) The second, filed in and around June 2003, also was dismissed on the same grounds. *(Id.,* Ex. F.) Plaintiffs, through their attorney, then filed this Complaint

Annex 7

H

United States Bankruptcy Court, S.D. New York
In re: Lehman Brothers Inc., Debtor.

Case No. 08–01420(JMP) (SIPA)
July 11, 2013

Background: Trustee for liquidation of broker-dealer under the Securities Investor Protection Act (SIPA) filed omnibus objection to claims that were filed after the bar date. Claimants objected, arguing, inter alia, that they did not have actual notice of the filing deadline.

Holdings: The Bankruptcy Court, James M. Peck, J., held that:
(1) given trustee's diligent compliance with the court's claims process order and with the notice provisions of SIPA, the late-filed claims had to be disallowed, and
(2) claimants were not entitled to equitable relief under a standard of "manifest injustice."

Objection granted; claims disallowed and expunged.

West Headnotes

[1] Securities Regulation 349B 185.21

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.21 k. Proceedings. Most Cited Cases

Securities Investor Protection Corporation (SIPC) is deemed to be a party in interest in all matters arising under a SIPA liquidation proceeding. Securities Investor Protection Act of 1970 § 5, 15 U.S.C.A. § 78eee(d).

[2] Securities Regulation 349B 185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

SIPA mandates that all claims against the estate must be filed within six months after the date of commencement of the case, while providing the limited right to extend this deadline for cause shown within the six-month period. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff.

[3] Securities Regulation 349B 185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

SIPA's rather rigid approach to time limitations differs from customary bankruptcy practice in setting bar dates and reflects Congress's response to the policies underlying the SIPA statutory scheme, namely, ensuring the systematic integrity of the securities industry, restoring investor confidence, and upgrading the financial responsibility requirements for registered brokers and dealers. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff.

[4] Securities Regulation 349B 185.10

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.10 k. In general. Most Cited Cases

Congress enacted SIPA to address the systematic integrity of the financial system and the inability of bankruptcy proceedings to otherwise effectively preserve and timely return creditor funds held by broker-dealers. Securities Investor Protection Act of 1970 § 1, 15 U.S.C.A. § 78aaa.

[5] Securities Regulation 349B 185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

Under SIPA, extensions of time are limited to a narrow class of claimants, namely, governmental units, infants, and incompetents without guardians, and must be requested before the expiration of the six-month time period. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff.

[6] Bankruptcy 51 2900(1)

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2897 Time for Filing
51k2900 Extension of Time; Excuse for Delay
51k2900(1) k. In general. Most Cited Cases

Securities Regulation 349B 185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

Extensions of the time period for filing claims in SIPA cases are permitted only when the express statutory requirements are satisfied, which differs from the familiar “excusable neglect” standard that applies to late-filed claims in Chapter 11 cases. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff; Fed. R. Bankr. P. 9006(b)(1).

[7] Securities Regulation 349B 185.10

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.10 k. In general. Most Cited Cases

Aim of a SIPA case is not reorganization but the prompt return of customer property. Securities Investor Protection Act of 1970 § 1, 15 U.S.C.A. § 78aaa.

[8] Securities Regulation 349B 185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

SIPA's goal of the prompt return of customer property, like the goal of prompt closure and distribution in Chapter 7 of the Bankruptcy Code, justifies a strict six-month time limitation for filing claims against the debtor broker-dealer, a limitation period that by design may be extended only in those circumstances that are specified in the SIPA statute. Securities Investor Protection Act of 1970 §§ 1, 6, 15 U.S.C.A. §§ 78aaa, 78fff.

[9] Securities Regulation 349B 185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

Statutory time limitations for filing a claim in a SIPA case are clearly delineated and do not allow the court to fashion judicial exceptions to such filing deadlines. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff.

[10] Bankruptcy 51 2131

51 Bankruptcy

51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2131 k. Notice. Most Cited Cases

Title 11 ordinarily calls for notice to be given by mail, although bankruptcy courts may decide that notifying creditors by publication is sufficient or desirable under the circumstances. Fed. R. Bankr. P. 2002(l).

[11] Securities Regulation 349B ⚷185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation
349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

Late-filed **claims** against broker-dealer had to be disallowed where SIPA trustee complied diligently with the form and manner of notice prescribed under the court's **claims** process order and with the notice provisions of SIPA, such that everything was done that reasonably could have been done to provide actual or publication notice to all known brokerage customers and other parties with potential **claims** against broker-dealer, even if, despite proof of mailing of mailed notices and trustee's use of addresses taken from broker-dealer's books and records, certain of the claimants, for unexplained reasons, did not receive actual written notice of the bar date; SIPA's six-month time limitation for filing **claims** was fixed, and the statute did not accommodate any of claimants' excuses for failing to file a **timely claim** against broker-dealer. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff.

[12] Bankruptcy 51 ⚷2163

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence; witnesses. Most Cited Cases

Direct and substantial evidence is required to rebut the presumption that the addressee of a properly addressed and mailed notice actually receives that notice.

[13] Constitutional Law 92 ⚷3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases

Due process does not require that the interested party to whom notice was sent actually receive the notice. U.S. Const. Amends. 5, 14.

[14] Bankruptcy 51 ⚷2131

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2131 k. Notice. Most Cited Cases

Constitutional Law 92 ⚷4478

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4478 k. Bankruptcy. Most Cited Cases

Although notice by publication alone is insufficient for known creditors in bankruptcy, it is well settled that constructive notice of the claims bar date by publication satisfies the requirements of due process for unknown creditors. U.S. Const. Amends. 5, 14.

[15] Securities Regulation 349B ⚷185.18

349B Securities Regulation
349BI Federal Regulation
349BI(F) Liquidation of Broker-dealers; Securities Investor Protection Corporation

349Bk185.18 k. Requisites of claims; time for filing. Most Cited Cases

Even if bankruptcy court had discretion, under a standard of “manifest injustice,” to grant relief from the harsh consequences of the six-month time limitation for filing claims in SIPA cases, claimants did not establish the kind of truly extraordinary or exceptional extenuating circumstances that might justify granting such relief, such as a disruptive event that temporarily impairs the claimant's ability to manage his, her, or its affairs and makes it virtually impossible or impracticable to file the claim on time, for example, a life-threatening accident, an unexpected serious medical emergency, or a major natural disaster that destroys business records and interrupts ordinary operations of a business; claimants alleged only routine or mundane circumstances, including ordinary confusion about proper name of affiliate that was obligated to a claimant, filing of claims by mistake in the wrong cases, or problems with mail delivery. Securities Investor Protection Act of 1970 § 6, 15 U.S.C.A. § 78fff.

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MEMORANDUM OPINION GRANTING THE TRUSTEE'S TWENTY–EIGHTH OMNIBUS OBJECTION TO GENERAL CREDITOR CLAIMS (LATE–FILED CLAIMS)

JAMES M. PECK, UNITED STATES BANKRUPTCY JUDGE

Introduction

The provisions of the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §§ 78aaa et seq. (“SIPA”), governing the filing of claims in this largest ever broker-dealer liquidation impose time limits that subject all customers and claimants to a well-defined deadline with few permitted exceptions. SIPA mandates that all claims against the estate must be ***440** filed within six months after the date of commencement of the case and by its express language does not accommodate late claims unless the claimant has moved for an extension before expiration of the bar date. Only limited classes of potential claimants even qualify to request such an extension. The standards are designed to be tough, and they are.

SIPA, as written, does not tolerate garden variety excuses for the failure to comply with the bar date for claims, even in situations where the claimant has only constructive notice by publication of the filing deadline and is able to show a plausible excuse for having missed the deadline. The omnibus objection to late-filed claims brought by James W. Giddens (the “Trustee”), as trustee for the liquidation of Lehman Brothers Inc. (“LBI”) under SIPA, calls for an examination and application of this very strict procedural requirement. Consistent with the letter of the law as written, the seemingly harsh result is that all claims presently before the Court are untimely and will be disallowed and expunged.

[1]The Trustee has objected to certain claims

that were filed after the bar date and seeks an order under section 502(b) of title 11 of the United States Code (the "Bankruptcy Code"), applicable to this case pursuant to sections 78fff(b) and 78fff–1(a) of SIPA, and Rule 3007(d) of the Federal Rules of Bankruptcy Procedure, disallowing and expunging these claims (the "Twenty–Eighth Omnibus Objection to General Creditor Claims" or the "Motion"). [ECF No. 5775.] The Securities Investor Protection Corporation ("SIPC") supports the Motion.FN1 [ECF No. 6319.]

FN1. SIPC is deemed to be a party in interest in all matters arising under a SIPA liquidation proceeding. 15 U.S.C. § 78eee(d).

Responses to the Motion have been filed by various affected claimants: Aaron Akman ("Akman Response") [ECF No. 5888]; Grace Gathungu ("Gathungu Response") [ECF No. 5874]; Dean R. Monksfield ("Monksfield Response") [ECF No. 6323 Ex. C]; Stephen H. Thomas ("Thomas Response") [ECF No. 5864]; Andre Verderame ("Verderame Response") [ECF No. 6323 Ex. B]; and Mario Monello ("Monello Response") [ECF No. 6062] (collectively the "Respondents").FN2 Mario Monello also filed a Cross Motion of Mario A. Monello Pursuant to Rule 9006(b)(a) of the Federal Rules of Bankruptcy Procedure to Deem as **Timely** Late–Filed Proofs of **Claim** (the "Monello Cross–Motion"). [ECF No. 6062.]

FN2. Several additional responses were filed—ZPR International, Inc. [ECF No. 6083]; CA, Inc. [ECF No. 5930]; and Adam Epstein [ECF No. 6323 Ex. D]—but the hearing on these claim objections has been adjourned to September 18, 2013. This Memorandum Decision does not address these adjourned responses directly, but the Court's ruling necessarily will impact the treatment of similarly situated claimants.

The Trustee filed an Omnibus Reply to Certain Responses to the Twenty–Eighth Omnibus Objection to General Creditor Claims and an Opposition to the Cross–Motion of Mario A. Monello (the "Reply"). [ECF No. 6323.] Annexed to the Reply is the declaration of James Katchadurian ("Katchadurian Declaration"). [ECF No. 6323 Ex. A.] Mario Monello filed a Sur–Reply. [ECF No. 6390.]

A hearing on the Motion was held on June 19, 2013. During oral argument, counsel for SIPC noted that controlling authority with respect to late filed claims in cases arising under SIPA can compel outcomes that at times may seem draconian. That observation is correct. Upon consideration of the Motion and each of the responses, the Court agrees with the ***441** Trustee and SIPC and finds, based on the facts presented, that it does not have the discretion to grant any relief from the firm and final deadline established by the Claims Process Order (as defined below). Therefore, for the reasons stated in this Memorandum Decision, the Twenty–Eighth Omnibus Objection to General Creditor Claims is granted as to all claim objections not otherwise adjourned or withdrawn, and the Monello Cross–Motion is denied.

Background

The SIPA case for LBI was commenced at the end of a tumultuous week in September 2008 that began with the chapter 11 filing of Lehman Brothers Holdings Inc. ("LBHI"). In furtherance of the administration of LBI's liquidation, on November 7, 2008 the Court entered an order Approving Form and Manner of Publication and Mailing of Notice of Commencement; Specifying Procedures and Forms for Filing, Determination, and Adjudication of Claims; Fixing a Meeting of Customers and Other Creditors; and Fixing Interim Reporting Pursuant to SIPA (the "Claims Process Order"). [ECF No. 241.]

The Claims Process Order specified the requirements for the Trustee to give notice of a June 1, 2009 deadline for filing claims against LBI (the "Bar Date") (i) by publication in the December 1, 2008, editions of *The New York Times*, *The Wall*

Street Journal and *The Financial Times* and (ii) by mail to “persons who, as identified from LBI's books and records, may potentially assert claims as customers or general creditors on December 1, 2008.” *Id.* The Trustee complied with the publication notice requirements and published additional notice in the December 1, 2008, edition of *The International Herald Tribune*. *See*Affs. of Publication, ECF Nos. 396–399.

The Trustee engaged a third-party vendor to mail printed notices of the Bar Date to all potential customers or general creditors whose names and addresses appeared in LBI's books and records (each, a “Mailed Notice” and together, the “Mailed Notices”). *See* Aff. of Service, ECF No. 391; Katchadurian Decl. ¶ 4. In accordance with the Claims Process Order, the notice given by publication and the Mailed Notices was calculated to notify all potential customers and general creditors that it was essential to file a claim on or before the Bar Date, and the Trustee's compliance with these procedures fulfilled the requirements of the notice provisions of SIPA. *See* Claims Process Order at 2, ECF No. 241.

