INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LTD.
(Claimant)
v.
INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
(Respondent)

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Exhibit R-17

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS

R-17

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

Further information may be obtained from:

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS
New York, 2015

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The publication reproduced here is a revised version in which part three of the original publication of 2009 has been removed.

Contents

Introduction

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Key provisions

The Convention applies to awards made in any State other than the State in which recognition and enforcement is sought. It also applies to awards "not considered as domestic awards". When consenting to be bound by the Convention, a State may declare that it will apply the Convention *(a)* in respect to awards made only in the territory of another Party and *(b)* only to legal relationships that are considered "commercial" under its domestic law.

The Convention contains provisions on arbitration agreements. This aspect was covered in recognition of the fact that an award could be refused enforcement on the grounds that the agreement upon which it was based might not be recognized. Article II (1) provides that Parties shall recognize

written arbitration agreements. In that respect, UNCITRAL adopted, at its thirty-ninth session in 2006, a Recommendation that seeks to provide guidance to Parties on the interpretation of the requirement in article II (2) that an arbitration agreement be in writing and to encourage application of article VII (1) to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The central obligation imposed upon Parties is to recognize all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the lex fori. Each Party may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement.

The Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. The grounds include incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, setting aside or suspension of an award in the country in which, or under the law of which, that award was made. The Convention defines two additional grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award. Those grounds relate to arbitrability and public policy.

The Convention seeks to encourage recognition and enforcement of awards in the greatest number of cases as possible. That purpose is achieved through article VII (1) of the Convention by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while allowing the continued application of any national provisions that give special or more favourable rights to a party seeking to enforce an award. That article recognizes the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention.

Entry into force

The Convention entered into force on 7 June 1959 (article XII).

How to become a party

The Convention is closed for signature. It is subject to ratification, and is open to accession by any Member State of the United Nations, any other

State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

Optional and/or mandatory declarations and notifications

When signing, ratifying or acceding to the Convention, or notifying a territorial extension under article X, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Party to the Convention. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration (article I).

Denunciation/Withdrawal

Any Party may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of the receipt of the notification by the Secretary-General (article XIII).

Part one

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK, 20 MAY–10 JUNE 1958

Excerpts from the Final Act of the United Nations Conference on International Commercial Arbitration[1]

"1. The Economic and Social Council of the United Nations, by resolution 604 (XXI) adopted on 3 May 1956, decided to convene a Conference of Plenipotentiaries for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.

[…]

"12. The Economic and Social Council, by its resolution convening the Conference, requested it to conclude a convention on the basis of the draft convention prepared by the Committee on the Enforcement of International Arbitral Awards, taking into account the comments and suggestions made by Governments and non-governmental organizations, as well as the discussion at the twenty-first session of the Council.

"13. On the basis of the deliberations, as recorded in the reports of the working parties and in the records of the plenary meetings, the Conference prepared and opened for signature the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is annexed to this Final Act.

[…]

"16. In addition the Conference adopted, on the basis of proposals made by the Committee on Other Measures as recorded in its report, the following resolution:

[1]The full text of the Final Act of the United Nations Conference on International Commercial Arbitration (E/CONF.26/8Rev.1) is available at http://www.uncitral.org

"*The Conference*,

"*Believing* that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

"*Having considered* the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CONF.26/6),

"*Having given particular attention* to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

"*Expresses the following views* with respect to the principal matters dealt with in the note of the Secretary-General:

"1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations,[2] and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to coordinating their respective efforts;

"2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

"3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

"4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of

[2]For example, the Economic Commission for Europe and the Inter-American Council of Jurists.

such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

"5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[3] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

"*Expresses the wish* that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

"*Suggests* that any such steps be taken in a manner that will assure proper coordination of effort, avoidance of duplication and due observance of budgetary considerations;

"*Requests* that the Secretary-General submit this resolution to the appropriate organs of the United Nations."

[3]For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) *(e)*, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order

to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation

shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Part two

RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

General Assembly resolution 61/33 of 4 December 2006

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,[1]

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

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[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,[3] and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[3]

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

64th plenary meeting
4 December 2006

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[2]United Nations, *Treaty Series*, vol. 330, No. 4739.

[3]*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[4] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to

[4]United Nations, *Treaty Series*, vol. 330, No. 4739.

the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[5] as subsequently revised, particularly with respect to article 7,[6] the UNCITRAL Model Law on Electronic Commerce,[7] the UNCITRAL Model Law on Electronic Signatures[8] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[9]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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[5] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[6] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[7] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[8] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[9] General Assembly resolution 60/21, annex.

V.15-05576

Exhibit R-18

Redacted - Third Party Designated Confidential Information

Exhibit R-19

Redacted - Confidential Information

Exhibit R-20

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February 28, 2018

VIA E-MAIL AND U.S. MAIL

Mr. John Jeffrey
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

John.Jeffrey@icann.org

Mr. Akram Atallah
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Akram.Atallah@icann.org

Re: Delegation of the .web TLD

Dear Messrs. Jeffrey and Atallah:

On February 15, 2018 Jose Rasco, Chief Financial Officer of Nu Dotco, LLC, the winner of the .web contention set ("NDC"), requested via email to ICANN that, in light of the DOJ's termination of its investigation regarding the .web top level domain (the "TLD"), and the absence of any pending accountability mechanisms regarding the TLD, ICANN move forward with execution of the Registry Agreement for the TLD (the "Registry Agreement"). As of this date, NDC has not received any response from ICANN regarding Mr. Rasco's request.

NDC and VeriSign, Inc. ("VeriSign"), as an interested party, believe there is not any reasonable justification for further delay. Accordingly, we reiterate our earlier requests that ICANN send NDC an execution copy of the .web Registry Agreement (the "Registry Agreement") for NDC's signature. We specifically request that you deliver the Registry Agreement to NDC by Wednesday, March 7.

The Applicant Guidebook (the "Guidebook") is clear that "[a]n applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step" for the execution of a registry agreement to operate a new gTLD. (Guidebook, Module 4, § 4.4) (emphasis added). NDC's execution of the Registry Agreement has been delayed for over 20 months, despite NDC having won ICANN's public auction for the TLD and immediately thereafter paying ICANN the $135,000,000 necessary to secure its right to proceed with execution of the Registry Agreement. The only reported justifications for these delays have been the pendency of baseless proceedings initiated by third parties. Indeed, ICANN and/or the United States District Court for the Central District

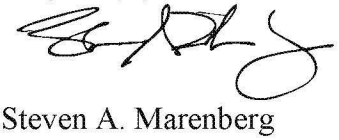
of California have rejected as meritless each of the false claims asserted by third parties to interfere with the result of the public auction for the .web TLD.

Further, ICANN ended its Cooperative Engagement Process ("CEP") with .web applicant Ruby Glen, LLC ("Ruby Glen") on January 31, 2018 and set a February 14 deadline for Ruby Glen to commence an Independent Review Process ("IRP"). Ruby Glen did not file an IRP by February 14 and, to NDC's and VeriSign's knowledge, as of the date of this letter, there are no other accountability mechanisms pending with respect to .web brought by Ruby Glen or any other person. ICANN's website still lists NDC's application as "on hold" due to the pendency of an accountability mechanism. To our knowledge, this is not correct.

NDC and VeriSign have been more than patient and cooperative with ICANN throughout this 20 month period, avoiding as best we could any adversarial tone or action, while disputing as baseless the third party claims and delays in the execution of the Registry Agreement. At this point, however, neither NDC nor ICANN should tolerate any further delays in execution of the Registry Agreement.

ICANN has gone to great lengths over a very long period of time to protect what it thought might be any interests of other parties – including those who sued ICANN in violation of the terms of the Guidebook – by ensuring them an opportunity to voice their concerns, no matter how baseless they might be. That process is complete. It is now time that ICANN proceed to protect the interests of NDC, as the rightful winner of ICANN's public auction, and those of the Internet community at large, by removing the "hold" on NDC's .web application and proceeding promptly with the execution of the Registry Agreement with NDC. All rights and remedies are reserved.

Very truly yours,



Steven A. Marenberg
Attorneys for Nu Dotco, LLC

SM:ce

cc: Jose Rasco
Thomas Indelicarto
Jeffrey A. LeVee

10458284

Exhibit R-21

[settlement-comments]

<<< Chronological Index >>> <<< Thread Index >>>

Statement from gTLD Registries

- *To*: <settlement-comments@xxxxxxxxx>
- *Subject*: Statement from gTLD Registries
- *From*: "Simon Sheard" <simon@xxxxxxxxxxx>
- *Date*: Mon, 20 Feb 2006 11:18:34 -0000

```
Please find attached a statement from the following gTLD
registries/sponsors: Afilias, Employ Media, Global Name Registry, NeuLevel,
Public Interest Registry and VeriSign.

Sincerely

Simon Sheard
```

Attachment: **Registry Operators Statement re Verisign Settlement.DOC**
Description: MS-Word document

<<< Chronological Index >>> <<< Thread Index >>>

Registry Operators' Submission Re:
Objections to the Proposed Verisign Settlement

The undersigned registry operators submit this statement in response to certain objections being voiced with respect to the proposed registry agreement between ICANN and Verisign for operation of the .com registry. We are concerned that many of the objections being voiced in this debate reflect either (i) a serious misreading of the actual terms of the proposed agreement or (ii) a very worrisome perspective about the extent to which individual members of the ICANN community can and/or should be empowered to dictate the terms and conditions contained in ICANN's commercial agreements with DNS service providers. While this statement is submitted by the undersigned members of the registry constituency, our concerns involve fundamental checks and balances built into the ICANN process that are designed to protect both registries and registrars alike.

A Brief History of ICANN's Policy Authority

ICANN was conceived from the beginning as an organization with a limited charter. This understanding is reflected in ICANN's by-laws, which contemplate policy development only on issues within ICANN's mission statement. As specifically set forth in the ICANN by-laws, for examples, only mission-related issues are properly the subject of a PDP.

As articulated in its mission statement, ICANN is responsible for coordinating specified technical functions including:

1. The allocation and assignment of domain names, IP addresses and numbers, and protocol port and parameter numbers; and
2. The operation and evolution of the DNS root name server system.

ICANN is also responsible for policy development "reasonably and appropriately related to these technical functions."

The limited nature of ICANN's mission is also reflected in the original contracts between ICANN and NSI, and in every registry agreement (RA) and registrar accreditation agreement (RAA) executed since that time. In its original agreements with ICANN, for example, NSI agreed to comply with "consensus" policies adopted by ICANN provided (i) that such policies did not unreasonably restrain competition and (ii) that the policies related to:

1. Issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or domain-name system;

2. Registry policies reasonably necessary to implement consensus policies relating to registries and/or registrars; or

3. Resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).

The parties also acknowledge that ICANN should have policy-making authority in certain other areas (e.g., to develop the UDRP) involving issues that, while specifically considered in the White Paper, may not have been strictly technical in nature.[1] To avoid subsequent disagreements about these issues, the original registry agreements and registrar accreditation agreements contained a list of specific areas in which ICANN was deemed to have legacy policy authority, as follows:

1. Allocation principles (e.g., first-come/first-served, timely renewal, holding period after expiration; surviving registrars);

2. Prohibitions on warehousing or speculation;

3. Reservation of SLD names that may not be registered initially or that may not be renewed due to reasons reasonably related to (a) avoidance of confusion among or misleading of users, (b) intellectual property, or (c) the technical management of the DNS or the Internet (e.g., "example.com" and single-letter/digit names); and

4. Dispute resolution policies related to registration of domain names.

Taken together, the general policy making authority granted to ICANN to preserve the stability and security of the DNS and the legacy policy authority listed above created a “picket fence” around ICANN’s authority. ICANN could establish policy and/or best practices affecting issues outside the picket fence, but could not mandate registry and registrar compliance with such policies.[2] ICANN’s ability to impose policy prospectively on registries and registrars was further constrained by procedural safeguards (ICANN’s first PDP) designed to demonstrate the presence of a “true consensus” - *i.e.*, the absence of substantial objections.

When the first new TLDs came online in 2001, the “picket fence” was retained, with only minor refinements. This was no accident: even though operators of the new registries had virtually no bargaining power, the agreements reflected the community’s settled understanding about ICANN’s authority. ICANN was empowered to impose policies - even prospectively - on DNS service providers in a limited number of areas related to interoperability, technical reliability, operational stability, the safety and integrity of the Registry Database.[3]

By 2002, it was widely (but not universally) conceded that the standard for measuring consensus laid out in the Registry Agreements and the Registrar

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[1] For the most part, this policy authority (a) related to the protection of intellectual property rights and (b) derived from formulations contained in the White Paper.

[2] Of course, registries and registrars remained free to comply with best practices or other voluntary standards.

[3] ICANN’s legacy policy authority with respect to intellectual property protection likewise did not change.

Accreditation Agreements was unworkable. The standard by which consensus was measured - the absence of substantial opposition - was a barrier to policy development. Accordingly, as part of ICANN's "evolution and reform (ERC)" process, ICANN amended its by-laws to include the GNSO PDP process. Under that process, ICANN could develop and adopt consensus policies, even in the face of substantial opposition, so long as the policy area was within ICANN's mission statement and ICANN followed specified procedures in developing such policies.[4]

The ERC process not only embraced the concept of the "picket fence" - it incorporated those substantive constraints into ICANN's bylaws in the form of a mission statement. Post-ERC registry and registrar agreements continued (as they do to this day) to limit the scope of permissible topics for mandatory specifications and policies. In effect, registrars and registry operators confirmed their agreement to abide by subsequently developed ICANN policies so long as those policies were (i) necessary to facilitate interoperability, technical reliability, operational stability on the DNS or the Internet, and the safety and integrity of the Registry Database, or (ii) covered by ICANN's legacy authority.

Some might argue that the constraints on ICANN's policy authority are artificial, and should be abandoned. That would be a mistake. The protections of the picket fence and the procedural safeguards are today - just as they were when first agreed - the ultimate source of ICANN's legitimacy. Private commercial actors - registries and registrars - voluntarily ceded to ICANN, via contractual undertakings, the authority it needed to fulfill ICANN's legitimate mission. ICANN's authority is legitimate because the delegation of authority was necessary, but no more than needed, to create policy in areas requiring coordination. ICANN is recognized as a legitimate private standards setting body because its authority answers but does not exceed that needed to perform its legitimate coordinating functions. Absent these constraints, ICANN's authority would be vulnerable to challenges under the competition laws of most countries participating in ICANN through the GAC.

The Registry Agreement

Notwithstanding the arguments of some of those opposed to the Verisign settlement, the new agreements - including the Verisign agreement - are, with regards to fundamental policy considerations, entirely consistent with the prior agreements.

- First, the new agreements obligate registry operators to agree in advance to comply with consensus policies as they are developed in the future.

[4] In December of 2002, however, the GNSO PDP could not be used to impose policy on any registry operator, each of whom had the contractual right to insist on the original formulation. The first registry agreement to adopt the new by-law procedure was .org, effective January of 2003. Since that time, registry operators, including VeriSign, have agreed to be bound by policy adopted in accordance with the GNSO PDP in ICANN's post-ERC by-laws.

- Second, the new agreements include a picket fence not dissimilar to those found in every registry agreement since 1999. Registry operators must promise to comply with existing and prospective "consensus policies" relating to a very familiar set of issues, including:

    1. Issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS;

    2. Functional and performance specifications for the provision of registry services;

    3. Security and stability of the registry database for the TLD;

    4. Registry policies reasonably necessary to implement consensus policies relating to registry operations or registrars; or

    5. Resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).

As before, the agreements specifically grandfather policies relating to name allocation, warehousing, speculation, IP protection, Whois data, and registration disputes.

As a result, the undersigned registry operators believe that in general, while registries are not equal and there are fundamental differences between sponsored and non-sponsored TLDs, the future agreements and contract renewals should be made consistent with the .com agreement as applicable, and that Registries should be treated on an equitable basis.

Those objecting to the proposed agreement for .com ignore the fundamental continuity and focus instead on presumptions of renewal and the pricing authority. But unless those who object can make a reasonable case that the disputed terms and conditions threaten ICANN's ability to preserve interoperability, stability, and security, they are not properly the subject of ICANN consensus policy-making.[5]

As a threshold matter, consensus policies must fit within the constraints ICANN has acknowledged from the start - *i.e.*, in order to be binding on registries and registrars, the resulting policies must be reasonably necessary to facilitate interoperability, security and stability of the Internet or the DNS, or relate to the

[5] That is not to say, however, that the ICANN Board has no ability to effect registry or registrar behavior in these areas. Far from it, ICANN is free to negotiate additional terms and conditions as it sees fit - and regularly does so. But issues outside of ICANN's core mission must be resolved through arms-length commercial negotiations, and in these areas the ICANN Board must remain free to exercise its reasoned judgment consistent with its fiduciary duty to the organization, keeping in mind that local law/jurisdiction obligations of individual Registries might warrant considering such carve-outs from general consensus policies, for example as related to data protection and privacy.

resolution of disputes regarding the registration (as opposed to the use) of domain names.

The GNSO has recently undertaken to draft terms of reference for a PDP to establish the terms and conditions under which existing registry agreements will be renewed. Because this draft TOR is presumably motivated by dissatisfaction about the new registry agreements in general, and the proposed agreement for .com in particular, it provides important context for the objections to the proposed registry agreement for the .com TLD. Accordingly, the scope of the proposed PDP is relevant to the Board's consideration of the Verisign settlement, and weaddress below certain provisions of the draft TOR that appear to be parallel objections to the .com agreement.

Registry Agreement Renewal. The draft TOR asks "What benefits does the ICANN community derive from presumptive rights of renewal?" This is simply the wrong question. Unless a reasonable case can be made that such presumptions pose a threat to interoperability, security, and/or stability, the question of renewal presumptions can not be a subject for consensus policy making and must, we submit, be resolved through commercial negotiations. Again, that is not to say that the GNSO council is not entitled to develop a view. For example, the draft PDP TOR might appropriately ask:

> Do presumptions of renewal pose a threat to interoperability, security, and stability of the Internet and DNS, or undermine existing consensus policies on name allocation, warehousing, Whois data, and registration disputes?

While the undersigned registry operators believe that the answer is a rather emphatic "no," we have no objection to a serious debate on the question.[6]

Registry Agreements and Consensus Policies. The draft TOR asks whether registry contract provisions should ever be immune from the obligation to abide by consensus policies. This could be an interesting question, and properly constructed, within the scope of a PDP.[7] But it is simply not on the table in connection with the new registry agreements: nothing in any of the new sTLD agreements, in the .net agreement or in the proposed .com agreement with Verisign permits a registry operator to ignore a policy that is (1) adopted in accordance with the PDP procedures, and (2) necessary to preserve the interoperability, security, and stability of the Internet.

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[6] We believe that renewal presumptions are quite positive, and expect as a matter of equity that these presumptions will be extended to all existing registry operators. The possibility of redelegation -- however remote -- undermines the ability of registry operators to raise capital. At the same time, we do not believe that the theoretical ability to redelegate a TLD is a meaningful enforcement tool for ICANN. ICANN will be better served by other, more practicable responses to non-compliance.

[7] The proper construction would be "Do carve-outs from the general obligation of registry operators to abide by consensus policy pose a threat to interoperability, security, and stability of the Internet and DNS, or undermine existing consensus policies on name allocation, warehousing, Whois data, and registration disputes?" With respect to any properly constructed consensus policy, moreover, the answer should be yes.

Whatever one thinks about proposed agreement between ICANN and Verisign for the .com registry, it does not except Verisign from the obligation that all registry operators have to comply with applicable consensus policies.[8] To the extent that the proposed contract has language that does not appear in other new agreements, that language is nothing more than a belt-and-suspenders exercise that, given the circumstances under which this contract was negotiated, should surprise no one. The fact that ICANN cannot expand the scope of its consensus policy authority beyond interoperability, stability, and security and the legacy policy authority areas is consistent with ICANN's mission statement and reflected in every registry agreement ever negotiated. Simply put, ICANN does not have the authority to adopt a new mission and then unilaterally obligate registries or registrars to comply with related policies.[9]

The Importance of Negotiating Flexibility

The GNSO is, of course, free to recommend whatever course of action its members agree on. Likewise, individual members of the ICANN community are free to express their views on the proposed settlement. But the community should understand that an issue outside the picket fence cannot be moved inside simply by considering it under the procedural rules set out in the GNSO PDP. Policies and policy recommendations related to issues outside the picket fence simply are not "consensus policies" and are not, as a result, binding on either registries or registrars except as a result of commercial negotiations.

In our view, the vast majority of objections to the .com agreement pertain to issues that are not within the picket fence and that have to date been addressed in commercial negotiations. Those who object to the agreement are, in effect, second-guessing the ICANN Board, and demanding a seat at the negotiating table to negotiate issues outside of ICANN's mission. The ICANN Board should proceed with extreme caution, and address its critiques head on, without setting a precedent that will complicate ICANN's ability to take care of business for years to come.

The job of the ICANN Board is to serve the community by exercising its informed judgment based on the best available information. Some of that important information may be proprietary, and not on the public record. Some of that information may relate to the fiduciary obligations of the ICANN Board and properly not on the public record. By acceding to the demands of a few with respect to commercial issues outside of ICANN's core mission the Board deprives the community of its informed judgment, limits its future negotiating flexibility and, at the same time, makes it increasingly difficult to resist those who would use ICANN's agreements with DNS service providers to create an anti-competitive regulatory regime. In negotiating agreements with registry operators, ICANN must retain the authority to respond to the commercial realities in which any particular registry operates. This requires that ICANN have the ability to modify its position with respect to fees, renewal terms, the introduction of new registry

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[8] This does not mean that all consensus policies necessarily apply to all TLDs. It is certainly conceivable that a consensus policy would fairly apply to gTLDs and not sTLDs (or vice versa). As a baseline principle, however, to the extent that registry operators are similarly situated we expect the same rules to apply.

[9] For example, ICANN could not decide that its mission now includes the prevention of online gambling and require registries or registrars to delete any domain registration used for that purpose.

services, and other issues that may well vary from registry to registry. The Board must retain the authority to actually make a deal that the registry operators on the other side of the table can rely on. Tying the hands of the ICANN board in these areas makes little sense.

While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators. Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.

Signed by:

Afilias (.info)
Employ Media (.jobs)
Global Name Registry (.name)
NeuLevel (.biz)
PIR (.org)
VeriSign (.com and .net)

Exhibit R-22

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-11

29 APRIL 2014

The Requester, Commercial Connect, LLC, seeks reconsideration of the decision by ICANN staff to change the application status of the Requester's .SHOP application to "On Hold" to reflect that the application is involved in multiple ICANN Accountability Mechanisms.

I. Brief Summary.

The Requester applied for .SHOP. The Requester subsequently filed string confusion objections to two other applied-for strings: (i) Amazon EU S.a.r.l.'s application for the Japanese translation of "online shopping"; and (ii) Top Level Domain Holdings Limited's Application for the Chinese Translation of "shop." The Requester's objection to Amazon's application was sustained; its objection to Top Level Domain Holdings Limited's application was denied. Following the issuance of the expert determinations on these objections, several accountability mechanisms were invoked relating to Requester's .SHOP application. Specifically, Amazon submitted Reconsideration Request 13-9 seeking reconsideration of the expert determination on Requester's objection. The Requester submitted Reconsideration Request 13-10 seeking reconsideration of the expert determination on its objection to Top Level Domain Holdings Limited's application. Requests 13-19 and 13-10 are pending consideration by the New gTLD Program Committee (NGPC), which will follow the NGPC's consideration of matters surrounding certain string confusion expert determinations. Additionally, the Requester also invoked a Cooperative Engagement Process (CEP) as part of the Independent Review Process for .SHOP.

Under the New gTLD Program process, applications that are subject to pending activities that may impact the status of the applications, such as accountability mechanisms, are regularly reviewed and may be placed on hold until the pending activities have been resolved. Because of the various accountability mechanisms that have been invoked relating in some way to Requester's .SHOP application, the Requester received an email informing it that its "application status will be changed to 'On Hold' to reflect that the application is involved in an ICANN Accountability Mechanism." The Requester then filed Reconsideration Request 14-11, requesting reconsideration of the ICANN staff's action in placing the Requester's Application on hold.

With respect to the claims submitted by the Requester, there is no evidence that ICANN staff acted in contravention of established policy or procedure in placing Requester's application on hold. Therefore, the BGC concludes that Request 14-11 should be denied.

II. Facts.

A. Background Facts.

The Requester Commercial Connect LLC ("Requester") applied for .SHOP. The Requester subsequently filed string confusion objections to: (i) Amazon EU S.a.r.l.'s ("Amazon") application for a Japanese string that translates to mean "online shopping," ("Amazon's Applied-For String"); and (ii) Top Level Domain Holdings Limited's ("TLDH") Application for a Chinese string that translates to mean "shop" ("TLDH's Applied-For String"), contending that the two applied-for strings were "confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications." (New gTLD Applicant Guidebook, § 3.3.2.1; New gTLD Dispute Resolution Procedure, Art. 2(e).)

The Objections were referred to the ICDR,[1] which appointed two separate panels, one to render an expert determination on each of the Requester's objections. The panel appointed to hear the Requester's objection to TLDH's Applied-for String rendered its determination on 8 August 2013 ("TLDH Expert Determination"), dismissing the Requester's objection. The panel appointed to hear the Requester's objection to Amazon's Applied-for String rendered its determination on 21 August 2013 ("Amazon Expert Determination"), finding in favor of the Requester.

On 4 September 2013, Amazon submitted Reconsideration Request 13-9 seeking reconsideration of the Amazon Expert Determination.

On 5 September 2013, the Requester submitted Reconsideration Request 13-10, seeking reconsideration of the TLDH Expert Determination.

On 10 October 2013, the BGC[2] recommended that Reconsideration Requests 13-9 and 13-10 be denied on the basis that neither Amazon nor the Requester had stated proper grounds for reconsideration. The BGC further recommended that "staff provide a report to the NGPC . . . setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String." (Determination on Reconsideration Request 13-9, p. 14; Determination on Reconsideration Request 13-10, p. 11.) The BGC further recommended that "the strings not proceed to contracting prior to staff's report being produced and considered by the NGPC." (*Id.*) Requests 13-19 and 13-10 are pending

[1] International Centre for Dispute Resolution.

[2] Board Governance Committee.

consideration by the NGPC, which will follow the NGPC's consideration of matters surrounding certain string confusion expert determinations relating to the issues raised within these Requests.

On 12 February 2014, the Requester invoked a Cooperative Engagement Process ("CEP") in an effort to resolve or narrow the issues that are contemplated to be brought to an Independent Review Process. (Bylaws, Art. IV, § 3.14.) The CEP is currently ongoing.

On 14 March 2014, the Requester received an email from ICANN stating that the Requester's "application status will be changed to 'On Hold' to reflect that the application is involved in an ICANN Accountability Mechanism." (Request, § 3, p.1.)

On 2 April 2014, the Requestor filed Reconsideration Request 14-11, requesting reconsideration of the ICANN staff's decision to change the application status of the Requester's Application to "On Hold."

B. The Requester's Claims.

Reconsideration Request 14-11 seeks reconsideration of ICANN staff's alleged violation of established policies and procedures by placing the Requester's application on hold. (*Id*., § 3, Pg. 2) Specifically, the Requester contends that "unfairly placing our application on hold violates our rights and the commitments of neutrality, objectivity, integrity and fairness made by ICANN." (*Id*. § 3, Pg.8.) While Requester references its efforts to introduce .SHOP over the course of fourteen years and makes a number of varied assertions concerning ICANN's alleged failings, Requester does not state that it is seeking reconsideration of these matters in this Request and has provided no basis supporting reconsideration of such matters.[3] For purposes of responding to Request 14-11, the BGC addresses only the Requester's claim that ICANN policy

[3] Many of the events chronicled by the Requester occurred years – and even decades – ago. Any challenge to an alleged Board action or inaction concerning such long past conduct would be time-barred in all events. (Bylaws, Art. IV, § 2.5.).

or process was violated by virtue of the Requester's .SHOP application being placed on hold.

C. Relief Requested.

The Requester asks that ICANN lift the hold status on Requester's Application or, in the event the Requester's Application cannot be released from hold, that ICANN place "the complete new TLD process . . . on hold until such time where ICANN can made correct and proper determinations and allow these decisions to be applied to all applicants equally and fairly." (Request, § 9, p. 13.)

III. Issues.

In view of the claims set forth in Request 14-11, the issue is whether ICANN staff acted in contravention of established policy or process by placing the Requester's gTLD application on hold to reflect that the .SHOP application is involved in an ICANN Accountability Mechanism.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[4] (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

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[4] Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

Requests challenging staff actions or requests must be submitted within 15 days of "the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action." (Bylaws, Art. IV, § 2.5.)

V. Analysis and Rationale.

1. The Request is Untimely.

The Request is untimely. The Requester seeks reconsideration of ICANN staff's decision to place the Requester's Application on hold. As acknowledged by the Requester, the Requester "received an email" from ICANN on 14 March 2014, stating, among other things, that "[y]our application status will be changed to 'On Hold' to reflect that the application is involved in an ICANN Accountability Mechanism." (Request, § 3, Pgs.1-2.) Requester states elsewhere that it only became aware of the staff's action on 18 March 2014, but this is inconsistent with the Requester's concession that it received the hold notification email from ICANN on 14 March 2014. (*Compare* Request, § 3, Pg. 1 *with* Request, § 5, Pg. 10.) Absent an explanation of this contradiction, the Requester will be deemed to have first become aware of the contested staff action on 14 March 2014. Request 14-11 was not filed until 2 April, more than 15 days from the date on which the Requester became aware of the challenged staff action. Request 14-11 is therefore untimely under ICANN's Bylaws. (Bylaws, Art. IV, § 2.5.)

Notwithstanding the foregoing, even if the Request were timely, the BGC finds that the stated grounds for the Request do not support reconsideration.

2. ICANN Staff Did Not Violate Established Policy or Procedure in Placing the Requester's Application on Hold.

The Requester claims that ICANN staff acted in violation of established policy or procedure in placing its .SHOP application on hold. (Request, § 3, p. 8.) The Requester's claim is unsupported. In the context of the New gTLD Program, ICANN has publicly stated that an

"On Hold" designation "may be applied if there are pending activities (*i.e.* ICANN Accountability Mechanisms …) that may impact the status of the application." (http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en .) ICANN's accountability mechanisms are identified in ICANN's Bylaws and include: (i) Ombudsman; (ii) Reconsideration Request process; and (iii) the Independent Review process ("IRP"), including Cooperative Engagement in advance of the filing of an IRP.[5] (Bylaws, Art. IV, §§ 2, 3; *see also*, http://www.icann.org/en/news/in-focus/accountability/mechanisms.) Here, the Requester's Application was placed on hold because the Application is subject to two pending Reconsideration Requests (one filed by the Requester) and because the Requester has also initiated a CEP in anticipation of an IRP concerning its application.

Specifically, the Requester filed Reconsideration Request 13-10 seeking reconsideration of the TLDH Expert Determination. Similarly, Amazon filed Reconsideration Request 13-9 seek reconsideration of the Amazon Expert Determination.[6] Both Requests are still pending before the NGPC. Furthermore, as the Requester notes in Request 14-11, the Requester is currently in an active CEP with ICANN concerning its .SHOP application. (Request, § 3, Pg. 3.)

Application status updates are part of the New gTLD Program process "to provide a more complete picture of the current status of applications…[a]s applications complete evaluation and proceed to the next phases of the New gTLD Program."

---

[5] An "on hold" designation is considered for and typically assigned to applications on which status may be impacted by a Reconsideration Request or known Ombudsman complaint. Neither of these Accountability Mechanisms has a process step that allows a party to seek a stay of activity related to one or more impacted applications. In contrast, the "on hold" designation is not typically assigned to an application whose status may be impacted by an Independent Review Process ("IRP") because the IRP has a built in mechanism within the IRP procedures that allows parties to seek an emergency stay of activity related to impacted applications.

[6] The Requester contends that those two objections did not involve applications in its contention set, however, the Amazon Applied-for String is in the Requester's contention set. https://gtldresult.icann.org/application-result/applicationstatus/contentionsetdiagram/229

(http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en.) The current application status page reflects the New gTLD Program process in which an application is currently engaged. According to the process for updating application status:

> An application engaged in one of the New gTLD Program processes as defined in section 1.1.2 of the AGB is considered an active application and may have one of the following statuses: In IE, In EE, Evaluation Complete, In Contracting, In PDT, or Transition to Delegation. Alternatively, the application status page may reflect one of the following statuses for an application:
>
> - Withdrawn – The applicant has withdrawn the application and will not continue in the New gTLD Program. This is a final status.
> - Not Approved – The application is not approved and shall not continue in the New gTLD Program as a result of a resolution passed by the ICANN Board of Directors or a Committee of the ICANN Board, such as the New gTLD Program Committee.
> - Will Not Proceed – The application has completed a Program process, and based on the outcome will not continue, as defined in the AGB. This could include process outcomes including but not limited to not passing evaluation, a dispute resolution proceeding, not prevailing in a contention resolution auction.
> - On-Hold – May be applied if there are pending activities (i.e. ICANN Accountability Mechanisms, ICANN Public Comment periods on proposed implementation plans for Program-related activities) that may impact the status of the application. The application stays in the current process step and will not proceed to the next step in the Program until the On-Hold status is cleared.
> - Delegated – Indicates the gTLD for this application has been delegated in the Root Zone of the DNS. This is a final status.

(http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en.)

In light of the pending Reconsideration Requests 13-9 and 13-10, and the active CEP, the decision by ICANN staff to change the status of the Requester's .SHOP application to "on hold" was in accordance ICANN transparency and with stated procedures for application status updates and of placing applications on hold pending the final outcome of accountability mechanisms.

The Requester also claims that its Application should not have been placed on hold because "strings that[] should be in contention with .shop [] have not been placed on hold . . . ."

(Request, § 3, p. 2.) The Requester does not, however, identify any ICANN process or policy that was violated in this regard. On the contrary, as set forth in the contention set status update procedure below, ICANN's stated policy is to place all applications in a contention set on hold if at least one application in the set is on hold.

> **Explanation of Contention Set Status:**
>
> The following will be used to indicate the status of Contention Sets:
> - **Active** – The set contains at least two active applications in direct contention with each other and no applications are identified as On-Hold.
> - **On Hold** – The set contains at least one application with a status of On-Hold. Applications in the set cannot proceed to New gTLD Program Auctions until the set is no longer on hold.
> - **Resolved** – No direct contention remains amongst the active applications and no applications are identified as On-Hold.

(http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en.) As the Requester acknowledges, ICANN staff complied with its policy, placing all the applications in the Requester's contention set on hold.[7] The Requester cites to no policy or procedure that would require ICANN to put an undefined number of gTLD applications on hold simply because one contention set is on hold.

VI. Decision.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-11. Given that there is no indication that staff violated any policy or process in placing the Requester's Application on hold, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

[7] https://gtldresult.icann.org/application-result/applicationstatus/contentionsetdiagram/229

In accordance with Article IV, § 2.15 of the Bylaws, the BGC's determination on Request 14-11 shall be final and does not require Board consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BCG's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-11 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

Exhibit R-23

Board of Directors

ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors

(/sites/default/files/assets/board-2000x1330-07nov19-en.jpg)

(/profiles/68039)

Maarten Botterman (/profiles/68039) | Chair

(/profiles/111659)

León Sánchez (/profiles/111659) | Vice-Chair

R-23

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: November 2016 – Annual General Meeting 2022

Committees:

Compensation (/en/groups/board/compensation) | Chair

Executive (/en/groups/board/executive) | Chair

Selected by: At-Large Community (https://atlarge.icann.org/)

Term: November 2017 – Annual General Meeting 2020

Committees:

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Chair

Compensation (/en/groups/board/compensation) | Member

Executive (/en/groups/board/executive) | Member

Board Governance (/en/groups/board/governance) | Member

(https://www.icann.org/profiles/136693)

Harald Alvestrand (https://www.icann.org/profiles/136693)

IETF (Internet Engineering Task Force) (http://www.ietf.org/) Liaison since 2018

Committees:

(/profiles/68035)

Becky Burr (/profiles/68035)

Selected by: GNSO (Generic Names Supporting Organization) (http://gnso.icann.org/)

Term: November 2016 – Annual General Meeting 2022

Committees:

Finance (/resources/pages/finance-committee-2014-03-21-en) | Non-Voting Member

Risk (/resources/pages/risk-committee-2014-03-21-en) | Non-Voting Member

Technical (/resources/pages/technical-committee-2017-11-02-en) | Non-Voting Member

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Member

Finance (/resources/pages/finance-committee-2014-03-21-en) | Member

Board Governance (/en/groups/board/governance) | Member

Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Member

(/profiles/35083)

Ron da Silva (/profiles/35083)

Selected by: ASO (Address Supporting Organization) (http://www.aso.icann.org/)

Term: October 2015 – Annual General Meeting 2021

Committees:

Compensation (/en/groups/board/compensation) | Member

Finance (/resources/pages/finance-committee-2014-03-21-en) | Chair

(/profiles/111661)

Sarah Deutsch (/profiles/111661)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: November 2017 – Annual General Meeting 2020

Committees:

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Member

Audit (/en/groups/board/audit) | Chair

Board Governance (/en/groups/board/governance) | Member

Compensation (/en/groups/board/compensation) | Member

(/profiles/51)

Chris Disspain (/profiles/51)

Selected by: ccNSO (Country Code Names Supporting Organization) (http://ccnso.icann.org/)

Term: June 2011 – Annual General Meeting 2020

Committees:

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Member

Compensation (/en/groups/board/compensation) | Member

(/profiles/111663)

Avri Doria (/profiles/111663)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: November 2017 – Annual General Meeting 2020

Committees:

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Member

Audit (/en/groups/board/audit) | Member

Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Chair

(/profiles/35085)

Lito Ibarra (/profiles/35085)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: October 2015 – Annual General Meeting 2021

Committees:

Finance (/en/groups/board/finance) | Member

Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Member

Risk (/resources/pages/risk-committee-2014-03-21-en) | Chair

Technical (/resources/pages/technical-committee-2017-11-02-en) | Member

(/profiles/112367)

Manal Ismail (/profiles/112367)

GAC (Governmental Advisory Committee) (http://gac.icann.org/) Liaison since 2017

(https://www.icann.org/profiles/136691)

Danko Jevtović (https://www.icann.org/profiles/136691)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: October 2018 – Annual General Meeting 2021

Committees:

- Audit (/en/groups/board/audit) | Member
- Finance (/en/groups/board/finance) | Member
- Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Member

(https://www.icann.org/profiles/136695)

Merike Käo (https://www.icann.org/profiles/136695)

SSAC (Security and Stability Advisory Committee) (/en/groups/ssac) Liaison Since 2018

Term: October 2018 – Annual General Meeting 2021

Committees:

- Audit (/en/groups/board/audit) | Non-Voting Member
- Risk (/resources/pages/risk-committee-2014-03-21-en) | Non-Voting Member
- Technical (/resources/pages/technical-committee-2017-11-02-en) | Non-Voting Member

(/profiles/68037)

Akinori Maemura (/profiles/68037)

Selected by: ASO (Address Supporting Organization) (http://aso.icann.org/)

Term: November 2016 – Annual General Meeting 2022

Committees:

Audit (/en/groups/board/audit) | Member

Risk (/resources/pages/risk-committee-2014-03-21-en) | Member

Technical (/resources/pages/technical-committee-2017-11-02-en) | Chair

(/resources/pages/goran-marby-2016-02-08-en)

Göran Marby (/resources/pages/goran-marby-2016-02-08-en) | President & CEO

Committees:

Executive (/en/groups/board/executive) | Member

(https://www.icann.org/profiles/162237)

(https://www.icann.org/profiles/162239)

Mandla Msimang (https://www.icann.org/profiles/162237)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: November 2019 – Annual General Meeting 2022

Committees:

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Member

Audit (/en/groups/board/audit) | Member

Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Member

Ihab Osman (https://www.icann.org/profiles/162239)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: November 2019 – Annual General Meeting 2022

Committees:

Finance (/en/groups/board/finance) | Member

Board Governance (/en/groups/board/governance) | Member

Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Member

(/profiles/68043)

Kaveh Ranjbar (/profiles/68043)

RSSAC (Root Server System Advisory Committee) (/groups/rssac) Liaison since 2016

Term: October 2016 – Annual General Meeting 2022

(https://www.icann.org/profiles/136697)

Nigel Roberts (https://www.icann.org/profiles/136697)

Selected by: ccNSO (Country Code Names Supporting Organization) (http://ccnso.icann.org/)

Committees:

Board Governance (/en/groups/board/governance) | Non-Voting Member

Risk (/resources/pages/risk-committee-2014-03-21-en) | Non-Voting Member

Technical (/resources/pages/technical-committee-2017-11-02-en) | Non-Voting Member

Term: October 2018 – Annual General Meeting 2021

Committees:

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Member

Risk (/resources/pages/risk-committee-2014-03-21-en) | Member

(/profiles/111665)

Matthew Shears (/profiles/111665)

Selected by: GNSO (Generic Names Supporting Organization) (http://gnso.icann.org/)

Term: November 2017 – Annual General Meeting 2020

Committees:

Board Governance (/en/groups/board/governance) | Member

Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Member

(https://www.icann.org/profiles/136699)

Tripti Sinha (https://www.icann.org/profiles/136699)

Selected by: Nominating Committee (http://nomcom.icann.org/)

Term: October 2018 – Annual General Meeting 2021

Committees:

Compensation (/en/groups/board/compensation) | Member

Executive (/en/groups/board/executive) | Member

Risk (/resources/pages/risk-committee-2014-03-21-en) | Member	Finance (/en/groups/board/finance) | Member Board Governance (/en/groups/board/governance) | Chair Technical (/resources/pages/technical-committee-2017-11-02-en) | Member

Board Committees

Accountability Mechanisms (/resources/pages/accountability-mechanisms-committee-2017-11-02-en) | Audit (/en/groups/board/audit) | Board Governance (/en/groups/board/governance) | Compensation (/en/groups/board/compensation) | Executive (/en/groups/board/executive) | Finance (/en/groups/board/finance) | Risk (/en/groups/board/risk) | Organizational Effectiveness (/resources/pages/organizational-effectiveness-committee-2014-03-21-en) | Technical (/resources/pages/technical-committee-2017-11-02-en)

Former Directors

With term ending:

2018

Cherine Chalaby (https://www.icann.org/profiles/50) | December 2010 – November 2019

Khaled Koubaa (https://www.icann.org/profiles/68041) | November 2016 – November 2019

2018

Jonne Soininen (/profiles/71) | October 2013 – October 2018

Lousewies van der Laan (/profiles/35081) | October 2015 – October 2018

Mike Silber (/profiles/65) | May 2009 – October 2018

Ram Mohan (/profiles/60) | October 2008 – October 2018

George Sadowsky (/profiles/64) | October 2009 – October 2018

2017

Rinalia Abdul Rahim (/profiles/1139) | October 2014 – November 2017

Steve Crocker (/profiles/47) | November 2008 – November 2017

Asha Hemrajani (/profiles/12489) | October 2014 – November 2017

Markus Kummer (/profiles/12491) | October 2014 – November 2017

Thomas Schneider (/profiles/12493) | GAC (Governmental Advisory Committee) Liaison, October 2014 – November 2017

2016

Akram Atallah | March 2016 – May 2016

Fadi Chehadé (/resources/pages/fadi-chehade-2016-07-05-en) | September 2012 – March 2016

Bruno Lanvin (/profiles/57) | November 2013 – October 2016

Erika Mann (/profiles/59) | December 2010 – October 2016

Bruce Tonkin (/profiles/48) | June 2007 – October 2016

Suzanne Woolf (/profiles/70) | RSSAC (Root Server System Advisory Committee) Liaison, 2004 – October 2016

Kuo-Wei Wu (/profiles/72) | April 2010 – October 2016

2015

Wolfgang Kleinwächter (/profiles/56) | November 2013 – October 2015

Gonzalo Navarro (/profiles/61) | October 2009 – October 2015

Ray Plzak (/profiles/62) | May 2009 – October 2015

2014

Olga Madruga-Forti | October 2012 – October 2014

Bill Graham | June 2011 – October 2014

Sebastien Bachollet | December 2010 – October 2014

Heather Dryden | GAC (Governmental Advisory Committee) Liaison, June 2010 – October 2014

2013

Judith Duavit Vazquez | October 2011 – October 2013

Bertrand de La Chapelle | December 2010 – November 2013

Thomas Narten | IETF (Internet Engineering Task Force) Liaison, July 2005 – July 2013

Francisco da Silva | TLG Liaison 2012 – 2013

2012

Thomas Roessler | TLG Liaison, October 2011 – October 2012

R. Ramaraj | December 2006 – October 2012

Akram Atallah | July 2012 – September 2012

Rod Beckstrom | July 2009 – July 2012

2011

Peter Dengate Thrush | January 2005 – June 2011

Rita Rodin Johnston | June 2006 – June 2011

Reinhard Scholl | TLG Liaison, December 2010 – October 2011

Katim Seringe Touray | November 2008 – October 2011

2010

Harald Tveit Alvestrand | November 2007 – December 2010

Raimundo Beca | May 2004 – April 2010

Dennis Jennings | November 2007 – December 2010

Janis Karklins | GAC (Governmental Advisory Committee) Liaison, March 2007 – 25 June 2010

Vanda Scartezini | ALAC (At-Large Advisory Committee) Liaison, October 2009 – December 2010

Jonne Soininen (/profiles/71) | TLG Liaison, October 2009 – December 2010

Jean-Jacques Subrenat | November 2007 – December 2010

2009

Roberto Gaetano | December 2006 – October 2009; ALAC (At-Large Advisory Committee) Liaison, 2003 – December 2006

Demi Getschko | 2005 – 7 May 2009

Steve Goldstein | December 2006 – October 2009

Thomas Roessler | TLG Liaison, November 2008 – October 2009

Wendy Seltzer | ALAC (At-Large Advisory Committee) Liaison, October 2007 – October 2009

Paul Twomey | 27 March 2003 – 30 June 2009

Dave Wodelet | May 2006 – 7 May 2009

2008

Susan Crawford | December 2005 – November 2008

Njeri Rionge | June 2003 – November 2008

Reinhard Scholl | TLG Liaison, 2008

2007

Vittorio Bertola | ALAC (At-Large Advisory Committee) Liaison, until November 2007

Vint G. Cerf | November 1999 – November 2007; Chair, November 2000 – November 2007

Joichi Ito | December 2004 – November 2007

Alejandro Pisanty | November 1999 – June 2007

Vanda Scartezini | December 2004 – November 2007

Francisco A. Jesus Silva, | until June 2003; as TLG Liaison until Feb 2005; as TLG Liaison, 2007

Mohamed Sharil Tarmizi, Governmental Advisory Committee (Advisory Committee) Liaison | December 2004 – March 2007

2006

Daniel Dardailler, TLG Liaison, 2006

Mouhamet Diop | until June 2006

Hagen Hultzsch | until December 2006

Veni Markovski | June 2003 – December 2006

Michael D. Palage | April 2003 – April 2006

Hualin Qian | June 2003 – December 2006

2005

John Klensin, IETF (Internet Engineering Task Force) Liaison | until June 2005

Thomas Niles | June 2003 – December 2005

Richard Thwaites, TLG Liaison, 2005

2004

Ivan Moura Campos | until December 2004

Lyman Chapin | October 2001 – May 2004

Tricia Drakes | June 2003 – December 2004

2003

Amadeu Abril i Abril | November 1999 – 26 June 2003

Karl Auerbach (http://www.cavebear.com) | until June 2003

Jonathan Cohen | November 1999 – June 2003

Masanobu Katoh | November 2000 – October 2003

Hans Kraaijenbrink | October 1998 – June 2003

Sang-Hyon Kyong | until June 2003

M. Stuart Lynn President/CEO | March 2001 – March 2003

Andy Mueller-Maguhn | November 2000 – June 2003

Jun Murai | October 1998 – June 2003

Nii Quaynor | October 2000 – June 2003

Helmut Schink | until June 2003

Linda S. Wilson | October 1998 – June 2003

2002

Robert Blokzijl | October 1999 – 15 December 2002

Philip Davidson | October 1999 – 2 April 2002

Frank Fitzsimmons | October 1998 – 15 December 2002

2001

Ken Fockler | October 1999 – September 2001

Michael Roberts President/CEO | October 1998 – March 2001

2000

Jean-François Abramatic | October 1999 – September 2000

Geraldine Capdeboscq | October 1998 – November 2000

George Conrades | October 1998 – November 2000

Greg Crew | October 1998 – November 2000

Esther Dyson | October 1998 – Chairman until November 2000

Eugenio Triana | October 1998 – November 2000

Pindar Wong | until September 2000

Exhibit R-24

Welcome to ICANN (Internet Corporation for Assigned Names and Numbers)!

Thanks for visiting! If you're new to ICANN (Internet Corporation for Assigned Names and Numbers), we built this page for you. It contains resources that can help you quickly understand who we are and what we do.

Welcome to ICANN (Internet Corporation for Assigned Names and Numbers)'s global community supporting the vision of "one world, one Internet." We warmly encourage your participation.

What Does ICANN (Internet Corporation for Assigned Names and Numbers) Do?

To reach another person on the Internet you have to type an address into your computer -- a name or a number. That address must be unique so computers know where to find each other. ICANN (Internet Corporation for Assigned Names and Numbers) coordinates these unique identifiers across the world. Without that coordination, we wouldn't have one global Internet.

In more technical terms, the Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) helps coordinate the Internet Assigned Numbers Authority (IANA (Internet Assigned Numbers Authority)) functions, which are key technical services critical to the continued operations of the Internet's underlying address book, the Domain Name (Domain Name) System (DNS (Domain Name System)). The IANA (Internet Assigned Numbers Authority) functions include: (1) the coordination of the assignment of technical protocol parameters including the management of the address and routing parameter area (ARPA (Advanced Research Projects Agency (See also DARPA))) top-level domain; (2) the administration of certain responsibilities associated with Internet DNS (Domain Name System) root zone management such as generic (gTLD (generic Top Level Domain)) and country code (ccTLD (Country Code Top Level Domain)) Top-Level

Domains; (3) the allocation of Internet numbering resources; and (4) other services.

Learn more. You can download a free *Beginner's Guide to Domain Names* and a *Beginner's Guide to Internet Protocol (Protocol) (IP (Internet Protocol or Intellectual Property)) Addresses* from our E-Learning pages (/en/about/learning).

How Does ICANN (Internet Corporation for Assigned Names and Numbers) Work?

Besides providing technical operations of vital DNS (Domain Name System) resources, ICANN (Internet Corporation for Assigned Names and Numbers) also defines policies for how the "names and numbers" of the Internet should run. The work moves forward in a style we describe as the "bottom-up, consensus-driven, multi-stakeholder model:"

- **Bottom up.** At ICANN (Internet Corporation for Assigned Names and Numbers), rather than the Board of Directors solely declaring what topics ICANN (Internet Corporation for Assigned Names and Numbers) will address, members of sub-groups in ICANN (Internet Corporation for Assigned Names and Numbers) can raise issues at the grassroots level. Then, if the issue is worth addressing and falls within ICANN (Internet Corporation for Assigned Names and Numbers)'s remit, it can rise through various Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) until eventually policy recommendations are passed to the Board for a vote.

- **Consensus (Consensus)-driven**. Through its Bylaws, processes, and international meetings, ICANN (Internet Corporation for Assigned Names and Numbers) provides the arena where all advocates can discuss Internet policy issues. Almost anyone can join most of ICANN (Internet Corporation for Assigned Names and Numbers)'s volunteer Working Groups, assuring broad representation of the world's perspectives. Hearing all points of view, searching for mutual interests, and working toward consensus take time, but the process

resists capture by any single interest– an important consideration when managing a resource as vital as the global Internet

- **Multistakeholder model**. ICANN (Internet Corporation for Assigned Names and Numbers)'s inclusive approach treats the public sector, the private sector, and technical experts as peers. In the ICANN (Internet Corporation for Assigned Names and Numbers) community, you'll find registries, registrars, Internet Service Providers (ISPs), intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from more than 100 governments, and a global array of individual Internet users. All points of view receive consideration on their own merits. ICANN (Internet Corporation for Assigned Names and Numbers)'s fundamental belief is that all users of the Internet deserve a say in how it is run.

To learn more about ICANN (Internet Corporation for Assigned Names and Numbers)'s policy development processes:

- Frequently Asked Questions (/en/about/learning/faqs)
- Diagram of the Multi-Stakeholder Model (/en/groups/chart)
- Bylaws (/en/about/governance/bylaws)
- Process Documentation (/processdocumentation)

What Has ICANN (Internet Corporation for Assigned Names and Numbers) Accomplished?

Here are just a few highlights of what our bottom-up, consensus-driven, multi-stakeholder model has produced:

- ICANN (Internet Corporation for Assigned Names and Numbers) established market competition for generic domain name (gTLD (generic Top Level Domain)) registrations resulting in a lowering of domain name costs by 80% and saving consumers and businesses over US$1 billion annually in domain registration fees.

- ICANN (Internet Corporation for Assigned Names and Numbers) implemented an efficient and cost-effective Uniform Domain Name (Domain Name) Dispute Resolution Policy (UDRP (Uniform Domain-Name Dispute Resolution Policy)), which has been used to resolve thousands of disputes over the rights to domain names.

- Working in coordination with the appropriate technical communities and stakeholders, ICANN (Internet Corporation for Assigned Names and Numbers) adopted guidelines for the deployment of Internationalized Domain Names (IDN), opening the way for registration of domains in hundreds of the world's languages.

- Verisign, ICANN (Internet Corporation for Assigned Names and Numbers) and U.S. National Telecommunications and Information Administration (NTIA (US National Telecommunications and Information Agency)) jointly completed deployment of Domain Name (Domain Name) System Security (Security – Security, Stability and Resiliency (SSR)) Extensions (DNSSEC (DNS Security Extensions)) for the root zone in July 2010. These extensions make certain kinds of cyberfraud much more difficult to perpetrate. As of 30 June 2011, 70 TLDs had adopted DNSSEC (DNS Security Extensions), including two of the largest TLDs -- .com and .de.

- ICANN (Internet Corporation for Assigned Names and Numbers) created the New gTLD (generic Top Level Domain) Program, so that any established entity in the world can apply to operate its own top-level domain. Many of these new gTLDs will go online in 2013.

- The world broadly accepts ICANN (Internet Corporation for Assigned Names and Numbers) as the place to work out Internet governance policies. As 2011 ended, the Governmental Advisory Committee (Advisory Committee) represented 109 nations (plus the European Union and the Vatican). The Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) represented more than 120 country code domains. The At-Large Advisory Committee (Advisory Committee) represented 134 At-Large Structures (ALSes) from all geographic regions.

ICANN (Internet Corporation for Assigned Names and Numbers) Welcomes Your Participation

If you have an interest in global Internet policy related to ICANN (Internet Corporation for Assigned Names and Numbers)'s mission of technical coordination, we encourage you to participate ICANN (Internet Corporation for Assigned Names and Numbers) provides many online forums through this website, and the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees) have active mailing lists for participants Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) holds public meetings (https://meetings.icann.org) throughout the year.

At any given time, many of the groups working on policy issues are seeking public input. You are always welcome to lend them your perspective, on the Public Comment Forum (/en/news/public-comment).

For more information on the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees), please refer to their respective websites or pages:

- Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization) (https://aso.icann.org))
- At-Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee) (https://atlarge.icann.org))
- Country Code Domain Name (Domain Name) Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization) (https://ccnso.icann.org))
- Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization) (https://gnso.icann.org))
- Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee) (https://gac.icann.org))

- Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee) (/en/groups/rssac))
- Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee) (/en/groups/ssac))

Exhibit R-25

GOVERNMENTAL ADVISORY COMMITTEE

Internet Corporation for Assigned Names and Numbers

The GAC serves as the voice of Governments and International Governmental Organizations in ICANN's multi-stakeholders representative structure.

Our key role is to provide advice to ICANN on issues of public policy, especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements. We discuss issues with the ICANN Board and other ICANN Supporting Organizations, Advisory Committees and other groups and deliver regular Advice. About the GAC

IMPACT

Over its 17 years history, the GAC has delivered 66 Communiques & 342 Correspondences including a total of 202 pieces of Advice that help shape Internet policies and governance.

Learn about the role of the GAC

CURRENT WORK

The GAC is currently engaged in 26 activities spanning 203 topics

These efforts are discussed and executed by GAC Working Groups prior to reaching consensus by the GAC as a whole.

MEMBERSHIP

There are 178 Members and 38 Observers in the GAC. Membership is constantly evolving. New Members are always welcome.

Meet Our Members and Observers

Learn how to join the GAC

NEWS

ICANN63 Barcelona Communique

ICANN63 GAC Schedule and Session Objectives (as of 4 Oct)

ICANN62 Panama Communique

GAC Capacity Development Workshop at Africa Internet Summit in Dakar - Draft agenda (FR)

ICANN Board letter to GAC Chair on ICANN61 GAC's Consensus Advice on IGO Reserved Acronyms

See all GAC News & Notifications

UPCOMING MEETINGS

Wednesday
03
Jun 2020

GAC Leadership and RrSG ExComm Call - 3 June 2020

Closed Session

Thursday
04
Jun 2020

DNS Operation in times of Covid-19: the ccTLD experience - Webinar 1

Closed Session

Friday
05
Jun 2020

DNS Operation in times of Covid-19: the ccTLD experience - Webinar 2

Closed Session

See the GAC Calendar

Exhibit R-26

New Generic Top-Level Domains

CONTRACTING & THE REGISTRY AGREEMENT

News & Views

Announcement: 04 August 2017 – 2017 Base New gTLD Registry Agreement Now Effective (/en/announcements-and-media/announcement 04aug17 en)

Contracting Overview

Contracting is a process by which eligible applicants enter into a Registry Agreement ("RA") with ICANN to operate the applied-for TLD. This process commences once the applicant successfully meets all of the following New gTLD Program requirements:

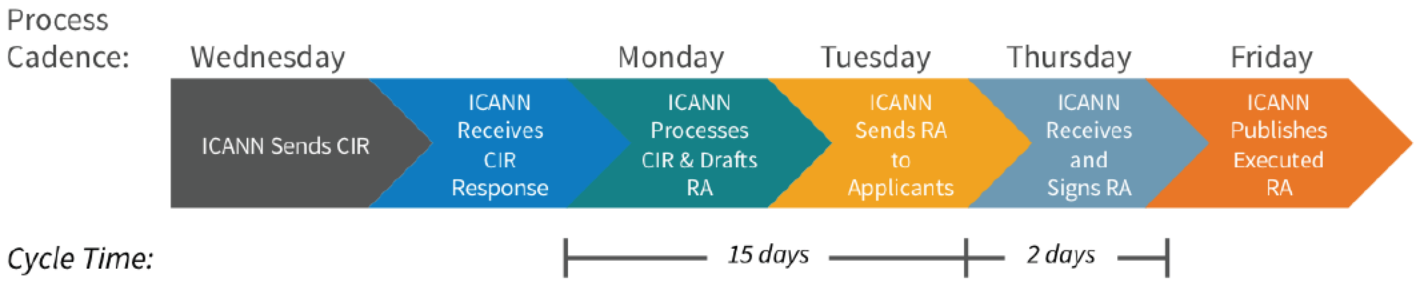
- Pass application evaluation
- Resolve contention
- Completes objection dispute resolution
- Clear GAC advice
- Completes change requests

Once an applicant is eligible to commence the contracting process, ICANN will notify the applicant's primary contact via the Naming Services portal (https://portal.icann.org). Notifications are sent by prioritization number. Included with the notification is a CIR Form that requests for certain information needed for drafting of the RA. It is important that applicants complete and submit the CIR Form promptly upon notification to avoid missing the 9-month deadline to execute a Registry Agreement. As per Section 5.1 of the Applicant Guidebook, "Eligible applicants are expected to have executed the registry agreement within nine (9) months of the notification date. Failure to do so may result in loss of eligibility, at ICANN's discretion." The Applicant Guidebook also provides for applicants to request an extension to the 9-month window to execute the Registry Agreement if the applicant "can demonstrate, to ICANNs reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement." To request for an extension, the contracting point of contact should complete and submits the Request for Extension to Execute Registry Agreement Form (/en/applicants/agb/agreement-extension-form-19may14-en.docx) [DOCX, 565 KB].

To help applicants prepare for completion and submission of the CIR Form, ICANN has provided the following information:

- Contracting Information Request User Guide (/en/applicants/agb/cir-guidance-15jul14-en.pdf) (updated 15 July 2014) [PDF, 2.02 MB]
- *Sample* Irrevocable Standby Letter of Credit (/en/applicants/agb/loc-irrevocable-standby-21jun13-en.docx) [DOCX, 169 KB]
- *Template* for Requesting Changes to the base Registry Agreement (/en/applicants/agb/base-agreement-requested-edits-08jan14-en.docx) [DOCX, 24 KB]
- *Sample Affirmation Letter to Designate a New Signatory (/en/applicants/agb/base-agreement-signatory-affirmation-10jan14-en.docx)* [DOCX, 31 KB]

Contracting will be completed once the RA is executed and the applicant will proceed to the next phase of Transition to Delegation known as Pre-Delegation Testing (/en/applicants/pdt). Below is an overview of the contracting process. The graphic depicts a best-case scenario where there are no issues with the application. The cycle time is subject to change if volume of CIR response exceeds 40 per week. Please note that the below cycle time does not apply to applications that have been granted an extension to execute the Registry Agreement. For those applications that have been granted an extension to execute the Registry Agreement, ICANN will abide by the timelines provided in the extension notifications.



(/sites/default/files/main-images/contracting-cycle-1200x320-07nov14-en.png)

Contracting Deadlines and Extensions

On 3 September 2014, ICANN published a "Requests for Extension to Execute New gTLD Registry Agreements (/en/announcements-and-media/announcement-03sep14-en)" announcement. This announcement re-emphasizes that eligible applicants are expected to execute the Registry Agreement within nine (9) months of the notification date. Applicants must submit extension requests at least 45 days prior to the original deadline date to be eligible for an extension. If an extension request is not submitted by the deadline, the applicant will not be granted an extension and will be expected to execute the Registry Agreement by the original deadline.

Scenario 1: No responses to the CIR received 3 weeks prior to the Registry Agreement execution deadline, and no extensions have been granted.

If no extensions have been granted and the applicant does not submit a response to the CIR 3 weeks prior to the Registry Agreement execution deadline, it must execute the Registry Agreement by the Registry Agreement execution deadline. To provide applicants under this scenario the ability to execute the Registry Agreement by the deadline date, ICANN will send eligible applicants the base Registry Agreement 2 weeks prior to the deadline date to execute the Registry Agreement.

Scenario 2: The applicant requests an extension to execute the Registry Agreement.

Applicants should demonstrate, to ICANN's reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement. Applicants provided with any extension shall meet interim milestone deadlines based on the activities that need to be completed. All applicants who have been granted an extension must execute the Registry Agreement by the extended deadline, or risk losing eligibility to execute the Registry Agreement with ICANN. In addition, applicants that fail to meet interim milestone deadlines will be at risk of losing eligibility to execute the Registry Agreement with ICANN. If an applicant loses eligibility to execute the Registry Agreement with ICANN, the status of its application will be changed to "Will Not Proceed."

- Download the Extension Request Form (/en/applicants/agb/agreement-extension-form-19may14-en.docx) [DOC, 565 KB]
- View the Contracting Deadlines and Extensions FAQs (/en/applicants/agb/base-agreement-contracting/execution-extension-faqs-07aug14-en.pdf) [PDF, 340 KB]

Registry Agreement

The Registry Agreement is the formal written and binding agreement between the applicant and ICANN that sets forth the rights, duties, liabilitie and obligation of the applicant a a Regi try Operator Applicant may elect to negotiate the term of the RA by exception, but this course of action will take substantially longer to complete the Contracting process.

- View the Base Registry Agreement (/sites/default/files/agreements/agreement-approved-31jul17-en.pdf) [PDF, 925 KB] (Updated 31 July 2017)
- View Reline of Base New gTLD Registry Agreement (/sites/default/files/agreements/agreement-approved-redline-31jul17-en.pdf) [924 KB] (Updated 31 July 2017)
- 2017 Global Amendment to the Base New gTLD Registry Agreement (https://www.icann.org/resources/pages/global-amendment-base-new-gtld-registry-agreement-2017-01-23-en)
- *Template for Requesting Changes to the base Registry Agreement* (/en/applicants/agb/base-agreement-requested-edits-08jan14-en.docx)

Specification 13

On 26 March 2014, by the New gTLD Program Committee ("NGPC") of the ICANN Board passed a resolution (http //feature icann org/approval regi try agreement pecification 13 brand category applicant) approving a Regi try Agreement Specification 13 for Brand category of applicants. One provision of Specification 13 gives a .BRAND registry operator the ability to de ignate up to three ICANN accredited regi trar to erve a the exclu ive regi trar for their TLD When the NGPC approved Specification 13 on 26 March 2014, implementation of this provision was delayed for 45 days in respect of the GNSO policy Recommendation 19 on the Introduction of New Generic Top Level Domain After con idering the matter, the GNSO Council informed ICANN in correspondence dated 9 May 2014 (http://gnso.icann.org/en/correspondence/robinson-to-chalaby-09may14-en.pdf) [PDF, 366 KB] that although it found that the propo ed provi ion wa incon i tent with Recommendation 19, given the unique and pecific circumstances, the GNSO Council accepted the variation from the original policy, did not object to the adoption of Specification 13 in its entirety, and o indicated in the form of a motion vote on and pa ed at the GNSO Council meeting of 8 May 2014 Specification 13 wa not finalized until May 9, 2014. Subsequently, as a result of the 2017 Global Amendment, the current form of Specification 13 is effective 31 July 2017

Specification 13 provide certain modification to the RA for tho e applicant that qualify a a Brand TLD The e requirement include

- The TLD tring i identical to the textual element protectable under applicable law, of a regi tered trademark valid under applicable law;
- Only Regi try Operator, it Affiliate or Trademark Licen ee are regi trant of domain name in the TLD and control the DNS records associated with domain names at any level in the TLD;
- The TLD i not a Generic String TLD (a defined in Specification 11);
- Registry Operator has provided ICANN with an accurate and complete copy of such trademark registration.

Registry operators that want to qualify as a .Brand TLD and receive a Specification 13 to the RA may submit an application for Specification 13 to ICANN ICANN po t all application for Specification 13 for comment for 30 day All input received will be taken into con ideration If a Specification 13 is granted, it will include an exemption to the Registry Operator Code of Conduct.

- View Specification 13 (/sites/default/files/agreements/agreement-approved-specification-13-31jul17-en.pdf) [PDF, 292 KB] (Updated 31 July 2017)
- View Specification 13 Process and Application Form (/en/applicants/agb/base-agreement-spec-13-application-form-15jul14-en.pdf) [PDF, 472 KB]
- View Applications to Qualify for Specification 13 (/en/applicants/agb/base-agreement-contracting/specification-13-applications)
- Submit Comment on Application for Specification 13 (mailto pec13 reque t@icann org)
- View Comments Submitted on Applications for Specification 13 (http://mm.icann.org/pipermail/spec13-request/)
- Read the Specification 13 FAQ (/en/applicant /agb/ba e agreement pec 13 faq 15jul14 en pdf) (Updated 15 July 2014) [PDF, 428 KB]

Registry Operator Code of Conduct

The Registry Operator Code of Conduct is a set of guidelines for registry operators relating to certain and limited operations of the registry. All registry operators are subjected to the Code of Conduct unless an exemption is granted to the registry operator by ICANN. In order to qualify for an exemption to the Code of Conduct, the TLD must not be a "generic string" (as defined in Section 3(d) of Specification 11) and the following criteria must be satisfied:

- All domain name registrations in the TLD are registered to, and maintained by, Registry Operator for the exclusive use of Registry Operator or its affiliates;
- Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an affiliate of Registry Operator; and
- Application of the Code of Conduct to the TLD is not necessary to protect the public interest.

Registry operators that want to be exempted from the Code of Conduct may submit a request for exemption to the Code of Conduct to ICANN. ICANN posts all requests for exemption to the Code of Conduct for comment for 30 days. All input received will be taken into consideration.

A clause providing an exemption to the Code of Conduct is included in the provisions of Specification. Thus, any registry operator applying for a Specification 13 to the RA need not separately apply for an exemption to the Code of Conduct.

- Review the COC Exemption Process & Forms (/en/applicants/agb/ro-code-of-conduct-exemption-28oct13-en.pdf) [PDF, 146 KB]
- View Requests for Exemption to the Code of Conduct (/en/applicants/agb/base-agreement-contracting/ccer)
- Submit Comments on Requests for Exemption to the Code of Conduct (mailto:exemption-request@icann.org)
- View Comments Submitted on Requests for Exemption to the Code of Conduct (http://mm.icann.org/pipermail/exemption-request/)
- Read the Code of Conduct Exemption FAQ (/en/applicants/agb/base-agreement-contracting/ccer/faqs-18jul14-en.pdf) (Updated 18 July 2014) [PDF, 500 KB]

Application Eligibility Reinstatement

Application Eligibility Reinstatement is a process that allows applicants with applications in a "Will Not Proceed" status because a contracting related deadline was missed to request reinstatement of the application's eligibility status. If eligibility reinstatement is granted, the applicant may proceed to signing the Registry Agreement with ICANN provided the application meets all Program requirements.

ICANN will notify applicants that are qualified to request reinstatement of eligibility status of their applications via the Naming Services portal (https://portal.icann.org/) (referenced as Application Eligibility Notification). Generally, ICANN will notify the applicant within one week of the application status being changed to "Will Not Proceed." Upon notification, applicants may request reinstatement of their applications' eligibility by submitting the Application Eligibility Reinstatement Request form. Requests must be submitted by the deadline communicated to the applicant in the Application Eligibility Notification to be considered.

To ensure applicants are committed to signing the Registry Agreement and to delegate the TLD within 12 months of the Effective Date of the Registry Agreement, applicants will be required to provide:

- All pending information required for the execution of the Registry Agreement. This could include:
  - Compliant Continuing Operations Instrument
  - Complete Contracting Information Request form or updated information for the Contracting Information Request
  - Application change request
  - Complete Specification 13 application
  - Complete Request to Registry Operator Code of Conduct Exemption
- All required information for Post-Contracting activities:
  - Pre-Delegation Testing information
  - A fully executed Data Escrow agreement
  - Registry contact and Registry public contact information
  - Registry Onboarding Information Request information
  - Notification of intent for Registry assignment or material sub-contractor changes

Deadline and Timeline

In addition to the above required information, applicants will need to commit to signing the Registry Agreement and completing post-contracting activities by certain deadline dates:

- **Registry Agreement signing** – If applicant has a Registry Agreement signing deadline date that is in the future, applicant will be required to sign the Registry Agreement by that date. If applicant has an Registry Agreement signing deadline date that has passed, applicant will be required to sign the Registry Agreement 30 days from the date ICANN notifies applicant of the new Registry Agreement signing deadline date.
- **Onboarding** – Applicant will be required to complete Onboarding 45 days from the Effective Date of the Registry Agreement. Applicant will receive a notification after Registry Agreement execution to enter the provided information into the Naming Services portal (https://portal.icann.org/).
- **Pre-Delegation Testing** – Applicant will be required to start Pre-Delegation Testing 45 days from the Effective Date of the Registry Agreement. Applicant will receive a notification after Registry Agreement execution to schedule Pre-Delegation Testing appointment. All required information and documents must be submitted with the request so that ICANN may review the request in its entirety to make a determination. ICANN will review requests based on the unique circumstances of each application and notify applicants of its determination via the Naming Services portal (https://portal.icann.org/).

- View Application Eligibility Reinstatement Process and Request Form (/en/applicants/agb/base-agreement-contracting/reinstatement-request-03sep15-en.docx) [DOCX, 536 KB]

Contracting Statistics

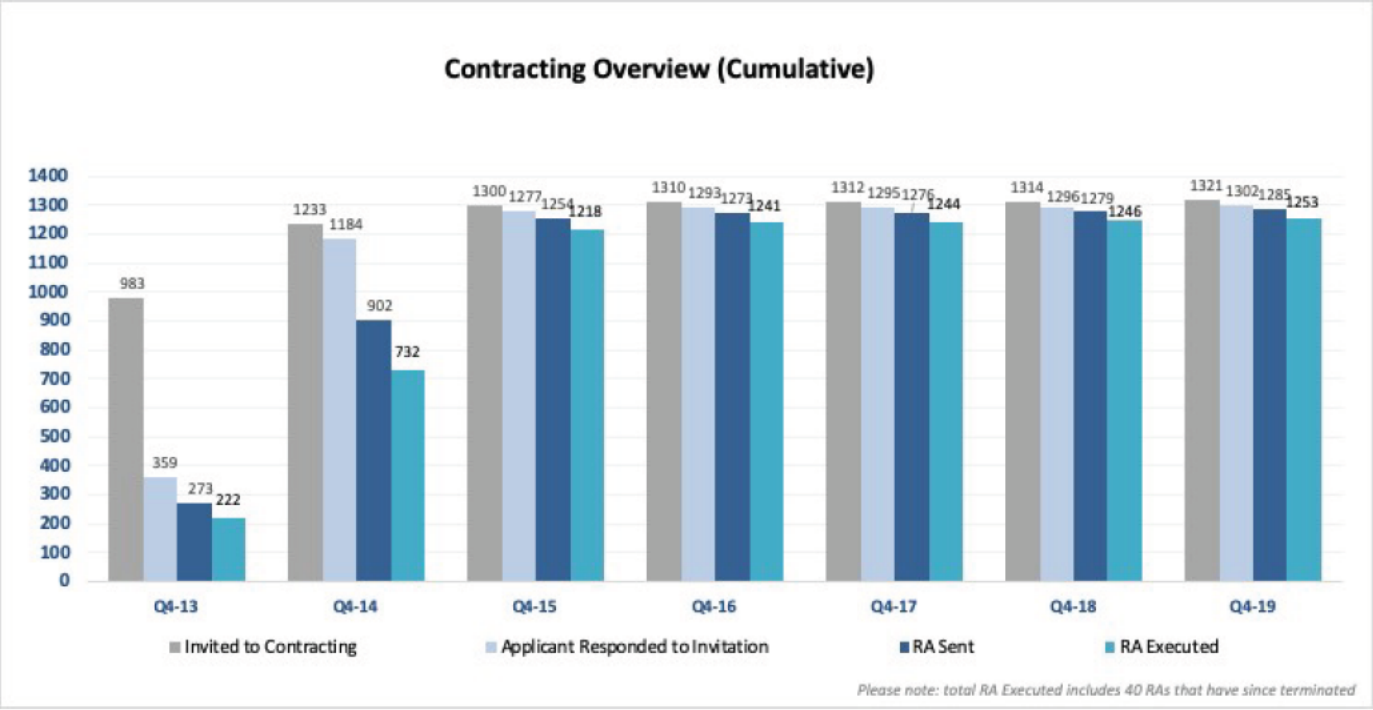
The following contracting statistics are updated on a quarterly basis:

For the Quarter Ending: 31 December 2019

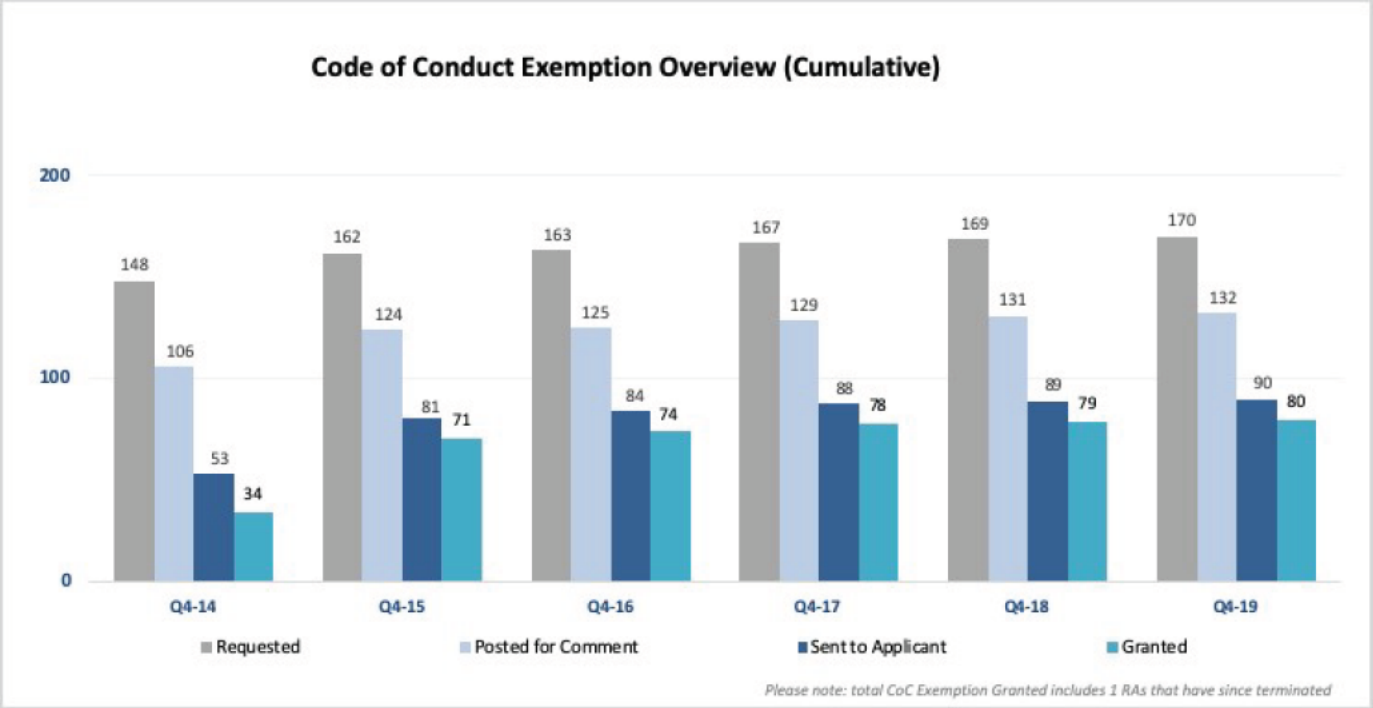
Number of Applications Invited to Contracting: 3
Number of Responses to Contracting Invite Received: 3
Number of Registry Agreements Sent to Applicants: 3
Number of Registry Agreements Executed: 3

Number of Requests for Exemption to the Code of Conduct Posted for 30-day Comment: 0
Number of Code of Conduct Exemptions Granted: 0

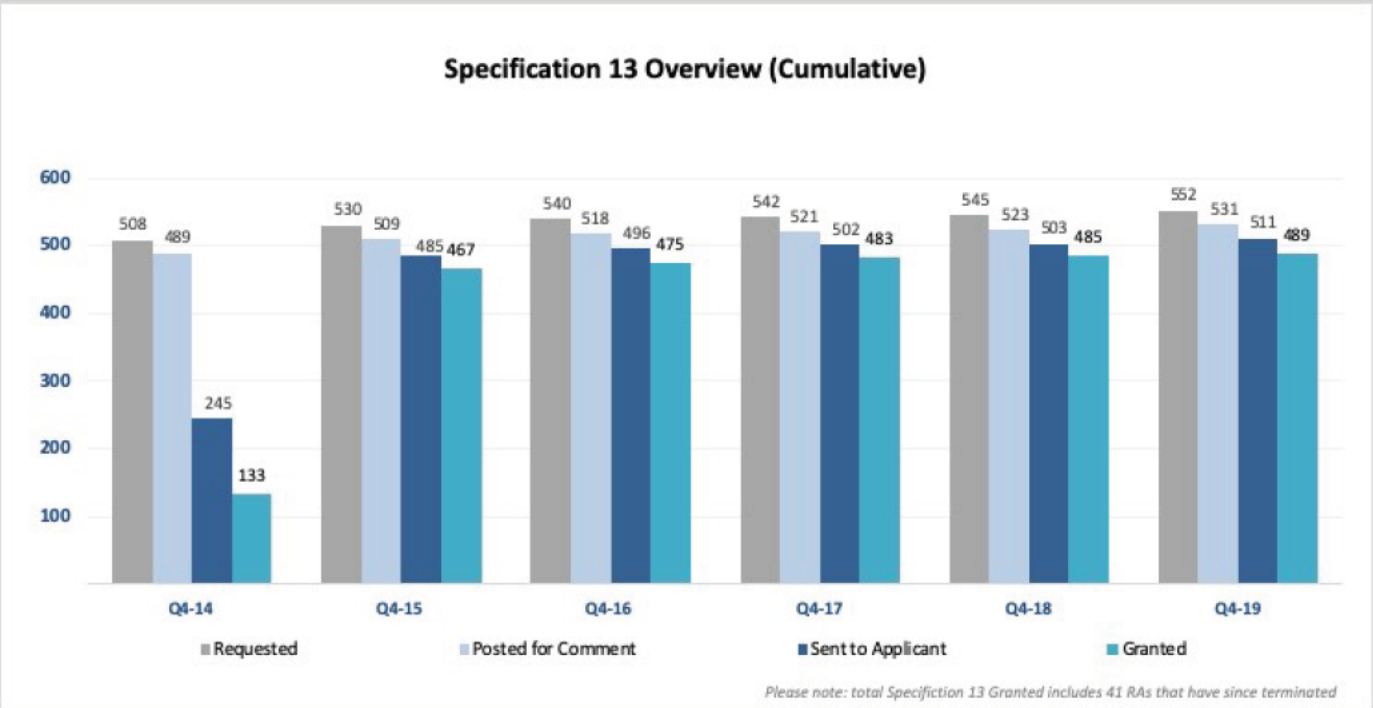
Number of Applications for Specification 13 Posted for 30-day Comment: 0
Number of Specification 13 Granted: 3



(/sites/default/files/main-images/contracting-overview-743x383-14jan20-en.jpg)



(/sites/default/files/main-images/code-of-conduct-overview-743x384-14jan20-en.jpg)



(/sites/default/files/main-images/spec-13-overview-743x385-14jan20-en.jpg)

Contracting Resources

Documents

- Base Registry Agreement (/sites/default/files/agreements/agreement-approved-31jul17-en.pdf) [PDF, 925 KB] (Updated 31 July 2017)
- Specification 13 (/sites/default/files/agreements/agreement-approved-specification-13-31jul17-en.pdf) [PDF, 292 KB] (Updated 31 July 2017)
- Contracting Information Request Guidance (/en/applicants/agb/cir-guidance-15jul14-en.pdf) (Updated 15 July 2014) [PDF, 2.02 MB]
- Naming Services portal User's Guide (https://www.icann.org/en/system/files/files/nsp-user-guide-25sep17-en.pdf) [PDF, 730 KB]
- *Sample* Irrevocable Standby Letter of Credit (/en/applicants/agb/loc-irrevocable-standby-21jun13-en.docx) [DOCX, 169 KB]
- *Template for Requesting Changes to the base Registry Agreement (/en/applicants/agb/base-agreement-requested-edits-08jan14-en.docx)* [DOCX, 24 KB]
- *Sample Affirmation Letter to Designate a New Signatory (/en/applicants/agb/base-agreement-signatory-affirmation-10jan14-en.docx)* [DOCX, 31 KB]
- Specification 13 Process and Application Form (/en/applicants/agb/base-agreement-spec-13-application-form-15jul14-en.pdf) [PDF, 472 KB]
- COC Exemption Process & Form (/en/applicants/agb/ro-code-of-conduct-exemption-28oct13-en.pdf) [PDF, 146 KB]
- Request for Extension to Execute Registry Agreement Form (/en/applicants/agb/agreement-extension-form-19may14-en.docx) [DOCX, 565 KB]

Comments

- View Applications to Qualify for Specification 13 (/en/applicants/agb/base-agreement-contracting/specification-13-applications)
- Submit Comments on Applications for Specification 13 (mailto:spec13-request@icann.org)
- View Comments Submitted on Applications for Specification 13 (http://mm.icann.org/pipermail/spec13-request/)
- View Requests for Exemption to the Code of Conduct (/en/applicants/agb/base-agreement-contracting/ccer)
- Submit Comments on Requests for Exemption to the Code of Conduct (mailto:exemption-request@icann.org)
- View Comments Submitted on Requests for Exemption to the Code of Conduct (http://mm.icann.org/pipermail/exemption-request/)

Frequently Asked Questions

- Specification 13 FAQs (/en/applicants/agb/base-agreement-spec-13-faqs-15jul14-en.pdf) [PDF, 427 KB]
- Code of Conduct Exemption FAQ (/en/applicants/agb/base-agreement-contracting/ccer/faqs-18jul14-en.pdf) [PDF, 500 KB]
- Contracting Deadlines and Extensions FAQs (/en/applicants/agb/base-agreement-contracting/execution-extension-faqs-07aug14-en.pdf) [PDF, 340 KB]

Questions?

- **Applicants:** Submit an inquiry via the Naming Services portal (https://portal.icann.org/)
- **Non-Applicants:** Email us at newgtld@icann.org (mailto:newgtld@icann.org)

News Archive

Below find archival materials documenting milestones in the development of the Contracting process, listed in reverse chronological order.

29 July 2014 – CORRECTION: ICANN Updates Specification 13 Process and Application Form (/en/announcements-and-media/announcement-2-15jul14-en)

15 July 2014 – ICANN Updates Specification 13 Process and Application Form (/en/announcements-and-media/announcement-2-15jul14-en)

14 April 2014 – ICANN Publishes Process to Qualify for Specification 13 to the New gTLD Registry Agreement (/en/announcements-and-media/announcement-14apr14-en)

18 March 2014 – ICANN Seeks Comments on Requests for Exemption to the Registry Operator Code of Conduct (/en/announcements-and-media/announcement-18mar14-en)

9 May 2014 – GNSO Provided Input on Specification 13 at New gTLD Program Committee's ("NGPC") Request

On 26 March, the NGPC approved Specification 13 to the New gTLD Registry, along with an additional clause that would allow .Brand registry operators to designate up to three ICANN accredited registrars to serve as the exclusive registrars for their TLD. The NGPC asked the GNSO to comment on whether this clause is in line with GNSO policy recommendations. On 9 May, the GNSO provided its comment in a letter to Cherine Chalaby, the Chair of the NGPC:

- Letter from Jonathan Robinson to Cherine Chalaby (/program-status/correspondence/robinson-to-chalaby-09may14-en.pdf) [PDF, 367 KB]

15 July 2013 – Contracting Session at ICANN 47 Durban

Krista Papac, ICANN's gTLD Registry Services Director, leads a session focused on helping New gTLD applicants understand and prepare for the Contracting process.