The Respondents have objected to the Motion on a variety of grounds, but, in general, each of them contends that his or her late filed claim should be allowed because the notice procedures of the Claims Process Order failed to give them actual notice of the filing deadline. They do not challenge the adequacy of the procedures themselves. They focus instead on the unfairness in disallowing their claims under circumstances when they did not know about or understand the obligation to file their claims against LBI before the June 1, 2009 Bar Date. Their individual arguments are summarized below.

No Mailed Notice was sent to Respondent Thomas because the Trustee did not identify him as a known claimant from LBI's books and records. *See* Katchadurian Decl. ¶ 13. The Thomas Response urges that Thomas's late-filed compensation-based claim [Claim No. 6119] should be allowed because: (i) he did not receive actual notice of the Bar Date, (ii) he only learned of the Bar Date when attempting to file a claim in the LBHI chapter 11 case, and (iii) certain other mailings that he received from LBI and LBHI did not give notice of the Bar Date. *See* Thomas Resp. ¶¶ 1–9. The Mailed Notices were sent to all of the other Respondents, and only the Mailed Notice sent to Respondent ***442** Gathungu was returned as undeliverable. *See* Katchadurian Decl. ¶¶ 5, 6, 9–11.

The Akman Response argues that Akman's compensation-based claim [Claim No. 6127] should be allowed on grounds of either excusable neglect or laches because: (i) he never received actual notice of the Bar Date, (ii) he was suffering from a depressed mental state in the wake of the LBI bankruptcy and the subsequent termination of his employment, (iii) he was confused as to the separate filing deadlines that applied to the LBI and LBHI cases, and (iv) he believed his claim had been accepted by the Trustee due to the three-and-one-half-year delay between the filing of his claim on September 21, 2009 and the date of the Motion. *See* Akman Resp. 1–3.

The Gathungu claim [Claim No. 6197] relates to securities held by LBI on Gathungu's behalf, and, in the Gathungu Response, the claimant cites to a letter accompanying her claim. *See* Gathungu Resp. 1. The letter explains that Gathungu had submitted information on June 3, 2008 in an effort to recover securities moved from her account to LBI's “abandoned properties” account as a result of her not having been in contact with LBI for eight years. [Claim No. 6197.] She asserts that she never received a response regarding the status of her account or any actual notice of the bar date. *Id.*

The Monksfield Response relates to a claim for unpaid wages [Claim No. 6129] and concedes that this claim was filed after the Bar Date. Monksfield argues for an exception because he missed the bar date due to “an overload of documentation.” *See* Monksfield Resp. 1. Similarly, the Verderame Response in connection with Verderame's claim for unpaid severance pay [Claim No. 6246] concedes that his claim was filed after the Bar Date. The Verderame Claim originally was filed against LBHI rather than LBI. Verderame asks for an equitable exception to the Bar Date in the LBI case, arguing that the late filing should be excused due to having mistakenly filed the claim in the wrong case. *See* Verderame Resp. ¶¶ 2–6.

The Monello Response states that Monello's claims are based on deferred compensation [Claim No. 6123] and shares in LBI's Private Employee Equity Fund [Claim No. 6132]. The Monello Cross–Motion requests a finding that his late-filed **claims** should be deemed **timely** filed under the excusable neglect standard of FED. R. BANKR.P. 9006(b) because Monello allegedly did not receive actual notice of the Bar Date due to a chronic problem of mail not being delivered properly to his address and because he believed erroneously that he needed to file his proofs of **claim** in the LBHI case. *See* Monello Resp. ¶¶ 1–21.

The Mailed Notices to Akman, Verderame, and Monksfield were sent to the same addresses that they submitted on their late-filed proof of claim forms (and, in the case of Akman and Monksfield, these addresses also were provided with their responses), and the Mailed Notices sent to Monello and Gathungu were sent to the same addresses that appeared on the documentation supporting their proofs of claim. *See* Katchadurian Decl. ¶¶ 4–13.

These various objections to the Motion and requests by the Respondents that they be excused from the consequences of not having complied with the Bar Date must be considered in light of the strict governing legal standards discussed below.

Discussion

Filing Deadlines for Claim s in SIPA Proceedings are Narrowly Construed

The Statutory Time Limitation, Exceptions, and Policy of SIPA

[2]SIPA provides that “[t]o the extent consistent with the provisions of [SIPA], a ***443** liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of [the Bankruptcy Code].” 15 U.S.C. § 78fff. SIPA contains a plainly-worded and mandatory time limitation of six months for filing claims against the debtor while providing the limited right to extend this deadline for cause shown within the six-month time period. It provides that

> [n]o claim of a customer or other creditor of the debtor which is received by the trustee after the expiration of the six-month period beginning on the date of publication of notice ... shall be allowed, except that the court may, upon application within such period and for cause shown, grant a reasonable, fixed extension of time for the filing of a claim by the United States, by a State or political subdivision thereof, or by an infant or incompetent person without a guardian.

15 U.S.C. § 78fff– 2.

[3][4]This rather rigid approach to time limitations differs from customary bankruptcy practice in setting bar dates and reflects Congress's response to the policies underlying the SIPA statutory scheme—namely, ensuring the systematic integrity of the securities industry, restoring investor confidence, and “upgrad[ing] the financial responsibility requirements for registered brokers and dealers.” *See SIPC v. Barbour,* 421 U.S. 412, 415–16, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) (citing S. Rep. No. 91–1218, pp. 2–4 (1970); H.R. Rep. No. 91–1613, pp. 2–4 (1970), and U.S. Code Cong. & Admin. News 1970, p. 5254.). Congress enacted SIPA to address the systematic integrity of the financial system and the inability of bankruptcy proceedings to otherwise effectively preserve and timely return creditor funds held by broker-dealers. *See id.* at 417, 95 S.Ct. 1733 (citing 15 U.S.C. § 78fff(a)) (“[A SIPA] trustee is empowered and directed by [SIPA] to return customer property, complete open transactions, enforce rights of subrogation, and liquidate the business of the member ... he is not empowered to reorganize or rehabilitate the

business.").

[5][6]Given these policy objectives of SIPA and the explicit statutory language concerning time limitations, extensions of time are limited to a narrow class of claimants (governmental units, infants and incompetents without guardians) and must be requested before the expiration of the six-month time period. Under this structure, extensions of the time period for filing claims in SIPA cases are permitted only when the express statutory requirements are satisfied. This differs from the familiar "excusable neglect" standard that applies to late filed claims in chapter 11 cases. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 389, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (footnote and citation omitted) ("The "excusable neglect" standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases. The rules' differentiation between Chapter 7 and Chapter 11 filings corresponds with the differing policies of the two chapters. Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors.").

[7][8]The aim of a SIPA case is not reorganization but the prompt return of customer property, and that goal, like the goal of prompt closure and distribution in chapter 7, justifies a strict six-month time limitation for filing claims against the debtor broker-dealer, a limitation period that by design may be extended only in ***444** those circumstances that are specified in the SIPA statute.

Equitable Discretion to Extend Deadline for Filing Claims is Limited Under SIPA

[9]The statutory time limitations for filing a claim in a SIPA case are clearly delineated and do not allow the Court to fashion judicial exceptions to such filing deadlines. *Miller v. Austin,* 72 B.R. 893, 896–99 (S.D.N.Y.1987) ("[I]t is clear from the face of the statute that the six-month time limit for filing is subject to extension at the discretion of the court in only three specified instances," and "the 'excusable neglect' exception contained in ... Rule 9006(b)(1) of the Bankruptcy Rules[ ] is inapplicable to SIPC liquidations."). This conclusion is consistent with the wording of the SIPA statute, the legislative history of the provision and SIPA's policy goals. *See* Act to Amend the Securities Investor Protection Act of 1970, Pub. L. No. 95–283, 92 Stat. 259 and 261–2 (1978) (amending SIPA to include the stand-alone limitations of **15 U.S.C. § 78fff– 2(a)(3)** and eliminate references to equitable extensions of time available under the Bankruptcy Act).

SIPA Notice Requirements

Section 78fff– 2(a)(1) of SIPA governs the manner for giving notice to both customers and creditors in a SIPA liquidation. The section provides that

> [p]romptly after the appointment of the trustee, such trustee shall cause notice of the commencement of proceedings under this section to be published in one or more newspapers of general circulation in the form and manner determined by the court, and at the same time shall cause a copy of such notice to be mailed to each person who, from the books and records of the debtor, appears to have been a customer of the debtor with an open account within the past twelve months, to the address of such person as it appears from the books and records of the debtor. Notice to creditors other than customers shall be given in the manner prescribed by Title 11, except that such notice shall be given by the trustee.

15 U.S.C. § 78fff– 2.

[10][11]Title 11 ordinarily calls for notice to be given by mail, although bankruptcy courts may decide that notifying creditors by publication is sufficient or desirable under the circumstances. FED. R. BANKR. P. 2002(l) ("The court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice."). Here, the form and manner of notice pre-

scribed under the Claims Process Order and implemented by the Trustee were appropriate and fully consistent with the noticing requirements of SIPA. Everything was done that reasonably could have been done to provide actual or publication notice to all known brokerage customers and other parties with potential claims against LBI.

[12]Despite proof of mailing of the Mailed Notices, certain of the Respondents complain that they did not receive actual written notice of the Bar Date, and they urge that an exception should be made for this reason. The cause for not having received the Mailed Notices that used addresses taken from LBI's books and records is unexplained. None of the Respondents have produced "direct and substantial evidence" to rebut the "presumption that the addressee of a properly addressed and mailed notice actually receives that notice." *In re Chicago P'ship Bd., Inc.,* 236 B.R. 249, 256 (Bankr.N.D.Ill.1999) (citations and internal quotation marks omitted). Thus, the Trustee has satisfied his obligation to give notice to ***445** customers by mailing notices of the Bar Date.

[13][14]The Mailed Notices were addressed properly, based on LBI's books and records. While using these addresses is required, "due process does not require that the interested party actually receive the notice." *SIPC v. Stellatos (In re Blinder, Robinson & Co., Inc.),* 124 F.3d 1238, 1243 (10th Cir.1997) (citation omitted). Additionally, although notice by publication alone is insufficient for known creditors in bankruptcy, "[i]t is well settled that constructive notice of the claims bar date by publication satisfies the requirements of due process for unknown creditors." *In re New Century TRS Holdings, Inc.,* 465 B.R. 38, 48 (Bankr.D.Del.2012) (citations omitted).

Notwithstanding the argument that for whatever reason the Mailed Notices of the Bar Date were not received by certain of the Respondents (and for purposes of this discussion, the Court assumes that such assertions are true without testing their credibility), the Trustee has shown his diligent compliance with the Claims Process Order and with the notice provisions of SIPA. Importantly, notice of the Bar Date is still adequate regardless of actual receipt by the Respondents because the Trustee properly relied upon addresses taken directly from LBI's records and followed procedures that were "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Adler, Coleman Clearing Corp.,* 204 B.R. 99, 106–07 (Bankr.S.D.N.Y.2001) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

The procedures for giving notice, both by mail and by publication, were entirely appropriate and were followed here in a manner that complied fully with the Claims Process Order. The Trustee did all that was required of him. From the point of view of the affected claimants, not having received the printed notice of the Bar Date (or perhaps not having paid attention to it and later recognizing the error) may well lead to a feeling that claim preclusion is unfair under the circumstances. But such a feeling, while an understandable personal reaction, disregards the policy goals embedded in the statute. The deadlines have been set purposefully, and equitable pleas for special exceptions are beyond the scope of the statutory language and are unavailing. No relief may be granted from the deadlines imposed in the **Claims** Process Order because the six-month time limitation for filing **claims** is fixed and the SIPA statute does not accommodate any of the excuses for failing to file a **timely claim** against LBI.

Respondents Are Not Entitled to Relief Under a Standard of "Manifest Injustice"

[15]The Monello Response and the Monello Cross–Motion argue that the Court can grant relief from the harsh consequences of the six-month time limitation in order to avoid a result that would be manifestly unjust. Monello submits that his confusion as to the separate filing deadlines in the LBHI and LBI cases and the fact that he did not receive

notice of the Bar Date due to persistent problems with his home mail delivery offer a reasonable excuse for the late filing of his claim and that the Court may grant him an exception from strict compliance with the Bar Date because it would be manifestly unfair under the circumstances to disallow his claim for deferred compensation owed to him by LBI. That argument relies upon language in *Miller v. Austin,* but misses the central point of that case. *Miller* stands for the proposition that bankruptcy ***446** courts do not have the discretion to override the clear time limitations imposed by SIPA.