- Web Conference Recording (http://icann.adobeconnect.com/p2zg75doidh/)
- Audio Recording (http://audio.icann.org/meetings/durban2013/contracting-new-gtld-15jul13-en.mp3) [MP3, 36.7 MB]
- Presentation (http://durban47.icann.org/meetings/durban2013/presentation-contracting-new-gtld-15jul13-en.pdf) [PDF, 726 KB]
- Additional Questions & Answers (http://durban47.icann.org/meetings/durban2013/presentation-contracting-new-gtld-qa-15jul13-en.pdf) [PDF, 274 KB]

15 July 2013 – First Registry Agreements

On the opening day of ICANN 47 Durban, ICANN signs the first four Registry Agreements with new gTLD applicants.

- First Registry Agreements Executed – Internet Users Will Soon Be Able to Navigate the Web in Their Native Language (/en/announcements-and-media/announcement-15jul13-en)
- Akram Atallah's Blog Post: 2013 RAA and RyA Signings Kick-off ICANN 47 in Durban (http://blog.icann.org/2013/07/2013-raa-and-rya-signings-kick-off-icann-47-in-durban/)

14 July 2013 – Supplement to the Registry Agreement

Required of applicants facing outstanding items, such as Governmental Advisory Committee (GAC) Advice, Rights Protection Mechanisms requirements, and Post-Delegation Dispute Resolution Proceedings, that wish to sign the Registry Agreement ahead of resolving those issues.

- Supplement to the Registry Agreement (/en/applicants/agb/agreement-supplement-14jul13-en.pdf) [PDF, 49 KB]

21 June 2013 – Contracting Information Request Guidance

ICANN publishes materials to help applicants to prepare for contracting.

- Contracting Information Request Guidance (/en/applicants/agb/cir-guidance-21jun13-en.pdf) [PDF, 304 KB]

13 June 2013 – New gTLD Contracting Webinar

ICANN hosts a webinar to help new gTLD applicants understand the Contracting process and learn what information they must provide prior to executing a Registry Agreement.

- Web Conference Recording (http://icann.adobeconnect.com/p354cxa2ilo/)
- Teleconference Recording (http://audio.icann.org/new-gtlds/webinar-contracting-13jun13-en.mp3) [MP3, 15.8 MB]
- Presentation (/en/applicants/agb/contracting-13jun13-en.pdf) [PDF, 1.29 MB]
- Additional Questions & Answers (/en/applicants/agb/contracting-qa-13jun13-en.pdf) [PDF, 532 KB]
- Announcement (/en/announcements-and-media/announcement-2-17may13-en)

29 April 2013 – Registry Agreement is Now Available for Public Comment

ICANN is seeking public comment on the Proposed Final Registry Agreement published on 29 April 2013.

- Read the Announcement (http://www.icann.org/en/news/announcements/announcement-29apr13-en.htm)
- Comment now (http://www.icann.org/en/news/public-comment/base-agreement-29apr13-en.htm)

1 April 2013 – Revised Registry Agreement Posted for Review

ICANN provides the latest version of the "Revised new gTLD Registry Agreement" for the community's information and review.

- ICANN Blog Post (http://blog.icann.org/2013/04/revised-registry-agreement-posted-for-review/)

26 March 2013 – New gTLD Update Webinar

ICANN staff hosts a webinar session providing information about the Contracting process, among other program updates.

- Conference Call Audio (http://audio.icann.org/new-gtlds/webinar-26mar13-en.mp3) [MP3, 21.8 MB]
- Presentation (/en/applicants/webinar-26mar13-en.pdf) [PDF, 2.08 MB]

5 February 2013 – New gTLD Applicant Webinar

ICANN staff hosts a webinar session providing details about the Public Interest Commitments (PIC) Specification, among other program updates.

- Web Meeting Recording (https://icann.adobeconnect.com/_a819976787/p5enbfwj1pd)
- Conference Call Recording (http://audio.icann.org/new-gtlds/webinar-applicant-update-05feb13-en.mp3)
- Presentation (/en/applicants/webinar-05feb13-en.pdf) [PDF, 1.04 MB]

5 February 2013 – Public Comment: Revised New gTLD Registry Agreement & PIC Spec

ICANN solicits feedback on a revised version of the New gTLD Registry Agreement that includes information on the Public Interest Commitments (PIC) Specification.

- Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification (http://www.icann.org/en/news/public-comment/base-agreement-05feb13-en.htm)
- Frequently Asked Questions | Specification 11 of the Revised New gTLD Registry Agreement: Public Interest Commitments (/en/applicants/agb/base-agreement-specs-pic-faqs)

5 September 2013 – Customer Portal User Guide

ICANN publishes a User Guide to help applicants complete Transition to Delegation processes. Applicants must conduct Contracting through the Customer Portal.

- Announcement: Customer Portal User Guide Created to Help Applicants Transition to Delegation (/en/announcements-and-media/announcement-05sep13-en)
- Customer Portal User Guide (/en/applicants/customer-service/user-guide-transition-delegation-05sep13-en.pdf) [PDF, 2.18 MB]

27 August 2013 – Potential Name Space Collision Report

ICANN explains how the Name Space Collision Report will affect the Contracting process. New gTLD applications are to be handled according to the potential for risk.

Potential Name Space Collision Report's Impact on Contracting (/en/announcements-and-media/announcement-27aug13-en)

	i					

11 Oct	1701 – 1930 (Completed)
04 Oct	1501 1700
27 Sep	1401 – 1500
20 Sep	1251 – 1400
13 Sep	1101 – 1250
06 Sep	951 1100
30 Aug	801 – 950
23 Aug	701 – 800
16 Aug	501 – 700
09 Aug	201 500
02 Aug	109 – 200
26 Jul	51 – 108
19 Jul	Not applicable
12 Jul	Not applicable
05 Jul	1 – 50

Exhibit R-27

Independent Review Process Documents

This page collects documents from Independent Review Proceedings filed in accordance with Article IV, section 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. They are arranged by initial filing date in descending order.

- CEP and IRP Status Update – 4 March 2020 (/en/system/files/files/irp-cep-status-04mar20-en.pdf) [PDF, 279 KB]
    - Archive (/resources/pages/cep-irp-pending-archive-2014-09-26-en#2019)

Namecheap, Inc. (/resources/pages/irp-namecheap-v-icann-2020-03-03-en) (.ORG/.INFO/.BIZ)

Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited (/resources/pages/irp-fegistry-et-al-v-icann-hotel-2019-12-20-en) (.HOTEL)

Afilias Domains No. 3 Limited (/resources/pages/irp-afilias-v-icann-2018-11-30-en) (.WEB)

Amazon EU S.à.r.l. v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/irp-amazon-v-icann-2016-03-04-en) (.AMAZON)

Commercial Connect, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/irp-commercial-connect-v-icann-2016-02-16-en) (.SHOP)

Commercial Connect, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/irp-commercial-connect-v-icann-2016-01-28-en) (.SHOP) - CLOSED

Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/irp-agit-v-icann-2015-12-23-en) (.ISLAM/.HALAL)

Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/afilias-brs-tin-llc-v-icann-2015-10-12-en) (.RADIO) - WITHDRAWN

Corn Lake, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/corn-lake-v-icann-2015-04-07-en) (.CHARITY)

dot Sport Limited v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/dot-sport-v-icann-2015-03-27-en) (.SPORT)

Little Birch LLC and Minds + Machines Group Limited v. ICANN (Internet Corporation for Assigned Names and Numbers) (.ECO) & Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/various-v-icann-eco-hotel-2015-09-02-en) (.HOTEL)

Gulf Cooperation Council (GCC) v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/gcc-v-icann-2014-12-06-en) (.PERSIANGULF)

Donuts Inc. v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/donuts-v-icann-2014-10-13-en) (.SPORTS/.RUGBY)

Dot Registry, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/dot-registry-v-icann-2014-09-25-en) (.INC/.LLC/.LLP)

Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/merck-v-icann-2014-07-22-en)

(.MERCK/.MERCKMSD)

Vistaprint Limited v. ICANN (Internet Corporation for Assigned Names and Numbers) (/resources/pages/vistaprint-v-icann-2014-06-19-en) (.WEBS)

Better Living Management Co, Ltd. v. ICANN (Internet Corporation for Assigned Names and Numbers) (/en/news/irp/blm-v-icann) (.THAI)

Booking.com v. ICANN (Internet Corporation for Assigned Names and Numbers) (/en/news/irp/booking-v-icann) (.HOTELS)

DCA Trust v. ICANN (Internet Corporation for Assigned Names and Numbers) (/en/news/irp/dca-v-icann) (.AFRICA)

Manwin Licensing International v. ICANN (Internet Corporation for Assigned Names and Numbers) (/en/news/irp/manwin-v-icann)

ICM v. ICANN (Internet Corporation for Assigned Names and Numbers) (/en/news/irp/icm-v-icann)

Exhibit R-28

Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (.RADIO) - Withdrawn

Claimants withdrew their request for independent review on 18 May 2016. The International Centre for Dispute Resolution (ICDR) notified ICANN (Internet Corporation for Assigned Names and Numbers) that the ICDR had closed the administration of the IRP on 31 May 2016.	31 May 2016
• ICANN (Internet Corporation for Assigned Names and Numbers)'s Response to Claimants' Request for Independent Review Process (/en/system/files/files/irp-afilias-et-al-icann-response-redacted-10nov15-en.pdf) [PDF, 1.11 MB] • Exhibits 1 to 11 (/en/system/files/files/irp-afilias-et-al-exhibits-1-10nov15-en.pdf) [PDF, 7.87 MB]	10 November 2015

• Notice of Independent Review Process (/en/system/files/files/afilias-brs-tin-llc-irp-notice-redacted-05oct15-en.pdf) [PDF, 1.49 MB]
• Request for Independent Review Process (/en/system/files/files/afilias-brs-tin-llc-irp-request-redacted-05oct15-en.pdf) [PDF, 790 KB]
  • Annexes 1 - 12 (/en/system/files/files/afilias-brs-tin-llc-irp-annex-1-redacted-05oct15-en.pdf) [PDF, 8.1 MB]
  • Annexes 13 - 23 (/en/system/files/files/afilias-brs-tin-llc-irp-annex-2-redacted-05oct15-
	5 October 2015

en.pdf) [PDF, 10.4 MB]	

Exhibit R-29

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

TRANSCRIPT[*]
HEARING ON AFILIAS' APPLICATION OF 29 APRIL 2020
HELD ON Monday, May 11, 2020

(Hearing conducted by conference call and recorded by Conference America, at the request of the International Centre for Dispute Resolution American Arbitration Association)

[*]Prepared for Dechert LLP by TransPerfect Legal Solutions, 700 6th Street NW, 2nd Floor, Washington, DC 20001.

TOM SIMOTAS: Okay everyone, the conference call is recording. I am going to start with the rollcall again; and on behalf of the tribunal, and may I please have your names for this matter.

PIERRE BIENVENU: Mr. Simotas, this is Pierre Bienvenu. Are you calling upon each party to identify their respective team members.

TOM SIMOTAS: Let us start with the tribunal. Let me do this. We have Mr. Bienvenu, Ms. Kessedjian, Mr. Chernick on the line, and the secretary of the tribunal Ms. Virginie Blanchette-Séguin--I apologize if I mispronounced that--is on the line as well. I am going to ask now for Afilias, who is on the line.

ARIF H. ALI: For Afilias, this is Arif Ali, we also have Alex de Gramont, Tamar Sarjveladze, Rosey Wong, and Anna Avilés-Alfaro. In addition, we have Mr. Ethan Litwin and Ms. Rosa Morales. Thank you.

TOM SIMOTAS: Thank you very much. For ICANN, please may I ask who is on the line?

STEVEN SMITH: Yes, this is Steven Smith and with me are Jeff LeVee, Eric Enson, David Wallach, Kelly Ozurovich, and Amy Stathos, ICANN's Deputy General Counsel.

TOM SIMOTAS: Thank you very much, Mr. Smith. From VeriSign, please may I ask who is on the line?

RONALD JOHNSTON: Ron Johnston and Jim Blackburn, both of Arnold and Porter.

TOM SIMOTAS: Thank you very much. And for Nu Dotco?

STEVEN MARENBERG: Steven Marenberg and Josh Gordon from Paul Hastings.

TOM SIMOTAS: Counsel, thank you very much. I will turn the call over to the Panel and I will be on standby for a couple of minutes to make sure the lines are

stable and connected. I want to thank you all for making yourselves available, and then I will quietly drop off and obviously reach out to the panel for further instructions. The call recording, as always, will be sent to everyone via secured link. Thank you very much. Mr. Bienvenu, the call is yours.

PIERRE BIENVENU: Thank you very much Mr. Simotas, and can the parties hear me well?

[MULTIPLE SPEAKERS]

STEVEN MARENBERG: Yes.

RONALD JOHNSTON: Yes.

ARIF H. ALI: Yes.

PIERRE BIENVENU: Thank you very much, so good day everyone. This procedural hearing is being held in relation to an application by the Claimant dated 29th April 2020 seeking the assistance from the panel regarding what is described in the application as the Respondent's "grossly deficient production" and the Respondent's filing of the privilege log described in the application as insufficiently detailed. Respondent opposed the application, which it has responded by a written submission dated 6th May 2020. Could I ask everybody listening in on this call to put their phone to mute. There is interference. In correspondence between the Panel and the Parties, it was determined that each party would have 30 minutes to address the Tribunal, the Claimant to go first, the Respondent to follow, and the Claimant to have an opportunity to reply using time out of its budget of 30 minutes. The Amici are attending this hearing pursuant to the Panel's decision on Phase I. However, the issues in dispute are issues between the Parties to the exclusion of the Amici. I wish to confirm to counsel that members of the Panel have carefully reviewed the application and the response, including the attachments to these submissions, so

there is no use to repeat what is already set-out in those submissions. The Panel also had occasion to discuss the application during a telephone call yesterday. So, we are well-prepared to deal with the issues and dispute between the Parties. Late last night or this morning, the Parties emailed their respective PowerPoint presentations. I am in receipt of those presentations and I trust that my colleagues are as well. As a last point, in introduction, whenever counsel finds it convenient in the course of their respective presentations, we would appreciate it if each Party could briefly address the question of the applicable law and, more specifically, is it common ground between the parties as we understand it is that the law applicable to the issues raised by the Claimant's application, is California Law and U.S. Federal Law as set out in the Parties' respective written submissions, and of course as that law may be supplemented by the rules applicable to these proceedings. So, this is what I have to say by way of introduction. Unless anybody has anything to raise by way of preliminary remark, I would invite counsel for the Claimant to present their oral submission. Thank you.

ALEXANDRE DE GRAMONT: Thank you Mr. Chairman and good morning to you and Mr. Chernick. Good afternoon to Professor Kessedjian. This is Alex de Gramont and I will be making our opening presentation for Afilias. I understand you have our PowerPoint presentation and I will be referring to that as I go through our opening presentation. In addition --

TOM SIMOTAS: Mr. De Gramont, this is Tom Simotas, I apologize for cutting you off. I think we might have a little bit of an issue with reception.

ALEXANDRE DE GRAMONT: Yes.

TOM SIMOTAS: Ms. Kessedjian, can you hear us okay or --

CATHERINE KESSEDJIAN: It is better when this part of the call is taking place. When Pierre Bienvenu was speaking, it was for some reason very unclear.

TOM SIMOTAS: Okay.

CATHERINE KESSEDJIAN: Now it is better.

PIERRE BIENVENU: This is Pierre Bienvenu, I too throughout my opening remarks could hear annoying interference on the line. We can still hear it now actually.

TOM SIMOTAS: Okay. May I ask that when we are not speaking that everyone put their line on mute. Perhaps that will help with the background noise. Okay, and let us see if that will help with line issues and if you are still getting interference, please do speak up. We might want to give you a chance to drop off and dial in again and then we will see if that works as well. So, I apologize for the interruption. Mr. de Gramont please go ahead.

ALEXANDRE DE GRAMONT: Not at all, and please, everyone feel free to interrupt me if you cannot hear me. So, the Panel and counsel should have the PowerPoint slides that we sent around. I am going to start on slide two. You should also have three annexes, which I am not going to ask you to look at during my part of the presentation, but the PowerPoint slides refer to them. Annex 1 is simply the same Attachment C that we submitted with our application. It is a privilege log put in chronological order, and we simply added numbers for ease of reference. Annex 2 is a subset of that and it includes entries that refer to communications to Verisign, NDC and .WEB applicants. And Annex 3 is a re-organized version of Annex 1. It is color-coded based on categories I will address in the slides.

So, let me begin with a quick overview of our presentation. I am going to start with some context and background which are critical for

understanding the privilege issues in our application. Then, I am going to address what we call the missing documents or communications which are specifically referred to in other documents that ICANN has produced or has included, or referred to in their privilege log but which we do not have. I will then address the multiple privilege entries for correspondence between non-lawyers. After that, I will summarize the multiple privilege entries dealing with ICANN's investigation and supposed deferral determination, and then I will briefly conclude with Afilias' requested relief. So, I am turning to Slide 3, [which] begins with context and background, and with some basic principles. This is from the first IRP decision ever rendered in 2010. It is the majority decision by Judge Schwebel and Professor Paulsson in ICM v. ICANN, and it says: "ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority" -- regulatory authority – "of vast dimension and pervasive global reach in ICANN". And subsequent IRP panels have agreed. Next slide. ICANN's own articles and by-laws confirm that it is the global regulator and gatekeeper to the domain name system of the internet. So, the articles say ICANN "shall pursue the charitable and public purposes of lessening the burdens of government" -- lessening the burdens of government -- "by carrying out its mission." So, ICANN has taken on the burdens of government, the regulatory burdens. ICANN's by-laws state that its mission includes "coordinating the allocation and assignment of names and the root zone of the DNS." So, ICANN, and ICANN only, distributes the exclusive registry rights to billions of dollars' worth of TLDs. These are exclusive rights for the entire world's principle method of communication, which now of course, is the internet. Next

slide. Now, this is the first IRP concluded under ICANN's new by-laws, or the first IRP proceeding under ICANN's new by-laws and in 2016, in anticipation of the U.S. Government transferring all of the Department of Commerce's IANA functions to ICANN, the ICANN community decided that "improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the U.S. Government provided." So, next slide. And so, ICANN's by-laws were revised to strengthen ICANN's accountability mechanisms, how its decision-making processes must be conducted and scrutinized. So first, the drafters of the new by-laws strengthened the core values and commitments with which ICANN "must operate." Second, the IRP now covers "actions or failures to act by or within ICANN committed by the Board," and here's the new part, "individual Directors, Officers, or Staff Members that give rise to a dispute," which is defined as including any "action or inaction that violated the articles or by-laws." So now, IRPs are extended beyond simply the board and to individual directors, officers, and staff, and there is no exception for legal staff, especially when they are carrying out ICANN's mission. Next slide, please. Now, this IRP is about the action and inaction of ICANN's staff and the ICANN Board. What you see on this side is a summary of our claims as stated in our reply memorial. The IRP "is about ICANN staff's flawed analysis of the New gTLD Program Rules, its biased and inadequate investigation of NDC's and Verisign's conduct, its recommendation, if one was made, to the ICANN Board to take no action, its decision without Board approval or oversight to proceed with contracting, and the Board's complete abdication of its responsibility to ensure implementation of the New gTLD Program Rules in

accordance with ICANN's articles and by-laws." And as we'll discuss, virtually all of the documents that would shed light on those claims have been withheld as privileged. Next slide, please. Afilias' claims go to the heart of ICANN's decision-making process. The by-laws provide "in performing its Mission, ICANN must" -- must -- "make decisions" -- make decisions -- "by applying documented policies consistently, neutrally, objectively, and fairly without singling out any party for discriminatory treatment." The by-laws go on, "ICANN and its constituent bodies shall operate to the maximum extent feasible, in an open and transparent matter, and consistent with procedures designed to ensure fairness." Next slide, please. ICANN's defense goes to its decision-making process. ICANN claims in its response that at some unspecified time and in some unspecified manner, its board determined to "defer such consideration of Afilias' claims until this Panel renders its final decision." Now, until we saw this assertion in ICANN's response, we had no idea that ICANN had made any sort of determination of that type. What we knew was that in August 2016, Afilias had raised concerns to ICANN about NDC's application and bid. We knew that in September 2016, ICANN promised an "informed resolution" of Afilias' concerns and that Afilias would be updated. We knew that there was a yearlong hiatus during the U.S. Department of Justice's investigation under U.S. antitrust laws, and we knew that after the DOJ investigation completed in January 2018, we repeatedly -- we meaning Afilias and its counsel -- repeatedly asked for updates and we didn't get any. And then, in June 2018, without any warning or explanation, ICANN took .WEB off hold, and we have no insight whatsoever into any of the decision-making processes that led ICANN through this course.

Next slide, please. This is a quote from the Gulf Cooperation Council versus ICANN case, and it is relevant here. There, the panel said, "We have no evidence or indication of what, if anything, the Board did asses in taking its decision. Our role is to review the decision-making process of the ICANN Board, which here was virtually non-existent. By definition core ICANN values of transparency and fairness were ignored." And I will add that this was before the new by-laws, so your role as the IRP Panel is to review the decision-making process of the ICANN Board, as well as staff. Now, I will add that it is not clear from the GCC decision whether ICANN failed to produce evidence about its decision-making process based on privilege or for some other reason, but the result is the same. We have no idea, no idea of what the staff or the board did in its decision-making processes or why. Everything has been shrouded in claims of privilege. Now, with that, let us turn to the particular deficiencies we have identified. So, going to the next slide, which is Slide 11, there are a number of communications referred to in the documents that ICANN has produced or in the log entries themselves, but the communications or documents reflecting such communications have not been produced. So, for example, ICANN in its 6th May letter to the Panel says, "There are no documents" -- no documents -- "reflecting a request for information from ICANN to Verisign regarding the DAA," and yet we know from Mr. Johnston's 23 August 2016 letter to Mr. Enson that Mr. Johnston said that counsel for Verisign and NDC "jointly submit this document to you in response to your request for information regarding the agreement between NDC and Verisign relating to the .web gTLD." Now, unless Mr. Johnston was inventing the request for information, which seems unlikely, there must have been a request. It is extraordinary to us -- it would be extraordinary to us if that request were made orally. Is it possible that Mr. Enson or someone else at ICANN called Mr.

Johnston and said, “There has been a complaint? Can you send us your defense and we’ll take it into consideration?” Again, that would seem to us extraordinary but even so, it would, or it should have been, recorded in some sort of record, even if only a time record. Yet, here we are, a critically important document in the case withheld from us until the Procedures Officer ordered it produced in the proceedings in December 2018. We have absolutely no idea how it came about. I will note that Mr. Enson is listed 10 times on ICANN’s log between 11 and 23 August, including as a CC. The descriptions are so vague and generic that we have no idea what they consisted of or whether there is any reference in there to this request to Verisign and NDC but, again, this is part of the decision-making process that is at issue in this case, and it has been hidden behind asserted privileges.

Slide 12. According to ICANN’s 6th May letter, ICANN “had no communications with the Amici regarding Verisign’s interest in .WEB,” and yet, we know from documents that have been produced, for example, Mr. Rasco sent an e-mail to Ms. Willett of ICANN on 31 July 2016 and he wrote, “I wanted to let you know” -- and by the way, this is several days after NDC won the auction -- Mr. Rasco writes, “I wanted to let you know that Verisign intends to issue a press release tomorrow regarding the .web TLD. I understand that someone from Verisign is or will shortly be contacting Akram.” And he is referring to Akram Atallah, the President of ICANN’s Global Domains Division. Now, Mr. Atallah is listed as sending or receiving twelve documents on the log in the two-week period after the 31 July e-mail, including where in-house counsel are merely listed as CCs. The descriptions are too vague to know whether they concern any communications with Verisign, but this raises the question, Was Mr. Rasco incorrect? Did no one from Verisign contact Mr. Atallah? And if Mr. Atallah was contacted, did he really keep no record of this, Verisign’s acquiring for $135,000,000

the rights to .web under the guise of NDC's application?" The executives of Verisign, the dominant industry player, so chummy with Mr. Atallah that they could call him and have an off-the-record chat about Verisign just having acquired .web? One would think that in an open and transparent organization, such communications would be reported in some fashion and perhaps they are referred to in the various privileged entries, but there is not sufficient description for us to know. Next slide, please. ICANN says again it had no communications with the amici regarding its interest in .web, but ICANN's privilege log lists 16 separate entries regarding "correspondence with Verisign" and "correspondence with NDC," and 13 additional entries referring to "correspondence with .web applicants." And we have listed them in Annex 2. So, these allegedly privileged documents refer to nearly 30 pieces of correspondence with Verisign, NDC, and .web applicants from 14th August 2016 to 28th February 2018. We know about a handful of communications. There is Mr. Johnston's 23 August letter, Verisign's and NDC's responses to the questionnaire from Ms. Willett. Mr. Marenberg wrote a letter to ICANN in, I believe, February 2018, and maybe these entries are referring to those same several pieces of correspondence over and over again over the course of roughly two years, but the Panel should at least order ICANN to identify the correspondence that is being discussed so that we can know, and we can know whether there are other communications out there that we have not seen, and then we can know the context of the allegedly privileged documents that are discussed in those communications.

Next slide, please. There are numerous log entries for correspondence between non-lawyers, and we recall what the panel said in Corn Lake v. ICANN, "The mere sending of a communication to or from an internal ICANN attorney does not render that communication privileged. The mere fact that an in-house ICANN attorney is copied

on an email, including as one of many addressees, is insufficient by itself to establish the attorney-client privilege." Now, ICANN has 79 entries for correspondence between non-lawyers. They are set forth at the beginning of our Annex 3. They are shaded in green. Let us take a look at just a few of the entries. So, next slide, please. You will see that the very first entry is a 29 July 2016 email from S. Woolf, who is a member of the board, to Mr. A. Maemura, who is also a member of the board, and Steve Crocker and Lauren Allison and the ICANN Board are copied. I believe that Mr. Crocker and Ms. Allison are also Board members. John Jeffrey, the General Counsel, is a BCC, a BCC and yet, this email purports to be seeking legal advice from J. Jeffrey regarding auction rules. Now, why on earth is Ms. Woolf seeking legal advice from Mr. Jeffrey by writing another Board member and copying the entire Board, and putting Mr. Jeffrey as a BCC? And look at the subject. This is advice regarding the auction rules. It apparently applies or asks about the application of the auction rules, which is what ICANN is supposed to do. ICANN is supposed to explain how its auction rules are to be applied so that other bidders can follow them so that ICANN's interpretation can be scrutinized. So, on the face of this document, ICANN has simply not met its burden of establishing privilege. The same with respect to the next document on this slide. C. Chalaby, a Board member, writing to the president of ICANN, Mr. Atallah. Several people are copied, two of them happened to be [in-house counsel] and the summary is "email seeking information for the facilitation of legal advice" -- the facilitation of legal advice. How does that fall into any category of privileged communication? Again, ICANN has failed to meet its burden here.

Moving to the next slide, just a couple more examples, this is a 5 August 2016 email from Mr. Atallah to Christine Willett. You will recall that Mr. Rasco wrote to Ms. Willett several days before that, that someone from Verisign would be

contacting him. Is that what this communication is about? We cannot tell. And furthermore, again, there are two ICANN in-house lawyers copied and yet the description is “email seeking legal advice from A. Stathos in anticipation of litigation regarding registry agreement with NDC for .Web.” Again, why is Mr. Atallah writing to Ms. Willett asking Ms. Stathos for -- as a copyee -- for legal advice. And then, finally among the examples, the last one is No. 64. These are two non-lawyers. No ICANN lawyer in-house or outside is identified. This email is “discussing draft letter to Afilias prepared at the request of ICANN counsel in anticipation of litigation regarding .Web contention set.” And really? Mr. Hemphill of Afilias has written a letter expressing concerns. Two ICANN staff people are drafting a response and that is privileged? Here again, ICANN has not met its burden of establishing privilege and that is true with respect to all of the green-coded documents in our Annex 3.

Next slide please. ICANN has squarely put its decision-making at issue in this IRP, and the purpose of an IRP is to examine ICANN’s decision-making processes. So, we learned in ICANN’s response that the ICANN Board determined again at some unspecified date and time and in some unspecified manner that they would defer consideration of Afilias’ concerns until this Board [sic] renders its final decision. Again, we do not know when. We do not know how. We do not know on what basis. In ICANN’s 6 May letter, we are told that “the ICANN Board engaged the assistance of ICANN’s in-house and external counsel in determining that ICANN should wait to make any decisions until accountability mechanisms had run their course.” Now ICANN cannot hide its decision-making processes behind privilege. If ICANN wants to outsource its decision-making processes to counsel, then there must be one of two consequences: Number one, ICANN can either waive the privilege by putting the decision-making

process at issue as part of its defense or number two, ICANN has simply not conducted its decision-making processes in an open and transparent [manner] as it is required to do. Next slide please. Similarly, ICANN cannot hide its due diligence by staff behind assertions of privilege. Again, we are told in the response "as part of ICANN's due diligence into the issues raised by Afilias and Ruby Glen in 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC and Verisign, seeking input regarding the .Web auction, the NDC/Verisign agreement, and the alleged violations of the Guidebook. These questions were designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen. In ICANN's 6 May letter, we are told that all this due diligence is also shrouded in secrecy by asserted privilege because "ICANN's in-house and external counsel were intimately involved in investigating the allegations surrounding NDC's and Verisign's conduct." So here again, this is supposed to be an investigation by ICANN to ensure that it is complying with its bylaws and articles to make sure that its making decisions by applying its documented policies, but all of this is in a black box because of the assertions of privilege.

Next slide please. ICANN asserts in its response "the facts and claims supporting Afilias' allegations of NDC's Guidebook violations were known to Afilias and set forth in its August and September 2016 letters to ICANN." The Panel will of course be able to examine whether that is correct or not, but for now the question is, what did ICANN do in response to those letters -- in response to those concerns? Afilias requested documents referring to the letters. ICANN refused to produce them and the Panel ordered them to be produced nonetheless and yet all of ICANN's communications about Afilias' letters have been designated as privileged, so we have absolutely no insight into what if anything ICANN concluded based on the letters. In

the interest of time, I am going to skip over this slide because I think, it is self-explanatory and based on it, we do not anticipate that ICANN will be submitting documents in support of its brief given that ICANN takes no position with regard to the contentions that the Amici violated the Guidebook. Slides 21 through 23 set forth our requested relief and we have stated our requested relief based on categories of documents. As the Panel will see, in some instances we have asked that the Panel order ICANN to produce all communications such as those that are clearly not privileged between lawyers and non-lawyers. In other instances, we have asked the Panel to either order ICANN to produce all communications or to provide more elaborate, informed privilege descriptions including, whether the documents that fall into the categories of investigation or due diligence. I am not going to go through each of them in the interest of time, but obviously, we are happy to address any of these should the Panel have questions on them. Thank you.

PIERRE BIENVENU: Thank you Mr. de Gramont. This is Pierre Bienvenu speaking. May I ask my colleagues if they have questions for counsel for Afilias starting with Ms. Kessedjian.

CATHERINE KESSEDJIAN: I have no questions. Thank you.

PIERRE BIENVENU: Mr. Chernick?

RICHARD CHERNICK: None at this time Pierre. Thank you.

ALEXANDRE DE GRAMONT: And if I may Mr. Chairman by my count, I think we have six minutes left for a rebuttal. I am not sure who is keeping time but at least according to my stopwatch, I went about 24 minutes.

PIERRE BIENVENU: Very good. So, I have a number of questions –

[OVERLAP, TIME: 00:39:50]

JEFFREY A. LEVEE: Mr. Chairman, I am sorry this is Jeff LeVee. I do not mean to be a pest, but according to my watch, you used 29 minutes.

ALEXANDRE DE GRAMONT: I am not sure if he started the clock before -- there was an interruption when we are having communication difficulties. We started my stopwatch right after that.

JEFFREY A. LEVEE: Okay.

PIERRE BIENVENU: Mr. de Gramont, I have questions for you, but I think I will defer asking them until we have heard from your friends [on behalf of ICANN].

[OVERLAP]

ALEXANDRE DE GRAMONT: Thank you Mr. Chairman.

PIERRE BIENVENU: On behalf of the Panel, Mr. de Gramont, thank you very much for these submissions. Who will address us on behalf of ICANN?

STEVEN L. SMITH: Yes. This is Steve Smith. Eric Enson will be addressing the adequacy of ICANN's production, and David Wallach will be addressing the adequacy of ICANN's privilege log.

PIERRE BIENVENU: Thank you very much, and I then understand that you will start Mr. Enson?

ERIC ENSON: Yes, Chairman Bienvenu and members of the Panel, thank you very much. As Mr. Smith said, I will address the production issues, Mr. Wallach will address the privilege issues and in particular, the applicable law issues, but if you would move with me to the PowerPoint presentation that we provided late last night and turn to Slide No. 3. I would like to begin with the most relevant procedural order, which is Procedural Order No. 2 issued by the Panel in March of this year. In that

order, the Panel called on ICANN to produce non-privileged documents responsive to any of Afilias' 18 document requests to the extent those documents existed and were within the possession, custody or control of ICANN. Procedural Order No. 2 defines documents within ICANN's control as those documents that are "in the possession of third parties – like subsidiaries, agents or advisors – who, because of a legal or relevant contractual relationship with ICANN, have in their possession documents which, effectively, are under the control of ICANN. Moving to Slide 4, please. We thought it important to provide a high-level summary of some of the specifics of ICANN's document collection because the search was robust and it was specifically designed to identify responsive materials. First, ICANN actually performed two separate searches: one before the issuance of Procedural Order No. 2, and then another search was performed after the Order, just to ensure that we captured all documents responsive to that Order to the extent they existed. And even though Afilias requested only 10 specific document custodians in their requests, ICANN extended its search to 21 document custodians based on ICANN's and its counsel's independent evaluation of which people or databases may have responsive materials.

[OVERLAP]

PIERRE BIENVENU: Mr. Enson, I apologize for interrupting you. This is Pierre Bienvenu. Did you disclose to your friends opposite the names of the 21 document custodians whose files you searched?

ERIC ENSON: We did not disclose those names. It was never requested of us by Afilias. They, in their document requests, there were 10 specific custodians that they wanted searched for particular requests and we

did that. But we then expanded the search for all requests to 11 additional custodian and databases and we did that based on our own internal analysis and the request never came from Afilias to disclose that information. Here on this Slide, Slide No. 4, is a sampling of some of the custodians and we want to provide this information because these custodians cover a large swath of the type of people and locations where responsive materials would most likely exist. So, for example, the custodians included key executives and officers such as the President of ICANN's Global Domain Division, Akram Atallah and ICANN's CEO, Fadi Chehadé. Custodians included Board Members such as Mr. Crocker and Mr. Disspain. A number of ICANN's attorneys, were document custodians such as the General Counsel of ICANN, the Deputy General Counsel of ICANN and a number of Jones Day lawyers. ICANN staff members directly responsible for New gTLD Program such as Ms. Willet and Mr. Namazi were also document custodians. Both of ICANN's ombudsman were searched for responsive documents. And then finally, we searched certain of ICANN's inboxes and databases for responsive documents just to make sure that we did not miss anything that might not have been in the possession of any of these individual custodians. And moving on to Slide 5, this is a high-level summary of the review and production process, which is consistent with all best practices for identifying and producing responsive materials. Specifically, we employed a team of outside and in-house counsel to conduct a multilayered review of the collected documents in order to identify what materials may be responsive. We knew that there was a possibility that a number of responsive documents could be privileged because we collected documents from ICANN's attorneys and ICANN was engaged in ongoing litigation with Ruby Glen

regarding .Web at the time that Verisign announced the Nu Dotco agreement. So, all responsive documents were reviewed for privilege, again, using a multilayered review by outside and in-house counsel. We then produced the documents that were responsive and we logged the documents that were privileged and we provided that information to Afilias consistent with the directions of Procedural Order No. 2. And lastly, I think it is important to note that, all attorneys involved in the document review process are bound by their ethical obligations and California's Rules of Professional Conduct to not suppress evidence and to produce all non-privileged responsive documents. And that is a duty that both ICANN's in-house attorneys and Jones Day attorneys take very seriously.

Moving on to Slide 6, please. We come to one of Afilias' chief claims, which is that ICANN was required to search the Amici, Verisign and Nu Dotco, for any documents within their possession that might be responsive to Afilias' requests. But the Interim Supplementary Procedures, the IBA Rules and federal law, all note that document productions are limited to what is within a party's possession, custody or control. And Afilias has made this argument on two occasions and on both of those occasions this Panel rejected the argument. Specifically in Procedural Orders No. 2 and 3, the Panel ruled that ICANN's document production obligations were limited to documents within its possession, custody or control. And in applying that standard here, ICANN does not have possession, custody or control of Amici's documents and there is no legal or contractual relationship between ICANN and Amici that would place documents in their possession under ICANN's control. So, that we think

should end the debate on Afilias' third attempt at getting ICANN to search Amici.

Now, turning to Slide 7, please. I want to deal with some of the specific complaints that Afilias has made. And the point here is that many of the documents that Afilias seeks just do not exist. No documents were produced in response to Requests No. 2, 8, 10(b), or 20. All which seek certain communications between ICANN and Verisign or NDC because those documents-- there are no documents that reflect these kinds of communications with the Amici. And I want to quickly respond to Mr. de Gramont's argument regarding the "request for information to Verisign" which is referred to at Slide 11 of his presentation. The request was made by me and it was done over the phone. The lawyers … -- ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this. Likewise, the arguments about someone from Verisign contacting Mr. Atallah at Slide 12 of Afilias' presentation is misplaced. We searched Mr. Atallah's records. We knew that there was an email referring to some sort of contact. We searched for that contact. We did not find it. There was no document reflecting any such communication between Mr. Atallah and Verisign of the sort that Afilias is suggesting. Although, Mr. Atallah is no longer employed by ICANN, we do believe that to the extent there was any sort of communication like this, that was also by phone.

Moving on quickly to Slide 8 because I know my time is getting short, I want to provide Mr. Wallach with enough time to address the privilege issue. Many of the documents that Afilias seeks with the application were actually produced to

Afilias. Request No. 3 for example, seeking communications on or after 23 August 2016, from ICANN and Amici concerning Verisign's interest in acquiring the rights to .Web. Those documents were produced. They were a handful of communications such as Verisign's and Nu Dotco's response to ICANN's questionnaire in September of 2016, those were produced to Afilias. The letter from Mr. Marenberg that Mr. de Gramont referred to in his presentation, that was produced. Request No. 21. Multiple communications between Ms. Eisner and Mr. McAuley were produced to Afilias. And finally, another critical point is that, a number of the documents that Afilias' seeks are privileged. They're covered by attorney-client privilege and Mr. Wallach will address that point now.

[OVERLAP/MULTIPLE SPEAKERS]

DAVID WALLACH: Thank you. This is David Wallach. Before picking up with the PowerPoint presentation, I just want to address a couple of things, preliminarily. First, I want to answer the Panel's question regarding what law governs. And the answer is California law supplemented by federal law. ICANN is organized under California law; it is based in California; its in-house and external counsel are California attorneys; and the communications and documents in question occurred in and/or were created in California. We assume Afilias agrees that California law governs because its Brief is based almost entirely on California and federal law, with a couple of unexplained detours into English law. So, I am not going to spend more time on this issue unless we hear otherwise from Afilias.

The other issue I want to address or two other issues I want to address before picking up with the Slides. One is Afilias' relief requested. Now in its presentation, we saw that Afilias has five claims for relief. These differ substantially from the three claims for relief that Afilias sought in its Application.

And I want to make two points about that: first, it is improper; Afilias cannot be allowed to change the basis and nature of its Application in a presentation that it first provided to ICANN at 10:00 p.m. on Sunday night in California, 1:00 a.m. on Monday morning on the East Coast, before a hearing that is scheduled to start at 7:00 a.m. the next morning. In either purpose or maybe just in effect, this sandbags ICANN and ICANN has had no fair opportunity to respond to these new requests for relief. And the second point I wanted to make about the request for relief, is the fact that Afilias finds it necessary to change its requests for relief at the eleventh hour -- literally -- in this matter, is an implicit acknowledgement that its original requests for relief are not well-founded.

One last point I want to make before and then I will pick up with the presentation. I want to address Afilias' contention that the documents in green on its Annex 3 are what it says, are clearly non-privileged and it is because it says, they are not communications involving counsel. And ICANN accepts that CC-ing counsel on an otherwise non-privilege document does not make that document privileged. ICANN is not claiming privilege on that basis. But the fact that counsel appears on an email as a CC, rather than on the TO or the FROM line of the email does not mean that that is not an attorney-client communication. In most instances, these are attorney-client communications and we all use email every day and we know how email works. Emails are frequently conversations among multiple recipients who are included in the TO lines or the CC lines and when a person responds to an email, often the message will be addressed to a person that appears on the CC line and we won't bother to delete the person from the CC line and replace them in the TO line, because everyone understands how this works. And this is the case with most the documents that Afilias seeks to challenge. And to take the example that Afilias used, which appears on page – on Slide

15 of Afilias' presentation and I think it is the first entry on their Annex. That is an email on which the ICANN Board is CC'd. Now John Jeffrey, who is ICANN's General Counsel, and Amy Stathos, who is ICANN's Deputy General Counsel, are both on the ICANN Board ListServ. John Jeffrey was also BCC'd on that message. I do not know why that is, but he was CC'd. So, everyone on the message, every recipient of that message knew that John Jeffrey was on it and the email is an email seeking legal advice from John Jeffrey. These columns, the TO, FROM and the CC and BCC are automatically populated metadata. They are based on where the people appear on the email message, not the person to whom the email message is actually directed. So, this is an email to John Jeffrey, and that is true of nearly every email that Afilias claims is clearly between non-lawyers. They are emails that actually are to or from lawyers. And then the second point about that, and I will get to this in more detail later in the presentation, is the documents may well be privileged even if no lawyer is involved in the communication and like I said, I will get back to that. Now, I am going to go back --

[OVERLAP]

PIERRE BIENVENU: Mr. Wallach, this is Pierre Bienvenu. While we are on page 15 -- listed there, what about the second that was commented by your friend Mr. de Gramont and he took issue with privilege being claimed because an email seeks information "for the facilitation of legal advice." Could you comment on this?

DAVID WALLACH: Yes, communications among corporate employees or Board members, even if they did not involve counsel and these do, which are made for the purposes of gathering information in response to an attorney's request to -- or in order to request legal advice from an attorney -- are privileged. This issue was not specifically raised by Afilias' Application, but I will note that we cite several authorities that go directly to this issue in our Response and that is at page 14 and

the authorities are cited in footnote 34. And in particular, the SmithKline Beecham case says, “A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds. In the case of a corporate client, privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys.” So, emails gathering information for the purpose of seeking legal advice are privileged.

PIERRE BIENVENU: So, you are saying then that the expression or in this case, the expression for the facilitation of legal advice is about evidence gathering?

DAVID WALLACH: I do not know if it is gathering evidence or simply information but yes. It is about gathering information for the purpose of obtaining legal advice.

PIERRE BIENVENU: And Mr. Wallach, the quote from Corn Lake that appears on page 14, I understand from your earlier remarks that you do not take issue with the propositions cited there on page 14 --

DAVID WALLACH: No, we do not take issue.

[OVERLAP]

PIERRE BIENVENU: -- that would reflect the arguments about your document review.

DAVID WALLACH: Absolutely, we do not take issue with the principle that simply CC-ing an attorney on a non-privileged communication makes it privileged. And Afilias cites Corn Lake as somehow suggesting that this is a practice, it is something that ICANN did or does. If you read Corn Lake, it is clearly not suggesting that. It is just laying out some black letter principles and we agree with those principles and we applied those principles. Unless you have any more questions, Chairman Bienvenu or other members of the Panel, I will move back to the slide deck now.

PIERRE BIENVENU: Yes, please go ahead. Thank you.

DAVID WALLACH: Okay, so we left the slide deck at Slide 10. I have taken up some time responding to matters that came up in Afilias' presentation. So, I am going to skip over the first few slides and I will pick up at Slide 13. This slide sets out the five particular arguments that Afilias makes in seeking to overcome the privilege and we'll notice that in their presentation, they really didn't go into the particulars of these arguments because I think the arguments are very difficult to defend. Afilias stays at a very high level of generality. I am not going to read this slide but I will address each of these arguments in turn starting with the level of detail for document description.

Now, the Panel set out in paragraph 16 of Procedural Order No. 2, the specific information that needed to be included in the privilege log. I quote that here. I won't read it. ICANN complied with each of these requirements. All of the information that the Panel said should be included in the privilege log is included in ICANN's privilege log. Now, moving out to Slide 15. Afilias complains about every single document's description in ICANN's log. It doesn't identify a particular document and says we need more information about this or we need more information about that. Its challenge is completely general and categorical. But Afilias doesn't cite a single case holding that the document's descriptions in ICANN's logs are insufficient and ICANN cites several cases expressly approving document descriptions that are not meaningfully distinguishable from ICANN's.

Slide 16, this is one of the cases that ICANN cites, Mitre Sports International. I put it here because it is the most recent and it provides a helpful summary of the law. It says that "identifying e-mails in a privilege log as seeking, transmitting or reflecting legal advice--which is how HBO describes many e-mails--

provides a sufficient description to sustain an assertion of privilege." And then it cites the Beacon Hill case, which is also discussed in our Brief, as explaining that although the subject matter of the legal advice was not described, disclosure of additional information as to the subject matter would come perilously close to requiring disclosure of the substance of the privileged communications. And then it cites the Carl Zeiss case, which is also cited in our letter, and that is to the same effect. Now, these are federal authorities and as I have said at the beginning, California law here governs primarily, supplemented by federal law. However, the nature of -- the way it works in California is that trial court's opinions are not published and federal trial court's opinions are and the court of appeals' opinions don't often descend to this level of detail, but California practice is consistent with federal practice and to the extent it differs -- California law differs -- it provides an even higher level of protection.

Slide 17. Afilias as I said challenges every single document description on ICANN's log and I obviously can't go through all of those. But here are a couple of examples and these are not examples that I cherry picked, these are the examples that Afilias specifically references in its letter. The first, Document 7757, is an email seeking legal advice from A. Stathos, which is Amy Stathos, ICANN's Deputy General Counsel, regarding correspondences with Verisign. And the second is an email from ICANN's Deputy General Counsel providing legal advice in anticipation of litigation regarding the .web contention set. So, these descriptions identify that the documents either seek or provide legal advice as the case may be, where they were created in anticipation of litigation they provide that information. They include the sender and all recipients of the document, the type of the document, the date of the document and they provide a general description of the topic of the legal advice that is being

sought or provided. And that provides more information than the descriptions that were approved in Mitre Sports, in Beacon Hill and in Carl Zeiss. And Afilias does not cite any authority to the contrary. The two cases that it cites are inapposite. I am not going to go into the details of those but they're dealt with in pages 9 through 10 of our letter.

Afilias also complains that ICANN's log does not establish that counsel were acting in a legal capacity. Afilias did not address this issue in its presentation so I take from that, that it is not seriously pressing the argument but I will address this briefly. First, as a matter of fact, Afilias is simply wrong. Each document description states that the document was created for the purpose of providing legal advice, that it is seeking legal advice, that it reflects advice or a similar description. That establishes that the document is created in a legal capacity. Second, it is after ICANN has set -- has established a prima facie claim for privilege as it has done in its log, the burden shifts to Afilias to come forward with some evidence that the documents were created in something other than a legal capacity or otherwise the privilege doesn't apply and that's established, for example, by the Coleman case which we cite and quote here. I am not going to read the quote but the important point is that Afilias has made no showing. It has produced no evidence. It has not even said what non-legal transaction or capacity these documents could possibly relate to. Its assertion is pure speculation.

Slide 20. Afilias -- this is Afilias' next argument. It argues that many documents likely include facts and it cites the principle that attorney-client privilege and the work product doctrine protect communications and documents, they do not protect facts. And then Afilias draws from that the conclusion, which is mistaken, that the documents should be produced in redacted form to reveal the facts that are

being communicated, analyzed or considered. This appears in pages 7 through 8 of Afilias' letter and in response to 123 separate entries on ICANN's privilege logs, and here is an example.

This is a memorandum to ICANN's in-house counsel prepared by outside counsel providing legal advice in anticipation of litigation regarding the .web contention set, and Afilias objects that "given the nature of the document it is impossible that the document does not contain facts related to the dispute or otherwise non-privileged information. It should be produced in redacted form."

Now, Afilias' claim that protected materials should be redacted and produced to reveal facts is just wrong. It just misunderstands the way privilege works and here are a few quotes that establish that. The first is from the California Supreme Court, which is on Slide 22, "The attorney-client privilege attaches to a confidential communication irrespective of whether it includes unprivileged material." And then there is a quote from a Federal District Court, "Even if the privilege does not attach to the underlying fact, communications of that fact are privileged." And then another Federal District Court, "There is no requirement that the communication involve only legal issues, and factual communications made for the purpose of facilitating legal representation are also protected."

Slide 23. Now, Afilias' argument here is so fundamentally misguided that its own cases contradict it. The first case is the State Farm [Fire] and Casualty Company case. I will not read that quote but it contradicts Afilias' position. The next one is from the United States Supreme Court and it says, "The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, What did you say or write to the attorney? but

may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication with his attorney."

Now, Afilias is asking that ICANN be forced to disclose what it said to its attorney or what its attorney said in response to the extent such statements could be characterized as facts. This is exactly where Afilias' own cases say cannot be done. Afilias can question witnesses about non-privileged facts, but it cannot obtain privileged document on the basis that they contain facts. And this is set out in another case, Lopez v. Vieira which is set at page 12 of our Brief, very clearly where it says that "Opposing parties may question corporate employees and officers to ascertain facts relevant to the pending litigation even if the particular fact was disclosed to counsel in a communication protected by the attorney-client privilege. But opposing parties may not simplify the discovery process by demanding copies of attorney-client communications in which the facts are included." Now again, that is exactly what Afilias is demanding here. This is not a close call. The authorities, including Afilias' authorities, clearly contradict this argument.

Slide 24. Afilias' next argument is that privilege can never apply to communications among non-lawyers. And I talked about this briefly at the beginning. This is where -- this sets out where Afilias has made its argument, the terms that it has made it in. I will not read that. Slide 25 provides an example of a communication where this argument is made, and an in many instances, it is just flat wrong on the facts and this is one of them. This is a communication to Amy Stathos from Shawn White and it copies Christine Willet, Akram Atallah, Russ Weinstein and Daniel Halloran. So this is a communication from ICANN's associate general counsel to its deputy general counsel, copying its president of the Global Domains Division and the type is kind of small, but if you see to the right, we have Afilias' objection which is that "the

correspondence is non-privileged as it is not an exchange between lawyers and clients." So, that assertion is impossible to understand. This is clearly an exchange between lawyers and clients and the contrary position makes no sense.

PIERRE BIENVENU: This is the Chairman here. Perhaps this was because mistakenly, there was no asterisks next to Shawn White's name.

DAVID WALLACH: That is an error --

PIERRE BIENVENU: Something I noted when I reviewed the schedule.

DAVID WALLACH: Yes, that is an error but there is an asterisk next to Amy Stathos' name as well as an asterisk next to Daniel Halloran's name. And so, even if Shawn White were not ICANN's associate general counsel, as he is, this still would clearly be a communication between lawyers and clients. So, the lack of an asterisk is our error, but I don't think that can explain the objection.

Slide 26. We do acknowledge, however, that there are a small number of documents that are not communications between or including lawyers and over which privilege is claimed and privilege is properly claimed. And -- Afilias takes the position that if a lawyer is not involved in the communication, it can never be privileged and again, that is just flat wrong as a matter of law. We cite two cases here that stand for that proposition. The first is from the California Court of Appeals and it says that "If legal advice is discussed or contained in the communication between non-legal Zurich employees, then to that extent, it is presumptively privileged." And the next case, Datel Holdings from the Northern District of California says, "The attorney-client privilege may attach to communications between nonlegal employees where: (1) the employees discuss or transmit legal advice given by counsel; or (2) an employee discusses her intent to seek legal advice about a particular issue." So, there is no ambiguity on this point that

attorney-client privilege extends to certain communications that do not include lawyers and Afilias literally cites no authority for its position.

Slide 27. This is Afilias' next argument which is that, in Afilias' view, work product protection applies only to documents that reveal legal strategy. This is another argument that is just simply and clearly wrong. California's work product rule is memorialized in Section 2018.030 of the Code of Civil Procedure. It says that "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances" and then Section b, "The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in injustice." So, documents that reflect an attorney's legal strategies receive absolute protection and all other documents created by an attorney receive qualified protection and that protection applies not just to the documents created by an attorney him or herself, it also applies to documents created for an attorney by people acting as the attorney's agents, consultants or in other capacities and that's established by the Citizens for Ceres case cited at the bottom of this Slide.

Slide 28. Federal Law is substantially in accord and that is memorialized in Federal Rule of Civil Procedure 26(b)(3). I set that out here. I will not read it because I am getting short on time, but like California Law, Federal Law distinguishes between qualified and absolute work product protection. Absolute protection applies to documents that reveal an attorney's strategies on mental impressions; qualified protection can be overcome only on a showing of substantial need or an inability to obtain the information from another source.

So, Afilias' work product arguments are simply indefensible. It is not true that work product protection applies only to documents that reveal an attorney's legal strategy. Afilias also asserts that documents that reveal an attorney's legal strategy can be discovered on a showing that the information is unavailable from other sources. That is also not true. Documents revealing legal strategy are absolutely protected and cannot be discovered under any circumstances.

Okay, moving on to the next slide. These address Afilias' waiver arguments. Afilias' first argument is that ICANN waived privilege for all of its documents because ICANN's privilege log purportedly is deficient. Afilias does not press this argument in its presentation, so I assume it is not seriously maintaining it. But ICANN's log is not deficient for the reasons I have already discussed. It provides all of the information necessary to establish privilege and even if it were in some manner deficient, waiver would not be an appropriate or even an available remedy and the case that we cite here stands for that proposition. It says that a court errs as a matter of law by ordering a waiver based on a purportedly deficient privileged log.

Slide 31. ICANN also does not waive privilege by adopting transparency as a core value or by making itself accountable through an independent review process rather than litigation. At issue waiver applies only where a party claiming the privilege puts its communication at issue. Afilias argues that many of its claims put ICANN's privilege communications at issue. That is not a basis for a waiver. A party cannot waive its opponent's privilege by making allegations about its opponent's privileged communications. If it could, the privilege would be meaningless. In every case, the parties would make those allegations simply to pierce the privilege. And while ICANN had made itself accountable for the conduct of its Staff, it has nowhere

waived its right to claim attorney-client privilege and work product protection. Afilias does not need ICANN's privileged documents in order to attempt to make its case and it has no right to those documents. The right to discovery is created by Rule 8 of Interim Supplementary Procedures and that right is expressly qualified by the privilege, by the attorney-client privilege and work product protection.

And it is also notable in this regard that the allegations on which Afilias relies for its issue waiver argument and its presentation are taken from its reply brief, which was filed, I think, four maybe five days after its Application and this is from Slide 7 of Afilias' presentation. Now, these statements are clearly designed for the purpose of supporting its Application which further underscores why a party cannot waive its opponent's right to attorney-client privilege by putting its privileged communication at issue.

ICANN's bylaws also recognize ICANN's right to claim privilege, the IBA Rules, which the parties agreed would serve as guidelines in this proceeding, recognize the parties' right to claim privilege and the Panel recognized ICANN's right to claim privilege in its Procedural Order No. 2, at paragraph 24. So Afilias' argument that ICANN has somehow waived its privilege has no basis and must be rejected and I will stop my presentation now.

PIERRE BIENVENU: Thank you very much Mr. Wallach. Any questions for Mr. Wallach or Mr. Enson by my colleagues?

RICHARD CHERNICK: No thank you.

CATHERINE KESSEDJIAN: [INAUDIBLE]

PIERRE BIENVENU: Professor Kessedjian, we cannot hear you very well. You have to get closer to your --

CATHERINE KESSEDJIAN: Is that better?

PIERRE BIENVENU: That is better.

CATHERINE KESSEDJIAN: Okay, I would like ICANN representatives to go to their page 23 of their presentation for today. Where they cite two cases and I am a bit puzzled by the citation of Upjohn v. United States. I am reading this quote from the decision to actually confirm and not contradict Afilias' contentions that facts as such are not privileged, but you said in your presentation in the slide on page 23 says that this contradicts Afilias. So, you have lost me on that and I would like a little bit more presentation on this point. My second question relates to page 26 of your presentation and that is about the case Zurich American Insurance. These -- the quotes that you are mentioning here on page 26 speaks of presumption. Now, a presumption, I gather in this particular context, is rebuttable presumption. So, my first question is am I correct to think that this is a rebuttable presumption and if I am correct, then how do we go? What is ICANN's position about going to who is able to actually look into the matter and see whether or not this is rightly a privileged document and second, so the first question is who is doing it and the second question is how we are doing it? Whoever that person is.

DAVID WALLACH: Yeah, this is David Wallach, I am happy to answer those questions and thank you for them, Professor Kessedjian. Starting with the first one at Slide 23. ICANN agrees that facts as such are not privileged, that is not what we are saying Afilias is wrong about. What we are saying Afilias is wrong about is its claim that privileged communications or attorney-client work products or attorney work product documents need to be produced in a form that is redacted to reveal the facts that are communicated or discussed. So, the fact that those facts are communicated to an attorney would be revealed by producing those documents and that is what Upjohn says cannot happen. It says "The protection of the privilege extends . . . to

communications and not to facts. . . . A client cannot be compelled to answer the question, What did you say or write to the attorney?" If ICANN needs to produce attorney-client privileged communications that are redacted in some way to show what facts they contain, that shows precisely what ICANN wrote to its attorney. So, a fact is one thing, a communication is another. Afilias can ask ICANN's witnesses about whatever facts it wants to ask them about and they cannot say, I will not answer that question because I communicated that information to my attorney or although I know that fact, I will not answer it because I learned it from my attorney. Those would not be valid objections. But ICANN cannot ask them what facts they communicated to their attorney and they cannot ask for those underlying communications themselves which is precisely what Afilias is doing here.

CATHERINE KESSEDJIAN: Could I ask a follow up question on this?

DAVID WALLACH: Yes of course.

CATHERINE KESSEDJIAN: In the -- I would say, with a goal to efficiency, why wait until we have witnesses particularly in an IRP where if I understand ICANN rules correctly, we are trying to be more efficient than in a classic arbitration, so why make that formal answer when it would be efficient if we could have those facts before getting to witnesses?

DAVID WALLACH: The reason is because attorney client-privilege provides an absolute protection and work product doctrine provide in many cases an absolute and in other cases a qualified protection for those communications and a judgment has been made in the law that encouraging open communications between attorneys and clients so that the clients can get the best legal advice is more important than the interest of efficiency that would be served by simply producing all of those documents. And that

is a legal judgment, is a judgment that has been standing in the common law for hundreds of years and it is a principle that applies in this case.

CATHERINE KESSEDJIAN: But it cannot be an absolute protection if the witness has to answer those questions of facts. So, I am puzzled by this notion of absolute protection.

DAVID WALLACH: Well it is -- Professor Kessedjian, I apologize if I have not been as clear as I would hope to be. The witness can answer the question about the underlying facts. The facts are not protected absolutely or otherwise. But the witness cannot be made to answer a question about the communication, they cannot be asked what facts did you tell your attorney, and that is what would be --

[OVERLAP/MULTIPLE SPEAKERS]

CATHERINE KESSEDJIAN: But that is not my point. My point is why wait until the witness type of evidence is proposed to the Panel when you can do it in a very different way before this phase of the arbitration of the IRP. Again, I am just looking at some efficiency here.

DAVID WALLACH: ICANN could not produce communications to its counsel with information other than facts redacted without having revealed what facts were communicated to counsel, and that is exactly what Upjohn and all of these other authorities say cannot be done.

CATHERINE KESSEDJIAN: Okay. Could you go to my second question, please?

DAVID WALLACH: Yes. Slide 26. Any claim of privilege, any prima facie showing of privilege creates a presumption, a rebuttable presumption, that the document is privileged. The presumption can be rebutted on various grounds. It can be rebutted by showing that a privileged document was shown to somebody who is outside the attorney-client relationship and confidentiality was compromised. It can be

rebutted based on a crime fraud exception or other exceptions. There are numerous grounds on which privilege can be rebutted. But, there is a burden shifting that happens. The party that is claiming the privilege makes a prima facie showing, and then the opponent has to come forward with evidence to rebut the presumption. It is not simply -- it is sufficient to simply challenge the claim of privilege without coming forward with any showing. If that were the case, every claim of privilege would be challenged simply to burden the other side. So, yes it is a presumption and it can be rebutted as any claim of privilege can, but Afilias has made no showing to rebut the presumption here. And that, I think, answers the first part of your question.

The second part of your question is if Afilias had made such a showing, who would decide that? And the answer is the Panel, you would decide that. But in deciding that, you would have to decide it based on the evidence that Afilias introduced to rebut the presumption and the evidence that ICANN then introduced to answer that rebuttal. It could not be decided by reviewing the documents themselves, in camera or otherwise. That is prohibited under California Law because California Law recognizes that the privilege protects disclosure of the documents to anyone outside of the attorney-client privilege including the Panel. And that it would be a violation of the privilege for a court or in this case, the IRP Panel, to require the documents to be submitted for review in order to rule on a privilege claim, and we cite authorities to that effect in our Brief at page 21.

CATHERINE KESSEDJIAN: And California Law -- and this is a very genuine question, so, I don’t know the answer to. California Law does not know concept of special master.

DAVID WALLACH: There are special masters that are appointed in cases in California in various circumstances, but California does not allow a special master to be appointed to review privileged documents in order to rule on a privilege.

PIERRE BIENVENU: Thank you. Questions from Mr. Chernick.

RICHARD CHERNICK: Yes, I do. I have one question for Mr. Enson.

ERIC ENSON: Yeah.

RICHARD CHERNICK: Mr. Enson, could you look at Slide 13 of the Afilias PowerPoint.

ERIC ENSON: Yes.

RICHARD CHERNICK: This concerns Annex 2, which list references in the privilege log, to correspondence with the Amici. And my question is, are those references inconsistent with your position that ICANN produced no documents concerning communications with the amici in response to the document requests?

ERIC ENSON: Yes, just a moment, I am pulling up Annex 2, Mr. Chernick if you give me just a moment.

RICHARD CHERNICK: Sure.

ERIC ENSON: I believe that the entries referred to at Slide 13 in Afilias' slides are entries regarding communications by, I believe, me and ICANN's in-house counsel regarding Verisign's and Nu Dotco's responses to ICANN's September 2016 questionnaire. And those communications, as Mr. Wallach described earlier, those communications between outside counsel and in-house counsel are privileged. The underlying communications or correspondence with VeriSign and NDC are not privileged. And those documents were all produced to the extent they existed and again, they were limited, I believed there were four or five. Those documents were all produced to Afilias in our document production.

RICHARD CHERNICK: So, the fact that there were 16 or so separate communications between inside and outside counsel at ICANN, is not inconsistent with ICANN's position that the very few documents that were received from either NDC or VeriSign have been in fact produced?

ERIC ENSON: That is correct. The 16 separate entries does not mean there were 16 separate communications with VeriSign or Nu Dotco. It just means that there were communications between counsel and in-house counsel regarding the limited communications with VeriSign and Nu Dotco that ICANN did have and all those were produced.

RICHARD CHERNICK: All right. So, my last question then to Mr. Wallach relates to the issue of relief, and you made the point that there was a different request for relief in the Application and in the PowerPoint. Could you respond directly to the requests for relief in the original Application and tell us what ICANN's position is with respect to that relief?

DAVID WALLACH: Yes, of course. Thank you, Mr. Chernick. There were four requests for relief in the original Application. They are mis-numbered with a three twice which is why I referred to it as three. I am looking at the Application and this at page 11.

The first is to supplement and remedy ICANN's production by producing documents that are subject to the Tribunal's production order or ICANN's production agreement. That request should be denied. ICANN searched for and conducted a robust search for documents responsive to all the requests that it agreed to respond to or that the Panel ordered it to respond to and it produced all non-privileged documents that it found that were responsive to those requests.

The second request for relief was to order ICANN to produce documents listed on ICANN's privilege log that are not privileged. That should also be denied. The documents listed on ICANN's privilege log are privileged and Afilias' argument to the contrary is based on fundamental misconceptions of the nature and extent of attorney-client privilege and the work-product doctrine as we explained in our letter and as I set forth briefly in my presentation.

The third request is for ICANN to be ordered to produce documents that contain privileged and non-privileged information with appropriate redaction covering only the privileged information. That also misunderstands the attorney-client privilege and the work-product doctrine. The attorney-client privilege protects communications; it does not protect information. A communication that is privileged is privileged regardless of whether it contains information which in and of itself is not privileged. And numerous cases, we cite them in our Brief and I went over them in the presentation, say that a client cannot be compelled to turn over a communication or to disclose what information was communicated to his attorney even if the information itself is non-privileged. They can be asked about that information, but they cannot be ordered to disclose the attorney-client communication itself, which is exactly what Afilias is seeking.

And then number four, which is renumbered three as well, says for the remaining documents ask that ICANN be ordered to remedy as privilege log so that the Panel and Afilias can properly assess the validity of the privilege that ICANN has invoked. ICANN's privilege log provide -- that request should also be denied -- ICANN's privilege log provides every category of information that a log typically contain -- it contains every category of information that the Panel instructed for the log to contain in

its Procedural Order No. 2. And the documents' descriptions, which in particular is what Afilias focuses on, are entirely consistent with the standards that have been expressly approved by United States courts as set out in the cases that we cite, the Carl Zeiss, the Beacon Hill and the Mitre Sport cases, and Afilias has not cited any authority to the contrary. So that request should also be denied.

RICHARD CHERNICK: Thank you.

PIERRE BIENVENU: Before we turn to Afilias for a reply, I would like to ask a question and it is not -- it arises out of the Jones Day May 6 submission, but it is not directly related to the privilege issues that we have been discussing. So, whether the question is answered by Mr. Enson and Mr. Wallach or Messrs. Smith or LeVee, does not matter to us. But I am referring to page 5 of the submission where in the last paragraph, in the middle of the paragraph it is stated "ICANN takes no position with regard to Afilias' contentions that the Amici violated the Guidebook or that Amici's potential operation of .WEB raises competition concerns, et cetera." Is it the position that ICANN takes no position and had never taken a position as to whether Afilias' contentions that the amici violated the Guidebook are correct or incorrect?

JEFF LEVEE: Steven, you want me to take that?

STEVEN SMITH: Yeah, go ahead Jeff and I will join in if I have to.

JEFF LEVEE: Sure. Mr. Chairman, this is Jeff LeVee. It is correct that ICANN has not yet made a determination as to whether the domain acquisition agreement violates the Guidebook. It is something that we

explained in our previous paper as to why that has happened this way and it is something we will of course address even more substantially in our next paper. On the question of competition. There is a process for ICANN to evaluate alleged competition concerns. And if ICANN is concerned that a proposed event, in this instance, VeriSign's ultimate acquisition of .web. If ICANN is concerned that an event may pose competition concerns under relevant law, in this instance, U.S. law, what ICANN does historically is refer those concerns to the appropriate regulator. And so we have had issues from time to time where ICANN has asked the United States Department of Justice Antitrust Division to look at a proposed transaction because ICANN has worries that the transaction may be anticompetitive. Here, the Department of Justice -- the Antitrust Division of the Department of Justice -- beat ICANN to the punch and conducted a year-long review and concluded that it would not pursue any claims against VeriSign or NDC with respect to the proposed acquisition by VeriSign of .web, and so for that reason, as we will explain in our next brief -- for that reason there really would not be much more for ICANN to consider. Afilias, in the Brief that they filed last week, takes the position that ICANN really should ignore what the Department of Justice's position is and they should be taking a different type of review and we will respond to that in some detail in our next brief of course. Have I answered your questions?

PIERRE BIENVENU: No. There came a point, as I understand the events as they unfolded, when ICANN having put the matter on hold lifted that decision, am I right?

JEFF LEVEE: I am not sure I understand the question. There was a period of time where ICANN kept the .web contention set on hold, so when there are multiple applications for a string, ICANN refers to that as a contention set. We did keep the contention set on hold while the Department of Justice was investigating. The Department of Justice came to us via a subpoena. They also came to VeriSign via a subpoena and my understanding is they came to others although we have not -- we do not know entirely who received subpoenas, but you know we did and we know VeriSign did because VeriSign announced that in it securities filings. And so, yes we kept the contention set on hold while the Department of Justice was investigating the questions that it was investigating.

PIERRE BIENVENU: And at one point, it changed the position, correct?

JEFF LEVEE: I am sorry at one point?

PIERRE BIENVENU: At one point that, I do not know how to refer to the decision to lift the decision to put the contention set on hold. At one point that was done, correct?

JEFF LEVEE: Yeah. So, I would call it, removing or releasing the hold.

PIERRE BIENVENU: Okay so, would ICANN have released that hold, had it found that there has been -- let’s assume it for the purpose of my question -- a clear violation of the Guidebook?

JEFF LEVEE: If ICANN -- well, if ICANN had determined that there was a violation of the Guidebook, ICANN would not have released the hold, but it would have done other things. I cannot speculate as to what it would have

done. Some Guidebook violations result in no activity. Other Guidebook violations result in the Board taking steps to do various things with respect to an application and we do not know here because the Board did not reach that point. So, ICANN has discretion when it determines that there has been a violation of the Guidebook as to how it wants to proceed. Afilias in its Brief again served a week ago today, argues that it should, that ICANN should not have discretion in this instance and we will respond to that.

PIERRE BIENVENU: Very well, thank you for those explanations.

JEFF LEVEE: Of course.

PIERRE BIENVENU: Mr. de Gramont, it is for you now to reply, we have interrupted your colleagues and as a result, they had a bit more time than you did. So, feel comfortable to take a little bit more than the six minutes that you said you had reserved for your reply.

ALEXANDRE DE GRAMONT: Thank you Mr. Chairman. Mr. Litwin followed by Mr. Ali will provide our reply.

PIERRE BIENVENU: You are welcome.

ETHAN LITWIN: Thank you Mr. Chairman. This is Ethan Litwin of Constantine Cannon on behalf of Afilias. I would like to begin by setting the stage regarding the rebuttable presumption point that was discussed a few minutes earlier. ICANN, even under federal law has the burden not only to prove privilege, but to prove that they did not waive their privilege. I will refer just briefly to the Ninth Circuit's decision in the Weil case, 647 F.2nd 18, reading from page 25, "As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it. One of the elements that the asserting party must prove is that it has

not waived the privilege." Now in all the discussion from ICANN today, they have said nothing about their obligation to operate to the maximum extent feasible in an open and transparent manner and how that obligation relates to ICANN's production obligations. ICANN relies on privilege rules under California Law essentially arguing that they should be treated no differently than any other for-profit California business. That is just not correct. As the very first IRP Panel found, as Mr. de Gramont said at the top of his presentation, ICANN is no ordinary not-for-profit California corporation, let alone a for-profit corporation.

There are very specific and mandatory obligations that apply to how ICANN conducts itself at the mandate of the U.S. Federal Government. Its legitimacy -- ICANN's legitimacy to do what it does rests entirely on its strict adherence to its bylaws and articles. Internet stakeholders and governments accept ICANN's coordinating activities and de facto regulation based on this premise. The obligation of transparency serves as a lens through which this Panel must assess ICANN's invocation of privilege. The obligations set out in the bylaws place a heavier burden on ICANN to establish that information that it wants to keep secret from the public that pertain to its functions -- how ICANN works -- is being legitimately withheld. Only complete disclosure will allow for rigorous accountability, the rigorous accountability that ICANN promised specifically to the U.S. Government when it took over its role in administering and regulating the DNS. This IRP focuses on staff conduct, something consented to in ICANN's new bylaws. So, this Panel will be the very first one that will assess the implications of transparency and discovery privilege insofar as staff conduct is concerned, the fact that the Board and the internet community accepted the disclosure requirements. Now while, ICANN notes that the bylaws provide for attorney-client exceptions in some limited areas, it is critical to note that these are not

broad assertions of privilege and that the provision specifically related to the IRP are totally silent as to whether any privilege exception exists, especially with regard to challenges of ICANN staff and specifically its legal staff.

Now, on page 4 of ICANN's deck for today, they try to distinguish their attorneys from their staff, but ICANN legal staff, the in-house lawyers, are part of ICANN staff. And if we look at where the bylaws specifically provide for attorney-client exceptions in regard to reconsideration requests, the Board may redact materials that it was briefed on to cover attorney-client material. But here, ICANN has totally withheld briefing materials based on attorney-client privilege. And that provision in the reconsideration requests section is not repeated in the IRP section, compounding the error. Secondly, and this is the only other time that the attorney-client privilege appears in the massive bylaws of ICANN, is in regard to inspection requests. ICANN is allowed to deny an inspection request because it relates to documents or communications covered by the attorney-client privilege. But here, where we are challenging the conduct of ICANN staff in actually performing an independent investigation, there is no such exception.

Now specifically regarding waiver, we are not arguing here today that ICANN does not have the right to legal privilege, absolutely. There are two discrete waiver issues that ICANN does not address at all. First, is that the bylaws specifically consent to allow Afilias to challenge the conduct of ICANN staff which necessarily includes its legal staff. No exception is made for the legal staff. ICANN chose to task its legal department with running its investigation of Afilias' complaints that could have been done by the gTLD staff -- by Ms. Willett who did so in response to Donuts' complaint and those materials have been produced. Or by the ombudsman to whom Afilias also submitted a complaint, but did not investigate here as

he did with the Donuts' complaint and produced documents related to his investigation of the Donuts' complaint. But ICANN chose voluntarily to have its legal staff do the work here. That work, the investigation, the discovery of facts regarding the conduct of third parties is not inherently legal in nature. Second, the bylaws again specifically consent to allow Afilias to challenge the Board's decision-making process. Here, Afilias complains that the ICANN Board failed to act to disqualify NDC. ICANN defends its Board by arguing that the Board reasonably determined not to make any determinations regarding NDC's conduct until after this IRP concludes. ICANN therefore affirmatively put the reasonableness and good faith of that decision by its Board at issue in this case, that the Board's decision was made on the advice of counsel does not allow ICANN to shield the basis for or any discussion of that determination at the discovery stage. It is what the Court had called the quintessential example of waiver. ICANN, not Afilias, put the advice of counsel at issue here and must now produce those responsive documents so that the Panel can evaluate the reasonableness of the determination by the ICANN Board not to act, which is the subject of our claim here.

Courts have found implied waiver of the attorney-client privilege in instances even where the magic words "advice of counsel" are not used to articulate a defense, but where the circumstances underlying an affirmative defense necessarily rely on privileged material. We did not know that was the case until ICANN submitted its letter a few days ago on May 6, where they say "it should come as no surprise to Afilias that ICANN's in-house and external counsel were intimately involved in investigating the allegations concerning NDC's and VeriSign's conduct. It should also come as no surprise that the ICANN Board engaged the assistance of ICANN's in-house and external counsel in these matters [and] in determining that ICANN should wait to

make any decisions until accountability mechanisms have run their course." That is the quintessential example of waiver and I can refer you to the Olvera v. County of Sacramento case, 2012 Westlaw 273158, from the Eastern District of California.

PIERRE BIENVENU: Is that --

ETHAN LITWIN: Here --

[OVERLAP]

PIERRE BIENVENU: Excuse me Mr. Litwin. The Olvera case, is that among the authorities cited by Afilias in its Application?

ETHAN LITWIN: It is not. We did not know that was even applicable until after we received ICANN's reply and the paragraph I just read to you. We would have put it in but of course, ICANN said that they would not allow us to make any response to their letter, so, we are doing so today.

PIERRE BIENVENU: I want to make sure I understand your position or the position you are advancing on behalf of Afilias Mr. Litwin. Are you making the claim, which I believe is a broader claim than that set out in the Application, that as a matter of law because ICANN is a nonprofit corporation and because it is under an obligation of transparency it cannot invoke privilege in the context of this IRP. Perhaps you would add the proviso in particular when the case concerns a challenge of the conduct of ICANN's staff. Is that the broad claim that you are making?

ETHAN LITWIN: So, I think there are two points there Mr. Chairman. The first is that, we have not had an IRP --an ICANN accountability mechanism under the new guidelines. And I think, there is a real question to how ICANN's consent to operate in an open and transparent manner, to make decisions in an open and transparent manner, to act in an open and transparent manner that is consistent with its Articles and Bylaw, to task its in-house legal department to run part of its

business. Its investigation of malfeasance of third parties in the New gTLD Program and thereby shield all of that fact-finding and decision-making process from the public. How are we going to hold ICANN accountable if they can so easily shield the necessary material from the public? But here, Mr. Chairman, we are making two specific waiver points. The first one, is that ICANN has specifically injected the advice of its counsel into the IRP through its affirmative defense that the Board has not yet made a determination. In its response, ICANN argues that in fact, that this IRP is in a sense premature because ICANN has not acted yet. But of course, the bylaws provide that you can bring an IRP based on failure to act -- by the Board's failure to act -- and now we know that the input into that decision not to act was made by ICANN's lawyers. That is expressly putting the advice of counsel at issue in this case.

The second and frankly, this is the one we referred to in our Application. The bylaw's consent to allow in an IRP a challenge to ICANN's staff. And that includes the legal staff. There is no exemption for legal staff in that consent provided in ICANN's bylaws. So, if ICANN's legal staff and their conduct can be challenged in an IRP, how can they refuse to disclose the very documents that show how they acted? It is a circular argument. First, ICANN requires all New gTLD applicants to waive the right to litigate against ICANN. And that is in response -- on the basis that you can challenge ICANN's action or inactions in an IRP. And then, ICANN comes here and says, well we have these 400 documents where we're reasonably anticipating litigation by those very people who we mandated waive their right to litigate against us. And ICANN then causes Afilias' complaints about NDC's misconduct to be investigated by its legal staff, but then says, you cannot challenge our actions or inactions because it was done by our legal staff and we are not going to give you any documents. So, what we are going to find by the time we get to a hearing is that,

ICANN says, well, Afilias does not have any evidence. And the reason we do not have any evidence is because they shielded it by privilege. That just cannot be the rule. So that is what we are arguing. I hope that answers your question Mr. Chairman.

PIERRE BIENVENU: Yes, thank you.

[OVERLAP]

ETHAN LITWIN: If I could just make one final comment on the sufficiency of ICANN's descriptions in their privilege log, I will refer to Slide 17 in ICANN's presentation and I will just in the interest of the time focus on the e-mail from Amy Stathos. What this description says is [that] the reason that the document is privileged, legal advice in anticipation of litigation regarding .web. That does not provide any description of the subject matter in that communication. It is a formulaic recitation of the standard for privilege: legal advice, and the standard for work product: in anticipation of litigation, and the most general subject matter about this IRP: .web -- the .web contention set. And that just does not provide any information. That does not, first of all, establish the subject matter as required by the Order; it does not establish the reason for that is privileged; and, more importantly, it does not say anything about the two arguments for waiver that we have made. And that is the reason their log is totally insufficient.

PIERRE BIENVENU: And what authority Mr. Litwin, what authority under California law or Federal law do you rely on to advance the proposition that this description is insufficient?

ETHAN LITWIN: I think there are many cases, including the cases that ICANN's cites and its Brief, that say you have to provide description of the communication. They have provided a description of the overall relevance to the case. They have not explained, 1) what the subject of the communication is -- it is

frequently done by putting what the subject matter line is of the e-mail in the privilege log. They have not done that. Secondly, if they are going to claim that --

[OVERLAP]

PIERRE BIENVENU: Sorry to cut you off Mr. Litwin. My question is, what authority are you relying on to justify your contention that the privilege description is insufficient? What precise authority do you rely on?

ETHAN LITWIN: I would need to get you a case on that Mr. Chairman, but I will say that, if you read any of the cases that ICANN has submitted here, they make very clear that the description has to be the description of the document in the specific communication not just the subject of the IRP.

PIERRE BIENVENU: Thank you. So, does that conclude your reply Mr. Litwin?

ETHAN LITWIN: It does. Mr. Ali has one comment to make on governing law.

PIERRE BIENVENU: Thank you Mr. Litwin.

[OVERLAP]

ARIF H. ALI: Good morning and good afternoon --

PIERRE BIENVENU: Mr. Ali?

ARIF H. ALI: Yes, it is just a -- I think a point that could best be described as providing the right framework of analysis as far as we are concerned regarding the governing law. And I will make it with reference to -- the point that Mr. Wallach made. ICANN's position is that it is California Law, federal laws that applies and that is it. And he makes that point based on the fact that California -- or that ICANN is based in California and I think that what Mr. Wallach is not correct to say is that we do not challenge the fact that it is California law that applies. I think he is partially correct and partially wrong. We certainly do contest that it is

exclusively California law that applies. And I think, he also made the observation that he did not understand why we were referring to English law. Well, obviously, we are referring to English law because London is the seat of arbitration and so, English law will certainly have a relevance. I think, the general proposition here is to the application of principle and rules to questions of privilege have to be ascertained from transnational law and transnational principles that would apply. And I come to that particular conclusion not only based on ICANN's articles of incorporation which would refer specifically to ICANN having to conduct its activities in conformity with international law, local law as well as applicable treaties. Now let me just focus very briefly on the concept of local law. Local law does not necessarily just mean California law. ICANN has operations in other parts of the world so the -- the law that would be applicable based on let's say, principles of jurisdiction could well be the law of those other jurisdictions where ICANN is -- conducts its activities, not just the legal seat where ICANN happens to be organized. So, I think, from -- let's say from the -- the standpoint of writing a decision that addresses the applicable law, I think we need to start with the instrument of consent, as one would normally do in consent-based dispute resolution proceedings. And what is that instrument of consent? That instrument of consent is ICANN's bylaws. I would like to -- the bylaws and the offer to arbitrate is something akin to the structure that we see in consents that are based in treaties. And here we have an offer to arbitrate or an offer to participate in a dispute resolution process to hold ICANN accountable that is contained in ICANN's bylaws. So, the first place that one starts in terms of an applicable law is that instrument itself which lays out the principles of objectivity, fairness, neutrality and as Mr. de Gramont and Mr. Litwin pointed out, the obligation to operate to the maximum extent feasible in an open and transparent manner. And that

is a principle that is not only stated in black and white in the bylaws, but is stated, and it is one that is reflected in the general principle of international law that would be applicable here and that are mandated pursuant to ICANN's articles of corporation. So, what does that effectively mean? It means that, when we look at the difference, we look at other bodies of municipal law that might apply. And here just parenthetically, I should say is that it is very important to appreciate that ICANN, as the first IRP panel has said and subsequent IRP panels have said, ICANN is no ordinary California corporation and Mr. Wallach and Mr. Enson have approached this whole discussion of privilege as if we are talking about a normal California corporation that is operating for a profit. They have not approached this privilege discussion or argument from the stand point of an entity that has a public purpose, that is coordinating and regulating a global commons, that has certain obligations that go far beyond that of a normal California corporation. And so, I think that that by itself really puts into perspective and minimizes the applicability of the argument that they put forward. The very technical argument, which I might say are based on cases none of which addresses the obligation for public authority in any way from the stand point of privilege. Every case that they cited has to do with a private party, not a party that has the kind of characteristics that ICANN, from its very inception, has. And so, I believe that when you look at this issue of privilege, as I have said, I would suggest that the Panel start with the instrument of consent and the principle laid out therein and use those principles as a lens through which to view the question of whether ICANN has established its prima facie case, which Mr. Litwin has just indicated to you and demonstrated to you it has not by virtue of its privilege log and the descriptions contained therein. And -- and also in terms of your review of the specific technical rules of privilege that Mr. Enson and Mr. Wallach discussed with

you earlier. And I think that if there is a question of specific technical rules that the Panel needs to be guided by, ultimately, it would have to be a set of transnational principles or guidelines as reflected in the IBA Rules, but even those need to be viewed through the lens of the principles that laid out in the instrument of consent and ICANN's ultimate foundational document which are its articles of incorporation. And so, I will stop there Mr. Chairman and be happy to answer any questions.

PIERRE BIENVENU: Any questions from Mr. Chernick or Professor Kessedjian [for Mr. Ali?

CATHERINE KESSEDJIAN: No, thank you.

[OVERLAP]

PIERRE BIENVENU: Mr. Chernick?

RICHARD CHERNICK: Yes. I am concerned that we are first hearing a concrete waiver argument in a reply argument where we have had briefing and full arguments up to this point and I think that the Respondent needs to have an opportunity to respond to what I regard as arguments that have not previously been presented.

[OVERLAP]

ARIF H. ALI: Mr. Chernick I can appreciate that, but ultimately, the purpose of a hearing is not simply for us to regurgitate the arguments made in our applications, but to respond to ICANN. ICANN specifically asked you for a ruling that we not be permitted to provide any type of submission and response to the submission that they made this past Wednesday. And so, I think that sophisticated counsel such as ICANN will anticipate that we would be addressing the specifics of their submission that they made this past Wednesday and our submission that we would make to you today.

Ultimately, these are arguments that are responsive and based on ICANN's response to our Application.

RICHARD CHERNICK: I am specifically addressing the waiver arguments that was made in the original application which is different fundamentally from the waiver arguments that Mr. Litwin just made, and that is my concern.

ARIF H. ALI: That argument that Mr. Litwin just made --

[OVERLAP]

PIERRE BIENVENU: Mr. Ali, this is Mr. Bienvenu here. I think there are two questions here: the first, the concern that is raised, is raised in the context of affording an opportunity to the Respondent to respond to the re-articulation, or the novel articulation I would say, of the waiver arguments. It was my intention to invite the Respondent to comment on Mr. Litwin's oral presentation because, like Mr. Chernick, I do believe that it presents a different argument than the one articulated in the original Application. So, apart from that issue of giving the Respondent an opportunity to address this waiver argument, do you have a question for Mr. Ali, Mr. Chernick?

RICHARD CHERNICK: No, I do not.

PIERRE BIENVENU: Okay.

ARIF H. ALI: Mr. Chairman, I should say, far from us to want to deprive ICANN from an opportunity to respond. I mean, we would certainly not object to short post-hearings or ICANN's response right now to what we have to say and both parties being allowed to make short submissions in short order following this hearing.

PIERRE BIENVENU: Let's not run ahead of ourselves. Let's give the Respondent an opportunity to respond to Mr. Litwin's argument, but I have a question for you, Mr. Ali. Following your assertions of applicable law, is it your

understanding that under California Law and Federal Law, if for example, the respondent were a regulatory agency at the U.S. Government, it could not because of that, invoke privilege in a proceeding such as this one?

ARIF H. ALI: Not at all. Sorry if I implied that. I am not saying that and I do not think anybody on my side is saying that ICANN does not have the ability to, or the right to invoke privilege under Federal or California Law. Ultimately, to state the obvious, the question and the scope of that privilege under the technical application of the rule of evidence and the burden shifting and ultimately the standard pursuant to which the privilege could be affected or not.

PIERRE BIENVENU: Okay. Thank you for that clarification. So, I invite the Respondent briefly to reply to -- particularly the submissions of Mr. Litwin which seem to articulate a different waiver argument than the one that we read in the Application.

DAVID WALLACH: Thank you. This is Mr. Wallach. I will respond, and thank you for the opportunity to respond. As the Panel has noted, Mr. Litwin makes new arguments which did not appear in Afilias' Application and did not appear in its initial presentation even. Afilias also cites two new cases, in particular, the Weil case and the Olvera case, neither of which are referenced anywhere in its Application. I appreciate Mr. Ali's high opinion of ICANN's counsel but not withstanding that opinion, we are not in a position to fairly respond on the fly on to new arguments and new authorities that we have had no prior notice of.

I have though, as I sat here, had the opportunity to look up the Weil case because it was the first one that Mr. Litwin cited and so, I had a little bit of time on that. And that was a case -- Mr. Litwin, if you will recall, cited it for the argument that the proponents of privilege had the burden to disprove waiver. That was

a case in which the party claiming the privilege had disclosed the privileged communication to a person outside the attorney-client relationship, and it claimed that the disclosure did not waive privilege because it purportedly did not intend to waive privilege. And in those circumstances where the evidence showed that the document had been disclosed and confidentiality had been compromised, the Court said that the party claiming privilege had the burden to show that that disclosure did not waive privilege. The Court did not hold or suggest that a party claiming privilege has an affirmative duty to come forward and disprove every potential grounds for waiver when there is no evidence at all in the record supporting such a waiver. I am not aware of any authority that supports that. And this just underscores the unfairness of citing new authority on the fly in the middle of a hearing. I had the opportunity to look up this authority. I did not have the opportunity to look up the other authority. But this is why briefing is done in an organized manner to allow both sides to have to a chance to fairly respond.

On the waiver argument, Afilias raises two new arguments which it has not raised before. First, Afilias asserts that ICANN injected the advice of counsel into this dispute through its defense that the Board has not made a determination of Afilias' allegation. That is a new argument, so it should not properly be considered. It is also just wrong. That the Board has not made a determination is a fact. ICANN has not put at issue the advice of counsel. It has not argued that the Board's determination is somehow valid because it was advised by counsel. It has not, in any way, waived privilege with respect to communications with counsel leading up to that determination. If Afilias wants to argue that that determination is somehow contrary to ICANN's bylaws, it is of course free to do so, but it is not entitled to ICANN's privileged documents.

Afilias also argues that ICANN somehow waived the privilege by consenting to allow parties to challenge conduct of ICANN's staff and IRPs are permitted to challenge the conduct of staff. But there is nothing in ICANN's bylaws that states that ICANN waived the privilege with respect to communications between its staff and their lawyers or where its staff are in-house counsel. Afilias can challenge those actions if it wants, but it cannot have ICANN's privileged documents. And in fact, the right to discovery of documents from ICANN exists only by virtue of Rule 8 of the Interim Supplementary Procedures. There is no inherent right to demand documents and Rule 8 specifically recognizes ICANN's right to claim attorney-client privilege and work-product protection.

Mr. Litwin and then Mr. Ali repeatedly said that ICANN is invoking privilege as though it is just any other for-profit California business. The rules of privilege apply to individuals. They apply to governments. They apply to businesses regardless of whether they are for-profit or not-for-profit. There is not a special set of rules of privilege that apply to for-profit businesses. And if you look through the authorities cited by ICANN, they do not relate exclusively or primarily to for-profit businesses. There is simply no difference between the rules of privilege that apply to for-profit businesses, not-for-profit businesses, individuals or others.

Mr. Ali also, related to this point, said that ICANN's cases all addressed private authorities and not government, that statement is also wrong. At page 20 of ICANN's letter, we make the point in response to Afilias' argument that ICANN's commitment to transparency somehow impliedly waived privilege. We make the argument that the Federal Government is also committed to transparency and specifically, has committed to transparency under the Freedom of Information Act and the Courts have held that that commitment does not waive privilege and we cite a case

for that, Wallick v. Agricultural Marketing. And then in the next paragraph, there is another case which is also a case concerning the Federal Government, In re Lindsay and that applies the same rules of privilege and the same basic policies to communications within the Federal Government as to anyone else. And of course, the Federal Government exercises vast regulatory authority. And there is no authority that holds that the exercise of such regulatory authority somehow waives privilege. If that were right, there would be innumerable cases on the issue, and there are none.

Mr. Litwin suggested that ICANN had somehow delegated functions to attorneys in this situation in order to shield them from disclosure. That is simply incorrect. This is a situation in which litigation involving these matters has been ongoing for the entire period at issue. Ruby Glen filed litigation on the 22 of July 2016, that is before the .web auction even occurred. That litigation continued until November of 2018 which is the month that Afilias filed this IRP. In the interim, ICANN received letters from Afilias, from NDC and from VeriSign which makes absolutely clear that however these issues were resolved, ICANN was going to face an IRP or litigation from one of them. If [ICANN] disqualified NDC, it would face an IRP or litigation from NDC and VeriSign. And if ICANN did not disqualify NDC, it would face an IRP or litigation from Afilias. So, ICANN anticipated litigation this entire time, litigation was ongoing this entire time and there was a Department of Justice investigation that was initiated in early 2017 and continued for many months thereafter. So, these are inherently legal matters, they were going out in the context of ongoing litigation, anticipated litigation and a federal investigation, and it should come as no surprise that ICANN’s counsel were involved in this.

Finally, I just want to address the choice of law issue. Mr. Ali suggested that transnational law should apply to the privilege issue. This is another

new argument. This is not in Afilias' papers. Afilias does not cite any authority establishing a transnational law of privilege or work-product. I am not aware of one. Afilias also does not explain the content of transnational privilege law, if such a thing exists. And so, its argument that that law, such as it is, should apply, really does not go anywhere. Just to repeat, ICANN is a California non-profit corporation. All of the employees at issue here sat in California. The communications happened in California. ICANN's internal counsel are California lawyers. ICANN's external counsel are California lawyers and California imposes an ethical obligation on lawyers who are barred here, not to disclose privileged information, which we cite at footnote 18 of our Brief. There is just no legitimate dispute that California Law must govern these communications and documents and that is all I will say for now.

PIERRE BIENVENU: Thank you very much Mr. Wallach. I believe that concludes the hearing on this, either of my colleagues would like to add anything?

CATHERINE KESSEDJIAN: Not from my side.

RICHARD CHERNICK: Thank you, I am fine here.

PIERRE BIENVENU: Very well. So, then it remains for me on behalf of my colleagues to thank counsel on both sides for their assistance in addressing the issues raised by Claimant's Application. We will take these issues under advisement and communicate our decision to the Parties as quickly as possible. And on that, I thank you all for your attendance.

ARIF H. ALI: Thank you Mr. President and thank you to the members of the Panel and to my colleagues from ICANN.

STEVEN SMITH: Yes and thank you very much on behalf of ICANNN, Mr. Bienvenu and the other members of the Panel.

PIERRE BIENVENU: Very well. Thank you all. Bye-bye.

DAVID WALLACH: Thank you.

[02:34:47]

Exhibit R-30

To: Arif Ali on behalf of Afilias Domains No. 3 Ltd.

Date: 24 March 2018

Re: Request No. 20180223-1

In your letter dated 23 February 2018 that you submitted on behalf of Afilias Domains No. 3 Ltd. (Afilias), among other things, you request: (1) an update on ICANN organization's investigation of the .WEB contention set; and (2) documentary information pursuant to the Internet Corporation for Assigned Names and Numbers' (ICANN's) Documentary Information Disclosure Policy (DIDP). For reference, a copy of your letter is attached to the email transmitting this Response.

As an initial matter, the DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for one to make information requests or requests for "updates" concerning ICANN organization's internal activities. As such, your request for "an update on ICANN's investigation of the .WEB contention set" is beyond the scope of the DIDP and will not be addressed in this Response. Moreover, ICANN organization is not required to create or compile summaries of any documented information in response to a DIDP Request. (*See* DIDP (https://www.icann.org/resources/pages/didp-2012-02-25-en).)

Items Requested

Your Request seeks the disclosure of documentary information relating to the .WEB applications and the .WEB contention set:

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;
4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
    a. the .WEB contention set,
    b. NDC's application for the .WEB gTLD,
    c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
    d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;

8. Documents sufficient to show the current status of the delegation of .WEB;
9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
    a. document productions to the DOJ;
    b. communications with the DOJ;
    c. submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions;
    d. communications with Verisign or NDC relating to the investigation; and
    e. internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation.

Response

The New gTLD Program and String Contention

In 2012, ICANN opened the application window for the New Generic Top-Level Domain (gTLD) Program and created the new gTLD microsite (https://newgtlds.icann.org/en/), which provides detailed information about the Program. From the Program Status webpage of the new gTLD microsite (https://newgtlds.icann.org/en/program-status), people can access the public portions of each new gTLD application, including all of the .WEB applications, by clicking on "Current Application Status" and accessing the New gTLD Current Application Status webpage (https://gtldresult.icann.org/application-result/applicationstatus/viewstatus).

ICANN received seven applications for .WEB, which were placed into a contention set (*see* Applicant Guidebook (Guidebook), §1.1.2.10 (String Contention)). Module 4 of the Guidebook (String Contention Procedures) describes situations in which contention for applied-for new gTLDs occurs, and the methods available to applicants for resolving contention absent private resolution: "It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means." (Guidebook, § 4.3 (Auction: Mechanisms of Last Resort).)

Should private resolution not occur, the contention set will proceed to an auction of last resort governed by the Auction Rules that all applicants agreed to by applying. (Guidebook, § 1.1.2.10 (String Contention)). In furtherance of ICANN's commitment to transparency, ICANN organization established the New gTLD Program Auctions webpage, which provides extensive detailed information about the auction process (https://newgtlds.icann.org/en/applicants/auctions.)

Resolution of .WEB/.WEBS Contention Set

Following the procedures set forth in the Guidebook, ICANN organization scheduled an auction of last resort for 27 July 2016 to resolve the .WEB/.WEBS contention set (Auction). (*See* https://newgtlds.icann.org/en/applicants/auctions/schedule-13mar18-en.pdf.)

On or about 22 June 2016, Ruby Glen LLC (Ruby Glen) asserted that changes had occurred in NU DOT CO LLC's (NDC's) application for .WEB, in particular to NDC's management and ownership, and asserted that the Auction should be postponed pending further investigation. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-memorandum-point-authorities-support-motion-dismiss-first-amended-complaint-26oct16-en.pdf.)

ICANN organization investigated Ruby Glen's assertions regarding NDC's application. After completing its investigation, ICANN org sent a letter to the members of the contention set stating, among other things, that "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction." (*See* https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members-13jul16-en.pdf.)

Ruby Glen then invoked one of ICANN's accountability mechanisms by submitting a reconsideration request on an urgent basis (Request 16-9), seeking postponement of the Auction and requesting a more detailed investigation. (*See* https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-request-redacted-17jul16-en.pdf.) After carefully considering the information related to Request 16-9, on 21 July 2016 ICANN's Board Governance Committee (BGC) denied Request 16-9. (*See* https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-bgc-determination-21jul16-en.pdf.)

The next day Ruby Glen sued ICANN org. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf.) At the same time, Ruby Glen applied for a temporary restraining order (TRO Application), seeking to stop ICANN org from conducting the Auction at the scheduled time. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-ex-parte-application-tro-memo-points-authorities-22jul16-en.pdf.) The Court denied the TRO Application (*see* https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf) and the Auction took place on 27 and 28 July 2016. NDC placed the winning bid. (*See* https://gtldresult.icann.org/application-result/applicationstatus/auctionresults.)

On 28 November 2016, the Court dismissed Ruby Glen's complaint and entered judgment in ICANN organization's favor. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-judgment-28nov16-en.pdf.) Ruby Glen appealed that decision, and the appeal is currently pending. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-notice-appeal-regarding-dismissal-20dec16-en.pdf.)

DIDP Process and Responses

The DIDP exemplifies ICANN's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. (*See* https://www.icann.org/resources/pages/didp-2012-02-25-en.)

Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN org has published process guidelines for responding to requests for documents submitted pursuant to the DIDP (DIDP Response Process). (*See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf (DIDP Response Process).) The DIDP Response Process provides that, following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the Defined Conditions for Nondisclosure identified [on ICANN organization's website]." If ICANN organization concludes that a document falls within one of the Defined Conditions for Nondisclosure (Nondisclosure Conditions), "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure."

The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN, which included extensive public comment and community input. (*See* https://www.icann.org/news/announcement-4-2007-03-29-en; https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en.) Following the completion of this review, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (*See* https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency" (*see* https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf), and sought additional community input on the proposed changes before implementing them (*see* https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en).

Neither the DIDP nor ICANN's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in its possession. As noted above, the DIDP sets forth Nondisclosure Conditions for which other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the community has agreed are presumed not to be appropriate for public disclosure. The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without

contravening its commitment to transparency. As the Amazon EU S.à.r.l. Independent Review Process Panel noted, "notwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure." (Amazon EU S.à.r.l. v. ICANN, Procedural Order (7 June 2017) (https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf).)

ICANN's Bylaws address the need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, Art. 1, Section 1.2(c) (https://www.icann.org/resources/pages/governance/bylaws-en/#article1).)

Afilias' DIDP Request

Item 1

Item 1 seeks "[a]ll documents received from Ruby Glen, NDC, and Verisign, Inc. (Verisign) in response to ICANN's 16 September 2016 request for additional information."

The documentary information received from NDC, Verisign, Afilias, and Ruby Glen in response to ICANN organization's 16 September 2016 request for information are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

Notwithstanding the above, ICANN organization will continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP. If it is determined that certain additional documentary information is appropriate for public

disclosure, ICANN organization will supplement this DIDP Response and notify the Requestor of the supplement.

Items 2 and 3

Item 2 seeks Ruby Glen's Notice of Independent Review, filed on 22 July 2016; Item 3 seeks "[a]ll documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016."

ICANN organization understands that, on 22 July 2016, Ruby Glen filed certain materials with the International Centre for Dispute Resolution (ICDR) relating to the initiation of an Independent Review Process (IRP) against ICANN. Ruby Glen did not provide ICANN organization with these materials; nor has Ruby Glen, the ICDR, or any other entity ever provided ICANN organization with a Notice of or Request for Independent Review Process that Ruby Glen might have filed against ICANN. As such, ICANN organization does not have any responsive documentary information in response to Items 2 or 3. ICANN understands that Ruby Glen withdrew its request for IRP on 18 August 2016; and that the ICDR later closed the IRP.

Item 4

Item 4 seeks "[a]ll applications, and all documents submitted with the applications, for the rights to .WEB." Materials responsive to Item 4 are publicly available on ICANN's website. Specifically, ICANN organization posts the public portions of each gTLD application and the public portions of any documents submitted with an application on the New gTLD Current Application Status webpage. (*See* https://gtldresult.icann.org/application-result/applicationstatus/viewstatus.) The public portions of the .WEB applications can be accessed as follows:

- NU DOT CO LLC's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1053;
- Charleston Road Registry Inc.'s .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/520;
- Web.com Group, Inc.'s .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1596;
- DotWeb Inc's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1663;
- Ruby Glen, LLC's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/692;
- Afilias Domains No. 3 Ltd's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/292;
- Schlund Technologies GmbH's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/542.

As stated in the Guidebook (Guidebook, Module 2 (Evaluation Questions and Criteria) (https://newgtlds.icann.org/en/applicants/agb)), certain applicant information is not appropriate for public posting and ICANN organization informed applicants that the following types of information would not be publicly posted:

- Personally identifying information (*see* Applicant Questions 6, 7, 11);
- An applicant's Business ID, Tax ID, VAT registration number, or equivalent (*see* Application Question 10);
- Involvement of any individual identified in an application in civil or criminal legal proceedings, (*see* Application Question 11);
- Bank details related to wire transfer payment of the evaluation fee (*see* Application Question 12);
- For geographic names, letters of support or non-objection (*see* Application Question 21(b));
- Descriptions of the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry (*see* Application Questions 30(b) – 44);
- Financial information (*see* Application Question 45-50).

The foregoing types of information contained in new gTLD applications and supporting materials are also subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

Item 5

Item 5 seeks "[a]ll documents discussing the importance of .WEB to bringing competition to the provision of registry services." Item 5 is vague, and does not appear

to concern ICANN's operational activities; as written, it is unclear what documents are being requested.

To the extent Item 5 seeks materials concerning ICANN organization's review of how the New gTLD Program has impacted competition, consumer choice and consumer trust, ICANN organization has established a Competition, Consumer Trust & Consumer Choice Review webpage (https://newgtlds.icann.org/en/reviews/cct), which includes documentary information concerning, among other things, the extent to which the introduction of new gTLDs has promoted competition.

To the extent Item 5 seeks materials that overlap with the materials responsive to Item 9(a) ("document productions to the DOJ" in response to the DOJ CID), ICANN organization incorporates and refers Requestor to the response to Item 9(a) below.

Should the Requestor wish to clarify or narrow the scope of Item 5, ICANN organization will consider the revised request. However, as currently written, Item 5 is so overbroad and vague that ICANN organization is not able to provide a further response at this time.

Item 6

Item 6 seeks "[a]ll documents concerning any investigation or discussion related to: (a) the .WEB contention set, (b) NDC's application for the .WEB gTLD, (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign."

With regard to Items 6(a) and 6(b), these requests are exceedingly overbroad and vague; as written, it is unclear what documents are being requested. NDC (and all the applicants for .WEB) went through an extensive application process that included, among other things: the submission of the application and supporting materials; an administrative completeness check; comment period and a formal objection process; contention procedures and dispute resolution; an initial evaluation (which included string reviews and demonstrations of technical, operational, and financial capability, as well as reviews for DNS security issues); and background screening. As written, Items 6(a) and 6(b) seek "[a]ll documents" concerning every facet of the application process for each of the seven .WEB applications, which is not a reasonable request. As such, it is subject to the following Nondisclosure Condition:

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Should the Requestor wish to clarify or narrow the scope of Items 6(a) and 6(b), ICANN organization will consider the revised request. However, as currently written, Items 6(a) and 6(b) are so overbroad and vague that ICANN organization is not able to provide a

further response at this time. In addition, Items 6(a) and 6(b) potentially seek documents that are subject to the following Nondisclosure Conditions:

- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

With regard to Items 6(c) and 6(d), these requests seek "[a]ll documents concerning any investigation or discussion related to: […] (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign." Certain materials responsive to Items 6(c) and 6(d) are publicly available. Verisign issued a public statement regarding its agreement with NDC and its involvement in the auction. (*See* "Verisign Statement Regarding .Web Auction Results," available at https://investor.verisign.com/releasedetail.cfm?ReleaseID=981994.)

Any further documents responsive to Items 6(c) and 6(d) are subject to the following Nondisclosure Conditions:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents,

memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

To the extent Item 6 seeks materials that overlap with the materials responsive to Item 9(a) ("document productions to the DOJ" in response to the DOJ CID), ICANN organization incorporates and refers Requestor to the response to Item 9(a) below.

Notwithstanding the above, ICANN organization will continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP. If it is determined that certain additional documentary information is appropriate for public disclosure, ICANN organization will supplement this DIDP Response and notify the Requestor of the supplement.

Item 7

Item 7 seeks "[d]ocuments sufficient to show the current status of NDC's request to assign .WEB to Verisign." ICANN organization does not have any documentary information responsive to this request. That said, the current application status for each new gTLD application, including NDC's .WEB application, is publicly available on the New gTLD Current Application Status webpage. (*See* https://gtldresult.icann.org/application-result/applicationstatus/viewstatus; *see also* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.)

Item 8

Item 8 seeks "[d]ocuments sufficient to show the current status of the delegation of .WEB." Materials responsive to Item 8 are publicly available. Specifically, ICANN organization makes publicly available information concerning the current application status for each gTLD application, including NDC's .WEB application, on the New gTLD Current Application Status webpage. (*See* https://gtldresult.icann.org/application-result/applicationstatus/viewstatus; *see also* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.) As reflected on the foregoing webpages, .WEB is "in contracting."

Item 9

Item 9 seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; (d) communications with Verisign or NDC relating to the investigation; and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board."

On 1 February 2017, DOJ issued a Civil Investigative Demand (CID) to ICANN in connection with DOJ's investigation of Verisign's proposed acquisition of NDC's contractual rights to operate the .WEB gTLD. ICANN provided DOJ with information responsive to the CID.

With regard to Item 9(a), the vast majority of the documents provided to DOJ are publicly available materials. Attachment A provides links to the publicly available documents that ICANN organization provided to DOJ in response to the CID. With respect to the non-public materials provided to DOJ, such materials are categorized as follows and are subject to various Nondisclosure Conditions:

- Confidential data reports, subject to the following Nondisclosure Conditions:
    - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
    - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
    - Confidential business information and/or internal policies and procedures.

- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

- Correspondence from, to, or among ICANN organization relating to .WEB, subject to the following Nondisclosure Conditions:

  - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

  - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

  - Confidential business information and/or internal policies and procedures.

  - Trade secrets and commercial and financial information not publicly disclosed by ICANN.

  Certain of these documents comprise correspondence to or from the Requestor, which are undoubtedly already in the Requestor's possession, custody, or control. If the Requestor considers its correspondence with ICANN organization to be appropriate for public disclosure, ICANN organization can supplement this DIDP Response and make such documents publicly available.

- Auction forms from .WEB applicants, subject to the following Nondisclosure Conditions:

  - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

  - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

  - Confidential business information and/or internal policies and procedures.

  - Trade secrets and commercial and financial information not publicly disclosed by ICANN.

Again, certain of these documents comprise auction forms the Requestor submitted to ICANN organization, which are undoubtedly already in the Requestor's possession, custody, or control. If the Requestor considers its auction forms to be appropriate for public disclosure, ICANN organization can supplement this DIDP Response and make such documents publicly available.

- Self-Resolution notices regarding gTLDs other than .WEB, subject to the following Nondisclosure Conditions:
    - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
    - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
    - Confidential business information and/or internal policies and procedures.
    - Trade secrets and commercial and financial information not publicly disclosed by ICANN.
- Draft Board materials, draft announcements, and other internal documents, subject to the following Nondisclosure Conditions:
    - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
    - Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
    - Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

Item 9(b) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including […] (b) communications with the DOJ." Documents responsive to Item 9(b) are subject to the following Nondisclosure Conditions:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Item 9(c) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including: […] (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions." Documents responsive to Item 9(c) are subject to the following nondisclosure conditions:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Confidential business information and/or internal policies and procedures.

Item 9(d) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ('DOJ') investigation including Verisign becoming the registry operator for .WEB, including […] (d) communications with Verisign or NDC relating to the investigation…." ICANN organization did not engage in written communications with Verisign or NDC concerning the substance of DOJ's investigation and therefore ICANN org does not have any documentary information responsive to this request.

Item 9(e) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ('DOJ') investigation including Verisign becoming the registry operator for .WEB, including […] (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board." Documents responsive to Item 9(e) are subject to the following Nondisclosure Conditions:

- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks "[a]ll joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation." ICANN does not have any documentary information responsive to this request.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN org has determined that there are no current circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure. ICANN org will continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP. If it is determined that certain additional documentary information is

appropriate for public disclosure, ICANN org will supplement this DIDP Response and notify the Requestor of the supplement.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see http://www.icann.org/en/about/transparency/didp. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. ICANN organization encourages you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. If you have any further inquiries, please forward them to didp@icann.org.

ATTACHMENT A

DOCUMENT DESCRIPTION	LINK
App cant Gu debook	https://newgt ds. cann.org/en/app cants/agb/gu debook fu 04 un12 en.pdf
ICANN Auct on Ru es, Eva uat on Processes, Etc.	https://newgt ds. cann.org/en/program status/eva uat on pane s#overv ew
	https://newgt ds. cann.org/en/program status/odr
	https://newgt ds. cann.org/en/app cants/auct ons
Documents Perta n ng to .WEB App cat ons	https://newgt ds. cann.org/s tes/defau t/f es/drsp/03feb14/determ nat on 1 1 1033 22687 en.pdf
	https://gt dresu t. cann.org/app cat onstatus/str ngcontent onstatus:down oad auct onreport/233
Mater a s re February 27, 2014 Board Governance Comm ttee ("BGC") Meet ng	https://www. cann.org/resources/board mater a /m nutes bgc 2014 02 27 en
	https://www. cann.org/en/system/f es/f es/request annex v stapr nt 06feb14 en.pdf
	https://www. cann.org/en/system/f es/f es/sereboff to bgc 24feb14 en.pdf
	https://www. cann.org/en/system/f es/f es/determ nat on v stapr nt 27feb14 en.pdf
	https://www. cann.org/resources/board mater a /agenda bgc 2014 02 27 en
	https://www. cann.org/en/system/f es/f es/request v stapr nt 06feb14 en.pdf
Mater a s re October 22, 2015 Regu ar Meet ng of the ICANN Board	https://www. cann.org/resources/board mater a /reso ut ons 2015 10 22 en
	https://www. cann.org/resources/board mater a /m nutes 2015 10 22 en
	https://www. cann.org/resources/board mater a /pre m report 2015 10 22 en
	https://www. cann.org/en/system/f es/bm/br ef ng mater a s 1 redacted 22oct15 en.pdf
	https://www. cann.org/en/system/f es/bm/br ef ng mater a s 2 22oct15 en.pdf
Mater a s re December 2, 2015 Spec a Meet ng of the ICANN Board	https://www. cann.org/resources/board mater a /reso ut ons 2015 12 02 en
	https://www. cann.org/resources/board mater a /m nutes 2015 12 02 en
	https://www. cann.org/resources/board mater a /pre m report 2015 12 02 en
	https://www. cann.org/en/system/f es/bm/br ef ng mater a s 1 redacted 02dec15 en.pdf
	https://www. cann.org/en/system/f es/bm/br ef ng mater a s 2 redacted 02dec15 en.pdf
Mater a s re March 3, 2016 Regu ar Meet ng of the ICANN Board	https://www. cann.org/resources/board mater a /pre m report 2016 03 03 en
	https://www. cann.org/en/system/f es/bm/br ef ng mater a s 1 redacted 03mar16 en.pdf
	https://www. cann.org/en/system/f es/bm/br ef ng mater a s 2 redacted 03mar16 en.pdf
	https://www. cann.org/resources/board mater a /reso ut ons 2016 03 03 en
	https://www. cann.org/resources/board mater a /m nutes 2016 03 03 en
Mater a s re Ju y 21, 2016 BGC Meet ng	https://www. cann.org/resources/board mater a /m nutes bgc 2016 07 21 en
	https://www. cann.org/en/system/f es/f es/recons derat on 16 9 ruby g en rad x request redacted 17 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/recons derat on 16 9 ruby g en rad x bgc determ nat on 21 u 16 en.pdf
Mater a s re September 15, 2016 Regu ar Meet ng of the ICANN Board	https://www. cann.org/resources/board mater a /m nutes 2016 09 15 en
	https://www. cann.org/resources/board mater a /pre m report 2016 09 15 en
Pub c App cat on Mater a s for .WEB	https://gt dresu t. cann.org/app cat onstatus/app cat ondeta s:down oadapp cat on/1596?t:ac=1596
	https://gt dresu t. cann.org/app cat onstatus/app cat ondeta s:down oadapp cat on/292?t:ac=292
	https://gt dresu t. cann.org/app cat onstatus/app cat ondeta s:down oadapp cat on/542?t:ac=542
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	https://gt dresu t. cann.org/app cat onstatus/app cat ondeta s:down oadapp cat on/520?t:ac=520
	https://gt dresu t. cann.org/app cat onstatus/app cat ondeta s:down oadapp cat on/1663?t:ac=1663
.WEB/.WEBS Content on Set Status	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/content onsetd agram/233
V stapr nt L m ted v. ICANN (.WEBS) IRP Mater a s	https://www. cann.org/resources/pages/v stapr nt v cann 2014 06 19 en
	https://www. cann.org/en/system/f es/f es/v stapr nt v cann f na dec arat on 09oct15 en.pdf
	https://www. cann.org/en/system/f es/f es/ cann response add t ona subm ss on redacted 01may15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt response pet t on new hear ng 30apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt pet t on new hear ng 30apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt add t ona subm ss on procedura order 2 redacted 24apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt add t ona subm ss on reference mater a redacted 24apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/procedura order 2 19apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/ cann rp support response redacted 02apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/ cann rp response exh b ts 02apr15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt rp support request redacted 02mar15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt rp support annex redacted 02mar15 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt rp support reference mater a redacted 02mar15 en.pdf
	https://www. cann.org/en/system/f es/f es/procedura order 1 30 an15 en.pdf
	https://www. cann.org/en/system/f es/f es/ cann response rp 21 u 14 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt rp not ce 11jun14 en.pdf
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	https://www. cann.org/en/system/f es/f es/v stapr nt rp request annex 11 11 un14 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt rp reference mater a 1 11 un14 en.pdf
	https://www. cann.org/en/system/f es/f es/v stapr nt rp reference mater a 6 11 un14 en.pdf
Auct on Part c pat on Forms (temp ates)	https://newgt ds. cann.org/en/app cants/auct ons/b dder form 09nov17 en.pdf
	https://newgt ds. cann.org/en/app cants/auct ons/ru es nd rect content on 24feb15 en.pdf

	https://newgt ds. cann.org/en/app cants/auct ons/b dder agreement 09nov17 en.pdf
	https://newgt ds. cann.org/en/app cants/auct ons/b dder agreement supp ement 09nov17 en.pdf
	https://newgt ds. cann.org/en/app cants/auct ons/b dder des gnat on form 09nov17 en.pdf
Auct on Resu t Reports	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/16
	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/52
	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/82
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	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/229
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	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/20
	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/41
	https://gt dresu t. cann.org/app cat on resu t/app cat onstatus/str ngcontent onstatus:down oadauct onreport/233
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	https://gt dresu t. cann.org/app cat onstatus/str ngcontent onstatus:down oad auct onreport/67
Ruby G en v. ICANN L t gat on Mater a s	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en comp a nt 22 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en ex parte app cat on tro memo po nts author t es 22 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en dec arat on pau a zecch n 22 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en dec arat on onathon nevett 22 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en cann oppos t on ex parte app cat on tro 25 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en court order deny ng p a nt ff ex parte app cat on tro 26 u 16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en amended comp a nt 08aug16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en mot on court ssue schedu ng order 26oct16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en dec arat on zacch n 26oct16 en.pdf

	Notice: https://www. cann.org/en/system/f es/f es/ t gat on ruby g en cann not ce mot on d sm ss f rst amended comp a nt 26oct16 en.pdf **Memorandum**: https://www. cann.org/en/system/f es/f es/ t gat on ruby g en cann memorandum po nt author t es support mot on d sm ss f rst amended comp a nt 26oct16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en mot on court ssue schedu ng order 26oct16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en oppos t on mot on d sm ss f rst amended comp a nt 07nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en p a nt ff request jud c a not ce support oppos t on cann mot on d sm ss f rst amended comp a nt 07nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en cann oppos t on mot on court ssue schedu ng order 07nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en cann rep y support mot on d sm ss f rst amended comp a nt 14nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en rep y mot on court ssue schedu ng order 14nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en court order mot on d sm ss f rst amended comp a nt 28nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en judgment 28nov16 en.pdf
	https://www. cann.org/en/system/f es/f es/ t gat on ruby g en not ce appea regard ng d sm ssa 20dec16 en.pdf
	Court f ngs ava ab e at https://www.pacer.gov/f ndcase.htm
M sce aneous Mater a s Subm tted n Response to CID	N e sen ICANN G oba Consumer Research Apr 2015, ava ab e at: http://newgt ds. cann.org/en/rev ews/cct/g oba consumer survey 29may15 en.pdf
	N e sen ICANN G oba Consumer Research Apr 2015, ava ab e at: http://newgt ds. cann.org/en/rev ews/cct/g oba consumer survey 29may15 en.pdf
	N e sen ICANN G oba Reg strant Survey September 2015, ava ab e at http://newgt ds. cann.org/en/rev ews/cct/g oba reg strant survey 25sep15 en.pdf
	N e sen ICANN G oba Reg strant Survey September 2015, ava ab e at http://newgt ds. cann.org/en/rev ews/cct/g oba reg strant survey 25sep15 en.pdf
	Phase I Assessment of the Compet t ve Effects Assoc ated w th the New gTLD Program, ava ab e at: http://newgt ds. cann.org/en/rev ews/cct/compet t ve effects phase one assessment 28sep15 en.pdf
	ICANN App cat on Process Survey November 2016 ICANN 57 Top ne Presentat on, pub c y ava ab e at https://commun ty. cann.org/down oad/attachments/56135378/2016%20ICANN%20App cat on%20Process%20ICANN%2057%20Top ne%20v1.1.pptx?vers on=1&mod f cat onDat
	ICANN App cat on Process Survey November 2016 ICANN 57 Top ne Presentat on, pub c y ava ab e at https://commun ty. cann.org/down oad/attachments/56135378/2016%20ICANN%20App cat on%20Process%20ICANN%2057%20Top ne%20v1.1.pptx?vers on=1&mod f cat onDat
	ICANN Announces Phase One Resu ts from Econom c Study Eva uat ng Compet t on n the Doma n Name Space, ava ab e at: https://www. cann.org/news/announcement 2 2015 09 28 en
	Phase I Assessment of the Compet t ve Effects Assoc ated w th the New gTLD Program, by Greg Rafert and Cather ne Tucker, ava ab e at: http://newgt ds. cann.org/en/rev ews/cct/compet t ve effects phase one assessment 28sep15 en.pdf

	Econom c Study on New gTLD Program's Compet t ve Effects: Phase II Resu ts Ava ab e for Pub c Comment, ava ab e at: https://www. cann.org/news/announcement 2016 10 11 en
	Phase II Assessment of the Compet t ve Effects Assoc ated w th the New gTLD Program, by Greg Rafert and Cather ne Tucker, ava ab e at https://newgt ds. cann.org/en/rev ews/cct/compet t ve effects phase two assessment 11oct16 en.pdf
	ICANN Econom c Study FAQs, ava ab e at https://newgt ds. cann.org/en/rev ews/cct/econom c study faqs 28sep15 en
	Compet t on, Consumer Trust and Consumer Cho ce Rev ew Team Draft Report Webs te Announcement, ava ab e at: https://www. cann.org/news/announcement 2 2017 03 07 en
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	Ana ys s Group Phase II Assessment October 2016 Reg stry market segmentat on ana ys s.x sx, ava ab e at https://commun ty. cann.org/down oad/attachments/56135378/Reg stry%20Market%20Segmentat on%20Ana ys s%20%28Project5%29_8.28.2016.x sx?vers on=1&mod
	Doma nW re G oba TLD Stat Report, ava ab e at nk https://www.centr.org/ brary/ brary/stat st cs report/doma nw re g oba t d report 2016 4.htm (referred by Russ We nste n)
	Compet t on, Consumer Trust and Consumer Cho ce Rev ew Webs te (w th overv ew of other mater a s), ava ab e at: https://newgt ds. cann.org/en/rev ews/cct
	Informat on regard ng the Compet t on, Consumer Trust and Consumer Cho ce Rev ew Team (CCT RT) members, ava ab e at https://www. cann.org/news/announcement 2 2015 12 23 en

Exhibit R-31

Afilias Domains No. 3 Limited Reconsideration Request ("RR")

1. Requestor Information

Requestor:

Name: Afilias Domains No. 3 Limited

Address: Contact Information Redacted

Email: Scott Hemphill, Contact Information Redacted

Requestor is represented by:

Counsel: Dechert LLP

Address: Contact Information Redacted

Email: Arif Hyder Ali, Contact Information Redacted

2. Request for Reconsideration of:

___ Board action/inaction

_X__ Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Afilias Domains No. 3 Limited ("**Afilias**" or "**Requestor**") seeks reconsideration of ICANN's 24 March 2018 response to Requestor's Documentary Information Disclosure Policy ("**DIDP**") request, which denied disclosure of certain categories of documents pursuant to ICANN's DIDP.

On 23 February 2018, Requestor submitted to ICANN a DIDP request seeking the disclosure of certain documentary information related to the .WEB contention set (the "**DIDP**

Request").[1] Specifically, the Requestor submitted 10 requests as follows:

> Request 01: All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
>
> Request 02: Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
>
> Request 03: All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;
>
> Request 04: All applications, and all documents submitted with applications, for the rights to .WEB;
>
> Request 05: All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
>
> Request 06: All documents concerning any investigation or discussion related to (a) the .WEB contention set, (b) NDC's application for the .WEB gTLD, (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
>
> Request 07: Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
>
> Request 08: Documents sufficient to show the current status of the delegation of .WEB;
>
> Request 09: All documents relating to the Department of Justice, Antitrust Division's ("**DOJ**") investigation into Verisign becoming the registry operator for .WEB ("**DOJ Investigation**"), including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; (d) communications with Verisign or NDC relating to the investigation; and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
>
> Request 10: All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ

[1] Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf.

Investigation.[2]

Subsequently, on 24 March 2018, ICANN responded to the DIDP Request by issuing a response (the "**DIDP Response**").[3] ICANN's DIDP Response is the basis for this reconsideration request. Of Requestor's ten requests, ICANN stated that it was fully disclosing requested documents for only two requests (Requests 07, 08), and asked Requestor to revise an additional two requests (Requests 05, 06(a, b)).[4] ICANN denied one request in whole (Request 01) and three requests in part (Requests 04, 06(c, d), and 09(a-c, e)) based on its assertion that the requested documents are subject to the DIDP's Nondisclosure Conditions.[5] ICANN stated that it has no documents responsive to four requests (Requests 02, 03, 09(d), 10).[6]

Requestor subsequently submitted to ICANN a letter addressing and responding to ICANN's stated concerns in the DIDP Response on 23 April 2018 (the "**DIDP Reply**") in order to facilitate the timely disclosure of responsive documents.[7] The DIDP Reply proposes that Requestor will limit the disclosure of any material identified by ICANN as "highly confidential" to only Requestor's outside counsel pursuant to a confidentiality agreement.[8] It also proposed modified document requests based on the DIDP Response. In accordance with the DIDP Reply, Requestor's outstanding and amended document requests are as follows:

> Request 01: All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 21016 request for additional information, and their email responses to ICANN that indicate whether they consent to the public disclosure of their responses to ICANN's 16 September 2016 request for information.
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> Request 04: NDC's responses to Items 12 and 45 through 50 in

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2 *Id.* at pp. 3-5 (emphasis added).
3 Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf.
4 *Id.* at pp. 7-11.
5 *Id.* at pp. 5-7, 9-15.
6 *Id.* at pp. 6, 15.
7 Exhibit 3, Letter from A. Ali to ICANN Board (23 Apr. 2018).
8 *Id.* at p. 2.

> its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.
>
> Request 05: All documents discussing the importance of .WEB to bringing competition to the provision of registry services.
>
> Request 06(a): Documents sufficient to show (1) the date on which ICANN first learned that Verisign was going to or had in fact funded NDC's bids for the .WEB gTLD at the 27-28 July 2016 auction, and (2) the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.
>
> Request 6(b): All documents (1) reflecting NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, and (2) concerning any investigation or discussion related to NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012.
>
> Request 6(c): All documents concerning any investigation or discussion related to Verisign's agreement with NDC to assign the rights to .WEB to Verisign.
>
> Request 6(d): All documents concerning Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign.
>
> Request 09: All documents relating to the DOJ Investigation, excluding those documents that ICANN has reasonably identified as already being in Afilias' possession, including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; (d) communications with Verisign or NDC relating to the investigation; and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board.[9]

Each of these requests plainly seek documents relevant to Requestor's concerns, including: the impact on competition if Verisign obtains the .WEB license; whether Verisign and NDC violated, *inter alia*, provisions of the New gTLD Applicant Guidebook ("**AGB**") and ICANN's

[9] *See id.* at 2-5; Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), pp. 3-5, https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf.

Auction Rules; and whether ICANN's handling of these matters has been consistent with its Bylaws and Articles of Incorporation ("**Articles**").

We recognize that ICANN has not yet responded to the DIDP Reply. Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the DIDP Response should ICANN and Requestor fail to reach an agreement based on the DIDP Reply.[10] Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the DIDP Reply. Requestor is prepared to discuss an appropriate "tolling" agreement that would allow Requestor and ICANN to attempt to reach an agreement concerning the DIDP Request and the DIDP Reply.

4. Date of action/inaction:

ICANN acted on 24 March 2018 by issuing the DIDP Response.

5. On what date did you become aware of action or that action would not be taken?

Requestor became aware of the action on 24 March 2018, when it received the DIDP Response from ICANN.

[10] Afilias believes that the 30-day period for submitting a reconsideration request is stayed until 30 days after ICANN responds in writing to the DIDP Reply. *See* Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 4, § 4.2(g), https://www.icann.org/resources/pages/governance/bylaws-en (providing that a reconsideration request must be submitted within 30 days of the ICANN Staff action or inaction). However, in an abundance of caution, Afilias is submitting this Reconsideration Request now.

6. Describe how you believe you are materially affected by the action or inaction:

Requestor is materially affected by ICANN's refusal to disclose certain documentary information concerning the .WEB contention set, as requested in the DIDP Request and amended in the DIDP Reply.

As described with more detail in **Section 8** below, Requestor submitted to ICANN an application to operate the .WEB gTLD as part of ICANN's New gTLD Program. Requestor consequentially became a member of the .WEB contention set.[11] All of the members of the contention set agreed to resolve the contention set through a private auction. However, at the eleventh hour, one member—Nu Dot Co LLC ("**NDC**")—suddenly withdrew from the private auction after having previously consented to that process. As a result of NDC's withdrawal, the .WEB contention set was resolved through an ICANN-administered auction ("**ICANN Auction**") pursuant to the AGB. NDC won the auction, apparently after agreeing to assign all rights to the .WEB license to Verisign, Inc. ("**Verisign**"), upon whose behalf NDC placed the winning bid.[12]

After the ICANN Auction, Verisign, which had not applied for the .WEB license and was not part of the contention set, announced that it had entered into a secret agreement with NDC. Pursuant to the terms of that secret agreement, Verisign had agreed to fund NDC's bid in exchange for NDC's agreement to "assign the [.WEB] Registry Agreement to Verisign."[13] This secret agreement, and ICANN's failure to timely address it, violates ICANN's documented policies,

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[11] Exhibit 5, "New gTLD Contention Set Status," ICANN (last visited 16 Feb. 2018), https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (listing all seven applicants for the .WEB gTLD).

[12] Exhibit 6, "ICANN New gTLD Contention Set Resolution Auction Final Results for WEB/WEBS" ICANN, https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadauctionreport/18?t:ac=692 (listing results of and bid amounts for the .WEB auction).

[13] Exhibit 7, Verisign, "Verisign Statement Regarding .Web Auction Results" (1 Aug. 2016), https://investor.verisign.com/news-releases/news-release-details/verisign-statement-regarding-web-auction-results.

including, without limitation, the AGB, ICANN's Auction Rules, and ICANN's mandate to promote competition. ICANN consequently cannot permit the delegation of .WEB to NDC or to Verisign.[14]

ICANN's investigation of the matter, if any, has been entirely nontransparent. After Requestor raised concerns about the manner in which NDC had secretly acted as Verisign's agent to obtain the .WEB license for the benefit of Verisign, ICANN sent Requestor a lengthy list of questions, purporting to seek information about Requestor's concerns.[15] Although Requestor provided detailed responses to ICANN on 7 October 2016, Requestor has received no meaningful information about ICANN's investigation or how ICANN intends to address the subterfuge by which NDC acquired the .WEB license on Verisign's behalf. Indeed, Requestor still has no information about what ICANN currently plans to do with respect to the delegation of .WEB.

6.1 ICANN Violated its own Bylaws in Refusing to Disclose the Requested Documents

In response to the lack of information from ICANN, Requestor filed the DIDP Request to obtain documents relevant to ICANN's investigation of the .WEB contention set. ICANN, however, did not produce documents in response to certain requests—specifically Requests 01, 04-06, and 09.[16] ICANN thereby failed to "operate in a manner consistent with [its] Bylaws," which require that it operate with transparency and openness.[17]

The DIDP is intended to promote transparency in accordance with ICANN's Bylaws and Articles. ICANN implemented the DIDP as part of its "approach to transparency and information disclosure," as codified in both ICANN's Bylaws and Articles.[18] These governing documents require

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14 *See, e.g.*, Exhibit 8, Letter from S. Hemphill to A. Atallah (8 Aug. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf (listing problems with Verisign's involvement in the .WEB auction).

15 Exhibit 9, Letter from C. Willett to J. Kane (16 Sep. 2016).

16 *See* Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf.

17 Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(a), https://www.icann.org/resources/pages/governance/bylaws-en.

18 Exhibit 10, "ICANN Documentary Information Disclosure Policy" ICANN (last visited 27 Feb. 2018), https://www.icann.org/resources/pages/didp-2012-02-25-en.

that ICANN operate "through open and transparent processes"[19] and "to the maximum extent feasible in an open and transparent manner."[20] More specifically, they state that ICANN must:

- "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . ***through open and transparent processes that enable competition*** and open entry in Internet-related markets;"[21]

- "operate to the maximum extent feasible in an open and transparent manner and consistency with procedures designed to ensure fairness;"[22]

- "[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector;"[23] and

- "operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole."[24]

Yet, ICANN did not operate with openness or transparency in the DIDP Response. Requestor asked for information on ICANN's investigation of NDC, Verisign, and the .WEB contention set.[25] ICANN denied the requests for documentary information, choosing instead to maintain a veil of secrecy over its investigation, by unreasonably and illegitimately applying the DIDP's Nondisclosure Conditions and asserting that the requests are "overbroad and vague."[26] These actions are not consistent with ICANN's obligations to operate in "an open and transparent

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19 Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(a), (a)(iv), https://www.icann.org/resources/pages/governance/bylaws-en; Exhibit 11, Amended and Restated Articles of Incorporation (3 Oct. 2016), Section 4, https://www.icann.org/resources/pages/governance/articles-en.

20 Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1, https://www.icann.org/resources/pages/governance/bylaws-en.

21 Exhibit 11, Amended and Restated Articles of Incorporation (3 Oct. 2016), Section 2(III), https://www.icann.org/resources/pages/governance/articles-en (emphasis added).

22 Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1, https://www.icann.org/resources/pages/governance/bylaws-en.

23 *Id.* at Art. 1, § 1.2 (a)(iv).

24 *Id.* at Art. 1, § 1.2(a).

25 Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf.

26 Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), pp. 5, 8-15, https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf. ICANN disclosed only one 'new' document pursuant to the DIDP Request, which simply listed the public documents that ICANN provided the DOJ. *See id.* at Attachment A.

manner."[27] Resultantly, ICANN is not operating "in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole."[28]

Furthermore, Verisign exercises substantial market power through its exclusive licenses to operate the .COM and .NET registries, as evinced by ICANN's continued subjugation of those registries to price caps.[29] The .WEB gTLD, however, can threaten Verisign's long-entrenched monopoly, obviating the need for continued regulation.[30] In order to maintain its monopoly, Verisign entered into a secret arrangement with NDC to obtain the right to operate the .WEB gTLD and further diminish competition at the heart of the domain name system ("**DNS**").

Allowing Verisign to carry out this subterfuge and acquire the .WEB license will harm the Internet community by stifling competition in the DNS. It will also allow applicants to obtain gTLD rights through secretive, unfair, and deceptive means that are inconsistent with ICANN's stated rules and policies. Given ICANN's mandate to operate openly and transparently and to "promote and sustain" competition in the DNS,[31] and Requestor's stated plan to contest Verisign's acquisition of the .WEB gTLD in order to protect competition in the DNS,[32] it is vitally important that ICANN disclose the requested documents—either publicly or pursuant to a confidentiality

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27 Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1, https://www.icann.org/resources/pages/governance/bylaws-en. Moreover, even assuming *arguendo* that ICANN's objections have any validity (and they do not), Requestor has proposed reasonable compromises in the DIDP Reply.

28 *Id.* at Art. 1, § 1.2(a).

29 *See* Exhibit 12, Letter from the United State Senate to the Honorable Renata B. Hesse (12 Aug. 2016), p. 2, https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-ICANNLetter.pdf ("Verisign's government-approved control of the .com registry allows it to operate as a monopoly.").

30 Exhibit 13, Kevin Murphy, "Verisign likely $135 million winner of .web gTLD," DOMAININCITE (1 Aug. 2016), http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld (".web has been seen, over the years, as the string that is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient sematic value to provide a real challenge to .com."); Exhibit 14, Andrew Allann, "Why Verisign paid $135 million for the .web top level domain," DOMAIN NAME WIRE (29 Jul. 2016), https://domainnamewire.com/2016/07/29/verisign-paid-135-million-web-top-level-domain/ ("It views it as competitive to .com – a handful of industry watchers and top level domain name companies have said that .web is the one domain that could unseat .com."); Exhibit 15, Derek Vaughan, "Inside the High Stakes Auction for .Web," THEHOSTINGFINDERS (25 Jul. 2016), https://www.inetservices.com/blog/inside-the-high-stakes-auction-for-web/ (explaining how .WEB could become the new .COM).

31 Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(b), https://www.icann.org/resources/pages/governance/bylaws-en.

32 *See* Exhibit 16, Letter from A. Ali to ICANN Board (16 Apr. 2018) (informing ICANN that Requestor will initiate the cooperative engagement process and file a Request for an Independent Review Process against ICANN should it proceed to delegate the .WEB gTLD to NDC).

agreement—to Requestor.[33] Disclosure will benefit the entire Internet community by providing Requestor with information necessary to contest Verisign's underhanded attempt to protect its competition-stifling monopoly.

6.2 The Public Interest Warrants Disclosure of the Requested Documents

Furthermore, pursuant to the DIDP, ICANN can disclose documents that are governed by the DIDP's Nondisclosure Conditions. Indeed, ICANN must disclose a document covered by a Nondisclosure Condition if "the public interest in disclosing the information outweighs the harm that may be caused by such disclosure."[34] Here, there is a significant public interest in ensuring a competitive market in the DNS that outweighs any harm in disclosure, especially given the proposed confidentiality agreement in the DIDP Reply.

First of all, the subterfuge by which Verisign secretly obtained its asserted rights to the .WEB license seriously undermines core ICANN principles, including "open and fair processes that enable competition and open entry in Internet-related markets" and the application of documented policies in a consistent, neutral, objective, fair, and transparent manner.[35] Verisign hid behind NDC in order to secretly compete for and obtain the .WEB license. Investigating and rectifying such unfair and deceptive conduct is plainly in the public interest.

Second, Verisign's secretive scheme to obtain the .WEB license for itself was not only unfair, deceptive, and lacking in transparency; Verisign's conduct was also carried out specifically to harm competition. Competition is vital to the maintenance of the DNS and the promotion of competition is one of ICANN's core values. Indeed, ICANN emphasizes its mandate to promote

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33 Exhibit 3, Letter from A. Ali to ICANN Board (23 Apr. 2018), p. 2 (proposing that ICANN disclose the requested documents to Requestor pursuant to a confidentiality agreement).

34 Exhibit 10, "ICANN Documentary Information Disclosure Policy" ICANN (last visited 27 Feb. 2018), https://www.icann.org/resources/pages/didp-2012-02-25-en.

35 Exhibit 11, Amended and Restated Articles of Incorporation (3 Oct. 2016), Section 2(III), https://www.icann.org/resources/pages/governance/articles-en (emphasis added).

competition several times in its Bylaws—and has even expressly granted itself permission to discriminate against a party in order to "promot[e] effective competition."[36] ICANN further implemented the New gTLD Program to "encourage competition" in the DNS[37] because a more competitive environment in the DNS will "result in greater innovation, consumer choice, and satisfaction in the long run."[38] As explained in Requestor's 16 April 2018 letter to ICANN, allowing Verisign to obtain the .WEB license based on its subterfuge and collusion with NDC would not only seriously undermine competition in the DNS, contrary to ICANN's mandate, but would also constitute a serious and illegitimate distortion of the fundamental principles of fair play and transparency that underlie ICANN's Bylaws. Clearly, the public's interest in competition outweighs any compelling reason for ICANN to refuse documentary disclosure to Requestor—especially since Requestor is willing to protect the disclosed documents through a confidentiality agreement.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

The entire Internet community is materially affected by ICANN's refusal to disclose the requested documents.

Requestor submitted the DIDP Request in order to gain information to protect the legitimacy by which ICANN awards gTLD licensing rights, as well as to protect competition in

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[36] Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 2, § 2.3, https://www.icann.org/resources/pages/governance/bylaws-en ("ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."). ICANN has identified a core value as "introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest," and committed to operating "through open and transparent processes that enable competition." *Id.* at Art. 1, § 1.2.

[37] Exhibit 17, gTLD Applicant Guidebook (4 Jun. 2012), Preamble, https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf.

[38] Exhibit 18, United States Department of Commerce, "Statement of Policy on the Management of Internet Names and Addresses" (5 Jun. 1998), https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses.

the DNS by contesting the delegation of .WEB to NDC and, consequentially, Verisign. If Verisign obtains the rights to operate .WEB, then, as described in **Section 6.2** above, the entire Internet community will be affected by the further destruction of competition in the DNS. Verisign will stifle innovation, restrict consumer choice, and ensure that it maintains its monopoly.[39] Moreover, Verisign will have extended its monopoly in a manner that shatters ICANN's stated principles, including (without limitation) fairness, transparency, and the neutral, objective, and consistent application of documented policies. The deception and subterfuge deployed by Verisign and NDC have made a mockery of those principles.

If ICANN allows NDC and/or Verisign to succeed in obtaining the .WEB license through such deceptive means, ICANN will have established a disastrous precedent. Any person or company seeking a gTLD will be able to disguise its true identity by secretly funding a putative applicant to obtain gTLD rights on its behalf. Basic requirements for applicants—*e.g.*, that they disclose their parent companies and affiliates; that they provide true, accurate, and complete background information; and that they disclose their funding sources and how they intend to finance the operation of the gTLD—will be rendered meaningless. The dangers posed by such a precedent are readily apparent in this case, where Verisign, the entrenched monopolist, has attempted to maintain its substantial market power even further by hiding behind a relatively small company such as NDC.

There can be no mincing of words concerning the dishonest scheme carried out by Verisign and NDC. They affirmatively concealed the identity of the true party seeking the .WEB license from ICANN, the rest of the contention set, and, indeed, every person with any interest in

[39] Exhibit 19, United States Department of Commerce, "Improvement of Technical Management of Internet Names and Addresses" (20 Feb. 1998), https://www.ntia.doc.gov/federal-register-notice/1998/improvement-technical-management-internet-names-and-addresses-proposed-.

the .WEB gTLD. They intentionally deceived all stakeholders. Of course, the mere fact that Verisign and NDC were willing to engage in such a deceptive scheme should in itself be disqualifying. That ICANN does not appear to have taken any serious action to address the deception and subterfuge carried out by Verisign and NDC—which took place in mid-2016 (nearly two years ago)—adversely affects the entire Internet community. Allowing such underhanded conduct to succeed would seriously undermine the legitimacy and integrity of ICANN. Given the principles at stake, ICANN's refusal to provide the documents sought by the DIDP will adversely affect numerous other stakeholders—including, in particular, the numerous consumers of gTLD registry services.

8. Detail of Staff/Board Action/Inaction – Required Information

8.1 The .WEB Contention Set

Requestor submitted its application for the .WEB gTLD on 13 June 2012 pursuant to the policies and rules set forth in the AGB.[40] Six other entities also applied to become the registry operator for .WEB: NDC; Google, through Charleston Road Registry Inc.; Web.com Group, Inc.; Radix FZC, through DotWeb Inc.; Ruby Glen, LLC ("**Ruby Glen**"), through Donuts, Inc.; and Schlund Technologies GmbH.[41] Since ICANN encourages the private settlements of contention sets,[42] all of the .WEB applicants agreed to resolve the contention set through a private auction. However, NDC

[40] Exhibit 20, Afilias Domains No. 3 Limited, "New gTLD Application Submitted to ICANN" (13 Jun. 2012), https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/292?t:ac=292.

[41] Exhibit 5, "New gTLD Contention Set Status," ICANN (last visited 16 Feb. 2018), https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (identifying members of the .WEB contention set).

[42] Exhibit 17, gTLD Applicant Guidebook (4 Jun. 2012), p. 4-6, https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf ("Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention.").

suddenly withdrew its support for the private auction, thereby forcing all of the .WEB applicants to participate in an ICANN Auction.[43]

NDC's withdrawal concerned Ruby Glen. In subsequent discussions, NDC implied to Ruby Glen that it underwent a change in ownership, which might explain NDC's withdrawal from the private auction.[44] Ruby Glen raised with ICANN its belief that NDC underwent a change in control without having notified ICANN of such change, as required by the AGB.[45] However, both ICANN and its Ombudsman claimed that they investigated Ruby Glen's concern and found that there was no change in control.[46] In fact, it appears that ICANN and its Ombudsman did little more than ask NDC if it had undergone a change in ownership or corporate control, to which NDC answered 'no.'[47] Taking NDC's answer at face value, and apparently asking no further questions, ICANN decided to proceed with the ICANN auction. Ruby Glen protested this decision by initiating both the IRP process and a lawsuit against ICANN, but neither delayed the ICANN Auction.[48]

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43 *Id.* at p. 4-19 ("It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.").

44 Exhibit 21, Email exchange between J. Nevett and J. Rasco (6 Jun. 2016); Exhibit 22, NU DOT CO LLC, "New gTLD Application Submitted to ICANN" (13 Jun. 2012), p. 2, https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1053?t:ac=1053.

45 Exhibit 23, Email exchange between J. Nevett and ICANN (June 2016), https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf; Exhibit 24, Amended Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 8 Aug. 2016), https://www.icann.org/en/system/files/files/litigation-ruby-glen-amended-complaint-08aug16-en.pdf. Other applicants expressed their support for Ruby Glenn's request that ICANN investigate. Exhibit 25, Email from B. Joshi to ICANN (11 Jul. 2016), https://www.icann.org/en/system/files/correspondence/joshi-to-atallah-et-al-11jul16-en.pdf (supporting postponement of .WEB auction to permit ICANN to investigate NDC); Exhibit 26, Email from T. Moerz to ICANN (11 Jul. 2016), https://www.icann.org/en/system/files/correspondence/moerz-to-atallah-et-al-11jul16-en.pdf (same).

46 Exhibit 27, Email exchange between NDC and ICANN (June 2016), https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf (documenting ICANN's inquiry regarding NDC's change in ownership or control); Exhibit 28, Letter from ICANN to Members of the .WEB/.WEBS Contention Set (13 Jul. 2016), p. 1, https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members-13jul16-en.pdf.

47 Exhibit 27, Email exchange between NDC and ICANN (June 2016), https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf.

48 Exhibit 24, Amended Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 8 Aug. 2016), ¶ 55, https://www.icann.org/en/system/files/files/litigation-ruby-glen-amended-complaint-08aug16-en.pdf ("On July 22, 2016, Plaintiff initiated ICANN's Independent Review Process by filing ICANN's Notice of Independent Review. The IRP remains pending."); *see* Exhibit 29, Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 22 Jul. 2016), https://www.icann.org/en/system/files/files/litigation-ruby-glen-amended-complaint-08aug16-en.pdf.

Requestor, along with the other .WEB applicants, participated in the ICANN Auction on 27 July 2016. NDC prevailed at the auction with an unexpectedly high bid of $142 million.[49] The source of NDC's funding was revealed four days later: Verisign.[50] NDC had entered into an agreement with Verisign where, in exchange for Verisign funding NDC's bid for .WEB, NDC agreed to assign the .WEB Registry Agreement to Verisign.[51]

Verisign had failed to apply for the gTLD in 2012 and was therefore not part of the contention set. Instead of publicly applying for the rights to the .WEB registry, Verisign secretly arranged with NDC to obtain the .WEB license through stealth. As a result of Verisign's secret funding, NDC was able to make an unexpectedly high bid and win the .WEB license. By virtue of its secret arrangement with NDC, Verisign is now poised to take on the .WEB license and further consolidate its dominant position within the DNS.[52]

ICANN did nothing in response to Verisign's announcement about its agreement with NDC. Requestor voiced its concerns about Verisign's involvement in the ICANN Auction to ICANN on both 8 August 2016 and 9 September 2016.[53] It received no response from ICANN until 16 September 2016, when ICANN asked for "additional information" from Requestor, Ruby Glen, Verisign, and NDC to "help facilitate informed resolution" of Requestor's "questions regarding,

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49 Exhibit 6, "ICANN New gTLD Contention Set Resolution Auction Final Results for WEB/WEBS" ICANN, https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadauctionreport/18?t:ac=692 (listing results of and bid amounts for the .WEB auction).

50 Exhibit 7, Verisign, "Verisign Statement Regarding .Web Auction Results" (1 Aug. 2016), https://investor.verisign.com/news-releases/news-release-details/verisign-statement-regarding-web-auction-results.

51 Exhibit 7, Verisign, "Verisign Statement Regarding .Web Auction Results" (1 Aug. 2016), https://investor.verisign.com/news-releases/news-release-details/verisign-statement-regarding-web-auction-results.

52 Exhibit 12, Letter from the United State Senate to the Honorable Renata B. Hesse (12 Aug. 2016), p. 4, https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-ICANNLetter.pdf ("Verisign's bid to secure the .web registry may have been undertaken to protect its position in the .com market from additional competition.").

53 *See* Exhibit 8, Letter from S. Hemphill to A. Atallah (8 Aug. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf (listing problems with Verisign's involvement in the .WEB auction); Exhibit 30, Letter from S. Hemphill to A. Atallah (9 Sep. 2016), https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf (reiterating concerns about the .WEB auction to ICANN). The next communication from ICANN occurred over a week after Requestor's 8 August 2016 letter to ICANN, and it simply notified Requestor that the .WEB contention set was placed "on-hold" because of "a pending ICANN Accountability Mechanism initiated by another member of the contention set." Exhibit 31, Letter from A. Atallah to S. Hemphill (30 Sep. 2016), https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf.

among other things, whether [NDC] should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected."[54] Requestor submitted a detailed response to ICANN's inquiries within the requested timeframe that further articulated Requestor's concerns about Verisign and NDC.[55] ICANN, though, did not respond until nearly a year and a half later. When ICANN finally contacted Requestor on 31 March 2018, it simply requested permission to disclose Requestor's response to the 16 September 2016 letter.[56] ICANN has still provided no substantive response or meaningful information to address Requestor's serious concerns. To the extent that ICANN has any position regarding Requestor's concerns, it has failed to make that position known.

8.2 The DIDP Request

Requestor has waited over a year and a half to learn from ICANN the results of its supposed investigation into NDC and Verisign. Given the significant delay, Requestor sought to obtain some information from ICANN regarding its investigation through the DIDP. As described in **Section 3** above, on 23 February 2018, Requestor submitted to ICANN the DIDP Request.[57]

ICANN's response to the DIDP Request did not provide Requestor with any significant new information regarding NDC, Verisign, or the .WEB contention set. Rather, for the majority of the requests, ICANN either (1) refused to disclose the requested documents pursuant to the DIDP's Nondisclosure Conditions or (2) argued that there was some problem with the request itself.[58] ICANN's refusal to disclose documents in the DIDP Response is the basis for this reconsideration request, as described in **Section 6** above.

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54 Exhibit 9, Letter from C. Willett to J. Kane (16 Sep. 2016).

55 *See* Exhibit 32, Letter from J. Kane to C. Willett (7 Oct. 2016) (providing responses to ICANN's request for information).

56 Exhibit 33, Email from C. Willett to J. Kane (31 Mar. 2018).

57 Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf.

58 *See* Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf.

Requestor has since offered to resolve ICANN's problems with its DIDP Request through the DIDP Reply.[59] As stated above, if Requestor and ICANN agree to the disclosure of the requested documents pursuant to the proposed compromise set forth in the DIDP Reply, this reconsideration request will be moot and Requestor will withdraw the request. However, if Requestor and ICANN fail to reach an agreement, Requestor will pursue this reconsideration request in order to obtain the denied document requests as amended in the DIDP Reply.

9. What are you asking ICANN to do now?

Requestor asks ICANN to disclose the documents requested in the DIDP Request, as amended by the DIDP Reply.

10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

A described in **Section 8** above, Requestor is a member of the .WEB contention set and the entity that submitted both the DIDP Request and the DIDP Reply to ICANN. It is therefore materially affected by ICANN's decision to deny its requests for documentary information, which directly relate to the .WEB contention set.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

[59] *See* Exhibit 3, Letter from A. Ali to ICANN Board (23 Apr. 2018).

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

This is not applicable.

12. Do you have any documents you want to provide to ICANN?

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

April 23, 2018

Arif Hyder Ali Date

Exhibit R-32

DETERMINATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-7
5 JUNE 2018

The Requestor, Afilias Domains No. 3 Ltd., seeks reconsideration of ICANN organization's response to the Requestor's request, pursuant to ICANN organization's Documentary Information Disclosure Policy (DIDP), for documents relating to the .WEB contention set (DIDP Request).[1] Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Commitments established in the Bylaws concerning accountability, transparency, and openness.[2]

I. Facts.

A. Background Facts.

The Requestor submitted an application for .WEB, which was placed in a contention set with other .WEB applicants. The Requestor was invited to, and did, participate in an auction to secure the right to operate .WEB. The Requestor did not prevail at the auction; another applicant, Nu Dot Co, LLC (NDC), secured the winning bid.

On 23 February 2018, the Requestor submitted a DIDP Request (First DIDP Request) to ICANN organization requesting documents related to the .WEB contention set.[3] The First DIDP Request requested the following ten categories of documents:

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;

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[1] Request 18-7, § 3, at Pgs. 1-5.
[2] Request 18-7, § 6, at Pg. 6-11.
[3] 23 February 2018 DIDP Request No. 20180223-1, *available at* https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf.

4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
    a. The .WEB contention set,
    b. NDC's application for the .WEB gTLD,
    c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
    d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;
9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
    a. Document productions to the DOJ,
    b. Communications with the DOJ,
    c. Submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions,
    d. Communications with Verisign or NDC relating to the investigation, and
    e. Internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ investigation.[4]

On 24 March 2018, ICANN organization responded to the Requestor's First DIDP Request (DIDP Response). ICANN responded individually to each of the ten items (and their subparts) by providing links to the publicly availably documents; objecting to certain requests as vague, overbroad, or unrelated to ICANN's operational activities; or confirming that documents responsive to the items do not exist. With respect to certain requested materials that were in ICANN organization's possession and not already publicly available, ICANN organization explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, "ICANN organization … considered whether the

[4] *Id*.

public interest in disclosure of the information subject to these conditions … outweigh[ed] the harm that may be caused by such disclosure" and "determined that there [were] no current circumstances for which the public interest in disclosing the information outweigh[ed] the harm" of disclosure.[5] In response to Item 1, ICANN organization responded that it would contact relevant third parties to determine whether additional documentary information is appropriate for public disclosure.[6] With respect to requests that were vague, ICANN organization suggested the Requestor could amend its DIDP request to clarify.[7]

On 23 April 2018, the Requestor submitted Request 18-7 challenging ICANN organization's responses Items 1, 4, 5, 6, and 9 in the DIDP Response. At the same time, the Requestor submitted a Reply to the DIDP Response (DIDP Reply)[8] in which it revised Items 1, 4, 5, 6(a-b), and 9(a) as follows:

Request	Original Request	Amended Request
1	All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information	Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN's 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter
4	All applications, and all documents submitted with the applications, for the rights to .WEB	NDC's responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items;
5	All documents discussing the importance of .WEB to bringing	Any documents, analyses, or studies that contain information regarding potential competition, substitution, and

[5] 24 March 2018 Response to DIDP Request No. 20180223-1, *available at* https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf.
[6] *Id*.
[7] *Id*.
[8] 23 April 2018 Reply to DIDP Request No. 20180223-1, *available at* https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf.

	competition to the provision of registry services	interchangeability between or among .WEB and .COM, .NET, or other gTLDs
6(a-b)	All documents concerning any investigation or discussion related to a. The .WEB contention set, b. NDC's application for the .WEB gTLD	Documents related to the .WEB Investigation, including: 1. All documents reflecting NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 2. All documents concerning any investigation or discussion related to NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 3. Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC's bids for the .WEB gTLD at the 28-28 July 2016 (*sic*) auction, and 4. Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.
9(a)	All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including: (a) Document productions to the DOJ	All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afilias' possession.

The Requestor also offered to enter into a confidentiality agreement under which the Requestor would limit disclosure of any material produced by ICANN organization in response to Requests 1, 4, 6, and 9 designated as "highly confidential" to the Requestor's outside counsel.

The Requestor acknowledged in Request 18-7 that it had submitted the DIDP Reply and that Request 18-7 is premature. Specifically, the Requestor stated:

> Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the DIDP Response should ICANN and Requestor fail to reach an agreement based on the DIDP Reply. Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the DIDP Reply. Requestor is prepared to discuss an appropriate "tolling" agreement that would allow Requestor and ICANN to attempt to reach an agreement concerning the DIDP Request and the DIDP Reply.[9]

On 27 April 2018, ICANN organization responded to the Requestor's DIDP Reply.[10] Regarding the Requestor's offer to enter into a confidentiality agreement, ICANN organization stated:

> The concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make public documents concerning ICANN organization's operations unless there is a compelling reason for confidentiality. (*See* https://www.icann.org/resources/pages/didp-2012-02-25-en.) Moreover, your proposal is asking ICANN organization to treat Afilias differently than other requestors, and to act in a manner that is contrary to what is set forth in the DIDP Process, which as you know would be in contravention of ICANN's Bylaws.[11]

With respect to the amended requests, ICANN organization offered, and the Requestor agreed, to treat them as a new DIDP request, with an effective submission date of 23 April 2018. ICANN organization confirmed that it will respond to the DIDP Reply in accordance with the

[9] Request 18-7, § 3, at Pg. 5.
[10] *See* Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, *available at* https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf.
[11] *Id.*

DIDP Process.[12] ICANN organization provided a response to the DIDP Reply on 23 May 2018.[13]

B. Relief Requested.

The Requestor asks the BAMC to "disclose the documents requested in the DIDP Request, as amended by the DIDP Reply."[14]

II. Issue Presented.

The issue is whether Request 18-7 is sufficiently stated or whether summary dismissal is appropriate.

III. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

> (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
>
> (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
>
> (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information."[15]

Pursuant to Article 4, Section 4.2(k) of the Bylaws, the BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.[16] The BAMC

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[12] *Id.*
[13] *See* DIDP Response to Request No. 20180423-1, 23 May 2018, *available at* https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf.
[14] Request 18-7, § 9, at Pg. 17.
[15] ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).
[16] *Id.* at § 4.2(k).

may summarily dismiss a reconsideration request if the BAMC determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.[17] If a reconsideration request is not summarily dismissed, it shall be sent to the Ombudsman, who shall either recuse himself in accordance with Article 4, Section 4.2(l)(iii) of the Bylaws or shall review and consider the reconsideration request.[18] The Ombudsman shall submit to the BAMC his substantive evaluation of the reconsideration request within 15 days of the Ombudsman's receipt of the request.[19] The BAMC shall then promptly proceed to review and consider the reconsideration request.[20] The BAMC must make a nonbinding recommendation to the Board within 30 days following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the reconsideration request for those matters for which the Ombudsman recuses himself), unless impractical, after which the Board will make a final decision on the merits of the request.[21] As noted above, this Determination is limited to evaluating Request 18-7 to determine if it is sufficiently stated.

IV. Analysis and Rationale.

In evaluating whether a reconsideration request is sufficiently stated, the following factors are considered: (1) is the reconsideration request timely; and (2) does the requestor meet the requirements for bringing a reconsideration request? We conclude that Request 18-7 is not sufficiently stated. Even though Request 18-7 was timely filed and identifies established ICANN policies that the Requestor claims ICANN organization violated, it does not demonstrate that the

[17] *Id.*
[18] *Id.* at § 4.2(l).
[19] *Id.* at § 4.2(l)(ii).
[20] Where the Ombudsman has recused himself from consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman. *See id.* at § 4.2(l)(iii).
[21] ICANN Bylaws, 22 July 2017, Art. 4 §§ 4.2(q) and (r).

Requestor is materially or adversely affected by ICANN staff action or inaction. Accordingly, the BAMC will summarily dismiss Request 18-7.

A. Request 18-7 is Timely.

Request 18-7 was timely filed. Pursuant to ICANN's Bylaws, a reconsideration request challenging staff action must be filed "within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action."[22] The Requestor challenges the 24 March 2018 response to the Requestor's DIDP Request, which the Requestor became aware of on 24 March 2018. Request 18-7 was submitted on 23 April 2018, 30 days after the Requestor became aware of the challenged action.

B. The Requestor Does Not Meet the Requirements Set Forth Under Article 4, Section 4.2 of the ICANN Bylaws for Bringing a Reconsideration Request.

While Request 18-7 sufficiently identifies established ICANN policies that it claims ICANN organization violated, the Requestor has not sufficiently stated that it has been materially or adversely affected by the challenged conduct. The Bylaws provide that "ICANN shall have in place a process by which any person or entity ***materially affected*** by an action or inaction of the ICANN Board or Staff may request … the review or reconsideration of that action or inaction by the Board."[23] The Bylaws also provide that the Requestor may submit a Reconsideration Request "to the extent that the Requestor has been ***adversely*** affected by" Board or Staff action or inaction.[24]

Here, although the Requestor states that it is challenging ICANN's DIDP Response, the Requestor makes clear that in reality, it is challenging ICANN's forthcoming response to the

[22] ICANN Bylaws, 22 July 2017, Art. 4 § 4.2(g)(i)(B).
[23] ICANN Bylaws, 22 July 2017, Art. 4 § 4.2(a).
[24] *Id*. at Art. 4§ 4.2(c).

requests as amended in the DIDP Reply, including the Requestor's offer to enter into a confidentiality agreement. Request 18-7 alleges that ICANN violated its Bylaws by refusing to produce documents in response to Requests 1, 4-6, and 9.[25] These are the exact Requests addressed in the Requestor's DIDP Reply, which was pending at the time the Requestor submitted Request 18-7.

As noted above, the Requestor even acknowledges that the DIDP Reply is pending, and states that "to the extent [the Requestor] can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part."[26] The Requestor submitted Request 18-7 only to "preserve its rights to contest the DIDP Response." The Requestor further requests that the BAMC wait to decide Request 18-7 at least until ICANN organization responds to the DIDP Reply.[27] The Requestor asks the Board to "disclose the documents requested in the DIDP Request, as amended by the DIDP Reply."[28] In other words, the Requestor asks the Board to disclose the documents requested in the DIDP Reply. Accordingly, given that at the time the Requestor submitted Request 18-7, ICANN organization had not yet responded to the DIDP Reply, the Requestor has not demonstrated that it has been materially or adversely affected by the DIDP Response.

The Reconsideration process is not intended to be a mechanism for parties to simply file a Reconsideration Request to preserve their right to contest a future action or inaction that may or may not materially affect the parties. To do so would undermine with the purpose of the Reconsideration process as set forth in Article 4, Section 4.2(a):

[25] Request 18-7, § 6, at Pg. 7.
[26] Request 18-7, § 3, at Pg. 5; § 8, at Pg. 17.
[27] Request 18-7, § 3, at Pg. 5.
[28] Request 18-7, § 9, at Pg. 17.

> ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request…the review or reconsideration of that action or inaction by the Board.[29]

Moreover, the Requestor's suggestion of a tolling agreement on Request 18-7 "that would allow Requestor and ICANN to attempt to reach an agreement concerning the DIDP Request and the DIDP Reply" does not change the fact that there is no material adverse impact on the Requestor given that it did file Request 18-7, to which ICANN organization has now responded.

ICANN organization provided a response to the DIDP Reply on 23 May 2018.[30] To the extent the Requestor wishes to seek reconsideration of that response, the Requestor has the option to submit a new reconsideration request.

V. Determination.

Based on the foregoing, the BAMC concludes that the Requestor does not meet the requirements for bringing a reconsideration request, and therefore summarily dismisses Request 18-7. If the Requestor believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

A substantive review of the merits of the Requestor's claims is beyond the scope of this memorandum. The BAMC's conclusion is limited to only the preliminary assessment of whether the Requestor meets the requirements for bringing a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 18-7 is not sufficiently stated and therefore is subject to summary dismissal. As a result, the BAMC hereby summarily dismisses Request 18-7.

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[29] ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(a).
[30] *See* DIDP Response to Request No. 20180423-1, 23 May 2018, *available at* https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf.

Exhibit R-33

New Generic Top-Level Domains

UPDATE ON APPLICATION STATUS AND CONTENTION SETS

Updated on 1 August 2016

ICANN has updated the "Update on Application Status and Contention Sets" Advisory to include a new application status, "RA Terminated." This status has been added to support the Registry Agreement Termination process. For more information, see the Registry Agreement Termination Information Page (https://www.icann.org/resources/pages/gtld-registry-agreement-termination-2015-10-09-en).

Previous update: 4 September 2014

ICANN has updated the "Update on Application Status and Contention Sets" Advisory to describe how application statuses and contention set statuses are currently being maintained. These changes reflect modifications that have been made to the process to enhance efficiency and transparency in application processing.

The following updates were made:

- The description of the "On-Hold" application status now reflects that applications may not "complete" certain Program processes while "On-Hold." Previously, the description indicated that an application would "stay in the current process step" until no longer "On-Hold."
- The contention set status descriptions have been updated to explain how each status reflects the pending activities within the contention set. Previously, contention set statuses were defined by whether or not applications in the contention set had statuses of "On-Hold."

Application Status and Contention Set Status

As applications complete evaluation and proceed to the next phases of the New gTLD Program, ICANN is updating application statuses and contention sets to provide a more complete picture of the current status of applications.

Updates Reflect the Results of the Most Recently Completed Processes:
ICANN is updating application statuses to reflect the results of various New gTLD Program processes. Such Program processes include Evaluation, Objections and Dispute Resolution, Community Priority Evaluation, and Auctions. ICANN is also updating contention sets as the result of these processes.

Note, however, that an update is not a definite indication that an application may proceed to another phase of the Program, such as contention resolution or contracting. Regardless of an application's status, it must meet all relevant eligibility criteria before proceeding to the next Program process. Application statuses are not final, except in the case of an application's status being "Withdrawn," "Delegated," or "RA Terminated." Further, contention sets listed as "On-Hold" are not final. Certain application statuses or contention sets, while updated to reflect the current status, may not yet be final because one or more of the applications in a contention set may be impacted by Program processes or other factors, including pending objection proceedings, ICANN accountability mechanisms, or direction from the ICANN Board's New gTLD Program Committee.

Explanation of Application Statuses:
The current application status page reflects the New gTLD Program process in which an application is currently engaged, for example, *In Contracting* or *In PDT*. An application engaged in one of the New gTLD Program processes as defined in Section 1.1.2 of the AGB is considered an active application and may have one of the following statuses: **In IE, In EE, Evaluation Complete, In CPE, In Auction, In Contracting, In PDT, or Transition to Delegation.**

Alternatively, the page may reflect one of the following statuses for an application:

- **Withdrawn** – The applicant has withdrawn the application and will not continue in the New gTLD Program. This is a final status.
- **Not Approved** – The application is not approved and shall not continue in the New gTLD Program as a result of a resolution passed by the ICANN Board of Directors or a Committee of the ICANN Board, such as the New gTLD Program Committee.
- **Will Not Proceed** – The application has completed a Program process, and based on the outcome will not continue, as defined in the AGB. This could include process outcomes including but not limited to not passing evaluation, not prevailing a dispute resolution proceeding, not prevailing in contention resolution.
- **On-Hold** – May be applied if there are pending activities (e.g., ICANN accountability mechanisms, ICANN public comment periods on proposed implementation plans for Program-related activities, Board decisions, or other outstanding unresolved issues) that may impact the status of the application. The application is active but cannot complete certain Program processes such as Auction, Contracting, and Transition to Delegation until the On-Hold status is cleared.
- **RA Terminated** – Indicates that the Registry Agreement for this application was terminated. This status only applies in cases where the gTLD was not delegated. (In cases where the gTLD was delegated and the Registry Agreement was subsequently terminated, the application status is "Delegated." For a complete list of all terminated gTLD Registry Agreements, see the Registry Agreement Termination Information Page (https://www.icann.org/resources/pages/gtld-registry-agreement-termination-2015-10-09-en).) This is a final status.
- **Delegated** – Indicates the gTLD for this application has been delegated in the Root Zone of the DNS. This is a final status.

Explanation of Contention Set Status:
The following will be used to indicate the status of Contention Sets:

- **Active** – The set contains at least two active applications in direct contention with each other and there are no pending activities that may impact the processing of the applications in the set.
- **On Hold** –There are pending activities that may impact the processing of the applications in the set. Applications in the set cannot complete certain Program processes such as Auction, Contracting, and Transition to Delegation until the On-Hold status is cleared.
- **Resolved** – No direct contention remains amongst the active applications and there are no pending activities that may impact the processing of the applications in the set.

Application statuses and contention sets are updated on a weekly basis as necessary.

Click here to view the Current Application Status (https://gtldresult.icann.org/application-result/applicationstatus) page.

Click here to view the Contention Set Status (https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus) page.

Questions?

New gTLD Applicant: Submit an inquiry via the Customer Service Portal (https://myicann.secure.force.com/)
General Inquiries: Email us at newgtld@icann.org (mailto:newgtld@icann.org)

Exhibit R-34

ICANN (Internet Corporation for Assigned Names and Numbers) Board Selects New .org Registry Operator

Marina del Rey, California USA (14 October 2002) – The Internet Corporation for Assigned Names and Numbers (ICANN (Internet Corporation for Assigned Names and Numbers)) Board of Directors voted 11 to 1 (/minutes/prelim-report-14oct02.htm#SuccessorOperatorfororgRegistry) (with three abstentions) today to select the proposal (/tlds/org/applications/isoc/) submitted by the Internet Society (http://www.isoc.org) (ISOC (Internet Society)) for a new registry operator of the .org top-level domain, to replace VeriSign.

ISOC (Internet Society) has established a new organization, Public Interest Registry (PIR), which will be the registry operator, subject to agreements to be negotiated between ICANN (Internet Corporation for Assigned Names and Numbers) and PIR. PIR will subcontract with Afilias (http://www.afilias.info), the operator of .info – the new gTLD (generic Top Level Domain) approved by ICANN (Internet Corporation for Assigned Names and Numbers) last year – to provide operational support. ISOC (Internet Society) is responsible for appointing the Board of Directors of PIR, which will otherwise operate as a not-for-profit entity separate from ISOC (Internet Society).

Subject to final agreements, PIR will assume operations of the .org registry from VeriSign on 1 January 2003. Stuart Lynn, president of ICANN (Internet Corporation for Assigned Names and Numbers), noted "ISOC (Internet Society)/PIR presented ICANN (Internet Corporation for Assigned Names and Numbers) with a very solid transition plan. Current registrants in .org should notice no interruption of service."

An extensive bid solicitation and evaluation process was launched last April Eleven bids were received in response to a request for proposals These bids were analyzed and evaluated by three evaluation teams that operated independently of each other Lynn thanked all eleven bidders for the excellence of their proposals and for their "commitment and interest through a long and arduous process It is a shame that we cannot select all eleven, but obviously that is impossible."

As part of the evaluation, two evaluation teams focused on technical issues: one from Gartner, Inc., an international consulting and research organization that specializes in information technologies, and the other a team mainly composed of CIOs of major universities that just participated in the early stages of the evaluation Another team was provided by ICANN (Internet Corporation for Assigned Names and Numbers)'s Non Commercial Domain Name (Domain Name) Holders Constituency that focused on the effectiveness of the proposals to address the particular needs of the org registry Additional input came from extensive comments by the public and the applicants themselves.

ICANN (Internet Corporation for Assigned Names and Numbers) is re assigning the .org registry under a revised agreement among ICANN (Internet Corporation for Assigned Names and Numbers), VeriSign, and the U.S. Department of Commerce that was signed in May 2001. Under that agreement, VeriSign was permitted to keep its registrar business, NSI (Network Solutions Inc.) provided that it agreed to relinquish org at the end of December 2002, and subject to other provisions of the revised agreements. As part of those revised agreements, VeriSign agreed to endow the new operator with US$ 5 million to help fund operating costs, provided that the new operator was a not for profit organization

More Announcements

Call for Expressions of Interest: ICANN (Internet Corporation for Assigned Names and Numbers) 2021 Nominating Committee Chair and Chair-Elect (/news/announcement-2020-05-29-en)

Register for ICANN68 Prep Sessions (/news/announcement-2020-05-28-en)

ICANN (Internet Corporation for Assigned Names and Numbers) and FIRST Sign Memorandum of Understanding on DNS (Domain Name System) Threats Mitigation (/news/announcement-2020-05-22-en)

ICANN (Internet Corporation for Assigned Names and Numbers) Announces Successful String Evaluation for Israel IDN ccTLD (Country Code Top Level Domain) (/news/announcement-2020-05-19-en)

Exhibit R-35

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV04-1292 AHM (CTx)

VERISIGN, INC., a Delaware corporation,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation; DOES 1-50,

Defendants.

Case No.

COMPLAINT FOR VIOLATION OF THE ANTITRUST LAWS, SPECIFIC PERFORMANCE OF CONTRACT, DAMAGES FOR BREACH OF CONTRACT, INTERFERENCE WITH CONTRACTUAL RELATIONS, DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff VERISIGN, INC. ("VeriSign") alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for declaratory relief, specific performance, damages, and preliminary and permanent injunctive relief arising out of improper and unlawful actions by the Internet Corporation for Assigned Names and Numbers ("ICANN") designed to: (1) prohibit or otherwise restrict VeriSign from offering services valuable to Internet users, (2) impose improper conditions on the offering of such services by VeriSign, (3) regulate and set the prices at which such services may be offered, and/or (4) delay the introduction of new services. The conduct of ICANN as alleged herein constitutes actual and threatened violations of the federal antitrust laws and state law, and breaches of ICANN's registry agreement with VeriSign.

2. ICANN was originally established to assist in the transition of the Internet domain name system from one of a single domain name registrar to one with multiple companies competing to provide domain name registration services to Internet users "in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the [domain name system]." ICANN's ongoing role is to provide technical coordination of the Internet's domain name system by encouraging coordination among various constituent groups using the Internet.

3. VeriSign serves as the Internet registry for second-level domain names registered in the ".com" and ".net" global top-level domains. Notwithstanding the narrow purposes for which ICANN was established, and ICANN's clear and express mandate to promote competition, ICANN has purported to assert progressively broader authority to "regulate" the services VeriSign may offer and the price at which they may be offered. Through this course of conduct, ICANN repeatedly has blocked, delayed and/or restricted VeriSign's introduction of new and valuable

Internet services, or has attempted to do so, in violation of the terms of the registry agreement between the parties and applicable federal and state law.