In *Miller,* the United States District Court for the Southern District of New York held that it was error for a bankruptcy court to rely on bankruptcy precedent in allowing an extension of the deadline for filing claims in a SIPA case because doing so "disregards the long-established rule that except in the most unusual cases ... the equitable power should not be used to extend the statutory six months period fixed by Congress." *Miller,* 72 B.R. at 898 (internal quotation marks and citation omitted). In *dicta,* the court does mention certain instances that might satisfy a manifest injustice standard in a bankruptcy case but did not state that an exception based on unusual circumstances or any other equitable concept is available in the context of a SIPA proceeding. *Id.* The court noted that in cases unrelated to SIPA, "courts have allowed the time period for filing to be extended in only two circumstances: (i) where the claimant received inadequate notice; and (ii) where an officer of the bankruptcy court committed an error relied upon by the claimant." *Id.*

Mr. Monello contends that the analysis in *Miller* allows for the possibility that the period for filing a SIPA claim may be extended to prevent manifest injustice in appropriate cases and argues that his situation presents the kind of exceptional circumstances that would justify granting equitable relief from the harsh consequences of the Bar Date. But even if the Court were to accept the concept of an equitable remedy to deal with those extremely rare situations that seem to cry out for relief,FN3 none of the Respondents have shown that adherence to the time limitations prescribed by SIPA would be manifestly unjust under the relatively mundane circumstances that have been alleged here.

FN3. The Court does not wish to speculate regarding what would need to be shown by a claimant to demonstrate a right to an equitable exception based on manifest injustice. Conceivably, no sufficient showing can ever be made. However, if a case for an exception were to be seriously considered, something truly extraordinary would need to be shown involving an occurrence or circumstance that makes it virtually impossible or impracticable to file the claim on time. An example would be a disruptive event that temporarily impairs the claimant's ability to manage his, her or its affairs (*e.g.,* a life-threatening accident, an unexpected serious medical emergency or a major natural disaster that destroys business records and interrupts ordinary operations of a business). No such excuses have been shown by any of the Respondents.

Mr. Monello and the other Respondents have raised issues that arguably may fit within the category of excusable neglect but not the more exacting standard that would be invoked to prevent manifest injustice. The facts alleged are routine in nature and insufficient to support any finding of truly exceptional extenuating circumstances. Ordinary confusion about such things as the proper name of the Lehman affiliate that is obligated to the claimant, the filing of claims by mistake in the wrong cases or problems with mail delivery are not sufficient to justify any exceptions to the Bar Date. Like the factual circumstances in *Miller,* the Respondents have alleged the "types of occurrences [that] can be expected" in a SIPA liquidation. 72

B.R. at 899. Accordingly, equitable relief is not available, and the Bar Date will be enforced in accordance with its terms as to Mr. Monello and the other Respondents.

Conclusion

For the reasons stated, the six-month time limitation for filing claims in SIPA cases is mandatory and must be strictly construed. It would be an abuse of discretion***447** for the Court to grant the exceptional relief sought by the Respondents. The Motion is granted, and the late-filed claims of the Respondents are disallowed and expunged. The Trustee is directed to submit an order consistent with this Memorandum Decision.

SO ORDERED.

Bkrtcy.S.D.N.Y., 2013
In re Lehman Brothers Inc.
493 B.R. 437, 58 Bankr.Ct.Dec. 50

END OF DOCUMENT

Annex 8

H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
Third Circuit.
Barbara KANOFF, Appellant
v.
BETTER LIFE RENTING CORP.; Lefrak Organization, Inc.

No. 08-4489.
Submitted Under Third Circuit LAR 34.1(a) Sept. 30, 2009.
Filed: Oct. 28, 2009.

Background: After dismissal of her complaint, the United States District Court for the District of New Jersey, Freda L. Wolfson, J., 2008 WL 4755343, denied plaintiff's motion to extend time to file notice of appeal, and she appealed.

Holding: The Court of Appeals, Chagares, Circuit Judge, held that district court did not abuse its discretion in ruling that counsel's failure to file notice of appeal electronically did not constitute excusable neglect.

Affirmed.

West Headnotes

Federal Courts 170B ⚿669

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk669 k. Commencement and running of time for filing; extension of time. Most Cited Cases

Counsel's failure to file notice of appeal electronically was not instance of excusable neglect, and thus did not warrant extension of time to file notice of appeal, even if counsel did not know that notices of appeal needed to be electronically filed, and appellee was not prejudiced by delay, where electronic filing requirement had been adopted three years earlier by standing order and local rule, and docket sheet warned counsel that "[c]ivil initial pleadings" had to be filed electronically. F.R.A.P.Rule 4(a)(5)(A)(ii), 28 U.S.C.A.

***656** On Appeal from the United States District Court for the District of New Jersey (No. 07-cv-2363), District Judge: Honorable Freda L. Wolfson.John A. Craner, Esq., Craner, Satkin & Scheer, Scotch Plains, NJ, for Appellant.

James S. Richter, Esq., Winston & Strawn, Newark, NJ, for Better Life Renting Corp.; Lefrak Organization, Inc.

Before: MCKEE, CHAGARES, and NYGAARD, Circuit Judges.

OPINION OF THE COURT

CHAGARES, Circuit Judge.

****1** Barbara Kanoff appeals from the District Court's order denying her motion to extend the time to file a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5)(A)(ii). We will affirm.

I.

Because we write solely for the benefit of the parties, we will only briefly recite the essential facts.

Kanoff filed a complaint against Better Life

Renting Corp. ("Better Life"). Better Life filed a motion to dismiss. On February 14, 2008, 2008 WL 442145, the District Court entered an order granting the motion.

Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), Kanoff had until March 17, 2008 to file a notice of appeal with the District Court. The local rules required that such notices be electronically filed. Kanoff's counsel attempted to file the notice in hardcopy form on March 11, 2008. The Clerk's Office received the hardcopy notice, but not until March 26, 2008, because Kanoff's secretary had included the wrong address on the envelope she mailed that contained the hardcopy notice. The Clerk docketed the notice and deemed it filed on March 26, 2008, but by that time, the notice was no longer timely.

On March 31, 2008, counsel filed a motion to extend the time to appeal pursuant to Rule 4(a)(5)(A)(ii). He argued that his failure to file the notice of appeal electronically constituted "excusable neglect" within the meaning of that rule because he did not know that notices of appeal must be electronically filed. The District Court held that counsel's lack of knowledge of proper filing procedures did not constitute "excusable neglect" and denied the motion.

The District Court observed that the delay did not greatly prejudice Better Life, but held that "[f]ault in the delay remains an important factor-perhaps the most important single factor-in determining***657** whether neglect is excusable." Appendix ("App.") at 3 (citing *City of Chanute v. Williams Natural Gas Co.,* 31 F.3d 1041, 1046 (10th Cir.1994)). The District Court held that, in light of the fact that the electronic filing requirement was made publicly available via inclusion in District of New Jersey Local Civil Rules and was the subject of a District of New Jersey Standing Order, counsel's fault in failing to follow established filing requirements outweighed the absence of prejudice (as well as other countervailing factors) and therefore that counsel's neglect was not "excusable" within the meaning of Rule 4(a)(5)(A)(ii).

Kanoff then filed this appeal.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1), and we have jurisdiction pursuant to § 1291. We review the District Court's ruling that counsel's neglect that caused the notice of appeal not to be timely filed was not "excusable" within the meaning of Rule 4(a)(5)(A)(ii) for abuse of discretion. *Consol. Freightways,* 827 F.2d at 918 .

Rule 4(a)(1)(A) provides that a party has 10 days in which to file a notice of an appeal from a District Court order. Rule 4(a)(5)(A)(ii), however, allows a district court to extend that time if "that party shows excusable neglect...." FN1 The Supreme Court has explained that determining whether neglect is "excusable" requires weighing a number of factors, including "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). These factors, however, do not establish a mathematical formula; "the determination is at bottom an equitable one...." *Id.* at 395, 113 S.Ct. 1489. FN2 Though no one factor is dispositive, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect...." *Id.* at 392, 113 S.Ct. 1489. To summarize, "excusable neglect" describes situations "where the court, after weighing the relevant considerations is satisfied that counsel has exhibited substantial diligence, professional competence and has acted in good faith to conform his or her conduct in accordance with the rule, but as the result of some minor neglect, compliance was not achieved." *Consol. Freightways,* 827 F.2d at 920.

FN1. A district court also may extend the time in which to file a notice of appeal for "good cause," but the "good cause" prong is reserved for events over which the filing party has no control. *See* Fed. R.App. P. 4 Advisory Committee Notes ("The excusable neglect standard applies in situations in which there is fault.... The good cause standard applies in situations in which there is no fault-excusable or otherwise.").

FN2. Our Court, in a case pre-dating Pioneer Investment Services, recited a similar list:

> whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure ...; [ ] whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court ...; [ ] whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence ...; [ ] whether the inadvertence reflects a complete lack of diligence ...; or [ ] whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.
>
> *Consolidated Freightways Corp. of Del. v. Larson,* 827 F.2d 916, 919 (3d Cir.1987).

****2** The District Court did not abuse its considerable discretion in ruling that counsel's***658** failure to file the notice of appeal electronically was not an instance of "excusable neglect" within the meaning of Rule 4(a)(5)(A)(ii).

First, the electronic filing was incorporated into at least two authorities that govern attorneys practicing in the District of New Jersey: Standing Order 05-1 and Local Civil Rule 5.2. Second, this requirement did not come into existence weeks or even months before counsel had the occasion to file the notice of appeal that is the subject of this case. It existed at least as early as January 31, 2005-more than three years before the District Order issued the order Kanoff attempted to appeal. *See* Standing Order 05-1. Third, even if counsel did not know that notices of appeal need to be electronically filed, he knew as early as May 21, 2007 that *some* documents which before could be filed in hardcopy had to be filed electronically. *See* App. 11 (District Court docket sheet reflecting warning to counsel that "[c]ivil initial pleadings" must be filed electronically).

Kanoff's reliance on *Consolidated Freightways* is misplaced. He correctly points out that in *Consolidated Freightways,* we held that merely failing to address an envelope correctly constituted "excusable neglect" within the meaning of Rule 4(a)(5)(A)(ii). He then argues that, had his secretary correctly addressed the envelope containing Kanoff's notice of appeal, the Clerk's Office would have received it and docketed it by March 17, 2008 (the timeliness cut-off date). This argument is unavailing. In *Consolidated Freightways,* mailing a correctly-addressed envelope constituted complying with proper procedure. Had the Clerk there received the hardcopy notice of appeal in a timely fashion, the Clerk would have been obligated to docket that notice. Here, by contrast, mailing a correctly-addressed envelope *still* would have violated the District Court's directive that notices of appeal must be filed electronically. There is nothing in the record to suggest that the Clerk would have docketed the non-compliant notice, even had it been timely received.

Put simply, this was not a case where "as the result of some minor neglect, compliance was not achieved." *Consol. Freightways,* 827 F.2d at 920. Compliance was not achieved because counsel failed to educate himself about a sea change in filing requirements that had taken place more than three years before the relevant events of the instant case. The District Court acted within its discretion in declining to permit counsel to file a notice of appeal out of time.

III.

For the foregoing reasons, we will affirm the decision of the District Court.

C.A.3 (N.J.),2009.
Kanoff v. Better Life Renting Corp.
350 Fed.Appx. 655, 2009 WL 3448897 (C.A.3 (N.J.)), 74 Fed.R.Serv.3d 1370

END OF DOCUMENT

Annex 9

H
Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Daniel B.GRAVES, Plaintiff,
v.
DEUTSCHE BANK SECURITIES, INC., Defendant.

No. 07 Civ. 05471(BSJ)(KNF).
March 4, 2011.

MEMORANDUM AND ORDER

KEVIN NATHANIEL FOX, United States Magistrate Judge.

***1** On January 24, 2011, the Court directed the plaintiff to file, on or before January 27, 2011, his motion to disqualify the law firms Sidley Austin LLP and Seyfarth Shaw LLP from representing, in this action, witnesses who are former employees of the defendant. The docket sheet maintained by the Clerk of Court indicates that the plaintiff filed his notice of motion on January 27, 2011, Docket Entry No. 85. However, the plaintiff filed his memorandum of law, declaration and exhibits in support of the motion as well as a corrected certificate of service, Docket Entry Nos. 86–88, on January 28, 2011.