4. Among other specific acts of ICANN in derogation of VeriSign's rights, shortly before the filing of this action, ICANN wrongfully demanded that VeriSign shut down an important and valuable new service for Internet users, VeriSign's Site Finder service, which is a type of service contemplated and allowed by the parties' registry agreement. This brazen attempt by ICANN to assume "regulatory power" over VeriSign's business is a serious abuse of ICANN's technical coordination function, a blatant breach of the registry agreement, and an interference with VeriSign's contractual relations and prospective economic relationships. The suspension of the Site Finder service as a consequence of ICANN's arbitrary and anticompetitive actions, as well as the other actions alleged in this Complaint, are subjecting VeriSign to ongoing irreparable injury.

JURISDICTION AND VENUE

5. Plaintiff VeriSign is a corporation, duly organized and existing under the laws of the State of Delaware, with its principal office and place of business located in Mountain View, California. Since 1992, VeriSign or its predecessor, Network Solutions, Inc. ("NSI"), has acted as the exclusive registry for the ".com" top-level domain, among others.

6. Defendant ICANN is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal office and place of business located in Marina del Rey, California.

7. Defendants Does 1-50 are persons who instigated, encouraged, facilitated, acted in concert or conspiracy with, aided and abetted, or are otherwise responsible in some manner or degree for the breaches and wrongful conduct of ICANN averred herein. VeriSign is presently ignorant of the true names and

capacities of Does 1-50, and will amend this complaint accordingly once they are known.

8. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337, and 15 U.S.C. §§ 15 and 26; the Declaratory Judgment Act, 28 U.S.C. § 2201; and the principles of supplemental jurisdiction under 28 U.S.C. § 1367.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (b) and (c) and 15 U.S.C. § 22, in that defendant resides, transacts business and is found in this district.

THE INTERNET DOMAIN NAME SYSTEM

10. The Internet is a network of interconnected computers and computer networks. Every computer connected directly to the Internet has a unique address. These addresses, which are known as Internet Protocol ("IP") numbers, are necessary for computers to "communicate" with each other over the Internet. An example of an IP number might be: 98.27.241.30.

11. Because IP numbers can be cumbersome and difficult for Internet users to remember or to use, the IP number system has been overlaid with a more "user-friendly" system of domain names: the Internet domain name system ("DNS"). This overlay associates a unique alpha-numeric character string – or domain name – with a specific IP number.

12. Internet domain names consist of a string of "domains" separated by periods. "Top-level" domains, or "TLDs", are found to the right of the period and include (among others) ".com," ".gov," ".net" and ".biz," which are sometimes referred to as "generic" TLDs (also known as "gTLDs"). Other top-level domains are referred to as country code TLDs (also known as "ccTLDs"), and are represented by two-letter abbreviations for each country, such as ".uk" (United Kingdom) and ".ca" (Canada). For relevant purposes herein, gTLDs are functionally equivalent to

ccTLDs. There are approximately 250 top-level domains, which are administered and operated by numerous entities, both in and outside of the United States.

13. "Second-level" domains ("SLDs") are those domains immediately to the left of the top-level domains, such as "uscourts" in the domain name "uscourts.gov." There are over 50 million second-level domains currently registered within the various TLDs.

14. Because domain names are essentially "addresses" that allow computers connected to the Internet to communicate with each other, each domain name must be unique, even if it differs from another domain name by only one character (*e.g.*, "uscourts.com" is different from "uscourt.com" or "us-courts.com"). A given domain name, therefore, can be registered to only one entity.

15. VeriSign acts as the "registry" for domain names registered in the .com gTLD in accordance with a written agreement with ICANN. As the "registry" for the .com gTLD, VeriSign maintains the definitive directory that associates registered domain names in this gTLD with the corresponding IP numbers of their respective domain name servers. The domain name servers, in turn, direct Internet queries to resources such as websites and email systems.

16. A domain name is created by an individual or organization that registers the domain name and thereby includes it in the registry's master database. The individual or organization that registers a specific domain name is a "registrant." Registrants do not have direct access to the VeriSign registry. Instead, prospective registrants must register domain names through any one of over 130 private companies located in the United States and throughout the world that act as domain name "registrars" for the second-level domain names in the .com gTLD.

THE PARTIES

17. From 1993 until November 1999, in accordance with Cooperative Agreement NCR 92-18742 ("Cooperative Agreement") entered into between NSI and

the National Science Foundation ("NSF"), NSI performed domain name registration and registry functions for the .com and .net gTLDs, among others, in exchange for financial and other support from the United States Government. The National Telecommunications and Information Administration of the United States Department of Commerce ("DOC") assumed responsibility from NSF for administering the Cooperative Agreement on or about October 1, 1998, pursuant to Amendment 10 of the Cooperative Agreement. Subsequent to November 1999, NSI has continued to serve as a registrar of domain names, and VeriSign has operated the registries for the .com and .net (among other) gTLDs, as more specifically described below.

18. ICANN is a private corporation that was created in 1998 in response to a plan by the DOC to introduce competition into the field of domain name registration, among other objectives. ICANN is governed by and acts through an international Board of Directors that is elected by members of various constituencies within the Internet community. Among the members of these groups are operators of gTLDs that compete with each other and with VeriSign; domain name registrars that are present or potential competitors of each other and of VeriSign for certain services; foreign governments and foreign registries that have ccTLDs that compete with the gTLD registries operated by VeriSign; and others. ICANN also operates in cooperation with various industry boards that are comprised of existing or potential competitors of VeriSign. ICANN frequently carries out its activities, including the conduct alleged herein, through the collective action of these constituent groups.

19. In November 1998, the DOC entered into a Memorandum of Understanding ("MOU") with ICANN. In accordance with the MOU, ICANN was to perform certain technical coordination functions in connection with the domain name system. Among other things, ICANN was to study and develop procedures for the transition from a system of one domain name registrar to a system of multiple

registrars of second-level domain names in the ".com," ".net," and ".org" gTLDs, and for the creation of new gTLDs. The MOU established the promotion of competition in the domain name system as one of its central principles. Furthermore, the MOU explicitly prohibits ICANN from acting arbitrarily or unjustifiably to injure any person or entity, or from "singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause."

20. Following execution of the MOU, ICANN has entered into registry agreements with VeriSign for the ".com" and ".net" (among other) gTLDs. In addition to these registry agreements, ICANN has entered into forms of registry agreements with the registries of certain other gTLDs, such as ".biz" and ".info," and with the registries of certain ccTLDs that have come into existence since the MOU was executed. These other registries compete with the .com and .net gTLD registries. In addition to the registries with which ICANN has entered agreements, there are numerous TLD registries, including the vast majority of the more than 240 ccTLD registries, that compete with the .com gTLD registry operated by VeriSign and that have not entered into any form of registry agreement with ICANN.

THE 2001 .COM REGISTRY AGREEMENT

21. On or about November 10, 1999, NSI and ICANN entered into a written Registry Agreement (the "1999 Registry Agreement") with respect to NSI's operation of the registry for the .com gTLD.

22. On or about May 25, 2001, VeriSign, which succeeded to the registry business of NSI, entered into a new written .com Registry Agreement (the "2001 .com Registry Agreement") with ICANN, which superseded the 1999 Registry Agreement with NSI. Subject to certain extension rights provided for therein, the 2001 .com Registry Agreement expires on November 10, 2007.

23. In accordance with the 2001 .com Registry Agreement, VeriSign undertook to operate the .com gTLD registry and to pay certain registry-level fees to

ICANN. Since a registry maintains the authoritative database of second-level domain names and IP addresses within a TLD, there necessarily can be only one registry for each TLD. VeriSign is that sole registry for the .com gTLD.

24. Under the 2001 .com Registry Agreement, VeriSign is required to provide "Registry Services" to ICANN-accredited registrars in a manner meeting the performance and functional specifications attached to the agreement. "Registry Services" generally are defined in the agreement as follows:

> "Registry Services" means services provided as an integral part of the Registry TLD, including all subdomains. These services include receipt of data concerning registrations of domain names and name servers from registrars, provision to registrars of status information relating to the Registry TLD zone servers, dissemination of contact and other information concerning domain name and name server registrations in the Registry TLD, and such other services required by ICANN through the establishment of Consensus Policies as set forth in Definition 1 of this Agreement.

25. The 2001 .com Registry Agreement defines "Consensus Policies" as consisting of those specifications and policies established on the basis of a consensus among Internet stakeholders represented in the ICANN process, as demonstrated by compliance with specific, detailed procedures prescribed in the agreement.

26. VeriSign generally is obligated to comply with Consensus Policies if, among other requirements, they are properly adopted by ICANN and consistent with ICANN's other contractual obligations, and: (A) they "do not unreasonably restrain competition"; and (B) relate to: "(1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability

and/or stable operation of the Internet or DNS, (2) registry policies reasonably necessary to implement Consensus Policies relating to registrars, or (3) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain name)."

27. Recognizing the potential for harm to VeriSign from ICANN's subsequent adoption of specifications or policies, the parties included in the 2001 .com Registry Agreement a provision entitled "Protection from Burdens of Compliance With ICANN Policies." That provision expressly provides: "ICANN shall indemnify, defend, and hold harmless Registry Operator [VeriSign] . . . from and against any and all claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising solely from Registry Operator's compliance as required by this Agreement with an ICANN specification or policy (including a Consensus Policy) established after the Effective Date . . . ."

28. The 2001 .com Registry Agreement further sets forth the following "General Obligations of ICANN." "With respect to all matters that impact the rights, obligations, or role of Registry Operator," the agreement explicitly provides that ICANN shall, among other obligations: (i) "exercise its responsibilities in an open and transparent manner," (ii) "not unreasonably restrain competition and, to the extent feasible, promote and encourage robust competition," and (iii) "not apply standards, policies, procedures and practices arbitrarily, unjustifiably or inequitably and not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."

29. The 2001 .com Registry Agreement establishes affirmative obligations of ICANN: (i) to establish and maintain "independent review policies" and "adequate appeal procedures" to be available to VeriSign to the extent it "is adversely affected by ICANN standards, policies, procedures or practices," and (ii) to take all reasonable steps, and make substantial progress, towards entering into agreements, similar to the

2001 .com Registry Agreement, with registries competing with the .com gTLD registry operated by VeriSign.

30. In addition to such express obligations not unreasonably or inequitably to interfere with VeriSign's registry business, ICANN is subject to an implied covenant of good faith and fair dealing not to take actions unfairly or in bad faith to deprive VeriSign of the intended benefits of the 2001 .com Registry Agreement. Further, at all times relevant hereto it was understood and agreed between the parties that ICANN would not unreasonably withhold or delay consent to reasonable updates, upgrades or other changes in the operation of or specifications for the registry.

31. Nothing in the 2001 .com Registry Agreement authorizes ICANN to do any of the following: (i) prohibit, regulate, or restrict VeriSign's provision of services that are not defined Registry Services governed by the agreement; (ii) regulate or fix the prices at which VeriSign may offer such services; or (iii) regulate, restrict, or prohibit the marketing methods or promotions VeriSign uses to promote its services.

ICANN'S CONDUCT WITH RESPECT TO VERISIGN'S PROPOSED NEW SERVICES HAS RESTRAINED COMPETITION AND VIOLATED THE 2001 .COM REGISTRY AGREEMENT

32. As the operator of the registry for the .com gTLD, VeriSign competes with the operators of registries for other gTLDs and ccTLDs. VeriSign's commercial and competitive success in operating the .com registry depends in substantial part on its ability to offer services that are attractive to its customers, which include the registrars of second-level domain names and the domain name registrants who are customers of those registrars. In order to serve its customers and preserve its competitive position, VeriSign has attempted to provide a variety of new innovative value-added services to its customers to enhance the value and attractiveness of

second-level domain names registered in the .com gTLD. These services have been blocked, delayed and/or restricted by ICANN's wrongful conduct.

Site Finder

33. VeriSign created and, on or about September 15, 2003, implemented a new service known as Site Finder. Site Finder provides an Internet user who makes an error in typing a web address, such that the second-level domain name of the address does not appear in the .com gTLD's zone files, with a list of alternative web addresses to which the user may choose to navigate. For example, if a user typed www.bookstre.com into his Internet browser and no such web address existed, Site Finder would respond with a message that the address entered could not be found and asking whether the user meant www.bookstore.com or www.bookstores.com.

34. Prior to the introduction of Site Finder, when a user mistyped a web address, the user typically would receive a message (known as a "404 error message") that simply told the user that the web page he or she is seeking is "not found," without any other assistance. With the Site Finder service, however, the user receives a user-friendly help screen that includes not only a clear message that what was entered could not be found but also such information as: (i) alternative web addresses the user may have been seeking; (ii) a search engine, and (iii) links to contextually popular categories of websites the user can search. Thus, the Site Finder screen provides the user with helpful information and options beyond a simple error message.

35. Other gTLD and ccTLD registries that compete with the .com gTLD registry, including the .museum gTLD registry, with which ICANN has a registry agreement, and ccTLD registries, many of which have no agreements with ICANN, are currently offering services similar to Site Finder, and the operators of other gTLD and ccTLD registries have stated that they intend to launch similar services. ICANN has never objected to the offering of such services by these other gTLD and ccTLD

registries, and ICANN facilitated the offering of a service similar to Site Finder by the .museum gTLD.

36. The Site Finder service is not integral to the operation of the .com gTLD registry nor a Registry Service within the meaning of the 2001 .com Registry Agreement. All actions by VeriSign, including services provided by VeriSign in connection with Site Finder, are fully compliant with all specifications provided in the 2001 .com Registry Agreement.

37. Nonetheless, on October 3, 2003, ICANN demanded that VeriSign suspend its Site Finder service, wrongly asserting, *inter alia*, that Site Finder is a Registry Service within the meaning of the 2001 .com Registry Agreement and that ICANN has the right to restrict or prohibit the offering of Site Finder and/or establish the terms and conditions upon which the service may be offered ("Suspension Ultimatum"). In its Suspension Ultimatum, ICANN further asserted that the operation of Site Finder by VeriSign was inconsistent with the 2001 .com Registry Agreement and threatened VeriSign that, unless Site Finder was suspended forthwith, ICANN would initiate legal proceedings against VeriSign, thereby threatening VeriSign's operation of the .com registry. In connection with the Suspension Ultimatum, ICANN issued false public statements that VeriSign was violating its obligations as registry operator and interfering with the stability of the Internet.

38. ICANN's demands upon VeriSign were made in conjunction with and at the behest of various constituent groups within ICANN and other businesses that compete with VeriSign. As a direct result of the Suspension Ultimatum and related actions by ICANN, VeriSign was forced to suspend Site Finder to the detriment of VeriSign and millions of Internet users.

39. ICANN's improper conduct has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate from and in connection with Site Finder. In addition, by unjustifiably imposing improper

conditions on the Site Finder service, ICANN has deprived VeriSign of the ability to formulate and offer a service in the manner best designed to meet the needs of customers and the competitive and financial goals of VeriSign.

Wait Listing Service

40. In or about December 2001, VeriSign informed ICANN of the details of a proposed Wait Listing Service ("WLS") that VeriSign intended to begin offering. VeriSign designed WLS to meet a market demand for an orderly and reliable, open and transparent, way for domain name registrants, through their selected, participating registrars, to submit a subscription to register a currently registered domain name in the event the current registration is deleted.

41. Using WLS, a prospective domain name registrant, through any of the approximately 130 ICANN-accredited registrars, could submit a subscription on a first-come, first-served basis for a domain name currently registered in the .com gTLD registry. In the event that a registered domain name in the .com gTLD registry, on which a WLS subscription is placed, is thereafter deleted from the registry, and thereby becomes available for creation and registration – and more than 25,000 domain names are deleted each day – the holder of the WLS subscription would become the registrant of the domain name.

42. If there is no WLS subscription for a domain name in the .com gTLD registry, upon the deletion of the domain name registration by the sponsoring registrar, the domain name is deleted from the VeriSign registry's database and becomes available for creation and registration through any ICANN-accredited registrar, on a first-come, first-served basis.

43. As proposed by VeriSign, WLS is not integral to the operation of the .com TLD registry and is not a Registry Service within the meaning of the 2001 .com Registry Agreement.

44. Nevertheless, ICANN discussed VeriSign's proposed offering of WLS with, and sought agreements with respect to WLS from, ICANN's registrar constituency, the members of which are in competition or potential competition with VeriSign, potential customers of VeriSign for WLS, and other Internet constituency groups. Based in part on opposition to WLS from its registrar constituency, ICANN announced to the Internet community that WLS is a Registry Service within the meaning of the 2001 .com Registry Agreement. In addition, ICANN has asserted against VeriSign the authority to: (i) prevent the offering of WLS, (ii) set the price at which it may be offered, (iii) establish the terms and conditions of the service, and (iv) restrict when WLS can be introduced.

45. VeriSign would have been ready and able to begin offering WLS to registrars and their customers in or before August 2002, and would have done so, but for ICANN's conduct alleged herein. As a condition purportedly to approving WLS, ICANN insisted that VeriSign must, among other things: (i) introduce new procedures not required by the 2001 .com Registry Agreement; (ii) delay offering WLS at least until approximately October 2003, and now indefinitely; (iii) reduce the price at which VeriSign intended to offer WLS based on input from competitors; and (iv) accept other "conditions" of ICANN suggested by and intended to benefit various ICANN constituencies to the detriment of VeriSign, competition, and the proposed service. While VeriSign's offering of WLS is being delayed by ICANN's conduct, members of ICANN's registrar constituency who have objected to WLS, and others, are free, without these impediments by ICANN, to offer similar services that are competitive with WLS, and numerous registrars have offered and are offering such services.

46. Furthermore, ICANN has imposed conditions on VeriSign, changed conditions, and imposed new conditions for offering WLS arbitrarily, unjustifiably,

and inequitably, delaying and preventing introduction of WLS, and ICANN has done so in a manner that is not open or transparent.

47. The delay in introducing WLS caused by ICANN has deprived consumers of a beneficial new service and has deprived VeriSign of the revenues and profits it would have generated from and in connection with WLS. In addition, by unjustifiably imposing other conditions on the service and purporting to restrict its price, ICANN has deprived VeriSign of the ability to formulate and offer a service in the manner best designed to meet the needs of customers and the competitive and financial goals of VeriSign. At the same time, the delay in offering WLS has benefited other businesses that offer similar or competitive services, including businesses who have combined and conspired with ICANN and caused ICANN to delay and obstruct VeriSign's offering of WLS.

ConsoliDate

48. In or about January 2003, VeriSign began offering a new domain name registration expiration date ("anniversary date") synchronization service known as "ConsoliDate." ConsoliDate was designed to make it easier for domain name registrants, through any of the approximately 130 ICANN-accredited registrars, to manage the registration and renewal of multiple domain names, by adjusting and synchronizing the anniversary dates of their various domain name registrations.

49. The average domain name registrant maintains from 10 to 15 domain names in the .com gTLD registry. Large corporations maintain hundreds or even thousands of domain name registrations. Different domain name registrations usually have different anniversary dates for purposes of renewal of the registrations. Registrants therefore receive multiple renewal notices; must keep track of multiple renewal dates; and pay renewal fees on multiple dates throughout the year.

50. ConsoliDate allows domain name registrants in the .com gTLD to add from 1 to 364 days to an existing domain name registration term. For example, a

registrant with one domain name registration with an anniversary date of June 13, 2005, and another with an anniversary date of October 4, 2005, could use ConsoliDate to synchronize these expiration dates by adding 113 days to the term of the first domain name registration period, so that it will also have an anniversary date of October 4, 2005. ConsoliDate thereby allows domain name registrants to create a single anniversary date for their entire domain name registration portfolio in the .com gTLD, reducing registrant errors and permitting registrants to streamline their payment processes.

51. ConsoliDate is not integral to the operation of the .com gTLD registry and is not a Registry Service within the meaning of the 2001 .com Registry Agreement.

52. While ICANN provisionally supported the introduction of ConsoliDate, it has claimed that ConsoliDate is a Registry Service and has purported to condition permanent approval of ConsoliDate on VeriSign's entering into certain amendments to the 2001 .com Registry Agreement.

53. ICANN has made statements and engaged in conduct that presuppose ConsoliDate is a Registry Service within the meaning of the 2001 .com Registry Agreement, and ICANN has asserted authority to: (i) restrict the offering of ConsoliDate, (ii) set the price at which it may be offered, and (iii) establish the terms and conditions of the service. ICANN's actions threaten, among other adverse effects on competition, a future interruption in the offering of ConsoliDate.

54. Further, ICANN has imposed conditions, and then imposed new conditions for Consolidate arbitrarily, unjustifiably, and inequitably, and ICANN has done so in a manner that is not open and transparent.

55. By improperly purporting to impose conditions on ConsoliDate and control its price and other terms, ICANN has deprived VeriSign of the ability to formulate and offer a service in the manner best designed to meet the needs of

customers and the competitive and financial goals of VeriSign, and has deprived VeriSign of revenues and profits it would have generated from and in connection with ConsoliDate.

Internationalized Domain Names

56. In or about November 2000, VeriSign began an internationalized domain name service ("IDN") in a third-level domain testbed environment. IDN allows Internet users to use non-ASCII (that is, non-English) character sets to register and use domain names in the .com TLD. In other words, a speaker of Mandarin Chinese, for example, could type a web address including a registered second-level domain name within the .com gTLD, using the non-ASCII character set of her native language. IDN would permit a translation of that address to the appropriate registered domain name within the .com gTLD. VeriSign intended thereafter to offer IDN on a permanent basis with respect to second-level domain names within the .com gTLD.

57. In the early days of the Internet, the vast majority of users and domain name registrants spoke English as their native language and used ASCII (English) character sets on their computers. However, there are Internet users worldwide whose native languages are represented in non-ASCII character sets. Currently or in the near future this group will comprise the majority of Internet users.

58. Languages represented in non-ASCII character sets are not widely supported in the global domain name system. IDN meets the important need for a global multilingual DNS solution, supporting the billions of people who require or want Internet access in their native languages. IDN would significantly increase Internet availability and e-commerce opportunities for this group and for those who do business with them, and it would increase the value and attractiveness of second-level domain names in the .com gTLD.

59. IDN is not integral to the operation of the .com registry and is not a "Registry Service" within the meaning of the 2001 .com Registry Agreement.

60. While IDN makes possible the use of non-ASCII character sets in users' native languages, the registered second-level domain name within the .com gTLD must be in ASCII characters. To trigger the translation of the domain name from ASCII characters to the corresponding non-ASCII characters, these domain names include the prefix "bq--" in the testbed, and will include the prefix "xn--" when IDN is launched.

61. An appendix to the 2001 .com Registry Agreement purports to "reserve" to ICANN all "tagged domain names" with "hyphens in the third and fourth characters." VeriSign therefore sought ICANN's authorization to use domain names with an "xn--" prefix to enable the .com gTLD registry to provide IDN service, as other competing ccTLD registries that are not under contract with ICANN are already doing or have publicly announced they intend to do.

62. ICANN has conditioned its approval of the release of domain names with hyphens in the third and fourth characters from reserved status, however, on VeriSign's formal agreement to abide by certain "Guidelines for the Implementation of Internationalized Domain Names," among other conditions. These "Guidelines" and other conditions ICANN has sought to impose would require costly and burdensome procedures not within the contemplation of the 2001 .com Registry Agreement. Even though VeriSign has operated the IDN testbed for nearly three years and has maintained IDN registrations for nearly one million names in that testbed, ICANN has arbitrarily and unreasonably withheld its consent to the new service.

63. ICANN's conditions for giving consent are not consistent with the requirements of the 2001 .com Registry Agreement or covenants of good faith and

fair dealing therein, and they impose arbitrary, long-term, fixed obligations on VeriSign with respect to a rapidly emerging technology.

64. ICANN's actions have caused, among other adverse affects on competition, a delay in VeriSign's offering of IDN, other than on a third-level testbed environment.

65. The delay in introducing IDN caused by ICANN's conduct has deprived consumers of a beneficial new service and has deprived VeriSign of the revenues and profits it would have generated from and in connection with IDN. In addition, by unjustifiably imposing other conditions on the service, ICANN has attempted to deprive VeriSign of the ability to formulate and offer a service in the manner best designed to meet the needs of customers and the competitive and financial goals of VeriSign. At the same time, the delay has benefited other businesses that offer similar or competitive services, including those who have acted in concert with ICANN to cause ICANN to impose the foregoing conditions and impediments on VeriSign.

ICANN'S CONDUCT WITH RESPECT TO VERISIGN'S INCENTIVE MARKETING PROGRAM HAS RESTRAINED COMPETITION AND VIOLATED THE 2001 .COM REGISTRY AGREEMENT

66. In or about November 2001, VeriSign launched an incentive promotion program that encouraged domain name registrars to promote the sale of second-level domain names in the .com gTLD on their web sites. Under the promotion, participating webmasters were offered incentive on non-discriminatory terms to display an advertisement for .com domain names on their site. The promotion required participants to display a VeriSign advertisement prominently on every web page on which a participating registrar offered domain names for registration. In exchange for such advertisements, VeriSign would pay placement fees and provide other consideration to participants in the promotional program. The impetus for and

purpose of this marketing program was to enable VeriSign to meet the increased competition for domain name registrations from new and rapidly growing ccTLDs and from newly established gTLDs.

67. Nonetheless, within days of the launch of VeriSign's marketing program, ICANN improperly demanded that VeriSign cease the program on the ground that it had not been approved by ICANN, even though nothing in the 2001 .com Registry Agreement or elsewhere required ICANN's approval therefor, and ICANN threatened to declare VeriSign in formal breach of the 2001 .com Registry Agreement unless the program was suspended. ICANN refused to withdraw its threat to declare VeriSign in breach of the agreement, until VeriSign committed to modify its marketing program to conform to ICANN's arbitrary and improper dictates.

68. ICANN has no right to approve, or jurisdiction over, VeriSign's marketing practices. By unjustifiably imposing improper conditions on VeriSign's marketing practices, ICANN has deprived VeriSign of the ability to promote and market its services in the manner best designed to enhance its business. Moreover, the ccTLD registries with which VeriSign competes can implement similar or other promotional programs freely, without ICANN's approval or involvement. ICANN's unauthorized and wrongful interference with VeriSign's business has improperly restrained VeriSign's ability to compete for domain name registrations and deprived it of revenues and profits it would generate from, and as a result of, its intended marketing program. ICANN's actions also have harmed competition among TLD registries by unreasonably restricting VeriSign's ability to promote registrations in the .com gTLD.

ICANN'S BREACHES OF THE REGISTRY AGREEMENT

Issuing Improper Ultimatum to Shut Down Site Finder

69. Prior to the suspension of Site Finder as alleged above, Site Finder provided a helpful service to users of the Internet; enabled VeriSign to compete more

effectively with operators of competitive gTLD and ccTLD registries that are offering or intend to offer a similar service; made the registration of domain names within the .com gTLD more desirable and attractive, to the benefit of .com gTLD registrars and registrants; and generated additional revenues for VeriSign.

70. No proper basis existed for ICANN's issuance of the Suspension Ultimatum, which was a violation of the 2001 .com Registry Agreement. The Suspension Ultimatum was issued despite the facts: (i) that Site Finder was fully compliant with all applicable specifications and standards; (ii) did not destabilize the operation of the .com gTLD registry, the DNS, or the Internet; and (iii) other competing gTLD and ccTLD registries continue to offer services similar to Site Finder. In taking this action, ICANN singled VeriSign out for arbitrary and disparate treatment, failed to act in an open and transparent manner, and acted without having in place a functional mechanism for independent review of its action, all as required by the 2001 .com Registry Agreement. Furthermore, the Suspension Ultimatum was undertaken without ICANN's compliance with the procedural and substantive safeguards necessary to adopt a valid Consensus Policy.

71. Since the Suspension Ultimatum is not authorized by, and was issued in violation of, the 2001 .com Registry Agreement, the Suspension Ultimatum has the effect of a new ICANN policy or specification adopted subsequent to the effective date of said agreement. As such, in addition to VeriSign's other rights under the agreement, VeriSign is entitled to indemnity from ICANN for the costs and injury to VeriSign resulting from the Suspension Ultimatum.

Improperly Purporting to Broaden the Definition of Registry Services

72. ICANN's unjustified and overreaching attempt to regulate services that VeriSign offers to registrars and to domain name registrants, in breach of the parties' registry agreement, has delayed and otherwise impeded the introduction of new services by VeriSign. ICANN has also attempted improperly to regulate and to fix

the prices at which those services may be offered by VeriSign. As a result, ICANN's conduct has harmed competition and caused injury to VeriSign, and threatens to continue to cause such harm and injury to VeriSign in the future.

73. ICANN has asserted the authority to "regulate" as Registry Services governed by the agreement, new services of VeriSign that, in fact, do not fall within the definition of "Registry Services" and are not properly the subject of the .com Registry Agreement or any proper restriction by ICANN. Furthermore, ICANN has purported to assert the authority to fix the price at which such services may be offered.

74. As alleged in more detail above with respect to specific new services of VeriSign, the effect of ICANN's improper attempt to broaden the definition of Registry Services governed by the agreement has been: (i) to prohibit, delay and impede the introduction of beneficial new services by VeriSign, (ii) to impose conditions on the offering of these services, (iii) improperly to set or regulate the prices of those services, (iv) unreasonably to restrain competition for such services and interfere with VeriSign's business, and (v) unfairly to prevent VeriSign from securing the benefits contemplated by the Registry Agreement.

75. ICANN further has asserted the authority to "regulate" VeriSign's marketing practices, even though they do not fall within the definition of "Registry Services" and are not properly the subject of the .com Registry Agreement or any proper restriction by ICANN. As a result, ICANN's conduct has harmed competition and caused injury to VeriSign, and threatens to continue to cause such harm and injury to VeriSign in the future.

76. The improper conduct of ICANN has been facilitated by, and has inured to the benefit of, competitors and potential competitors of VeriSign who have misused ICANN's processes, often with the active and knowing encouragement and

participation of ICANN, to impede VeriSign's offering of new services and to fix, and attempt to fix, the prices for services offered by VeriSign.

Failing to Promote Competition and Unreasonably Restraining Competition

77. The foregoing course of conduct places VeriSign at a competitive disadvantage in comparison to other gTLDs under contract with ICANN that have been allowed to offer and market similar, competitive services without the same restrictions, delays, and impediments that ICANN has placed on VeriSign. This conduct is a breach of ICANN's obligations under the 2001 .com Registry Agreement "not [to] apply standards, policies, procedures and practices arbitrarily, unjustifiably or inequitably and not single out Registry Operator for disparate treatment."

78. In addition, the foregoing course of conduct by ICANN has placed VeriSign at a competitive disadvantage in comparison to registries for the ccTLDs as to which ICANN has no agreements and claims no power to regulate. The latter registries are free to offer, and are offering, new and improved services to registrars and registrants, and to market their services to the public, while VeriSign's offering and marketing of similar and other services for the .com gTLD is being unreasonably and arbitrarily prevented, delayed, regulated and impeded by ICANN.

Failure to Reach Agreements with Other Registry Operators

79. At the time VeriSign and ICANN entered into the 2001 .com Registry Agreement, the parties understood and intended, and ICANN committed to VeriSign, that ICANN would use all reasonable efforts, and make substantial progress, toward signing agreements similar to the 2001 .com Registry Agreement with registries, particularly the over 240 ccTLD registries, that compete with the .com gTLD registry operated by VeriSign. The mutually understood purpose of this commitment was to assure that, to the maximum extent feasible, competitive registries would be

competing on an equal footing with the .com gTLD registry. This obligation on the part of ICANN was carried over from the 1999 Registry Agreement with NSI.

80. Notwithstanding this obligation, ICANN has failed to make substantial progress toward entering into any agreements, much less agreements similar to the 2001 .com Registry Agreement, with competing registries, thereby severely and adversely affecting VeriSign from a competitive perspective.

81. In fact, only 10 of the approximately 240 competing ccTLD registries have entered into Registry Agreements with ICANN, and ICANN has publicly admitted making little or no effort to have ccTLD registries do so. Moreover, of the 10 competing ccTLD registries with which ICANN does have agreements, those agreements are not similar to the 2001 .com Registry Agreement, and do not impose on the competing registries the obligations and restrictions that ICANN imposes, and seeks to impose, on VeriSign based upon the 2001 .com Registry Agreement. As a result, ICANN's failure in this regard has exacerbated the harm to competition from ICANN's actions as alleged herein and the losses and damages VeriSign has incurred and will continue to incur in the future.

Other Breaches by ICANN

82. ICANN has additionally breached its obligations to VeriSign under the 2001 .com Registry Agreement by, among other actions and omissions, and as more fully alleged in this Complaint, consistently failing to exercise its responsibilities in an open and transparent manner; applying its standards, policies, procedures, and practices arbitrarily, inequitably, and in bad faith, and repeatedly and unjustifiably singling VeriSign out for disparate treatment; and failing to establish any meaningful, adequate, and independent review policies and procedures.

FIRST CLAIM FOR RELIEF FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT

83. Plaintiff repeats and realleges the averments of paragraphs 1 through 82 above as though fully set forth herein.

84. The operation of TLD registries is a relevant product market. The relevant geographic market is worldwide.

85. The acts of ICANN in restricting or purporting to "regulate" the non-Registry Services offered, or proposed to be offered, by VeriSign, and to delay the introduction or to set the prices or terms of those services, as alleged above, are the collective and conspiratorial acts of ICANN and its members, including constituent groups within ICANN and the members of those groups, and represent the collective action of competitors in the relevant market and submarkets.

86. The acts of ICANN alleged above have unreasonably restrained and restricted competition in the market for the operation of TLD registries and submarkets thereof, and have deprived consumers of the benefits of free and open competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and threaten to continue to restrain such competition in those markets in the future unless enjoined by the Court.

87. The specific wrongful acts of ICANN alleged above have not been expressly or impliedly authorized or directed by DOC or any other agency of the United States Government, nor have these specific acts been the subject of active supervision by any agency of the United States Government.

88. VeriSign has been injured in its business and property, and is threatened with continued injury to its business and property, as a result of the anti-competitive conduct of ICANN as alleged above.

89. VeriSign is therefore entitled to an award of three times the damages it has sustained as a result of ICANN's antitrust violations, as provided by Section 4 of

the Clayton Act, 15 U.S.C. § 15, including damages sustained during the pendency of this litigation and to be sustained in the future, according to proof at trial, and to recover its costs of litigation, including reasonable attorneys' fees, as provided by Section 4 of the Clayton Act, 15 U.S.C. § 15.

90. VeriSign is further entitled to entry of a judicial declaration finally determining and adjudicating that ICANN's collective action in restricting the price, terms, conditions and timing on which VeriSign may offer services violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

91. VeriSign is also entitled to a preliminary and permanent injunction restraining ICANN from continuing to violate Section 1 of the Sherman Act, 15 U.S.C. § 1, through collective action in restricting the price, terms, conditions and timing on which VeriSign may offer new services.

SECOND CLAIM FOR RELIEF

FOR INJUNCTIVE RELIEF FOR BREACH OF CONTRACT

92. Plaintiff repeats and realleges the averments contained in paragraphs 1 through 91 above as though fully set forth herein.

93. VeriSign has duly and properly performed, and is continuing duly and properly to perform, all of its obligations under the 2001 .com Registry Agreement, except those obligations it has been prevented or excused from performing as a result of ICANN's breaches and other misconduct averred in this Complaint.

94. ICANN has materially breached its obligations to VeriSign under and in connection with the 2001 .com Registry Agreement, including covenants of good faith and fair dealing therein, in that, among other conduct, ICANN issued the Suspension Ultimatum demanding the suspension of Site Finder without any proper ground therefor, without acting in an open and transparent manner, and without having independent review policies in place.

95. As a result, VeriSign has suspended Site Finder. VeriSign therefore has suffered, and will continue to suffer, substantial injuries and losses as a proximate result of the breaches and other conduct of ICANN averred herein with respect to the suspension of Site Finder, including, without limitation, losses of revenues from third-parties, profits, consequential costs and expenses, market share, reputation, and good will.

96. VeriSign has no adequate legal remedy against ICANN to obtain full compensation or other monetary redress for its injuries and losses in that, among other things: (i) ICANN is interfering with the business of VeriSign and injuring its reputation; (ii) ICANN has insufficient assets to compensate VeriSign for its losses; (iii) some of VeriSign's injuries and losses may be difficult to calculate precisely in dollar terms; and (iv) the 2001 .com Registry Agreement purports to limit ICANN's liability for damages in the event of a breach of the agreement to only a fraction of VeriSign's actual injuries and losses, which limitation may be applicable to certain of the injuries alleged herein.

97. VeriSign is entitled to preliminary and permanent injunctive relief prohibiting ICANN, its officers, directors, employees, agents, and others acting in concert or in association with it, from directly or indirectly taking any action, or engaging in any conduct, to promote, effectuate, or enforce its Suspension Ultimatum with respect to Site Finder or otherwise to interfere with, limit, restrict, impede, or delay the implementation and operation of Site Finder.

98. The 2001 .com Registry Agreement expressly requires ICANN to indemnify VeriSign against any and all damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising from VeriSign's compliance with an ICANN policy or specification established after the Effective Date of the agreement. VeriSign is therefore entitled to a recovery of its reasonable attorneys' fees incurred herein.

THIRD CLAIM FOR RELIEF

FOR DAMAGES FOR BREACH OF CONTRACT

99. Plaintiff repeats and realleges the averments contained in paragraphs 1 through 98 above as though fully set forth herein.

100. VeriSign has duly and properly performed, and is continuing duly and properly to perform, all of its obligations under the 2001 .com Registry Agreement, except those obligations it has been prevented or excused from performing as a result of ICANN's breaches and other misconduct averred in this Complaint.

101. ICANN has materially breached its obligations to VeriSign under and in connection with the 2001 .com Registry Agreement, including covenants of good faith and fair dealing therein, in that, among other conduct, ICANN issued the Suspension Ultimatum demanding the suspension of Site Finder without any proper ground therefor, without acting in an open and transparent manner, and without having independent review policies in place.

102. As a result, VeriSign has suspended Site Finder. VeriSign therefore has suffered, and will continue to suffer, substantial injuries and losses as a proximate result of the breaches and other conduct of ICANN averred herein with respect to the suspension of Site Finder, including, without limitation, losses of revenues from third-parties, profits, consequential costs and expenses, market share, reputation, and good will.

103. The 2001 .com Registry Agreement expressly requires ICANN to indemnify VeriSign against any and all damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising from VeriSign's compliance with an ICANN policy or specification established after the Effective Date of the agreement.

104. Consequently, both pursuant to ICANN's indemnity obligation in the 2001 .com Registry Agreement and as a matter of law, VeriSign is entitled to an

award from ICANN of monetary damages therefor and of its reasonable attorneys' fees, according to proof at trial.

FOURTH CLAIM FOR RELIEF

FOR INTERFERENCE WITH CONTRACTUAL RELATIONS

105. Plaintiff repeats and realleges the averments contained in paragraphs 1 through 104 above as though fully set forth herein.

106. At times relevant hereto, Verisign has had a valid and existing contract with a provider of search and other services ("Provider"), under which the Provider agreed to provide to VeriSign Internet search services and other services that support VeriSign's Site Finder service.

107. The terms and provisions of the contract between VeriSign and the Provider are confidential and cannot be disclosed by VeriSign absent further agreement. Nonetheless, ICANN knew of the existence of this contract, and ICANN's conduct with respect to Site Finder, including, without limitation, its issuance of the Suspension Ultimatum, as alleged in this Complaint, was designed and intended to disrupt this contractual relationship.

108. As a direct result of ICANN's intentional acts and conduct, the value to VeriSign of the contractual relationship between VeriSign and the Provider has been injured and VeriSign has been, and is being, deprived of revenues it would otherwise have derived from performance of its contract.

109. ICANN's intentional interference with the contractual relationship between VeriSign and the Provider has directly and proximately resulted in a substantial loss of revenues and profits to VeriSign. VeriSign is entitled to an award from ICANN of monetary damages therefor, according to proof at trial.

110. ICANN's interference and conduct alleged herein was, *inter alia*, intentional, undertaken for the purpose of harming VeriSign and assisting its competitors, sought to be justified by ICANN on grounds known by it to be false and

baseless, and otherwise malicious, oppressive, and fraudulent within the meaning of California Civil Code Section 3294. Consequently, VeriSign is entitled to an award of punitive or exemplary damages sufficient in amount to punish and to make an example of ICANN.

FIFTH CLAIM FOR RELIEF

FOR SPECIFIC PERFORMANCE OF CONTRACT

AND INJUNCTIVE RELIEF

111. Plaintiff repeats and realleges the averments contained in paragraphs 1 through 110 above as though fully set forth herein.

112. The 2001 .com Registry Agreement constitutes a valid and binding contract between VeriSign and ICANN. The material terms of that agreement, insofar as they are pertinent to this action, include those set forth in paragraphs 24 through 30 above.

113. All of the terms of the 2001 .com Registry Agreement are just and reasonable to ICANN, and the consideration for ICANN's obligations under the agreement, to the extent relevant to this action, is fair and adequate to ICANN.

114. VeriSign has duly and properly performed, and is continuing duly and properly to perform, all of its obligations under the 2001 .com Registry Agreement, except those obligations it has been prevented or excused from performing as a result of ICANN's breaches and other misconduct averred in this Complaint.

115. ICANN has materially breached its obligations to VeriSign under and in connection with the 2001 .com Registry Agreement, including covenants of good faith and fair dealing therein, in that, among other conduct:

- Commencing in or about 2002, and continuing to the present time, ICANN has repudiated the restrictions on the scope of Registry Services in its conduct under the 2001 .com Registry Agreement and, without any contractual right or other legal basis therefor, has acted in such a manner as to delay and

impede the introduction of beneficial new value-added services by VeriSign, to impose conditions on the introduction of such new services, and to restrict and regulate the prices of those services, including, without limitation, the services alleged above.

- Commencing in or about 2002, and continuing to the present time, ICANN has applied its standards, policies, procedures, and practices in an arbitrary, unjustifiable, and inequitable fashion with respect to VeriSign, and has singled out VeriSign for disparate treatment, not justified by any substantial and reasonable cause, in violation of the 2001 .com Registry Agreement, in that ICANN has, among other conduct: (i) delayed and impeded the introduction of beneficial new services by VeriSign; (ii) placed conditions on the offering of such services; (iii) restricted and regulated the prices of those services; and (iv) otherwise interfered with VeriSign's business, while allowing other registries for competitive TLDs, as well as members of ICANN's various constituent groups which are competitors of VeriSign, to offer similar services to consumers without any interference, restriction, or attempted regulation by ICANN.

- Commencing in or about 2002, and continuing to the present time, ICANN has ignored its obligation under the 2001 .com Registry Agreement to promote and encourage robust competition and, instead, has unreasonably restrained competition, in violation of the agreement, in that ICANN has, among other conduct: (i) delayed and impeded the introduction of beneficial new value-added services by VeriSign; (ii) placed conditions on the introduction of such new services; (iii) restricted and regulated the prices of those services; and (iv) otherwise interfered with VeriSign's business, while allowing other registries for competitive TLDs, as well as other members of ICANN's various constituent groups which are competitors of VeriSign, to

offer similar services without any interference, restriction or attempted regulation by ICANN.

- Commencing in or about 2001, and continuing to the present time, ICANN has regulated, and attempted to regulate, VeriSign's marketing practices and other facets of its business operations that are not governed by the 2001 .com Registry Agreement and that ICANN is without any contractual right or other legal basis to control.

- Despite its obligation in the 2001 .com Registry Agreement, ICANN has failed to enter into registry agreements similar to the 2001 .com Registry Agreement, and even to make a serious or good faith effort to enter into such registry agreements, with more than a small handful of competing ccTLD registries. Even as to those few ccTLD registries that do have agreements with ICANN, their agreements are not similar and do not contain the same provisions under which ICANN claims a purported right to prohibit or restrict services offered by VeriSign. These competing ccTLD registries are consequently able to offer similar services to those VeriSign wants to offer, and others, without any interference, prohibition, restriction or attempted regulation by ICANN.

- Throughout the term of the 2001 .com Registry Agreement, and contrary to the express provisions thereof, ICANN has failed to exercise its responsibilities with respect to VeriSign and the .com gTLD registry in an open and transparent manner; has failed to establish any meaningful, adequate, and independent review policies and appeal procedures; and has applied its standards, policies, procedures, and practices arbitrarily, inequitably, and in bad faith, and repeatedly and unjustifiably singled VeriSign out for disparate treatment.

116. ICANN threatens to persist, throughout the remaining term of the 2001 .com Registry Agreement, in the foregoing or similar conduct constituting breaches of the agreement, thereby increasing and exacerbating VeriSign's injuries and losses.

117. VeriSign has suffered, and will continue to suffer, substantial injuries and losses as a proximate result of the breaches and other conduct of ICANN averred herein, including, without limitation, losses of revenues from third-parties, profits, market share, reputation, and good will.

118. VeriSign has no adequate legal remedy against ICANN to obtain full compensation or other monetary redress for its injuries and losses in that, among other things: (i) ICANN is interfering with the business of VeriSign and injuring its reputation; (ii) ICANN has insufficient assets to compensate VeriSign for its losses; (iii) some of VeriSign's injuries and losses may be difficult to calculate precisely in dollar terms; and (iv) the 2001 .com Registry Agreement purports to limit ICANN's liability for damages in the event of a breach of the agreement to only a fraction of VeriSign's actual injuries and losses, which limitation may be applicable to certain of the injuries alleged herein.

119. The 2001 .com Registry Agreement provides and contemplates that VeriSign can obtain a decree of specific performance and other equitable relief for a breach of the agreement.

120. Accordingly, VeriSign is entitled to a judicial decree of specific performance commanding and compelling ICANN to perform fully the terms and conditions of the 2001 .com Registry Agreement, including, without limitation: (i) to abide the definition of Registry Services in the agreement; (ii) to comply with and adhere to the limits on its exercise of authority provided by the agreement; (iii) to apply its standards, policies, procedures, and practices in a fair, non-arbitrary, reasonable, and equitable fashion with respect to VeriSign; (iv) to promote and encourage robust competition in the operation of TLD registries and other services

associated with domain name registration; (v) to exercise its responsibilities with respect to VeriSign and the .com gTLD registry in an open and transparent manner; (vi) to establish meaningful, adequate, and independent review policies and appeal procedures; and (vii) to take all reasonable steps to enter into registry agreements similar to the 2001 .com Registry with competing ccTLD registries.

121. VeriSign is also entitled to preliminary and permanent injunctive relief prohibiting ICANN, its officers, directors, employees, agents, and others acting in concert or in association with it, from directly or indirectly taking any action, or engaging in any conduct: (i) to restrict, regulate, interfere with, or exercise control over the offering, introduction, or performance of any services by VeriSign (or its affiliates) to consumers that are not Registry Services within the meaning of the 2001 .com Registry Agreement; (ii) to delay or impede the introduction of any new services by VeriSign (or its affiliates) that are not Registry Services within the meaning of the 2001 .com Registry Agreement, to impose conditions on the introduction of such services, or to restrict or regulate the prices VeriSign may charge consumers for any services that are not Registry Services within the meaning of the 2001 .com Registry Agreement; (iii) to control, regulate, or limit, or attempt to control, regulate, or limit, VeriSign's marketing practices and other business conduct that is not governed by the 2001 .com Registry Agreement or otherwise subject to ICANN's authority; (iv) to apply its standards, policies, procedures, and practices in an arbitrary, unjustifiable, and inequitable fashion with respect to VeriSign, or to single out VeriSign for disparate treatment, not justified by any substantial and reasonable cause; and (v) to unreasonably restrain competition for the operation of TLD registries and for services that may be offered by VeriSign.

SIXTH CLAIM FOR RELIEF
FOR DAMAGES FOR BREACH OF CONTRACT

122. Plaintiff repeats and realleges the averments contained in paragraphs 1 through 121 above as though fully set forth herein.

123. VeriSign has duly and properly performed, and is continuing duly and properly to perform, all of its obligations under the 2001 .com Registry Agreement, except those obligations it has been prevented or excused from performing as a result of ICANN's breaches and other misconduct averred in this Complaint.

124. ICANN has materially breached its obligations to VeriSign under and in connection with the 2001 .com Registry Agreement, including covenants of good faith and fair dealing therein, in that, among other conduct:

- Commencing in or about 2002, and continuing to the present time, ICANN has repudiated the restrictions on the scope of Registry Services in its conduct under the 2001 .com Registry Agreement and, without any contractual right or other legal basis therefor, has acted in such a manner as to delay and impede the introduction of beneficial new value-added services by VeriSign, to impose conditions on the introduction of such new services, and to restrict and regulate the prices of those services, including, without limitation, the services alleged above.

- Commencing in or about 2002, and continuing to the present time, ICANN has applied its standards, policies, procedures, and practices in an arbitrary, unjustifiable, and inequitable fashion with respect to VeriSign, and has singled out VeriSign for disparate treatment, not justified by any substantial and reasonable cause, in violation of the 2001 .com Registry Agreement, in that ICANN has, among other conduct: (i) delayed and impeded the introduction of beneficial new services by VeriSign; (ii) placed conditions on the offering of such services; (iii) restricted and regulated the prices of those

services; and (iv) otherwise interfered with VeriSign's business, while allowing other registries for competitive TLDs, as well as members of ICANN's various constituent groups which are competitors of VeriSign, to offer similar services to consumers without any interference, restriction, or attempted regulation by ICANN.

- Commencing in or about 2002, and continuing to the present time, ICANN has ignored its obligation under the 2001 .com Registry Agreement to promote and encourage robust competition and, instead, has unreasonably restrained competition, in violation of the agreement, in that ICANN has, among other conduct: (i) delayed and impeded the introduction of beneficial new value-added services by VeriSign; (ii) placed conditions on the introduction of such new services; (iii) restricted and regulated the prices of those services; and (iv) otherwise interfered with VeriSign's business, while allowing other registries for competitive TLDs, as well as other members of ICANN's various constituent groups which are competitors of VeriSign, to offer similar services without any interference, restriction or attempted regulation by ICANN.

- Commencing in or about 2001, and continuing to the present time, ICANN has regulated, and attempted to regulate, VeriSign's marketing practices and other facets of its business operations that are not governed by the 2001 .com Registry Agreement and that ICANN is without any contractual right or other legal basis to control.

- Despite its obligation in the 2001 .com Registry Agreement, ICANN has failed to enter into registry agreements similar to the 2001 .com Registry Agreement, and even to make a serious or good faith effort to enter into such registry agreements, with more than a small handful of competing ccTLD registries. Even as to those few ccTLD registries that do have

agreements with ICANN, their agreements are not similar and do not contain the same provisions under which ICANN claims a purported right to prohibit or restrict services offered by VeriSign. These competing ccTLD registries are consequently able to offer similar services to those VeriSign wants to offer, and others, without any interference, prohibition, restriction or attempted regulation by ICANN.

- Throughout the term of the 2001 .com Registry Agreement, and contrary to the express provisions thereof, ICANN has failed to exercise its responsibilities with respect to VeriSign and the .com gTLD registry in an open and transparent manner; has failed to establish any meaningful, adequate, and independent review policies and appeal procedures; and has applied its standards, policies, procedures, and practices arbitrarily, inequitably, and in bad faith, and repeatedly and unjustifiably singled VeriSign out for disparate treatment.

125. VeriSign has suffered, and will continue to suffer, substantial injuries and losses as a proximate result of the breaches of contract and other conduct of ICANN averred herein, including, without limitation, losses of revenues from third-parties, profits, market share, reputation, and good will.

126. VeriSign is entitled to an award of monetary damages therefor from ICANN, according to proof at trial.

SEVENTH CLAIM FOR RELIEF

FOR DECLARATORY JUDGMENT

127. Plaintiff repeats and realleges the averments contained in paragraphs 1 through 126 above as though fully set forth herein.

128. An actual and justiciable controversy has arisen, and now exists, between VeriSign and ICANN with respect to the interpretation of essential terms of the 2001 .com Registry Agreement and the application of those terms, if any, to a

continuing series of new value-added services VeriSign desires, now or in the future, to offer to consumers during the remaining term of the agreement, including, without limitation, Site Finder, ConsoliDate, WLS and IDN.

129. More particularly, VeriSign contends:

- Registry Services as used in the 2001 .com Registry Agreement means and is limited to (i) those services expressly identified in the paragraph I(9) of the 2001 .com Registry Agreement and subject to the specifications and functionality set forth in Exhibits "C" and "D" to the agreement; and (ii) those services required by Consensus Policies duly and formally adopted pursuant to paragraph I(1) of the Registry Agreement.

- Site Finder, ConsoliDate, WLS and IDN are not Registry Services and, therefore, are not subject to the terms or restrictions of the 2001 .com Registry Agreement.

- ICANN has no legal or contractual right, directly or indirectly, to interfere with, restrict, regulate, or control, the introduction, offering or performance by VeriSign now or in the future of any services that are not Registry Services, including, without limitation, Site Finder, ConsoliDate, WLS and IDN, or to impose conditions on the introduction of such services, or to set or limit the prices VeriSign may charge or the conditions under which it may offer such services to consumers, or to regulate VeriSign's marketing practices.

- As a result of ICANN's failure to enter into registry agreements similar to the 2001 .com Registry Agreement with any competing ccTLD registries (and any agreements with only approximately ten of the 240 competing ccTLD registries), VeriSign has a right under the 2001 .com Registry Agreement to terminate the agreement with the approval of the Department of Commerce.

- ICANN has failed to exercise its responsibilities with respect to VeriSign and the .com gTLD registry in an open and transparent manner.
- ICANN has failed to establish any meaningful, adequate, and independent review policies and appeal procedures.
- ICANN's issuance of the Suspension Ultimatum regarding Site Finder is baseless and wrongful.

130. ICANN has expressly and openly denied, or does deny, each of these contentions by VeriSign and contends the opposite.

131. VeriSign and ICANN are bound to perform under the 2001 .com Registry Agreement for at least another 4 years.

132. If VeriSign relies on its interpretation of the 2001 .com Registry Agreement and proceeds to offer new services to consumers without ICANN's approval, over its asserted objections, or in a manner inconsistent with pricing and other conditions and limitations ICANN has imposed or threatens to impose, as VeriSign believes it has an absolute legal and contractual right to do, VeriSign risks ICANN's declaring it to be in breach of the 2001 .com Registry Agreement and/or attempting to terminate the agreement prematurely, with resulting losses of revenue from third-parties, profits, extension rights, reputation, and good will.

133. Alternatively, were VeriSign to defer offering such services to the public during the effective period of the 2001 .com Registry Agreement, or to modify such services due to ICANN's conduct and threats, VeriSign will suffer irreparable losses of revenue from third-parties, profits, market share, competitive position, reputation, and good will. Furthermore, millions of Internet users will be deprived of the improved functionality and quality of VeriSign's services.

134. In either event, for the reasons averred in paragraphs 117-118 above, among others, VeriSign has and will have no adequate legal remedy against ICANN

for any of these losses. VeriSign is therefore in need of immediate declaratory relief from the Court consistent with its contentions set forth above.

WHEREFORE Plaintiff prays for entry of judgment against Defendant as follows:

A. On the First Claim for Relief:

1. For an award of three times the damages it has sustained as a result of ICANN's antitrust violations, as provided by Section 4 of the Clayton Act, 15 U.S.C. § 15, including damages sustained during the pendency of this litigation and to be sustained in the future, according to proof.

2. For entry of a final and binding judicial declaration determining and adjudicating that ICANN's collective action in restricting the price, terms, conditions and timing on which VeriSign may offer services violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. For entry of a preliminary and permanent injunction prohibiting ICANN, its officers, directors, employees, agents, and others acting in concert or in association with it, from directly or indirectly continuing to violate Section 1 of the Sherman Act, 15 U.S.C. § 1, through collective action in restricting the price, terms, conditions, and timing on which VeriSign may offer services.

4. For its reasonable attorneys' fees, as provided by Section 4 of the Clayton Act, 15 U.S.C. § 15.

B. On the Second Claim for Relief:

1. For entry of a preliminary and permanent injunction prohibiting ICANN, its officers, directors, employees, agents, and others acting in concert or in association with it, from directly or indirectly taking any action, or engaging in any conduct, to promote, effectuate, or enforce its Suspension Ultimatum with respect to Site Finder or otherwise to interfere with, limit, restrict, impede, or delay the implementation and operation of Site Finder.

2. For its reasonable attorneys' fees pursuant to contract.

C. On the Third Claim for Relief:

1. For an award of monetary damages, according to proof.

2. For its reasonable attorneys' fees pursuant to contract.

D. On the Fourth Claim for Relief:

1. For an award of monetary damages, according to proof.

2. For an award of punitive or exemplary damages.

E. On the Fifth Claim for Relief:

1. For entry of a judicial decree of specific performance commanding and compelling ICANN to perform fully the terms and conditions of the 2001 .com Registry Agreement, including, without limitation: (i) to abide by the definition of Registry Services in the agreement; (ii) to comply with and adhere to the limits on its exercise of authority provided by the agreement; (iii) to apply its standards, policies, procedures, and practices in a fair, reasonable, and equitable fashion with respect to VeriSign; (iv) to promote and encourage robust competition in the operation of TLD registries and other services associated with domain name registration; (v) to exercise its responsibilities with respect to VeriSign and the .com gTLD registry in an open and transparent manner; (vi) to establish meaningful, adequate, and independent review policies and appeal procedures; and (vii) to take all reasonable steps to enter into registry agreements similar to the 2001 .com Registry with competing ccTLD registries.

2. For entry of a preliminary and permanent injunction prohibiting ICANN, its officers, directors, employees, agents, and others acting in concert or in association with it, from directly or indirectly taking any action, or engaging in any conduct: (i) to restrict, regulate, interfere with, or exercise control over the offering, introduction, or performance of any services by VeriSign (or its affiliates) to consumers that are not Registry Services within the meaning of the 2001 .com

Registry Agreement; (ii) to delay or impede the introduction of any new services by VeriSign (or its affiliates) that are not Registry Services within the meaning of the 2001 .com Registry Agreement, to impose conditions on the introduction of such services, or to restrict or regulate the prices VeriSign may charge consumers for any services that are not Registry Services within the meaning of the 2001 .com Registry Agreement; (iii) to control, regulate, or limit, or attempt to control, regulate, or limit, VeriSign's marketing practices and other business conduct that is not governed by the 2001 .com Registry Agreement or otherwise subject to ICANN's authority; (iv) to apply its standards, policies, procedures, and practices in an arbitrary, unjustifiable, and inequitable fashion with respect to VeriSign, or to single out VeriSign for disparate treatment, not justified by any substantial and reasonable cause; and (v) to unreasonably restrain competition for the operation of TLD registries and for services that may be offered by VeriSign.

F. On the Sixth Claim for Relief

1. For an award of monetary damages, according to proof.

G. On the Seventh Claim for Relief:

1. For entry of a final and binding judicial declaration determining and adjudicating each and all of VeriSign's contentions as set forth in paragraph 129 above.

H. On All Claims for Relief:

1. For its costs of suit incurred herein.

2. For such further relief as is just and proper.

DATED: February 26, 2004

ARNOLD & PORTER LLP
RONALD L. JOHNSTON
LAURENCE J. HUTT
THADDEUS M. POPE

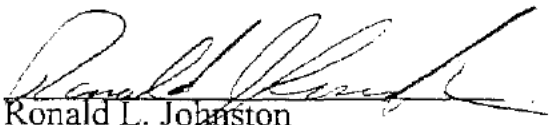
By: 
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Exhibit R-36

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INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

VERISIGN, INC., a Delaware corporation,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation; DOES 1-50,

Defendant.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation,

Cross-Complainant and Defendant,

v.

VERISIGN, INC., a Delaware corporation,

Cross-Defendant.

CASE NO. BC 320763

Assigned for all purposes to Judge Rolf M. Treu

Complaint Filed: August 27, 2004

DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' CROSS-COMPLAINT FOR DECLARATORY RELIEF

Cross-Complainant Internet Corporation for Assigned Names and Numbers ("ICANN") alleges against Cross-Defendant VeriSign Inc. ("VeriSign") as follows:

NATURE OF THE CASE

1. This Cross-complaint arises out of a dispute over obligations that VeriSign assumed under an agreement with ICANN in exchange for ICANN's appointment of VeriSign as the ".com" registry operator for the Internet. These disputes have arisen because VeriSign has refused to comply with its obligations under the parties' agreement and has taken actions that are inconsistent with those obligations. VeriSign's conduct threatens the secure and stable operation of the .com registry. VeriSign's actions and its assertions that it need not comply with those obligations are contrary to the terms of the parties' agreement.

2. ICANN is the internationally organized nonprofit corporation responsible for coordinating the global Internet's domain name system. The Internet domain name system consists of approximately 250 Top-Level Domains ("TLDs") (e.g., .com, .net, .org, .edu) and about 64.5 million registered domain names (e.g., www.register.com) for which TLD operators charge for registration. ICANN's mission is to protect the stability, integrity, and utility of this system on behalf of the global community. Among its many responsibilities, ICANN is charged with overseeing the delegation of TLDs to qualified applicants. ICANN has awarded contracts to a number of entities to operate one or more TLDs and to maintain the definitive registry of domain names for that TLD. VeriSign is one of those entities.

3. Pursuant to separate May 2001 registry agreements, VeriSign is the "registry" for, and thus has the responsibility for operating, two of the largest TLDs, ".com" and ".net." These two TLDs collectively contain nearly 90% of all registered domain names in the United States, and 53% of all registered domain names on the Internet throughout the world. This cross-complaint concerns only the 2001 .com Registry Agreement (".com agreement").[1]

[1] Unlike the 2001 .com Registry Agreement, which allows either party to initiate litigation unless both parties agree to arbitration, the 2001 .net Registry Agreement (".net agreement") mandates dispute resolution via arbitration at the insistence of either party. On November 10, 2004, ICANN initiated arbitration under the .net agreement with respect to the very same issues raised herein. ICANN would welcome the opportunity to arbitrate the parties' disputes under the .com agreement, but VeriSign has chosen to pursue litigation instead.

4. The disputes between ICANN and VeriSign are causing serious contention between the parties. VeriSign has, on multiple occasions, taken unilateral actions (with little or no notice to ICANN or to affected users and operators of the Internet) contrary to its obligations under the relevant agreements. For example, on September 15, 2003, VeriSign, with virtually no notice whatsoever to ICANN or the Internet community, introduced a "wildcard" in the .com and .net registries such that when an Internet user typed in a domain name address that did not exist, that user, instead of receiving an error message, was re-directed to a special Internet page set up and maintained by VeriSign (the "Wildcard service"). If, for example, a user accidentally typed "www.regissster.com" instead of "www.register.com", the user would be sent to a VeriSign-operated web page that contained links to paid advertisements. VeriSign's unilateral implementation of the Wildcard service not only violated the .com agreement, but also provoked serious concern and outcry across the Internet community.

5. Within hours of its deployment, ICANN received numerous complaints and comments from concerned members of the community. These individuals informed ICANN that the Wildcard service was adversely affecting their systems by, among other things, overriding various software programs widely used in connection with the DNS. The community urged ICANN to take action and called on VeriSign to deactivate the wildcard. In response to the outcry, ICANN requested that VeriSign voluntarily suspend the service so that ICANN and the Internet community could study the service and make informed recommendations regarding its future use. VeriSign refused. Following that refusal, on October 3, 2003, ICANN's chief executive officer sent a letter to VeriSign stating that VeriSign's unilateral and unannounced changes to the operation of the .com registry were not consistent with material provisions of the agreement. He further warned that, if VeriSign did not return the .com registry to its pre-wildcard state, ICANN would be forced to take the steps necessary under the .com agreement to compel VeriSign's compliance. Only then did VeriSign elect to temporarily suspend the use of the Wildcard service. VeriSign, however, has stated publicly that it plans to reintroduce the Wildcard service at some point in the future and that it may do so at its discretion.

6. The Wildcard service is not the first time VeriSign has chosen to ignore its contractual obligations to seek to gain some inappropriate financial advantage from its stewardship of the .com and .net registries. In November 2000 and again in January 2003, VeriSign violated both agreements by initiating two different fee-based services (International Domain Name "IDN" service and "ConsoliDate" service) without obtaining the necessary contractual amendments required by the agreements. For example, the .com agreement expressly requires that VeriSign obtain written consent from ICANN to amend the agreement before it can charge a fee for any "Registry Service" not already listed on Appendix G to the agreement. VeriSign has refused to comply with its obligations under the agreements by continuing to offer the services without the necessary amendments in place.

7. VeriSign has taken the position that services like the Wildcard service, ConsoliDate, and IDN, and a "wait listing" service that VeriSign has proposed to offer, are not subject to the parties' agreement in any respect. Specifically, VeriSign has argued that these services are not "Registry Services" as that term is defined in the agreement. However, the definition provided in the contract, together with the accompanying examples, makes clear that VeriSign's services do constitute "Registry Services" and, therefore, are governed by the agreement.

8. By initiating this cross-complaint, ICANN seeks a declaration of VeriSign's obligations under the .com agreement and a determination that VeriSign has breached its obligations under the agreement. These determinations are necessary to protect ICANN's ability under the agreement to ensure that VeriSign's activities in operating the .com registry do not endanger the stability or security of the Internet and are consistent with ICANN's goals in coordinating the domain name system, including promoting competition in the provision of registration services. They may also be relevant to the process of determining whether VeriSign or some other entity should be chosen to operate the .net or .com registries when the existing agreements expire.

PARTIES TO CROSS-COMPLAINT

9. Cross-Complainant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN") is a not-for-profit corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at 4676 Admiralty Way, Suite 330, Marina del Rey, CA 90292-6601.

10. Cross-Defendant VERISIGN, INC. ("VeriSign") is a corporation, organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 487 East Middlefield Road, Mountain View, CA 94043.

VENUE

11. Venue is proper in this Court pursuant to the Code of Civil Procedure, including, without limitation, Section 395.5.

PROCEDURAL HISTORY

12. On February 26, 2004, VeriSign filed in the United States District Court for the Central District of California a complaint against ICANN for violation of antitrust laws, specific performance of contract, damages for breach of contract, interference with contractual relations, declaratory and injunctive relief.

13. On May 19, 2004, the district court dismissed VeriSign's complaint without prejudice.

14. On June 14, 2004, VeriSign filed in the United States District Court for the Central District of California a first amended complaint against ICANN seeking the same relief.

15. On August 12, 2004, the district court again dismissed VeriSign's federal claims, this time with prejudice, and declined supplemental jurisdiction of VeriSign's state claims.

16. On August 27, 2004, VeriSign filed the current complaint in this Court seeking relief for its state law claims.

17. On September 24, 2004, VeriSign filed a Notice of Appeal to the Ninth Circuit Court of Appeals seeking review of the federal district court's August 12, 2004 order dismissing VeriSign's first amended complaint.

GENERAL ALLEGATIONS

I. THE INTERNET DOMAIN NAME SYSTEM

18. The Internet is a "network of networks" that allows computers around the world to communicate with each other quickly and efficiently. These computers (and other devices) serve a variety of purposes, including hosting web sites, handling e-mail, and providing access points to the Internet for users. For the Internet to function effectively, computers connected to the Internet must have unique identifiers, or addresses, so that information can be routed to and from each computer, or set of computers using such identifiers.

19. The unique identifiers used by Internet computers to route traffic and establish connections among themselves are lengthy numerical codes known as Internet Protocol ("IP") addresses. For example, the IP address for the computer that hosts the Los Angeles Superior Court's web site is "216.55.67.34".

20. Because Internet users cannot easily remember IP address, most Internet computers also have a unique, user-friendly address, called a "domain name", which corresponds to the computer's IP address. The domain name for the Los Angeles Superior Court's web site computer is www.LASuperiorCourt.org.

21. However, user-friendly domain names would be useless without an effective way to translate domain names to the IP addresses that computers use to communicate among themselves. Such translation enables a user to access a service on the Internet (such as a web site) by typing the domain name rather than the IP address into a web browser.

22. Nearly all Internet computers translate domain names to IP addresses by using the Domain Name System ("DNS"), which the Internet engineering community devised in the early 1980s. The DNS is based on a hierarchical network of computers known as "nameservers." These computers receive queries from a user's computer, or its interface, for information about the domain name it is attempting to locate. The nameserver transmits information about that domain name to the user's computer in response. Currently, there are over 1,000,000 nameservers on the Internet.

23. At the top of the DNS hierarchy are 13 special nameservers, called "root servers." They are located at various sites around the world and identified by the letters A through M. The root servers contain the IP addresses for the nameservers of all top-level domain registries (i.e., .com, .net, .org). Also scattered across the Internet are millions of computers called "recursive nameservers" that routinely cache (store) the information they receive from queries to the root servers. These recursive nameservers are located strategically with Internet Service Providers ("ISPs") or institutional networks. They are used to respond to a user's request to resolve a domain name -- that is, to translate that domain name to the corresponding IP address.

24. In addition to a hierarchical network of computers, the DNS also uses a hierarchical naming system. In order to read a domain name, a user must look from right-to-left. Thus, "www.register.com" consists of: "com" the top-level domain ("TLD"); "register" the second-level domain; and "www" the third-level domain. A "domain" includes the specified domain level and all levels under it. Hence, the domain "register.com" includes: "register.com"; "www.register.com"; and "email.register.com".

25. This hierarchy allows responsibility for data maintenance to be allocated among many entities. Responsibility for maintenance of each hierarchical level is allocated by dividing the Internet into "zones." A DNS zone begins at the top of a domain and extends down until the zone administrator has chosen to delegate responsibility to someone else. For instance, the zone operator for "register.com" maintains control of that domain level and can delegate control of "www.register.com" to another operator.

26. By combining both the hierarchical network with the hierarchical naming process, a user's computer is able to obtain the IP address corresponding to the requested domain name if that domain name exists. If the domain name does not exist, most users receive an error message.

II. REGISTERING A DOMAIN NAME

27. A consumer (or "registrant") who wishes to register a domain name in the .com TLD must contact one of the 350 competitive ICANN-accredited "registrars," which in turn contacts VeriSign, the .com Registry Operator, to see if the domain name is available. If the name is available, VeriSign delegates the domain name to the registrant through the registrar.

VeriSign, pursuant to the .com agreement, cannot deal directly with registrants but must work through registrars that are accredited by ICANN.

28. This system was developed to promote a competitive environment for domain name registration services. Each Registry Operator, including VeriSign, is obligated by the Registry Agreement to treat all ICANN-accredited registrars on equivalent and non-discriminatory terms.

III. ICANN'S ROLE IN THE MANAGEMENT OF THE DOMAIN NAME SYSTEM

29. ICANN is a not-for-profit corporation organized under California law. ICANN's mission "is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." In 1998, ICANN entered into a Memorandum of Understanding ("MOU") with the United States Department of Commerce ("DOC") in which they agreed to "jointly design, develop and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity." The MOU has been amended and extended on several occasions.

30. ICANN seeks to develop consensus wherever possible, and the bulk of ICANN's activity occurs either on the Internet or in meetings open to the public. ICANN maintains open and transparent processes, and it regularly posts on the Internet its minutes, transcripts of its meetings, and other important information and correspondence.

31. One of ICANN's functions has been to enter into contracts with the operators of various Internet "registries." Those companies maintain the "zone" or "master" file for the TLDs of the Internet (e.g., .com, .net, and .org). TLD registries are, in some senses, similar to phone books in that the registry operators maintain a list (and a variety of other relevant information) about each of the domains within the TLD. ICANN presently has contracts with a number of registry operators, including VeriSign, which operates the ".com" and ".net" registries. The current .com registry agreement between VeriSign and ICANN was entered into in May 2001.

Absent grounds for termination, the .com agreement is currently set to expire on November 10, 2007.

IV. THE 2001 .COM REGISTRY AGREEMENT

32. Under the .com agreement, ICANN has appointed VeriSign as the sole Registry Operator of the .com TLD. The .com agreement allows VeriSign to charge registrars certain fees. In exchange, VeriSign has agreed to comply with a number of obligations under the .com agreement.

33. One of those obligations is to provide Registry Services. "Registry Services" generally are defined in the .com agreement as including "services provided as an integral part of the Registry TLD, including all subdomains."

34. The agreement also provides a non-exhaustive list of potential categories of Registry Services that "include: receipt of data concerning registrations of domain names and nameservers from registrars; provision to registrars of status information relating to the Registry TLD zone servers, dissemination of TLD zone files, operation of the Registry zone servers, dissemination of contact and other information concerning domain name and nameserver registrations in the Registry TLD, and such other services required by ICANN through the establishment of Consensus Policies...."

35. This particular listing of services was included to: (a) identify particular services that are necessarily Registry Services, and (b) illustrate the types of services that fall within the general definition of "Registry Services." The list was not intended to be exhaustive. A service that is provided as an integral part of the .com TLD is a Registry Service even though that service is not expressly listed.

36. Registry Services generally must meet the performance and functional specifications established by ICANN and initially set forth in Appendices C (functional specifications) and D (performance specifications) to the .com agreement, although those specifications are not exhaustive.

37. Additionally, any Registry Service introduced by VeriSign must comply with all new and revised specifications and policies established by ICANN pursuant to Section I.1 of the .com agreement.

38. The .com agreement further requires, among other things, that VeriSign:

i. obtain ICANN's written consent to amend Appendix G before charging a fee to anyone for Registry Services not already listed on Appendix G;

ii. obtain ICANN's written consent before using hyphens in the third and fourth character positions of a domain name;

iii. maintain only those means of public, query-based access to domain name registrations that comply with the ICANN-prescribed protocol;

iv. not register all otherwise unregistered domain names;

v. take reasonable steps to protect Personal Data from loss, misuse, unauthorized disclosure, alteration, or destruction; and

vi. not exploit its position to the detriment of the Internet community.

39. VeriSign has other obligations as well, including an obligation to treat all registrars equally and not discriminate against any registrar. VeriSign's conduct, as described below, indicates that VeriSign is willing to ignore a number of its obligations.

40. The .com agreement sets forth detailed requirements for how VeriSign provides Registry Services. But because it was contemplated that changes in technology may lead to additional Registry Services, the agreement contains mechanisms for VeriSign to request and ICANN to approve the terms under which additional Registry Services may be provided.

41. Upon receipt of a court judgment declaring VeriSign to be in violation of the .com agreement, ICANN may terminate the .com agreement pursuant to Section II.16(A) of the .com agreement.

V. VERISIGN REFUSES TO RECOGNIZE ITS OBLIGATIONS UNDER THE 2001 .COM REGISTRY AGREEMENT.

42. VeriSign refuses to recognize its contractual commitments under the .com agreement. VeriSign has taken the position that the Wildcard service it introduced and threatens

to reintroduce, as well as three other services that it presently operates in the .com registry -- ConsoliDate, the International Domain Name service, and the Wait Listing Service -- are not Registry Services and are not subject to *any* of the terms and conditions of the .com agreement.

43. VeriSign's position and actions taken in furtherance of that position are inconsistent with material provisions of the .com agreement and collectively demonstrate that VeriSign is willing to exploit its role as the monopoly Registry Operator of the .com registry to the detriment of the Internet community, including consumers of name registration services.

1. VERISIGN'S WILDCARD SERVICE

A. Wildcards In The Domain Name System

44. When most web users type in an address that has not been registered in the registry, the user's computer receives an "error" message or a "page cannot be displayed" message that states in effect that the Internet web site does not exist. Some users will see a search results page generated by their browser or ISP. If, instead, a Registry Operator wanted to redirect the Internet user to an Internet page containing content supplied by the Registry Operator, the Registry Operator can insert what is known as a "wildcard" into the zone file, which contains, among other things, the domain names specifically registered by Internet users. The wildcard causes an Internet user who types in an address that is not specifically registered to be redirected to an Internet page established and controlled by the Registry Operator.

45. Wildcards are instructions to the nameservers for recognizing queries for domain names within the nameserver's zone that are not listed with that nameserver. A wildcard works by entering a record labeled "*" in a specified zone. The "wildcard" will then direct the nameserver to positively return any query by a user's computer that is within that zone but not matched by any specifically registered domain name.

46. Without a wildcard, the reply from the nameserver would be positive (RCODE = 0) if a specifically registered domain name exists. For a non-existent domain name, or a domain name the nameserver refuses to provide for any other reason, the reply would be negative (RCODE = 1 through 5), and an error message would be transmitted back to the user's computer. By implementing a wildcard, however, the non-existent domain names now return a positive

answer (RCODE = 0) with the IP address of the wildcard Internet page. In fact, with a wildcard all queries to the nameserver will return a positive answer (RCODE = 0) because wildcards cannot discern between different protocols, transports, or services (i.e., web, e-mail, TCP, UDP).

47. Without substantial communication with the Internet community, including open and transparent testing and evaluation, the introduction of a wildcard into a widely-used TLD would have a negative effect on a number of Internet functions and could potentially have adverse effects on the TLD, the DNS, and the Internet. This is particularly true where a wildcard has never been implemented.

B. VeriSign Deploys A Wildcard Service In The .Com Zone.

48. From its inception in 1985, the .com zone has never used a wildcard. However, on September 15, 2003, VeriSign, with virtually no warning to the Internet community and without seeking the approval from ICANN required under the .com agreement, inserted a wildcard in the .com zone.

49. Where once a user received an error page, VeriSign's wildcard instead returned the domain name address of a VeriSign-operated web site called "Site Finder" (the "Wildcard service") that linked the Internet user to alternative choices, a search engine, and paid-for advertisements. The effect of this wildcard was that any computer that requested a domain name not otherwise present in the .com zone (including reserved names, names in non-hostname or "improper" format, unregistered names, and registered but inactive names) was directed to the Wildcard service.

50. Upon implementation of the Wildcard service, there was immediate widespread expression of concern about the impact these changes would have on the security and stability of the Internet, the DNS, and the .com TLD.

51. As a result, ICANN asked VeriSign to voluntarily suspend the Wildcard service until more information could be gathered on the impact of these changes. On September 21, 2003, VeriSign refused to honor ICANN's request.

52. Following VeriSign's refusal, the ICANN Security and Stability Advisory Committee ("SSAC"), consisting of approximately 20 technical experts from industry and

academia, preliminarily confirmed the Internet communities concerns and issued a statement concluding that:

> VeriSign's change appears to have considerably weakened the stability of the Internet, introduced ambiguous and inaccurate responses in the DNS, and has caused an escalating chain reaction of measures and countermeasures that contribute to further instability.

53. In addition to the SSAC statement, ICANN continued to be bombarded with letters, comments, and e-mails, all expressing concerns about the impact and appropriateness of these changes and calling for VeriSign to voluntarily suspend its Wildcard service.

54. On October 3, 2003, after determining that VeriSign's actions were inconsistent with material provisions of the .com agreement, ICANN issued a formal demand to VeriSign, stating that: "[g]iven the magnitude of the issues that have been raised, and their potential impact on the security and stability of the Internet, the DNS and the .com and .net top level domains, VeriSign must suspend the changes to the .com and .net top-level domains introduced on 15 September 2003 by 6:00 PM PDT on 4 October 2003. Failure to comply with this demand by that time will leave ICANN with no choice but to seek promptly to enforce VeriSign's contractual obligations."

55. Within hours of ICANN's demand letter, VeriSign agreed to suspend its Wildcard service temporarily, but VeriSign informed the Internet community that it would reintroduce the service at its discretion.

56. Following VeriSign's temporary suspension of its Wildcard service, various public meetings were initiated, notwithstanding VeriSign's protest, to evaluate the implementation of the wildcard in the .com TLD. A number of organizational and corporate users also listed specific technical issues that they faced with the implementation of the Wildcard service. Although presented with harsh criticism, VeriSign "made clear … that it had no intention of turning Site Finder off for good." When asked by Stephen Crocker, one of the Internet's original architects and the SSAC committee's chairman, why the wild card was introduced in the first place without giving network operators any warning, Verisign failed to provide an answer, but simply hinted to "concerns of proprietary information and competitive advantage."

C. VeriSign's Wildcard Service Violates The 2001 .Com Registry Agreement.

57. VeriSign's Wildcard service is a "Registry Service" and its introduction is constrained by VeriSign's contractual commitments under the .com agreement.

58. Should VeriSign choose to reintroduce its Wildcard service, as VeriSign has publicly stated it intends to, the Wildcard service would be inconsistent with several material provisions in the .com agreement, including but not limited to the following:

i. Section II.20 and Appendix C of the .com agreement;

ii. Section II.3(A)(i) and Appendix G of the .com agreement;

iii. Sections II.23(C), II.23(D), and II.24 and Appendix X of the .com agreement;

iv. Section II.10 of the .com agreement;

v. Section II.11 of the .com agreement; and

vi. Section II.23(D) and Appendix I of the .com agreement.

2. VERISIGN'S CONSOLIDATE SERVICE

A. ConsoliDate Timeline of Events

59. At or about the beginning of 2003, VeriSign informed ICANN that it was interested in implementing "ConsoliDate" in the .com registry. For a fee, ConsoliDate allows a registrant (such as a company with a large portfolio of domain names) to add from 1 to 364 days to an existing domain name registration term in order to create a single anniversary date for its entire .com domain name registration portfolio.

60. ICANN informed VeriSign that ConsoliDate was a Registry Service. VeriSign did not dispute this assertion.

61. ICANN provisionally supported the introduction of ConsoliDate and designated a maximum price that VeriSign could charge for ConsoliDate.

62. On February 25, 2003, the ICANN Board approved amendments to Appendices C and G of the .com agreement and allowed ICANN's General Counsel to negotiate and approve additional conforming amendments in order to incorporate ConsoliDate.

63. Before any amendment becomes effective, VeriSign must agree in writing to the amendment and it must be approved by the DOC. ICANN requested on various occasions that VeriSign begin discussions to change the current language of the .com agreement to incorporate ConsoliDate.

64. VeriSign failed to do so. Instead, VeriSign has chosen to operate ConsoliDate without contractual authorization.

B. VeriSign's Continued Operation Of ConsoliDate Violates The 2001 .Com Registry Agreement.

65. ConsoliDate is a "Registry Service" and its introduction is constrained by VeriSign's contractual commitments under the .com agreement.

66. VeriSign has breached Section II.22 and Appendices G and F of the .com agreement because VeriSign is charging a fee for ConsoliDate without executing the necessary amendments to Appendices G and F.

67. VeriSign has breached Section II.20 and Appendix C of the .net agreement because ConsoliDate uses a "SYNC" command, and fails to support a grace period to renew domain names, without executing the necessary amendments to Appendix C.

3. VERISIGN'S INTERNATIONAL DOMAIN NAMES SERVICE

A. International Domain Names Service Timeline of Events

68. In or about November 2000, VeriSign began offering multilingual domain names that were later stored in a third-level domain testbed environment created in concert with an Internet Engineering Task Force ("IETF") working group. Multilingual domain names allowed users of the Internet to use non-ASCII (non-English) character sets to register domain names.

69. VeriSign charged users for registration of multilingual domain names in this environment and approximately thirty registrars signed-up to be a part of this testbed.

70. Shortly thereafter, VeriSign changed the name of the service from multilingual domain names to International Domain Names ("IDN").

71. On March 1, 2001, ICANN and VeriSign announced a proposal to modify the existing Registry Agreement (which then combined com/net/org). Part of the discussion relating

to this modification was that the then-existing Registry Agreement did not have a provision constraining the use of IDNs. VeriSign agreed that ICANN could place such constraints, and these constraints are now present in Appendix K of the current .com agreement.

72. One of these constraints is reserving domain names having labels with hyphens in the third and fourth character positions from initial registration within the .com TLD without ICANN's express written consent. IDN necessarily requires the use of hyphens in these positions in order for the DNS to decipher whether the computer is referring to IDN names or regular ASCII (English) names.

73. Controversy quickly emerged in East Asia with regard to VeriSign's testbed, based in part on the large numbers of inappropriate Chinese, Japanese, and Korean domain names registered within the testbed. For example, one user had registered the domain name of the Japanese Emperor (which is considered blasphemous by traditional Japanese cultural standards). Registration of inappropriate domain names was one of a number of growing problems that IDNs were creating. As a result, from the beginning of 2001 to approximately June 2003, there were discussions on various ways to institute procedures that would avoid these types of problems.

74. An ICANN working group was initially formed to aid this process, and in late 2001, a broader committee was formed within the Internet community to develop appropriate procedures for implementation of IDN.

75. In March 2003, at an ICANN Board meeting, the committee presented six points (four mandatory and two advisory) for implementation of IDN. VeriSign agreed with these points but took the position that ICANN should not require VeriSign to commit to them.

76. On June 20, 2003, ICANN published revisions of the committee's six points with VeriSign's participation. The publication was entitled "Guidelines for the Implementation of Internationalized Domain Names." VeriSign again stated that it agreed with the guidelines but believed that it should not have to commit to them. All other Registry Operators seeking to implement IDN (.cn, .jp, .tw, .info, .org, and .museum) agreed to abide by the guidelines and were authorized in writing by ICANN to use IDN. VeriSign never formally agreed to the guidelines.

77. IDN is currently functioning in the .com TLD without ICANN's formal written approval.

B. VeriSign's Continued Operation Of the International Domain Names Service Violates The 2001 .Com Registry Agreement.

78. IDN is a "Registry Service" and its introduction is constrained by VeriSign's contractual commitments under the .com agreement.

79. Under Appendix K of the .com agreement, VeriSign is obligated to reserve domain names having labels with hyphens in the third and fourth character positions ("Tagged Domain Names") from initial (i.e., other than renewal) registration within the .com TLD, except to the extent that ICANN otherwise expressly authorizes in writing.

80. Subject to the requirements of Section II.4 of the .com agreement, ICANN is entitled to establish conditions on any authorization it may have for VeriSign to accept initial registrations of Tagged Domain Names.

81. In operating IDN, VeriSign has accepted initial registrations of Tagged Domain Names without, and beyond the extent of, ICANN's express written authorization because VeriSign refuses to be bound by the "Guidelines for the Implementation of Internationalized Domain Names" created through the Internet community consensus building process.

82. As such, VeriSign's current introduction of IDNs in the .com TLD is in breach of Section II.3(A)(i) and Appendix K of the .com agreement.

83. Additionally, VeriSign has breached Section II.3(A)(i) and Appendix G of the .com agreement because VeriSign is charging a fee for IDNs not listed on Appendix G.

4. VERISIGN'S WAIT LISTING SERVICE

A. Wait Listing Service Timeline of Events

84. Domain name subscriptions typically are for one or two years. At the end of that term, some domain name registrants elect not to renew their subscriptions, which causes those names to be deleted from the registry and permits others to register those names.

85. Some time ago, VeriSign proposed to offer a Wait Listing Service ("WLS") which allows a prospective domain name registrant to submit a request for an expired domain name on a

first-come, first-serve basis through any of the more than 350 ICANN-accredited registrars for a domain name currently registered in the .com registry. If the domain name is deleted (for example, because the current registrant of the domain name elected not to renew his or her registration), VeriSign would automatically register the domain name in the name under the sponsorship of the registrar that placed the WLS subscription. Internet registrars could elect to offer WLS to consumers if they wished but would be under no obligation to do so.

86. In making its WLS proposal, VeriSign's Vice President of Internet Relations and Compliance, Registry, acknowledged on March 21, 2002, that an amendment to the .com agreement would be required in order for VeriSign to offer WLS because WLS was a "Registry Service."

87. After VeriSign submitted its WLS proposal to ICANN, ICANN solicited comment on the proposal from the Internet community. In August 2002, after receipt of those comments, ICANN's Board of Directors adopted a resolution authorizing ICANN's president and general counsel to negotiate amendments to its agreements with VeriSign to permit WLS to proceed. After various procedural reviews of that decision – including reconsideration at the requests of both registrars and VeriSign – the ICANN Board passed a resolution approving the results of the negotiations and authorized ICANN staff to seek the approval of the DOC (as required by ICANN's MOU with that agency) to amend the VeriSign registry agreements to permit WLS to be offered.

88. To complete WLS deployment without violating the .com agreement, VeriSign must further secure approval from the DOC and enter into formal written amendments to the .com agreement with ICANN. VeriSign has refused to do so, apparently because VeriSign now contends that WLS is not a Registry Service.

B. VeriSign's Wait Listing Service Violates The 2001 .Com Registry Agreement As Currently In Effect.

89. WLS is a "Registry Service" and its introduction is constrained by VeriSign's contractual commitments under the .com agreement.

90. VeriSign's proposed implementation of WLS would violate Section II(3)(A)(i) and Appendix G of the .com agreement as currently in effect, in that it would involve VeriSign charging for a Registry Service not specified in that Appendix.

91. VeriSign's proposed implementation of WLS would violate Section II.20 and Appendix C of the .com agreement as currently in effect, in that it would be contrary to functional specifications contained in that Appendix.

92. VeriSign has refused to proceed with WLS because it does not want to acknowledge that WLS is a Registry Service, even though VeriSign has specifically acknowledged that an amendment to the. com agreement would be necessary because WLS would be a Registry Service.

5. VERISIGN'S NOVEMBER 2001 VOLUME DISCOUNT PROGRAM

A. November 2001 Volume Discount Program Timeline of Events

93. In or about November 2001, VeriSign initiated a "volume discount" program without giving prior notice to ICANN.

94. The program included payment of volume-based rebates to registrars of a portion of the price of domain-name registrations.

95. The rebates were calculated based on the percentage increase in domain names registered by the registrar as compared to the preceding month's registrations. As a result, smaller registrars were able to achieve larger rebates (e.g., if a registrar registered 50 domain names the first month and 100 domain names the following month, that would be a 100% increase, whereas a registrar who registered 1,000 domain names the first month and 1,500 domain names the next month would only demonstrate a 50% increase).

96. The equivalent access provisions of the .com agreement prohibit VeriSign from having different thresholds for different registrars.

97. ICANN raised the concern with VeriSign that the program violated the equivalent access provisions of the .com agreement and suggested that VeriSign change the program accordingly.

98. VeriSign subsequently ended its volume discount program after three months.

B. VeriSign's November 2001 Volume Discount Program Violated The 2001 .Com Registry Agreement.

99. VeriSign's November 2001 Volume Discount Program violated Sections II.19, II.22, and II.23 and Appendix W of the .com agreement.

6. VERISIGN'S THROTTLING OF REGISTRY-REGISTRAR AGREEMENTS

A. Timeline Of Events

100. In or around September 2004, VeriSign began restricting the ability of ICANN-accredited registrars to gain access to the Shared Registration System (the "SRS") operated by VeriSign under the .com agreement. This conduct violates Section II.19 and Appendix F of the agreement.

101. Section II.19 of the .com agreement requires VeriSign to enter into Registry-Registrar Agreements (RRAs) and promptly provide accredited registrars with access to the SRS. Specifically, the RRA, which is attached as Appendix F to the .com agreement, states:

> 2.1 System Operation and Access. Throughout the Term of this Agreement, [VeriSign] shall operate the System and provide Registrar with access to the System enabling Registrar to transmit domain name registration information for the Registry TLD to the System . . . .

102. This obligation to provide ICANN-accredited registrars with access to the SRS is absolute and unqualified and arises immediately upon VeriSign reasonably assuring itself that the applying entity in fact has been accredited. The .com agreement does not allow VeriSign unilaterally to restrict or constrain the ability of accredited registrars to gain such access for any reason.

103. Notwithstanding this obligation, VeriSign has publicly announced that it will limit the rate at which newly-accredited registrars are allowed access to the SRS. ICANN has received reports that in fact a large number of registrars already have been blocked in their efforts to gain access to the SRS.

B. VeriSign's Throttling of Registry-Registrar Agreements Violates The 2001 .Com Registry Agreement.

104. VeriSign's unilateral action to limit the rate at which ICANN-accredited registrars are allowed access to the SRS is inconsistent with Section II.19 and Appendix F of the .com agreement and amounts to a material breach of that agreement.

7. VERISIGN'S COLLECTIVE ACTIONS HAVE VIOLATED THE CLEAR MEANING AND SPIRIT OF THE 2001 .COM REGISTRY AGREEMENT CODE OF CONDUCT.

105. The .com agreement obligates VeriSign to comply with the Code of Conduct, attached as Appendix I to the .com agreement.

106. The clear meaning of the Code of Conduct, as demonstrated in its preamble, requires VeriSign to carry out its duties as registry operator in a manner that will not compromise the Internet community's trust in VeriSign. This obligation, when construed in light of the agreement as a whole, necessarily includes a general requirement that VeriSign will refrain from exploiting its position as the sole monopoly operator of the .com registry by using its position to secure financial benefits to the detriment of the Internet community.

107. The manner in which VeriSign has chosen to implement the Wildcard service, ConsoliDate, IDN, WLS, and the 2001 Volume Discount Program, as well as VeriSign's deliberate failure to immediately process Registry-Registrar Agreements, all demonstrate that VeriSign has ignored this obligation.

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

108. Cross-Complainant hereby incorporates and adopts by reference each and every allegation set forth in the preceding paragraphs of this cross-complaint as though fully set forth herein.

109. The .com agreement constitutes a valid and binding contract between ICANN and VeriSign.

110. All of the terms of the .com agreement are just and reasonable to VeriSign, and the consideration for VeriSign's obligations under the .com agreement, to the extent relevant to this action, is fair and adequate to VeriSign.

111. ICANN has duly and properly performed, and continues to duly and properly perform, all if its obligations under the .com agreement, except for any terms that it is prevented or otherwise excused from performing.

112. An actual controversy has arisen and now exists between ICANN and VeriSign relating to the parties' rights and obligations under the .com agreement in that ICANN contends, and VeriSign disputes, the following:

1. REGISTRY SERVICES DEFINITION

113. "Registry Services", as defined in Section I.9 of the .com agreement, means all services provided as an integral part of the .com TLD, other than those services excluded from the definition by the last sentence of Section I.9 of the agreement.

114. A service that is provided as an integral part of the .com TLD is a Registry Service even though that service may not be expressly listed in the second sentence of Section I.9 of the .com agreement. In listing particular services that are included in the definition, the second sentence of Section I.9 of the agreement serves: (a) to identify particular services that are necessarily Registry Services within the definition of Section I.9, and (b) to illustrate the types of services that fall within the general definition of "Registry Services" stated in the first sentence of Section I.9.

115. A service that is provided as an integral part of the .com TLD is a Registry Service even though that service may not be subject to the specifications and functionality provisions of Appendices C and D to the agreement.

2. ADDITIONAL OBLIGATION

116. Appendix G of the .com agreement prohibits VeriSign from charging for any Registry Service not specified in Appendix G.

3. WILDCARD SERVICE

117. VeriSign's Wildcard service, as implemented on September 15, 2003, is a Registry Service within the meaning of the .com agreement.

118. VeriSign's operation of its Wildcard service, as implemented on September 15, 2003, violates Section II.20 and Appendix C of the .com agreement.

119. In charging a fee for its referrals from its Wildcard service, as implemented on September 15, 2003, VeriSign violates Section II.3(A)(i) and Appendix G of the .com agreement.

120. VeriSign's operation of its Wildcard service, as implemented on September 15, 2003, violates Sections II.23(C), II.23(D), and II.24 and Appendix X of the .com agreement.

121. VeriSign's operation of its Wildcard service, as implemented on September 15, 2003, violates Section II.10 of the .com agreement.

122. VeriSign's operation of its Wildcard service, as implemented on September 15, 2003, violates Section II.11 of the .com agreement.

4. CONSOLIDATE

123. VeriSign's ConsoliDate service is a Registry Service within the meaning of the .com agreement.

124. VeriSign has implemented the ConsoliDate service in violation of Section II.20 and Appendix C of the .com agreement because ConsoliDate is contrary to functional specifications contained in that Appendix.

125. VeriSign's ConsoliDate service violates Section II.22 and Appendix G of the .com agreement because VeriSign is charging a fee for ConsoliDate without executing the necessary amendment to Appendix G.

126. VeriSign's ConsoliDate service violates Section II.22 and Appendix F of the .com agreement because ConsoliDate is charging a fee for ConsoliDate without executing the necessary amendment to Appendix F.

5. INTERNATIONAL DOMAIN NAME

127. VeriSign's IDN registration service is a Registry Service within the meaning of the .com agreement.

128. Under Appendix K of the .com agreement, VeriSign is obligated to reserve domain names having labels with hyphens in the third and fourth character positions ("Tagged Domain Names") from initial (i.e. other than renewal) registration within the .com TLD, except to the extent that ICANN otherwise expressly authorizes in writing.

129. Subject to the requirements of Section II.4 of the .com agreement, ICANN is entitled to establish conditions on any authorization it may give for VeriSign to accept initial registrations of Tagged Domain Names.

130. In operating its IDN registration service, VeriSign has accepted initial registrations of Tagged Domain Names without, and beyond the extent of, ICANN's express written authorization.

131. In operating its IDN registration service, VeriSign has violated the requirements of Section II.3(A)(i) and Appendix K of the .com agreement.

132. In charging a fee for its IDN registration service, VeriSign has violated Section II.3(A)(i) and Appendix G of the .com agreement by charging for a Registry Service not specified in that Appendix.

6. WAIT LISTING SERVICE

133. VeriSign's WLS is a Registry Service within the meaning of the .com agreement.

134. VeriSign's proposed implementation of WLS would breach Section II.3(A)(i) and Appendix G of the .com agreement as currently in effect, in that it would involve VeriSign charging for a Registry Service not specified in that Appendix.

135. VeriSign's proposed implementation of WLS would violate Section II.20 and Appendix C of the .com agreement as currently in effect, in that would be contrary to functional specifications contained in that Appendix.

7. NOVEMBER 2001 VOLUME DISCOUNT PROGRAM

136. VeriSign's November 2001 Volume Discount Program, which included payment of volume-based rebates to registrars of a portion of the price of domain-name registrations on terms not equally available to all registrars, violates Sections II.19, II.22, and II.23 and Appendix W of the .com agreement.

8. THROTTLING OF REGISTRY-REGISTRAR AGREEMENTS

137. VeriSign's unilateral action to limit the rate at which ICANN-accredited registrars are allowed access to the SRS is inconsistent with Section II.19 and Appendix F of the .com agreement and amounts to a material breach.

9. CODE OF CONDUCT

138. VeriSign's collective actions to date, as demonstrated in this Cross-complaint, have violated the Code of Conduct, attached as Appendix I to the .com agreement.

10. ICANN'S COMPLIANCE WITH THE 2001 .COM REGISTRY AGREEMENT

139. ICANN's obligations under Section II.4 of the .com agreement are limited to ICANN's activities that impact VeriSign's rights, obligations, and role as Registry Operator under the agreement in providing Registry Services and other duties as expressly provided for in the 2001 .com agreement

140. In matters that impact VeriSign's rights, obligations, and role as Registry Operator under the .com agreement, ICANN has exercised its responsibilities in an open and transparent manner.

141. In matters that impact VeriSign's rights, obligations, and role as Registry Operator under the .com agreement, ICANN has not unreasonably restrained competition and has, to the extent feasible, encouraged robust competition.

142. In matters that impact VeriSign's rights, obligations, and role as Registry Operator under the .com agreement, ICANN has established adequate appeal procedures for VeriSign, to the extent it has been adversely affected by ICANN standards, policies, procedures or practices.

143. In matters that impact VeriSign's rights, obligations, and role as Registry Operator under the .com agreement, ICANN has not applied standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and has not singled out VeriSign for disparate treatment unless justified by substantial and reasonable cause.

11. INDEMNITY

144. Section II.6 of the .com agreement is a standard third-party indemnity provision and does not afford VeriSign any right of indemnity for this or any other litigation brought against ICANN under the .com agreement.

12. NON-RENEWAL OF REGISTRY AGREEMENT

145. ICANN will not be obligated under Section II.25 of the .com agreement to award VeriSign a four-year renewal of the agreement in the event that ICANN demonstrates that VeriSign is in violation of the .com agreement.

146. ICANN will not be obligated under Section II.25 of the .com agreement to award VeriSign a four-year renewal of the agreement in the event that ICANN demonstrates that VeriSign has not provided and will not provide a substantial service to the Internet community under the .com agreement.

147. ICANN will not be obligated under Section II.25 of the .com agreement to award VeriSign a four-year renewal of the agreement in the event that ICANN demonstrates that the maximum price for initial and renewal registrations proposed in the Renewal Proposal submitted by VeriSign under Section II.25(A) exceeds the price permitted under Section II.22 of the .com agreement. ConsoliDate is a service under which registrations are renewed. The maximum price charged by VeriSign for renewal of registrations using the ConsoliDate service exceeds the price permitted for renewal registrations under Section II.22 of the .com agreement.

148. The WLS, as proposed by VeriSign, provides for the initial registration made by registrars on behalf of customers for a price that exceeds the price permitted for initial registrations under Section II.22 of the .com agreement.

13. TERMINATION OF REGISTRY AGREEMENT

149. ICANN has the right to terminate the .com agreement, in accordance with Section II.16(A) of the .com agreement, if VeriSign proceeds to offer Registry Services, including its Wildcard service, ConsoliDate, IDN, and WLS, without complying with the requirements of the agreement, including obtaining ICANN's approval.

150. ICANN has the right to terminate the .com agreement, in accordance with Section II.16 of the .com agreement, if the Court determines that VeriSign is in violation of the .com agreement.

151. Cross-Complainant desires a judicial determination and declaratory judgment of the respective rights and obligations of Cross-Complainant and Cross-Defendant with respect to matters alleged in this Cross-complaint.

SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT

152. Cross-Complainant hereby incorporates and adopts by reference each and every allegation set forth in the preceding paragraphs of this cross-complaint as though fully set forth herein.

153. VeriSign's conduct, as alleged above, constitutes multiple breaches of the .com agreement. ICANN has performed all of its obligations under the .com agreement except for those that are excused by virtue of VeriSign's conduct.

154. ICANN has suffered injury as a result of VeriSign's breaches in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, ICANN prays for judgment as follows:

155. For a declaration of the respective rights and obligations of the parties with respect to the .com agreement;

156. For a declaration and determination that VeriSign has breached the .com agreement;

157. For its costs of suit; and

158. For such other and further relief as the Court may deem just and proper.

Dated: November 12, 2004

JONES DAY

By: Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant and Cross-Complainant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013.

On November 12, 2004, I caused to be served the document described as:

DEFENDANT ICANN'S CROSS-COMPLAINT FOR DECLARATORY RELIEF

on the interested parties in this action.

_____ **BY (U.S. MAIL).** I placed ____ the original __X__ a true copy thereof enclosed in sealed envelope(s) to the addressee(s) as follows:

__X__ **BY PERSONAL SERVICE.** I placed ___ the original __X__ true copies thereof enclosed in sealed envelope(s) and caused such envelope to be hand delivered via messenger to the offices of the addressee(s) as follows:

LAURENCE HUTT, ESQ.
ARNOLD & PORTER
777 S. Figueroa, 44th Fl.,
Los Angeles, CA 90017

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.

_____(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__X__ (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction this service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 12, 2004, at Los Angeles, California.

Elba Alonso de Ortega
Type or Print Name

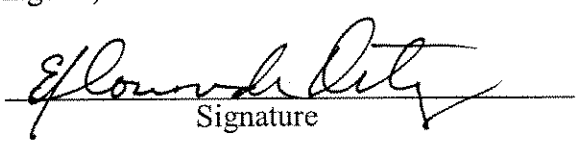
Signature

Exhibit R-37

VERISIGN™

12061 Bluemont Way
Reston, VA 20190

VerisignInc.com

8 January 2013

Ms. Maguy Serad
Vice President, Contractual Compliance
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Mr. Jack Khawaja
Manager, Risk and Audit
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Ms. Karla Valente
Director gTLD Registry Programs
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Contractual Compliance Audit for the .net TLD

Dear Maguy et al,

Verisign respectfully declines the invitation to voluntarily participate in ICANN's proposed Contractual Compliance Audit for the .net TLD. As set forth in my 7 December 2012 letter and confirmed in Jack Khawaja's 27 December 2012 email, Verisign has no contractual obligations under its .net Registry Agreement with ICANN to comply with the proposed audit. Absent such express contractual obligations, Verisign will not submit itself to an audit by or at the direction of ICANN of its books and records.

Verisign nevertheless welcomes the opportunity to cooperate with ICANN in the future in any Contractual Compliance Audits of TLDs operated by Verisign for which the applicable registry agreement contains sufficient audit rights.

Sincerely,

Patrick Kane
Senior Vice President and General Manager
VeriSign, Inc.

cc: John Jeffrey, ICANN
Jonathan Spencer, Verisign

Exhibit R-38

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited Claimants, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	ICDR CASE NO. 01-19-0004-0808

ICANN'S RESPONSE TO REQUEST FOR INDEPENDENT REVIEW PROCESS

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The Internet Corporation for
Assigned Names and Numbers

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers ("ICANN") hereby responds to the Request for Independent Review Process ("IRP"), dated 16 December 2019, submitted by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited ("Claimants").

1. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as "icann.org" into numeric IP addresses understood by computers. ICANN's core Mission is to ensure the stability, security, and interoperability of the DNS.[1] To that end, ICANN contracts with entities that operate generic top-level domains ("gTLDs"), which represent the portion of an Internet domain name to the right of the final dot, such as ".COM" or ".ORG."

2. ICANN's New gTLD Program ("Program") has produced ICANN's most ambitious expansion of the Internet's naming system. Through it, entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. ICANN designed the Program to enhance diversity, creativity, and choice, and to provide the benefits of innovation to consumers via the availability of new gTLDs. Indeed, the Program has already resulted in the introduction of over 1,200 new gTLDs to the Internet.

3. This IRP proceeding calls for a determination of whether ICANN complied with its Articles of Incorporation ("Articles"), Bylaws and internal policies and procedures in evaluating Claimants' Requests for Reconsideration concerning non-party Hotel Top Level Domain S.a.r.l.'s ("HTLD") community-based application to operate the .HOTEL gTLD. Despite Claimants' redundant rhetoric in the IRP Request, the claims against ICANN are entirely

unsupported. Notably, although Claimants purport to challenge the ICANN Board's actions on Reconsideration Requests 16-11 ("Request 16-11") and 18-6 ("Request 18-6"), references to those Board actions are conspicuously rare in the IRP Request. Instead, Claimants rely on baseless, hyperbolic accusations. Ignoring the rhetoric, Claimants primarily raise time-barred issues and, even if those issues were not time-barred, Claimants never address ICANN's thorough, reasoned responses to Requests 16-11 and 18-6.

4. Claimants, four of the seven applicants for .HOTEL, and they refuse to accept that HTLD's application achieved community priority over the other applications for .HOTEL. Instead, Claimants want to force an auction for control of. HOTEL, even though HTLD's application properly prevailed under the terms of the New gTLD Applicant Guidebook ("Guidebook"). To be clear, ICANN's interest in this matter is not in picking winners and losers, but in completing the rollout of the .HOTEL gTLD pursuant to the terms of the Guidebook and consistent with ICANN's Articles, Bylaws, and policies and procedures.

SUMMARY OF RELEVANT FACTS

I. ICANN'S ACCOUNTABILITY MECHANISMS.

5. To help ensure that ICANN is serving, and remains accountable to, the global Internet community, ICANN has established Accountability Mechanisms that allow aggrieved parties to challenge or seek review of ICANN actions and decisions that the parties believe violate ICANN's Articles, Bylaws, the Guidebook, and certain internal policies and procedures.[2]

6. ICANN's Bylaws provide for a process by which "any person or entity materially affected by an action or inaction" of ICANN may request review or reconsideration of that action or inaction ("Reconsideration Request").[3] A committee of the ICANN Board hears, considers, and recommends to the Board whether it should accept or deny a Reconsideration Request.[4]

7. Similarly, the Bylaws provide for an Office of the Ombudsman ("Ombudsman").[5]

The Ombudsman's main function is "to provide an independent internal evaluation of complaints" that ICANN or an ICANN constituent body has acted unfairly.[6] In addition, since 1 October 2016, the Ombudsman has also been tasked with evaluating Reconsideration Requests unless he recuses himself.[7] The Ombudsman provides to ICANN an evaluation of the Reconsideration Request before ICANN's Board Accountability Mechanisms Committee ("BAMC") makes a recommendation to the Board.[8] The Ombudsman does not investigate complaints while "one of the other formal accountability mechanisms" considers the same issue.[9]

8. In addition, the Bylaws create the IRP, under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an "independent third-party" for review.[10] IRPs are conducted in accordance with the International Centre for Dispute Resolution's ("ICDR") International Arbitration Rules, as modified by ICANN's Bylaws and IRP Interim Supplementary Procedures ("Interim Procedures").[11]

9. Under the Bylaws in effect prior to October 2016, an IRP had to be commenced within 30 days of the posting of the minutes of the Board meeting that the claimant contends demonstrates that ICANN violated its Bylaws or Articles.[12] Since October 2016, an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute provided; however, an IRP may not be filed more than twelve months from the date of such action or inaction.[13]

II. ICANN'S NEW gTLD PROGRAM.

10. Under the New gTLD Program, any interested party could apply to operate new gTLDs that were not already in use in the DNS; there was no cap on the number of new gTLD applicants. Approximately 1,200 new gTLDs have been delegated under the Program.[14]

11. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. Numerous

revisions to the Guidebook were made based on public comments, and multiple versions were drafted. ICANN adopted the operative, 338-page Guidebook in June 2012.[15]

12. New gTLD applicants must disclose in their applications the names and positions of their "directors," "officers and partners" and "shareholders holding at least 15% of shares."[16] Applicants must inform ICANN if "information previously submitted by an applicant becomes untrue or inaccurate," including "applicant specific information such as changes in financial position and changes in ownership or control of the applicant."[17]

13. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the applications are placed in a "contention set."[18] The Guidebook then encourages (but does not require) the applicants to agree among themselves on a private resolution of the contention set.[19] If the applicants cannot resolve the contention set privately, string contentions may be resolved through an ICANN auction of last resort; or, if one of the applications is community-based and prevails in Community Priority Evaluation ("CPE"), then that application would prevail over the rest of the contention set.[20]

14. New gTLD applicants may designate their applications as either standard or community-based, *i.e.*, "operated for the benefit of a clearly delineated community."[21] Applicants that designate their applications as community-based are expected to, among other things, "demonstrate an ongoing relationship with a clearly delineated community" and "have applied for a gTLD strongly and specifically related to the community named in the application."[22] An applicant with a community-based application may elect to proceed with CPE. If the applicant proceeds with CPE, its application is forwarded to an independent, third-party provider ("CPE Provider"), for review.[23]

15. A panel from the CPE Provider ("CPE Panel") evaluates the application against four criteria: Community Establishment; Nexus between Proposed String and Community;

Registration Policies; and Community Endorsement.[24] If the CPE Panel awards the application at least 14 out of 16 possible points, the application will prevail in CPE.[25]

16. If the application prevails in CPE, the applicant's application is given priority over all other applications for the same gTLD that did not seek and prevail in CPE.[26]

17. ICANN's contract with the CPE provider requires ICANN to maintain the CPE Provider's proprietary, secret, or confidential information or data relating to the CPE Provider's operations, products or services, and personal information, in confidence and "use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own" confidential information.[27]

III. THE .HOTEL CONTENTION SET.

18. ICANN received seven applications for .HOTEL — six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD ("HTLD's Application").[28] The seven applications for .HOTEL were placed into a contention set pursuant to the procedures set forth in the Guidebook.[29]

A. HTLD's Application

19. Since its submission in 2012, HTLD's Application has listed Afilias PLC or Afilias Ltd. (collectively, "Afilias") as one of two shareholders with at least 15% of HTLD's shares. The second major shareholder was HOTEL Top-Level-Domain GmbH ("HTLD GMBH").[30] On 17 June 2016, HTLD updated its application and replaced Johannes Lenz-Hawliczek and Katrin Ohlmer as "officers and partners" of and contacts for HTLD, with Philipp Grabensee, Managing Director of HTLD; Grabensee's email address ends in "@afilias.info."[31]

20. On 11 June 2014, HTLD's Application prevailed in CPE.[32] Pursuant to the Guidebook, HTLD's Application prevailed over the six other applications for .HOTEL.

B. The Despegar IRP

21. Following the CPE of HTLD's Application, certain of the .HOTEL applicants ("Despegar Claimants") challenged the HTLD CPE result, and ICANN's refusal to produce to them documents relating to the HTLD CPE, through the Reconsideration process (Requests 14-34[33] and 14-39[34]) and an IRP proceeding ("Despegar IRP").[35] While the Despegar IRP was pending, Despegar Claimants asserted in the IRP that the HTLD Application also should be rejected because an individual who was once associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal ("Portal Configuration") to access confidential data associated with certain Despegar Claimants' .HOTEL applications.[36]

22. In February 2016, the Despegar IRP Panel ruled in favor of ICANN.[37] The IRP Panel declined to consider the Despegar Claimants' Portal Configuration argument because it was raised long after the IRP process had commenced and the ICANN Board was still investigating the Portal Configuration.[38]

23. The Board accepted the Despegar IRP Panel's findings and directed ICANN to: (1) continue processing HTLD's Application; and (2) finish investigating the issues alleged by the Despegar Claimants regarding the Portal Configuration ("Despegar Resolutions").[39]

C. The Portal Configuration

24. In late February 2015, ICANN discovered that the privacy settings for the new gTLD applicant portal had been misconfigured, which enabled authorized users of that portal to see certain information of other users without permission.[40] Pursuant to the Board's directive, as described in detail in the BAMC's Recommendation on Request 16-11, ICANN conducted a thorough forensic investigation of the Portal Configuration and the Despegar Claimants' related allegations ("Portal Configuration Investigation").[41] The Portal Configuration Investigation confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records,

were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, and his associates, Oliver Süme and Katrin Ohlmer.[42]

25. As part of the Portal Configuration Investigation, ICANN informed the parties whose data was viewed, including certain Claimants.[43] ICANN also contacted Krischenowski and his associates for an explanation. Krischenowski acknowledged accessing the confidential information of other users but denied acting improperly or unlawfully. He claimed that he used the search tool in good faith and did not realize his ability to access other applicants' information involved a misconfiguration of the portal. Krischenowski and his associates certified to ICANN that they would delete or destroy all information obtained, and they affirmed that they had not used and would not use the information obtained, or convey it to any third party.[44]

26. Krischenowski was not an authorized contact, shareholder, director, or officer directly linked to HTLD's Application between March and October 2014; however, his company was a 50% shareholder and managing director of HTLD GMBH at the time, and HTLD GMBH was a 48.8% shareholder of HTLD. During the Portal Configuration Investigation, Grabensee informed ICANN that Krischenowski was "not an employee" of HTLD, although he had acted as a consultant for HTLD's Application when it was submitted in 2012. Grabenesee further verified that HTLD "only learned about [Krischenowski's access to confidential data] on 30 April 2015 in the context of ICANN's investigation." Grabensee stated that the consultancy services between HTLD and Krischenowski were terminated as of 31 December 2015.[45]

27. ICANN did not uncover any evidence that the information Krischenowski obtained through the Portal Configuration: (i) was used to support HTLD's Application; or (ii) enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Krischenowski's first instance of unauthorized access to any confidential information was in

early March 2014; his searches relating to other .HOTEL applicants occurred on 27 March, 29 March, and 11 April 2014.[46]

28. At HTLD's request, Krischenowski stepped down as a managing director of HTLD GMBH effective 18 March 2016 and transferred his company's 50% shares in HTLD GMBH to a company wholly owned by Ohlmer.[47] Further, HTLD announced on 23 March 2016 that HTLD GMBH would transfer its shares in HTLD to Afilias, "the majority shareholder of [HTLD]."[48] This severed HTLD's corporate relationship with HTLD GMBH.[49]

29. In March 2016, counsel for the Despegar Claimants asked ICANN to cancel HTLD's Application because Krischenowski accessed the Despegar Claimants' confidential information without authorization.[50] On 9 August 2016, after the Portal Configuration Investigation concluded, the Board determined that, even assuming that Krischenowski obtained confidential information belonging to .HOTEL applicants, it would not have had any impact on the CPE of HTLD's Application.[51] Whether HTLD's Application met the CPE criteria was based on the application materials submitted in May 2012, or when HTLD uploaded the last documents amending its application on 30 August 2013[52] – all of which occurred before Krischenowski or his associates accessed any confidential information. HTLD did not amend its application during CPE or submit any documents during CPE that the CPE Panel could have considered.[53] The Board also concluded that there was no evidence that the CPE Panel interacted with Krischenowski or HTLD during CPE.[54] The Board declined to cancel, and directed ICANN to continue processing, HTLD's Application ("Portal Resolutions").[55]

D. The CPE Process Review

30. Claimants submitted Request 16-11 (described in detail below) in August 2016, regarding the Portal Resolutions and Despegar Resolutions. While Request 16-11 was pending, and in response to concerns raised by Claimants and others about how ICANN interacted with

the CPE Provider, the Board directed ICANN to review the CPE process to determine whether those concerns had merit ("Scope 1" of the "CPE Process Review").[56] The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.[57] FTI Consulting, Inc.'s ("FTI") Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review.[58]

31. ICANN asked the CPE Provider to consent to disclose to FTI a variety of documentary information requested by FTI, but the CPE Provider did not agree to provide everything requested, and threatened litigation if ICANN did so, which the CPE Provider claimed would be a breach of ICANN's contractual confidentiality obligations.[59] FTI did "receive and review[] documents from ICANN" that were responsive to certain of FTI's requests for documents.[60] FTI also interviewed "relevant" ICANN and the CPE Provider personnel.[61]

32. On 13 December 2017, ICANN published three reports on the CPE Process Review ("CPE Process Review Reports").[62] Relevant here, FTI concluded that "there is no evidence that ICANN . . . had any undue influence on the CPE Provider . . . or engaged in any impropriety in the CPE process,"[63] and that ICANN "had no role in the evaluation process and no role in writing the initial draft CPE report," and reported that the "CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN['s] . . . comments."[64]

33. On 15 March 2018, the Board acknowledged and accepted the findings in the CPE Process Review Reports, declared that the CPE Process Review was complete, and directed the BAMC to consider the remaining Reconsideration Requests that were placed on hold pending completion of the CPE Process Review ("CPE Review Resolutions").[65]

E. Reconsideration Request 16-11

34. On 25 August 2016, Claimants[66] submitted Request 16-11, seeking

reconsideration of the Portal Resolutions and criticizing the Despegar Resolutions.[67] On 27 January 2019, consistent with the BAMC's recommendation, the Board denied Request 16-11.[68] The Board concluded that Claimants had not identified any false or misleading information that the Board relied upon, or material information that the Board failed to consider, in adopting the Portal Resolutions.[69] In particular, the Board concluded that there was no evidence that the Board did not consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration, and no evidence that the Board discriminated against Claimants.[70] After citing the evidence set forth in the Portal Resolutions (see above), the Board agreed with the BAMC that ICANN had: (1) verified Krischenowski's affirmations "that he and his associates did not and would not share the confidential information that they accessed" with HTLD; and (2) "confirmed with HTLD that it did not receive any confidential information" from Krischenowski or his associates.[71] The Board concluded that Krischenowski's unauthorized access did not affect HTLD's Application, including its CPE result.[72]

35. The Board also concluded that: (1) if Claimants were challenging the Despegar Resolutions, those challenges were time-barred because they were submitted "over five months after the Board's acceptance of the Despegar IRP Panel's Declaration, and well past the 15-day time limit to seek reconsideration of Board action"[73]; and (2) Claimants' assertions that other IRP Panel Declarations stated that the Despegar IRP Declaration revealed a misunderstanding of the relationship between ICANN and the CPE Provider, did not support reconsideration because each IRP involved "distinct considerations specific to the circumstances" in the IRP.[74]

F. Reconsideration Request 18-6

36. On 14 April 2018, several .HOTEL applicants submitted Request 18-6 challenging the CPE Review Resolutions.[75] The Board denied Request 18-6, concluding that the Board considered all material information and the CPE Review Resolutions are consistent with

ICANN's Mission, Commitments, Core Values, and policies.[76]

STANDARD OF REVIEW

37. An IRP Panel is asked to evaluate whether an ICANN action or inaction is consistent with ICANN's Articles, Bylaws, and internal policies and procedures.[77] But with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.[78] Rather, the core task of an IRP Panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.[79]

ARGUMENT

38. Claimants' arguments suffer from a systemic problem: they do not actually identify what was wrong with the BAMC's Recommendations or the Board's actions on Requests 16-11 and 18-6. Instead, Claimants literally ignore the key question here: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? The answer is no, which is why Claimants instead attempt to re-litigate time-barred disputes and cast unfounded aspersions on ICANN.

IV. THE BOARD'S ACTION ON REQUEST 16-11 COMPLIED WITH ICANN'S ARTICLES, BYLAWS & ESTABLISHED POLICIES & PROCEDURES.

39. Claimants argue that ICANN violated its Articles, Bylaws, or policies in denying Request 16-11, but they make so few references to that Request (or ICANN's response) that the exact nature of the alleged violation is unclear. Whatever the allegations, there is no doubt that ICANN's denial of Request 16-11 was consistent with its Articles, Bylaws and policies.

A. Claimants' Request For Ombudsman Review Is Baseless.

40. Claimants seek Ombudsman review of the BAMC's "decision[]" on Request 16-11 "as required by the Bylaws."[80] But neither the current Bylaws nor the Bylaws that governed Request 16-11 require the Ombudsman to review BAMC recommendations on Reconsideration

Requests.[81] Further, the Ombudsman "do[es] not investigate complaints that are simultaneously being addressed by one of the other formal accountability mechanisms."[82] This includes pending Reconsideration Requests and IRPs such as this one.[83]

41. Accordingly, the fact that the Ombudsman did not review either the BAMC's Recommendation on Request 16-11 or the Board's action on that Request is entirely consistent with the Bylaws. Claimants' suggestion that ICANN should be required to appoint "an ombudsman" (ICANN already has an Ombudsman) to "review the BAMC's decision" in Request 16-11 (when in fact the BAMC made a recommendation, and it is the Board that took the final action on Request 16-11) has no basis in ICANN's Articles, Bylaws, and policies.

B. Claimants' Challenge to the Despegar Resolutions Lacks Merit.

42. According to the Bylaws in place on 12 February 2016, an IRP had to be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action.[84] According to the Interim Procedures under ICANN's Bylaws adopted in October 2016, an IRP must be filed within 120 days after the claimant becomes aware "of the material effect of the action or inaction" giving rise to the dispute but no later than 12 months from the date of such action or inaction.[85] Under either measure, Claimants' challenge to the Board's action accepting the Despegar IRP Declaration was untimely when Claimants submitted Request 16-11. Moreover, this challenge lacks merit.

(1) Claimants' Challenge to the Despegar Resolutions Was Untimely.

43. The Board concluded that Claimants' challenges to the Despegar Resolutions in Request 16-11 were untimely because Claimants submitted Request 16-11 on 25 August 2016, more than five months after the Board adopted the Despegar Resolutions and well past the 15-day time limit for seeking reconsideration of the Despegar Resolutions.[86] Incredibly, Claimants' IRP Request does not even address the Board's determination that their request was not timely.

Accordingly, this request for review of the Despegar Resolutions should be denied.

44. If Claimants are instead challenging the Board's 10 March 2016 Despegar Resolutions directly (rather than challenging the Board's denial of *reconsideration* of the Despegar Resolutions), this challenge also is time-barred. Claimants' claims regarding the Board's Despegar Resolutions accrued on 10 March 2016, when ICANN posted the minutes reflecting the Board's adoption of the Despegar Resolutions.[87] Claimants needed to file an IRP by 9 April 2016 under the Bylaws in place on 10 March 2016, or by 7 August 2016 under the Interim Procedures (if they had been applicable at the time). Claimants instead initiated the Cooperative Engagement Process on 2 October 2018 and filed their IRP on 19 December 2019, missing the above deadlines by more than two years.[88] Therefore, Claimants' direct challenges to the Despegar Resolutions should be denied.

(2) The Despegar Resolutions Are Consistent with ICANN's Articles, Bylaws and Established Policies and Procedures.

45. Claimants' challenge to the Board's conclusion that the Despegar Resolutions are consistent with ICANN's Articles, Bylaws, and policies and procedures also lacks merit. As a preliminary matter, although Claimants presumably are challenging the Board's denial of reconsideration of the Despegar Resolutions (if they were not, their arguments would be time-barred, as explained above), Claimants have not identified a single statement or conclusion concerning this issue in the Board's action (or the BAMC's Recommendation) on Request 16-11 that Claimants assert was incorrect, focusing entirely on the underlying Despegar Resolutions. For this reason alone, review of this claim should be denied.

46. Even if we were to assume that the claim is timely (which it is not), this claim fails. Claimants assert that in the Despegar IRP, "ICANN 'informed' Claimants and the IRP Panel that . . . 'ICANN does not have any communications (nor does it maintain any

communications) with the evaluators that identify the scoring of any individual CPE'"; but, according to Claimants, the 2 August 2016 IRP Panel declaration in *Dot Registry, LLC v. ICANN* (the "Dot Registry IRP Declaration") "has clearly shown this turned out to be false."[89] Claimants blatantly misrepresent the Dot Registry IRP Declaration and supporting documents.

47. The Despegar IRP Panel concluded that ICANN's statement that it had no communications with evaluators identifying CPE scores was "a clear and comprehensive statement that such documentation does not exist."[90] At the same time, the Despegar IRP Panel recognized "'that ICANN [could have] communications with persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.'"[91]

48. The Dot Registry IRP Declaration did not conclude that ICANN staff communicated with the CPE evaluators. The Dot Registry IRP Declaration states in relevant part that "ICANN staff was intimately involved" in performing CPEs, supplying "continuing and important input on the CPE reports."[92] But Dot Registry's Exhibit C-050 demonstrates that ICANN's communications were not with the evaluators.[93] There, ICANN's Russ Weinstein asked his contact at the CPE Provider to "help us understand the pairings of [the] evaluators on each app[lication]."[94] ICANN did not even know who the evaluators were, much less communicate with them. This is consistent with ICANN's statement, cited in the Despegar IRP Declaration, that it may have communicated with "persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.'"[95]

49. Claimants argue that the documents they sought in the Despegar IRP were the same documents ultimately produced in the Dot Registry IRP, and complain that ICANN should have produced those documents to the Despegar Claimants.[96] But when Claimants made this argument in Request 16-11, the BAMC identified the key difference between the Dot Registry and Despegar IRPs: the Dot Registry IRP Panel ordered ICANN to produce the requested

documents; the Despegar IRP Panel did not[97] (and it does not appear that Claimants ever asked the Despegar IRP Panel to issue such an order).[98] Claimants have not disputed or otherwise addressed this distinction.

C. ICANN Did Not Discriminate Against Claimants By Reviewing Other CPE Results But Not Reviewing The .HOTEL CPE Result.

50. Next, citing the Dot Registry IRP Declaration, Claimants seek review of "whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL."[99] Claimants suggest this was a violation of ICANN's Commitment to "[m]ake decisions by applying documented policies consistently . . . without singling out any particular party for discriminatory treatment."[100]

51. It is not clear what Claimants mean by "reviewed other CPE results." If they seek review of Request 14-34 (seeking reconsideration of the HTLD CPE result), it is plainly time-barred. If they instead challenge the Board's denial of Request 16-11, they fail on the merits.

52. Claimants argue that the outcome of the Dot Registry IRP "proved" that the Despegar Claimants "were discriminated against in CPE."[101] Claimants argue that the Board's decision to "fully address[] the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants" by "refund[ing] Dot Registry's IRP costs" and ordering the BGC to reconsider the Dot Registry Reconsideration Requests without doing the same for the Despegar Claimants discriminated against Claimants.[102]

53. As an initial matter, ICANN notes that, contrary to Claimants' suggestion, the Dot Registry IRP Declaration did not conclude that ICANN's relationship with the CPE Provider was, in itself, inconsistent with ICANN's Bylaws, policies, or procedures. The Dot Registry IRP Declaration merely found that the BGC did not adequately investigate Dot Registry's allegations that the relationship was inconsistent with the Bylaws, policies and/or procedures with respect to the way the .LLC, .LLP, and .INC CPE applications were handled.

54. Moreover, Claimants are not similarly situated to the Dot Registry claimants; ICANN evaluated the different circumstances of both cases and acted differently—and appropriately—according to those circumstances. Those different circumstances include:

- The Dot Registry IRP Panel found in favor of Dot Registry; not so for the Despegar Claimants. And for the reasons given above, the Dot Registry IRP Declaration does not undermine the Despegar IRP Declaration.
- Dot Registry sought independent review of ICANN's denial of its application for Community Priority status; Despegar Claimants sought review of a decision to grant Community Priority status to a third party, HTLD.
- The Dot Registry IRP Panel ordered ICANN to reimburse Dot Registry's IRP fees[103] consistent with the Bylaws, provision that the "party not prevailing" (ICANN, in the Dot Registry IRP) is "ordinarily" responsible for bearing the IRP Provider's costs.[104] The Despegar Claimants were the "part[ies] not prevailing" in the Despegar IRP.[105]

55. Indeed, ICANN treated the Despegar Claimants the same as Dot Registry by accepting the IRP Panels' Declarations in both IRPs.

56. Because Claimants are not similarly situated to the Dot Registry Claimants, ICANN's actions during and in response to the Dot Registry IRP by no means "prove" that ICANN discriminated against Claimants.

57. Likewise, and again contrary to Claimants' assertions, the IRP Panel declaration in *Corn Lake, LLC v. ICANN* ("Corn Lake IRP Declaration") does not support Claimants' arguments here. The Corn Lake IRP Declaration "stresse[d] that this is a unique situation and peculiar to its own unique and unprecedented facts."[106] And the facts here are not even slightly analogous to those in the Corn Lake IRP: Corn Lake challenged ICANN's process for evaluating gTLD application objection proceeding results, not a CPE determination. The Corn Lake IRP

Declaration noted that Corn Lake was the only applicant in its particular circumstances, that no other party would be prejudiced by requiring ICANN to include Corn Lake in its review of objection proceeding results, and that the unique timing of relevant key events justified unique findings.[107] Nothing about the Corn Lake IRP Declaration supports Claimants' arguments here.

D. ICANN Handled the Portal Configuration Investigation and Consequences In A Manner Fully Consistent With the Articles, Bylaws, and Established Policies and Procedures.

58. Claimants ask the Panel to review "ICANN's 'Portal Configuration' investigation and refusal to penalize HTLD's willful accessing of Claimant's [sic] confidential, trade secret info."[108] Claimants assert that ICANN "violate[d]" its "duty of transparency" by failing to disclose "all documents concerning ICANN's investigation of HTLD's breach" during either the Portal Configuration or the Board's action on Request 16-11.[109] Claimants' arguments are plainly time-barred to the extent they challenge the Portal Resolutions directly; their challenges to the Board's action on Request 16-11 are invalid for two reasons:

(1) Claimants' Request for Review of ICANN's Refusal to Reconsider its Investigation of the Portal Configuration is Meritless.

59. Claimants assert that the Despegar IRP Panel "starkly questioned" the BAMC's rationale for recommending denial of Request 16-11.[110] But the BAMC's Recommendation on Request 16-11 post-dated the Despegar IRP declaration by more than two years, so the Despegar IRP Panel could not possibly have questioned the BAMC's conclusions.[111] The language that Claimants quote from the Despegar IRP Declaration referred to ICANN's argument in the IRP that Claimants had not identified Board action or inaction (necessary to initiate an IRP);[112] the quoted language does not, as Claimants allege, refer to the BAMC's recommendation regarding Request 16-11 or the BAMC's conclusion that there was no evidence that HTLD ultimately received the information that Krischenowski accessed via the Portal Configuration.

(2) Claimants' Request for Review of ICANN's Refusal to Reconsider Allowing HTLD's Application to Proceed is Meritless.

60. Claimants assert that "HTLD's theft of competitor Claimants' private trade secret data was . . . deserving not only of thorough investigation as ICANN purported to do, but also of some consequence to HTLD once the scope, frequency, and significance of its misconduct was revealed."[113] This argument conflates actions by officers of HTLD's minority shareholder with actions by HTLD itself. Claimants argue that Krischenowski's and Ohlmer's actions should be imputed to HTLD.[114] The sole case that Claimants cite for this proposition does not support their argument. That case, *Yost*, holds only that even if a corporate officer or director "acted as an agent of the corporation and not on his own behalf," he may nonetheless be personally liable for torts he authorizes, directs, or participates in.[115] *Yost* says nothing about when a corporate officer's acts may be attributed to the corporation, much less when the acts of a corporate officer of a minority shareholder of a corporation may be attributed to the corporation.

61. Claimants then assert—with literally no evidentiary support—that ICANN "would have said anything—or hid anything—to save [itself] from further embarrassment."[116] But the Portal Configuration Investigation shows the opposite: ICANN investigated the issue with efficiency, operating with transparency by providing regular updates to the public.[117]

V. THE BOARD'S ACTION ON REQUEST 18-6 COMPLIED WITH ICANN'S ARTICLES, BYLAWS AND ESTABLISHED POLICIES AND PROCEDURES.

62. Claimants appear to argue that ICANN should have reconsidered the CPE Review Resolutions because FTI was unable to review the CPE Provider's internal correspondence.[118] Yet, Claimants do not challenge any of the Board's (or BAMC's) well-reasoned conclusions in response to Request 18-6. Claimants also assert that ICANN should be required to disclose confidential correspondence with the CPE Provider so that Claimants and the IRP Panel can assess the Board's decision to accept the CPE Process Review Reports.[119] These claims fail.

A. Claimants' Request For Ombudsman Review Is Untimely and Baseless.

63. ICANN incorporates all of its arguments in Section IV.A above concerning the Ombudsman. The Bylaws in effect when the BAMC and Board acted on Request 18-6, which are the same Bylaws in effect today in all relevant aspects, did not require the Ombudsman to review the BAMC's recommendation or the Board's Action, and the Ombudsman does not investigate complaints subject to other pending accountability mechanisms.

64. On 30 January 2020, Claimants an emergency panelist to replace the Ombudsman and review the Ombudsman's recusal from Request 18-6 pursuant to Bylaws Article 4, § 4.2(l)(iii).[120] ICANN will address this argument more fully in response to the Request for Interim Relief, but in short, this challenge is untimely because it was brought more than 120 days after the Ombudsman recused himself from Request 18-6, which he did on 23 May 2018.[121] For reasons that will be set forth in ICANN's response to the Request for Interim Relief, the request for a new Ombudsman is also baseless.

B. Claimants' Reliance on the Dot Registry IRP Declaration to Challenge the CPE Process is Meritless.

65. Claimants rely on two statements from the Dot Registry IRP Declaration to argue that ICANN should disclose its confidential communications with the CPE Provider. Neither supports Claimants' position.

66. First, Claimants cite the Dot Registry IRP Panel's comments that "ICANN staff was intimately involved in the process" and "supplied continuing and important input on the CPE reports."[122] These statements are *dicta*. Dot Registry did not challenge ICANN's involvement with the CPE Provider; it challenged the manner in which the BGC evaluated Dot Registry's Reconsideration Requests.

67. Contrary to the *dicta* in the Dot Registry IRP Declaration, the CPE Provider affirmed that it "never changed the scoring or results [of a CPE] based on ICANN['s] . . .

comments," and FTI concluded that: (1) ICANN "never questioned or sought to alter the CPE Provider's conclusions"; and (2) ICANN "never dictated that the CPE provider take a specific approach" to a CPE.[123] Claimants ignore these findings.

68. Second, Claimants point to the Dot Registry IRP Panel's conclusion that ICANN should have "compared what the ICANN staff and [the CPE Provider] did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the [CPE Provider] treated the requestor in a fair and non-discriminatory manner."[124] This is precisely what was evaluated via the CPE Process Review.

69. In this IRP, Claimants fault ICANN for not disclosing "documented conversations with [the CPE Provider]" in the Despegar IRP or in response to their prior document request. The Board addressed this argument when it considered Request 16-11:

> Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter. In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce [the referenced documents].[125]

Claimants do not address—and therefore do not properly challenge—the Board's reasoning.

70. Further, ICANN has always been contractually barred from disclosing these documents, and need not breach its contract, risking litigation, simply because Claimants asked for the documents in a document request and complained about the response in the Despegar IRP. As the IRP Panel in *Amazon E.U. S.a.r.l. v. ICANN* has explained, "[b]oth ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information . . . may contain information that is appropriately protected against disclosure."[126]

ICANN's Documentary Information Disclosure Policy protects from disclosure, among other things,

> Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or a nondisclosure provision within an agreement.[127]

ICANN did not produce in response to the Claimants' document request and Despegar IRP complaints given the nondisclosure condition; further, complying with the terms ICANN's contract with the CPE Provider supports ICANN's Core Value of operating with efficiency and excellence.[128]

71. No Article, Bylaws provision, policy, or procedure requires ICANN to breach its contractual duties. Claimants' request for independent review of the Board's action regarding the relationship with the CPE Provider should be denied.

C. Claimants' Challenges to the Board's Action and BAMC's Recommendation Concerning the CPE Provider's Documents Regurgitate Arguments from Request 16-11 Without Addressing the Board's Responses.

72. Claimants challenged ICANN's relationship with the CPE Provider in Request 16-11. The BAMC concluded that the CPE Process Review Scope 1 Report showed that ICANN did not have any undue influence on the CPE Provider.[129]

73. Claimants then challenged the Board's acceptance of the CPE Process Review Reports in Request 18-6. The BAMC and Board concluded that the Board's action was consistent with the Bylaws, and that the "Board considered all material information when it adopted the [CPE Review] Resolutions."[130]

74. Here Claimants argue the Board "ought to want to know what [the CPE Provider] has been hiding," and "should have forced [the CPE Provider] and ICANN's lawyers to

disclose" documents before accepting FTI's reports.[131] But no Article, Bylaws provision, or established policy required ICANN to reject the CPE Process Review Reports simply because the CPE Provider refused to disclose certain documents to the reviewer.[132] The Board was entitled to accept FTI's conclusion that it had sufficient information for its review. That Claimants disagree with the Board's decision does not render that action inconsistent with the Articles or Bylaws.

D. Claimants' Requests for FTI and CPE Provider Documents are Premature.

75. Claimants assert that they and the IRP Panel "must be able to see . . . all relevant excerpts from the interviews that FTI conducted" and "FTI's agreement with ICANN" in order to review the Board's acceptance of the FTI CPE Process Review Reports.[133] Likewise, Claimants assert that documents reflecting ICANN's correspondence with the CPE Provider "can fairly be disclosed in this proceeding subject to the protections of a protective order" like the one entered in the Dot Registry IRP.[134]

76. ICANN will respond to Claimants' document requests and any Procedural Orders concerning the production of documents at the appropriate time during these proceedings, but as a preliminary matter, ICANN notes that, with respect to Claimants' request for excerpts from FTI's interviews, the IRP's role is not to conduct its own CPE Process Review. Its role is to determine whether the Board should have reviewed interview excerpts—if any even exist[135]—in the course of deciding whether to accept the CPE Process Review Reports. The Board was not required to do so. There is, therefore, no reason for the IRP Panel or Claimants to do so.

E. The Board's Acceptance of the CPE Process Review Reports was Consistent with the Articles, Bylaws and Established Policies and Procedures.

77. Claimants argue that the Board should have "forced [the CPE Provider] and ICANN's lawyers to disclose" additional documents before accepting FTI's CPE Process Review Reports.[136] Claimants offer nothing but their personal opinions that the Board should

have done more.

78. The BAMC and the Board addressed Claimants' arguments in the BAMC Recommendation on Request 18-6 and the Board action on Request 18-6, but Claimants do not even cite the Recommendation, despite claiming to challenge it here. Claimants have not shown that review of the Board's denial of Request 18-6 is warranted.

VI. CHALLENGES TO ICANN'S INACTION CONCERNING HTLD'S OWNERSHIP ARE UNTIMELY AND WITHOUT MERIT.

79. Claimants suggest that ICANN somehow violated its Articles, Bylaws, or established policies because Afilias' acquisition of HTLD GMBH's shares in HTLD "did not get Board review or approval, and there was no comment or outreach" concerning the transaction.[137] Claimants contend that ICANN should instead have cancelled HTLD's Application or withdrawn HTLD's Community Priority status because "HTLD is no longer the same company that applied for the .HOTEL TLD."[138] These claims are time-barred as Claimants waited for well over three years before bringing them; and they are meritless; no Article, Bylaws provision, or policy required the Board to approve the transaction or to submit it for public comment.

80. These claims accrued no later than 25 August 2016, when Claimants acknowledged in Request 16-11 (but did not challenge) that Afilias was acquiring all shares of HTLD. Claimants did not assert that the Board should have taken any action as a result of Afilias' acquisition of the remaining shares of HTLD until submitting their IRP Request in December 2019, more than three years later.

81. Afilias' ownership interest in HTLD has been public since HTLD submitted its Application, which disclosed that Afilias and HTLD GMBH (and no other entities) each owned 15% or more of HTLD.[139] In March 2016, Grabensee disclosed that "Afilias will in the near future be the sole shareholder of Applicant."[140] Then, on 9 August 2016, after concluding the Portal Configuration Investigation, which considered Grabensee's March 2016 notice that Afilias

would become HTLD's sole shareholder, the ICANN Board published minutes concluding that it would not cancel HTLD's application for .HOTEL.[141]

82. Claimants even acknowledged the transfer of ownership to Afilias in Request 16-11, submitted on 25 August 2016,[142] making an IRP on such claims due no later than 24 September 2016. Claimants missed this deadline by over three years.

83. Even if Claimants' arguments concerning HTLD's ownership were timely (which they are not), they fail on the merits. Claimants ask when "ICANN approve[d] assignment of the HTLD application to Afilias, and on what terms," and whether there was a public comment period concerning the "assignment" of the application.[143] Claimants also complain that HTLD, not Afilias, prevailed in CPE, but Afilias is unfairly reaping the benefits of HTLD's success.[144]

84. These questions are based on three false assumptions: first, they are based on the incorrect assumption that Afilias did not originally have an interest in HTLD's Application, and therefore it was necessary to "assign" or transfer the application from some other applicant to Afilias. But this is not the case. Afilias has been a major shareholder in HTLD since HTLD submitted its Application.

85. Second, they are based on the incorrect assumption that HTLD's shareholders were evaluated in CPE. HTLD's shareholders (Afilias, and originally HTLD GMBH) have never been the applicants for .HOTEL; HTLD is the applicant. None of the CPE criteria considers the applicant's ownership.[145]

86. Third, HTLD's application for .HOTEL, not HTLD itself, is the subject of the CPE.[146] If and when HTLD completes the contracting phase and the .HOTEL gTLD is delegated into the root zone, HTLD will still be bound by all of the requirements of a community gTLD. This—not the corporate structure—is the key element of community priority: HTLD, as a registry operator to the Hotel community, will be required to:

- Establish registration policies that conform to the requirements promised in its CPE;
- Establish procedures for enforcing registration policies for the gTLD and resolution of disputes over compliance with gTLD registration policies, and enforce the policies;
- "allow[] the TLD community to discuss and participate in the development and modification of policies and practices for the TLD";
- "implement and be bound by the Registry Restrictions Dispute Resolution Procedure" and "implement and comply with the community registration policies set forth [in] Specification 12,"[147] which will require HTLD to implement and comply with all community policies it set out in its application for community priority.[148]

87. Afilias' acquisition of the remaining shares of HTLD has no effect on HTLD's obligations to comply with the above provisions.

88. There is another problem with Claimants' argument: while assignments and transfers of Registry Agreements must be approved by ICANN,[149] no policy or procedure requires ICANN to reject CPE results based on changes to the corporate structure of new gTLD applicants. For this reason, Claimants do not cite any ICANN Bylaws or established policies or procedures in this section of the IRP Request. Instead, Claimants speculate about ICANN's "embarrass[ment]" over the Portal Configuration and ascribe a (fabricated) motive to ICANN to "be rid of Mr. Krischenowski" by authorizing Afilias to acquire more shares of HTLD.[150] This argument merely attempts to distort the fact that no ICANN Articles, Bylaws provision, policies or procedures dictated ICANN's response to Afilias' acquisition of all shares of HTLD.

CONCLUSION

89. ICANN complied with its Articles, Bylaws, policies and procedures relating to HTLD's Application. Moreover, many of Claimants' claims are time-barred. Accordingly, Claimants' IRP Request should be denied.

Respectfully submitted,

JONES DAY

Dated: February 3, 2020

By: _____ ISAM

Jeffrey A. LeVee

Counsel for Respondent ICANN

[1] Ex. R-1 (ICANN Bylaws (as amended 28 Nov. 2019) ("Bylaws")) Art. 1, § 1.1.

[2] *Id.*, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2.

[3] *Id*., Art. 4, § 4.2.

[4] *Id*. Today, that committee is the Board Accountability Mechanisms Committee ("BAMC"). Previously, it was the Board Governance Committee ("BGC").

[5] *Id*., Art. 5.

[6] *Id*., Art. 5, § 5.2.

[7] *Id.*, Art. 4, § 4.2(l).

[8] *Id.*

[9] Ex. R-3 (Email from H. Waye, ICANN Ombudsman, to M. Rodenbaugh, 30 January 2020); *see also* Ex. R-2 (ICANN Bylaws (as amended 11 Feb. 2016)) Art. V, § 2, Ex. R-2 (Ombudsman's charter is limited to matters for which neither the Reconsideration policy nor the IRP have been invoked); Ex. R-1 (Bylaws) Art. 5, § 5.2 (Ombudsman's charter is limited to matters for which IRP has not been invoked; Ombudsman's role in IRP is limited to the role "expressly provided for in Section 4.2" of the Bylaws).

[10] Ex. R-1 (Bylaws) Art. 4, § 4.3.

[11] Ex. R-4 (IRP Interim Supplementary Procedures (25 Oct. 2018) ("Interim Procedures")).

[12] Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

[13] Ex. R-4 (Interim Procedures) Rule 4. The deadlines in the Interim Procedures are subject to change because, as the procedures recognize, "[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants." *Id.* Rule 4, n.3.

[14] Ex. R-5 (Program Statistics, ICANN New gTLDs).

[15] Ex. R-6 (Guidebook) Preamble.

[16] *Id.*, Attachment to Module 2, at Pgs. A-6 – A-7.

[17] *Id.*, § 1.2.7.

[18] *Id*., § 4.1.1.

[19] *Id.*, § 4.1.3.

[20] *Id*., § 4.3. The proceeds of a public auction are provided to ICANN but are earmarked for purposes consistent with ICANN's Mission, Core Values and non-profit status. *Id*., § 4.3, n.1.

[21] *Id.*, § 1.2.3.1.

[22] *Id.*

[23] *See* Ex. R-7 (Community Priority Evaluation). ICANN selected the Economist Intelligence Unit to handle CPEs following a pubic request for applications from firms interested in

performing the various third party evaluations of new gTLD applications. *See* Ex. R-8 ("Preparing Evaluators for the New gTLD Application Process").

[24] Ex. R-9 (CPE Panel Process Document).

[25] Ex. R-6 (Guidebook) § 4.2.2.

[26] Ex. R-10 (ICANN Provides Update on Review of the CPE Process).

[27] Ex. R-32 (New gTLD Program Consulting Agreement between ICANN and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011).

[28] *See* Ex. R-11 (HTLD application details).

[29] See Ex. R-12 (Contention Set Diagram, HOTEL).

[30] Ex. R-13 (HTLD Application, 17 June 2016, question 11(c)); *see also* Ex. R-14 (HTLD Application Update history).

[31] *See* Ex. R-14 (HTLD Application Update history) 24 December 2014 update to application questions 6, 11; *compare* Ex. R-13 (HTLD Application, 17 June 2016, questions 6 and 11(b)) *with* Ex. R-44 (HTLD Application, 24 December 2014, questions 6 and 11(b)).

[32] See Claimants' Ex. D (HTLD CPE Report).

[33] Ex. R-15 (Request 14-34).

[34] Ex. R-16 (Request 14-39).

[35] *See* Claimants' Ex. G (Final Declaration, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, 12 Feb. 2016 ("Despegar IRP Declaration")). Claimant Minds + Machines Group, Ltd. attempted to join the other claimants in the Despegar IRP, but the IRP Panel concluded that Minds + Machines Group was time-barred from doing so. *Id.* at ¶¶ 139-142.

[36] *Id.* ¶ 49.

[37] *Id.* ¶ 151.

[38] *Id.* ¶¶ 134-38.

[39] Ex. R-17 (ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11).

[40] Ex. R-18 (Portal Configuration Notice); Ex. R-19 (New gTLD Applicant and GDD Portals Q&A).

[41] *See* Claimants' Ex. O (BAMC Recommendation on Request 16-11, at Pgs. 3-4).

[42] See Ex. R-20 (Announcement: New gTLD Applicant and GDD Portals Update); Ex. R-21 (Response to Documentary Information Disclosure Policy ("DIDP") Request No. 20150605-1); Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

[43] See Ex. R-22 (Letter from ICANN to Despegar, 23 February 2016).

[44] Claimants' Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

[45] Claimants' Ex. ZZ (Letter from Philipp Grabensee to ICANN, 23 March 2016). In Request 16-11, Requestors asserted that Ohlmer has also been associated with HTLD. *See* Claimants' Ex. J (Request 16-11) § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Claimants' Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 –

2016.08.09.15). The BAMC concluded that Ohlmer's prior association with HTLD, which the Requestors acknowledged ended no later than 17 June 2016 (Claimants' Ex. J (Request 16-11) § 8, at Pg. 15) did not support reconsideration because there was no evidence that any of the confidential information that Ohlmer (or Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE.

[46] Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

[47] *Id.* Lenz-Hawliczek and Ohlmer replaced Krischenowski as Managing Directors of HTLD GMBH. *Id.*

[48] Claimants' Ex. ZZ (23 March 2016 Letter).

[49] *Id.*

[50] *See* Ex. R-40 (Letter from Flip Petillion to ICANN, 8 March 2016); *see also* Ex. R-41 (Letter from Flip Petillion to ICANN, 1 March 2016).

[51] Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

[52] *Id.*

[53] Ex. R-22 (Letter from ICANN to Despegar, 23 February 2016).

[54] *Id*.

[55] *Id*.

[56] Ex. R-23 (ICANN Board Resolution 2016.09.17.01). The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report ("Scope 2"); and (ii) compilation of the research relied on by the CPE Provider to the extent such research exists for the evaluations which were the subject of certain then-pending Reconsideration Requests relating to the CPE process ("Scope 3"). Ex. R-24 (Minutes, BGC Meeting). Scopes 2 and 3 are not relevant to this IRP Request.

[57] Ex. R-25 (Update on the Review of the New gTLD Community Priority Evaluation Process, 26 April 2017). The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn, *see* https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

[58] *Id*.

[59] Claimants' Ex. T (ICANN's Response to DIDP Request No. 20180110-1); *see also* ¶ 17, *supra*.

[60] Ex. R-26 (CPE Process Review Scope 1 Report ("Scope 1 Report")) at Pg. 6.

[61] *Id.* at Pgs. 6-7.

[62] *See* Ex. R-27 (ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process).

[63] Ex. R-26 (Scope 1 Report) at Pg. 2.

[64] *Id.* at Pgs. 9, 15.

[65] Ex. R-28 (Board Resolutions 2018.03.15.08-2018.03.15.11).

[66] Two other .HOTEL applicants joined with Claimants to submit Request 16-11. *See* Claimants' Ex. J (Request 16-11) at Pgs. 1-3.

[67] Claimants' Ex. J (Request 16-11).

[68] Ex. R-29 (Board Action on Request 16-11).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Claimants' Ex. N (Request 18-6, § 2, at Pg. 3). Neither Claimant Domain Ventures Partners PCC Limited nor its subsidiary dot Hotel Limited (nor Famous Four Media Limited, which has also been associated with dot Hotel Limited's application for .HOTEL) were Requestors in Request 18-6. *Id.*

[76] Ex. R-30 (Board Action on Request 18-6).

[77] Ex. R-1 (Bylaws) Art. 4, § 4.3.

[78] *Id.*, § 4.3(h)(i)(iii); *see also* Ex. R-31 (Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 ("Booking.com Final Declaration") 3 March 2015) ¶ 115.

[79] Ex. R-1 (Bylaws) Art. 4, § 4.3(b).

[80] IRP Request at Pg. 12.

[81] *See* Ex. R-1 (Bylaws, Art. 4, § 4.2(l)) (Ombudsman shall review and consider Reconsideration Requests *before* the BAMC makes a recommendation on the Reconsideration Requests); *id.* Art. 5 (describing Ombudsman's role); *see also* Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. V § 2 (Ombudsman is "a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV *have not been invoked*." (emphasis added)).

[82] Ex. R-3 (Email from H. Waye (ICANN Ombudsman) to M. Rodenbaugh, 30 January 2020).

[83] Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. V, § 2 (Ombudsman's charter is limited to matters for which neither the Reconsideration policy nor the IRP have been invoked); Ex. R-1 (Bylaws) Art. 5, § 5.2 (Ombudsman's charter is limited to matters for which IRP has not been invoked; Ombudsman's role in IRP is limited to the role "expressly provided for in Section 4.2" of the Bylaws).

[84] Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

[85] Ex. R-4 (Interim Procedures) Rule 4.

[86] *See* Ex. R-29 (Board Action on Request 16-11, Jan. 27, 2019); Ex. R-2 (Bylaws, (as amended 11 Feb. 2016)) Art. IV, § 2.5.

[87] Ex. R-17 (Board Resolutions 2016.03.10.10-2016.03.10.11).

[88] The provisions for tolling the time to file an IRP while Claimants participated in CEP (Ex. R-33) do not save Claimants here, because they did not enter CEP until 2 October 2018, more than two years after ICANN posted the minutes reflecting the Board's adoption of the Despegar Resolutions. Ex. R-34.

[89] IRP Request, at Pg. 19.

[90] Claimants' Ex. G (Despegar IRP Declaration) at ¶ 96, quoting ICANN's Response to DIDP No. 20140804-01.

[91] *Id.* at ¶ 97.

[92] Claimants' Ex. M (Final Declaration, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 29 Jul. 2016 ("Dot Registry IRP Declaration")) ¶¶ 93, 101.

[93] Ex. R-35 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 13 July 2015 (Ex. C-050)).

[94] *Id.*

[95] Claimants' Ex. G (Despegar IRP Declaration) at ¶ 96.

[96] IRP Request at Pg. 20.

[97] Claimants' Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31.

[98] *See* Ex. R-36 (Despegar IRP documents) (reflecting only one Procedural Order, which did not order production of any documents).

[99] IRP Request, at Pg. 21.

[100] Ex. R-1 (ICANN Bylaws, Art. 1, § 1.2(a)(v)).

[101] IRP Request, at Pg. 22.

[102] IRP Request at Pgs. 23-24.

[103] Claimants' Ex. M (Dot Registry IRP Declaration) at ¶ 154.

[104] ICANN Bylaws (as amended 11 Feb. 2016) Art. 4, § 3.18, Ex. R-2.

[105] Claimants' Ex. G (Despegar IRP Declaration) at ¶ 158. In light of the "serious issues" that the Despegar Claimants raised, the Panel decided not to require the Despegar Claimants to reimburse ICANN's IRP costs. *Id.*

[106] Claimants' Ex. U (Final Declaration, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-002-9938, 17 Oct. 2016) at ¶ 8.98.

[107] *Id.*

[108] IRP Request at Pg. 24.

[109] *Id.* at Pg. 24-25.

[110] *Id.* at Pg. 8.

[111] *See id.*

[112] *See id.* at Pg. 8 n.14.

[113] *Id.* at Pg. 25.

[114] *Id.* at Pg. 25, citing Ex. R-LA-1 (Comm. for *Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996)).

[115] Ex. R-LA-1 (*Yost*, 92 F.3d at 823).

[116] IRP Request at Pg. 26.

[117] Claimants' Ex. O (BAMC Recommendation on RR 16-11) at Pgs. 8-12.

[118] IRP Request, at Pg. 14.

[119] *Id.* at 16-21.

[120] Claimants' Request for Interim Measures, 30 January 2020.

[121] Ex. R-37 (Ombudsman Action on Request 18-6). IRP Request. The provisions for extending the time to file an IRP while Claimants participated in ICANN's Cooperative Engagement Process (CEP) (Ex. R-33), do not save Claimants here, because they did not enter CEP until 2 October 2016, more than 120 days after the Ombudsman recused himself (Ex. R-34).

[122] Claimants' Ex. M (Dot Registry IRP Declaration) ¶ 93; *see also id.* ¶ 101; Ex. R-35 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004 (Exs. C-42 - C-50, C-53)).

[123] Ex. R-26 (Scope 1 Report) at Pgs. 14-15.

[124] Claimants' Ex. M (Dot Registry IRP Declaration) ¶ 125.

[125] Claimants' Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31; adopted in Ex. R-29 (Board Action on Request 16-11).

[126] Ex. R-38 (*Amazon EU S.a.r.l. v. ICANN*, ICDR Case No. 01-16-0007056, Procedural Order No. 3 (7 June 2017)) at Pg. 3.

[127] Ex. R-39 (DIDP).

[128] Ex. R-1 (Bylaws) Art. 1, § 1.2(b)(v); *see also* Claimants' Ex. T (ICANN Response to DIDP No. 20180110-1) at Pgs. 8-9.

[129] Claimants' Ex. O (BAMC Recommendation on Request 16-11) at Pg. 29-30.

[130] Ex. R-30 (Board Action on Request 18-6).

[131] IRP Request at Pg. 15.

[132] Claimants' Ex. P (BAMC Recommendation on Request 18-6) at Pg. 16. Claimants offer no support for their argument that the Board "ought to" want additional information before accepting the CPE Process Review Reports. *See* IRP Request at Pg. 15. This argument should be disregarded.

[133] IRP Request at Pg. 16

[134] *Id.* at Pg. 13.

[135] ICANN "does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to" FTI's interviews. Claimants' Ex. T (ICANN's Response to DIDP No. 20180110-1, 9 Feb. 2019).

[136] IRP Request at Pg. 15.

[137] *Id.* at Pg. 28.

[138] *Id.* at Pg. 28.

[139] Ex. R-13 (HTLD new gTLD application) response to question 11.c.

[140] Claimants' Ex. ZZ (23 March 2016 Letter) at Pg. 2.

[141] Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14-2016.08.09.15).

[142] Claimants' Ex. J (Request 16-11, § 8) at Pg. 18 ("It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afilias. . . . One interest-holder cannot disclaim responsibility for another interest-holders actions by buying him out.").

[143] IRP Request, at Pg. 27.

[144] *Id.* at Pgs. 26-27.

[145] Ex. R-6 (Guidebook Module 4, § 4.2.3, at Pg. 4-17). CPE Criterion 4, Community Endorsement, considers whether the applicant—here, HTLD—is the recognized community institution (or has support from or authority to represent the community). *Id.* It does not require the CPE Provider or ICANN to consider the applicant's corporate ownership.

[146] *See* Ex. R-6 (Guidebook) § 4.3.

[147] Ex. R-42 (Base generic TLD Registry Agreement updated on 31 July 2017 ("Base Registry Agreement")) Art. 2, § 2.19.

[148] *Id.*, Spec. 12.

[149] *See* Ex. R-43 (Registry Transition Processes).

[150] See IRP Request, at Pg. 27.

Exhibit R-39

BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

Note: this page is an archive of an old version of the bylaws. The current ICANN (Internet Corporation for Assigned Names and Numbers) bylaws are always available at: https://www.icann.org/resources/pages/governance/bylaws-en (/resources/pages/governance/bylaws-en)

As amended 11 April 2013

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ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN (Internet Corporation for Assigned Names and Numbers)") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN (Internet Corporation for Assigned Names and Numbers):

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

   a. Domain names (forming a system referred to as "DNS (Domain Name System)");

   b. Internet protocol ("IP (Internet Protocol or Intellectual Property)") addresses and autonomous system ("AS (Autonomous System (“AS”) Numbers)") numbers; and

   c. Protocol (Protocol) port and parameter numbers.

2. Coordinates the operation and evolution of the DNS (Domain Name System) root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN (Internet Corporation for Assigned Names and Numbers)'s activities to those matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission requiring or significantly benefiting from global coordination.

3 To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

5 Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6 Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7 Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

> 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness
>
> 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision making process, obtaining informed input from those entities most affected.
>
> 10 Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness
>
> 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its

business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of Article III, Section 6, the Board may act only by a majority vote of all members of the Board In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "all of the members of the Board."

Section 2. RESTRICTIONS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not act as a Domain Name (Domain Name) System Registry or Registrar or Internet Protocol (Protocol) Address Registry in competition with entities affected by the policies of ICANN (Internet Corporation for Assigned Names and Numbers). Nothing in this Section is intended to prevent ICANN (Internet Corporation for Assigned Names and Numbers) from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 3. NON DISCRIMINATORY TREATMENT

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Section 2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations (Supporting Organizations), and Advisory Committees (Advisory Committees); (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN (Internet Corporation for Assigned Names and Numbers)'s budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (ix) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community

Section 3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN (Internet Corporation for Assigned Names and Numbers), including the Website and various other means of communicating with and receiving input from the general community of Internet users

Section 4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the

extent known, an agenda for the meeting shall be posted.

Section 5. MINUTES AND PRELIMINARY REPORTS

1 All minutes of meetings of the Board and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary for posting on the Website

2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Articles VIII X of these Bylaws) and Advisory Committees (Advisory Committees) (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted

3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5 2 above

For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.

4 No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 6. NOTICE AND COMMENT ON POLICY ACTIONS

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:

a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

> b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
>
> c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee (Advisory Committee) and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these

Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN (Internet Corporation for Assigned Names and Numbers) actions and periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws

Section 2. RECONSIDERATION

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action of ICANN (Internet Corporation for Assigned Names and Numbers) may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

    a. one or more staff actions or inactions that contradict established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies); or

    b. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

    c. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

that are taken as a result of the Board's reliance on false or inaccurate material information

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests The Board Governance Committee shall have the authority to:

    a evaluate requests for review or reconsideration;

    b. summarily dismiss insufficient requests;

    c. evaluate requests for urgent consideration;

    d. conduct whatever factual investigation is deemed appropriate;

    e. request additional written submissions from the affected party, or from other parties;

    f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

    g. make a recommendation to the Board of Directors on the merits of the request, as necessary

4. ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:

a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or

b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or

c for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

6 To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website. at http //www icann org/en/groups/board/governance/reconsideration (/en/groups/board/governance/reconsideration). Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

8 The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting

harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request

9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.

10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.

1 The Board Governance Committee may ask the ICANN (Internet Corporation for Assigned Names and Numbers) staff for its views on the matter, which comments shall be made publicly available on the Website.

12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation

13. The Board Governance Committee may also request information relevant to the request from third parties. To the

extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor

14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN (Internet Corporation for Assigned Names and Numbers) staff, and by any third party.

15 For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action The Board Governance Committee's determination on staff action or inaction shall be posted on the Website The Board Governance Committee's determination is final and establishes precedential value

16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website.

17 The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken.

The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website. The Board's decision on the recommendation is final.

18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN (Internet Corporation for Assigned Names and Numbers)'s headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws

20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following

information for the preceding calendar year:

a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;

b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;

c. an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and

d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article (/en/about/governance/bylaws#IV-2), ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN (Internet Corporation for Assigned Names and Numbers) violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws The IRP Panel must apply a defined standard of review to the IRP request, focusing on

    a. did the Board act without conflict of interest in taking its decision?;

    b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

    c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

5. Requests for independent review shall not exceed 25 pages (double spaced, 12 point font) of argument ICANN (Internet Corporation for Assigned Names and Numbers)'s response shall not exceed that same length Parties may submit documentary evidence supporting their positions without limitation In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN (Internet Corporation for Assigned Names and Numbers) structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

7 All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (Internet Corporation for Assigned Names and Numbers) ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider

subject to approval by ICANN (Internet Corporation for Assigned Names and Numbers)

8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3 (/en/about/governance/bylaws#IV-3).

9 Either party may request that the IRP be considered by a one or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented

10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.

1 The IRP Panel shall have the authority to

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties;

c declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

e consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance

13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN (Internet Corporation for Assigned Names and Numbers) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP The cooperative engagement process is published on ICANN (Internet Corporation for Assigned Names and Numbers) org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN (Internet Corporation for Assigned Names and Numbers) is

the prevailing party in the request for independent review, the IRP Panel must award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN (Internet Corporation for Assigned Names and Numbers) in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses

19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website when they become available.

20 The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

Section 4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full time position, with salary and benefits appropriate to the function, as determined by the Board.

2 The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

3 The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

4 The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) budget process The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board

Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned

Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results

Section 3. OPERATIONS

The Office of Ombudsman shall

1 facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;

2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and

constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

4 heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and

6. comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies

Section 4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

1. No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints

2. ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations

made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office

3. Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

4 The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

5 The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website

ARTICLE VI: BOARD OF DIRECTORS

Section 1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting members ("Directors").

In addition, five non-voting liaisons ("Liaisons") shall be designated for the purposes set forth in Section 9 of this Article. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Section 2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIRMAN AND VICE-CHAIRMAN

1. The Directors shall consist of:

a. Eight voting members selected by the Nominating Committee established by Article VII of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seats 1 through 8.

b. Two voting members selected by the Address Supporting Organization (Supporting Organization) according to the provisions of Article VIII of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 9 and Seat 10.

c Two voting members selected by the Country-Code Names Supporting Organization (Supporting Organization) according to the provisions of Article IX of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 1 and Seat 12.

d. Two voting members selected by the Generic Names Supporting Organization (Supporting Organization) according to the provisions of Article X of these Bylaws. These seats on the Board of Directors are referred to in these Bylaws as Seat 3 and Seat 14.

e. One voting member selected by the At-Large Community according to the provisions of Article XI of these Bylaws. This

> seat on the Board of Directors is referred to in these Bylaws as Seat 15.
>
> f. The President ex officio, who shall be a voting member.

2. In carrying out its responsibilities to fill Seats 1 through 8, the Nominating Committee shall seek to ensure that the ICANN (Internet Corporation for Assigned Names and Numbers) Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 3 of this Article. At no time when it makes its selection shall the Nominating Committee select a Director to fill any vacancy or expired term whose selection would cause the total number of Directors (not including the President) from countries in any one Geographic Region (as defined in Section 5 of this Article) to exceed five; and the Nominating Committee shall ensure when it makes its selections that the Board includes at least one Director who is from a country in each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region ("Diversity Calculation").

For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("Domicile"), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws a person can only have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.

3. In carrying out their responsibilities to fill Seats 9 through 15, the Supporting Organizations (Supporting Organizations) and the At-

> Large Community shall seek to ensure that the ICANN (Internet Corporation for Assigned Names and Numbers) Board is composed of members that in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 3 of this Article. At any given time, no two Directors selected by a Supporting Organization (Supporting Organization) shall be citizens from the same country or of countries located in the same Geographic Region.
>
> For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("Domicile"), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Supporting Organization (Supporting Organization) or the At-Large Community to use for selection purposes. For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, a person can only have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.
>
> 4. The Board shall annually elect a Chairman and a Vice-Chairman from among the Directors, not including the President.

Section 3. CRITERIA FOR SELECTION OF DIRECTORS

ICANN (Internet Corporation for Assigned Names and Numbers) Directors shall be:

> 1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;

2. Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);

3. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section;

4. Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet;

5. Persons who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and

6. Persons who are able to work and communicate in written and spoken English.

Section 4. ADDITIONAL QUALIFICATIONS

1. Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

2. No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization) Council shall simultaneously serve as a Director or liaison to the Board. If such a person accepts a nomination to be considered for selection by the Supporting Organization (Supporting Organization) Council or the At-Large Community to be a Director, the person shall not, following such nomination, participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the selection of Directors by the Council or Community, until the Council or committee(s) designated by the At-Large Community has selected the full complement of Directors it is responsible for selecting. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council accepts a nomination to be considered for selection as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's selection process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) accepts a nomination to be considered for selection by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the Community's selection process.

3. Persons serving in any capacity on the Nominating Committee shall be ineligible for selection to positions on the Board as provided by Article VII, Section 8.

Section 5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the selection of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any Memorandum of Understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region

shall have at least one Director, and at all times no region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "Geographic Region": Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; and North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section shall be reviewed by the Board from time to time (but at least every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers). Each Director shall be responsible for disclosing to ICANN (Internet Corporation for Assigned Names and Numbers) any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the California Nonprofit Public Benefit Corporation Law ("CNPBCL"). In addition, each Director shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CNPBCL. The Board shall adopt policies specifically addressing Director, Officer, and Supporting Organization (Supporting Organization) conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.

Section 8. TERMS OF DIRECTORS

1. The regular term of office of Director Seats 1 through 15 shall begin as follows:

a. The regular terms of Seats 1 through 3 shall begin at the conclusion of ICANN (Internet Corporation for Assigned ames and Numbers)'s annual meeting in 2003 and each CANN (Internet Corporation for Assigned Names and umbers) annual meeting every third year after 2003;

b. The regular terms of Seats 4 through 6 shall begin at the conclusion of ICANN (Internet Corporation for Assigned ames and Numbers)'s annual meeting in 2004 and each CANN (Internet Corporation for Assigned Names and umbers) annual meeting every third year after 2004;

c The regular terms of Seats 7 and 8 shall begin at the conclusion of ICANN (Internet Corporation for Assigned ames and Numbers)'s annual meeting in 2005 and each CANN (Internet Corporation for Assigned Names and umbers) annual meeting every third year after 2005;

d. The terms of Seats 9 and 12 shall continue until the conclusion of ICANN (Internet Corporation for Assigned ames and Numbers)'s CANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2015. The next terms of Seats 9 and 12 shall begin at the conclusion of CANN (Internet Corporation for Assigned Names and umbers)'s annual meeting in 2015 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;

e. The terms of Seats 10 and 13 shall continue until the conclusion of ICANN (Internet Corporation for Assigned ames and Numbers)'s annual meeting in 2013. The next terms of Seats 10 and 13 shall begin at the conclusion of

CANN (Internet Corporation for Assigned Names and umbers)'s annual meeting in 2013 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and

f. The terms of Seats 11, 14 and 15 shall continue until the conclusion of ICANN (Internet Corporation for Assigned ames and Numbers)'s annual meeting in 2014. The next terms of Seats 11, 14 and 15 shall begin at the conclusion of CANN (Internet Corporation for Assigned Names and umbers)'s annual meeting in 2014 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

2. Each Director holding any of Seats 1 through 15, including a Director selected to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been selected and qualified or until that Director resigns or is removed in accordance with these Bylaws.

3. At least two months before the commencement of each annual meeting, the Nominating Committee shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of its selection of Directors for seats with terms beginning at the conclusion of the annual meeting.

4. At least six months before the date specified for the commencement of the term as specified in paragraphs 1.d-f above, any Supporting Organization (Supporting Organization) or the At-Large community entitled to select a Director for a Seat with a term beginning that year shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of its selection.

5. Subject to the provisions of the Transition Article of these Bylaws, no Director may serve more than three consecutive terms. For these purposes, a person selected to fill a vacancy in a term shall not be

deemed to have served that term. (Note: In the period prior to the beginning of the first regular term of Seat 15 in 2010, Seat 15 was deemed vacant for the purposes of calculation of terms of service.)

6. The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 9. NON-VOTING LIAISONS

1. The non-voting liaisons shall include:

a. One appointed by the Governmental Advisory Committee (Advisory Committee);

b. One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Article XI of these Bylaws;

c. One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Article XI of these Bylaws;

d. One appointed by the Technical Liaison Group established by Article XI-A of these Bylaws;

e. One appointed by the Internet Engineering Task Force.

2. Subject to the provisions of the Transition Article of these Bylaws, the non-voting liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a non-voting liaison shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of its appointment.

3. Non-voting liaisons shall serve as volunteers, without compensation other than the reimbursement of certain expenses.

4. Each non-voting liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the liaison resigns or is removed in accordance with these Bylaws.

5. The non-voting liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and privileges of Directors. Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

Section 10. RESIGNATION OF A DIRECTOR OR NON-VOTING LIAISON

Subject to Section 5226 of the CNPBCL, any Director or non-voting liaison may resign at any time, either by oral tender of resignation at any meeting of the Board (followed by prompt written notice to the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers)) or by giving written notice thereof to the President or the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers). Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective. The successor shall be selected pursuant to Section 12 of this Article.

Section 11. REMOVAL OF A DIRECTOR OR NON-VOTING LIAISON

1. Any Director may be removed, following notice to that Director, by a three-fourths (3/4) majority vote of all Directors; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a voting member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a

separate vote on the sole question of the removal of that particular Director. If the Director was selected by a Supporting Organization (Supporting Organization), notice must be provided to that Supporting Organization (Supporting Organization) at the same time notice is provided to the Director. If the Director was selected by the At-Large Community, notice must be provided to the At-Large Advisory Committee (Advisory Committee) at the same time notice is provided to the Director.

2. With the exception of the non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee), any non-voting liaison may be removed, following notice to that liaison and to the organization by which that liaison was selected, by a three-fourths (3/4) majority vote of all Directors if the selecting organization fails to promptly remove that liaison following such notice. The Board may request the Governmental Advisory Committee (Advisory Committee) to consider the replacement of the non-voting liaison appointed by that Committee if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 12. VACANCIES

1. A vacancy or vacancies in the Board of Directors shall be deemed to exist in the case of the death, resignation, or removal of any Director; if the authorized number of Directors is increased; or if a Director has been declared of unsound mind by a final order of court or convicted of a felony or incarcerated for more than 90 days as a result of a criminal conviction or has been found by final order or judgment of any court to have breached a duty under Sections 5230 et seq. of the CNPBCL. Any vacancy occurring on the Board of Directors shall be filled by the Nominating Committee, unless (a) that Director was selected by a Supporting Organization (Supporting Organization), in which case that vacancy shall be filled by that Supporting Organization (Supporting Organization), or (b) that Director was the President, in which case the vacancy shall be filled in accordance with the provisions of Article XIII of these Bylaws. The

> selecting body shall give written notice to the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) of their appointments to fill vacancies. A Director selected to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been selected and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.
>
> 2. The organizations selecting the non-voting liaisons identified in Section 9 of this Article are responsible for determining the existence of, and filling, any vacancies in those positions. They shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of their appointments to fill vacancies.