On January 28, 2011, the plaintiff made a motion for an extension of time, *nunc pro tunc,* to file his motion to disqualify the above mentioned law firms. The motion is unopposed. The plaintiff's counsel contends that, from January 24 to January 27, 2011, he was conducting depositions in Baltimore and New York, where he stayed in a hotel. He explains:

> All documents would have been filed before midnight on January 27 if I had not made some mistake with the portable scanner that first caused it to stop working while I was trying to scan the signature page on my Declaration, and then freeze my laptop. I consulted the manual for the software and looked for a program that might start it up again, but was unsuccessful.... I was forced to reboot, which on my laptop takes five to ten minutes for the reloading of software, but the scanner still did not work after the reboot.... I attempted to use the hotel's self-service business center to fax the signed page to my laptop so that I could use that signature, and spent at least ten minutes trying to get the hotel's equipment to read or register my credit card. When it finally did get the information, the equipment still did not enable the fax machine, and I then had to spend several minutes trying to get my credit card information wiped clean from the machine.... The front desk ultimately faxed the signature page to me, but it came to my laptop precisely at midnight was of poor quality and a vertical stripe interfered with legibility.... I ultimately filed my Declaration with the “/s/ Richard T. Seymour” electronic signature used in the ECF system, to preserve legibility.... I had begun to upload the Motion and Memorandum while I was trying to solve the problem of the signature page on my Declaration, and attempted to upload my Declaration as soon as the Memorandum, was uploaded. However, one of the attached exhibits—Exhibit 14—had been scanned on a new machine in my office that tends to produce images taking much more storage space than usual. Exhibit 14 was over 2.9 MB in size.... The ECF system rejected the filing because Exhibit 14 exceeded the 2.5 MB limit for attachments. It required me to start from the beginning and re-upload the Declaration and the 16 attachments ... My Adobe Acrobat program chose this time to stop performing the function of saving a PDF into a simpler form taking less space ... with the result that after a number of unsuccessful tries I had to split the exhibit into two parts.... The Declaration and all of its exhibits were ultimately uploaded, but it took 24 minutes past the deadline in order to do so.

***2** Counsel contends that "[b]ecause of the technical difficulties" the motion to disqualify "was filed at 11:59 P.M. on January 27, 2011, the Memorandum was filed one minute later at midnight and came through the Court's [electronic case filing ("ECF")] system marked as having been filed on January 28, 2011, at 00:00 A.M., and my Declaration in support was filed at 24 minutes past midnight." According to counsel, he has "good cause for the brief extension of time" for filing of the motion to disqualify because "[d]epositions in cities away from one's office force counsel to depend on either portable equipment or the equipment that can be found in a hotel business center, and these can cease functioning for reasons beyond the control of an attorney," Moreover, the defendant and its counsel, as well as Seyfarth Shaw LLP, "are unlikely to have suffered prejudice from the filing of the Declaration 24 minutes later than the midnight deadline."

"When an act may or must be done within a specified time, the court may, for good cause, extend the time ... on motion made after the time has expired if the party failed to act because of excusable neglect." Fed.R.Civ.P. 6(b)(1). In determining whether the party's neglect is excusable, courts consider four factors: (1) the length of the delay and its impact on judicial proceedings; (2) the danger of prejudice to the opposing party; (3) the reason for the delay; and (4) whether the movant acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership,* 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993). In this circuit, courts have taken a " 'hard line' [when] applying *Pioneer* that emphasizes the reason for the delay." *In re Enron Corp.,* 419 F.3d 115, 123 (2d Cir.2005). The focus of the inquiry is on "the reason for the delay, including whether it was within the reasonable control of the movant." *Id.* at 122–23. (quoting *Pioneer,* 507 U.S. at 395, 113 S.Ct. at 1498). "[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect" and "preoccupation or an excessive workload does not typically render a mistake excusable." *Id.* at 126 (quoting *Pioneer,* 507 U.S. at 392, 113 S.Ct. at 1496).

Here, although the length of delay is only one day, from January 27 to January 28, 2011, its impact on the fair administration of judicial proceedings cannot be dismissed, given that the discovery deadline was set for January 31, 2011, and the deadline for summary judgment motions was set for March 17, 2011. Any delay at this stage of the proceedings has the potential to prejudice the opposing party, no matter how small the prejudice. It appears that the plaintiff's counsel acted in good faith. Although counsel attempts to justify his neglect in filing the plaintiff's motion to disqualify timely, by arguing that, when he conducts business away from his office, he depends on portable equipment and the equipment of third parties, the malfunction of which is beyond his control, his declaration in support of the motion for an extension of time establishes that his circumstance was caused entirely by his own fault: "All documents would have been filed before midnight on January 27 if I had not made some mistake with the portable scanner."

***3** "Electronic filing must be **completed** before midnight local time where the Court is located in order to be considered timely filed that day." S.D.N.Y. Electronic Case Filing Rules & Instructions ("ECF Rules") § 3.3 (emphasis added), available at http://nysd.uscourts.gov/ecf/ECF_rules_SDNY_Aug08.pdf. "No single [portable document format ("PDF")] computer file may be larger than 2.5 megabytes (2.5 mb).... To determine the size on an Adobe Acrobat PDF file click on File, Document Properties, Summary." ECF Rules §§ 23.4–23.5, available at http://nysd.uscourts.gov/ecf/ECF_6drules_SDNY_Aug08.pdf.

While counsel goes out of his way to explain the technical difficulties he encountered in his attempt to file his declaration and exhibits in connection with the plaintiff's motion to disqualify, he fails to explain why he: (a) waited until 11:59 p.m., on January 27, 2011, the filing deadline, to file his motion papers which exceeded 10 MB in size; (b) did not determine the size of Exhibit 14 before filing it; and (c) attempted to file Exhibit 14, despite its size exceeding 2.5 MB, when the ECF Rules do not permit single files to be larger than 2.5 MB.

"The user log-in and password required to submit documents to the ECF system serve as the Filing User's signature on all electronic documents filed with the Court.... Electronically filed documents must include a signature block ... In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" typed in the space where the signature would otherwise appear ... Signatures for all other persons (clients, witnesses etc.) must be scanned in order to capture the actual ink signature." ECF Rules §§ 8.1, 8.2, 13.20, available at http://n ysd.uscourts.gov/ecf/ECF_rules_SDNY_Aug08.pdf.

Counsel's notice of the plaintiff's motion to disqualify, filed on January 27, 2011, as well as the memorandum of law, declaration of counsel and the corrected certificate of service, filed on January 28, 2011, all bear the same signature block: "/s/ Richard T. Seymour." It is not clear why counsel "was trying to scan the signature page on [his] Declaration," where scanning is only required for documents containing signatures of persons other than the filing attorney, so that the actual ink signature can be captured. The signature block in a document is typed, not signed by hand, and counsel's declaration is a document signed by counsel, who is the filing attorney, not by a person whose signature is required to be scanned. It is unclear, given that the signature block is the same on each document submitted in connection with the motion to disqualify, why counsel treated his declaration differently from other documents submitted on the motion, bearing the same signature block. Counsel's argument that hotel equipment "can cease functioning for reasons beyond the control of an attorney" does not apply here, because counsel did not allege that any equipment in the hotel where he was staying actually ceased functioning, only that the hotel equipment was slow in reading or registering his credit card when he attempted to use the hotel's facsimile machine and that "the equipment still did not enable the fax machine." Counsel admits that hotel personnel "ultimately faxed the signature page to me, but it came to my laptop precisely at midnight." Counsel's own equipment stopped functioning only after he "made some mistake with the portable scanner," a reason not "beyond the control of an attorney."

***4** In the circumstance of this case, counsel failed to show good cause that would justify his neglect in filing the plaintiff's motion to disqualify timely. The reason for the delay was within the reasonable control of counsel and the fault for the delay is entirely his. Therefore, the plaintiff's motion, Docket Entry No. 89, for a brief extension of time, *nunc pro tunc*, to file the plaintiff's motion to disqualify is denied, and the plaintiff's motion to disqualify counsel, Docket Entry 85, is untimely because its filing was not completed on or before January 27, 2011, as directed by the Court.

SO ORDERED:

S.D.N.Y.,2011.
Graves v. Deutsche Bank Securities, Inc.
Not Reported in F.Supp.2d, 2011 WL 1044357 (S.D.N.Y.)

END OF DOCUMENT

Annex 10

From: "Christine Willett" <christine.willett@icann.org>
To: "TUMPEL Hannah" <hannah.tuempel@iccwbo.org>
Sent: Tuesday, July 30, 2013 11:30 AM
Attach: harris-to-atallah-12jul13[2].pdf; Letter_to_ICC_Regarding_NGPC_Resolution_30July2013[1].pdf
Subject: NGPC Resolution

Dear Hannah,

Please see the attached communication regarding the New gTLD Program Committee's recent resolution.

Kind regards,

Christine A. Willett
Vice President, gTLD Operations
ICANN
Direct +1 310 578 8628
Mobile +1 310 460 8463
FAX +1 310 578 8649

The Internet Corporation for Assigned Names and Numbers

ICANN

30 July 2013

Ms. Hannah Tümpel
International Centre for Expertise of the International Chamber of Commerce (ICC)

Re: New gTLD Program Committee Resolution

Dear Ms. Hannah Tümpel:

Following on our recent message provided to all DRSPs regarding the recently published New gTLD Program Committee (NGPC) resolutions, we are forwarding to the ICC the attached letter for review in light of the NGPC's resolution that "in the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs are permitted and encouraged to use their discretion, in light of the facts and circumstances of each matter, and in cases where it is shown that the affected party is making a good faith effort to comply with the deadlines, as to whether to grant extensions, or deviate from the deadlines set forth in the Applicant Guidebook."

The full resolution is available here: http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13jul13-en.htm#1.b

Thank you, and please do not hesitate to let us know if you have any questions.

Best regards,

Christine A. Willett
Vice President, gTLD Operations

Los Angeles 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 USA T +1 310 301 5800 F +1 310 823 8649
Offices: Brussels • Silicon Valley • Washington

http://icann.org

Annex 11

This document, concerning the management of the Internet Domain Name System, is a statement of policy. Though it is not intended or expected, should any discrepancy occur between the document here and that published in the Federal Register, the Federal Register publication controls. The paper is being made available through the Internet solely as a means to facilitate the public's access to this document.

UNITED STATES DEPARTMENT OF COMMERCE

Management of Internet Names and Addresses

Docket Number: 980212036-8146-02

AGENCY: National Telecommunications and Information Administration

ACTION: Statement of Policy

SUMMARY: On July 1, 1997, as part of the Clinton Administration's *Framework for Global Electronic Commerce*,[(1)] the President directed the Secretary of Commerce to privatize the domain name system (DNS) in a manner that increases competition and facilitates international participation in its management.

Accordingly, on July 2, 1997, the Department of Commerce issued a Request for Comments (RFC) on DNS administration. The RFC solicited public input on issues relating to the overall framework of the DNS administration, the creation of new top-level domains, policies for domain name registrars, and trademark issues. During the comment period, more than 430 comments were received, amounting to some 1500 pages.[(2)]

On January 30, 1998, the National Telecommunications and Information Administration (NTIA), an agency of the Department of Commerce, issued for comment, *A Proposal to Improve the Technical Management of Internet Names and Addresses.* The proposed rulemaking, or "Green Paper," was published in the Federal Register on February 20, 1998, providing opportunity for public comment. NTIA received more than 650 comments, as of March 23, 1998, when the comment period closed.[(3)]

The Green Paper proposed certain actions designed to privatize the management of Internet names and addresses in a manner that allows for the development of robust competition and facilitates global participation in Internet management. The Green Paper proposed for discussion a variety of issues relating to DNS management including private sector creation of a new not-for-profit corporation (the "new corporation") managed by a globally and functionally representative Board of Directors.

EFFECTIVE DATE: This general statement of policy is not subject to the delay in effective date required of substantive rules under 5 U.S.C. § 553(d). It does not contain mandatory provisions and does not itself have the force and effect of law.[(4)] Therefore, the effective date of this policy statement is [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Karen Rose, Office of International Affairs (OIA), Rm 4701, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, 14th and Constitution Ave., NW, Washington, D.C., 20230. Telephone: (202) 482-0365. E-mail: dnspolicy@ntia.doc.gov

AUTHORITY: 15 U.S.C. § 1512; 15 U.S.C. § 1525; 47 U.S.C. § 902(b)(2)(H); 47 U.S.C. § 902(b)(2)(I); 47 U.S.C. § 902(b)(2)(M); 47 U.S.C. § 904(c)(1).

SUPPLEMENTARY INFORMATION:

Background:

Domain names are the familiar and easy-to-remember names for Internet computers (e.g., "www.ecommerce.gov"). They map to unique Internet Protocol (IP) numbers (e.g., 98.37.241.30) that serve as routing addresses on the Internet. The domain name system (DNS) translates Internet names into the IP numbers needed for transmission of information across the network.

U.S. Role in DNS Development:

More than 25 years ago, the U.S. Government began funding research necessary to develop packet-switching technology and communications networks, starting with the "ARPANET" network established by the Department of Defense's Advanced Research Projects Agency (DARPA) in the 1960s. ARPANET was later linked to other networks established by other government agencies, universities and research facilities. During the 1970s, DARPA also funded the development of a "network of networks;" this became known as the Internet, and the protocols that allowed the networks to intercommunicate became known as Internet protocols (IP).

As part of the ARPANET development work contracted to the University of California at Los Angeles (UCLA), Dr. Jon Postel, then a graduate student at the university, undertook the maintenance of a list of host names and addresses and also a list of documents prepared by ARPANET researchers, called Requests for Comments (RFCs). The lists and the RFCs were made available to the network community through the auspices of SRI International, under contract to DARPA and later the Defense Communication Agency (DCA) (now the Defense Information Systems Agency (DISA)) for performing the functions of the Network Information Center (the NIC).

After Dr. Postel moved from UCLA to the Information Sciences Institute (ISI) at the University of Southern California (USC), he continued to maintain the list of assigned Internet numbers and names under contracts with DARPA. SRI International continued to publish the lists. As the lists grew, DARPA permitted Dr. Postel to delegate additional administrative aspects of the list maintenance to SRI, under continuing technical oversight. Dr. Postel, under the DARPA contracts, also published a list of technical parameters that had been assigned for use by protocol developers. Eventually these functions collectively became known as the Internet Assigned Numbers Authority (IANA).

Until the early 1980s, the Internet was managed by DARPA, and used primarily for research purposes. Nonetheless, the task of maintaining the name list became onerous, and the Domain Name System (DNS) was developed to improve the process. Dr. Postel and SRI participated in DARPA's development and establishment of the technology and practices used by the DNS. By 1990, ARPANET was completely phased out.

The National Science Foundation (NSF) has statutory authority for supporting and strengthening basic scientific research, engineering, and educational activities in the United States, including the maintenance of computer networks to connect research and educational institutions. Beginning in 1987, IBM, MCI and Merit developed NSFNET, a national high-speed network based on Internet protocols, under an award from NSF. NSFNET, the largest of the governmental networks, provided a "backbone" to connect other networks serving more than 4,000 research and educational institutions throughout the country. The National Aeronautics and Space Administration (NASA) and the U.S. Department of Energy also contributed backbone facilities.

In 1991-92, NSF assumed responsibility for coordinating and funding the management of the non-military portion of the Internet infrastructure. NSF solicited competitive proposals to provide a variety of infrastructure services, including domain name registration services. On December 31, 1992, NSF entered into a cooperative agreement with Network Solutions, Inc. (NSI) for some of these services, including the domain name registration services. Since that time, NSI has managed key registration, coordination, and maintenance functions of the Internet domain name system. NSI registers domain names in the generic top level domains (gTLDs) on a first come, first served basis and also maintains a directory linking domain names with the IP numbers of domain name servers. NSI also currently maintains the authoritative database of Internet registrations.

In 1992, the U.S. Congress gave NSF statutory authority to allow commercial activity on the NSFNET.[(5)] This facilitated connections between NSFNET and newly forming commercial network service providers, paving the way for today's Internet. Thus, the U.S. Government has played a pivotal role in creating the Internet as we know it today. The U.S. Government consistently encouraged bottom-up development of networking technologies, and throughout the course of its development, computer scientists from around the world have enriched the Internet and facilitated exploitation of its true potential. For example, scientists at CERN, in Switzerland, developed software, protocols and conventions that formed the basis of today's vibrant World Wide Web. This type of pioneering Internet research and development continues in cooperative organizations and consortia throughout the world.

DNS Management Today:

In recent years, commercial use of the Internet has expanded rapidly. As a legacy, however, major components of the domain name system are still performed by, or subject to, agreements with agencies of the U.S. Government.

1) Assignment of numerical addresses to Internet users.

Every Internet computer has a unique IP number. IANA, headed by Dr. Jon Postel, coordinates this system by allocating blocks of numerical addresses to regional IP registries (ARIN in North America, RIPE in Europe, and APNIC in the Asia/Pacific region), under contract with DARPA. In turn, larger Internet service providers apply to the regional IP registries for blocks of IP addresses. The recipients of those address blocks then reassign addresses to smaller Internet service providers and to end users.

2) Management of the system of registering names for Internet users.

The domain name space is constructed as a hierarchy. It is divided into top-level domains (TLDs), with each TLD then divided into second-level domains (SLDs), and so on. More than 200 national, or country-code, TLDs (ccTLDs) are administered by their corresponding governments or by private entities with the appropriate national government's acquiescence. A small set of gTLDs do not carry any national identifier, but denote the intended function of that portion of the domain space. For example, .com was established for commercial users, .org for not-for-profit organizations, and .net for network service providers. The registration and propagation of these key gTLDs are performed by NSI, under a five-year cooperative agreement with NSF. This agreement expires on September 30, 1998.

3) Operation of the root server system.

The root server system is a set of thirteen file servers, which together contain authoritative databases listing all TLDs. Currently, NSI operates the "A" root server, which maintains the authoritative root database and replicates changes to the other root servers on a daily basis. Different organizations, including NSI, operate the other 12 root servers.[(6)] The U.S. Government plays a role in the operation of about half of the Internet's root servers. Universal name consistency on the Internet cannot be guaranteed without a set of authoritative and consistent roots. Without such consistency messages could not be routed with any certainty to the intended addresses.

4) Protocol Assignment.

The Internet protocol suite, as defined by the Internet Engineering Task Force (IETF), contains many technical parameters, including protocol numbers, port numbers, autonomous system numbers, management information base object identifiers and others. The common use of these protocols by the Internet community requires that the particular values used in these fields be assigned uniquely. Currently, IANA, under contract with DARPA, makes these assignments and maintains a registry of the assigned values.

The Need for Change:

From its origins as a U.S.-based research vehicle, the Internet is rapidly becoming an international medium for commerce, education and communication. The traditional means of organizing its technical functions need to evolve as well. The pressures for change are coming from many different quarters:

- There is widespread dissatisfaction about the absence of competition in domain name registration.
- Conflicts between trademark holders and domain name holders are becoming more common. Mechanisms for resolving these conflicts are expensive and cumbersome.
- Many commercial interests, staking their future on the successful growth of the Internet, are calling for a more formal and robust management structure.
- An increasing percentage of Internet users reside outside of the U.S., and those stakeholders want to participate in Internet coordination.
- As Internet names increasingly have commercial value, the decision to add new top-level domains cannot be made on an *ad hoc* basis by entities or individuals that are not formally accountable to the Internet community.
- As the Internet becomes commercial, it becomes less appropriate for U.S. research agencies to direct and fund these functions.

The Internet technical community has been actively debating DNS management policy for several years. Experimental registry systems offering name registration services in an alternative set of exclusive domains developed as early as January 1996. Although visible to only a fraction of Internet users, alternative systems such as the name.space, AlterNIC, and eDNS affiliated registries[(7)] contributed to the community's dialogue on the evolution of DNS administration.

In May of 1996, Dr. Postel proposed the creation of multiple, exclusive, competing top-level domain name registries. This proposal called for the introduction of up to 50 new competing domain name registries, each with the exclusive right to register names in up to three new top-level domains, for a total of 150 new TLDs. While some supported the proposal, the plan drew much criticism from the Internet technical community.(8) The paper was revised and reissued.(9) The Internet Society's (ISOC) board of trustees endorsed, in principle, the slightly revised but substantively similar version of the draft in June of 1996.

After considerable debate and redrafting failed to produce a consensus on DNS change, IANA and the Internet Society (ISOC) organized the International Ad Hoc Committee(10) (IAHC or the Ad Hoc Committee) in September 1996, to resolve DNS management issues. The World Intellectual Property Organization (WIPO) and the International Telecommunications Union (ITU) participated in the IAHC. The Federal Networking Council (FNC) participated in the early deliberations of the Ad Hoc Committee.

The IAHC issued a draft plan in December 1996 that introduced unique and thoughtful concepts for the evolution of DNS administration.(11) The final report proposed a memorandum of understanding (MoU) that would have established, initially, seven new gTLDs to be operated on a nonexclusive basis by a consortium of new private domain name registrars called the Council of Registrars (CORE).(12) Policy oversight would have been undertaken in a separate council called the Policy Oversight Committee (POC) with seats allocated to specified stakeholder groups. Further, the plan formally introduced mechanisms for resolving trademark/domain name disputes. Under the MoU, registrants for second-level domains would have been required to submit to mediation and arbitration, facilitated by WIPO, in the event of conflict with trademark holders.

Although the IAHC proposal gained support in many quarters of the Internet community, the IAHC process was criticized for its aggressive technology development and implementation schedule, for being dominated by the Internet engineering community, and for lacking participation by and input from business interests and others in the Internet community.(13) Others criticized the plan for failing to solve the competitive problems that were such a source of dissatisfaction among Internet users and for imposing unnecessary burdens on trademark holders. Although the POC responded by revising the original plan, demonstrating a commendable degree of flexibility, the proposal was not able to overcome initial criticism of both the plan and the process by which the plan was developed.(14) Important segments of the Internet community remained outside the IAHC process, criticizing it as insufficiently representative.(15)

As a result of the pressure to change DNS management, and in order to facilitate its withdrawal from DNS management, the U.S. Government, through the Department of Commerce and NTIA, sought public comment on the direction of U.S. policy with respect to DNS, issuing the Green Paper on January 30, 1998.(16) The approach outlined in the Green Paper adopted elements of other proposals, such as the early Postel drafts and the IAHC gTLD- MoU.

Comments and Response: The following are summaries of and responses to the major comments that were received in response to NTIA's issuance of *A Proposal to Improve the Technical Management of Internet Names and Addresses*. As used herein, quantitative terms such as "some," "many," and "the majority of," reflect, roughly speaking, the proportion of comments addressing a particular issue but are not intended to summarize all comments received or the complete substance of all such comments.

1. Principles for a New System. The Green Paper set out four principles to guide the evolution of the domain name system: stability, competition, private bottom-up coordination, and representation.

Comments: In general, commenters supported these principles, in some cases highlighting the importance of one or more of the principles. For example, a number of commenters emphasized the importance of establishing a body that fully reflects the broad diversity of the Internet community. Others stressed the need to preserve the bottom-up tradition of Internet governance. A limited number of commenters proposed additional principles for the new system, including principles related to the protection of human rights, free speech, open communication, and the preservation of the Internet as a public trust. Finally, some commenters who agreed that Internet stability is an important principle, nonetheless objected to the U.S. Government's assertion of any participatory role in ensuring such stability.

Response: The U.S. Government policy applies only to management of Internet names and addresses and does not set out a system of Internet "governance." Existing human rights and free speech protections will not be disturbed and, therefore, need not be specifically included in the core principles for DNS management. In addition, this policy is not intended to displace other legal regimes (international law, competition law, tax law and principles of international taxation, intellectual property law, etc.) that may already apply. The continued applicability of these systems as well as the principle of representation should ensure that DNS management proceeds in the interest of the Internet community as a whole. Finally, the U.S. Government believes that it would be irresponsible to withdraw from its existing management role without taking steps to ensure the stability of the Internet during its transition to private sector management. On balance, the comments did not present any consensus for amending the principles outlined in the Green Paper.

2. The Coordinated Functions. The Green Paper identified four DNS functions to be performed on a coordinated, centralized basis in order to ensure that the Internet runs smoothly:

1. To set policy for and direct the allocation of IP number blocks;
2. To oversee the operation of the Internet root server system;

3. To oversee policy for determining the circumstances under which new top level domains would be added to the root system; and

4. To coordinate the development of other technical protocol parameters as needed to maintain universal connectivity on the Internet.

Comments: Most commenters agreed that these functions should be coordinated centrally, although a few argued that a system of authoritative roots is not technically necessary to ensure DNS stability. A number of commenters, however, noted that the fourth function, as delineated in the Green Paper, overstated the functions currently performed by IANA, attributing to it central management over an expanded set of functions, some of which are now carried out by the IETF.