Section 13. ANNUAL MEETINGS

Annual meetings of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. Each annual meeting for ICANN (Internet Corporation for Assigned Names and Numbers) shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers), or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15. SPECIAL MEETINGS

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the members of the Board or by the Chairman of the Board or the President. A call for a special meeting shall be made by the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers). In the absence of designation, special meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and non-voting liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and non-voting liaison at the Director's or non-voting liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section to the contrary, notice of a meeting need not be given to any Director who signed a waiver of notice or a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the

meeting from time to time to another place, time, or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 18. ACTION BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

Members of the Board or any Committee of the Board may participate in a meeting of the Board or Committee of the Board through use of (i) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (ii) electronic video screen communication or other communication equipment; provided that (a) all Directors participating in such a meeting can speak to and hear one another, (b) all Directors are provided the means of fully participating in all matters before the Board or Committee of the Board, and (c) ICANN (Internet Corporation for Assigned Names and Numbers) adopts and implements means of verifying that (x) a person participating in such a meeting is a Director or other person entitled to participate in the meeting and (y) all actions of, or votes by, the Board or Committee of the Board are taken or cast only by the members of the Board or Committee and not persons who are not members. Participation in a meeting pursuant to this Section constitutes presence in person at such meeting. ICANN (Internet Corporation for Assigned Names and Numbers) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit members of the Board to participate by telephone.

Section 19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Section 20. ELECTRONIC MAIL

If permitted under applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. ICANN (Internet Corporation for Assigned Names and Numbers) shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

Section 21. RIGHTS OF INSPECTION

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 22. COMPENSATION

1. Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a voting member of the Board, each of the Directors shall be entitled to receive compensation for his/her services as a Director. The President shall receive only his/her compensation for service as President and shall not receive additional compensation for service as a Director.

2. If the Board determines to offer a compensation arrangement to one or more Directors other than the President of ICANN (Internet Corporation for Assigned Names and Numbers) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow a process that is calculated to pay an amount for service as a Director that is in its entirety Reasonable Compensation for such service under the standards set forth in §53.4958-4(b) of the Treasury Regulations.

3. As part of the process, the Board shall retain an Independent Valuation Expert to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a

Reasoned Written Opinion from such expert regarding the ranges of Reasonable Compensation for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.

4. After having reviewed the expert's written opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.

5. The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.

6. In addition to authorizing payment of compensation for services as Directors as set forth in this Section 22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by non-voting liaisons performing their duties as Directors or non-voting liaisons.

7. As used in this Section 22, the following terms shall have the following meanings:

a) An "Independent Valuation Expert" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (i) holds itself out to the public as a compensation consultant; (ii) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet Corporation for Assigned Names and Numbers); (iii) is

qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (iv) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned ritten Opinion regarding a particular compensation arrangement; and (v) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (i) through (iv) of this definition.

b) A "Reasoned Written Opinion" means a written opinion of a aluation expert who meets the requirements of subparagraph 7(a) (i) through (iv) of this Section. To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the aluation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, and the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding the whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently determined to be incorrect so long as the opinion addresses tself to the facts and the applicable standards. However, a ritten opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

c) "Reasonable Compensation" shall have the meaning set forth in §53.4958-4(b)(1)(ii) of the Regulations issued under §4958 of the Code.

Section 23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) immediately after the adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

ARTICLE VII: NOMINATING COMMITTEE

Section 1. DESCRIPTION

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers), responsible for the selection of all ICANN (Internet Corporation for Assigned Names and Numbers) Directors except the President and those Directors selected by ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), and for such other selections as are set forth in these Bylaws.

Section 2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

> 1. A non-voting Chair, appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Board;
>
> 2. A non-voting Chair-Elect, appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Board as a non-voting advisor;
>
> 3. A non-voting liaison appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Root Server System Advisory

Committee (Advisory Committee) established by Article XI of these Bylaws;

4. A non-voting liaison appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Article XI of these Bylaws;

5. A non-voting liaison appointed by the Governmental Advisory Committee (Advisory Committee);

6. Subject to the provisions of the Transition Article of these Bylaws, five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by Article XI of these Bylaws;

7. Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization), established by Article X of these Bylaws, as follows:

a. One delegate from the Registries Stakeholder Group;

b. One delegate from the Registrars Stakeholder Group;

c. Two delegates from the Business Constituency, one representing small business users and one representing large business users;

d. One delegate from the Internet Service Providers Constituency;

e. One delegate from the Intellectual Property Constituency; and

f. One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.

8. One voting delegate each selected by the following entities:

a. The Council of the Country Code Names Supporting Organization (Supporting Organization) established by Article X of these Bylaws;

b. The Council of the Address Supporting Organization Supporting Organization) established by Article VIII of these Bylaws;

c The Internet Engineering Task Force; and

d. The ICANN (Internet Corporation for Assigned Names and umbers) Technical Liaison Group established by Article XI-A of these Bylaws;

9. A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 3. TERMS

Subject to the provisions of the Transition Article of these Bylaws:

1. Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.

2. The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the

immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.

3. Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.

4. It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.

5. Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to paragraph 4 of this Article, or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 2(9) of this Article.

6. The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

> 1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and with experience and competence with collegial large group decision-making;
>
> 2. Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);
>
> 3. Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;
>
> 4. Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;
>
> 5. Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
>
> 6. Persons who are able to work and communicate in written and spoken English.

Section 5. DIVERSITY

In carrying out its responsibilities to select members of the ICANN (Internet Corporation for Assigned Names and Numbers) Board (and selections to any other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing

membership of the ICANN (Internet Corporation for Assigned Names and Numbers) Board (and such other bodies), and seek to ensure that the persons selected to fill vacancies on the ICANN (Internet Corporation for Assigned Names and Numbers) Board (and each such other body) shall, to the extent feasible and consistent with the other criteria required to be applied by Section 4 of this Article, make selections guided by Core Value 4 in Article I, Section 2 .

Section 6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

Section 7. PROCEDURES

The Nominating Committee shall adopt such operating procedures as it deems necessary, which shall be published on the Website.

Section 8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for selection by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 2 of this Article.

ARTICLE VIII: ADDRESS SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

1. The Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

2. The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICA N (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization (NRO (Number Resource Organization)), an organization of the existing regional Internet registries (RIRs).

Section 2. ADDRESS COUNCIL

1. The ASO (Address Supporting Organization) shall have an Address Council, consisting of the members of the NRO (Number Resource Organization) Number Council.

2. The Address Council shall select Directors to those seats on the Board designated to be filled by the ASO (Address Supporting Organization).

ARTICLE IX: COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)), which shall be responsible for:

> 1. developing and recommending to the Board global policies relating to country-code top-level domains;
>
> 2. Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs; and
>
> 3. Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers).

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those policies developed according to section 4.10 and 4.11 of this Article. However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

Section 2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (i) ccTLD (Country Code Top Level Domain) managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see Section 4(2) of this Article) and (ii) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

Section 3. ccNSO (Country Code Names Supporting Organization) COUNCIL

1. The ccNSO (Country Code Names Supporting Organization) Council shall consist of (a) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions in the manner described in Section 4(7) through (9) of this Article; (b) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (c) liaisons as described in paragraph 2 of this Section; and (iv) observers as described in paragraph 3 of this Section.

2. There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint such a liaison: (a) the Governmental Advisory Committee (Advisory Committee); (b) the At-Large Advisory Committee (Advisory Committee); and (c) each of the Regional Organizations described in Section 5 of this Article. These liaisons shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

3. The ccNSO (Country Code Names Supporting Organization) Council may agree with the Council of any other ICANN (Internet

Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) to exchange observers Such observers shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO (Country Code Names Supporting Organization) Council at any time by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

4 Subject to the provisions of the Transition Article of these Bylaws (a) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter; (b) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (c) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

5. A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

6. ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.

7. A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member. Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in Section 4(7) through (9) of this Article.

8. The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in Section 4(6) of this Article) and to manage the development of policy recommendations in accordance with Section 6 of this Article. The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the

members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time

9. The ccNSO (Country Code Names Supporting Organization) Council shall make selections to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office Notification of the ccNSO (Country Code Names Supporting Organization) Council's selections shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, consistent with Article VI, Sections 8(4) and 12(1).

10 The ccNSO (Country Code Names Supporting Organization) Council shall select from among its members the ccNSO (Country Code Names Supporting Organization) Council Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO (Country Code Names Supporting Organization) Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office The term of office of the ccNSO (Country Code Names Supporting Organization) Council Chair and any Vice Chair(s) shall be as specified by the ccNSO (Country Code Names Supporting Organization) Council at or before the time the selection is made The ccNSO (Country Code Names Supporting Organization) Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection

11. The ccNSO (Country Code Names Supporting Organization) Council, subject to direction by the ccNSO (Country Code Names Supporting Organization) members, shall adopt such rules and procedures for the ccNSO (Country Code Names Supporting Organization) as it deems necessary, provided they are consistent with these Bylaws Rules for ccNSO (Country Code Names Supporting Organization) membership and operating procedures

adopted by the ccNSO (Country Code Names Supporting Organization) Council shall be published on the Website.

12. Except as provided by paragraphs 9 and 10 of this Section, the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization) Council members are permitted to participate by at least one means described in paragraph 14 of this Section. Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO (Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

13. Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO (Country Code Names Supporting Organization) Council shall be provided to each ccNSO (Country Code Names Supporting Organization) Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO (Country Code Names Supporting Organization) Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

14. Members of the ccNSO (Country Code Names Supporting Organization) Council may participate in a meeting of the ccNSO (Country Code Names Supporting Organization) Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (a) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting can speak to and hear one another, (b) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO (Country Code Names Supporting Organization) Council, and (c) there is a reasonable means of verifying the identity of ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting and their votes. A majority of the ccNSO (Country Code Names Supporting Organization) Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote of the ccNSO (Country Code Names Supporting Organization) Council members present at any meeting at which there is a quorum shall be actions of the ccNSO (Country Code Names Supporting Organization) Council, unless otherwise provided in these Bylaws. The ccNSO (Country Code Names Supporting Organization) Council shall transmit minutes of its meetings to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 4. MEMBERSHIP

1. The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers. Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in paragraph 2 of this Section shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing an

ISO (International Organization for Standardization) 3166 country-code top level domain and referred to in the IANA (Internet Assigned Numbers Authority) database under the current heading of "Sponsoring Organization", or under any later variant, for that country-code top-level domain.

2 Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications Subject to the provisions of the Transition Article of these Bylaws, the application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (a) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (b) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 7(3) of this Article. A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (a) adhere to rules of the ccNSO (Country Code Names Supporting Organization) including membership rules, (b) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the

Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under Section 7(3) of this Article. In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

3 Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in Section 5 of this Article shall be a condition for access to or registration in the ANA (Internet Assigned Numbers Authority) database Any individual relationship a ccTLD (Country Code Top Level Domain) manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization)

4. The Geographic Regions of ccTLDs shall be as described in Article VI, Section 5 of these Bylaws or purposes of this Article, managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region, regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council

5. Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager. In the absence of such a designation, the ccTLD (Country Code Top Level Domain) manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database.

6 There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations)

7. The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members from each Geographic Region (see Section 3(1)(a) of this Article) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization) member selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and

election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.

8 Any ccNSO (Country Code Names Supporting Organization) member may nominate an individual to serve as a ccNSO (Country Code Names Supporting Organization) Council member representing the ccNSO (Country Code Names Supporting Organization) member's Geographic Region Nominations must be seconded by another ccNSO (Country Code Names Supporting Organization) member from the same Geographic Region By accepting their nomination, individuals nominated to the ccNSO (Country Code Names Supporting Organization) Council agree to support the policies committed to by ccNSO (Country Code Names Supporting Organization) members

9. If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated candidates shall be selected to serve on the ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by e mail) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO (Country Code Names Supporting Organization) members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO (Country Code Names Supporting Organization) members within the Geographic Region The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO

(Country Code Names Supporting Organization) Council members under this paragraph.

10. Subject to clause 4(11), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (a) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Article IX, Section 6 and Annex C; (b) have been developed through the ccPDP as described in Section 6 of this Article, and (c) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (d) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.

11. A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the ccNSO (Country Code Names Supporting Organization) Council stating that (a) implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in paragraph 10 of this Section), and (b) failure to implement the policy would not impair DNS (Domain Name System) operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO (Country Code Names Supporting Organization) Council will provide a response to the ccNSO (Country Code Names Supporting Organization) member's declaration. If there is a ccNSO (Country Code Names Supporting Organization) Council consensus disagreeing with the declaration, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council, the response shall state the ccNSO (Country Code Names Supporting Organization) Council's disagreement with the declaration and the reasons for disagreement. Otherwise, the response shall state the

ccNSO (Country Code Names Supporting Organization) Council's agreement with the declaration If the ccNSO (Country Code Names Supporting Organization) Council disagrees, the ccNSO (Country Code Names Supporting Organization) Council shall review the situation after a six-month period. At the end of that period, the ccNSO (Country Code Names Supporting Organization) Council shall make findings as to (a) whether the ccNSO (Country Code Names Supporting Organization) members' implementation of the policy would require the member to breach custom, religion, or public policy (not embodied in the applicable law described in paragraph 10 of this Section) and (b) whether failure to implement the policy would impair DNS (Domain Name System) operations or interoperability In making any findings disagreeing with the declaration, the ccNSO (Country Code Names Supporting Organization) Council shall proceed by consensus, which may be demonstrated by a vote of 14 or more members of the ccNSO (Country Code Names Supporting Organization) Council.

Section 5. REGIONAL ORGANIZATIONS

The ccNSO (Country Code Names Supporting Organization) Council may designate a Regional Organization for each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council and shall be subject to review according to procedures established by the Board

Section 6. ccNSO (Country Code Names Supporting Organization) POLICY DEVELOPMENT PROCESS AND SCOPE

1 The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names

Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board

2. In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Polic -Development Process (ccPDP). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 7. STAFF SUPPORT AND FUNDING

1. Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization) Staff Manager Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager

2. Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO

(Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).

3. The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in paragraphs 1 and 2 of this Section, as approved by the ccNSO (Country Code Names Supporting Organization) members.

4. Written notices given to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary under this Article shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The ICANN (Internet Corporation for Assigned Names and Numbers) Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

ARTICLE X: GENERIC NAMES SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

There shall be a policy-development body known as the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)), which shall be responsible for developing and recommending to the ICANN (Internet Corporation for

Assigned Names and Numbers) Board substantive policies relating to generic top level domains

Section 2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of

> (i) A number of Constituencies, where applicable, organized within the Stakeholder Groups as described in Section 5 of this Article;
>
> (ii) Four Stakeholder Groups organized within Houses as described in Section 5 of this Article;
>
> (iii) Two Houses within the GNSO (Generic Names Supporting Organization) Council as described in Section 3(8) of this Article; and
>
> (iv) a GNSO (Generic Names Supporting Organization) Council responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization), as described in Section 3 of this Article.

Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors

Section 3. GNSO (Generic Names Supporting Organization) COUNCIL

> 1. Subject to the provisions of Transition Article XX, Section 5 of these Bylaws and as described in Section 5 of Article X, the GNSO (Generic Names Supporting Organization) Council shall consist of:
>
> > a. three representatives selected from the Registries Stakeholder Group;

b. three representatives selected from the Registrars Stakeholder Group;

c. six representatives selected from the Commercial Stakeholder Group;

d. six representatives selected from the Non-Commercial Stakeholder Group; and

e. three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee Appointee voting representative shall be assigned to each House (as described in Section 3(8) of this Article) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO (Generic Names Supporting Organization) Council is as diverse as possible and practicable, including considerations of geography, GNSO (Generic Names Supporting Organization) Constituency, sector, ability and gender.

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice

to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council

2. Subject to the provisions of the Transition Article XX, and Section 5 of these Bylaws, the regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve

more than two consecutive terms, in such a special circumstance a Council member may serve one additional term For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member A "special circumstance" is defined in the GNSO (Generic Names Supporting Organization) Operating Procedures

3. A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection Procedures for handling Stakeholder Group appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or ii) stated by a three-fourths (3/4) vote of all members of each House in the case of the non voting Nominating Committee appointee (see Section 3(8) of this Article). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member

4 The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization) It shall adopt such procedures (the "GNSO (Generic Names Supporting Organization) Operating Procedures") as it sees fit to carry out that responsibility, provided that such procedures are approved by a majority vote of each House The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a

twenty-one (21) day public comment period, and shall be subject to Board oversight and review Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in Section 6 of this Article.

5 No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO (Generic Names Supporting Organization) Council at any given time.

6 The GNSO (Generic Names Supporting Organization) shall make selections to fill Seats 13 and 14 on the ICANN (Internet Corporation for Assigned Names and Numbers) Board by written ballot or by action at a meeting. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in Section 3(8) of this Article, shall make a selection to fill one of two ICANN (Internet Corporation for Assigned Names and Numbers) Board seats, as outlined below; any such selection must have affirmative votes compromising sixty percent (60%) of all the respective voting House members:

> a. the Contracted Party House shall select a representative to fi l Seat 13; and
>
> b. the Non-Contracted Party House shall select a representative to fill Seat 14

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat selections shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, consistent with Article VI, Sections 8(4) and 12(1).

7. The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year Each House (as described in Section 3.8 of this Article) shall select a Vice-Chair, who will be a Vice Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held

8. Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see Section 3(1) of this Article) shall be organized into a bicameral House structure as described below

a the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee for a total of seven voting members; and

b the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO (Generic Names Supporting Organization) Council.

9 Except as otherwise specified in these Bylaws, Annex A hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions

a Create an Issues Report requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House

b. Initiate a Policy Development Process ("PDP (Policy Development Process)") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two thirds (2/3) of one House

c Initiate a PDP (Policy Development Process) Not Within Scope requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority.

d Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Within Scope requires an affirmative vote of more than one third 1/3) of each House or more than two-thirds (2/3) of one ouse

e. Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority

f. Changes to an Approved PDP (Policy Development rocess) Team Charter For any PDP (Policy Development Process) Team Charter approved under d. or e. above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House

g. Terminate a PDP (Policy Development Process): Once nitiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for s gnificant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote n favor of termination.

h Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names Supporting Organization) Supermajority requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation

. Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,

Approve a PDP (Policy Development Process) Recommendation Imposing New Obligations on Certain Contracting Parties where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

k Modification of Approved PDP (Policy Development rocess) Recommendation Prior to Final Approval by the CANN (Internet Corporation for Assigned Names and Numbers) Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council ith a GNSO (Generic Names Supporting Organization) Supermajority vote

. A "GNSO (Generic Names Supporting Organization) Supermajority" shall mean (a) two thirds (2/3) of the Council members of each House, or (b) three-fourths (3/4) of one ouse and a majority of the other House "

Section 4. STAFF SUPPORT AND FUNDING

1. A member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff shall be assigned to support the GNSO (Generic Names Supporting Organization), whose work on substantive matters shall be assigned by the Chair of the GNSO (Generic Names Supporting Organization) Council, and shall be designated as the GNSO (Generic Names Supporting Organization) Staff Manager (Staff Manager).

2 ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the GNSO (Generic Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by GNSO (Generic Names Supporting Organization) participants for travel to any meeting of the GNSO (Generic Names Supporting Organization) or for any other purpose. ICANN (Internet Corporation for Assigned Names and Numbers) may, at its discretion, fund travel expenses for GNSO (Generic

Names Supporting Organization) participants under any travel support procedures or guidelines that it may adopt from time to time.

Section 5. STAKEHOLDER GROUPS

1. The following Stakeholder Groups are hereby recognized as representative of a specific group of one or more Constituencies or interest groups and subject to the provisions of the Transition Article XX, Section 5 of these Bylaws:

a. Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

b. Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);

c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and

d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with Section 3(1) of this Article.

3. Each Stakeholder Group identified in paragraph 1 of this Section and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to

ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board

4. Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non Contracted Parties House. Any such petition shall contain:

a. A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic ames Supporting Organization) to carry out its policy-development responsibilities;

b. A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;

c A recommendation for organizational placement within a particular Stakeholder Group; and

d A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment

5. The Board may create new Constituencies as described in Section 5(3) in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers) In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group

affected and shall consider any response to that notification prior to taking action

Section 6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in Annex A to these Bylaws. These procedures may be supplemented or revised in the manner stated in Section 3(4) of this Article

ARTICLE XI: ADVISORY COMMITTEES

Section 1. GENERAL

The Board may create one or more Advisory Committees (Advisory Committees) in addition to those set forth in this Article. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

1. Governmental Advisory Committee (Advisory Committee)

   a. The Governmental Advisory Committee (Advisory Committee) should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names

and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues

b. Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct conomies as recognized in international fora, and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

c The Governmental Advisory Committee (Advisory Committee) may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.

d The chair of the Governmental Advisory Committee Advisory Committee) shall be elected by the members of the Governmental Advisory Committee (Advisory Committee) pursuant to procedures adopted by such members.

e Each member of the Governmental Advisory Committee Advisory Committee) shall appoint one accredited representative to the Committee The accredited representative of a member must hold a formal official position with the member's public administration The term "official" ncludes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies

f. The Governmental Advisory Committee (Advisory Committee) shall annually appoint one non voting liaison to the CANN (Internet Corporation for Assigned Names and Numbers) Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting

iaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee

g. The Governmental Advisory Committee (Advisory Committee) may designate a non voting liaison to each of the Supporting Organization (Supporting Organization) Councils and Advisory Committees (Advisory Committees), to the extent the Governmental Advisory Committee (Advisory Committee) deems it appropriate and useful to do so

h. The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely manner of any proposal raising public policy issues on which it or any of ICANN (Internet Corporation for Assigned Names and umbers)'s supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

The Governmental Advisory Committee (Advisory Committee) may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies

. The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies In the event that the ICANN (Internet Corporation for Assigned Names and Numbers) Board determines to take an action that is not consistent with the Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee (Advisory Committee) and the ICANN (Internet Corporation for Assigned ames and Numbers) Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k If no such solution can be found, the ICANN (Internet Corporation for Assigned Names and Numbers) Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee Advisory Committee) members with regard to public policy ssues falling within their responsibilities

2 Security (Security Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

a The role of the Security (Security Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("SSAC Security and Stability Advisory Committee)") is to advise the CANN (Internet Corporation for Assigned Names and umbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:

1. To communicate on security matters with the Internet technical community and the operators and managers of critical DNS (Domain Name System) infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS (Domain Name System) and address allocation and those engaged in operations planning

2. To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly The Committee shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats

3. To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities The Committee shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate

4. To report periodically to the Board on its activities.

5 To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board

b The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 anuary and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or

members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee) The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re appointment each year. The Board shall also have to power to remove SSAC (Security and Stability Advisory Committee) appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee) (Note The first full term under this paragraph shall commence on 1 January 2011 and end on 31 December 2013 Prior to 1 January 2011, the SSAC Security and Stability Advisory Committee) shall be comprised as stated in the Bylaws as amended 25 June 2010, and the SSAC (Security and Stability Advisory Committee) chair shall recommend the re appointment of all current SSAC (Security and Stability Advisory Committee) members to full or partial terms as appropriate to implement the provisions of this paragraph.)

c The SSAC (Security and Stability Advisory Committee) shall annually appoint a non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Board according to Section 9 of Article VI.

3. Root Server System Advisory Committee (Advisory Committee)

a. The role of the Root Server System Advisory Committee (Advisory Committee) ("RSSAC (Root Server System Advisory Committee)") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and ntegrity of the Internet's Root Server System It shall have the following responsibilities:

1 Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers

2. Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the processes and procedures for the production of the Root Zone (Root Zone) File.

3 Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the current status of root servers and the root zone.

4 Respond to requests for information or opinions from the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors

5. Report periodically to the Board on its activities.

6 Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board

b The RSSAC (Root Server System Advisory Committee) shall be led by two co-chairs. The RSSAC (Root Server System Advisory Committee)'s chairs and members shall be appointed by the Board.

1. RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three year term, commencing on 1 January and ending the second year thereafter on 31 December Members may be re appointed, and there are no limits to the number of terms the members may serve The RSSAC (Root Server System Advisory Committee) chairs shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee) If the board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee) then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chairs shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re appointment each year The Board shall also have to power to remove RSSAC (Root Server System Advisory Committee) appointees as recommended by or in consultation with the RSSAC (Root Server System Advisory Committee) (Note The first term under this paragraph shall commence on 1 July 2013 and end on 31 December 2015, and shall be considered a full term for all purposes. All other full terms under this paragraph shall begin on 1 January of the corresponding year Prior to 1 July 2013, the RSSAC (Root Server System Advisory Committee) shall be comprised as stated in the Bylaws as amended 16 March 2012, and the RSSAC (Root Server System Advisory Committee) chairs shall recommend the re-appointment of all current RSSAC (Root Server System Advisory Committee) members to full or partial terms as appropriate to implement the provisions of this paragraph)

2. The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the

chairs to the board following a nomination process that it devises and documents

c The RSSAC (Root Server System Advisory Committee) shall annually appoint a non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Board according to Section 9 of Article VI.

4. At-Large Advisory Committee (Advisory Committee)

a. The At-Large Advisory Committee (Advisory Committee) (A AC (At Large Advisory Committee)) is the primary organizational home within ICANN (Internet Corporation for Assigned Names and Numbers) for individual Internet users The role of the ALAC (At-Large Advisory Committee) shall be to consider and provide advice on the activities of ICANN Internet Corporation for Assigned Names and Numbers), nsofar as they relate to the interests of individual Internet users. This includes policies created through ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations), as well as the many other issues for which community input and advice is appropriate. The ALAC (At-Large Advisory Committee), which plays an important role in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, also coordinates some of ICANN (Internet Corporation for Assigned Names and Numbers)'s outreach to individual nternet users

b. The ALAC (At-Large Advisory Committee) shall consist of (i) two members selected by each of the Regional At Large Organizations ("RALOs") established according to paragraph 4(g) of this Section, and (ii) five members selected by the ominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country

ithin each of the five Geographic Regions established according to Section 5 of Article VI

c Subject to the provisions of the Transition Article of these Bylaws, the regular terms of members of the ALAC (At Large Advisory Committee) shall be as follows:

1. The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even numbered year

2. The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an odd numbered year

3. The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even numbered year

4. The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began

d The Chair of the ALAC (At Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to procedures adopted by the Committee.

e The ALAC (At Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the

same Geographic Region, as defined according to Section 5 of Article VI (/en/general/bylaws htm#VI 5)) to the Nominating Committee.

f Subject to the provisions of the Transition Article of these Bylaws, the At-Large Advisory Committee (Advisory Committee) may designate non voting liaisons to each of the cc SO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.

g There shall be one RALO for each Geographic Region established according to Section 5 of Article VI. Each RALO shall serve as the main forum and coordination point for public nput to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards established by the Board based on recommendations of the At Large Advisory Committee Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures

h. Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to paragraph 4(i) of

this Section. If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned ames and Numbers), a RALO may also include individual nternet users who are citizens or residents of countries within the RALO's Geographic Region.

Membership in the At Large Community

The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region

2 The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual Internet users who are citizens or residents of countries within the Geographic Region (as defined in Section 5 of Article VI (/en/general/bylaws.htm#VI-5)) of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

3 Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At Large Structures

4 To the extent compatible with these objectives, the criteria and standards should also afford to each RALO

the type of structure that best fits the customs and character of its Geographic Region

5 Once the criteria and standards have been established as provided in this Clause i, the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.

6 Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At Large Advisory Committee) in its Rules of Procedure, save always that any changes made to the Rules of Procedure in respect of ALS (At-Large Structure) applications shall be subject to review by the RALOs and by the ICANN (Internet Corporation for Assigned Names and Numbers) Board

7 Decisions as to whether to accredit, not to accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

8 On an ongoing basis, the ALAC (At Large Advisory Committee) may also give advice as to whether a prospective At Large Structure meets the applicable criteria and standards.

The ALAC (At Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities

1 Making a selection by the At Large Community to fill Seat 15 on the Board. Notification of the At-Large Community's selection shall be given by the ALAC (At Large Advisory Committee) Chair in writing to the

ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, consistent with Article VI, Sections 8(4) and 12(1).

2 Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);

3 Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development process;

4. Promoting outreach activities in the community of individual Internet users;

5. Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;

6. Establishing an outreach strategy about ICANN (Internet Corporation for Assigned Names and Numbers) issues in each RALO's Region;

7 Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;

8 Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;

> 9. Offering Internet-based mechanisms that enable discussions among members of At Large structures; and
>
> 10 Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues

Section 3. PROCEDURES

Each Advisory Committee (Advisory Committee) shall determine its own rules of procedure and quorum requirements

Section 4. TERM OF OFFICE

The chair and each member of a committee shall serve until his or her successor is appointed, or until such committee is sooner terminated, or until he or she is removed, resigns, or otherwise ceases to qualify as a member of the committee.

Section 5. VACANCIES

Vacancies on any committee shall be filled in the same manner as provided in the case of original appointments

Section 6. COMPENSATION

Committee members shall receive no compensation for their services as a member of a committee. The Board may, however, authorize the reimbursement of actual and necessary expenses incurred by committee

members, including Directors, performing their duties as committee members

ARTICLE XI-A: OTHER ADVISORY MECHANISMS

Section 1. EXTERNAL EXPERT ADVICE

1. Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN (Internet Corporation for Assigned Names and Numbers) to take advantage of existing expertise that resides in the public or private sector but outside of ICANN (Internet Corporation for Assigned Names and Numbers). In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.

2. Types of Expert Advisory Panels.

a. On its own initiative or at the suggestion of any ICANN Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector ndividuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of Section 1(3) . b) of this Article shall apply.

b. In addition, in accordance with Section 1(3) of this Article, the Board may refer issues of public policy pertinent to matters ithin ICANN (Internet Corporation for Assigned Names and umbers)'s mission to a multinational governmental or treaty organization.

3. Process for Seeking Advice-Public Policy Matters.

a. The Governmental Advisory Committee (Advisory Committee) may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above

b. In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee (Advisory Committee) regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice

c The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory Committee), with the suggestion that the request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.

4. Process for Seeking and Advice-Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with Section 1(2)(a) of this Article shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed

5. Receipt of Expert Advice and its Effect. External advice pursuant to this Section shall be provided in written form Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities

6. Opportunity to Comment. The Governmental Advisory Committee (Advisory Committee), in addition to the Supporting Organizations (Supporting Organizations) and other Advisory Committees (Advisory Committees), shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 2. TECHNICAL LIAISON GROUP

1. Purpose. The quality of ICANN (Internet Corporation for Assigned Names and Numbers)'s work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group (TLG) shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities.

2 TLG Organizations The TLG shall consist of four organizations the European Telecommunications Standards Institute (ETSI (European Telecommunications Standards Institute)), the International Telecommunications Union's Telecommunication Standardization Sector (ITU (International Telecommunication Union)-T), the World Wide Web Consortium (W3C (World Wide Web Consortium)), and the Internet Architecture Board (IAB (Internet Architecture Board)).

3 Role The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities

a. In response to a request for information, to connect the Board or other ICANN (Internet Corporation for Assigned ames and Numbers) body with appropriate sources of technical expertise This component of the TLG role covers c rcumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) seeks an authoritative answer to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization

b. As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN (Internet Corporation for Assigned Names and Numbers) actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) is unaware of a new development, and would therefore otherwise not realize that a question should be asked

4 TLG Procedures The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters) Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose

5. Technical Work of the IANA (Internet Assigned Numbers Authority) The TLG shall have no involvement with the IANA (Internet Assigned Numbers Authority)'s work for the Internet

Engineering Task Force, Internet Research Task Force, or the Internet Architecture Board, as described in the Memorandum of Understanding Concerning the Technical Work of the Internet Assigned Numbers Authority ratified by the Board on 10 March 2000

6. Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities These 8 experts shall be available as necessary to determine, through an exchange of e mail messages, where to direct a technical question from ICANN (Internet Corporation for Assigned Names and Numbers) when ICANN (Internet Corporation for Assigned Names and Numbers) does not ask a specific TLG organization directly.

7 Board Liaison and Nominating Committee Delegate Annually, in rotation, one TLG organization shall appoint one non-voting liaison to the Board according to Article VI, Section 9(1)(d) Annually, in rotation, one TLG organization shall select one voting delegate to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee according to Article VII, Section 2(8)(j). The rotation order for the appointment of the non voting liaison to the Board shall be ETSI (European Telecommunications Standards Institute), ITU (International Telecommunication Union) T, and W3C (World Wide Web Consortium). The rotation order for the selection of the Nominating Committee delegate shall be W3C (World Wide Web Consortium), ETSI (European Telecommunications Standards Institute), and ITU (International Telecommunication Union) T (IAB (Internet Architecture Board) does not participate in these rotations because the IETF (Internet Engineering Task Force) otherwise appoints a non-voting liaison to the Board and selects a delegate to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.)

ARTICLE XII: BOARD AND TEMPORARY COMMITTEES

Section 1. BOARD COMMITTEES

The Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board Only Directors may be appointed to a Committee of the Board. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee Committee members may be removed from a committee at any time by a two thirds (2/3) majority vote of all members of the Board; provided, however, that any Director or Directors which are the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required two-thirds (2/3) vote; and, provided further, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all members of the Board

Section 2. POWERS OF BOARD COMMITTEES

1. The Board may delegate to Committees of the Board all legal authority of the Board except with respect to

a The filling of vacancies on the Board or on any committee;

b. The amendment or repeal of Bylaws or the Articles of ncorporation or the adoption of new Bylaws or Articles of ncorporation;

c The amendment or repeal of any resolution of the Board hich by its express terms is not so amendable or repealable;

d The appointment of committees of the Board or the members thereof;

e The approval of any self dealing transaction, as such transactions are defined in Section 5233(a) of the CNPBCL;

> f. The approval of the annual budget required by Article XVI; or
>
> g The compensation of any officer described in Article XIII
>
> 2 The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings shall be governed by the provisions of Article VI applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees

ARTICLE XIII: OFFICERS

Section 1. OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN (Internet Corporation for Assigned Names and Numbers) may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chairman of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all the members of the Board Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected

Section 4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio member of the Board, and shall have all the same rights and privileges of any Board member. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board

Section 5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board

Section 6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("CFO") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers) If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual budget. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board Expenses

incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board

Section 9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers)

ARTICLE XIV: INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

ICANN (Internet Corporation for Assigned Names and Numbers) shall, to maximum extent permitted by the CNPBCL, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN (Internet Corporation for Assigned Names and Numbers), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICA N (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. For purposes of this Article, an "agent" of ICANN (Internet Corporation for Assigned Names and Numbers) includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (Internet Corporation for Assigned Names and Numbers) (including a member of any Supporting Organization (Supporting Organization), any Advisory Committee (Advisory Committee), the Nominating Committee, any other ICANN (Internet Corporation for Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise The Board may adopt a resolution authorizing the

purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article

ARTICLE XV: GENERAL PROVISIONS

Section 1. CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN (Internet Corporation for Assigned Names and Numbers), and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN (Internet Corporation for Assigned Names and Numbers) or to render it liable for any debts or obligations.

Section 2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN (Internet Corporation for Assigned Names and Numbers) shall be signed by such Officer or Officers, agent or agents, of ICANN (Internet Corporation for Assigned Names and Numbers) and in such a manner as shall from time to time be determined by resolution of the Board.

Section 4. LOANS

No loans shall be made by or to ICANN (Internet Corporation for Assigned Names and Numbers) and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN (Internet Corporation for Assigned Names and Numbers) to its Directors or Officers.

ARTICLE XVI: FISCAL MATTERS

Section 1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

Section 2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement and a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses). ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of certain transactions as required by the CNPBCL to be prepared and sent to each member of the Board and to such other persons as the Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

Section 4. ANNUAL BUDGET

At least forty-five (45) days prior to the commencement of each fiscal year the President shall prepare and submit to the Board, a proposed annual budget of ICANN (Internet Corporation for Assigned Names and Numbers) for the next fiscal year, which shall be posted on the Website. The proposed budget shall identify anticipated revenue sources and levels and shall, to the extent practical, identify anticipated material expense items by line item. The Board shall adopt an annual budget and shall publish the adopted Budget on the Website.

Section 5. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN (Internet Corporation for Assigned Names and Numbers), with the goal of fully recovering the reasonable costs of the operation of ICANN (Internet Corporation for Assigned Names and Numbers) and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN (Internet Corporation for Assigned Names and Numbers). Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

ARTICLE XVII: MEMBERS

ICANN (Internet Corporation for Assigned Names and Numbers) shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these Bylaws, in any ICANN (Internet Corporation for Assigned Names and Numbers) document, or in any action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff.

ARTICLE XVIII: OFFICES AND SEAL

Section 1. OFFICES

The principal office for the transaction of the business of ICANN (Internet Corporation for Assigned Names and Numbers) shall be in the County of Los Angeles, State of California, United States of America. ICANN (Internet

Corporation for Assigned Names and Numbers) may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE XIX: AMENDMENTS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the Articles of Incorporation or Bylaws of ICANN (Internet Corporation for Assigned Names and Numbers) may be altered, amended, or repealed and new Articles of Incorporation or Bylaws adopted only upon action by a two-thirds (2/3) vote of all members of the Board.

ARTICLE XX: TRANSITION ARTICLE

Section 1. PURPOSE

This Transition Article sets forth the provisions for the transition from the processes and structures defined by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, as amended and restated on 29 October 1999 and amended through 12 February 2002 (the "Old Bylaws (/en/general/archive-bylaws/bylaws-12feb02.htm)"), to the processes and structures defined by the Bylaws of which this Article is a part (the "New Bylaws (/en/general/bylaws.htm)"). [Explanatory Note (dated 10 December 2009): For Section 5(3) of this Article, reference to the Old Bylaws refers to the Bylaws as amended and restated through to 20 March 2009.]

Section 2. BOARD OF DIRECTORS

> 1. For the period beginning on the adoption of this Transition Article and ending on the Effective Date and Time of the New Board, as defined in paragraph 5 of this Section 2, the Board of Directors of the Corporation ("Transition Board") shall consist of the members of the

Board who would have been Directors under the Old Bylaws immediately after the conclusion of the annual meeting in 2002, except that those At-Large members of the Board under the Old Bylaws who elect to do so by notifying the Secretary of the Board on 15 December 2002 or in writing or by e-mail no later than 23 December 2002 shall also serve as members of the Transition Board. Notwithstanding the provisions of Article VI, Section 12 of the New Bylaws, vacancies on the Transition Board shall not be filled. The Transition Board shall not have liaisons as provided by Article VI, Section 9 of the New Bylaws. The Board Committees existing on the date of adoption of this Transition Article shall continue in existence, subject to any change in Board Committees or their membership that the Transition Board may adopt by resolution.

2. The Transition Board shall elect a Chair and Vice-Chair to serve until the Effective Date and Time of the New Board.

3. The "New Board" is that Board described in Article VI, Section 2(1) of the New Bylaws.

4. Promptly after the adoption of this Transition Article, a Nominating Committee shall be formed including, to the extent feasible, the delegates and liaisons described in Article VII, Section 2 of the New Bylaws, with terms to end at the conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in 2003. The Nominating Committee shall proceed without delay to select Directors to fill Seats 1 through 8 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for those Seats in Article VI, Section 8(1)(a)-(c) of the New Bylaws, and shall give the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of that selection.

5. The Effective Date and Time of the New Board shall be a time, as designated by the Transition Board, during the first regular meeting of ICANN (Internet Corporation for Assigned Names and Numbers) in 2003 that begins not less than seven calendar days after the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary has received written notice of the selection of Directors to

fill at least ten of Seats 1 through 14 on the New Board. As of the Effective Date and Time of the New Board, it shall assume from the Transition Board all the rights, duties, and obligations of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors. Subject to Section 4 of this Article, the Directors (Article VI, Section 2(1)(a)-(d)) and non-voting liaisons (Article VI, Section 9) as to which the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary has received notice of selection shall, along with the President (Article VI, Section 2(1)(e)), be seated upon the Effective Date and Time of the New Board, and thereafter any additional Directors and non-voting liaisons shall be seated upon the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary's receipt of notice of their selection.

6. The New Board shall elect a Chairman and Vice-Chairman as its first order of business. The terms of those Board offices shall expire at the end of the annual meeting in 2003.

7. Committees of the Board in existence as of the Effective Date and Time of the New Board shall continue in existence according to their existing charters, but the terms of all members of those committees shall conclude at the Effective Date and Time of the New Board. Temporary committees in existence as of the Effective Date and Time of the New Board shall continue in existence with their existing charters and membership, subject to any change the New Board may adopt by resolution.

8. In applying the term-limitation provision of Section 8(5) of Article VI, a Director's service on the Board before the Effective Date and Time of the New Board shall count as one term.

Section 3. ADDRESS SUPPORTING ORGANIZATION

The Address Supporting Organization (Supporting Organization) shall continue in operation according to the provisions of the Memorandum of Understanding originally entered on 18 October 1999 (/aso/aso-mou-26aug99.htm) between ICANN (Internet Corporation for Assigned Names

and Numbers) and a group of regional Internet registries (RIRs), and amended in October 2000 (/aso/aso-mou-amend1-25sep00.htm), until a replacement Memorandum of Understanding becomes effective. Promptly after the adoption of this Transition Article, the Address Supporting Organization (Supporting Organization) shall make selections, and give the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of those selections, of:

> 1. Directors to fill Seats 9 and 10 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for each of those Seats in Article VI, Section 8(1)(d) and (e) of the New Bylaws; and
>
> 2. the delegate to the Nominating Committee selected by the Council of the Address Supporting Organization (Supporting Organization), as called for in Article VII, Section 2(8)(f) of the New Bylaws.

With respect to the ICANN (Internet Corporation for Assigned Names and Numbers) Directors that it is entitled to select, and taking into account the need for rapid selection to ensure that the New Board becomes effective as soon as possible, the Address Supporting Organization (Supporting Organization) may select those Directors from among the persons it previously selected as ICANN (Internet Corporation for Assigned Names and Numbers) Directors pursuant to the Old Bylaws. To the extent the Address Supporting Organization (Supporting Organization) does not provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice, on or before 31 March 2003, of its selections for Seat 9 and Seat 10, the Address Supporting Organization (Supporting Organization) shall be deemed to have selected for Seat 9 the person it selected as an ICANN (Internet Corporation for Assigned Names and Numbers) Director pursuant to the Old Bylaws for a term beginning in 2001 and for Seat 10 the person it selected as an ICANN (Internet Corporation for Assigned Names and Numbers) Director pursuant to the Old Bylaws for a term beginning in 2002.

Section 4. COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

1. Upon the enrollment of thirty ccTLD (Country Code Top Level Domain) managers (with at least four within each Geographic Region) as members of the ccNSO (Country Code Names Supporting Organization), written notice shall be posted on the Website. As soon as feasible after that notice, the members of the initial ccNSO (Country Code Names Supporting Organization) Council to be selected by the ccNSO (Country Code Names Supporting Organization) members shall be selected according to the procedures stated in Article IX, Section 4(8) and (9). Upon the completion of that selection process, a written notice that the ccNSO (Country Code Names Supporting Organization) Council has been constituted shall be posted on the Website. Three ccNSO (Country Code Names Supporting Organization) Council members shall be selected by the ccNSO (Country Code Names Supporting Organization) members within each Geographic Region, with one member to serve a term that ends upon the conclusion of the first ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted. (The definition of "ccTLD (Country Code Top Level Domain) manager" stated in Article IX, Section 4(1) and the definitions stated in Article IX, Section 4(4) shall apply within this Section 4 of Article XX.)

2. After the adoption of Article IX of these Bylaws, the Nominating Committee shall select the three members of the ccNSO (Country Code Names Supporting Organization) Council described in Article IX, Section 3(1)(b). In selecting three individuals to serve on the ccNSO (Country Code Names Supporting Organization) Council, the Nominating Committee shall designate one to serve a term that ends upon the conclusion of the first ICANN (Internet Corporation for

Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted. The three members of the ccNSO (Country Code Names Supporting Organization) Council selected by the Nominating Committee shall not take their seats before the ccNSO (Country Code Names Supporting Organization) Council is constituted.

3. Upon the ccNSO (Country Code Names Supporting Organization) Council being constituted, the At-Large Advisory Committee (Advisory Committee) and the Governmental Advisory Committee (Advisory Committee) may designate one liaison each to the ccNSO (Country Code Names Supporting Organization) Council, as provided by Article IX, Section 3(2)(a) and (b).

4. Upon the ccNSO (Country Code Names Supporting Organization) Council being constituted, the Council may designate Regional Organizations as provided in Article IX, Section 5. Upon its designation, a Regional Organization may appoint a liaison to the ccNSO (Country Code Names Supporting Organization) Council.

5. Until the ccNSO (Country Code Names Supporting Organization) Council is constituted, Seats 11 and 12 on the New Board shall remain vacant. Promptly after the ccNSO (Country Code Names Supporting Organization) Council is constituted, the ccNSO (Country Code Names Supporting Organization) shall, through the ccNSO (Country Code Names Supporting Organization) Council, make selections of Directors to fill Seats 11 and 12 on the New Board, with terms to conclude upon the commencement of the next regular term specified for each of those Seats in Article VI, Section 8(1)(d) and (f) of the New Bylaws, and shall give the ICANN (Internet Corporation

for Assigned Names and Numbers) Secretary written notice of its selections.

6. Until the ccNSO (Country Code Names Supporting Organization) Council is constituted, the delegate to the Nominating Committee established by the New Byla s designated to be selected by the ccNSO (Country Code Names Supporting Organization) shall be appointed by the Transition Board or New Board, depending on which is in existence at the time any particular appointment is required, after due consultation with members of the ccTLD (Country Code Top Level Domain) community. Upon the ccNSO (Country Code Names Supporting Organization) Council being constituted, the delegate to the Nominating Committee appointed by the Transition Board or New Board according to this Section 4(9) then serving shall remain in office, except that the ccNSO (Country Code Names Supporting Organization) Council may replace that delegate with one of its choosing within three months after the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting, or in the event of a vacancy. Subsequent appointments of the Nominating Committee delegate described in Article VII, Section 2(8)(c) shall be made by the ccNSO (Country Code Names Supporting Organization) Council.

Section 5. GENERIC NAMES SUPPORTING ORGANIZATION

1. The Generic Names Supporting Organization (Supporting Organization) ("GNSO (Generic Names Supporting Organization)"), upon the adoption of this Transition Article, shall continue its operations; however, it shall be restructured into four new Stakeholder Groups which shall represent, organizationally, the former Constituencies of the GNSO (Generic Names Supporting Organization), subject to ICANN (Internet Corporation for Assigned Names and Numbers) Board approval of each individual Stakeholder Group Charter:

a. The gTLD (generic Top Level Domain) Registries Constituency shall be assigned to the Registries Stakeholder Group;

b. The Registrars Constituency shall be assigned to the Registrars Stakeholder Group;

c The Business Constituency shall be assigned to the Commercial Stakeholder Group;

d. The Intellectual Property Constituency shall be assigned to the Commercial Stakeholder Group;

e. The Internet Services Providers Constituency shall be assigned to the Commercial Stakeholder Group; and

f. The Non-Commercial Users Constituency shall be assigned to the Non-Commercial Stakeholder Group.

2. Each GNSO (Generic Names Supporting Organization) Constituency described in paragraph 1 of this subsection shall continue operating substantially as before and no Constituency official, working group, or other activity shall be changed until further action of the Constituency, provided that each GNSO (Generic Names Supporting Organization) Constituency described in paragraph 1 (c-f) shall submit to the CANN (Internet Corporation for Assigned Names and Numbers) Secretary a new or revised Charter inclusive of its operating procedures, adopted according to the Constituency's processes and consistent with these Bylaws Amendments, no later than the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in October 2009, or another date as the Board may designate by resolution.

3. Prior to the commencement of the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in October 2009, or another date the Board may designate by resolution, the GNSO (Generic Names Supporting Organization) Council shall consist of its current

Constituency structure and officers as described in Article X, Section 3(1) of the Bylaws (/en/general/archive-bylaws/bylaws-20mar09.htm#X-3.1) (as amended and restated on 29 October 1999 and amended through 20 March 2009 (the "Old Bylaws")). Thereafter, the composition of the GNSO (Generic Names Supporting Organization) Council shall be as provided in these Bylaws, as they may be amended from time to time. All committees, task forces, working groups, drafting committees, and similar groups established by the GNSO (Generic Names Supporting Organization) Council and in existence immediately before the adoption of this Transition Article shall continue in existence with the same charters, membership, and activities, subject to any change by action of the GNSO (Generic Names Supporting Organization) Council or ICANN (Internet Corporation for Assigned Names and Numbers) Board.

4. Beginning with the commencement of the ICANN (Internet Corporation for Assigned Names and Numbers) Meeting in October 2009, or another date the Board may designate by resolution (the "Effective Date of the Transition"), the GNSO (Generic Names Supporting Organization) Council seats shall be assigned as follows:

a. The three seats currently assigned to the Registry Constituency shall be reassigned as three seats of the Registries Stakeholder Group;

b. The three seats currently assigned to the Registrar Constituency shall be reassigned as three seats of the Registrars Stakeholder Group;

c The three seats currently assigned to each of the Business Constituency, the Intellectual Property Constituency, and the nternet Services Provider Constituency (nine total) shall be decreased to be six seats of the Commercial Stakeholder Group;

d. The three seats currently assigned to the Non-Commercial Users Constituency shall be increased to be six seats of the

on-Commercial Stakeholder Group;

e. The three seats currently selected by the Nominating Committee shall be assigned by the Nominating Committee as follows: one voting member to the Contracted Party House, one voting member to the Non-Contracted Party House, and one non-voting member assigned to the GNSO (Generic ames Supporting Organization) Council at large.

Representatives on the GNSO (Generic Names Supporting Organization) Council shall be appointed or elected consistent with the provisions in each applicable Stakeholder Group Charter, approved by the Board, and sufficiently in advance of the October 2009 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting that will permit those representatives to act in their official capacities at the start of said meeting.

5. The GNSO (Generic Names Supporting Organization) Council, as part of its Restructure Implementation Plan, will document: (a) how vacancies, if any, will be handled during the transition period; (b) for each Stakeholder Group, how each assigned Council seat to take effect at the 2009 ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting will be filled, whether through a continuation of an existing term or a new election or appointment; (c) how it plans to address staggered terms such that the new GNSO (Generic Names Supporting Organization) Council preserves as much continuity as reasonably possible; and (d) the effect of Bylaws term limits on each Council member.

6. As soon as practical after the commencement of the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in October 2009, or another date the Board may designate by resolution, the GNSO (Generic Names Supporting Organization) Council shall, in accordance with Article X, Section 3(7) and its GNSO (Generic Names Supporting Organization) Operating Procedures, elect officers and give the ICANN (Internet Corporation

for Assigned Names and Numbers) Secretary written notice of its selections.

Section 6. PROTOCOL SUPPORTING ORGANIZATION

The Protocol (Protocol) Supporting Organization (Supporting Organization) referred to in the Old Bylaws (/en/general/archive-bylaws/bylaws-12feb02.htm#VI-C) is discontinued.

Section 7. ADVISORY COMMITTEES AND TECHNICAL LIAISON GROUP

1. Upon the adoption of the New Bylaws, the Governmental Advisory Committee (Advisory Committee) shall continue in operation according to its existing operating principles and practices, until further action of the committee. The Governmental Advisory Committee (Advisory Committee) may designate liaisons to serve with other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as contemplated by the New Bylaws by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Promptly upon the adoption of this Transition Article, the Governmental Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2 of the New Bylaws.

2. The organizations designated as members of the Technical Liaison Group under Article XI-A, Section 2(2) of the New Bylaws shall each designate the two individual technical experts described in Article XI-A, Section 2(6) of the New Bylaws, by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. As soon as feasible, the delegate from the Technical Liaison Group to the Nominating Committee shall be selected according to Article XI-A, Section 2(7) of the New Bylaws.

3. Upon the adoption of the New Bylaws, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2(4) of the New Bylaws.

4. Upon the adoption of the New Bylaws, the Root Server System Advisory Committee (Advisory Committee) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Root Server Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2(3) of the New Bylaws.

5. At-Large Advisory Committee (Advisory Committee)

a. There shall exist an Interim At-Large Advisory Committee (Advisory Committee) until such time as ICANN (Internet Corporation for Assigned Names and Numbers) recognizes, through the entry of a Memorandum of Understanding, all of the Regional At-Large Organizations (RALOs) identified in Article XI, Section 2(4) of the New Bylaws. The Interim At-Large Advisory Committee (Advisory Committee) shall be composed of (i) ten individuals (two from each ICANN (Internet Corporation for Assigned Names and Numbers) region) selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Board following nominations by the At-Large Organizing Committee and (ii) five additional individuals

one from each ICANN (Internet Corporation for Assigned ames and Numbers) region) selected by the initial ominating Committee as soon as feasible in accordance with the principles established in Article VII, Section 5 of the New Bylaws. The initial Nominating Committee shall designate two of these individuals to serve terms until the conclusion of the CANN (Internet Corporation for Assigned Names and umbers) annual meeting in 2004 and three of these ndividuals to serve terms until the conclusion of the ICANN Internet Corporation for Assigned Names and Numbers) annual meeting in 2005.

b. Upon the entry of each RALO into such a Memorandum of Understanding, that entity shall be entitled to select two persons who are citizens and residents of that Region to be members of the At-Large Advisory Committee (Advisory Committee) established by Article XI, Section 2(4) of the New Bylaws. Upon the entity's written notification to the ICANN Internet Corporation for Assigned Names and Numbers) Secretary of such selections, those persons shall immediately assume the seats held until that notification by the Interim At-Large Advisory Committee (Advisory Committee) members previously selected by the Board from the RALO's region.

c Upon the seating of persons selected by all five RALOs, the nterim At-Large Advisory Committee (Advisory Committee) shall become the At-Large Advisory Committee (Advisory Committee), as established by Article XI, Section 2(4) of the ew Bylaws. The five individuals selected to the Interim At-Large Advisory Committee (Advisory Committee) by the ominating Committee shall become members of the At-Large Advisory Committee (Advisory Committee) for the remainder of the terms for which they were selected.

d. Promptly upon its creation, the Interim At-Large Advisory Committee (Advisory Committee) shall notify the ICANN Internet Corporation for Assigned Names and Numbers) Secretary of the persons selected as its delegates to the

> ominating Committee, as set forth in Article VII, Section 2(6) of the New Bylaws.

Section 8. OFFICERS

ICANN (Internet Corporation for Assigned Names and Numbers) officers (as defined in Article XIII of the New Bylaws) shall be elected by the then-existing Board of ICANN (Internet Corporation for Assigned Names and Numbers) at the annual meeting in 2002 to serve until the annual meeting in 2003.

Section 9. GROUPS APPOINTED BY THE PRESIDENT

Notwithstanding the adoption or effectiveness of the New Bylaws, task forces and other groups appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) President shall continue unchanged in membership, scope, and operation until changes are made by the President.

Section 10. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of the New Bylaws, all agreements, including employment and consulting agreements, entered by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("PDP (Policy Development Process)") until such time as modifications are recommended to and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board"). The role of the GNSO (Generic

Names Supporting Organization) is outlined in Article X of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

Section 1. **Required Elements of a Policy Development Process**

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers) contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

> a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the issue, and c) how that party Is affected by the issue;
>
> b. Formal initiation of the Policy Development Process by the Council;
>
> c. Formation of a Working Group or other designated work method;
>
> d. Initial Report produced by a Working Group or other designated work method;
>
> e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;
>
> f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
>
> g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council]; and

> h. Board approval of PDP (Policy Development Process) Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual (PDP (Policy Development Process) Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.6.

Section 3. **Requesting an Issue Report**

Board Request. The Board may request an Issue Report by instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee (Advisory Committee) Request. An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "Preliminary Issue Report"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

> a) The proposed issue raised for consideration;
>
> b) The identity of the party submitting the request for the Issue Report;
>
> c) How that party is affected by the issue, if known;
>
> d) Support for the issue to initiate the PDP (Policy Development Process), if known;
>
> e) The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
>
> f) The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the ICANN (Internet Corporation for Assigned

Names and Numbers) website for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

Section 5. **Initiation of the PDP (Policy Development Process)**

The Council may initiate the PDP (Policy Development Process) as follows:

Board Request: If the Board requested an Issue Report, the Council, within the timeframe set forth in the PDP (Policy Development Process) Manual, shall initiate a PDP (Policy Development Process). No vote is required for such action.

GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests: The Council may only initiate the PDP (Policy Development Process) by a vote of the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Article X, Section 3, paragraph 9(b) and (c) in favor of initiating the PDP (Policy Development Process).

Section 6. **Reports**

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. **Council Deliberation**

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Article X, Section 3, paragraph 9(d) through (g), as supplemented by the PDP (Policy Development Process) Manual.

Section 8. **Preparation of the Board Report**

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Section 9. **Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

> a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic

Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best

> interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. **Maintenance of Records**

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

Section 12. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO (Generic Names Supporting Organization) Council.

"Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

"GNSO (Generic Names Supporting Organization) Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("PDP (Policy Development Process)").

1. Request for an Issue Report

An Issue Report may be requested by any of the following:

> a. *Council.* The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the "Council") may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.

b. *Board.* The ICANN (Internet Corporation for Assigned Names and Numbers) Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.

c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

d. *ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee).* An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.

e. *Members of the ccNSO (Country Code Names Supporting Organization).* The members of the ccNSO (Country Code Names Supporting Organization) may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO (Country Code Names Supporting Organization) present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

2. Creation of the Issue Report and Initiation Threshold

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the

Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (Internet Corporation for Assigned Names and Numbers) (in which case the costs of the Issue Manager shall be borne by ICANN (Internet Corporation for Assigned Names and Numbers)) or such other person or persons selected by the Council (in which case the ccNSO (Country Code Names Supporting Organization) shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

> a. The proposed issue raised for consideration;
>
> b. The identity of the party submitting the issue;
>
> c. How that party is affected by the issue;
>
> d. Support for the issue to initiate the PDP (Policy Development Process);
>
> e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "Manager Recommendation"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:
>
> >) The issue is within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission statement;

> 2) Analysis of the relevant factors according to Article IX, Section 6(2) and Annex C affirmatively demonstrates that the ssue is within the scope of the ccNSO (Country Code Names Supporting Organization);

In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

> 3) Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
>
> 4) Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this Annex B) or to the scope of the ccNSO (Country Code Names Supporting Organization) (Annex C) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO (Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Article IX, Section 6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager accordingly. General Counsel and the ccNSO (Country Code Names Supporting Organization) Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO (Country Code Names Supporting Organization) then by a vote of 15 or more members the Council

may decide the issue is within scope. The Chair of the ccNSO (Country Code Names Supporting Organization) shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP (Policy Development Process) including both the opinion and analysis of General Counsel and Council in the Issues Report.

f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of the stages of PDP (Policy Development Process) outlined herein (PDP (Policy Development Process) Time Line).

g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken place. In these cases, the issue report should indicate this uncertainty.Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

3. Initiation of PDP (Policy Development Process)

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shal ote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.

b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the

> PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) mission statement and the ccNSO (Country Code Names Supporting Organization) Scope.

4. Decision Whether to Appoint Task Force; Establishment of Time Line

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

> a. In favor of convening a task force, it shall do so in accordance with Item 7 below.
>
> b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP (Policy Development Process) Time Lineset out in the Issue Report.

5. Composition and Selection of Task Forces

> a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see Article IX, Section 6) to appoint two individuals to participate in the task force (the "Representatives"). Additionally, the Council may appoint up to three advisors (the "Advisors") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory

Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.

b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.

c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

6. Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period

After initiation of the PDP (Policy Development Process), ICANN (Internet Corporation for Assigned Names and Numbers) shall post a notification of such action to the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. The Issue Manager, or some other designated Council representative shall review the comments and

incorporate them into a report (the "Comment Report") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

7. Task Forces

a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO (Country Code Names Supporting Organization) members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "Charter") within the time designated in the PDP (Policy Development Process) Time Line. Such Charter shall include:

. The issue to be addressed by the task force, as such issue as articulated for the vote before the Council that initiated the PDP (Policy Development Process);

2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and

3. Any specific instructions from the Council for the task force, ncluding whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of Article IX, Section 3(14) shall apply to Council actions under this Item 7(b).

c. *Appointment of Task Force Chair.* The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP (Policy Development Process) Time Line. At the initial meeting, the task force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. *Collection of Information.*

. *Regional Organization Statements.* The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO (Country Code Names Supporting Organization) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "Regional Statement") within the time designated in the PDP (Policy Development Process) Time Line. Every Regional Statement shall include at least the following:

(i) If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;

(ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;

(iii) A clear statement of how the Regional Organization arrived at its position(s). Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) A statement of the position on the issue of any ccNSO (Country Code Names Supporting Organization) members that are not members of the Regional Organization;

(v) An analysis of how the issue would affect the Region, including any financial impact on the Region; and

(vi) An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly abeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable,

into a single document ("Preliminary Task Force Report") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP (Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "Task Force Report") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;

2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted ithin the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;

3. An analysis of how the issue would affect each Region, ncluding any financial impact on the Region;

4. An analysis of the period of time that would likely be necessary to implement the policy; and

5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process) Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.

b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.

c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.

d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. Comments to the Task Force Report or Initial Report

a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.

b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable discretion, add appropriate comments to the Task Force Report or Initial Report, to prepare the "Final Report". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

10. Council Deliberation

a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.

b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.

c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed statement of the

> advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. Recommendation of the Council

In considering whether to make a recommendation on the issue (a "Council Recommendation"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

12. Council Report to the Members

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "Members Report"). The Members Report must contain at least the following:

> a. A clear statement of the Council's recommendation;
>
> b. The Final Report submitted to the Council; and
>
> c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes within the voting period, the resulting vote will be be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed if at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

14. Board Report

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13 incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

> a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;
>
> b. The Final Report submitted to the Council; and

c. the Members' Report.

15. Board Vote

a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).

. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the cc SO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or

more of the Council members shall be deemed to reflect the ew of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO (Country Code ames Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the cc SO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSO Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("Supplemental Board Statement").

5. In the event the Board determines not to accept a ccNSO Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

16. Implementation of the Policy

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

17. Maintenance of Records

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

> a. Issue Report;
>
> b. PDP (Policy Development Process) Time Line;
>
> c. Comment Report;
>
> d. Regional Statement(s);
>
> e. Preliminary Task Force Report;
>
> f. Task Force Report;
>
> g. Initial Report;
>
> h. Final Report;
>
> i. Members' Report;
>
> j. Board Report;
>
> k. Board Statement;
>
> l. Supplemental Members' Report; and

> m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in Article IX, Section 6(2) of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

> 1. Data is registered/maintained to generate a zone file,
>
> 2. A zone file is in turn used in TLD (Top Level Domain) name servers.

Within a TLD (Top Level Domain) two functions have to be performed (these are addressed in greater detail below):

> 1. Entering data into a database (Data Entry Function) and
>
> 2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) (Name Server Function).

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

> (a) under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
>
> (b) for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system. The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;

- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to defined and determined.

The information below offers an aid to:

> 1. delineate and identify specific policy areas;
>
> 2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

> Level 1: Root Name Servers
> Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))
> Executive role: Root Server System Operators
> Accountability role: RSSAC (Root Server System Advisory

Committee) (ICANN (Internet Corporation for Assigned Names and Numbers)), (US DoC-ICANN (Internet Corporation for Assigned Names and Numbers) MoU (Memorandum of Understanding))

Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability
Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized
Executive role: ccTLD (Country Code Top Level Domain) Manager
Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

Level 3: User's Name Servers
Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))
Executive role: Registrant (Registrant)
Accountability role: ccTLD (Country Code Top Level Domain) Manager

Data Entry Function (as to ccTLDs)

Level 1: Root Level Registry
Policy role: ccNSO (Country Code Names Supporting Organization) Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))
Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))
Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, US DoC, (national authorities in some cases)

Level 2: ccTLD (Country Code Top Level Domain) Registry
Policy role: Local Internet Community, including local government,

and/or ccTLD (Country Code Top Level Domain) Manager according to local structure
Executive role: ccTLD (Country Code Top Level Domain) Manager
Accountability role: Local Internet Community, including national authorities in some cases

Level 3: Second and Lower Levels
Policy role: Registrant (Registrant)
Executive role: Registrant (Registrant)
Accountability role: Registrant (Registrant), users of lower-level domain names

Exhibit R-40

Dechert LLP

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Practice Area

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Position

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SEARCH

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R-40

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TRANSLATE PAGE

Services

nternational Arbitration › International Trade and Government Regulation › Energy and Natural Resources › elecommunication Media and Technology › Health Care › Life cience › International and In olvency Litigation › Government ›

Arif Hyder Ali is the co-chair of Dechert's International Arbitration practice, which consists of some 50 partners and associates across the firm's 26 offices. He splits his time between the firm's Washington, D C and London offices He is also an Adjunct Professor of Law at Georgetown University, where he teaches international commercial and investment arbitration. From 2007 to 2012 he was an Honorary Lecturer and Global Faculty Member of the University of Dundee's Centre for Energy, Mining and Petroleum Law and Policy. In 2001, he was decorated with the Order of Bahrain (II) for his role in the esolution of Bahrain's maritime and territorial boundary dispute with Qatar before the International Court of Justice.

Mr Ali has served as lead trial counsel n international investment, commercial and construction arbitrations under many of the major international and regional arbitral regimes and covering a broad range of industries and economic activity, including foreign direct investment; privatization; the construction, operation and commercialization of thermal, nuclear, and hydro power plants; oil and gas pipeline construction and concession related matters; mining concessions; gas pricing disputes; natural resource exploitation projects and contracts; the development and operation of tourism and hospitality projects; project finance and development agreements; contract stabilization and renegotiation issues; patents and trademarks; Internet governance and top-level domains; and information technology-elated disputes He has represented parties from the United States, Canada, Central and South America, Europe, the Middle East, Africa, and across Asia.

Mr Ali is consistently rated as one of the world's leading international arbitration and public nternational law specialists by *Chambers and Partners*, *Legal 500*, *Global Arbitration Review*, *Who's Who in American Law*, *Who's Who in Public International Law*, T*he Legal Media Group's Guide to the World's Experts in Commercial Arbitration*, *Lawdragon*, *PLC Which Lawyer?*, *The International Who's Who of Business Lawyers*, *Washington Super Lawyers*, *The International Who's Who of Commercial Arbitration Lawyers* and *The Best Lawyers in America*.

e is praised by peers and clients as "*possessed of diamond pedigree*," a "*polished maestro in his field*," a *brilliant lawyer*," a "*great advocate*," and "*a very intelligent and knowledgeable international arbitration expert*" with "*extensive knowledge of complex arbitration issues*," and a "*pragmatic approach*." Clients say that he "*is a real pleasure to work with*," and note "*his knowledge of and sensitivity towards region-specific egal issues*," as well as "*his extensive knowledge in oil and gas, energy and mining matters* " He also draws particular acclaim for his "*unique case preparation methods, which are the best and most rigorous in the field*" (*Chambers & Partners – USA*: 2007, 2008, 2010, 2012; *Global*: 2011, 2012; *Latin America*: 2011, 2012) . n 2016, he was named MVPs of the Year by *Law 360* for his accomplishments in international arbitration He is noted as a Thought Leader in the 2019 Arbitration Guide of *Who's Who Legal*

Mr. Ali frequently sits as an arbitrator in a wide variety of international commercial, construction industrial and civil) and investor state disputes, involving the governing laws of different jurisdictions and under various institutional regimes.

As part of his dispute resolution practice, Mr Ali has also advised clients on risk mitigation and dispute avoidance strategies, and assisted clients in structuring resolutions to high-value and complex disputes orking with bankers, insurance companies, public relations specialists, and other areas of expertise, as ell as political advocacy.

He has taught at law faculties and spoken at more than a hundred conferences around the world on a ide range of topics in the fields of international arbitration, public international law, dispute avoidance and risk management, evidence in state investor and international commercial arbitration; globalization and international economic development; rule of law and international investment; and diversity and the practice of international law.

From 1993 to 1996, he was a section chief at the UN Compensation Commission, a special division of the UN Security Council, and from 2000 to 2001, he served as senior counsel at the World Intellectual Property Organization Arbitration and Mediation Center.

Mr. Ali's working languages are English, Spanish, French and Urdu. He is also conversant in Hindi, Bengali, and Portuguese. He is an avid Manchester United fan, cricket fanatic, secret poet, undeterred hef, and intrepid adventurer His love for the law is only surpassed by his love for his family

Client Reviews

Mr. Ali has received several awards for client service and results, including, on multiple occasions, the *nternational Law Office's Client Choice Award* for International Arbitration, based on client interviews, excerpts of which follow:

- *"Having consulted other leading international law firms with formidable arbitration teams and reputations, we were immediately impressed with Mr Ali's 'Outside of the Box' thinking and his uncanny ability to spot from the outset, potential argument angles that had been completely missed by the other firms "*
- *"In my initial consultation with Mr. Ali, he clearly stood out amongst his peers. His uptake of our circumstances was rapid, his questions cut to the quick and his conclusions and advice were concise I left the meeting with no doubt about my choice of representation."*
- *"Mr Ali has a thorough knowledge of international arbitration law which has obviously earned him great respect from his colleagues who rely on him; opposing counsel; and the arbitrators themselves, who obviously respect him."*
- *"Mr. Ali's preparation for hearings is thorough. He is demanding of himself and his colleagues and will not be outworked. Mr. Ali's anticipation of the opposing side's tactics is keenly intuitive."*
- *"Presentation skills during the proceedings are concise, eloquent and persuasive. Mr. Ali's focus and adaptability during the hearings is insightful. He thinks clearly on the run having the impressive ability to intake large volumes of information, boil that information down quickly, come to accurate conclusions and make moves on the fly "*
- *"Mr. Ali has an outstanding intellect evident in his ability to quickly absorb relevant technical and scientific information He combines his superior legal abilities and intellect with an unwavering commitment a willingness to give every drop of effort he has inside him."*

- *"Arif has an absolutely brilliant ability to rapidly understand the complexities of a business operation in the context of a contentious dispute, and to develop masterful strategies of advocacy that drive meaningful resolutions and advance the business objectives of the client. I never cease to be astounded by the facility with which he takes command of a seemingly overwhelming web of facts, witnesses, languages, and laws, and assembles it into an orderly and powerful narrative of advocacy This ability is the ultimate client service, because Arif engages with and appreciates the intricacies of our business practices, and he is able to articulate the critical connections between those practices and the laws and contractual relationships that govern them."*
- *"Equally important is Arif's ability to transcend cultural barriers, embracing and nurturing relationships with our associates around the world to foster the trust and open communication that is critical to successful international representation. His dedication to developing his own team of incredibly talented and diverse colleagues is another example of his instinct that inclusiveness is important both for the benefit of the young lawyers he mentors, but also to provide engaged and effective client service to a global company."*

Current Academic Research Projects

- Analysis and review of investment law-based consents.
- Application of the principle of good faith in international commercial and investment arbitration
- Application of the principle of adverse inferences in international commercial and investment arbitration

EXPERIENCE

EDUCATION

ADMISSIONS

LANGUAGES

MEMBERSHIPS

SPEAKING ENGAGEMENTS

VISIT THE BREXIT FOR BUSINESS HUB

Related Knowledge

Below are resources relating to **Arif Ali**

EVENT & WEBINAR

View All

LA MAISON DE L'AMÉRIQUE LATINE

APRIL 3, 2019
WEDNESDAY

The New Discovery of Latin America through International Arbitration

ONPOINTS & PUBLICATIONS

View All

MAY 15, 2020

COVID 19 Economic Crisis: Impending Sovereign Bond Disputes and the International Investment Protection System

NEWS

View All

OCTOBER 30, 2019

The International Arbitration Rulebook: A Guide to Arbitral Regimes

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Knowledge

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Publications

Events & Webinars

Case Studies

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Exhibit R-41

ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on ICANN (Internet Corporation for Assigned Names and Numbers)¹s website, unless there are exceptional circumstances requiring further redaction.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN (Internet Corporation for Assigned Names and Numbers)'s operational activities, and within ICANN (Internet Corporation for Assigned Names and Numbers)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN (Internet Corporation for Assigned Names and Numbers) makes available on its website as a matter of course.

Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at www.icann.org, numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – http://www.icann.org/en/about/annual-report (/en/about/annual-report)
- Articles of Incorporation – http://www.icann.org/en/about/governance/articles (/en/about/governance/articles)
- Board Meeting Transcripts, Minutes and Resolutions – http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings)
- Budget – http://www.icann.org/en/about/financials (/en/about/financials)
- Bylaws (current) – http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws)
- Bylaws (archives) – http://www.icann.org/en/about/governance/bylaws/archive (/en/about/governance/bylaws/archive)
- Correspondence – http://www.icann.org/correspondence/ (/correspondence/)
- Financial Information – http://www.icann.org/en/about/financials (/en/about/financials)
- Litigation documents – http://www.icann.org/en/news/litigation (/en/news/litigation)
- Major agreements – http://www.icann.org/en/about/agreements (/en/about/agreements)

- Monthly Registry reports – http://www.icann.org/en/resources/registries/reports (/en/resources/registries/reports)
- Operating Plan – http://www.icann.org/en/about/planning (/en/about/planning)
- Policy documents – http://www.icann.org/en/general/policy.html (/en/general/policy.html)
- Speeches, Presentations & Publications – http://www.icann.org/presentations (/presentations)
- Strategic Plan – http://www.icann.org/en/about/planning (/en/about/planning)
- Material information relating to the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) – http://aso.icann.org/docs (http://aso.icann.org/docs/) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) – http://gnso.icann.org (http://gnso.icann.org) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see http://gnso.icann.org/reference-documents.htm (http://gnso.icann.org/reference-documents.htm)), and council administration documents (see http://gnso.icann.org/council/docs.shtml (http://gnso.icann.org/council/docs.shtml)).
- Material information relating to the country code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) – http://ccnso.icann.org

(http://ccnso.icann.org) – including meeting agendas, minutes, reports, and presentations

- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – http://atlarge.icann.org (http://atlarge.icann.org) – including correspondence, statements, and meeting minutes

- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) – http://gac.icann.org/web/index.shtml (http://gac.icann.org/web/index.shtml) – including operating principles, gTLD (generic Top Level Domain) principles, ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD (generic Top Level Domain) Whois issues, communiqués, and meeting transcripts, and agendas

- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) – http://www.icann.org/en/groups/rssac (/en/groups/rssac) – including meeting minutes and information surrounding ongoing projects

- Material information relating to the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – http://www.icann.org/en/groups/ssac (/en/groups/ssac) – including its charter, various presentations, work plans, reports, and advisories

Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN (Internet Corporation for Assigned Names and Numbers) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN (Internet Corporation for Assigned Names and Numbers) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN

(Internet Corporation for Assigned Names and Numbers) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities

with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws).

DIDP Requests and Responses

Request submitted under the DIDP and ICANN (Internet Corporation for Assigned Names and Numbers) responses are available here: http://www.icann.org/en/about/transparency (/en/about/transparency)

Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings)) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm (/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm).

To submit a request, send an email to didp@icann.org (mailto:didp@icann.org)

Exhibit R-42

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 26 SEPTEMBER 2016

ACTIVE COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS[1]

Request Date	Requester	Subject Matter
17-Feb-2014	GCCIX, W.L.L.	.GCC
10-Dec-2014	SportAccord	.SPORTS
20-Jan-2015	Asia Green IT System Ltd.	.PERSIANGULF
20-Jan-2016	Donuts Inc.	.SPA
11-Jul-2016	American Institute of Certified Public Accountants (AICPA)	.CPA
17-Jul-2016	CPA Australia Ltd.	.CPA
2-Aug-2016	Donuts Inc. and Ruby Glen, LLC	.WEB
14-Sep-2016	DotMusic Limited	.MUSIC

[1] The Cooperative Engagement Process (CEP) is a process voluntarily invoked by a complainant prior to the filing of an Independent Review Process (IRP) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. (*See* Bylaws, Art. IV, §§ 3.14-3.17.) Cooperative engagement is expected to be between ICANN and the requesting party, without reference to outside counsel. The requesting party may invoke the CEP by providing written notice to ICANN, noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue. Further information regarding the CEP is available at: https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf.

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 26 SEPTEMBER 2016

RECENTLY CLOSED COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS

Request Date	Requester	Subject Matter	IRP Filing Deadline[2]
10-Dec-2014	World Rugby (formerly known as International Rugby Board)	.RUGBY	N/A (Withdrawn)

[2] The CEP process provides that "[i]f ICANN and the requester have not agreed to a resolution of the issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days." (https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf)

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 26 SEPTEMBER 2016

ACTIVE INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS[3]

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Status
5-Dec-2014	8-Dec-2014	Gulf Cooperation Council https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en	.PERSIANGULF	Panel Selection: Full panel was confirmed on 2 December 2015. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing took place on 7 July 2016; awaiting Final Declaration.
19-Mar-2015	24-Mar-2015	Dot Sport Limited https://www.icann.org/resources/pages/dot-sport-v-icann-2015-03-27-en	.SPORT	Panel Selection: Full Panel was confirmed on 3 September 2015. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing took place on 3 May 2016; awaiting Final Declaration.

[3] The Independent Review Process (IRP) is a process by which any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. (*See* Bylaws, Art. IV, § 3.) In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. Further information regarding the IRP is available at: https://www.icann.org/resources/pages/mechanisms-2014-03-20-en.

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 26 SEPTEMBER 2016

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Status
24-Mar-2015	7-Apr-2015	Corn Lake, LLC https://www.icann.org/resources/pages/corn-lake-v-icann-2015-04-07-en	.CHARITY	Panel Selection: Full Panel was confirmed on 17 September 2015. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing took place on 8 February 2016; awaiting Final Declaration.
15-Dec-2015	16-Dec-2015	Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en	.ISLAM .HALAL	Panel Selection: Full Panel was confirmed on 23 March 2016. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing scheduled for 17 October 2016 has been delayed; new date pending.
10-Feb-2016	10-Feb-2016	Commercial Connect, LLC https://www.icann.org/resources/pages/irp-commercial-connect-v-icann-2016-02-16-en	.SHOP	Panel Selection: Full Panel was confirmed on 28 July 2016. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Final hearing scheduled for 20 October 2016.

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 26 SEPTEMBER 2016

Date ICANN Received Notice of IRP	**Date IRP Commenced by ICDR**	**Requester**	**Subject Matter**	**Status**
1-Mar-2016	2-Mar-2016	Amazon EU S.à.r.l. https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en	.AMAZON	Panel Selection: Full Panel was confirmed on 23 September 2016. Materials: Written submissions, Declaration(s), and Scheduling Orders are posted here. Hearing(s): Second Administrative hearing scheduled for 30 September 2016.

COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSSES
STATUS UPDATE – 26 SEPTEMBER 2016

RECENTLY CLOSED INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requester	Subject Matter	Date IRP Closed	Date of Board Consideration of IRP Panel's Final Declaration[4]
21-Sep-2014	22-Sep-2014	Dot Registry, LLC https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en	.INC .LLC .LLP	29-Jul-2016	9-Aug-2016 (See here) 15-Sep-2016 (See here) 17-Sep-2016 (See here)

[4] Pursuant to Article IV, Section 3.21 of the ICANN Bylaws, "[w]here feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value." (https://www.icann.org/resources/pages/governance/bylaws-en#IV)

Exhibit R-43

Reconsideration Request

1. Requester Information

Name: **Afilias Limited**

Address: Contact Information Redacted

Email: Contact Information Redacted

Name: **BRS Media, Inc.**

Address: Contact Information Redacted

Email: Contact Information Redacted

Name: **Tin Dale, LLC**

Address: Contact Information Redacted

Email: Contact Informat on Redacted

Hereinafter collectively: the "Requesters".

2. Request for Reconsideration of (check one only):

___ Board action/inaction

x Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Requesters seek the reconsideration of ICANN's Community Priority Evaluation Panel's determination whereby Application ID 1-1083-39123 for the .RADIO gTLD (hereinafter: the "Application") submitted by the European Broadcasting Union (hereinafter: the "EBU") prevailed in Community Priority Evaluation. This determination was posted on ICANN's website under URL https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf (hereinafter: the "Determination").

As a result of this Determination, ICANN has:

- resolved the contention set for the .RADIO gTLD;
- changing the status of the Application to "In Contracting". Reference is made to the Application's status page, available at https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1468;
- changing the status of Requesters' respective applications for the .RADIO gTLD to "Will Not Proceed", as referred to their respective status pages available at https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1848; https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1508; and https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/624.

4. Date of action/inaction:

10 September 2014

5. On what date did you became aware of the action or that action would not be taken?

11 September 2014

6. Describe how you believe you are materially affected by the action or inaction:

Considering the fact that the Determination states that the EBU's Application prevailed in the context of Community Priority Evaluation, the Requesters' respective applications for the .RADIO gTLD will be no longer considered by ICANN, which will likely result in ICANN not awarding the .RADIO gTLD to any of the Requesters.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Requesters are of the opinion that, considering the fact that the community described in and targeted by the Application is too narrow and vague, third parties who have an affinity with the radio industry in general, including manufacturers of radio transmitters and receivers, telephony, video, radars, navigation and heating equipment, and many others directly or indirectly affiliated

with radio will be ineligible to register domain names in the .RADIO gTLD.

8. Detail of Board or Staff Action – Required Information

Provide the Required Detailed Explanation here:

In the context of ICANN's New gTLD Program, ICANN has received the following applications for the .RADIO gTLD:

- the EBU's application for a community-based gTLD (Application ID 1-1083-39123);
- Afilias Ltd.'s "standard" application (Application ID 1-868-75631);
- BRS Media, Inc.'s "standard" application (Application ID 1-994-75477);
- Tin Dale's "standard" application (Application ID 1-1593-8224).

On September 10, 2014, ICANN's Community Priority Evaluation panel published its Determination stating that the EBU's Application for the .RADIO gTLD obtained a passing score of 14 out of 16 points, and hence prevailed in Community Priority Evaluation.

Since Requesters are of the opinion that the publication of these Community Priority Evaluation results are considered to be an action by ICANN staff, they are entitled to invoke and utilize ICANN's Reconsideration Request process in relation to this Determination / action by ICANN staff.

The immediate effect of this Determination seems to be that each of the Requesters' applications for the .RADIO gTLD will no longer be considered by ICANN, given the fact that the status of each of their applications has been changed to "Will Not Proceed", as is reflected on their respective Application Status pages published by ICANN. Reference is made to:

- Afilias Ltd.'s application for the .RADIO gTLD: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1848;
- BRS Media, Inc's, application for the .RADIO gTLD: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1508;
- Tin Dale LLC's application for the .RADIO gTLD: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/624.

Requesters furthermore refer to their request submitted under ICANN's Documentary Information Disclosure Policy, attached hereto as Annex 1 and incorporated herein by reference.

According to the Determination:

- the Application met the Delineation requirement set out in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook;
- the Application met the Nexus and Uniqueness requirements set out in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook;
- the Application met the Registration Policies requirement set out in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook;
- the Application met the Opposition requirement set out in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook.

For the reasons set out below and any additional arguments to be developed by Requesters as a follow-up to this Reconsideration Request, Requesters are of the opinion that the Community Priority Evaluation Panel incorrectly applied the standards set out in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, and should not have awarded passing scores in the context of the Determination.

Requesters therefore request ICANN in accordance with its Reconsideration Request process to:

- reconsider the Determination, and in particular not award a passing score in view of the Community Priority Evaluation criteria set out in the Applicant Guidebook for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;
- reconsider the respective decisions by ICANN that each of the Requesters' applications for the .RADIO gTLD "Will Not Proceed" to contracting;
- restore the "Application Status" of the Requesters' applications and the Application submitted by the EBU to "Evaluation Complete", their respective "Contention Resolution Statuses" to "Active", and their "Contention Resolution Result" to "In Contention".

9. What are you asking ICANN to do now?

Based upon the information contained in the Application, Requests are convinced that the Application does not meet the criteria to qualify as a community-based gTLD set out in ICANN's Applicant Guidebook.

In view of obtaining further insights into the arguments of the Community Priority Evaluation panel and the information on which such panel has relied, Requesters

have submitted together with this Reconsideration Request and request to obtain further information under ICANN's Documentary Information Disclosure Policy.

Based upon the information and arguments included in this Reconsideration Request, for which the Requesters reserve the right to submit additional arguments and information following the outcome of their request submitted to ICANN in accordance with the Documentary Information Disclosure Policy, Requesters request ICANN to:

- acknowledge receipt of this Reconsideration Request;
- suspend the process for considering this Reconsideration Request in view of possible supplementary arguments and information to be provided by Requesters following receipt of ICANN's responses to Requesters' Request under ICANN's Documentary Information Disclosure Policy, attached hereto as Annex 1;
- in the meantime, suspend the process for awarding the .RADIO gTLD to the EBU;
- reverse the "Application Status" of the Requesters' applications and the Application submitted by the EBU to "Evaluation Complete", their respective "Contention Resolution Statuses" to "Active", and their "Contention Resolution Result" to "In Contention";
- ultimately, unless each of Requesters withdraw this Reconsideration Request or do not provide ICANN with additional information or arguments within a timeframe of 15 days following receipt of ICANN's responses to Requesters' request under ICANN's Documentary Information Disclosure Policy, reconsider the Determination and determine that the Application does not meet the required thresholds for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Each and every Requester is an applicant for the .RADIO gTLD.

Reference is made to ICANN's status page for each of the following applications:

- Afilias Ltd.: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1848;
- BRS Media, Inc.: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1508;
- Tin Dale, LLC: https://gtldresult.icann.org/application-

result/applicationstatus/applicationdetails/624.

Given the fact that due to the Determination, none of the Requesters' applications for the .RADIO gTLD will proceed to the contracting phase with ICANN, which will likely result in ICANN not awarding the .RADIO gTLD to any of the Requesters, it is clear that the Determination materially affects each of the Requesters' respective applications.

As a consequence, they have standing to file this Reconsideration Request in relation to the Determination by the Community Priority Evaluation, as well as ICANN's subsequent decision to change the status of each of the Requesters' applications from "In Contention" to "Will Not Proceed".

The grounds that support this request are the following:

1. Based on the information available to Requesters, the community definition contained in the Application does not meet the criteria for community-based gTLDs that have been set out in ICANN's Applicant Guidebook;

2. Based on the information available to Requesters, the Application does not meet the requirement of "Delineation" as set out in Section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook for the reasons stated herein, and should therefore not have been awarded a passing score by the Community Priority Evaluation panel in this respect.

   Reference is made to the arguments set out in Annex 1. Requesters reserve the right to provide ICANN with additional arguments following receipt of their responses to Requesters' request under ICANN's Documentary Information Disclosure Policy.