Response: In order to preserve universal connectivity and the smooth operation of the Internet, the U.S. Government continues to believe, along with most commenters, that these four functions should be coordinated. In the absence of an authoritative root system, the potential for name collisions among competing sources for the same domain name could undermine the smooth functioning and stability of the Internet.

The Green Paper was not, however, intended to expand the responsibilities associated with Internet protocols beyond those currently performed by IANA. Specifically, management of DNS by the new corporation does not encompass the development of Internet technical parameters for other purposes by other organizations such as IETF. The fourth function should be restated accordingly:

· to coordinate the *assignment* of other Internet technical parameters as needed to maintain universal connectivity on the Internet.

3. Separation of Name and Number Authority.

Comments: A number of commenters suggested that management of the domain name system should be separated from management of the IP number system. These commenters expressed the view that the numbering system is relatively technical and straightforward. They feared that tight linkage of domain name and IP number policy development would embroil the IP numbering system in the kind of controversy that has surrounded domain name issuance in recent months. These commenters also expressed concern that the development of alternative name and number systems could be inhibited by this controversy or delayed by those with vested interests in the existing system.

Response: The concerns expressed by the commenters are legitimate, but domain names and IP numbers must ultimately be coordinated to preserve universal connectivity on the Internet. Also, there are significant costs associated with establishing and operating two separate management entities.

However, there are organizational structures that could minimize the risks identified by commenters. For example, separate name and number councils could be formed within a single organization. Policy could be determined within the appropriate council that would submit its recommendations to the new corporation's Board of Directors for ratification.

4. Creation of the New Corporation and Management of the DNS. The Green Paper called for the creation of a new private, not-for-profit corporation[(17)] responsible for coordinating specific DNS functions for the benefit of the Internet as a whole. Under the Green Paper proposal, the U.S. Government[(18)] would gradually transfer these functions to the new corporation beginning as soon as possible, with the goal of having the new corporation carry out operational responsibility by October 1998. Under the Green Paper proposal, the U.S. Government would continue to participate in policy oversight until such time as the new corporation was established and stable, phasing out as soon as possible, but in no event later than September 30, 2000. The Green Paper suggested that the new corporation be incorporated in the United States in order to promote stability and facilitate the continued reliance on technical expertise residing in the United States, including IANA staff at USC/ISI.

Comments: Almost all commenters supported the creation of a new, private not-for-profit corporation to manage DNS. Many suggested that IANA should evolve into the new corporation. A small number of commenters asserted that the U.S. Government should continue to manage Internet names and addresses. Another small number of commenters suggested that DNS should be managed by international governmental institutions such as the United Nations or the International Telecommunications Union. Many commenters urged the U.S. Government to commit to a more aggressive timeline for the new corporation's assumption of management responsibility. Some commenters also suggested that the proposal to headquarter the new corporation in the United States represented an inappropriate attempt to impose U.S. law on the Internet as a whole.

Response: The U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management. Most commenters shared this goal. While international organizations may provide specific expertise or act as advisors to the new corporation, the U.S. continues to believe, as do most commenters, that neither national governments acting as sovereigns nor intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses. Of course, national governments now have, and will continue to have, authority to manage or establish policy for their own ccTLDs.

The U.S. Government would prefer that this transition be complete before the year 2000. To the extent that the new corporation is established and operationally stable, September 30, 2000 is intended to be, and remains, an "outside" date.

IANA has functioned as a government contractor, albeit with considerable latitude, for some time now. Moreover, IANA is not formally organized or constituted. It describes a function more than an entity, and as such does not currently provide a legal foundation for the new corporation. This is not to say, however, that IANA could not be reconstituted by a broad-based, representative group of Internet stakeholders or that individuals associated with IANA should not themselves play important foundation roles in the formation of the new corporation. We believe, and many commenters also suggested, that the private sector organizers will want Dr. Postel and other IANA staff to be involved in the creation of the new corporation.

Because of the significant U.S.-based DNS expertise and in order to preserve stability, it makes sense to headquarter the new corporation in the United States. Further, the mere fact that the new corporation would be incorporated in the United States would not remove it from the jurisdiction of other nations. Finally, we note that the new corporation must be headquartered somewhere, and similar objections would inevitably arise if it were incorporated in another location.

5. Structure of the New Corporation. The Green Paper proposed a 15-member Board, consisting of three representatives of regional number registries, two members designated by the Internet Architecture Board (IAB), two members representing domain name registries and domain name registrars, seven members representing Internet users, and the Chief Executive Officer of the new corporation.

Comments: Commenters expressed a variety of positions on the composition of the Board of Directors for the new corporation. In general, however, most commenters supported the establishment of a Board of Directors that would be representative of the functional and geographic diversity of the Internet. For the most part, commenters agreed that the groups listed in the Green Paper included individuals and entities likely to be materially affected by changes in DNS. Most of those who criticized the proposed allocation of Board seats called for increased representation of their particular interest group on the Board of Directors. Specifically, a number of commenters suggested that the allocation set forth in the Green Paper did not adequately reflect the special interests of (1) trademark holders, (2) Internet service providers, or (3) the not-for-profit community. Others commented that the Green Paper did not adequately ensure that the Board would be globally representative.

Response: The Green Paper attempted to describe a manageably sized Board of Directors that reflected the diversity of the Internet. It is probably impossible to allocate Board seats in a way that satisfies all parties concerned. On balance, we believe the concerns raised about the representation of specific groups are best addressed by a thoughtful allocation of the "user" seats as determined by the organizers of the new corporation and its Board of Directors, as discussed below.

The Green Paper identified several international membership associations and organizations to designate Board members such as APNIC, ARIN, RIPE, and the Internet Architecture Board. We continue to believe that as use of the Internet expands outside the United States, it is increasingly likely that a properly open and transparent DNS management entity will have board members from around the world. Although we do not set any mandatory minimums for global representation, this policy statement is designed to identify global representativeness as an important priority.

6. Registrars and Registries. The Green Paper proposed moving the system for registering second level domains and the management of generic top-level domains into a competitive environment by creating two market-driven businesses, registration of second level domain names and the management of gTLD registries.

a. Competitive Registrars. Comments: Commenters strongly supported establishment of a competitive registrar system whereby registrars would obtain domain names for customers in any gTLD. Few disagreed with this position. The Green Paper proposed a set of requirements to be imposed by the new corporation on all would-be registrars. Commenters for the most part did not take exception to the proposed criteria, but a number of commenters suggested that it was inappropriate for the United States government to establish them.

Response: In response to the comments received, the U.S. Government believes that the new corporation, rather than the U.S. Government, should establish minimum criteria for registrars that are pro-competitive and provide some measure of stability for Internet users without being so onerous as to prevent entry by would-be domain name registrars from around the world. Accordingly, the proposed criteria are not part of this policy statement.

b. Competitive Registries. Comments: Many commenters voiced strong opposition to the idea of competitive and/or for-profit domain name registries, citing one of several concerns. Some suggested that top level domain names are not, by nature, ever truly generic. As such, they will tend to function as "natural monopolies" and should be regulated as a public trust and operated for the benefit of the Internet community as a whole. Others suggested that even if competition initially exists among various domain name registries, lack of portability in the naming systems would create lock-in and switching costs, making competition unsustainable in the long run. Finally, other commenters suggested that no new registry could compete meaningfully with NSI unless all domain name registries were not-for-profit and/or noncompeting.

Some commenters asserted that an experiment involving the creation of additional for-profit registries would be too risky, and irreversible once undertaken. A related concern raised by commenters addressed the rights that for-profit operators might assert with respect to the information contained in registries they operate. These commenters argued that registries would have inadequate incentives to abide by DNS policies and procedures unless the new corporation could terminate a particular entity's license to operate a registry. For-profit operators, under this line of reasoning, would be more likely to disrupt the Internet by resisting license terminations.

Commenters who supported competitive registries conceded that, in the absence of domain name portability, domain name registries could impose switching costs on users who change domain name registries. They cautioned, however, that it would be premature to conclude that switching costs provide a sufficient basis for precluding the proposed move to competitive domain name registries and cited a number of factors that could protect against registry opportunism. These commenters concluded that the potential benefits to customers from enhanced competition outweighed the risk of such opportunism. The responses to the Green Paper also included public comments on the proposed criteria for registries.

Response: Both sides of this argument have considerable merit. It is possible that additional discussion and information will shed light on this issue, and therefore, as discussed below, the U.S. Government has concluded that the issue should be left for further consideration and final action by the new corporation. The U.S. Government is of the view, however, that competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically. Further, in response to the comments received, the U.S. government believes that new corporation should establish and implement appropriate criteria for gTLD registries. Accordingly, the proposed criteria are not part of this policy statement.

7. The Creation of New gTLDs. The Green Paper suggested that during the period of transition to the new corporation, the U.S. Government, in cooperation with IANA, would undertake a process to add up to five new gTLDs to the authoritative root. Noting that formation of the new corporation would involve some delay, the Green Paper contemplated new gTLDs in the short term to enhance competition and provide information to the technical community and to policy makers, while offering entities that wished to enter into the registry business an opportunity to begin offering service to customers. The Green Paper, however, noted that ideally the addition of new TLDs would be left to the new corporation.

Comments: The comments evidenced very strong support for limiting government involvement during the transition period on the matter of adding new gTLDs. Specifically, most commenters -- both U.S. and non-U.S.-- suggested that it would be more appropriate for the new, globally representative, corporation to decide these issues once it is up and running. Few believed that speed should outweigh process considerations in this matter. Others warned, however, that relegating this contentious decision to a new and untested entity early in its development could fracture the organization. Others argued that the market for a large or unlimited number of new gTLDs should be opened immediately. They asserted that there are no technical impediments to the addition of a host of gTLDs, and the market will decide which TLDs succeed and which do not. Further, they pointed out that there are no artificial or arbitrary limits in other media on the number of places in which trademark holders must defend against dilution.

Response: The challenge of deciding policy for the addition of new domains will be formidable. We agree with the many commenters who said that the new corporation would be the most appropriate body to make these decisions based on global input. Accordingly, as supported by the preponderance of comments, the U.S. Government will not implement new gTLDs at this time.

At least in the short run, a prudent concern for the stability of the system suggests that expansion of gTLDs proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evolution of the domain space. New top level domains could be created to enhance competition and to enable the new corporation to evaluate the functioning, in the new environment, of the root server system and the software systems that enable shared registration.

8. The Trademark Dilemma. When a trademark is used as a domain name without the trademark owner's consent, consumers may be misled about the source of the product or service offered on the Internet, and trademark owners may not be able to protect their rights without very expensive litigation. For cyberspace to function as an effective commercial market, businesses must have confidence that their trademarks can be protected. On the other hand, management of the Internet must respond to the needs of the Internet community as a whole, and not trademark owners exclusively. The Green Paper proposed a number of steps to balance the needs of domain name holders with the legitimate concerns of trademark owners in the interest of the Internet community as a whole. The proposals were designed to provide trademark holders with the same rights they have in the physical world, to ensure transparency, and to guarantee a dispute resolution mechanism with resort to a court system.

The Green Paper also noted that trademark holders have expressed concern that domain name registrants in faraway places may be able to infringe their rights with no convenient jurisdiction available in which the trademark owner could enforce a judgment protecting those rights. The Green Paper solicited comments on an arrangement whereby, at the time of registration, registrants would agree to submit a contested domain name to the jurisdiction of the courts where the registry is domiciled, where the registry database is maintained, or where the "A" root server is maintained.

Comments: Commenters largely agreed that domain name registries should maintain up-to-date, readily searchable domain name databases that contain the information necessary to locate a domain name holder. In general commenters did not take specific issue with the database specifications proposed in Appendix 2 of the Green Paper, although some commenters proposed additional requirements. A few commenters noted, however, that privacy issues should be considered in this context.

A number of commenters objected to NSI's current business practice of allowing registrants to use domain names before they have actually paid any registration fees. These commenters pointed out that this practice has encouraged cybersquatters and increased the number of conflicts between domain name holders and trademark holders. They suggested that domain name applicants should be required to pay before a desired domain name becomes available for use.

Most commenters also favored creation of an on-line dispute resolution mechanism to provide inexpensive and efficient alternatives to litigation for resolving disputes between trademark owners and domain name registrants. The Green Paper contemplated that each registry would establish specified minimum dispute resolution procedures, but remain free to establish additional trademark protection and dispute resolution mechanisms. Most commenters did not agree with this approach, favoring instead a uniform approach to resolving trademark/domain name disputes.