3. Based on the information available to Requesters, the Application does not meet the requirements of "Nexus" and "Uniqueness" as set out in Section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook for the reasons stated herein, and should therefore not have been awarded a passing score by the Community Priority Evaluation panel in this respect.

   In view of the Requesters, the concept "radio" is much broader than the so-called community definition provided by the EBU, as contained in the determination.

   Requesters refer to the fact that the Application does not cover the "radio" concept which is much broader than what has been set out in the Application. By way of example, Requesters refer to the description of all uses of the word "radio" listed by Wikipedia (see: http://en.wikipedia.org/wiki/Radio; and http://en.wikipedia.org/wiki/Radio_(disambiguation)).

4. Based on the information available to Requesters, the Application does

not meet the requirements of “Registration Policies” as set out in Section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook for the reasons stated herein, and should therefore not have been awarded a passing score by the Community Priority Evaluation panel in this respect.

According to the Requesters, the registration policies outlined in the Application, and in particular the eligibility and enforcement criteria set out in the Application do not meet the standards set out in the New gTLD Applicant Guidebook.

In particular, considering the fact that the eligibility criteria contained in the Application for registering domain names under the .RADIO gTLD as well as the community definition contained therein are contradictory, vague, and ill defined, this may result in:

- third parties who are affiliated with the “radio” concept, such as those who are active in the telephony, navigation, radar, video, heating, or other industries referred to – by way of example – Wikipedia will be unable to register domain names in the .RADIO gTLD because they do not meet the eligibility requirements set out in the Application, which seems to be mainly directed to the “radio industry”;
- others, such as but not limited to those who merely have the technical skills to set up and maintain a “plug and play” Internet radio software or service on his or her computer but who are not related to the “radio industry” or have no further affiliation with the “radio” concept at all, will be, according to the Application, eligible to register domain names in the .RADIO gTLD. Hence, these parties will have the ability to block or deprive those who are truly and genuinely affiliated to the broad concept of “radio” to register domain names in this gTLD …

Furthermore, Requesters are of the opinion that, given the fact that this definition and eligibility criteria are vague and contradictory, the effective enforcement of these criteria upon registrants and candidate registrants cannot be guaranteed by the EBU.

5. Based on the information available to Requesters, the Application does not meet the requirements of “Opposition” as set out in Section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook for the reasons stated herein, and should therefore not have been awarded a passing score by the Community Priority Evaluation panel in this respect.

   The fact that, in the Determination, the Community Priority Evaluation panel was of the opinion that the Requesters’ respective oppositions against the Application being recognized as a community-based gTLD and/or being considered to meet the thresholds set out in the Applicant

Guidebook for prevailing in the context of Community Priority Evaluation has been considered "of no relevance", considering the fact that Requesters operate a substantial part of the "radio"-related domain names in, for instance, .INFO, .ORG, .MOBI, .ASIA, .FM, .AM, and many others.[1]

Furthermore, bearing in mind the above, Requesters do not agree with the Community Priority Evaluation panel's Determination in which the Requesters collectively have been considered "a group of negligible size", and this for the reasons set out above.

Requesters refer to their request under the Documentary Information Disclosure Policy, attached hereto as Annex 1.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

x Yes

____ No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Yes. All of the Requesters are applicants for the .RADIO gTLD who are directly affected by the Determination, which – ultimately – would cause irreparable harm to Requesters if such Determination would be final.

However, Requesters acknowledge that, most likely and ultimately, only one of the Requesters or the EBU will become the Registry Operator for the .RADIO gTLD.

Do you have any documents you want to provide to ICANN?

See Annex 1: Requesters' Request under ICANN's Documentary Information Disclosure Policy (DIDP).

Pending Requesters' request under the Documentary Information Disclosure Policy, Requesters are not providing any additional documents to ICANN, but reserve the right to do so as a follow-up to this Reconsideration Request or in the context of one or more new Reconsideration Requests. Requesters recognize and acknowledge that any such additional Reconsideration Requests may be

[1] Based on the zone file information for each of these TLDs, the "radio"-related domain names registered in these TLDs seem to account for about half of the number of the 50.000 "websites" referred to in the EBU's Application.

consolidated by the Board Governance Committee.

Terms and Conditions for Submission of Reconsideration Requests

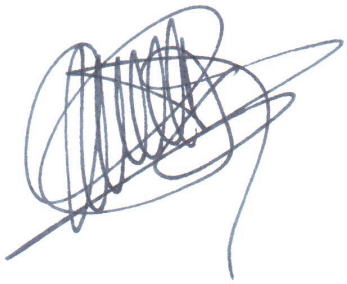
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requesters may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



26 September 2014

_____ _____

Bart Lieben Date

Annex 1: Request under ICANN's Documentary Information Disclosure Policy (DIDP)

Legal Authority R-LA-4

295 F.2d 21
United States Court of Appeals
Ninth Circuit.

ATKINS, KROLL
(GUAM), LTD., Appellant,
v.
Julio R. CABRERA, Appellee.

No. 17072.
|
Sept. 26, 1961.

Synopsis

An automobile raffle winner, who was unable to obtain delivery of the automobile, brought an action for damages against veterans' organization, which conducted the raffle, an automobile dealer, which had contracted to sell an automobile to the organization, and others. The United States District Court of Guam, Territory of Guam, Eugene R. Gilmartin, J., rendered a judgment for the winner against the automobile dealer, and the automobile dealer appealed. The Court of Appeals, Hamley, Hamley, Circuit Judge, held that the dealer was not estopped from asserting its title to the automobile merely because the dealer permitted the organization to take possession of the automobile and display it at various places to induce the sale of raffle tickets, where the winner did not rely on any act by the dealer when the winner purchased the raffle ticket.

Judgment reversed.

West Headnotes (2)

[1] **Estoppel** Reliance on Adverse Party

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k55 Reliance on Adverse Party

Reliance is essential element of equitable estoppel. Code Civ.Proc. Guam, § 1962, subd. 3.

2 Cases that cite this headnote

[2] **Estoppel** Reliance on Adverse Party

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k55 Reliance on Adverse Party

Automobile dealer was not estopped from asserting its title to automobile against winner of automobile raffle conducted by veterans' organization merely because dealer permitted organization to take possession of automobile and display it at various places to induce purchase of raffle tickets, where winner did not rely on any act by dealer when winner purchased raffle ticket. Penal Code Guam, §§ 324, 325; Code Civ.Proc. Guam, § 1962, subd. 3.

1 Cases that cite this headnote

Attorneys and Law Firms

***21** W. Scott Barrett, San Francisco, Cal., and Spiegel, Turner, Barrett & Ferenz, Agana, Guam, for appellant.

Arriola, Bohn & Gayle, and J. C. Arriola, Agana, Guam, and John A. Bohn and Charles J. Williams, Benecia, Cal., for appellee.

Before ORR, HAMLEY and HAMLIN, Circuit Judges.

Opinion

HAMLEY, Circuit Judge.

Julio R. Cabrera, winner of a raffle for an automobile, was unable to obtain delivery of the prize, so brought this action for damages in the District Court of Guam.[1] Three claims were ***22** stated in the second amended complaint. The first was against the American Legion and Ernie Pyle Post No. 37 (Guam) of the American Legion, which conducted the raffle. The second was against Ernie Pyle Post No. 37 and fifty 'John Doe' members thereof. The third was against Atkins, Kroll (Guam), Ltd., an automobile dealer which had entered into a contract to sell an automobile to the post and had given the latter possession of the automobile for purposes of display.

[1] That court had jurisdiction under 48 U.S.C.A. § 1424.

It was agreed between Cabrera and Atkins, Kroll that the third claim should be tried separately and ahead of the other claims, and an order to that effect was entered. Pretrial proceedings were had with regard to that claim, leading to the entry of a pretrial order. The parties therein stipulated that this claim should be tried by the court on agreed facts set out in that order. They further agreed that the sole question before the court was as to whether Atkins, Kroll was estopped from denying that the post was authorized by Atkins, Kroll to hold itself out as the owner of the automobile so that title and possession should have been transferred to Cabrera as the holder of the winning ticket.

Concluding that on the agreed facts Atkins, Kroll is estopped from asserting its title against Cabrera, the court entered judgment for plaintiff. The company appealed.

We had jurisdiction under 28 U.S.C.A. § 1291. However, we dismissed the appeal because of partial non-compliance with Rule 54(b), Federal Rules of Civil Procedure, 28 U.S.C.A. Atkins, Kroll (Guam), Ltd. v. Cabrera, 9 Cir., 277 F.2d 922. Upon remand the district court completed compliance with Rule 54(b) by making an express determination that there was no just reason for delay in taking the appeal. The instant appeal was then taken.

The agreed facts as set out in the pretrial order may be briefly stated. Officers of Ernie Pyle Post No. 37 desired to conduct a fair and raffle, and in accordance with Guam law obtained permission for conducting such a raffle.[2] Desiring to offer a 1957 Chevrolet automobile as the grand prize at the raffle, officers of the post in March 1957 contacted Atkins, Kroll, the Chevrolet automobile dealer in Guam. The company agreed to sell such an automobile to the post, and the post agreed to buy the automobile for a purchase price of

$2,801.25, which amount was the reasonable value of the automobile.

[2] This was done pursuant to Guam Penal Code §§ 324, 325, which provide that when approved by the governor a lottery may be held for 'a charitable or worthy public cause,' in which event the penal provisions making it a misdemeanor to conduct a lottery do not apply.

Ernie Pyle Post No. 37 made no payment upon the purchase price to Atkins, Kroll, nor did not company deliver to the post any certificate of title. The company, however, permitted the post to take possession of the automobile and to display it on a flat-bed truck at various places throughout Guam for the purpose of inducing the sale of raffle tickets. A sign accompanied the automobile, which read: 'Ernie Pyle Post No. 37, Fourth Annual Fair and Raffle, Grand Prize, 1957 4-Door Chevrolet.'

Cabrera purchased raffle ticket No. 08126 for the sum of one dollar. He had no knowledge that title to the automobile had not been transferred from Atkins, Kroll to the post. The raffle was held about June 1, 1957, and Cabrera was the holder of the winning ticket.

After the raffle Atkins, Kroll demanded possession of the automobile from the post, or payment therefor. Payment was not made and the company took possession of the automobile. Cabrera made demand upon the post for possession of the automobile, but since it had been repossessed the post could not honor the demand. Cabrera then made demand upon Atkins, Kroll for possession of the automobile, but the company refused the demand and likewise refused to pay Cabrera the reasonable value of the car.

On this appeal the company advances several arguments for versal. One of ***23** these is that under the stipulated facts it is not shown that Cabrera relied upon any conduct by Atkins, Kroll, and that without such a showing an equitable estoppel, which is the basis of the claim, was not established.

[1] Cabrera concedes, as of course he must, that reliance is an essential element of equitable estoppel. The doctrine of estoppel is provided for and governed by Guam Code of Civil Procedure, § 1962 subd. 3, which was taken from and is identical with California Code of Civil Procedure, § 1962, subd. 3.[3] As therein stated, it must be shown that the person claiming the estoppel was led to believe a particular thing true and that he acted on such belief. Making reference to the identical California statute, the court in Benson v. Andrews, 138 Cal.App.2d 123, 292 P.2d 39, 48, listed the four principal elements of equitable estoppel, the fourth element being that the party claiming the estoppel 'must rely upon that conduct to his prejudice or injury.'

[3] Guam Code of Civil Procedure, § 1962, subd. 3 reads as follows :
'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.'

Cabrera argues, however, that the conclusion that he purchased the raffle ticket in reliance upon the acts of Atkins, Kroll is warranted in view of the agreed facts recited above. [4]

[4] The trial court actually entered no finding or conclusion to the effect that Cabrera purchased his raffle ticket in reliance upon any act by the company.

[2] We disagree. Reliance is a question of fact. There is no agreed fact to the effect that Cabrera relied upon any act by Adkins, Kroll. Nor is there any agreed fact from which reliance reasonably could be inferred. The company gave the post possession of the automobile for purposes of display in connection with the raffle, and it was so displayed. But it was not stipulated that Cabrera had ever seen the displayed car prior to the time he purchased the ticket, or that he had been told prior thereto that such a car was on display. The fact that after the drawing Cabrera made demand upon the post and Atkins, Kroll for possession of the car has no tendency to show that in purchasing the ticket he relied upon any act by the company.

Cabrera makes reference in his brief to a statement contained in his deposition to the effect that he saw the automobile displayed at several places on the island. This, however, is not one of the agreed facts and may not be taken into consideration. But even if it were considered it would be to no avail, since Cabrera did not state in his deposition that he saw the automobile before he purchased his ticket or that he relied upon any act by the company in making the purchase.

We conclude that under the agreed facts there was not shown to be present the element of reliance essential in establishing equitable estoppel. The judgment based solely on that theory therefore cannot stand. It is not necessary for us to consider appellant's additional contentions. [5]

[5] These additional contentions include the following: (1) The winner of a raffle, even when the raffle is conducted legally, has no judicially enforceable remedy; (2) the doctrine of equitable estoppel is applied only as between two equally innocent parties who have parted with approximately equal value, which is not the fact here; (3) equitable estoppel may operate as a shield but never as a sword to create a new right or give a cause of action; and (4) in a title registration jurisdiction such as Guam, mere possession alone without a transfer of some indicia of ownership is insufficient to estop the true owner as against a bona fide purchaser.

The judgment is reversed.

All Citations

295 F.2d 21

Legal Authority R-LA-5

178 Cal.App.4th 1020
Court of Appeal, Sixth District, California.

BERG & BERG ENTERPRISES, LLC, Plaintiff and Appellant,
v.
John BOYLE et al., Defendants and Respondents.

No. H031591.
|
Oct. 29, 2009.
|
Rehearing Denied Nov. 24, 2009.
|
Review Denied Feb. 3, 2010.

Synopsis

Background: Creditor of insolvent corporation brought breach of fiduciary duty action against the individual members of corporation's board of directors. The Santa Clara County Superior Court, No. CV044686, Neal Cabrinha, J., sustained directors' demurrers to creditor's third amended complaint without leave to amend, and creditor appealed.

Holdings: The Court of Appeal, Duffy, J., held that:

[1] California did not recognize a broad fiduciary duty that directors of an insolvent corporation owed creditors solely because of a state of insolvency;

[2] directors did not breach fiduciary duties owed to creditors under the trust-fund doctrine by effecting an assignment for the benefit of creditors, rather than investigating a bankruptcy;

[3] even if creditor pled a cognizable breach of fiduciary duty claim, directors' actions were immune from liability under the business judgment rule; and

[4] trial court did not abuse its discretion by sustained demurrers without leave to amend.

Affirmed.

See also 131 Cal.App.4th 802, 32 Cal.Rptr.3d 325.

West Headnotes (40)

[1] Corporations and Business Organizations Nature and Form of Remedy

101 Corporations and Business Organizations
101VIII Derivative Actions; Suing or Defending on Behalf of Corporation
101VIII(A) In General
101k2022 Nature and Form of Remedy
101k2023 In general
(Formerly 101k207.5)

An action is "derivative," that is, in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation

or to prevent the dissipation of its assets.

2 Cases that cite this headnote

[2] **Corporations and Business Organizations** Nature and form

Corporations and Business Organizations By Creditors

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1996 Actions to Enforce Liability
101k1998 Nature and form
(Formerly 101k351)
101 Corporations and Business Organizations
101VIII Derivative Actions; Suing or Defending on Behalf of Corporation
101VIII(E) Derivative Actions by Persons Other Than Shareholders
101k2233 By Creditors
101k2234 In general
(Formerly 101k202)

In contrast to a derivative claim, a creditor's individual or "direct" claim is one for which the creditor does not seek to recover on behalf of the corporation for injury done to it; the injury need not be different from that suffered by a class of shareholders or be unique to the plaintiff, and it still may affect a substantial number of shareholders or creditors, but the direct claim is simply one that reflects an injury that is not incidental to an injury to the corporation as a whole.

2 Cases that cite this headnote

[3] **Pleading** Nature and office of demurrer, and pleadings demurrable

Pleading Hearing and Determination on Demurrer

302 Pleading
302V Demurrer or Exception
302k189 Nature and office of demurrer, and pleadings demurrable
302 Pleading
302V Demurrer or Exception
302k218 Hearing and Determination on Demurrer
302k218(1) In general

A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law.

7 Cases that cite this headnote

[4] **Appeal and Error** Objections and exceptions; demurrer

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)4 Pleading
30k3279 Objections and exceptions; demurrer
(Formerly 30k893(1))

The standard of review on appeal of an order sustaining a demurrer is de novo.

4 Cases that cite this headnote

[5] **Pleading** Facts well pleaded

Pleading Inferences and conclusions of fact

Pleading Conclusions of law and construction of written instruments

302 Pleading
302V Demurrer or Exception
302k214 Admissions by Demurrer
302k214(2) Facts well pleaded
302 Pleading
302V Demurrer or Exception
302k214 Admissions by Demurrer

302k214(4) Inferences and conclusions of fact
302 Pleading
302V Demurrer or Exception
302k214 Admissions by Demurrer
302k214(5) Conclusions of law and construction of written instruments

Courts treat a demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.

10 Cases that cite this headnote

[6] Pleading Scope of Inquiry and Matters Considered on Demurrer in General

302 Pleading
302V Demurrer or Exception
302k216 Scope of Inquiry and Matters Considered on Demurrer in General
302k216(1) In general

On a demurrer courts consider matters which may be judicially noticed.

4 Cases that cite this headnote

[7] Pleading Process, pleadings, and other documents

302 Pleading
302V Demurrer or Exception
302k216 Scope of Inquiry and Matters Considered on Demurrer in General
302k216(2) Process, pleadings, and other documents

On a demurrer courts give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.

3 Cases that cite this headnote

[8] Appeal and Error Objections and exceptions; demurrer

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)4 Pleading
30k3279 Objections and exceptions; demurrer (Formerly 30k863)

When a demurrer is sustained, the Court of Appeal determines whether the complaint states facts sufficient to constitute a cause of action.

11 Cases that cite this headnote

[9] Pleading Demurrer to amended pleading

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k254 Demurrer to amended pleading

When a demurrer is to an amended complaint, a court may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading.

21 Cases that cite this headnote

[10] Pleading Nature and office of demurrer, and pleadings demurrable

Pleading Scope of Inquiry and Matters Considered on Demurrer in General

302 Pleading
302V Demurrer or Exception
302k189 Nature and office of demurrer, and pleadings demurrable

302 Pleading
302V Demurrer or Exception
302k216 Scope of Inquiry and Matters Considered on Demurrer in General
302k216(1) In general

It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct; a demurrer tests only the legal sufficiency of the pleading.

[11] Pleading Facts well pleaded

302 Pleading
302V Demurrer or Exception
302k214 Admissions by Demurrer
302k214(2) Facts well pleaded

In considering the merits of a demurrer, the facts alleged in the pleading are deemed to be true, however improbable they may be.

5 Cases that cite this headnote

[12] Appeal and Error Pleadings

30 Appeal and Error
30XVI Review
30XVI(H) Theory and Grounds of Decision Below and on Review
30k4065 Particular Orders or Rulings Below, Theory and Grounds Supporting
30k4068 Pleadings
(Formerly 30k852)

The Court of Appeal will affirm a trial court's decision to sustain a demurrer if it was correct on any theory.

9 Cases that cite this headnote

[13] Appeal and Error Pleadings

30 Appeal and Error
30XVI Review
30XVI(H) Theory and Grounds of Decision Below and on Review
30k4065 Particular Orders or Rulings Below, Theory and Grounds Supporting
30k4068 Pleadings
(Formerly 30k854(3))

In an appeal of an order sustaining a demurrer, the Court of Appeal does not review the validity of the trial court's reasoning but only the propriety of the ruling itself.

10 Cases that cite this headnote

[14] Appeal and Error Objections and exceptions; demurrer

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)4 Pleading
30k3279 Objections and exceptions; demurrer
(Formerly 30k960(1))

Where a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend.

26 Cases that cite this headnote

[15] Appeal and Error Objections and exceptions; demurrer

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3892 Pleading
30k3895 Objections and exceptions; demurrer

(Formerly 30k901)

A plaintiff appealing a demurrer sustained without leave to amend bears the burden of establishing that it could have amended the complaint to cure the defect.

24 Cases that cite this headnote

[16] Pleading Amendment or Further Pleading After Demurrer Sustained

Pleading Demurrer to amended pleading

302 Pleading
302V Demurrer or Exception
302k219 Operation and Effect of Decision on Demurrer
302k225 Amendment or Further Pleading After Demurrer Sustained
302k225(1) In general
302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k254 Demurrer to amended pleading

When a plaintiff files an amended pleading in response to an order sustaining a prior demurrer to a cause of action with leave to amend, the amended cause of action is treated as a new pleading and a defendant is free to respond to it by demurrer on any ground.

5 Cases that cite this headnote

[17] Corporations and Business Organizations Pleading

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1996 Actions to Enforce Liability
101k2007 Pleading
101k2007(1) In general
(Formerly 101k360(3))

Individual members of insolvent corporation's board of directors were free to respond in their demurrers on any ground to creditor's third amended complaint alleging breach of fiduciary duty, including whether the complaint alleged a viable cause of action, though trial court sustained prior demurrers on the ground that creditor's superseded complaints were barred by the business judgment rule and a defendant could not demur to portions of an amended complaint as to which a prior demurrer was overruled, where all of creditor's complaints asserted only one cause of action, which was breach of fiduciary duty, and all of the prior demurrers to that cause of action were sustained. West's Ann.Cal.C.C.P. § 1008.

7 Cases that cite this headnote

[18] Corporations and Business Organizations Fiduciary nature of relation

Corporations and Business Organizations Fiduciary Duties as to Management of Corporate Affairs in General

Corporations and Business Organizations Good faith

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1811 Fiduciary nature of relation
(Formerly 101k307)

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1841 In general
(Formerly 101k310(1))
101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1844 Good faith
(Formerly 101k307)

Corporate directors owe a fiduciary duty to the corporation and its shareholders, and must serve in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders. West's Ann.Cal.Corp.Code § 309.

15 Cases that cite this headnote

[19] Corporations and Business Organizations Trust fund doctrine

Corporations and Business Organizations Trust fund doctrine

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1994 Trust fund doctrine
(Formerly 101k349)
101 Corporations and Business Organizations
101XI Insolvency and Receivers
101XI(B) Fraudulent Conveyances and Preferences
101k2849 Preferences to Creditors in General
101k2851 Trust fund doctrine
(Formerly 101k544(2))

Recovery for breaching fiduciary duties imposed under the "trust-fund doctrine," under which all of the assets of a corporation immediately upon becoming insolvent become a trust fund for the benefit of all creditors, generally pertains to cases where the directors or officers of an insolvent corporation have diverted assets of the corporation for the benefit of insiders or preferred creditors.

11 Cases that cite this headnote

[20] Corporations and Business Organizations Trust fund doctrine

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1994 Trust fund doctrine
(Formerly 101k349)

The scope of the "trust-fund doctrine," under which all of the assets of a corporation immediately upon becoming insolvent become a trust fund for the benefit of all creditors, is reasonably limited to cases where directors or officers have diverted, dissipated, or unduly risked the insolvent corporation's assets.

12 Cases that cite this headnote

[21] Corporations and Business Organizations Trust fund doctrine

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1994 Trust fund doctrine
(Formerly 101k349)

The trust-fund doctrine is not applied to create a duty owed by directors to creditors solely due to a state of corporate insolvency.

4 Cases that cite this headnote

[22] Corporations and Business Organizations Trust fund doctrine

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1994 Trust fund doctrine
(Formerly 101k349)

Application of the trust-fund doctrine requires that corporate directors have engaged in conduct that diverted, dissipated, or unduly risked corporate assets that might otherwise have been used to satisfy creditors' claims.

12 Cases that cite this headnote

[23] Corporations and Business Organizations Fiduciary duty to creditors in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1993 Fiduciary duty to creditors in general
(Formerly 101k349)

Under California law there is no broad, paramount fiduciary duty of due care or loyalty that directors of an insolvent corporation owe the corporation's creditors solely because of a state of insolvency.

20 Cases that cite this headnote

[24] Corporations and Business Organizations Trust fund doctrine

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1994 Trust fund doctrine
(Formerly 101k349)

The scope of any extra-contractual duty owed by corporate directors to an insolvent corporation's creditors is limited in California, consistently with the trust-fund doctrine, to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors claims.

24 Cases that cite this headnote

[25] Corporations and Business Organizations Fiduciary duty to creditors in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation

101k1993 Fiduciary duty to creditors in general
(Formerly 101k349)

There is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in the "zone" or "vicinity" of insolvency.

8 Cases that cite this headnote

[26] Corporations and Business Organizations Fiduciary duty to creditors in general

Corporations and Business Organizations Trust fund doctrine

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1993 Fiduciary duty to creditors in general
(Formerly 101k349)
101 Corporations and Business Organizations
101XI Insolvency and Receivers
101XI(B) Fraudulent Conveyances and Preferences
101k2849 Preferences to Creditors in General
101k2851 Trust fund doctrine
(Formerly 101k544(2))

Individual members of insolvent corporation's board of directors did not breach fiduciary duties owed to corporation's creditors under the trust-fund doctrine by effecting an assignment for the benefit of creditors, rather than investigating, exploring or pursuing a bankruptcy through which corporation's largest creditor claimed corporation could have maximized the value of corporation's accumulated net operating losses, as directors did not engage in self-dealing or prohibited preferential treatment of creditors, or divert, dissipate or unduly risk assets that were otherwise available to pay creditors.

See Annot., Right of corporation to prefer creditors (1922) 19 A.L.R. 320; Cal. Jur. 3d, Creditors' Rights and Remedies, § 260; 3 Cal. Transactions Forms, Business Transactions, § 16:42 (Thomson Reuters 2009); 8 Witkin, Cal. Procedure (5th ed. 2008) Enforcement of Judgment, § 505.

5 Cases that cite this headnote

[27] Pleading Amendment of Declaration, Complaint, Petition, or Statement

Pleading Abandonment or supersedure of prior pleading

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k242.1 In general
302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k252 Operation and Effect in General
302k252(2) Abandonment or supersedure of prior pleading

Under the sham-pleading doctrine, admissions in an original complaint that has been superseded by an amended pleading remain within the

court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted.

8 Cases that cite this headnote

[28] Corporations and Business Organizations Fiduciary duty to creditors in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1991 Insolvency, Dissolution or Forfeiture of Charter of Corporation
101k1993 Fiduciary duty to creditors in general (Formerly 101k349)

Even if corporation's largest creditor otherwise pled a cognizable claim for breach of fiduciary duty against individual members of insolvent corporation's board of directors for effecting an assignment for the benefit of creditors rather than investigating, exploring or pursuing a bankruptcy through which such creditor claimed corporation could have maximized the value of corporation's accumulated net operating losses, directors were immune from liability from the breach of fiduciary duty claim under the business judgment rule, as directors were not obligated to pursue speculative, contingent and potentially risky and costly alternatives to the assignment simply in order to facilitate creditor's plan. West's Ann.Cal.Corp.Code § 309.

[29] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general (Formerly 101k310(1))

The common law business judgment rule has two components, one which immunizes directors from personal liability if they act in accordance with its requirements, and the second which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest, and only the first component is embodied in business judgment statute. West's Ann.Cal.Corp.Code § 309.

8 Cases that cite this headnote

[30] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general (Formerly 101k310(1))

The broader common law business judgment rule, which insulates

from court intervention management decisions made by directors in good faith in what the directors believe is in the corporation's best interest, is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. West's Ann.Cal.Corp.Code § 309.

16 Cases that cite this headnote

[31] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general (Formerly 101k310(1))

The broader common law business judgment rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. West's Ann.Cal.Corp.Code § 309.

3 Cases that cite this headnote

[32] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general (Formerly 101k310(1))

The broader common law business judgment rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. West's Ann.Cal.Corp.Code § 309.

19 Cases that cite this headnote

[33] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general (Formerly 101k310(1))

A hallmark of the common law business judgment rule is that a court will not substitute its judgment for that of the corporation's board if the latter's decision can be attributed to any rational business purpose. West's Ann.Cal.Corp.Code § 309.

1 Cases that cite this headnote

[34] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general
(Formerly 101k310(1))

An exception to the presumption afforded by the business judgment rule, that decisions by a corporation's directors are based on sound business judgment, exists in circumstances which inherently raise an inference of conflict of interest, and the rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. West's Ann.Cal.Corp.Code § 309.

9 Cases that cite this headnote

[35] Corporations and Business Organizations Pleading

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1906 Actions by or Against Directors, Officers, or Agents in General
101k1909 Pleading
(Formerly 101k320(7), 101k319(6))

In order to plead an exception to the presumption under the business judgment rule that a decision by a corporation's directors was based on sound business judgment, a plaintiff must allege sufficient facts to establish these exceptions, and conclusory allegations of improper motives and conflict of interest are insufficient. West's Ann.Cal.Corp.Code § 309.

7 Cases that cite this headnote

[36] Corporations and Business Organizations Pleading

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1906 Actions by or Against Directors, Officers, or Agents in General
101k1909 Pleading
(Formerly 101k320(7), 101k319(6))

In order to plead an exception to the presumption under the business judgment rule that a decision by a corporation's directors was based on sound business judgment, it is not sufficient to generally allege the failure to conduct an active investigation, in the absence of allegations of facts which would reasonably call for such an investigation, or allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment. West's Ann.Cal.Corp.Code § 309.

8 Cases that cite this headnote

[37] Corporations and Business Organizations Pleading

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1906 Actions by or Against Directors, Officers, or Agents in General
101k1909 Pleading
(Formerly 101k320(7), 101k319(6))

In most cases, the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts on the part of the corporation's directors. West's Ann.Cal.Corp.Code § 309.

7 Cases that cite this headnote

[38] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general
(Formerly 101k310(1))

Interference with the discretion of corporate directors is not warranted in doubtful cases.

1 Cases that cite this headnote

[39] Corporations and Business Organizations Pleading

Corporations and Business Organizations Trial and judgment

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1906 Actions by or Against Directors, Officers, or Agents in General
101k1909 Pleading
(Formerly 101k320(9), 101k319(6))
101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1906 Actions by or Against Directors, Officers, or Agents in General
101k1911 Trial and judgment
(Formerly 101k320(9))

The failure in an action against corporate directors to sufficiently plead facts to rebut the business judgment rule or establish its exceptions may be raised on demurrer, as whether sufficient facts have been so pleaded is a question of law.

4 Cases that cite this headnote

[40] Corporations and Business Organizations Pleading

Corporations and Business Organizations Preferences

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1996 Actions to Enforce Liability
101k2007 Pleading
101k2007(1) In general
(Formerly 101k360(3))
101 Corporations and Business Organizations
101XI Insolvency and Receivers
101XI(C) Creditors' Remedies in General
101k2888 Assignment for Benefit of Creditors

101k2893 Preferences
(Formerly 101k544(1))

Trial court did not abuse its discretion by sustaining directors' demurrers to third amended complaint of corporation's creditor without leave to amend, in creditor's action alleging that the members of corporation's board breached their fiduciary duties under the trust-fund doctrine by effecting an assignment for the benefit of creditors rather than investigating, exploring or pursuing a bankruptcy through which such creditor claimed corporation could have maximized the value of corporation's accumulated net operating losses, as creditor did not allege new facts that would cure the complaint's defects; wage and severance claims that directors allegedly paid just before the assignment were generally entitled to preference under an assignment or a bankruptcy and would not have constituted the diversion or dissipation of assets, and alleged unscrupulous conduct of assignee in wasting assets occurred after directors no longer were managing corporation's affairs. 11 U.S.C.A. § 507(a)(4); West's Ann.Cal.C.C.P. § 1204 .

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

DUFFY, J.

***1024** Appellant Berg & Berg Enterprises, LLC, the largest creditor of the failed Pluris, Inc., challenges the trial court's sustaining, without leave to amend, respondents' demurrers to Berg's third amended complaint. Respondents were individual members of Pluris's board of directors. After ***1025** they challenged Berg's prior pleadings by successful demurrers and an anti-SLAPP motion, Berg's operative pleading alleged a single cause of action for breach of fiduciary duty. Pluris had experienced financial difficulties and had as a result entered into an assignment for the benefit of creditors under Code of Civil Procedure sections 493.010 and 1802.[1] The thrust of Berg's claim, as finally pleaded, was that the individual directors owed a fiduciary duty to Berg and other Pluris creditors on whose behalf Berg is purportedly proceeding. The duty allegedly arose when Pluris either became insolvent or entered into the "zone of insolvency" at some point before the

assignment. The directors allegedly breached that duty by electing to make the assignment, thereby extinguishing Berg's plan to use the corporation's alleged $50 ****881** million of net operating losses through a chapter 11 bankruptcy reorganization that, according to Berg, would have benefitted it and the other creditors by deriving value from the losses. Berg alleged that the directors had failed to conduct a reasonable investigation into its proposed plan before proceeding with the assignment and had they investigated, they would have seen that pursuing Berg's bankruptcy plan was the only viable way to protect, and thereby satisfy their fiduciary duty to, Pluris's creditors. [2]

[1] An assignment for the benefit of creditors is a recognized but less than comprehensive statutory procedure that is an alternative to liquidation in bankruptcy. (Code Civ. Proc., §§ 493.010 & 1802; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 829, fn. 13, 32 Cal.Rptr.3d 325; *Sherwood Partners, Inc. v. EOP–Marina Business Center, L.L.C.* (2007) 153 Cal.App.4th 977, 981–982, 62 Cal.Rptr.3d 896; 1 Witkin, Summary of Cal. Law (10th Ed.2005) Contracts, §§ 710 & 711, pp. 795–798.)

[2] In a previous separate but related action, Berg also sued the assignee for the benefit of creditors, Sherwood Partners, Inc., and its counsel, SulmeyerKupetz, alleging, among other claims, an attorney-client conspiracy to deplete Pluris's assets by generating and paying from them unconscionable attorney fees. Concluding that Berg had failed to plead a viable conspiracy claim against a party and its lawyers and further that the assignee's counsel owed no independent fiduciary duty to Pluris's creditors, we rejected Berg's claims in *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., supra,* 131 Cal.App.4th 802, 32 Cal.Rptr.3d 325. On remand, the case apparently settled, with Sherwood assigning whatever claims it had against the individual Pluris directors to Berg, or so Berg alleged below. We express no opinion on the validity of any such assignment and we need not do so in light of our opinion.

We conclude that Berg failed to plead a cognizable claim for breach of fiduciary duty against the individual directors. And even if a cognizable claim had been alleged, on the pleaded facts the business judgment rule insulated the directors from personal liability on the alleged claims for breach of fiduciary duty as a matter of law. We accordingly affirm the judgment of dismissal.

***1026** STATEMENT OF THE CASE

I. *Prior Pleadings and the Trial Court's Rulings on Challenges Thereto* [3]

[3] While only the third amended complaint as the operative pleading is directly relevant to our review of the judgment, we briefly discuss the pleading history as certain prior

> allegations and court rulings bear on the issues pertinent to that review. We more thoroughly relay the pleaded background facts in conjunction with our discussion of the third amended complaint.

Berg's initial complaint, on which it proceeded directly on its sole behalf (as opposed to derivatively), named as defendants the respondents here—John Boyle, David Britts, Tony Daffer, Barry Eggers, Diana Everett, John Gerdelman, Cliff Higgerson, Joseph Kennedy, and Bob Williams—all members of Pluris's board of directors at some point. The pleading alleged a single cause of action for breach of fiduciary duty. Underlying the claim was the allegation that at all relevant times, Pluris was operating "in a zone of insolvency" during which its board of directors owed its creditors a fiduciary duty. This alleged duty included "the obligation not just to protect the assets of PLURIS but to affirmatively examine a range of possible courses of action to maximize the value of its remaining assets, not merely to take the course of action most expedient to [the individual directors] and make an Assignment [for the benefit of creditors]." This duty was alleged to have been primarily breached by the directors' having "fail[ed] to explore whether BERG's proposed reorganization [in bankruptcy] would or might have yielded greater assets [than the assignment] for [Pluris's] creditors."

The pleading also alleged as background that some six months before the assignment for the benefit of creditors in July 2002, Pluris and a Berg-related entity had entered into a settlement that liquidated and partially secured what came to be Berg's claim by assignment, and allowed Pluris to seek additional outside financing. In conjunction with the settlement, Berg's ****882** principal, Carl Berg, allegedly informed the Pluris directors that if the financing effort failed, Berg "would want to explore ways to derive value from PLURIS beyond the obvious hard and soft assets, including the possibility of obtaining value from the millions of dollars in net operating losses ... PLURIS ha[d] accumulated. To obtain that value, PLURIS would need to be reorganized under the bankruptcy laws."[4] The pleading further alleged that it was not until after the assignment—during the course of later involuntary bankruptcy proceedings initiated by Berg and two other creditors—that Carl Berg offered the details of his plan to use the company's net operating losses. These details included ***1027** that through a bankruptcy reorganization: (1) Berg would make a $150,000 cash contribution to Pluris for the benefit of its unsecured creditors; (2) Berg would reduce the unsecured portion of its claim by $1.5 million in consideration for 100 percent of the stock in the reorganized entity plus the assignment of all claims or causes of action that Pluris had the right to pursue; and (3) Berg would further reduce its unsecured claim by $2.5 million in consideration for all of Pluris's non-cash assets, including its intellectual property, software, and inventory. All told, the pleading alleged, these plan details would result in the reduction of Berg's unsecured claim by $4 million plus its infusion of $150,000 for the benefit of other unsecured creditors. The import of these background allegations of the initial complaint as relevant here was that they alleged that it was only *after* the assignment for the benefit of creditors had been made and "during" later involuntary

bankruptcy proceedings that Berg provided the details of its plan to use Pluris's net operating losses.

[4] As observed by defendant Boyle at oral argument, Berg references no authority for the proposition that Pluris was required to proceed in bankruptcy in order to use the net operating losses in the manner proposed by Berg because it could not do so through an assignment for the benefit of creditors. For our purposes, we accept as true Berg's allegation that a bankruptcy proceeding was required in order to implement its plan.

Apparently before any responsive pleadings were filed, Berg filed a first amended complaint. The new pleading restated the breach-of-fiduciary-duty claim and added two causes of action for fraudulent and negligent misrepresentation, respectively. It reiterated that before the assignment, Berg had only generally informed Pluris's directors of his desire to explore the use of Pluris's net operating losses through a petition in bankruptcy if Pluris's outside financing efforts failed and that it was only later, during involuntary bankruptcy proceedings, that Berg provided the details of this plan.

[1] **[2]** Defendant John Boyle demurred to the amended pleading on various grounds. The other directors likewise demurred and some filed an anti-SLAPP motion (under Code Civ. Proc., § 425.16) to the new misrepresentation causes of action, which the other defendants joined. In the face of the anti-SLAPP motion, Berg voluntarily dismissed its two misrepresentation causes of action leaving only its claim for breach of fiduciary duty as the target of the demurrers.[5] The court (Judge C. Randall Schneider) sustained the demurrers with leave to amend. The basis of the order was, in essence, lack of standing—Berg's claim of injury was not unique to itself or to a particular class of creditors but rather incidental to injury that all of Pluris's creditors might have suffered as a result of the assignment for ****883** the benefit of creditors. Therefore, the claim was not direct and particular to Berg but rather derivative and assertable only on behalf of all of Pluris's creditors.[6] The court further noted that in light of its dispositive ruling, it need not directly address ***1028** another ground raised by demurrer—that the Pluris directors were insulated from liability by the business judgment rule. But, "for the guidance of the parties," the court nevertheless observed that particular allegations of the first amended complaint appeared "sufficient to rebut the business judgment presumption."

[5] The court nevertheless concluded that the anti-SLAPP motion was well taken and later awarded defendants statutory attorney fees per this determination.

[6] "An action is derivative, that is, in the corporate right, ' "if the gravamen" of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' (*Jones [v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106, 81 Cal.Rptr. 592, 460 P.2d 464].)" (*Everest Investors*

> *8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 425, 8 Cal.Rptr.3d 31.) On the other hand, a creditor's individual or direct claim is one for which the creditor does not seek to recover on behalf of the corporation for injury done to it. The injury need not be different from that suffered by a class of shareholders or be unique to the plaintiff and it still may affect a substantial number of shareholders or in this case, creditors. But the direct claim is simply one that reflects an injury that is not incidental to an injury to the corporation as a whole. (*Id.* at pp. 425–428, 8 Cal.Rptr.3d 31.)

Berg filed a second amended complaint, this time on "behalf of [itself] and all other Pluris, Inc. creditors," consistently with the court's prior ruling. The new pleading in substance restated the allegations of Berg's previously asserted breach-of-fiduciary-duty claim, including that before the assignment for the benefit of creditors, Berg had informed Pluris of its desire to explore use of Pluris's net operating losses through bankruptcy in the event Pluris could not obtain outside financing but after the assignment and during later involuntary bankruptcy proceedings, Berg provided details of this plan.

The directors demurred to Berg's second amended complaint on numerous grounds. The court (Judge Neal A. Cabrinha) determined that while the pleading could be "reasonably be interpreted as alleging a creditors' claim under common law," Berg had failed to allege specific facts to rebut the business judgment rule—"affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching, or an unreasonable failure to investigate material facts"—and thus had not stated a viable claim for breach of fiduciary duty. The court ruled that Berg's allegations that the directors did not conduct a "reasonable inquiry into alternative methods of financing or alternative ways to derive additional value in Pluris for its creditors, but instead took the easiest path for themselves and assigned all of Pluris's assets to an assignee" did not establish "that [the] defendants acted with an improper motive and a conflict of interest.... [¶] ... [¶] At first blush, the allegation that defendants did not explore alternative avenues of financing or alternative ways to derive additional value in Pluris for its creditors pleads around the business judgment rule. However, it is not sufficient to generally allege the failure to conduct an active investigation without (1) alleging facts which would reasonably call for such an investigation, or (2) alleging facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.... [¶] ... The Second Amended Complaint does not allege facts establishing the existence of any alternative methods of financing or means to increase the ***1029** value of Pluris's assets for the benefit of creditors ****884** generally. As a result, it fails to establish a breach of fiduciary duty."

Thus, the court determined that because Berg had failed to plead specific facts to rebut the presumption of nonliability afforded by the business judgment rule, it had failed to adequately plead a cognizable claim for breach of fiduciary duty against the directors. As a result, the court sustained the demurrers with leave to amend.

II. *Berg's Third Amended Complaint*

This brings us to the operative pleading—Berg's third amended complaint.[7] In it, Berg, for itself and purportedly on behalf of all Pluris creditors, restated its single cause of action for breach of fiduciary duty against the Pluris directors.[8] The pleading alleged in conclusory fashion and without supporting facts that "[a]t least from January 2002, and continuing thereafter, PLURIS was either insolvent or operating within the 'zone of insolvency.' During this time, PLURIS's Board of Directors and each director individually owed a fiduciary duty to act for the benefit of PLURIS's creditors." That duty, as alleged, included "the obligation not just to protect the assets of PLURIS but to affirmatively examine a range of possible courses of action to maximize the value of the remaining assets, not merely to take the course of action most expedient to [the directors] and make an Assignment."

7 We include here only seemingly relevant facts alleged in the 17–page pleading containing a single cause of action.

8 For the first time, Berg also named Pluris as a defendant but this is not relevant to the issues on appeal.

As background, the pleading, like its superseded predecessors, went on to allege that in 2001, one of Pluris's creditors was a Berg-related entity that had entered into a lease with Pluris, which Pluris repudiated, resulting in litigation. That dispute was settled in February 2002 when Pluris informed Berg's principal, Carl Berg, that it was attempting to obtain outside financing to continue operations and that settlement of Berg's claim was a condition to receiving that financing. In the course of these discussions, Carl Berg then informed Pluris, allegedly through its board of directors, that if its financing efforts failed, the Berg-related entity or its assignee "wanted to derive value" or "want[ed] to explore ways to derive additional value" from the $50 million in net operating losses that Pluris had accumulated and that one of Berg's plans for doing so required a reorganization of Pluris through federal bankruptcy laws.[9] The settlement between Pluris and the Berg-related entity ***1030** liquidated and partially secured the claim, which was then assigned to Berg making it Pluris's largest creditor.

9 This is a bit different from prior pleadings, which had alleged that at this point in time, Berg had only expressed a general desire to "explore" ways to derive value from Pluris's net operating losses, an allegation that is also included in the third amended complaint. As Berg's counsel later explained, in order to "derive value" from Pluris's net operating losses according to Berg's plan, the corporation had to reorganize through a bankruptcy proceeding and allow Carl Berg "to put a skeleton staff together, run it for a period of time, and take advantage of the net operating losses." Just how this activity by Pluris as a separate business entity could inure to Berg's benefit is not exactly clear.

Pluris's efforts to obtain outside financing did not result in its getting sufficient funds to

continue operations, as a result of which, on July 11, 2002, Pluris, through its board of directors, made an assignment for the benefit of creditors. According to Berg, in doing so, the directors "failed, refused or neglected to seek or to find any alternative financing or to make a reasonable inquiry into alternative financing even though they knew or reasonably should ****885** have known there were a number of potential sources available." The board also "failed to make any reasonable inquiry into alternative ways to derive additional value for the PLURIS creditors other than making an assignment for the benefit of creditors ... despite the fact that [the directors] were specifically advised there were alternatives that might generate greater value. For example, [Carl] Berg [had] explained [that] if Pluris w[ere] unsuccessful [at obtaining sufficient outside financing], he intended to seek [to benefit from] the value of PLURIS's $50 million [in net operating losses through] a bankruptcy reorganization. Pursuant to the reorganization, there would [be] additional benefits to creditors such as [those] incorporated in the proposed Berg plan." These benefits included the same reduction of Berg's unsecured claim and a cash contribution to the bankruptcy estate of $150,000 for the benefit of other unsecured creditors that we noted from prior pleadings.[10] But, Berg further alleged, "[r]ather than exploring alternative forms of financing, including Berg's plans, ... the Directors took the easiest path for themselves, and made an assignment of all PLURIS's assets to an assignee for the alleged benefit of creditors, and then 'washed their hands' of the matter." Said yet another way, the directors, as shareholders, "[h]aving determined that their own investment in PLURIS essentially had no value, they looked no further and ignored their continuing duties to the PLURIS creditors by, among other things, refusing to examine alternatives which were specifically brought to their attention or to explore other options, all of which would have enhanced the value to the PLURIS creditors. Instead, they assigned PLURIS's assets to an assignee, and walked away." Berg still further alleged that the directors "did not explore and had no intention of exploring alternative avenues of financing or ways to maximize PLURIS's assets, but instead chose to 'cut ***1031** their losses' " by the assignment "without any reasonable inquiry concerning other ways to protect the interests of Berg and the other creditors, despite that several possible alternatives had specifically been brought to their attention by Berg, and other possible alternatives might have been found with modest inquiry."

10 These were the plan details that prior pleadings had alleged were first proposed by Berg only later, during involuntary bankruptcy proceedings. The third amended complaint alleges, inconsistently with those prior pleadings, that during the involuntary bankruptcy proceedings, Carl Berg "*continued* to offer his plans for reorganization," as if the plan details, or some of them, had been previously put forth before the July 2002 assignment. (Italics added.)

The pleading then alleged that from the date of the assignment in July 2002 until August 16, 2002, when Berg and two other Pluris creditors filed an involuntary petition in bankruptcy on its behalf, Berg "tried unsuccessfully to contact PLURIS's BOARD OF DIRECTORS"

and no member of the board contacted Berg "to explore ... identifying alternative ways to achieve greater value in PLURIS. Nor did any [director] conduct [a] reasonable inquiry to determine how to protect or enhance the value of PLURIS [or how] to protect BERG's interests, including an inquiry concerning BERG's ability to use PLURIS's [net operating losses]. [¶] ... At no time between January 2002 and the Assignment ... did PLURIS's BOARD OF DIRECTORS ever examine means to increase the value of PLURIS's assets for the benefit of creditors generally other than by making an Assignment...."

In the penultimate allegations of the cause of action as relevant here, Berg pleaded that the directors had breached their fiduciary duties by selecting a course ****886** of action that was "easiest for them by ignoring alternatives specifically brought to their attention, including BERG's proposed reorganization[,] and [by] failing to make any reasonable inquiry into other possible approaches that would or might have yielded greater assets for the creditors;" and by failing "to explore BERG's articulated plan to maximize the value of PLURIS's [net operating losses for] the benefit [of] creditors."[11]

11 Berg also pleaded as part of these allegations that the directors had breached their duty by prohibiting Berg from timely using or otherwise disposing of Pluris's assets that secured its obligation to Berg, and, without reference to any specific facts, by "using the remaining PLURIS assets for themselves." But Berg did not pursue these particular allegations below and does not pursue them here. Any claim regarding them has accordingly been forfeited or waived.

The pleading further alleged that "[o]n August 16, 2002, in order to protect their interests and the interests of other creditors, three of PLURIS's creditors, including BERG, filed an involuntary petition for bankruptcy [under 11 U.S.C § 303] concerning PLURIS's estate. During the bankruptcy proceeding, Berg continued to offer his plans for [Pluris's] reorganization."[12] In January 2003, at the request of Sherwood, the assignee, the bankruptcy court ***1032** abstained from exercising jurisdiction under title 11 United States Code section 305, subdivision (a)(1) and dismissed the involuntary petition.[13]

12 See footnote 10, *ante.*

13 The primary bases of the court's order were that creditors and the debtor would be "better served" by a dismissal of the involuntary petition because Pluris, as a "non-operating company" with "no employees, no ongoing business activities, no accounts receivables or any other source of revenue, and no customers" had already entered into an assignment for the benefit of creditors through which it was being liquidated, not reorganized, and because Carl Berg was not motivated to ensure a fair distribution to Pluris's creditors but rather to gain "control of Pluris and its assets for his potential advantage," which the court viewed as "self serving."

The third amended complaint finally alleged that as a proximate result of the directors' breach of fiduciary duty, which Berg alleged to be willful, malicious, and oppressive so as to justify an award of punitive damages, Berg and the other Pluris creditors were damaged in a sum "in excess of $50 million which includes, but is not limited to, the loss of use of PLURIS's [net operating losses]."

III. *The Directors' Demurrers and the Trial Court's Ruling*

The directors all demurred to the third amended complaint for its failure to state facts sufficient to constitute a cause of action, reprising many arguments they had raised in previous pleading challenges. On December 21, 2006, the court (Judge Neal A. Cabrinha) issued its order sustaining the demurrers without leave to amend. The court's rationale was that the third amended complaint failed to allege a viable claim for breach of fiduciary duty against the directors. The court relied on *CarrAmerica Realty Corp. v. nVIDIA Corp.*, No. 05–00428, 2006 WL 2868979, 2006 U.S. Dist. LEXIS 75399 (N.D.Cal. Sept. 29, 2006) (*CarrAmerica*), a recent federal Northern District of California that had not been cited by the parties in their papers.

According to the court, *CarrAmerica* determined that California follows the " 'trust fund doctrine' " with respect to duties owed by corporate directors to creditors that arise upon the corporation's insolvency. The scope of this duty is to avoid " 'divert[ing], dissipat[ing] or unduly risk[ing] assets necessary to satisfy' " ****887** creditors' claims. The court observed that because this duty can be characterized as the obligation to avoid the squandering of an insolvent corporation's assets, "recovery for breach of this fiduciary duty generally concerns cases [in which] the directors of an insolvent corporation improperly divert corporate assets. [Citations.] Although no California cases expressly limit the 'fiduciary duty under the trust fund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the scope of the trust fund doctrine in California is reasonably limited to cases [in which] directors or officers have diverted, dissipated, or unduly risked the insolvent corporation's assets.' [Citation.]"

***1033** The court noted that the third amended complaint did not meet this standard as it did not allege that the Pluris directors "improperly assigned assets for their own interests, or assigned assets knowing the assignee would breach its fiduciary duty to the creditors." Instead, the pleading alleged only that the directors had failed "to explore a plan suggested by [Berg] that may have made better use of the assets.... [Berg's] allegations relating to the conduct of the assignee are irrelevant absent an allegation that the directors were aware that the assignee was unscrupulous or that the directors have an interest in the assignee." The court concluded that because Berg "cannot allege defendants breached their duty not to 'divert, dissipate or unduly risk assets' by [having assigned] the assets for the benefit of [Pluris's] creditors, the demurrers are sustained without leave to amend."

Berg moved for reconsideration of the order under Code of Civil Procedure section 1008, citing *CarrAmerica* as new law and asserting that its claim was not based on the directors' failure to make the best use of

Pluris's assets as the court had concluded but rather on their having "knowingly squandered Pluris ['s] largest asset"—its net operating losses. This breach of duty, it argued, fell squarely within the parameters of a permissible breach-of-fiduciary-duty claim as defined in *CarrAmerica*—the diversion, dissipation, or undue risking of assets. Moreover, Berg contended, it could plead additional facts to state such a claim as set out in the court's order, namely that the directors had used a "portion of [Pluris's] remaining cash to pay preferred creditors (employee severance payments made days before the assignment)" and that after the assignment, Berg contacted the directors, "reminded them of his plan, complained about the unscrupulous acts of the assignee, and was ignored."

Over defendants' opposition, the court granted reconsideration of its prior order because the court had relied on *CarrAmerica*—a case not initially cited or briefed by the parties. Upon reconsideration, the court affirmed its prior order sustaining the demurrers to Berg's third amended complaint without leave to amend.

Judgment of dismissal was entered on May 7, 2007 and Berg's timely notice of appeal followed.

DISCUSSION

I. *Berg's Contentions on Appeal and Standard of Review*

Berg's overarching contention on appeal is that the trial court erred in sustaining the demurrers to its third amended complaint because Berg had stated a viable claim for breach of fiduciary duty and had pleaded facts to ***1034** rebut the business judgment rule. Its subsidiary contentions include that the court lacked the power to determine that a claim for breach of fiduciary duty against the directors had not been stated in light of prior demurrer rulings and that Berg should have been ****888** granted leave to file a fourth amended complaint.

[3] [4] [5] [6] [7] [8] [9] "A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]" (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, 21 Cal.Rptr.3d 246.) Thus, the standard of review on appeal is de novo. (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152, 2 Cal.Rptr.3d 396.) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citations.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58; see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5, 40 Cal.Rptr.3d 205, 129 P.3d 394; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82, 76 Cal.Rptr.3d 73.) Where, as here, a demurrer is to an amended complaint, we may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid

by making " ' "contradictory averments, in a superseding, amended pleading." ' " (*People ex. rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957, 70 Cal.Rptr.3d 501.)

[10] **[11]** "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213, 197 Cal.Rptr. 783, 673 P.2d 660.) Thus, as noted, in considering the merits of a demurrer, "the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604, 176 Cal.Rptr. 824; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496, 86 Cal.Rptr. 88, 468 P.2d 216 [court reviewing propriety of ruling on demurrer not concerned with the "plaintiff's ability to prove ... allegations, or the possible difficulty of making such proof"].)

[12] **[13]** On appeal, we will affirm a "trial court's decision to sustain the demurrer [if it] was correct on any theory. [Citation.]" (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, 50 Cal.Rptr.2d 736, fn. omitted.) Accordingly, "we do not review the validity of the trial court's reasoning but ***1035** only the propriety of the ruling itself. [Citations.]" (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757, 62 Cal.Rptr.2d 778.)

[14] **[15]** Where a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Williams v. Housing Authority of City of Los Angeles* (2004) 121 Cal.App.4th 708, 719, 17 Cal.Rptr.3d 374.) The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320, 25 Cal.Rptr.3d 320, 106 P.3d 976.)

****889** II. *The Trial Court Was Free to Consider Whether Berg Had Stated Facts Sufficient to State a Cause of Action For Breach of Fiduciary Duty on Demurrer to the Third Amended Complaint*

As a preliminary matter, we dispense with Berg's claim that because of prior rulings on demurrers to its superseded pleadings, the trial court lacked jurisdiction to consider whether the third amended complaint alleged a viable cause of action for breach of fiduciary duty. Citing *Bennett v. Suncloud* (1997) 56 Cal.App.4th 91, 65 Cal.Rptr.2d 80 (*Bennett*), Berg contends that the jurisdictional components of Code of Civil Procedure section 1008, the statute governing motions for reconsideration of prior rulings and renewed motions, [14] precluded the court from considering the viability of the breach-of-fiduciary-duty claim and that the only ground open for consideration on demurrer to the third amended complaint was that the claim was

barred by the business judgment rule. Berg is mistaken.

14 These components are generally that an application for reconsideration of a prior ruling or a renewed motion must be made on new or different facts, circumstances, or law. (Code Civ. Proc., § 1008.)

[16] **[17]** *Bennett* did hold that where a prior demurrer was sustained as to some causes of action but overruled as to others, a defendant may not demur again on the same grounds to those portions of an amended pleading as to which the prior demurrer was *overruled.* (*Bennett, supra,* 56 Cal.App.4th at pp. 96–97, 65 Cal.Rptr.2d 80.) But here, there was only one cause of action and the prior demurrers to that cause of action were *sustained*—a critical difference. And *Bennett* also affirmed the principle that when a plaintiff files an amended pleading in response to an order sustaining a prior demurrer to a cause of action with leave to amend, the amended cause of action is treated as a new pleading and a defendant is free to respond to it by demurrer on any ground. (*Ibid;* ***1036** *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1232, 271 Cal.Rptr. 72.) Accordingly, because defendants here demurred to the single cause of action of the new, third amended complaint as to which no prior demurrer had been overruled, the restrictive provisions of Code of Civil Procedure section 1008 are inapplicable. [15]

15 We further observe that none of the court's prior rulings actually turned on a determination that Berg had stated a viable claim for breach of fiduciary duty. Its order on demurrer to the first amended complaint narrowly determined that Berg could not proceed with its claim directly but must do so derivatively. Its order sustaining the demurrers to the second amended complaint determined that a viable claim for breach of fiduciary duty had not been stated because on the face of the pleading, the business judgment rule barred the claim. In other words, the court did not separate the viability of the breach-of-fiduciary-duty claim from the presumption of the business judgment rule, concluding that a viable claim must plead facts to rebut the presumption.

It also bears noting that in spite of *Bennett,* we have previously concluded that a party is within its rights to successively demur to a cause of action in an amended pleading notwithstanding a prior unsuccessful demurrer to that same cause of action. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 389, 102 Cal.Rptr.2d 125.) Citing earlier case law, we so concluded on the rationale that the " 'interests of all parties are advanced by avoiding a trial and reversal for a defect in pleadings. The objecting party is acting properly in raising the point at his first opportunity, by general demurrer. If the demurrer is ****890** erroneously overruled, he is acting properly in raising the point again, at his next opportunity. If the trial judge made the former ruling himself [or herself], he [or she] is not bound by it. [Citation.] And, if the demurrer was overruled by a different judge, the trial judge is equally free to reexamine the sufficiency of the pleading. [Citations.]' [Citation.]" (*Pacific States Enterprises, Inc. v. City of Coachella*

(1993) 13 Cal.App.4th 1414, 1420, fn. 3, 17 Cal.Rptr.2d 68.)[16]

16 We have not had occasion to reassess this conclusion in light of *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097, 29 Cal.Rptr.3d 249, 112 P.3d 636, which in essence clarified that parties requesting reconsideration of a ruling or filing a renewed motion must comply with Code of Civil Procedure section 1008.

Moreover, the role of this court entails review of the trial court's ruling, not its rationale. Thus, even if the trial court here were constrained by its prior rulings in its consideration of the grounds raised on demurrers to the third amended complaint, on review of the judgment, we are not so constrained and are free to render an opinion based on the correct rule of law. (*Bennett, supra,* 56 Cal.App.4th at p. 97, 65 Cal.Rptr.2d 80.)

For all these reasons, we reject Berg's contention that the trial court erred by disposing of the third amended complaint based on Berg's failure to state a viable claim for breach of fiduciary duty and by not limiting its consideration of the pleading challenge to the bar of the business judgment rule.

***1037** III. *The Demurrer to Berg's Third Amended Complaint Was Properly Sustained*

A. *The Question of a Duty Owed by Individual Directors to Creditors*

Berg contends that the individual members of Pluris's board of directors owed Berg, and all of Pluris's creditors, a paramount fiduciary duty. The alleged duty arose beginning at a point in time when Pluris entered into that ill-defined sphere known as the "zone of insolvency." Respondent directors appear to accept that they owed creditors a duty of due care upon Pluris's actual insolvency. We begin our analysis by focusing on the question whether the individual directors owed creditors a duty and if so, when the duty arose and its scope.

[18] It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders." (Corp.Code, § 309, subd. (a).)[17] This duty—generally to act with honesty, loyalty, and good faith—derived from the common law. (*Lehman v. Superior Court* (2006) 145 Cal.App.4th 109, 120–121, 51 Cal.Rptr.3d 411 [director's fiduciary duty ****891** is not liability created by statute]; *Jones v. H.F. Ahmanson & Co., supra,* 1 Cal.3d at pp. 106–110, 81 Cal.Rptr. 592, 460 P.2d 464 [discussing common law development of directors' fiduciary duty]; C.f., *Pittelman v. Pearce* (1992) 6 Cal.App.4th 1436, 1446–1447, 8 Cal.Rptr.2d 359 [corporate bondholders, unlike shareholders, not owed fiduciary duty; obligations owing are defined by contractual terms of bond].)

17 Corporations Code section 309, subdivision (a) provides that "[a] director shall perform the duties of a director ... in good faith, in a manner such director believes to be in the best interests of the corporation

> and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." A director "who performs the duties of a director in accordance with" this subdivision, as well as other subdivisions that permit reliance on information provided by others under certain circumstances not relevant here, "shall have no liability based upon any alleged failure to discharge the person's obligations as a director." (Corp.Code, § 309, subd. (c).) Accordingly, this section sets forth the standard of care owed by directors and accords directors immunity if they comply with that standard by codification of the common law business judgment rule, which we discuss *post*.

There is no analogous statutory authority in California establishing or recognizing that upon a corporation's insolvency, or more vaguely when it enters into a "zone of insolvency," directors instead or also owe a duty to the corporation's creditors. And it is easy to see that especially when a corporation is in financial distress, the interests of the shareholders and the corporation itself may inherently collide with those of the creditors, making any ***1038** respective duties owed by directors to each constituency potentially in conflict and making the scope of each respective duty elusive and difficult to ascertain.

The modern common-law notion that the individual directors of a financially distressed corporation operating in the zone of insolvency or even upon insolvency owe a duty of care to its creditors finds its genesis in *Credit Lyonnais Bank Nederland N.V. v. Pathe Communications Corp.*, 1991 WL 277613, 1991 Del. Ch. Lexis 215, (Del. Ch. Dec. 30, 1991) (*Credit Lyonnais*), which arose out of the leveraged buyout of MGM and which laid the ground for the insolvency exception to the general rule that directors owe exclusive duties to the corporation and its shareholders, but not to creditors. While the Delaware chancellor in *Credit Lyonnais* did not find a breach of any duty in that case, he did posit in a well known footnote that "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise," i.e., the "community of interests" of those involved with the corporation, including its creditors. (*Credit Lyonnais, supra,* 1991 WL 277613, *34 and fn. 55, 1991 Del. Ch. Lexis 215 at p. *34 & *108, fn. 55.) The recognition of such a duty was seen to minimize the risk to creditors of directors' "opportunistic behavior" like the disposition of corporate property at "fire-sale prices" or unreasonable risk-taking with corporate assets for the sole benefit of shareholders. (*Id.* at p. *34.)

Subsequent federal and out-of-state decisions discussing *Credit Lyonnais* and grappling with the question and scope of a duty owed to creditors upon insolvency have underscored that when managing a corporation that is insolvent, directors must consider the best interests of the whole "corporate enterprise, encompassing all its constituent groups, without preference to any. That duty, therefore, requires directors to take creditor

interests into account, but not necessarily to give those interests priority. In particular, it is not a duty to liquidate and pay creditors when the corporation is near insolvency, provided that in the directors' informed, good faith judgment there is an alternative. Rather, the scope of that duty to the corporate enterprise is 'to exercise judgment in an informed, good faith effort to maximize the corporation's long-term wealth creating capacity.' " (*In re Ben Franklin Retail Stores, Inc.* (1998) 225 B.R. 646, 655 (*Ben Franklin*); see also, e.g., *Geyer v. Ingersoll Publications Co.* (1992) 621 A.2d 784, 789–791; *In re Hechinger Inv. Co. of Delaware, Inc.* (2002) 274 B.R. 71, 89; *In re RSL Com Primecall, Inc.* (2003) 2003 WL 22989669, *8, 2003 Bankr.Lexis 1635, pp. *24–25; *Production Resources v. NCT Group* (2004) 863 A.2d 772, 787–803, overruled in part in *NACEPF v. Gheewalla* (2007) 930 A.2d 92, 103.)

**892 *1039 As generally discussed by the court in *Ben Franklin,* the rationale for the general rule of no duty owed to creditors is that it is the shareholders who own a corporation, which is managed by the directors. In an economic sense, when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets and who are the residual risk-bearers. As long as the corporation remains solvent, the business decisions made by management directly affect the shareholders' income; management accordingly owes fiduciary duties to those shareholders as well as to the corporation. The corporation's creditors, on the other hand, are free to protect their interests by contract. As long as the corporation is solvent, no matter how badly managed it might be, it is able to satisfy its contractual obligations to creditors who are therefore unaffected by management's business decisions. But when insolvency arises, the value of creditors' contract claims may be affected by management's business decisions in a way it was not before insolvency. At the same time, as long as insolvency persists, shareholder value is essentially worthless and shareholders no longer occupy the position of residual claimants. Because insolvency shifts the residual risk of management decisions from shareholders to creditors, at least some of the duties formerly owed by directors only to shareholders are owed also to creditors upon that circumstance, or so the theory goes. (*Ben Franklin, supra,* 225 B.R. at pp. 652–656; see also *In re Verestar, Inc.* (2006) 343 B.R. 444, 471–472.) [18]

18 The establishment of a general duty owed by corporate directors to creditors has generated controversy and has not been without a steady stream of broad criticism from commentators. Their writings on the subject focus on matters such as the difficulty of perceiving insolvency, or worse, the zone of insolvency, which is when such duties arise, and the practical difficulties and inefficiencies inherent in directors managing conflicting duties owed to disparate interests, thereby diluting the continuing and historic duty owed by directors to shareholders. Some commentators have even called for the abolition of the duty to creditors. (See, e.g., Lin, *Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors* (1993) 46 Vand. L.Rev. 1485;

Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors* (1995) 20 Del. J. Corp. L. 1; Schwarz, *Rethinking a Corporation's Obligation to Creditors* (1996) 17 Cardozo L.Rev. 647; Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation* (2003) 50 UCLA L.Rev. 1189; Sahyan, *The Myth of the Zone of Insolvency: Production Resources Group v. NCT Group* (Fall, 2006) 3 Hastings Bus. L.J. 181; Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency* in 1 Journal of Business and Technology Law (2007) at p. 335; Westbrook, *Abolition of the Corporate Duty to Creditors* (2007) 107 Colum. L.Rev. 1321; Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties For Creditors* (2008) 57 Emory L.J. 809; McLaughlin, *The Uncertain Timing of Directors' Shifting Fiduciary Duties in the Zone of Insolvency: Using Altman's Z–Score to Synchronize the Watches of Courts, Directors, Creditors, and Shareholders* (Winter, 2008) 31 Hamline L.Rev. 145; See also, *NACEPF v. Gheewalla, supra,* 930 A.2d at p. 99, fn. 28 [listing many articles on the topic of duties owed to creditors on corporate insolvency].)

***1040** There are apparently no published cases in California that rely on or postdate *Credit Lyonnais* and determine, based on acceptance or rejection of its rationale, whether or not in this state, corporate insolvency triggers the existence of fiduciary duties of due care and loyalty owed by directors to creditors. But, as observed by federal cases, there are older California cases that, consistently with *Pepper v. Litton* (1939) 308 U.S. 295, 306–307, 60 S.Ct. 238, 84 L.Ed. 281, [19] apply the ****893** " 'trust fund doctrine' " where " 'all of the assets of a corporation, immediately upon becoming insolvent, become a trust fund for the benefit of all creditors' " in order to satisfy their claims. [20] (*CarrAmerica, supra,* 2006 WL 2868979, *5, 2006 U.S. Dist. Lexis 75399, at p. *16, citing *Saracco Tank & Welding Co. v. Platz* (1944) 65 Cal.App.2d 306, 313–318, 150 P.2d 918 [trust-fund doctrine applied for statutory liability for dereliction imposed on directors for wrongful distribution of all assets of insolvent foreign corporation for payment to preferred creditors]; *Commons v. Schine* (1973) 35 Cal.App.3d 141, 145, 110 Cal.Rptr. 606 [trust-fund doctrine applied to a controlling partner's preference in paying insolvent partnership's debt to his own creditor corporation]; *Title Ins. & Trust Co. v. California Development Co.* (1915) 171 Cal. 173, 206–207, 152 P. 542 [trust-fund doctrine applied to a company controlling an insolvent development corporation's preferential payment of the corporation's debts]; *Bonney v. Tilley* (1895) 109 Cal. 346, 351–352, 42 P. 439 [trust-fund doctrine applied to directors of an insolvent corporation, who were also creditors of the corporation and who secured a preference to their claims over other creditors' claims]; *In re Wright Motor Co.* (1924) 299 F. 106, 109–110 [trust fund doctrine applied based on California law to a director's fraudulent transfer of corporate assets to himself]; see also *In re Jacks* (9th Cir. BAP 2001) 266 B.R. 728, 736, [trust-fund doctrine applied under

California law to a director's use of an insolvent corporation's assets to guarantee a personal debt].)

19 *Pepper v. Litton* is a seminal United States Supreme Court case that established, among other things, that controlling shareholders, like directors, owe fiduciary duties that are "designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." (*Pepper v. Litton, supra,* 308 U.S. at p. 307, 60 S.Ct. 238, fn omitted.) Transactions by such fiduciaries with the corporation therefore are rigorously scrutinized and must meet standards of good faith and inherent fairness from the viewpoint of the corporation and its interested constituencies, which include creditors. Such transactions must under all the relevant circumstances "carry the earmarks of an arm's length bargain." (*Id.* at pp. 306–307, 60 S.Ct. 238, fn. omitted.) Transactions that fail to meet this standard may be set aside in a bankruptcy court under its equity powers. (*Ibid.*) The factual context of the case involved fraud and misconduct by the dominant shareholder amounting to self-dealing, none of which is even alleged here.

20 For an excellent discussion of the trust fund doctrine under Delaware law, see *In re JTS Corp.* (Bankr.N.D.Cal.2003) 305 B.R. 529, 535–536.

[19] [20] [21] [22] As observed in *CarrAmerica* and by the trial court here, recovery for breaching the fiduciary duties imposed under the trust-fund doctrine in California "generally pertains to cases where the directors or officers of an insolvent corporation have diverted assets of the corporation 'for the benefit ***1041** of insiders or preferred creditors.' [Citations.]" (*CarrAmerica, supra,* 2006 WL 2868979, *6, 2006 U.S. Dist. Lexis 75399, at p. *6.) While no California cases "expressly limit the fiduciary duty under the trustfund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the scope of the trustfund doctrine in California is reasonably limited to cases where directors or officers have diverted, dissipated, or unduly risked the insolvent corporation's assets." (*Ibid.*) In other words, the doctrine is not applied to create a duty owed by directors to creditors solely due to a state of corporate insolvency. Application of the doctrine requires, in addition, that directors have engaged in conduct that diverted, dissipated, or unduly risked corporate assets that might otherwise have been used to satisfy creditors' claims.

[23] [24] [25] Accordingly, based on this established doctrine, we conclude that under the current state of California law, there is no broad, paramount fiduciary duty of due care or loyalty that directors of an insolvent ****894** corporation owe the corporation's creditors solely because of a state of insolvency, whether derived from *Credit Lyonnais* or otherwise. And we decline to create any such duty, which would conflict with and dilute the statutory and common law duties that directors already owe to shareholders and the corporation. We also perceive practical problems with creating such a duty, among them a director's ability

to objectively and concretely determine when a state of insolvency actually exists such that his or her duties to creditors have been triggered. We accordingly hold that the scope of any extra-contractual duty owed by corporate directors to the insolvent corporation's creditors is limited in California, consistently with the trust-fund doctrine, *to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors claims.* This would include acts that involve self-dealing or the preferential treatment of creditors.[21] Further, because all the California cases applying the trust-fund doctrine appear to have dealt with actually insolvent entities, and because the existence of a zone or vicinity of insolvency is even less objectively determinable than actual insolvency, we hold that there is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in the "zone" or "vicinity" of insolvency.[22]

21 As Berg has not pleaded facts supporting fraud or concealment by the directors, we have no occasion to address that circumstance in our discussion. Nor does our conclusion displace the general obligation owed by all persons under Civil Code section 1708, which recognizes that "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights."

22 And we observe that the "vicinity of insolvency" breach-of-fiduciary-duty theory of liability was recently rejected, along with that of direct (as opposed to derivative) individual claims by creditors against directors of an insolvent corporation for breach of fiduciary duty, by the Delaware Supreme Court in *NACEPF v. Gheewalla, supra,* 930 A.2d 92 at pages 101–103. We further observe that when an insolvent corporation files for relief in bankruptcy, duties owed to creditors as beneficiaries of the bankruptcy estate are then governed by the federal bankruptcy laws.

[26] **[27]** ***1042** Applying the scope of duty defined by the trust-fund doctrine, and according truth to the well-pleaded facts of Berg's third amended complaint while ignoring its contentions, deductions, and conclusions of fact or law, we, like the trial court, conclude that the pleading fails to state facts constituting a cognizable claim for breach of fiduciary duty. Assuming a state of actual insolvency, which is not well pleaded here by facts,[23] and apart from the speculative and contingent nature of Berg's or Pluris's ability to actually carry forward and use Pluris's net operating losses against future income,[24] the thrust ****895** of Berg's claim, pleaded repeatedly, is as follows: The directors effected the assignment for the benefit of creditors, a recognized statutory alternative to liquidation through bankruptcy ***1043** (*Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1169–1170, 209 Cal.Rptr. 119), rather than investigating, exploring or pursuing a bankruptcy reorganization, through which Berg theoretically could have maximized the value of Pluris's accumulated net operating losses and

the other creditors could have benefited from Berg's reorganization plan. [25]

23 There are multiple definitions of insolvency. Corporations Code section 501 provides, for example, that a corporation is insolvent, if, as a result of a prohibited distribution, it would "likely be unable to meet its liabilities ... as they mature." But there is also insolvency in the balance sheet sense in which the value of liabilities exceeds the value of assets. (*In re Kallmeyer* (9th Cir.BAP1999) 242 B.R. 492, 496–497 [affirming bankruptcy court's use of balance-sheet test for corporate insolvency in applying Oregon's trust-fund doctrine in 11 U.S.C. § 523(a)(4) context].) Berg did not plead any facts establishing Pluris's insolvency at any specific point in time under any test, only the conclusion that at all relevant times, the corporation was insolvent or in the zone of insolvency. In the Ninth Circuit Court of Appeals, a finding of insolvency by the standard of a debtor not paying debts when they become due requires more than merely establishing the existence of a few unpaid debts. (*In re Dill* (9th Cir.1984) 731 F.2d 629, 632.)

24 Net operating losses, whose value depends on future income against which to apply them, have been considered property of a bankruptcy estate for purposes of title 11 United States Code sections 541, subdivision (a)(1) and 548, subdivision (a)(1). (*In re Russell* (8th Cir.1991) 927 F.2d 413, 416–417; *In re Prudential Lines Inc.* (2d Cir.1991) 928 F.2d 565, 571–573.) In order to obtain benefit from net operating losses, an entity must comply with title 26 United States Code section 382 concerning ownership, control, and continuity-of-business-enterprise and may not run afoul of title 26 United States Code section 269, which prohibits the use of net operating losses when control of a company is acquired principally to evade taxes. Treasury Regulations also limit and define an entity's ability to carry forward and use net operating losses. (See Trower, *Federal Taxation of Bankruptcy and Workouts* (1993) ¶ 7.08[6] at pp. 7–91–7–96; Weil, Gotshal & Manges, *Reorganizing Failed Businesses,* V. II (rev. ed.2006) pp. 22–12–22–21.) We need not decide whether Pluris would have been able to comply with the complex federal statutes and IRS regulations concerning a taxpayer's ability to carry forward net operating losses in order to offset future gain, particularly in the context of a bankruptcy organization. Nor could we, given all the practical contingencies associated with that course of action, including but not limited to Pluris's ability to continue operations as a debtor in bankruptcy and its ability to generate future income against which to offset accumulated net operating losses. It suffices to say that directors contemplating a course of action such as a bankruptcy reorganization in

an inherently speculative attempt to benefit from the corporation's net operating losses by carrying them forward to offset against potential gain would be engaging in a complex exercise of business judgment involving much risk that the endeavor would not ultimately be successful.

25 We consider the new allegations of Berg's third amended complaint, that in February 2002, well before the assignment, Carl Berg informed the Pluris directors of some details of his reorganization plan, i.e., reduction of Berg's unsecured claim and its contribution of $150,000 to be apportioned among those other creditors, to be sham. Berg's superseded pleadings, of which we take judicial notice, clearly alleged that in February 2002, Carl Berg expressed *only* his desire to explore the use of Pluris's net operating losses if it was unable to obtain outside financing and that it was *only after* the assignment and during involuntary bankruptcy proceedings that Berg first offered any details of his plan. The later amendments to these allegations are inconsistent with these prior allegations. Under the sham-pleading doctrine, admissions in an original complaint that has been superseded by an amended pleading remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425–426, 42 Cal.Rptr.3d 807, fn. 3 [if a party files an amended pleading and attempts to avoid defects of original complaint by either omitting facts that rendered prior complaint defective or adding facts inconsistent with prior allegations, court may take judicial notice of prior pleadings and disregard inconsistent allegations or read into amended complaint the allegations of the superseded complaint]; *Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1213, 214 Cal.Rptr. 9.) We accordingly disregard the subject allegations of the third amended complaint and read into the operative pleading the previous allegations on the matter.

These facts do not involve self dealing or prohibited preferential treatment of creditors and further do not constitute the actual diversion, dissipation, or undue risking of Pluris's assets that were otherwise available to pay creditors' claims. At most, and contrary to Berg's contentions on appeal, these facts allege that another course of action, if explored and pursued, might have offered more value in the end ****896** or that beneficial, maximum, or more valuable use could thereby have been made of Pluris's net operating losses, assuming that the many contingencies required to successfully do so all would have transpired favorably. And to the extent the claim asserts that the breach was the failure to have contacted Berg in order to more fully explore the details of its reorganization plan before making the assignment, that failure alone cannot, as a matter of law, have constituted the diversion, dissipation, or undue risking of assets that could have otherwise been used to pay creditors'

claims. Because of the inherently speculative and contingent nature of the plan, with or without its details, the obvious risks and costs associated with pursuing it would not have been eliminated by discussions with Carl Berg or anyone else.

Moreover, Berg did not plead facts that identified sources of funds or financing through which Pluris could have continued to operate even in bankruptcy, and thereby potentially generate profit within the allowed time period, which was necessary to successfully carrying forward and using the ***1044** net operating losses; it did not plead facts identifying options other than bankruptcy and reorganization according to its own plan through which Pluris could have carried forward its net operating losses; and it did not plead facts alleging just how, if they had not been squandered or had been better protected, the carry-forward of Pluris's accumulated net operating losses through bankruptcy could have been actually used *to pay or satisfy Berg's or its other existing creditors' claims*—the operative standard. (*CarrAmerica, supra,* 2006 WL 2868979, *7, 2006 U.S. Dist. Lexis 75399, *20 [secret agreement by directors unrelated to protecting corporate assets in order to satisfy creditors' claims cannot form basis of breach-of-fiduciary-duty]; *Ben Franklin, supra,* 225 B.R. at pp. 655–656 [existence of duty not to divert, dissipate, or unduly risk assets is only to protect creditors' contractual and priority rights and is only there to guard against risk that creditors' claims would be defeated by directors giving shareholders preferred rights to assets, which did not occur by prolongation of corporate life that did not result in creditors receiving less than full value for their claims].)

Nor, as noted by the trial court, did Berg allege facts about the assignee, Sherwood Partners, Inc., that would have been discovered by reasonable inquiry and that would have foretold any breach by it of a fiduciary duty to creditors or other misconduct detrimental to them.

No matter how Berg now characterizes or packages the basic factual underpinnings of its claim, its allegations fail to state a cognizable cause of action for breach of fiduciary duty against the directors based on the trust-fund doctrine, i.e., that the directors of the insolvent Pluris engaged in misconduct, self-dealing, or the prohibited preferential treatment of creditors, or that they diverted, dissipated, or unduly risked corporate assets that otherwise could have been used to pay or satisfy creditors' claims. The trial court was therefore correct in sustaining the demurrers to Berg's third amended complaint. Notwithstanding its many allegations about the directors' conduct while Pluris was in the zone of insolvency or even actually insolvent, the pleading still fails to state facts sufficient to constitute a cause of action for breach of fiduciary duty by the directors, having diverted, dissipated, or unduly risked corporate assets that might otherwise have been available to satisfy creditors' claims.

B. *The Bar of the Business Judgment Rule*

[28] Even if we had determined that Berg had otherwise pleaded a cognizable claim for breach of fiduciary duty, we ****897** would still conclude that the directors are immune from liability on the claim based on the business judgment rule and, therefore, that the demurrers were correctly sustained. [26]

26 And based on these dispositive conclusions, we need not address respondents' other bases for challenging Berg's third amended complaint, including lack of standing, the failure to plead recoverable damages, and what appears to be a form of collateral estoppel based on the bankruptcy court's prior dismissal of the involuntary petition.

[29] [30] [31] [32] [33] *1045 As noted, the business judgment rule has been codified in California at Corporations Code section 309. But the common law rule "has two components—one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. [Citation.] Only the first component is embodied in Corporations Code section 309." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714, 57 Cal.Rptr.2d 798 (*Lee*); *Lambden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 257, 87 Cal.Rptr.2d 237, 980 P.2d 940.) The broader rule is " ' "a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions." ' (*Barnes [v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365,] 378 [, 20 Cal.Rptr.2d 87] [(*Barnes*)]; *Gaillard v. Natomas Co.* [(1989) 208 Cal.App.3d 1250,] 1263[, 256 Cal.Rptr. 702] [(*Gaillard*)].) [It] is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes, supra,* 16 Cal.App.4th at p. 378[, 20 Cal.Rptr.2d 87]; *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776[, 230 Cal.Rptr. 815].) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366[, 27 Cal.Rptr.2d 681]; *Barnes, supra,* 16 Cal.App.4th at pp. 379–380 [, 20 Cal.Rptr.2d 87].)" (*Lee, supra,* 50 Cal.App.4th at p. 711, 57 Cal.Rptr.2d 798.) " 'A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be "attributed to any rational business purpose." [Citation.]' " (*Katz, supra,* 22 Cal.App.4th at p. 1366, 27 Cal.Rptr.2d 681.)

[34] [35] [36] [37] [38] An exception to the presumption afforded by the business judgment rule accordingly exists in "circumstances which inherently raise an inference of conflict of interest" and the rule "does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest." (*Everest Investors 8 v. McNeil Partners, supra,* 114 Cal.App.4th at p. 430, 8 Cal.Rptr.3d 31; *Lee, supra,* 50 Cal.App.4th at p. 715, 57 Cal.Rptr.2d 798.) But a plaintiff must allege sufficient facts to establish these exceptions. To do so, more is needed than "conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an

active investigation, in the absence of (1) allegations of facts which would reasonably call for ***1046** such an investigation, or (2) allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business ****898** judgment." (*Lee, supra,* at p. 715, 57 Cal.Rptr.2d 798.) In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.] Interference with the discretion of directors is not warranted in doubtful cases." (*Ibid.*)

[39] And contrary to Berg's contention, the failure to sufficiently plead facts to rebut the business judgment rule or establish its exceptions may be raised on demurrer, as whether sufficient facts have been so pleaded is a question of law. (*Lee, supra,* 50 Cal.App.4th at pp. 711–717, 57 Cal.Rptr.2d 798 [judgment of dismissal following sustaining of demurrer affirmed on appeal for complaint's failure to have pleaded facts establishing exception to business judgment rule]; *Barnes, supra,* 16 Cal.App.4th at pp. 378–379, 20 Cal.Rptr.2d 87 [judgment of dismissal after sustaining of demurrer affirmed in part due to failure to allege facts rebutting business judgment rule]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 177–179, 240 P.2d 421 [affirmance of sustained demurrer as pleading failed to allege fraud or bad faith as exception to business judgment rule].)

Berg acknowledges the elements of the business judgment rule but contends that it has sufficiently pleaded facts to rebut it. Specifically, it contends that it alleged facts that the directors failed to conduct a reasonable investigation into ways to protect Berg's interests when Pluris was in the zone of insolvency; and that given the information the board initially had about Berg's intention to use Pluris's net operating losses, it failed to investigate the details of Berg's bankruptcy reorganization plan or any other plan that would have facilitated such use, instead eliminating the possibility of deriving value from the losses by entering into the assignment. But what Berg has essentially alleged are not facts but the conclusion that the board simply did nothing by way of investigation of alternatives to the assignment. And the facts that are alleged—Pluris being in the zone of insolvency and the directors' knowledge of Berg's intention to explore ways to use Pluris's net operating losses—do not, without more, rebut the presumption.

First, as we have already concluded, in this state, corporate directors do not owe a fiduciary duty to creditors by reason of the corporation being in the zone or vicinity of insolvency. Under the trust-fund doctrine, upon actual ***1047** insolvency, directors continue to owe fiduciary duties to shareholders and to the corporation but also owe creditors the duty to avoid diversion, dissipation, or undue risk to assets that might be used to satisfy creditors' claims. Under these circumstances, and even accepting as true Pluris's state of actual insolvency at the time of the assignment for the benefit of creditors and the directors' knowledge that Berg wished to use Pluris's net operating losses through a bankruptcy reorganization, the directors were not obliged to contact Berg or to pursue speculative,

contingent and potentially risky and costly alternatives to the assignment simply in order to facilitate Berg's plan. The directors did not owe a paramount duty of loyalty to Berg over and above shareholders or other constituencies comprising the collective interests in the corporate enterprise that gave rise to an obligation to put Berg's interests above these other constituencies or to explore ways to facilitate Berg's desires above all else. This is particularly so when the asset—the net operating losses—the value of which Berg claims was not maximized was not a source of actual payment of creditors' claims.