Some commenters noted that temporary suspension of a domain name in the event of an objection by a trademark holder within a specified period of time after registration would significantly extend trademark holders' rights beyond what is accorded in the real world. They argued that such a provision would create a de facto waiting period for name use, as holders would need to suspend the use of their name until after the objection window had passed to forestall an interruption in service. Further, they argue that such a system could be used anti-competitively to stall a competitor's entry into the marketplace.

The suggestion that domain name registrants be required to agree at the time of registration to submit disputed domain names to the jurisdiction of specified courts was supported by U.S. trademark holders but drew strong protest from trademark holders and domain name registrants outside the United States. A number of commenters characterized this as an inappropriate attempt to establish U.S. trademark law as the law of the Internet. Others suggested that existing jurisdictional arrangements are satisfactory. They argue that establishing a mechanism whereby the judgment of a court can be enforced absent personal jurisdiction over the infringer would upset the balance between the interests of trademark holders and those of other members of the Internet community.

Response: The U.S. Government will seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, which includes the participation of trademark holders and members of the Internet community who are not trademark holders, to (1) develop recommendations for a uniform approach to resolving trademark/domain name disputes involving cyberpiracy (as opposed to conflicts between trademark holders with legitimate competing rights), (2) recommend a process for protecting famous trademarks in the generic top level domains, and (3) evaluate the effects, based on studies conducted by independent organizations, such as the National Research Council of the National Academy of Sciences, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders. These findings and recommendations could be submitted to the board of the new corporation for its consideration in conjunction with its development of registry and registrar policy and the creation and introduction of new gTLDs.

In trademark/domain name conflicts, there are issues of jurisdiction over the domain name in controversy and jurisdiction over the legal persons (the trademark holder and the domain name holder). This document does not attempt to resolve questions of personal jurisdiction in trademark/domain name conflicts. The legal issues are numerous, involving contract, conflict of laws, trademark, and other questions. In addition, determining how these various legal principles will be applied to the borderless Internet with an unlimited possibility of factual scenarios will require a great deal of thought and deliberation. Obtaining agreement by the parties that jurisdiction over the domain name will be exercised by an alternative dispute resolution body is likely to be at least somewhat less controversial than agreement that the parties will subject themselves to the personal jurisdiction of a particular national court. Thus, the references to jurisdiction in this policy statement are limited to jurisdiction over the domain name in dispute, and not to the domain name holder.

In order to strike a balance between those commenters who thought that registrars and registries should not themselves be engaged in disputes between trademark owners and domain name holders and those commenters who thought that trademark owners should have access to a reliable and up-to-date database, we believe that a database should be maintained that permits trademark owners to obtain the contact information necessary to protect their trademarks.

Further, it should be clear that whatever dispute resolution mechanism is put in place by the new corporation, that mechanism should be directed toward disputes about cybersquatting and cyberpiracy and not to settling the disputes between two parties with legitimate competing interests in a particular mark. Where legitimate competing rights are concerned, disputes are rightly settled in an appropriate court.

Under the revised plan, we recommend that domain name holders agree to submit infringing domain names to the jurisdiction of a court where the "A" root server is maintained, where the registry is domiciled, where the registry database is maintained, or where the registrar is domiciled. We believe that allowing trademark infringement suits to be brought wherever registrars and registries are located will help ensure that all trademark holders - both U.S. and non-U.S. - have the opportunity to bring suits in a convenient jurisdiction and enforce the judgments of those courts.

Under the revised plan, we also recommend that, whatever options are chosen by the new corporation, each registrar should insist that payment be made for the domain name before it becomes available to the applicant. The failure to make a domain name applicant pay for its use of a domain name has encouraged cyberpirates and is a practice that should end as soon as possible.

9. Competition Concerns.

Comments: Several commenters suggested that the U.S. Government should provide full antitrust immunity or indemnification for the new corporation. Others noted that potential antitrust liability would provide an important safeguard against institutional inflexibility and abuses of power.

Response: Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality.

The Green Paper envisioned the new corporation as operating on principles similar to those of a standard-setting body. Under this model, due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices would need to be included in the new corporation's originating documents. For example, the new corporation's activities would need to be open to all persons who are directly affected by the entity, with no undue financial barriers to participation or unreasonable restrictions on participation based on technical or other such requirements. Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and appealing if adversely affected. Further, the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category. If the new corporation behaves this way, it should be less vulnerable to antitrust challenges.

10. The NSI Agreement.

Comments: Many commenters expressed concern about continued administration of key gTLDs by NSI. They argued that this would give NSI an unfair advantage in the marketplace and allow NSI to leverage economies of scale across their gTLD operations. Some commenters also believe the Green Paper approach would have entrenched and institutionalized NSI's dominant market position over the key domain name going forward. Further, many commenters expressed doubt that a level playing field between NSI and the new registry market entrants could emerge if NSI retained control over .com, .net, and .org.

Response: The cooperative agreement between NSI and the U.S. Government is currently in its ramp down period. The U.S. Government and NSI will shortly commence discussions about the terms and conditions governing the ramp-down of the cooperative agreement. Through these discussions, the U.S. Government expects NSI to agree to take specific actions, including commitments as to pricing and equal access, designed to permit the development of competition in domain name registration and to approximate what would be expected in the presence of marketplace competition. The U.S. Government expects NSI to agree to act in a manner consistent with this policy statement, including recognizing the role of the new corporation to establish and implement DNS policy and to establish terms (including licensing terms) applicable to new and existing gTLD registries under which registries, registrars and gTLDs are permitted to operate. Further, the U.S. Government expects NSI to agree to make available on an ongoing basis appropriate databases, software, documentation thereof, technical expertise, and other intellectual property for DNS management and shared registration of domain names.

11. A Global Perspective

Comments: A number of commenters expressed concern that the Green Paper did not go far enough in globalizing the administration of the domain name system. Some believed that international organizations should have a role in administering the DNS. Others complained that incorporating the new corporation in the United States would entrench control over the Internet with the U.S. Government. Still others believed that the awarding by the U.S. Government of up to five new gTLDs would enforce the existing dominance of U.S. entities over the gTLD system.

Response: The U.S. Government believes that the Internet is a global medium and that its technical management should fully reflect the global diversity of Internet users. We recognize the need for and fully support mechanisms that would ensure international input into the management of the domain name system. In withdrawing the U.S. Government from DNS management and promoting the establishment of a new, non-governmental entity to manage Internet names and addresses, a key U.S. Government objective has been to ensure that the increasingly global Internet user community has a voice in decisions affecting the Internet's technical management.

We believe this process has reflected our commitment. Many of the comments on the Green

Paper were filed by foreign entities, including governments. Our dialogue has been open to all Internet users - foreign and domestic, government and private - during this process, and we will continue to consult with the international community as we begin to implement the transition plan outlined in this paper.

12. The Intellectual Infrastructure Fund.

In 1995, NSF authorized NSI to assess domain name registrants a $50 fee per year for the first two years, 30 percent of which was to be deposited in the Intellectual Infrastructure Fund (IIF), a fund to be used for the preservation and enhancement of the intellectual infrastructure of the Internet.

Comments: Very few comments referenced the IIF. In general, the comments received on the issue supported either refunding the IIF portion of the domain name registration fee to domain registrants from whom it had been collected or applying the funds toward Internet infrastructure development projects generally, including funding the establishment of the new corporation.

Response: As proposed in the Green Paper, allocation of a portion of domain name registration fees to this fund terminated as of March 31, 1998. NSI has reduced its registration fees accordingly. The IIF remains the subject of litigation. The U.S. Government takes the position that its collection has recently been ratified by the U.S. Congress,(19)

and has moved to dismiss the claim that it was unlawfully collected. This matter has not been finally resolved, however.

13. The .us Domain.

At present, the IANA administers .us as a locality-based hierarchy in which second-level domain space is allocated to states and U.S. territories.(20) This name space is further subdivided into localities. General registration under localities is performed on an exclusive basis by private firms that have requested delegation from IANA. The .us name space has typically been used by branches of state and local governments, although some commercial names have been assigned. Where registration for a locality has not been delegated, the IANA itself serves as the registrar.

Comments: Many commenters suggested that the pressure for unique identifiers in the .com gTLD could be relieved if commercial use of the .us space was encouraged. Commercial users and trademark holders, however, find the current locality-based system too cumbersome and complicated for commercial use. They called for expanded use of the .us TLD to alleviate some of the pressure for new generic TLDs and reduce conflicts between American companies and others vying for the same domain name. Most commenters support an evolution of the .us domain designed to make this name space more attractive to commercial users.

Response: Clearly, there is much opportunity for enhancing the .us domain space, and .us could be expanded in many ways without displacing the current structure. Over the next few months, the U.S. Government will work with the private sector and state and local governments to determine how best to make the .us domain more attractive to commercial users. Accordingly, the Department of Commerce will seek public input on this important issue.

ADMINISTRATIVE LAW REQUIREMENTS:

On February 20, 1998, NTIA published for public comment a proposed rule regarding the domain name registration system. That proposed rule sought comment on substantive regulatory provisions, including but not limited to a variety of specific requirements for the membership of the new corporation, the creation during a transition period of a specified number of new generic top level domains and minimum dispute resolution and other procedures related to trademarks. As discussed elsewhere in this document, in response to public comment these aspects of the original proposal have been eliminated. In light of the public comment and the changes to the proposal made as a result, as well as the continued rapid technological development of the Internet, the Department of Commerce has determined that it should issue a general statement of policy, rather than define or impose a substantive regulatory regime for the domain name system. As such, this policy statement is not a substantive rule, does not contain mandatory provisions and does not itself have the force and effect of law.

The Assistant General Counsel for Legislation and Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration, that, for purposes of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq., the proposed rule on this matter, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published along with the proposed rule. No comments were received regarding this certification. As such, and because this final rule is a general statement of policy, no final regulatory flexibility analysis has been prepared.

This general statement of policy does not contain any reporting or record keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. ch. 35 (PRA). However, at the time the U.S. Government might seek to enter into agreements as described in this policy statement, a determination will be made as to whether any reporting or record keeping requirements subject to the PRA are being implemented. If so, the NTIA will, at that time, seek approval under the PRA for such requirement(s) from the Office of Management and Budget.

This statement has been determined to be not significant for purposes of Office of Management and Budget review under Executive Order 12866, entitled Regulatory Planning and Review.

REVISED POLICY STATEMENT:

This document provides the U.S. Government's policy regarding the privatization of the domain name system in a manner that allows for the development of robust competition and that facilitates global participation in the management of Internet names and addresses.

The policy that follows does not propose a monolithic structure for Internet governance. We doubt that the Internet should be governed by one plan or one body or even by a series of plans and bodies. Rather, we seek a stable process to address the narrow issues of management and administration of Internet names and numbers on an ongoing basis.

As set out below, the U.S. Government is prepared to recognize, by entering into agreement with, and to seek international support for, a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system. Under such agreement(s) or understanding(s), the new corporation would undertake various responsibilities for the administration of the domain name system now performed by or on behalf of the U.S. Government or by third parties under arrangements or agreements with the U.S. Government. The U.S. Government would also ensure that the new corporation has appropriate access to needed databases and software developed under those agreements.

The Coordinated Functions

Management of number addresses is best done on a coordinated basis. Internet numbers are a unique, and at least currently, a limited resource. As technology evolves, changes may be needed in the number allocation system. These changes should also be coordinated.

Similarly, coordination of the root server network is necessary if the whole system is to work smoothly. While day-to-day operational tasks, such as the actual operation and maintenance of the Internet root servers, can be dispersed, overall policy guidance and control of the TLDs and the Internet root server system should be vested in a single organization that is representative of Internet users around the globe.

Further, changes made in the administration or the number of gTLDs contained in the authoritative root system will have considerable impact on Internet users throughout the world. In order to promote continuity and reasonable predictability in functions related to the root zone, the development of policies for the addition, allocation, and management of gTLDs and the establishment of domain name registries and domain name registrars to host gTLDs should be coordinated.

Finally, coordinated maintenance and dissemination of the protocol parameters for Internet addressing will best preserve the stability and interconnectivity of the Internet. We are not, however, proposing to expand the functional responsibilities of the new corporation beyond those exercised by IANA currently.

In order to facilitate the needed coordination, Internet stakeholders are invited to work together to form a new, private, not-for-profit corporation to manage DNS functions. The following discussion reflects current U.S. Government views of the characteristics of an appropriate management entity. What follows is designed to describe the characteristics of an appropriate entity generally.

Principles for a New System. In making a decision to enter into an agreement to establish a process to transfer current U.S. government management of DNS to such a new entity, the U.S. will be guided by, and consider the proposed entity's commitment to, the following principles:

1. Stability

The U.S. Government should end its role in the Internet number and name address system in a manner that ensures the stability of the Internet. The introduction of a new management system should not disrupt current operations or create competing root systems. During the transition and thereafter, the stability of the Internet should be the first priority of any DNS management system. Security and reliability of the DNS are important aspects of stability, and as a new DNS management system is introduced, a comprehensive security strategy should be developed.

2. Competition.

The Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom. Where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.

3. Private, Bottom-Up Coordination.

Certain management functions require coordination. In these cases, responsible, private-sector action is preferable to government control. A private coordinating process is likely to be more flexible than government and to move rapidly enough to meet the changing needs of the Internet and of Internet users. The private process should, as far as possible, reflect the bottom-up governance that has characterized development of the Internet to date.

4. Representation.

The new corporation should operate as a private entity for the benefit of the Internet community as a whole. The development of sound, fair, and widely accepted policies for the management of DNS will depend on input from the broad and growing community of Internet users. Management structures should reflect the functional and geographic diversity of the Internet and its users. Mechanisms should be established to ensure international participation in decision making.

Purpose. The new corporation ultimately should have the authority to manage and perform a specific set of functions related to coordination of the domain name system, including the authority necessary to:

1) set policy for and direct allocation of IP number blocks to regional Internet number registries;

2) oversee operation of the authoritative Internet root server system;

3) oversee policy for determining the circumstances under which new TLDs are added to the root system; and

4) coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.

Funding. Once established, the new corporation could be funded by domain name registries, regional IP registries, or other entities identified by the Board.

Staff. We anticipate that the new corporation would want to make arrangements with current IANA staff to provide continuity and expertise over the course of transition. The new corporation should secure necessary expertise to bring rigorous management to the organization.

Incorporation. We anticipate that the new corporation's organizers will include representatives of regional Internet number registries, Internet engineers and computer scientists, domain name registries, domain name registrars, commercial and noncommercial users, Internet service providers, international trademark holders and Internet experts highly respected throughout the international Internet community. These incorporators should include substantial representation from around the world.

As these functions are now performed in the United States, by U.S. residents, and to ensure stability, the new corporation should be headquartered in the United States, and incorporated in the U.S. as a not-for-profit corporation. It should, however, have a board of directors from around the world. Moreover, incorporation in the United States is not intended to supplant or displace the laws of other countries where applicable.

Structure. The Internet community is already global and diverse and likely to become more so over time. The organization and its board should derive legitimacy from the participation of key stakeholders. Since the organization will be concerned mainly with numbers, names and protocols, its board should represent membership organizations in each of these areas, as well as the direct interests of Internet users.

The Board of Directors for the new corporation should be balanced to equitably represent the interests of IP number registries, domain name registries, domain name registrars, the technical community, Internet service providers (ISPs), and Internet users (commercial, not-for-profit, and individuals) from around the world. Since these constituencies are international, we would expect the board of directors to be broadly representative of the global Internet community.

As outlined in appropriate organizational documents, (Charter, Bylaws, etc.) the new corporation should:

1) appoint, on an interim basis, an initial Board of Directors (an Interim Board) consisting of individuals representing the functional and geographic diversity of the Internet community. The Interim Board would likely need access to legal counsel with expertise in corporate law, competition law, intellectual property law, and emerging Internet law. The Interim Board could serve for a fixed period, until the Board of Directors is elected and installed, and we anticipate that members of the Interim Board would not themselves serve on the Board of Directors of the new corporation for a fixed period thereafter.

2) direct the Interim Board to establish a system for electing a Board of Directors for the new corporation that insures that the new corporation's Board of Directors reflects the geographical and functional diversity of the Internet, and is sufficiently flexible to permit evolution to reflect changes in the constituency of Internet stakeholders. Nominations to the Board of Directors should preserve, as much as possible, the tradition of bottom-up governance of the Internet, and Board Members should be elected from membership or other associations open to all or through other mechanisms that ensure broad representation and participation in the election process.

3) direct the Interim Board to develop policies for the addition of TLDs, and establish the qualifications for domain name registries and domain name registrars within the system.

4) restrict official government representation on the Board of Directors without precluding governments and intergovernmental organizations from participating as Internet users or in a non-voting advisory capacity.

Governance. The organizing documents (Charter, Bylaws, etc.) should provide that the new corporation is governed on the basis of a sound and transparent decision-making process, which protects against capture by a self-interested faction, and which provides for robust, professional management of the new corporation. The new corporation could rely on separate, diverse, and robust name and number councils responsible for developing, reviewing, and recommending for the board's approval policy related to matters within each council's competence. Such councils, if developed, should also abide by rules and decision-making processes that are sound, transparent, protect against capture by a self-interested party and provide an open process for the presentation of petitions for consideration. The elected Board of Directors, however, should have final authority to approve or reject policies recommended by the councils.

Operations. The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders. Typically this means that decision-making processes should be sound and transparent; the basis for corporate decisions should be recorded and made publicly available. Super-majority or even consensus requirements may be useful to protect against capture by a self-interested faction. The new corporation does not need any special grant of immunity from the antitrust laws so long as its policies and practices are reasonably based on, and no broader than necessary to promote the legitimate coordinating objectives of the new corporation. Finally, the commercial importance of the Internet necessitates that the operation of the DNS system, and the operation of the authoritative root server system should be secure, stable, and robust.

The new corporation's charter should provide a mechanism whereby its governing body will evolve to reflect changes in the constituency of Internet stakeholders. The new corporation could, for example, establish an open process for the presentation of petitions to expand board representation.

Trademark Issues. Trademark holders and domain name registrants and others should have access to searchable databases of registered domain names that provide information necessary to contact a domain name registrant when a conflict arises between a trademark holder and a domain name holder.[(21)] To this end, we anticipate that the policies established by the new corporation would provide that following information would be included in all registry databases and available to anyone with access to the Internet:

- up-to-date registration and contact information;

- up-to-date and historical chain of registration information for the domain name;

- a mail address for service of process;

- the date of domain name registration;

- the date that any objection to the registration of the domain name is filed; and

- any other information determined by the new corporation to be reasonably necessary to resolve disputes between domain name registrants and trademark holders expeditiously.

Further, the U.S. Government recommends that the new corporation adopt policies whereby:

1) Domain registrants pay registration fees at the time of registration or renewal and

agree to submit infringing domain names to the authority of a court of law in the jurisdiction in which the registry, registry database, registrar, or the "A" root servers are located.

2) Domain name registrants would agree, at the time of registration or renewal, that in cases involving cyberpiracy or cybersquatting (as opposed to conflicts between legitimate competing rights holders), they would submit to and be bound by alternative dispute resolution systems identified by the new corporation for the purpose of resolving those conflicts. Registries and Registrars should be required to abide by decisions of the ADR system.

3) Domain name registrants would agree, at the time of registration or renewal, to abide by processes adopted by the new corporation that exclude, either pro-actively or retroactively, certain famous trademarks from being used as domain names (in one or more TLDs) except by the designated trademark holder.

4) Nothing in the domain name registration agreement or in the operation of the new corporation should limit the rights that can be asserted by a domain name registrant or trademark owner under national laws.

THE TRANSITION

Based on the processes described above, the U.S. Government believes that certain actions should be taken to accomplish the objectives set forth above. Some of these steps must be taken by the government itself, while others will need to be taken by the private sector. For example, a new not-for-profit organization must be established by the private sector and its Interim Board chosen. Agreement must be reached between the U.S. Government and the new corporation relating to transfer of the functions currently performed by IANA. NSI and the U.S. Government must reach agreement on the terms and conditions of NSI's evolution into one competitor among many in the registrar and registry marketplaces. A process must be laid out for making the management of the root server system more robust and secure. A relationship between the U.S. Government and the new corporation must be developed to transition DNS management to the private sector and to transfer management functions.

During the transition the U.S. Government expects to:

1) ramp down the cooperative agreement with NSI with the objective of introducing competition into the domain name space. Under the ramp down agreement NSI will agree to (a) take specific actions, including commitments as to pricing and equal access, designed to permit the development of competition in domain name registration and to approximate what would be expected in the presence of marketplace competition, (b) recognize the role of the new corporation to establish and implement DNS policy and to establish terms (including licensing terms) applicable to new and existing gTLDs and registries under which registries, registrars and gTLDs are permitted to operate, (c) make available on an ongoing basis appropriate databases, software, documentation thereof, technical expertise, and other intellectual property for DNS management and shared

registration of domain names;

2) enter into agreement with the new corporation under which it assumes responsibility for management of the domain name space;

3) ask WIPO to convene an international process including individuals from the private sector and government to develop a set of recommendations for trademark/domain name dispute resolutions and other issues to be presented to the Interim Board for its consideration as soon as possible;

4) consult with the international community, including other interested governments as it makes decisions on the transfer; and

5) undertake, in cooperation with IANA, NSI, the IAB, and other relevant organizations from the public and private sector, a review of the root server system to recommend means to increase the security and professional management of the system. The recommendations of the study should be implemented as part of the transition process; and the new corporation should develop a comprehensive security strategy for DNS management and operations.

ENDNOTES

1. Available at <http://www.ecommerce.gov>.

2. July 2, 1997 RFC and public comments are located at: <http://www.ntia.doc.gov/ntiahome/domainname/index.html>.

3. The RFC, the Green Paper, and comments received in response to both documents are available on the Internet at the following address: <http://www.ntia.doc.gov>. Additional comments were submitted after March 23, 1998. These comments have been considered and treated as part of the official record and have been separately posted at the same site, although the comments were not received by the deadline established in the February 20, 1998 Federal Register Notice.

4. See Administrative Law Requirements at p. 19.

5. See Scientific and Advanced-Technology Act of 1992; Pub. L. 102-476 § 4(9), 106 Stat. 2297, 2300 (codified at 42 U.S.C. § 1862 (a)).

6. An unofficial diagram of the general geographic location and institutional affiliations of the 13 Internet root servers, prepared by Anthony Rutkowski, is available at <http://www.wia.org/pub/rootserv.html>.

7. For further information about these systems see: name.space: <http://namespace.pgmedia.net>; AlterNIC: <http://www.alternic.net>; eDNS: <http://www.edns.net>. Reference to these organizations does not constitute an endorsement of their commercial activities.

8. Lengthy discussions by the Internet technical community on DNS issues generally and on the Postel DNS proposal took place on the *newdom, com-priv, ietf* and *domain-policy* Internet mailing lists.

9. See *draft-Postel-iana-itld-admin-01.txt*, available at <http://www.newdom.com/archive>.

10. For further information about the IAHC see: <http://www.iahc.org> and related links. Reference to this

organization does not constitute an endorsement of the commercial activities of its related organizations.

11. December 1996 draft: *draft-iahc-gtldspec-00.txt;* available at <http://info.internet.isi.edu:80/in-drafts/files>.

12. The IAHC final report is available at <http://www.iahc.org/draft-iahc-recommend-00.html>.

13. See generally public comments received in response to July 2, 1997 RFC located at <http://www.ntia.doc.gov/ntiahome/domainname/email>.

14. For a discussion, see Congressional testimony of Assistant Secretary of Commerce Larry Irving, Before the House Committee on Science, Subcommittee on Basic Research, September 25, 1997 available at <http://www.ntia.doc.gov/ntiahome/domainname/email>.

15. See generally public comments received in response to July 2, 1997 RFC located at <http://www.ntia.doc.gov/ntiahome/domainname/email>.

16. The document was published in the *Federal Register* on February 20, 1998, (63 Fed. Reg. 8826 (Feb. 20, 1998)).

17. As used herein, the term "new corporation" is intended to refer to an entity formally organized under well recognized and established business law standards.

18. As noted in the Summary, the President directed the Secretary of Commerce to privatize DNS in a manner that increases competition and facilitates international participation in its management. Accordingly, the Department of Commerce will lead the coordination of the U.S. government's role in this transition.

19. 1998 Supplemental Appropriations and Rescissions Act; Pub. L. 105-174; 112 Stat. 58.

20. Management principles for the .us domain space are set forth in Internet RFC 1480, <http://www.isi.edu/in-notes/rfc1480.txt>.

21. These databases would also benefit domain name holders by making it less expensive for new registrars and registries to identify potential customers, enhancing competition and lowering prices.