****899** Moreover, Berg did not plead facts demonstrating the availability of viable alternate sources of financing or facts that made the board's decision to enter into the assignment irrational, unsound, or unreasonable had the directors merely conducted an adequate investigation into alternatives before doing so. Although Berg alleged the conclusion that the details of its reorganization plan would have benefited creditors, it did not allege facts establishing that its plan could have practically and reasonably been implemented or that its plan was less risky, less costly, or likely to succeed so as to enable Pluris or Berg and other creditors to benefit from its net operating losses. Nor did Berg allege facts identifying any other viable alternatives. Although Berg alleged in conclusory fashion a failure by the directors to investigate its plan, the pleading fails to state facts that reasonably called for further investigation or facts about its plan that if discovered by such investigation would have been material to the questioned exercise of business judgment. (*Lee, supra,* 50 Cal.App.4th at p. 715, 57 Cal.Rptr.2d 798.) Berg suggests that it has pleaded a total abdication by the directors of their corporate responsibilities and an utter failure by the directors to diligently exercise their business judgment. (*Gaillard, supra,* 208 Cal.App.3d at pp. 1263–1264, 256 Cal.Rptr. 702 [business judgment rule does not immunize directors for abdication of duty by closing their eyes to what is going on in the conduct of the business].) But the mere fact of the assignment and the failure by the directors to pursue Berg's bankruptcy reorganization plan or some other unidentified alternative do not, as a matter of fact or law, establish abdication of duty; the failure to have exercised judgment with reasonable care, skill, and diligence; or even an unreasonable failure to have investigated so as to rebut or allege exceptions to the business judgment rule.

***1048** As noted, the business judgment rule has two components—immunization from liability that is codified at Corporations Code section 309 and a judicial policy of deference to the exercise of good-faith business judgment in management decisions. We conclude that based on the allegations of Berg's third amended complaint that do not rebut the presumption afforded by the rule, both components apply here. Even if an otherwise cognizable claim for breach of fiduciary duty against the directors had been pleaded, the claim would still be barred by the business judgment rule. Accordingly, the demurrers would have properly been sustained on this ground as well.

IV. *The Court Did Not Abuse its Discretion in Denying Leave to Amend*

[40] As noted, a reviewing court must determine whether there is a reasonable possibility that a pleading as to which a

demurrer has been sustained without leave to amend is capable of amendment to cure the defect. And it is the plaintiff who bears the burden of establishing that it is. (*Williams v. Housing Authority of Los Angeles, supra,* 121 Cal.App.4th at p. 719, 17 Cal.Rptr.3d 374; *Campbell v. Regents of University of California, supra,* 35 Cal.4th at p. 320, 25 Cal.Rptr.3d 320, 106 P.3d 976.)

Berg contends in its opening brief[27] that its third amended complaint can be still further amended to state new allegations ****900** establishing a viable cause of action for breach of fiduciary duty. The new allegations are: (1) The directors knowingly dissipated an asset—the net operating losses—by ceasing operations and making the assignment knowing that it would destroy the "creditors' ability to obtain" the losses; (2) Before the assignment, the directors paid preferred claims to employees with remaining cash;[28] (3) After the assignment, the directors became aware of the assignee's unscrupulous conduct in wasting Pluris's assets and did nothing about it. None of these allegations would cure the pleading defects we have identified so as to state a cognizable claim.

27 To the extent Berg offered that it could allege other additional or different facts in its motion for reconsideration below, the same have been waived or forfeited on appeal for Berg's failure to raise them in its briefing.

28 Berg does not identify these allegedly preferred creditors as employees in its opening brief but they were identified by Berg as such in the court below.

The first proposed allegation alleges nothing more or new in factual substance from that which is already alleged in the third amended complaint. Moreover, the directors' acts of knowingly ceasing operations and making the assignment, without more, do not constitute the intentional dissipation of an ***1049** asset that could otherwise be used to pay or satisfy creditors' claims. Accordingly, the allegation does not cure the existing failure to state a viable claim for breach of fiduciary duty under the trust-fund doctrine.

As to the second allegation that the directors paid unidentified preferred employee wage or severance claims of unstated amounts just before the assignment, such claims are generally entitled to legal preference under state law governing assignments for the benefit of creditors (Code Civ. Proc., § 1204) and under federal bankruptcy law (11 U.S.C. § 507(a)(4)), as respondents point out. Thus, without other facts, such payments would not constitute the diversion, dissipation, or undue risking of assets that would amount to a cognizable claim for breach of fiduciary duty.

Berg's third and final proposed new allegation is conclusory in that it states without specific facts that the directors became aware of the assignee's "unscrupulous" behavior in wasting Pluris's remaining assets after the assignment but did nothing about it, without specifically stating just what the directors could or should have done. Even more problematic is that the allegation does not state that the directors knew of facts *before* the assignment suggesting that the assignee would commit

waste yet proceeded with the assignment anyway to the detriment of creditors. After the assignment, the assignee assumed the duty to marshal and protect Pluris's assets and the directors were thus no longer managing Pluris's affairs. (*Sherwood Partners, Inc. v. EOP–Marina Business Center, L.L.C., supra,* 153 Cal.App.4th at p. 983, 62 Cal.Rptr.3d 896.) It follows that they, as individuals, ceased to owe any duty as directors to Pluris's creditors and were not legally responsible for acts of the assignee. Finally, as respondent Boyle argues, the factual allegation that Berg contacted the directors after the assignment to inform them of the assignee's unscrupulous conduct directly contradicts existing allegations of the third amended complaint to the effect that after the assignment, Berg was not in contact with the directors, and indeed was unable to contact them, and that Pluris then had no functioning board. Under the sham pleading doctrine, we are free to disregard inconsistent allegations offered for amendment and we do so here.

In sum, Berg has not demonstrated that it can allege new facts that would cure the defects we have concluded exist in its third ****901** amended complaint. Based on the proposed new allegations, we remain unconvinced of the possibility that Berg's pleading can be amended to overcome these defects. Accordingly, we further conclude that the trial court did not abuse its discretion in sustaining the demurrers without leave to amend.

***1050** DISPOSITION

The judgment is affirmed.

WE CONCUR: MIHARA, Acting P.J., and McADAMS, J.

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142 Cal.App.4th 453
Court of Appeal, Second District, Division 4, California.

CAZA DRILLING (CALIFORNIA), INC., Plaintiff, Cross-defendant and Respondent,
v.
TEG OIL & GAS U.S.A., INC., Defendant, Cross-complainant and Appellant;
Sefton Resources, Inc., Cross-complainant and Appellant.

No. B182892.
|
Aug. 29, 2006.

Synopsis

Background: In response to drilling company's complaint against oil corporation, alleging breach of contract and other causes of action, corporation and its parent filed cross-complaint seeking compensation for economic loss and physical harm to equipment and facilities in connection with drilling blowout. The Superior Court, Los Angeles County, No. PC033872, Barbara M. Scheper, J., granted drilling company summary judgment on cross-complaint based on exculpatory clause in drilling contract. Oil corporation and parent appealed.

Holdings: The Court of Appeal, Epstein, P.J., held that:

[1] corporation was proper party in appeal even though litigation remained as to company's complaint against corporation;

[2] general provision in "daywork drilling contract" between company and corporation, placing liability on corporation controlled over more specific provisions setting forth certain duties;

[3] liability provision was not invalid under statute prohibiting exculpatory clauses when public interest was involved;

[4] corporation's allegations that drilling company violated law did not invalidate exculpatory provision; and

[5] statutes and regulations governing operators of oil facilities did not apply to drilling company.

Affirmed.

West Headnotes (12)

[1] Appeal and Error Determination of part of controversy

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k80 Determination of Controversy
30k80(6) Determination of part of controversy

Where a defendant cross-claims against the plaintiff, dismissal of the cross-complaint is not a final judgment for purposes of appeal

unless there is a separate and distinct party involved and adjudication of the cross-complaint represents a final adverse adjudication as to that party.

1 Cases that cite this headnote

[2] **Appeal and Error** Error affecting coparty or other related party

30 Appeal and Error
30XVI Review
30XVI(C) Persons Entitled to Assert Arguments on Review
30XVI(C)1 In General
30k3082 Necessity and Nature of Harm to Person Complaining
30k3085 Error affecting coparty or other related party
(Formerly 30k880(1))

On appeal from summary judgment for drilling company in cross-complaint against company by oil corporation and its parent, parent had standing to assert issues concerning contract between company and corporation and damages to corporation's facilities, even though cross-complaint alleged no facts that other parties intended to confer any benefit on parent; trial court overruled company's demurrer made on ground of parent's standing, and thus there was no occasion to amend cross-complaint.

[3] **Appeal and Error** Determination of part of controversy

Appeal and Error Parties jointly liable or having joint interests

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k80 Determination of Controversy
30k80(6) Determination of part of controversy
30 Appeal and Error
30VI Parties
30k321 Appellants or Plaintiffs in Error
30k323 Separate Proceeding by One or More Coparties
30k323(3) Parties jointly liable or having joint interests

Oil corporation was proper party in appeal from summary judgment for drilling company in cross-complaint against company by oil corporation and its parent, even though litigation remained as to company's complaint against corporation, since corporation's claims were inextricably intertwined with issues of appeal.

See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 73; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 2:41.5 (CACIVAPP Ch. 2-B).

[4] **Appeal and Error** Determination of part of controversy

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k80 Determination of Controversy
30k80(6) Determination of part of controversy

Where the issues involved in an appeal are inextricably intertwined with claims raised by a party still involved in litigation at the trial court level, judicial economy permits that party to join in the appeal.

[5] **Mines and Minerals** Contracts for testing or working

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k109 Contracts for testing or working

General provision in "daywork drilling contract" between drilling company and oil corporation, placing liability on corporation for economic consequences of operation, controlled over more specific provisions requiring drilling company to use all reasonable means to prevent fires and blowouts, and requiring both parties to comply with all federal, state, and local laws, rules, and regulations.

1 Cases that cite this headnote

[6] **Contracts** Exemption from liability

Contracts Exculpatory contracts

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k114 Exemption from liability
95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189.5 Exculpatory contracts

For an agreement to be construed as precluding liability for "active" or "affirmative" negligence, there must be express and unequivocal language in the agreement which precludes such liability, and an agreement which seeks to limit liability generally without specifically mentioning negligence is construed to shield a party only for passive negligence, not for active negligence.

6 Cases that cite this headnote

[7] **Contracts** Exculpatory contracts

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189.5 Exculpatory contracts
(Formerly 95k189)

Whether an exculpatory clause covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.

2 Cases that cite this headnote

[8] **Contracts** Exemption from liability

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k114 Exemption from liability

When the parties knowingly bargain for protection from liability for negligence, the protection should be afforded, which requires an inquiry by the court into the circumstances of the damage or injury and

the language of the contract; of necessity, each case will turn on its own facts.

4 Cases that cite this headnote

[9] Contracts Exemption from liability

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k114 Exemption from liability

As a matter of contractual interpretation, there is nothing to hinder voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.

2 Cases that cite this headnote

[10] Contracts Exemption from liability

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k114 Exemption from liability

Provision in "daywork drilling contract" between drilling company and oil corporation, placing liability on corporation for economic consequences of operation, was not invalid under statute prohibiting exculpatory clauses relieving party from consequences of its own negligence when public interest was involved; while production of oil was important to public, this drilling was important only to parties, and corporation's failure to plan such that company was only suitable option to perform drilling was not type of unequal bargaining power contemplated by statute. West's Ann.Cal.Civ.Code § 1668.

See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 659 et seq.; Cal. Jur. 3d, Contracts, §§ 139, 140; Cal. Civil Practice (Thomson/West 2003) Business Litigation, § 24:48 et seq.

3 Cases that cite this headnote

[11] Contracts Exemption from liability

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k114 Exemption from liability

Oil corporation's allegations that drilling company violated statutes and regulations did not invalidate exculpatory provision in parties' "daywork drilling contract," limiting drilling company's liability for economic consequences of operation such as blowouts; parties were commercial business entities, and company did not seek complete exemption from culpability but accepted responsibility for damage to its equipment, injury to employees, and certain environmental activity. West's Ann.Cal.Civ.Code § 1668.

10 Cases that cite this headnote

[12] Mines and Minerals Oil and Gas in General

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.12 Oil and Gas in General
260k92.13 In general

Statutes and regulations governing persons engaged in "operating" oil or gas wells did not apply to drilling company working under "daywork drilling contract" with oil corporation. West's Ann.Cal.Pub.Res.Code § 3219; 14 CCR § 1722 et seq.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

EPSTEIN, P.J.

***457** Appellants TEG Oil & Gas U.S.A., Inc. (TEG) and its parent company Sefton Resources, Inc. (Sefton) appeal the grant of summary judgment on their cross-complaint against respondent CAZA Drilling (California), Inc. (CAZA). TEG hired CAZA pursuant to a written agreement to drill a well on an oil field leased by TEG and Sefton and operated by TEG. CAZA argued, and the trial court agreed, that ****274** exculpatory and limitation of liability provisions in the parties' agreement precluded the recovery of the types of damages sought in the cross-complaint: compensation for economic loss and physical harm to equipment and facilities. The court entered judgment on the cross-complaint, despite appellants' contention that CAZA was both negligent and in violation of various regulations governing oil drilling operations.

On appeal, appellants take the position that the exculpatory and limitation of liability provisions in the parties' agreement are invalid under Civil Code section 1668 (section 1668), which prohibits enforcement of contracts that have for their object the exemption of parties from responsibility for fraud, willful injury, or violations of law. We conclude that the contractual provisions represented a valid limitation on liability rather than a complete exemption from responsibility, and that, in any event, appellants have failed in their repeated efforts to identify a specific law or regulation potentially violated by CAZA. We shall affirm the trial court judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Certain background facts are not disputed. In 2002, CAZA was hired by TEG to drill a well at the Tapia oil field, located in Castaic, California. The well was referred to as "Yule 6." The work was performed under

a standardized contract entitled "Daywork Drilling Contract—U.S."[1] A few days after drilling began, there was a blowout, resulting in the death of a CAZA employee, injury to others, and complete destruction of Yule 6.

[1] The same document also contained the "Drilling Bid Proposal" from CAZA.

It is appellants' position the blowout was the result of the negligence of CAZA's crew in pulling the drillstring out of the wellhole too quickly (referred to as "swabbing in"), which caused a fire to ignite. Under appellants' theory, the crew committed further negligence by failing to close the blowout preventer after the fire began. Nonetheless, TEG felt constrained to engage CAZA to do additional work to help repair the damage. In 2003, the parties signed a second Daywork Drilling Contract and a "Payment Schedule" to deal with outstanding invoices due under the 2002 agreement.

***458** *Complaint*

In November 2003, CAZA sued TEG for breach of contract, open book account, account stated, quantum meruit, and foreclosure of oil and gas liens. Initially, the complaint was based on the Payment Schedule. CAZA claimed to be owed $33,219.94, plus interest.

Subsequently, CAZA amended the complaint to include claims for breach of the two Daywork Drilling Contracts. The claim for unpaid work was increased to $117,824.73, based on work performed under the 2003 agreement.

Cross–Complaint

TEG and Sefton cross-claimed against CAZA for breach of contract, negligence, and negligence per se based on violations of various safety provisions contained in state and federal regulations. The cross-complaint alleged that as a result of CAZA's actions appellants suffered "damage to the Well and the hole, as well as unexpected and otherwise unnecessary cleanup and remediation damage, and losses to [appellants'] business operations." Although there is a reference to the related lawsuit by the survivors of the deceased worker (****275** *Currington et al., v. TEG Oil & Gas U.S.A. et al.* (Super. Ct. Los Angeles County, 2003, No. PC033424 (*Currington*)), the cross-complaint does not seek indemnification for damages paid to the plaintiffs in that lawsuit.

Daywork Drilling Contract

The 2002 Daywork Drilling Contract consists of a standardized form agreement with a number of blanks for the name of the operator, the contractor, the location of the well, the commencement date of drilling operations, the rates to be charged for various tasks, and other items. TEG was designated the "Operator" and CAZA was described as the "Contractor." The contract begins with a statement that "Operator [TEG] engages Contractor [CAZA] as an Independent Contractor to drill the hereinafter designated well or wells in search of oil or gas on a daywork basis" and that "Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and control of Operator." "Daywork basis" is defined to mean that "Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and

control of Operator (inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations).” The contract also provides that: “When operating on a daywork basis, Contractor shall be fully paid at the applicable rates of payment and assumes only the obligations and liabilities stated herein. ***459** Except for such obligations and liabilities specifically assumed by Contractor, Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis, including results and all other risks or liabilities incurred in or incident to such operations.”

Paragraph 8, entitled “DRILLING METHODS AND PRACTICES” includes the following pertinent subparagraphs: “8.1 Contractor [CAZA] shall maintain well control equipment in good condition at all times and shall use all reasonable means to prevent and control fires and blowouts and to protect the hole. [¶] ... [¶] 8.3 Each party hereto agrees to comply with all laws, rules, and regulations of any federal, state or local governmental authority which are now or may become applicable to that party's operations covered by or arising out of the performance of this Contract.”

Paragraph 14 governs “RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK.” Under subparagraph 14.1, the contractor (CAZA) “assume[s] liability” for “damage to or destruction of Contractor's surface equipment,” unless the damage fell under paragraph 10, which requires the operator (TEG) to prepare a “sound location” to support the drilling rig, or subparagraph 14.3, which requires the operator to assume liability for damage to or destruction of the contractor's equipment “caused by exposure to highly corrosive or otherwise destructive elements, including those introduced into the drilling fluid.” Subparagraph 14.2 requires the operator to assume liability for “damage to or destruction of Contractor's in-hole equipment.”

Subparagraph 14.4 requires the operator (TEG) to assume liability “for damage to or destruction of Operator's equipment ... regardless of when or how such damage or destruction occurs,” and to “release Contractor of any liability for any such loss or damage.” Similarly, under subparagraph 14.5, the operator is to “be solely responsible for ... damage to or loss of the hole, including the casing therein” and the operator ****276** is to “release Contractor [CAZA] of any liability for damage to or loss of the hole” and in addition “protect, defend and indemnify Contractor from and against any and all claims, liability, and expense relating to such damage to or loss of the hole.”

In subparagraph 14.6, the operator releases the contractor from liability for, and agrees to indemnify the contractor from and against claims “on account of injury to, destruction of, or loss or impairment of any property right in or to oil, gas, or other mineral substance or water” unless “reduced to physical possession above the surface of the earth,” and for “any loss or damage to any formation, strata, or reservoir beneath the surface of the earth.”

***460** Subparagraphs 14.8 and 14.9 require the parties to indemnify each other for claims based

on injuries to their own employees "without regard to the cause or causes thereof or the negligence of any party or parties."

Subparagraph 14.10 states that the operator is liable "for the cost of regaining control of any wild well, as well as for cost of removal of any debris."

The parties focus particular attention on subparagraph 14.11. Entitled "Pollution and Contamination," it provides:

"Notwithstanding anything to the contrary contained herein, except the provisions of Paragraphs 10 and 12[2], it is understood and agreed by and between Contractor and Operator that the responsibility for pollution and contamination shall be as follows: [¶] (a) Unless otherwise provided herein, Contractor [CAZA] shall assume all responsibility for, including control and removal of, and shall protect, defend and indemnity Operator from and against all claims, demands and causes of action of every kind and character arising from pollution or contamination, which originates above the surface of the land or water from spills of fuels, lubricants, motor oils, pipe dope, paints, solvents, ballast, bilge and garbage, except unavoidable pollution from reserve pits, wholly in Contractor's possession and control and directly associated with Contractor's equipment and facilities.

[2] As we have seen, paragraph 10 obligates the operator to prepare a sound location. Paragraph 12 provides for termination of the contractor's liability after restoration of the location.

"(b) Operator [TEG] shall assume all responsibility for, including control and removal of, and shall protect, defend and indemnify Contractor from and against all claims, demands, and causes of action of every kind and character arising directly or indirectly from all other pollution or contamination which may occur during the conduct of operations hereunder, including, but not limited to, that which may result from fire, blowout, cratering, seepage of any other uncontrolled flow of oil, gas, water or other substance, as well as the use or disposition of all drilling fluids, including, but not limited to, oil emulsion, oil base or chemically treated drilling fluids, contaminated cuttings or cavings, lost circulation and fish recovery materials and fluids. Operator shall release Contractor of any liability for the foregoing."

Subparagraph 14.12 provides that neither party is liable to the other for "special, indirect or consequential damages resulting from or arising out of this Contract, including, without limitation, loss of profit or business interruptions including loss or delay of production, however same may be caused."

***461** Finally, subparagraph 14.13 entitled "Indemnity Obligation" provides: "Except as otherwise expressly limited herein, it is ****277** the intent of parties hereto that all releases, indemnity obligations and/or liabilities assumed by such parties under terms of this Contract, including, without limitation, Subparagraphs 14.1 through 14.12 hereof, be without limit and without regard to the cause or causes thereof (including preexisting

conditions), strict liability, regulatory or statutory liability, breach of warranty (express or implied), any theory of tort, breach of contract or the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive."

There are two nonstandardized provisions. A handwritten term provides for a $10 million umbrella policy, in addition to the statutory workers' compensation insurance and the comprehensive general and automobile liability insurance policies. The other change is the deletion by interlineation of a provision requiring TEG to pay motel expenses for CAZA employees.

CAZA's Motion for Summary Judgment

CAZA moved for summary judgment on the cross-complaint on the ground that the 2002 Daywork Drilling Contract allocates liability for all damages claimed by appellants in the cross-complaint to TEG. The statement of undisputed material facts (SOF) is quite brief. With respect to the 2002 Daywork Drilling Contract, it states that the parties entered into the contract on November 7, 2002, that the contract identified TEG as operator and CAZA as contractor, and that TEG "claims that it is owed money for losses that resulted from the performance of the day work contract."

Other factual allegations were geared toward establishing that the parties' agreement contract was not an adhesion contract. In this regard, the SOF states that TEG had discussions with seven other drilling companies before settling on CAZA because CAZA "had the only drilling rig available in the area" at the time, although TEG "could have waited until a rig owned by [three other companies] became available"; that TEG's agent, Karl F. Arleth, refused to sign the 2002 contract until TEG was named an additional insured under CAZA's umbrella policy; that "[Arleth] struck out a term of the day work contract that would have required [TEG] to compensate CAZA" for its employees' hotel expenses; and that "[a]ll terms of the day work contract are negotiable for a price."

The remaining factual allegations relate to establishing that appellants were not at a disadvantage in negotiating with CAZA and were equally knowledgeable concerning the vagaries of drilling for oil. In this regard, the SOF states that Sefton had a market capitalization between $3 and $4 million; that its CEO, Jim Ellerton, was "well versed in the formation of oil ***462** and gas exploration companies"; that Arleth "held various positions in the oil and gas industry" since obtaining his degree; that Arleth worked for 22 years with "the international oil and gas conglomerate Amaco"; that Arleth's position with Amaco included "exploration geologist" and "president of Amaco Polant, Limited"; that "[d]rilling a commercial oil well is an extremely costly process that can result in the expenditure of hundreds of thousands of dollars"; and that "Craig Krummerich, the drilling engineer hired by [TEG], was hired for the express purpose of executing the 'drilling program with the drilling company, CAZA.' "

In a separate declaration, Gene Gaz, area manager for CAZA, explained that there are many different contracts covering drilling services. Besides the standard "Daywork Drilling" contract there are standard "Turnkey"

contracts and "Footage" contracts, and operators sometimes ****278** prepare their own agreements. Under a Turnkey contract, the contractor hires a geologist and formulates a drilling plan, but under a Daywork Drilling contract, "the Operator is in control" and "[t]he Contractor receives all of its direction from the Operator." Gaz stated that standard provisions are negotiable and that if a company wished to place responsibility for damage caused to the geologic structure on CAZA, "CAZA [would] allow such a change in exchange for a dramatically increased drilling cost to the Operator." [3]

[3] Under the 2002 Daywork Drilling Contract, CAZA charged approximately $7,780 per day plus approximately $6,000 for mobilization and demobilization costs.

In its memorandum of points and authorities, CAZA relied primarily on the 2002 Daywork Drilling Contract provision that "Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a Daywork basis, including results and all other risks or liabilities incurred in or incident to such operations" to establish that it could not be liable to appellants on the cross-complaint. The memorandum also references subparagraph 14.11 governing liability for environmental pollution, subparagraph 14.5 governing liability for damage to the hole, and subparagraph 14.12 prohibiting the recovery of consequential damages.

Appellants' Opposition

In their opposition SOF, appellants disputed that the provisions of the Daywork Drilling Contract were negotiable. Karl Arleth, TEG's former president and a director of Sefton who signed the contract on behalf of TEG, stated in a declaration that he was "never informed by CAZA that any of the provisions in the standard, pre-printed form were negotiable," and that "under the circumstances (the small size of our company and the unavailability of other drilling rigs and CAZA's awareness of these facts), it was clear to me ***463** that they were not negotiable." He also stated, however, that "we agreed with a hand-written change that CAZA would provide a $10 million umbrella policy and we also agree[d] to eliminate what appeared to be virtually duplicate per diem reimbursements by deleting the motel expense line and leaving the daily subsistence amount."

With respect to their losses, appellants stated that "Cross–Complainant [[[4]] claims that it is owed money for damages to its well and other costs and expenses resulting from CAZA's breach of the contract and from CAZA's gross negligence and violation of law." They further stated that "[t]he blowout and fire at the Yule 6 well caused injury and death and completely destroyed the well, forcing [appellants] to expend funds for remediation and clean-up, and for other costs and expenses, leaving TEG without income and resulting in Sefton having to sell its stock at a depressed price to raise capital."

[4] Since appellants' SOF used the term "Cross–Complainant" in the singular, it is unclear whether TEG or Sefton is being referred to or if it was a typographical error and both parties claim to have suffered such damages.

Appellants disputed that any of their employees was expert in drilling. They asserted that CAZA "had the only drilling rig available for work which would allow TEG to begin drilling work during the latter part of 2002" and that "[f]or financial reasons and because of duties to stockholders, [appellants] could not wait for other companies to have a rig available at a later time."

The remainder of appellants' SOF describes in detail the actions or omissions of ****279** CAZA's crew that appellants believe caused the blowout and fire. These assertions were supported by the declaration of expert witness, Gregg S. Perkin. Perkin expressed the opinion that "the CAZA crew swabbed in TEG's well as the drill stem was being pulled from the well"; that "the swabbing of the Yule 6 wellbore by the actions of the CAZA crew, and not an earlier reduction in the drilling mud's weight, caused the well to kick" resulting in "the well's blowing out and catching fire"; and that "[m]ore likely than not ... the drill stem was being pulled out of the hole [in a] negligent manner." He based this opinion on his review of the report of the Department of Gas and Geothermal Resources, the "DataHub EDR Log," and CAZA's "Master Driller Reference Guide." Perkin stated that in undertaking these actions, CAZA violated "Part 30 of the Code of Federal Regulations, Part 250.410(b), which stated that: [¶] '4) Drill pipe and downhole tool running and pulling speeds shall be at controlled rates so as not to induce an influx of formation fluids from the effects of swabbing nor cause a loss of drilling fluid and corresponding hydrostatic pressure decrease from the effects of surging. [¶] 5) When there is an indication of swabbing or influx of ***464** formation fluids, the safety devices and measures necessary to control the well shall be employed. The mud shall be circulated and conditioned, on or near the bottom, unless well or mud conditions prevent running the drill pipe back to the bottom.' " (Emphasis omitted.)

Trial Court Order

The trial court granted the motion for summary judgment on the cross-complaint, stating in its order: "[CAZA] asserts that the cross-complaint is barred by the provisions of the contract between the parties assigning liability 'for all consequences of operations by both parties' to [TEG]. Therefore, the issue is one of contract interpretation and is a matter of law for the court to decide. [¶][TEG] points to clauses in the contract requiring [CAZA] to maintain and control well equipment and follow the law. These provisions, however, do not negate the provisions assigning liability to [TEG] 'for all consequences of operation.' [TEG] argues further that the exculpatory provisions of the contract are void as against public policy under Civil Code Section 1668. The court disagrees for the reasons set forth in the moving papers."

Judgment was entered on the cross-complaint, and both Sefton and TEG purported to appeal, although TEG was a party to the still pending complaint.

DISCUSSION

I

[1] **[2]** Where a defendant cross-claims against the plaintiff, dismissal of the cross-

complaint is not a final judgment for purposes of appeal unless there is a separate and distinct party involved and adjudication of the cross-complaint represents a final adverse adjudication as to that party. (See, e.g., *Kantor v. Housing Authority* (1992) 8 Cal.App.4th 424, 429, 10 Cal.Rptr.2d 695; *County of Los Angeles v. Guerrero* (1989) 209 Cal.App.3d 1149, 1152, fn. 2, 257 Cal.Rptr. 787; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 73, p. 128.) Because TEG is still involved in litigation with CAZA, we asked the parties to explain how it could be a proper party to this appeal. We also asked them to address Sefton's standing to assert any issues pertaining to the 2002 Daywork Drilling Contract and damage to the oil facilities. The cross-complaint alleged that Sefton was a third-party beneficiary of the agreement, but the sole basis for that contention appeared to be its status as TEG's ****280** parent. No facts were alleged to show an intent by the parties to confer any benefit on Sefton, other than the indirect benefit derived from profits earned by its subsidiary TEG. (See ***465** *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 405, 87 Cal.Rptr.2d 745 ["It is elementary that a party asserting a claim must have standing to do so. In asserting a claim based upon a contract, this generally requires the party to be a signatory to the contract, or to be an intended third party beneficiary"]; *Luis v. Orcutt Town Water Co.* (1962) 204 Cal.App.2d 433, 441–442, 22 Cal.Rptr. 389 [holding that to assert a claim as a third-party beneficiary, "a plaintiff must plead a contract which was made expressly for his benefit and one in which it clearly appears that he was a beneficiary.... The fortuitous fact that he may have suffered detriment by reason of the nonperformance of the contract does not give him a cause of action"]; *National Rural Telecommunications v. DirecTV* (C.D.Cal.2003) 319 F.Supp.2d 1040, 1057 ["In general, a parent corporation and its subsidiary are legally distinct entities, and a contract under the corporate name of one is not treated as that of both"].)

In a supplemental brief, appellants explain that CAZA raised the issue of Sefton's standing in a demurrer to the cross-complaint that preceded the summary judgment motion. The trial court overruled the demurrer. Accordingly, appellants had no occasion to amend the cross-complaint. In their supplemental brief, appellants contend that Sefton owned the oil field where the injury occurred and the mineral rights impacted by the drilling accident. Since the order overruling the demurrer is not before us, we express no opinion on whether it was properly decided. But we agree with appellants that, under the circumstances, it would be unfair for this court to assume that appellants could not have amended the cross-complaint to assert direct injury to Sefton had the trial court required that they do so.

[3] **[4]** We turn to the issue of whether TEG is a proper party to this appeal. Where the issues involved in an appeal are "inextricably intertwined" with claims raised by a party still involved in litigation at the trial court level, "judicial economy" permits that party to join in the appeal. (*Miller v. Silver* (1986) 181 Cal.App.3d 652, 658, 226 Cal.Rptr. 479; accord, *Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 684–685, 36 Cal.Rptr.2d 12; see *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 60, 271 Cal.Rptr. 410

[where order sustaining demurrer was final and appealable with respect to some of the named defendants, court treated appeal from that order as it related to other defendants as a writ petition]; *G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co.* (1992) 11 Cal.App.4th 318, 325, 13 Cal.Rptr.2d 803 [same, except that appeal was taken from an order granting summary judgment].) That describes this case. We conclude, therefore, that TEG is a proper party here.

***466 II**

[5] We now turn to the merits. According to the 2002 Daywork Drilling Contract, "[e]xcept for such obligations and liabilities specifically assumed by [CAZA], [TEG] shall be solely responsible and assume liability for all consequences of operations by both parties." This was the provision chiefly relied upon by CAZA in seeking summary judgment. Preliminarily, appellants contend this general language cannot control over more specific provisions of subparagraphs 8.1, requiring CAZA to use "all reasonable means" to ****281** prevent fires and blowouts, and 8.3, requiring that both parties comply with all federal, state, and local laws, rules, and regulations.

Appellants are correct that when general and specific provisions are inconsistent, the latter control. (Code Civ. Proc., § 1859; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 754, p. 845.) However, as we have seen, the general provision just quoted is not the only provision in the agreement relating to allocation and limitation of liability. Paragraph 14 describes in detail the parties' respective "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK." Under its terms, each party was to be liable for damage to its own equipment, with certain limited exceptions, and for injury to its own employees. Responsibility for damage to the hole and the underground minerals and for regaining control of a "wild well" was fixed on the operator. Liability for "Pollution and Contamination" was allocated between the parties depending on the cause. Neither party was to be liable for the other's consequential damages. These provisions are more specific with respect to allocation and limitation of liability than the language cited by appellants.

Beyond that, we do not believe that the allocation and limitation of liability provisions are contradicted by subparagraphs 8.1 and 8.3. The latter describes CAZA's duties under the contract. To the extent TEG can establish that CAZA failed to perform these duties, it is entitled to raise that breach as a defense to CAZA's claim for payment under the 2002 Daywork Drilling Contract.[5] The provisions of paragraph 14 are intended to limit contract damages by excluding consequential damages and allocating liability for tort damages for injuries to persons or property in the case of negligence. There is nothing inherently inconsistent in a party to a contract agreeing to do "X," but stating that if it does not, the other party may not recover consequential damages or stating that if negligence occurs during the performance of "X," liability will be limited.

[5] Of course, the parties' rights and responsibilities may have been modified by the Payment Schedule and

the 2003 Daywork Drilling Contract, neither of which are before us.

The authorities upon which appellants rely —*Woodall v. Wayne Steffner Productions* (1962) 201 Cal.App.2d 800, 20 Cal.Rptr. 572 and *Continental* ***467** *Mfg. Corp. v. Underwriters at Lloyds London* (1960) 185 Cal.App.2d 545, 8 Cal.Rptr. 276—were decided before the Supreme Court's seminal decision in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (*Tunkl*), which we discuss more fully below. Their conclusion that a party cannot limit its liability for a duty it has undertaken to perform by contract when that duty is negligently performed does not represent the current state of the law in this area.

[6] **[7]** **[8]** Appellants also contend that the provisions of the various subparagraphs of paragraph 14 cannot be read as excluding liability for negligence because negligence was not specifically mentioned in every subparagraph. It is true that " '[f]or an agreement to be construed as precluding liability for "active" or "affirmative" negligence, there must be express and unequivocal language in the agreement which precludes such liability' " and that " '[a]n agreement which seeks to limit liability generally without specifically mentioning negligence is construed to shield a party only for passive negligence, not for active negligence.' " (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1066, 20 Cal.Rptr.3d 562, quoting *Salton Bay Marina,* ****282** *Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 932–933, 218 Cal.Rptr. 839.) But it is equally true that "[w]hether an exculpatory clause 'covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.' " (*Id.* at p. 1066, 20 Cal.Rptr.3d 562, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 632, 119 Cal.Rptr. 449, 532 P.2d 97.)

[9] Subparagraph 14.13 specifically states that the allocations of liability set forth in subparagraphs 14.1 through 14.12 are "without limit" and "without regard to the cause or causes thereof," including "regulatory or statutory liability," "breach of contract or the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive." Read as a whole, the provisions of paragraph 14 make clear the parties' intent —to limit "the Operator's" ability to recover for injury resulting from accidents, even those caused by the negligence of "the Contractor." As a matter of contractual interpretation, there is nothing to hinder a "voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." (*Tunkl, supra,* 60 Cal.2d at p. 101, 32 Cal.Rptr. 33, 383 P.2d 441.) Such an agreement may, however, run afoul of section 1668, to which we now turn.

***468 III**

Section 1668 provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." As explained in *Tunkl,* early interpretations of this provision expressed the view that section 1668 absolutely prohibited a party from limiting its liability for its own negligence. (*Tunkl, supra,* 60 Cal.2d at p. 95, 32 Cal.Rptr. 33, 383 P.2d 441, citing *England v. Lyon Fireproof Storage Co.* (1928) 94 Cal.App. 562, 271 P. 532.) In *Mills v. Ruppert* (1959) 167 Cal.App.2d 58, 333 P.2d 818, however, the court pointed out that "the only use of the word negligent in said section is in a restrictive sense and only in connection with violations of law." (*Id.* at p. 62, 333 P.2d 818.) It necessarily followed that " 'contracts seeking to relieve individuals from the results of their own negligence are not invalid as against the policy of the law as therein provided, and hence are neither contrary to public policy nor expressed provision of the law....' " (*Id.* at p. 63, 333 P.2d 818; accord, *Werner v. Knoll* (1948) 89 Cal.App.2d 474, 475–476, 201 P.2d 45.)

In *Tunkl,* the Supreme Court limited the holding in *Mills v. Ruppert.* The court concluded that exculpatory clauses relieving a party from the consequences of its own negligence cannot be enforced where the public interest was involved, even if the conduct did not involve a violation of law. The court described factors or characteristics which identify a transaction implicating the public interest: (1) the transaction "concerns a business of a type generally thought suitable for public regulation"; (2) "[t]he party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public"; (3) "[t]he party holds himself out as willing to perform this service for any member of the ****283** public who seeks it, or at least for any member coming within certain established standards"; (4) "[a]s a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services"; (5) "[i]n exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence"; and (6) "[a]s a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Tunkl, supra,* 60 Cal.2d at pp. 98–101, 32 Cal.Rptr. 33, 383 P.2d 441, fns. omitted.)

[10] Appellants contend these factors are present here. We disagree. Although the Supreme Court did not specifically exclude contracts between ***469** relatively equal business entities from its definition of contracts in the public interest, it is difficult to imagine a situation where a contract of that type would meet more than one or two of the requirements discussed in *Tunkl.* With respect to the second and third factors, for example, CAZA did not hold itself out as performing services for the public, but only for the small number of entities that happened to be oil field operators. While

the production of oil is of great importance to the public, the drilling of a particular oil well is generally only important to the party who will profit from it. With respect to the fourth and fifth factors, appellants' argument that it was forced into an adhesion contract boils down to this: "Although two provisions in the agreement were altered during negotiations, we did not know we could alter any provisions during negotiations." The fact that TEG found itself backed into a corner in late 2002 as a result of failure to plan ahead and had no choice but to deal with the only company that had a suitable drill rig available at that specific point in time, is not the sort of unequal bargaining power to which the court in *Tunkl* referred.

Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal.App.3d 1, 262 Cal.Rptr. 716, where commercial entities similarly tried to undercut contractual limitations on liability by reliance on *Tunkl,* is instructive. In that case, a rocket manufactured by defendant McDonnell Douglas Corp. failed to boost a communications satellite to the required orbit. As a result, the satellite had to be written off as a total loss. The insurers of the satellite owner sought to recoup their loss from McDonnell Douglas, contending that limitation of liability provisions in the parties' agreement were contrary to public policy. With regard to plaintiffs' argument that McDonnell Douglas's services were open to any member of the public and provided a service of great importance to some members of the public, the court stated: "[T]he provision of space hardware and launch services is of practical necessity to no individual member of the public; it is of 'practical necessity' only to a few, very large commercial and governmental entities dealing in highly specialized fields such as telecommunications." (*Appalachian Ins. Co. v. McDonnell Douglas Corp., supra,* at p. 29, 262 Cal.Rptr. 716.) Further, "all [sales] were to large, sophisticated commercial and governmental entities." (*Id.* at p. 30, 262 Cal.Rptr. 716.) With regard to the supposedly " 'essential nature' " of the services, the court stated: "*Tunkl's* focus was on whether the service was 'essential' to individual members of the public. Here, the service is 'essential' only to a small number of large corporations and governmental entities; it 'is not a compelled, essential service' but 'a voluntary relationship ****284** between the parties.' (*Okura v. United States Cycling Federation* [(1986)] 186 Cal.App.3d 1462, 1468 [231 Cal.Rptr. 429].) Finally, this case does not involve a 'decisive advantage of bargaining strength [used] against any member of the public who seeks [the] services.' *([Tunkl], supra,* 60 Cal.2d [at p.] 100 [32 Cal.Rptr. 33, 383 P.2d 441].) This case does not involve a large entity using its bargaining strength against an individual member of the ***470** public. This case involves two large, sophisticated corporations with relatively equal bargaining power who negotiated the terms of a voluntary agreement." (*Ibid.,* fn. omitted.)

The same is true here. CAZA's services may have been essential to TEG, but the agreement between the parties did not implicate the public interest in the way required to abrogate exculpatory provisions limiting liability for negligence under *Tunkl.*

IV

[11] If *Tunkl* were the only basis raised by appellants for the applicability of section 1668, we could end our analysis. However, in their cross-complaint and their opposition to the motion for summary judgment, appellants contend that CAZA violated various statutes and regulations in performing drilling activities. They argue that section 1668 invalidates any exculpatory language that would relieve CAZA of liability for performing drilling operations in violation of law "without regard to whether any public interest [was] involved." They cite for support this court's recent decision in *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, 39 Cal.Rptr.3d 425 (*Capri*).

The plaintiff in *Capri* had joined a health club, signing a membership agreement which contained a release and waiver of liability for injuries caused by the club's negligence. Plaintiff was using the club's outdoor swimming pool when he slipped and fell on the pool deck. After the accident, he noticed an accumulation of algae around the drain in the area where the accident occurred. In defense to plaintiff's personal injury suit, the club raised the release. However, in his complaint, plaintiff had alleged that the club violated Health and Safety Code sections 116040 and 116043, which require operators of public swimming pools to maintain them in a sanitary, healthful, and safe manner. Section 116065 of that code made violation of these provisions a crime. In reversing summary judgment in favor of the club, we held that because plaintiff had alleged that the club violated Health and Safety Code sections 116040 and 116043, and that the violation of these laws was the cause of his slip and fall, the limitation on liability "falls squarely within the explicit prohibition in section 1668 against contractual exculpation for a 'violation of law' and is invalid." (*Capri v. L.A. Fitness International, LLC, supra,* 136 Cal.App.4th at p. 1085, 39 Cal.Rptr.3d 425.)

We found support for our conclusion in *Hanna v. Lederman* (1963) 223 Cal.App.2d 786, 36 Cal.Rptr. 150, where tenants suffered property damage after fire system sprinklers flooded their leased premises. The landlord allegedly had failed to install the kind of sprinklers require by the municipal ***471** code. The appellate court held that "[s]ince the claim for damages because of negligence embodied in the first cause of action of each tenant was predicated upon the alleged violation of section 94.30312 of the Municipal Code, the exculpatory provision could not be a defense to that cause of action if the evidence showed such violation to be a proximate cause of the tenant's loss." (*Id.* at p. 792, 36 Cal.Rptr. 150.) Similarly, in *Halliday v. Greene* (1966) 244 Cal.App.2d 482, 53 Cal.Rptr. 267, plaintiffs were injured in a fire ****285** to their apartment building while exiting down the only available staircase. Plaintiffs provided evidence of a general industry safety order requiring two escape exits from a work area. The Court of Appeal reversed a nonsuit in favor of defendant, holding that plaintiffs were entitled to the benefit of the safety order, and hence that the exculpatory clause in the lease agreement was ineffective under section 1668. (*Halliday,* at pp. 487–490, 53 Cal.Rptr. 267.)

Capri is significantly different from the present case because it involved personal injury to a consumer. Here, the contract was between two business entities and the damages claimed

are entirely economic. In only one recent case has a court applied section 1668 to invalidate provisions in a contract between business entities: *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 6 Cal.Rptr.3d 235 (*Health Net*). The agreement at issue there was between Health Net and the Department of Health Services (DHS), and stated that remedies for noncompliance with laws not expressly incorporated into the contract "shall not include money damages." (*Id.* at p. 229, 6 Cal.Rptr.3d 235, italics omitted.) In an action against DHS under the agreement, Health Net claimed that DHS had violated a provision of the Welfare and Institutions Code. The trial court agreed and issued an injunction, but refused to award monetary damages because of the limitation of liability provision in the contract. The trial court thought that section 1668 did not apply since the transaction did not affect the public interest within the meaning of *Tunkl*. On review, that decision was reversed because "section 1668 prohibits the enforcement of any contractual clause that seeks to exempt a party from liability for violations of statutory and regulatory law, regardless of whether the public interest is affected." (*Health Net, supra,* at p. 235, 6 Cal.Rptr.3d 235.)

The holding in *Health Net* does not apply to this case because, as the court explained, the exculpatory clause at issue in that case "prohibit [ed] ... the recovery of *any damages at all* for DHS's statutory for regulatory violations" and "exempt[ed] DHS *completely* from responsibility for completed wrongs." (113 Cal.App.4th at pp. 240–241, 6 Cal.Rptr.3d 235, italics added.) The court believed that even in a commercial case, "an exculpation of any liability for *any* damages for *any* statutory violation surely rises to the level of an 'exempt[ion] from responsibility' within the meaning of the plain language of section 1668." (*Id.* at p. 239, 6 Cal.Rptr.3d 235.) The provisions at issue here do not exempt CAZA from all liability, but merely limit its responsibility with respect to economic damages. The court in *Health Net* expressly declined to decide ***472** whether "*some* contractual limitations over the scope of available remedies" would "necessarily run afoul of section 1668." (*Ibid.*, italics added; see *Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74, 70 Cal.Rptr.2d 85 ["Although exemptions from *all* liability for intentional wrongs, gross negligence and violations of the law have been consistently invalidated [citations], we have not found any case addressing a *limitation* on liability for intentional wrongs, gross negligence or violations of the law"].)

Although it did not reach the issue, the court in *Health Net* cited *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 54 Cal.Rptr. 609 as an example of a case where the court invalidated a provision in a commercial contract that merely limited liability. Plaintiff in *Klein* was a farmer who had purchased mislabeled seed that came with a disclaimer of liability limiting the buyer's damages to the price of the seed. The Court of Appeal upheld a different measure of damages: the difference between the reasonable market value of the ****286** crop as actually produced and the value of the theoretical crop that would have been produced had the seed been as labeled. The court concluded that the limitation on liability ran afoul of section 1668 because a provision

of the Agricultural Code made the sale of mislabeled seed an unlawful act. (*Klein, supra,* at p. 100, 54 Cal.Rptr. 609.)

The court in *Health Net* did not point out that the decision in *Klein* represented something of an anomaly. In the majority of commercial situations, courts have upheld contractual limitations on liability, even against claims that the breaching party violated a law or regulation. (See, e.g., *Nunes Turfgrass, Inc. v. Vaughan–Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1534–1539, 246 Cal.Rptr. 823 [court upheld a contractual provision precluding consequential damages although a violation of law occurred when a seed seller mislabeled packages of grass seed misrepresenting the percentage of annual rye grass because "[t]he California Uniform Commercial Code expressly allows the limitation or exclusion of consequential damages for commercial loss unless the limitation or exclusion is unconscionable"].) A relatively early case, *Delta Air Lines, Inc. v. McDonnell Douglas Corporation* (5th Cir.1974) 503 F.2d 239, involved the purchase of an aircraft from the manufacturer by a major airline. The purchase agreement contained an exculpatory clause limiting damages in the case of the manufacturer's negligence. The airline suffered economic damage when the nose gear of the aircraft collapsed during a landing because a part had allegedly been incorrectly installed. On appeal, the airline contended that the limitation of liability clause was "in clear violation of the public policy of California," pointing to section 21.165 of the Federal Aviation Administration (FAA) regulations "which provides in effect that an airplane manufacturer must determine that any airplane proposed for certification is in a condition for safe operation." (*Delta,* at pp. 243–244.) Applying California law, the Fifth Circuit disagreed that the alleged violation of the regulation rendered the limitation of liability ***473** clause invalid under section 1668: "[The airline] ... confuses a negligence theory of action, under which violation of a law or a regulation may be evidence of negligence, [citation], with the liability that may be imposed by law. [The manufacturer] is still answerable to the FAA and third parties for any responsibility established by the regulation, and any statutory right of action that might be given to [the airline] by FAA regulations has not been abrogated. But none of these causes of action are involved in an action based on common law negligence. We are unable to agree that the contract between two industrial giants fixing the dollar responsibility for [the manufacturer's] alleged negligence would be void under California law, any more than would be an insurance contract which might be written for the same purpose." (*Id.* at p. 244.)

Nearly a decade after the Fifth Circuit decision in *Delta Air Lines, Inc. v. McDonnell Douglas Corporation,* the Ninth Circuit addressed the identical issue and reached the same result. (*Airlift Intern., Inc. v. McDonnell Douglas Corp.* (9th Cir.1982) 685 F.2d 267.) Again seeking to invalidate a contractual limitation on liability, the airline specifically argued that "the exculpation clause was vitiated under state law by [the manufacturer's] violation of federal air regulations." (*Id.* at p. 269.) The court rejected that argument based on the authorities enforcing such clauses in similar situations. (*Ibid.*)

Continental Airlines v. Goodyear Tire & Rubber Co. (9th Cir.1987) 819 F.2d 1519 is to the same effect. That case also involved a limitation of liability provision in a contract for the sale of an aircraft. The ****287** airline argued that the exculpatory clause was "unenforceable to the extent that it bars [the airline] from showing that [the manufacturer] violated federal aviation regulations, which violations allegedly caused the accident." (*Id.* at p. 1527.) The Ninth Circuit disagreed: "The exculpatory clause does not permit [the manufacturer] to violate the federal regulations with impunity; it merely bars suit *by [the airline]* on this ground. Other sanctions remain in place. As we have said in a similar case, 'nothing inhibits the operation of the regulation[s] in question through [passengers'] suits ... or sanction imposed by the [FAA].' " (*Ibid.,* quoting *S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co.* (9th Cir.1981) 641 F.2d 746, 753.)

This line of authority was followed in *In re Air Crash Disaster, Detroit Metro. Airport* (E.D.Mich.1989) 757 F.Supp. 804, where the court, applying California law, upheld an exculpatory clause in a contract between an airline and an aircraft manufacturer even though some of the airline's claims were based on violation of FAA regulations because "[t]he preclusion of [the airline's] claim would not fully vindicate [the manufacturer] from the adverse repercussions that could result from a violation of federal aviation regulations." (*Id.* at p. 811.) "To the extent that [the manufacturer] violated any ***474** federal aviation regulations, it may be held accountable in the form of civil judgments and/or FAA sanctions. The mere fact that [the airline] is contractually precluded from similarly pursuing [the manufacturer] does not violate the spirit of section 1668." (*Id.* at p. 812.)

While no reported California case has expressly relied on this federal precedent, a similar issue was addressed in *Delta Air Lines, Inc. v. Douglas Aircraft Co.* (1965) 238 Cal.App.2d 95, 47 Cal.Rptr. 518. There, the court upheld a limitation of liability provision in a contract for the sale of an aircraft against a claim that it involved the public interest as defined by *Tunkl.* The court did not resolve whether a violation of law on the part of the manufacturer would have rendered the provision invalid under section 1668 because it concluded that no such violation had been established. (*Delta, supra,* at pp. 105–106, 47 Cal.Rptr. 518.) Although the lack of a proven violation of law precluded the court from reaching section 1668, in its discussion of the *Tunkl* public interest issue, it indicated that the outcome of the appeal would not have been substantially different had such a violation occurred: "The fact that [the airline] is a regulated enterprise and carries passengers has no relevance to the present decision. The upholding of the exculpatory clause will not adversely affect rights of future passengers. They are not parties to the contract and their rights would not be compromised. They retain their right to bring a direct action against [the manufacturer] for negligence. [Citation.] Also, their right to bring an action against [the manufacturer] for breach of implied warranty would not be interfered with because the passengers were not a party to the contract containing the exculpatory clause. [¶] In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the

product sold proved to be defective. Under the contract before us, [the airline] (or its insurance carrier if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on [the manufacturer] (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why [the airline], having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed ****288** to shift the risk so assumed to [the manufacturer], which had neither agreed to assume it nor been compensated for such assumption." (*Delta, supra,* at pp. 104–105, 47 Cal.Rptr. 518 fns. omitted.)

The same public policy issue was addressed more recently in *Philippine Airlines, Inc. v. McDonnell Douglas Corp.* (1987) 189 Cal.App.3d 234, 234 Cal.Rptr. 423, and, once again, the same result obtained. There, alleged negligence in the manufacture of an airplane led to a crash during takeoff and personal injury to a number of the airline's passengers. The passengers filed a lawsuit against the airline, and the trial court ruled that the limitation of liability clause in the airline's contract with the manufacturer barred the ***475** airline's cross-complaint for indemnity. Although it did not point to any specific law or regulation, the airline argued on appeal that the provision created a disincentive for manufacturers to produce safe aircraft and was thus directly contrary to California public policy. The appellate court disagreed: "[C]ontractual allocations of risk in nonconsumer commercial settings are routinely upheld. The reason, we think, lies with our laws of negligence and products liability, and with the economic realities of the marketplace. It may be true, as [the airline] argues, that the ultimate consumer—here the passenger—is provided with a streamlined remedy against the [airline] carrier [and therefore may never have incentive to sue the manufacturer directly]. Given, however, the realities of litigation, and the possibility that [an airline] carrier might have insufficient resources to cover what might be extensive liability should an aircraft malfunction, it would make little economic sense for a manufacturer to place on the market a defective product on the belief that it somehow would be insulated from the personal injury claims of passengers. Moreover, and aside from its potential liability to passengers, a manufacturer whose defective products caused its customers to be sued would not long remain in business. And a manufacturer ... is still answerable to the Federal Aviation Commission. We are thus of the opinion that the argued 'disincentive' to produce safe aircraft resulting from a finding that the disclaimer of liability at issue is valid, is largely illusory." (*Id.* at p. 242, 234 Cal.Rptr. 423, fn. omitted.)

Based on these authorities, we conclude that the challenged provisions in the 2002 Daywork Drilling Contract represent a valid limitation on liability rather than an improper attempt to exempt a contracting party from responsibility for violation of law within the meaning of section 1668. CAZA did not seek or obtain complete exemption from culpability on account of its potential negligence or violation of any applicable regulations. It merely sought to limit its liability for economic harm suffered by TEG. The parties foresaw the possibility that a blowout could occur and agreed between

themselves concerning where the losses would fall. Significantly, the agreement required CAZA to accept responsibility for damage to its equipment, injury to its employees, and certain pollution and contamination removal and control activities. Thus, the limitation of liability provisions did not adversely affect the public or the workers employed by CAZA. As appellants concede, CAZA accepted liability for the bodily injury that occurred as the result of the blowout, and has defended and indemnified appellants, through its carrier, in the *Currington* litigation. Under these facts, we agree with the federal courts and the court in *Delta Air Lines, Inc. v. Douglas Aircraft Co., supra,* 238 Cal.App.2d 95, 47 Cal.Rptr. 518: where the only question is which of two equal bargainers should bear the risk of economic loss in the event of a particular ****289** mishap, there is no reason for the courts to intervene and remake the parties' agreement.

***476 V**

[12] Finally, appellants made no serious effort to identify a specific law or regulation potentially violated by CAZA so as to trigger application of section 1668. In their cross-complaint, appellants contended that CAZA violated Public Resources Code section 3219, as well as California Code of Regulations, title 14, sections 1722, subdivisions (a) and (c), 1722.2, 1722.5, 1722.6, and 1744, and title 8, sections 3202, 6507, and 6573, subdivision (a). Appellants did not mention any of these provisions in opposing the summary judgment motion. The only reference to a statutory or regulatory violation was in an expert declaration, where Perkin contended that CAZA violated (former) 30 Code of Federal Regulations, part 250.410(b).[6] We asked for clarification in a letter to counsel, and, in one of the sections in their supplemental brief, appellants cited yet another set of statutes: Public Resources Code sections 3714 to 3716, 3724, 3724.1, 3739, 3740, 3754, and 3757.

6 The requirements quoted by Perkin now appear at 30 Code of Federal Regulations, part 250.456(d) and (e) (2005).

The statutes cited in the supplemental brief are contained in chapter 4 of division 3 of the Public Resources Code. While division 3 is entitled "Oil and Gas," chapter 4 deals entirely with "geothermal resources" defined as "the natural heat of the earth, the energy, in whatever form, below the surface of the earth present in, resulting from, or created by, or which may be extracted from, such natural heat, and all minerals in solution or other products obtained from naturally heated fluids, brines, associated gases, and steam, in whatever form, found below the surface of the earth, *but excluding oil, hydrocarbon gas or other hydrocarbon substances.*" (Pub. Resources Code, § 6903, italics added; see Pub. Resources Code, § 3701.) Since the well involved in this case was not for the production of geothermal resources, the statutory provisions cited in the supplemental brief cannot apply.

The federal regulations quoted in Perkin's declaration, are contained in a subchapter that regulates "oil, gas, and sulphur exploration, development, and production operations *on the outer Continental Shelf.*" (30 C.F.R. §§

250.101, 250.102, italics added.) Obviously, they have no application to this case. [7]

[7] California Code of Regulations, title 14, section 1744, cited in the cross-complaint, also applies to "wells on offshore sites."

At first glance, the statutory and regulatory provisions cited in the cross-complaint seem more relevant. Public Resources Code section 3219 appears in chapter 1 of division 3, which covers "oil and gas" wells. (Pub. Resources Code, § 3008.) Section 3219 provides: "Any person engaged in operating any ***477** oil or gas well wherein high pressure gas is known to exist, and any person drilling for oil or gas in any district where the pressure of oil or gas is unknown shall equip the well with casing of sufficient strength, and with such other safety devices as may be necessary, in accordance with methods approved by the supervisor, and shall use every effort and endeavor effectually to prevent blowouts, explosions, and fires." But, on examination, the flaw in appellants' attempt to hold CAZA accountable for ensuring compliance with this chapter of the Public Resources Code and the safety regulations promulgated under it becomes apparent.

Section 3219 of the Public Resources Code refers to persons engaged in "operating" ****290** oil or gas wells. Section 3009 defines "[o]perator" as "any person who, by virtue of ownership, or under the authority of a lease or any other agreement, has the right to drill, operate, maintain, or control a well." It would be stretching the definition of "operator" to include a company performing drilling work by the day. This is confirmed by other statutory provisions found in this chapter of the Public Resources Code, which imposes duties on "the operator" that a drilling company such as CAZA could not reasonably be expected to fulfill. (See Pub. Resources Code, § 3203 [operator must file a written notice of intent to commence drilling]; § 3204 [operator must post an indemnity bond prior to engaging in drilling; §§ 3210–3211 [owner or operator required to keep a log of the history of the drilling of the well showing, among other things, the formations encountered or passed through]; § 3227 [owner required to file monthly production reports]; *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 605–606, 61 Cal.Rptr.2d 826 ["It would be illogical to impose upon someone who has no authority or responsibility for a well the duty to: file a notice of intent to drill (§ 3203); post an indemnity bond prior to engaging in drilling (§ 3204); maintain a log of drilling operations (§ 3211); employ specific safety devices on wells and drilling techniques (§§ 3219, 3220); file monthly production reports (§ 3227); or abandon a well in accordance with the instructions of the Division (§§ 3228, 3229, 3230, and 3232)"].)

Review of the governing regulations further illustrates the point that "operator" means something more than a daywork contractor. Section 1722.1.1 of title 14 of the California Code of Regulations requires that there be posted at each well location a sign "with the name of the operator." Section 1722, subdivision (b) of title 14 requires "the operator" to "develop an oil spill contingency plan." Section 1722, subdivision (c) of title 14 requires "the operator" to submit "a blowout prevention and control

plan, including provisions for the duties, training, supervision, and schedules for testing equipment and performing personnel drills." Other regulations, while not specifically referencing owners or operators, similarly impose duties that a drilling company hired on a daywork basis could not reasonably be ***478** expected to undertake. Section 1722.2 of title 14 requires wells to have casings "designed to provide anchorage for blowout prevention equipment" and "to withstand anticipated collapse, burst, and tension forces." Sections 1722.3 and 1722.4 of title 14 require cement casings of a certain depth and strength.

Appellants draw our attention to California Code of Regulations, title 14, sections 1722.5 and 1722.6, which are specifically designed to prevent blowouts and "uncontrolled flow of fluids from any well."[8] ****291** While neither provision expressly imposes responsibility for compliance on well owners and operators, there is no reason to interpret them as imposing legal responsibility on a contractor like CAZA, when all the other statutes and regulations in this area are clearly directed at the owner or operator.

8 Section 1722.5 provides: "Blowout prevention and related well control equipment shall be installed, tested, used, and maintained in a manner necessary to prevent an uncontrolled flow of fluid from a well. Division of Oil, Gas, and Geothermal Resources publication No. MO 7, 'Blowout Prevention in California,' shall be used by division personnel as a guide in establishing the blowout prevention equipment requirements specified in the division's approval of proposed operations." (Cal.Code Regs., tit. 14, § 1722.5.)

Section 1722.6 provides: "The operational procedures and the properties, use, and testing of drilling fluid shall be such as are necessary to prevent the uncontrolled flow of fluids from any well. Drilling fluid additives in sufficient quantity to ensure well control shall be kept readily available for immediate use at all times. Fluid which does not exert more hydrostatic pressure than the known pressure of the formations exposed to the well bore shall not be used in a drilling operation without prior approval of the supervisor. [¶] (a) Before removal of the drill pipe or tubing from the hole is begun, the drilling fluid shall be conditioned to provide adequate pressure overbalance to control any potential source of fluid entry. Proper overbalance shall be confirmed by checking the annulus to ensure that there is no fluid flow or loss when there is no fluid movement in the drill pipe or tubing. The drilling fluid weight, the weight and volume of any heavy slug or pill, and the fact that the annulus was checked for fluid movement shall be noted on the driller's log. During removal of the drill pipe or tubing from the hole, a hole-filling program shall be followed to maintain a satisfactory pressure overbalance condition. [¶] (b) Tests of the drilling fluid to determine viscosity, water loss, weight, and gel strength shall be performed at least once daily while circulating, and the results of such tests shall be recorded

> on the driller's log. Equipment for measuring viscosity and fluid weight shall be maintained at the drill site. Exceptions to the test requirements may be granted for special cases, such as shallow development wells in low pressure fields, through the field rule process." (Cal.Code Regs., tit. 14, § 1722.6.)

In short, unlike plaintiff in *Capri,* appellants have failed to set forth a specific statute or regulation purportedly violated. Accordingly, no basis has been presented that justifies invalidating the exculpatory provisions of the 2002 Daywork Drilling Contract.

***479 DISPOSITION**

The judgment is affirmed.

We concur: WILLHITE, and HASTINGS [*], JJ.

[*] Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

All Citations

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Legal Authority R-LA-7

187 F.3d 442
United States Court of Appeals,
Fourth Circuit.

William J. ELMORE, Individually;
Wayne Comer, Individually
and as representatives of a
class of Plaintiffs similarly
situated, Plaintiffs–Appellants,
v.
CONE MILLS CORPORATION,
Defendant–Appellee,
and
Dewey L. Trogdon; Lacy G.
Baynes; Paul W. Stephanz; Cone
Mills Acquisition Corporation;
Wachovia Bank and Trust
Company, N.A., Defendants.

No. 95–2901.
|
Argued Oct. 31, 1996.
|
Decided Aug. 20, 1999.

Synopsis

Employees sued employer to enforce alleged representations that employer's management would contribute whole pension surplus to new employee stock ownership plan (ESOP) if management succeeded in its leveraged buy-out (LBO) of company. The United States District Court for the District of South Carolina entered judgment for employees on some claims, and granted summary judgment for employer on others. Appeal and cross-appeal were taken. On rehearing en banc, the Court of Appeals, 23 F.3d 855, affirmed in part, reversed in part and remanded. On remand, the District Court, Joseph F. Anderson, Jr., J., entered judgment for employer on employees' equitable estoppel, third-party beneficiary and unjust enrichment claims. Employees appealed. The Court of Appeals held that: (1) employees could not establish detrimental reliance on management's representations, and (2) employees could not recover on theory of unjust enrichment.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] Estoppel Reliance on Adverse Party

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k55 Reliance on Adverse Party

The detrimental reliance necessary for claim of equitable estoppel must take the form of a definite and identifiable action.

1 Cases that cite this headnote

[2] Estoppel When Estoppel Arises

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(4) When Estoppel Arises

An estoppel arises when one person makes a definite misrepresentation of fact to another person having reason to believe that the other

will rely upon it and the other in reasonable reliance does an act.

2 Cases that cite this headnote

[3] Labor and Employment Surplus Funds in General

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(D) Contributions and Funding
231Hk511 Recovery of Contributions; Overfunded Plans
231Hk513 Surplus Funds in General (Formerly 296k104)

Alleged representations of employer's management that, if it succeeded in its leveraged buy-out (LBO) of company, it would contribute pension surplus to new employee stock ownership plan (ESOP) could not give rise to reasonable expectation on part of employees that employer would contribute entire $69 million surplus to the ESOP, and thus employees were precluded from establishing the detrimental reliance necessary for equitable estoppel claim, where employees had only been aware of estimates approximating the surplus at about $50 million.

[4] Labor and Employment Surplus Funds in General

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(D) Contributions and Funding
231Hk511 Recovery of Contributions; Overfunded Plans
231Hk513 Surplus Funds in General (Formerly 296k104)

Even if employees voted for management's leveraged buy-out (LBO) of company in reliance upon management's representation that, if it succeeded in its LBO, it would contribute pension surplus to new employee stock ownership plan (ESOP), such reliance was not detrimental, so as to equitably estop employer from refusing to contribute entire $69 million surplus to ESOP, where employees still would not have gained title to pension surplus funds even if they had voted against the LBO and succeeded in killing the LBO.

[5] Labor and Employment Surplus Funds in General

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(D) Contributions and Funding
231Hk511 Recovery of Contributions; Overfunded Plans
231Hk513 Surplus Funds in General (Formerly 296k104)

Employees could not recover, under theory of unjust enrichment, the remaining $14.2 million of pension surplus which employer had not contributed to employee stock ownership plan (ESOP), despite management's alleged representations to employees that it would contribute pension surplus to ESOP if it succeeded in its leveraged buy-out (LBO) of company, where

the original plan entitled employer to the surplus.

3 Cases that cite this headnote

[6] Labor and Employment Equitable Relief; Injunction

Labor and Employment Judgment and Relief

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties
231Hk658 Judgment and Relief
231Hk660 Equitable Relief; Injunction
(Formerly 296k87)
231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk698 Judgment and Relief
231Hk699 In General
(Formerly 296k142)

ERISA provision authorizing plan participant, beneficiary or fiduciary to obtain appropriate equitable relief does not authorize a general form of "appropriate relief", but instead more narrowly circumscribes the availability of the remedy to situations involving the violation of an ERISA provision or the enforcement of the terms of an ERISA protected plan. Employee Retirement Income Security Act of 1974, § 502(a)(3), 29 U.S.C.A. § 1132(a)(3).

2 Cases that cite this headnote

Attorneys and Law Firms

***443 ARGUED:** James Robinson Gilreath, Greenville, South Carolina, for Appellants. John Robbins Wester, Robinson, Bradshaw & Hinson, P.A., Charlotte, North Carolina, for Appellee. **ON BRIEF:** J. Kendall Few, Greenville, South Carolina; John P. Freeman, Columbia, South Carolina, for Appellants. David C. Wright, III, Robinson, Bradshaw & Hinson, P.A., Charlotte, North Carolina; Robert O. King, Kristopher K. Strasser, Ogletree, Deakins, Nash, Smoak & Stewart, L.L.P., Greenville, South Carolina; Robert J. Lawing, Jane C. Jackson, Robinson, Maready, Lawing & Comerford, Winston–Salem, North Carolina, for Appellee.

Before WIDENER, Circuit Judge, HALL,* Senior Circuit Judge, and THORNBURG, United States District Judge for the Western District of North Carolina, sitting by designation.

* Senior Judge Hall heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

Affirmed by published per curiam opinion.

***444 OPINION**

PER CURIAM:

Plaintiffs William Elmore and Wayne Comer, individually and as representatives of a class of employees of defendant Cone Mills, appeal a decision of the district court in South Carolina entering judgment for the defendant and denying the plaintiffs' claims to a pension surplus governed by ERISA under federal common law theories of equitable estoppel, third-party beneficiary of a contract, and unjust enrichment. At issue is a $14.2 million portion of the surplus of an Employee Retirement Plan (ERP) which Cone Mills over-funded. Plaintiffs claim officers of Cone Mills represented Cone Mills' management would contribute the whole surplus to a new Employee Stock Ownership Plan (ESOP) if management succeeded in its leveraged buy-out of the company. Plaintiffs assert that Cone Mills only contributed about $54.8 million by 1985, and that under the foregoing theory they are entitled to recovery of the remainder of a $69 million surplus.

This is the third time this court has heard this case.[1] As a divided *en banc* court we vacated a panel decision and vacated an earlier district court decision in favor of the plaintiffs on their claim that Cone Mills had breached its fiduciary duty in contravention of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461. *Elmore v. Cone Mills Corp.,* 23 F.3d 855 (4th Cir.1994) (*en banc*). However, by an evenly divided court, we upheld the district court's determination that plaintiffs might be able to establish equitable estoppel, subject to proof of detrimental reliance. *Elmore,* 23 F.3d at 863. We did not reach the issue of breach of a third-party beneficiary contract and we affirmed the district court's dismissal of "all remaining ERISA and other claims." *Elmore,* 23 F.3d at 858, 863.

1 For the purposes of this appeal we permitted the use of the 17–volume Joint Appendix from the previous appeal. For completeness we note that the vacated panel decision is reported as 6 F.3d 1028 (4th Cir.1993).

On remand the district court permitted the plaintiffs to amend their complaint to add a claim for unjust enrichment, premised on a federal common-law theory under ERISA. The district court held that the plaintiffs' failure to establish either reasonable reliance or detrimental reliance, prerequisites for specific performance under notions of equitable estoppel or third-party beneficiary, required denial of those theories of recovery. Subsequently, the district court heard the unjust enrichment claim and denied recovery, finding that Cone Mills was not unjustly enriched where the pension plan and ERISA entitled Cone Mills to the surplus pension funds at issue.

The plaintiffs now appeal, asserting that they established the reliance necessary for their theories of equitable estoppel and third-party beneficiary. They claim that the district court's decision for the defendant on the issue of reliance is based on facts contrary to those found in the initial trial and affirmed by this court *en banc.* Additionally, they assert that reliance is not required for restitution under unjust enrichment, and that the plaintiffs had a reasonable expectation that the full pension reversion would be contributed to the surplus.

Our review is of these two issues, and we affirm the judgment of the district court.

I.

The district court in its first opinion set forth the underlying events, and we found the operative facts from that narrative in our *en banc* opinion. *Elmore,* 23 F.3d at 855, 858–860. We confine our discussion to the facts central to the issues before us, reliance and unjust enrichment.

***445** In order to fend off a hostile takeover bid announced on October 31, 1983, a group of senior management employees at Cone Mills organized a leveraged buy-out (LBO) of the company, which became final on March 27, 1984. At that time Dewey Trogdon was Cone Mills' Chairman of the Board and Chief Executive Officer. During the months preceding the LBO Trogdon engaged in regular communication with the employees of Cone Mills to keep them apprised of the situation and to obtain their support for the LBO. Through letters, office memoranda and video presentations Trogdon addressed employee concerns, in particular those regarding the effect of the LBO on their pensions.

Our *en banc* opinion focused on the contents of six of these pre-LBO communications. They are summarized as follows.

A December 12, 1983 letter to all Cone Mills employees explained that the LBO would include an Employee Stock Ownership Plan (ESOP) which would not diminish their pensions. It provided that "pension plans [would] be left in place with existing benefits guaranteed by the company" and that the combination of the new ESOP and the ERP would ensure employees "receive no less than the full amount" of their pre-LBO pension benefits. The letter further stated that "[t]ogether, the ESOP and your pension plan are expected to provide greater financial security than your present retirement benefits." (emphasis omitted). The letter "estimated" that the company could contribute over $50 million in stock to the new ESOP, but Trogdon made the express reservation that "[a]t this time I am not allowed to legally guarantee that amount, nor will it be the same amount in future years." A.J.A 3696.

A December 15, 1983 letter from Trogdon to salaried employees further detailed the proposed LBO. The letter stated that the existing ERP contained a surplus because the company had contributed more funds than were necessary to pay for the accrued benefits. It referred to the fact that under the terms of the ERP Cone Mills was entitled to reclaim this pension surplus. However, the letter provided:

> [i]f the management and the bank proposal to buy the Company is successful, there is agreement among management and the banks that we will contribute the surplus, or its equivalent in Company stock to the ESOP. When the transaction is executed and the contribution is made you, I, and all other Cone employees will "take title" to

> a substantial asset in which we currently have no rights or ownership.

Trogdon qualified this statement with a disclaimer.

> As we get more time, we will answer your questions and publish information to the extent that it can be done on a legal and factual basis. We are, however, giving you information based on our present plans which are subject to revision to meet changing situations.

A bulletin board notice followed the letters. It outlined how Cone Mills' planned contributions to the ESOP would be 10% of salaries paid in both 1983 and 1984, and 1% per annum thereafter. The notice stressed the discretionary nature of any additional contributions.

A February 1984 video presentation referred to the expected contribution as "over $50 million."

The question-and-answer booklet which accompanied the video similarly estimated that

> if all goes according to plan, over $50 million of stock will be contributed to the ESOP for the years 1983 and 1984. After 1984 the company's contribution will be determined by the board of Directors based on business conditions and company profits.

Like all the prior communications the pamphlet contained a disclaimer, this time in bold-face type, stating that

> [t]he legal documents control, and if this material differs in any way from the ***446** legal documents, the correct source of the information is the legal documents.

A February 23, 1984 proxy statement provided to all salaried employees as participants in the employee stock ownership plan (PAYSOP) outlined that the mandatory ESOP obligation of Cone Mills would follow the 10%/10%/1% formula.

A March 15 memorandum, less than two weeks before the LBO vote, cautioned that the company was not making any guarantees as to its contributions to the ESOP after 1985, other than the minimum required by the plan. Trogdon wrote "I do not believe it is prudent, presently, to guarantee ESOP contributions above the 1% minimum for years 1985 and forward...." A.J.A at 4034.

The salaried employees who received these communications owned a total of 1.3% of Cone Mill's common stock. The plaintiffs assert that as a result of these communications the salaried employees voted for the LBO, which was overwhelmingly adopted on March 26, 1984.

On April 2, 1984 the 1983 ESOP documents were executed. They obligated the company to contribute cash, stock, or other property equivalent in value to ten percent of each participating employee's compensation in 1983 and 1984. Thereafter, according to the 10%/10%/1% formula, the documents required a contribution of one percent of each covered employee's compensation. As the *en banc* opinion noted, the documents "did not refer to the pension surplus but did provide for discretionary contributions." *Elmore,* 23 F.3d at 860.

Cone Mills received the pension surplus between May, 1985 and December, 1985. During that time the surplus had increased to approximately $69 million.[2] It is undisputed that from the date of the LBO until September 1985 Cone Mills contributed stock to the ESOP worth $54,796,638. Cone Mills' payments into the ESOP did not coincide with the receipt by Cone Mills of the pension reversion and exceeded the roughly $30 million dollars that the 10%/10%/1% formula of the ESOP documents required over the first two years.

[2] The increase over the estimated $50 million resulted

> [b]ecause the [pension] reversion created taxable income, [therefore] Cone Mills deferred receipt until 1985 so that it could reclaim 1981 taxes paid in excess of $17 million. This intentional delay in receiving the pension reversion surplus increased its value from the original estimate of $50 million to the $69 million [Cone Mills] received by December of 1985.

Elmore, 23 F.3d at 860, n. 4.

On these facts an evenly divided *en banc* court affirmed that the plaintiffs could recover "based on the incorporation of equitable estoppel principles into the federal common law of ERISA", provided that on remand the plaintiffs could establish the final element, reliance.

On remand the district court in its order of April 19, 1996 granted summary judgment in favor of the defendant on the equitable estoppel and third-party beneficiary claims. Based on its review of the law of detrimental reliance and the evidence of the first trial the court found that there was no genuine dispute of material fact as to the issue of reliance. It further found that the record "disclosed that none of the Plaintiffs can demonstrate that he or she expected to receive contribution of more of the surplus than Cone Mills actually contributed."

II. *Detrimental Reliance*

[1] **[2]** The Supreme Court has held that "[an] essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations." *Lyng v. Payne,* 476 U.S. 926, 935, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986). Similarly, this circuit has long held that detrimental reliance on a misrepresentation is a prerequisite for restitution under a theory

of equitable estoppel. See *Service & Training, Inc. v. Data General Corp.,* 963 F.2d 680, 690 (4th Cir.1992). The reliance must take the ***447** form of a definite and identifiable action. Specifically, "[a]n estoppel arises when 'one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance does an act....' " *Sheppard & Enoch Pratt Hospital, Inc. v. Travelers Ins. Co.,* 32 F.3d 120, 127 (4th Cir.1994) (quoting *Heckler v. Community Health Servs. of Crawford,* 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984)).

[3] Central to the district court's finding of an absence of reliance was that all the parties to the litigation believed that the surplus referred to in the communications had a value of roughly $50 million. The court agreed with, and expressly relied upon, the concurring opinion of Judge Wilkins in our *en banc* decision in which Judges Niemeyer and Williams joined:

> The record is unassailable that Cone Mills and the Plaintiffs acted at all times with the mutual understanding that the surplus amounted to approximately $50 million. Because in the only information available to the Plaintiffs it was estimated that the amount of the surplus was approximately $50 million, Plaintiffs could not have relied upon receipt of a substantially greater amount.

Elmore, 23 F.3d at 872 (Wilkins, J. concurring). Thus because the plaintiffs were only aware of estimates approximating the surplus at about $50 million ("approximately $50 million", "over $50 million", "$50 million or more"), the district court found the plaintiffs were precluded from claiming they reasonably expected more. Indeed, the district court found as a matter of fact that there was no causal relation between the communications regarding the retirement benefits and the buy-out—"Whatever action they [the plaintiffs] took in regard to the LBO was not directly connected with the surplus." Rather, it is apparent, as Judge Wilkins' concurrence reasoned, and the district court found, the expectation concerned the amount of money paid to the ESOP. Significantly, we note that the complaint, in its last amended form, sues for $14.2 million, which is the difference between the $54+ million paid to the ESOP Fund by Cone Mills under the 10/10/1 formula and $69 million, the value of the stock in the ERP Fund, created by Cone Mills' overpayment because of the $17 million reclaim of 1981 taxes to the United States. The tax advantage taken by Cone Mills is the root of this law suit.

An additional reason supporting our decision is that the overpayment in the ERP Fund being the property of Cone Mills, we know of no reason that Cone Mills should not have taken advantage of the tax treatment. Since Cone Mills' payments into the ESOP Fund have exceeded anything promised, even the plaintiffs have tacitly acknowledged by

their claim for damages of only $14.2 million that they are not entitled both to all the ERP overpayment and to the 10%/10%/1% payments. As the district court found, " ... by the date Cone Mills' plan tax return was due for plan year 1985, Cone had committed an amount which exceeded the surplus funds returned to the company in 1985."

We find the district court's determinations of fact as to the respective states of mind of the parties are not clearly erroneous, and we affirm its finding of an absence of detrimental reliance by the plaintiffs.

The plaintiffs' contention that the district court contradicted its earlier fact finding by adopting Judge Wilkins' summary of the situation is not well taken. Judge Wilkins expressly based his synopsis above on the district court's observation in the first trial that " 'I think everybody thought [the surplus] was $50 million.' " *Elmore,* 23 F.3d at 872. In this same vein, the plaintiffs, in their briefs and at oral argument seek to buttress their argument of reliance with the claim that the district court initially found Cone Mills had promised the plaintiffs the entire surplus, regardless of the amount. The *en banc* court, the plaintiffs assert, affirmed this finding. Their argument is that the affirmance ***448** precluded the district court on remand from finding, as it did, that all the parties believed the surplus was $50 million and that therefore plaintiffs could not have relied on receiving more.

We are not convinced that these earlier findings of fact preclude or render clearly erroneous the district court's subsequent findings of fact. Consistent throughout is the fact that all the parties believed the surplus was approximately $50 million, regardless of whether Cone Mills represented it would contribute the surplus in its entirety. This does not contradict the court's finding on remand that the plaintiffs did not rely on receiving more if they had not even an inkling that the surplus would in fact be a greater sum.

[4] We also note that the district court, in both its April 19 order granting the summary judgment on the reliance issue and its final September 25 order denying the unjust enrichment claim, rejected several of the plaintiffs' theories regarding how they had relied to their detriment. We mention one of them.

The court rejected the plaintiffs' assertion that they relied to their detriment by voting for the LBO and by supporting management in its effort to persuade banks to participate in the LBO as lenders and equity owners. The court noted that the plaintiffs did not suffer any detriment either by voting for the LBO or by supporting the management.

> The surplus funds in the existing pension account did not belong to the plaintiffs. If the Plaintiffs somehow marshalled their votes and those of others to defeat the LBO, or if the Plaintiffs had expressed their dissatisfaction with the LBO to the extent the banks declined to participate, the Plaintiffs may well have

> succeeded in killing the LBO, but they still would not have gained title to the surplus funds in the existing pension account.

In short, even if the plaintiffs could show they relied on the representations, they had nothing to lose.

Upon review of the record and the materials of the parties we are convinced that these rulings by the district court on the plaintiffs' alternative theories are consistent with our law on estoppel and detrimental reliance, as set forth by *Service & Training, Inc.,* 963 F.2d at 680, and *Sheppard & Enoch Pratt Hospital, Inc.,* 32 F.3d at 120.

III. *Unjust Enrichment*

[5] On April 19, 1995 the district court allowed plaintiffs to amend their complaint to allege a claim for unjust enrichment. The district court denied the defendant's motion to dismiss the claim and "ordered the parties to appear ... for the purpose of presenting whatever evidence or argument either side wished to submit." Neither party submitted additional evidence, relying instead on the existing record. The court then heard argument of the parties on the issue of unjust enrichment and directed the parties to file proposed findings of fact and conclusions of law.

The court considered the testimony and the credibility of the witnesses. It reviewed the briefs and exhibits, and based on the applicable law made its September 25, 1995 Finding of Facts and Conclusions of Law in which it denied plaintiffs' claim that Cone Mills had been unjustly enriched by not contributing the $14.2 million remainder of the pension surplus to the ESOP.

We agree with the district court that *Provident Life & Acc. Ins. Co. v. Waller,* 906 F.2d 985 (4th Cir.), *cert. denied,* 498 U.S. 982, 111 S.Ct. 512, 112 L.Ed.2d 524 (1990), plainly requires the dismissal of the unjust enrichment claim.

Waller involved a claim by an insurance company for the return of medical expenses advanced to a defendant injured in an auto accident. After receiving the advance the defendant also recovered damages ***449** from a third party exceeding the amount of the advance. A clause in the plan provided that where the insured was injured through no fault of her own the insurer would advance her medical expenses, which she would have to repay in full. Because the plaintiff insurer had not required the insuree to sign the repayment provision the district court ruled that such noncompliance with the terms of the plan barred recovery by the plaintiff under the terms of the plan. *Waller,* 906 F.2d at 986–87.

However, we reversed and permitted recovery under a federal common law theory of unjust enrichment in part because the facts there "fit the archetypal unjust enrichment scenario." *Waller,* 906 F.2d at 993. More importantly though, "the plan contract in the present [*Waller*] case provided for repayment of the advanced monies" and thus "the creation of a common law remedy here would *further* the contract between the parties and effectuate the clear

intent of [the plan]." *Waller,* 906 F.2d at 993 (emphasis in original).

Although the plaintiffs continue in their appeal to rely on *Waller* which did permit an unjust enrichment claim in an ERISA action, we unambiguously reaffirmed in *Waller* the general rule that federal courts "must proceed cautiously in creating additional rights under the rubric of federal common law" and do not "possess *carte blanche* authority to 'use state common law to re-write a federal statute.' " *Waller,* 906 F.2d at 992. The use of a federal common law theory claim of unjust enrichment in *Waller* was clearly the exception and not the rule for ERISA cases. See *Waller,* 906 F.2d at 992 (citing *Cummings By Techmeier v. Briggs & Stratton,* 797 F.2d 383, 390 (7th Cir.), *cert. denied,* 479 U.S. 1008, 107 S.Ct. 648, 93 L.Ed.2d 703 (1986), and *Van Orman v. American Ins. Co.,* 680 F.2d 301, 312 (3d Cir.1982), as examples that circuits generally "decline to impose a federal common law of unjust enrichment.").

We agree with the district court that where the original plan entitled Cone Mills to the surplus, the facts in the instant case are closer to *Cummings By Techmeier,* 797 F.2d 383 at 390 (plan explicitly authorized the enrichment), and *Van Orman,* 680 F.2d at 312 (plan silent as to surplus). There is no express right in ERISA for unjust enrichment and the plaintiffs here have not established "a particularly strong affirmative indication that such a common law right would effectuate a statutory policy" of ERISA on the facts of the case. *Waller,* 906 F.2d at 993 (internal quotes omitted). Accordingly we affirm the district court's ruling that the plaintiffs' attempt to obtain funds outside of the plan documents on a federal common law theory of unjust enrichment must fail.

Finally, we would agree in the alternative with the district court that even if recovery under a theory of unjust enrichment were permissible here, plaintiffs are unable to make a satisfactory showing of the well-established elements of that cause of action. Quoting a sister circuit, the district court aptly noted that Cone Mills cannot be unjustly enriched where it put the surplus into the plan and where the plan specifically entitled Cone Mills to recover those funds at the termination of the plan. *Craig v. Bemis,* 517 F.2d 677, 684 (5th Cir.1975) ("enrichment [is] not unjust where it is allowed by the express terms of the Plan").

IV. *Varity Corporation v. Howe*

In their briefs and at oral argument plaintiffs relied on the recent decision of *Varity Corporation v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), announced after the district court issued its opinion in the instant case. In *Varity* the plaintiffs were employees of Massey–Ferguson, Inc., a wholly-owned subsidiary of Varity Corporation. As such the plaintiffs were participants in Massey Ferguson's self-funded welfare benefit plan, which fell within the scope of ERISA. *Varity,* 516 U.S. at 492, 116 S.Ct. 1065. ***450** To Varity's consternation certain divisions of Massey–Ferguson were losing large amounts of money. As a result, Varity faced the prospect of having to honor out of the pockets of Massey–Ferguson's profitable divisions the obligations of those failing divisions arising from the commitments of Massey–Ferguson's benefit

plan commitment to pay medical and other nonpension benefits to employees. *Varity,* 516 U.S. at 493, 116 S.Ct. 1065. The Court found that rather than face the repercussions of terminating those benefits, Varity reorganized according to what it misleadingly gave the optimistic label "Project Sunshine," pursuant to which it put all its "money-losing eggs in one financially rickety basket" named Massey–Combines. *Varity,* 516 U.S. at 493, 116 S.Ct. 1065. Varity then persuaded its employees through literature and videos to switch over to the new benefits plan. While guaranteeing the same benefits, the new plan had as its underpinning only the dubious financial resources of the doomed divisions. The new Massey Combines lost $88 million in its first year and finished its second in receivership, thereby denying the employees their nonpension benefits.

The employees sued under ERISA seeking the benefits they would have received under the previous Massey–Ferguson plan. The Court found that Varity and Massey–Ferguson in their capacity as ERISA fiduciaries through deliberate deception had harmed the plan's beneficiaries, thereby violating the corporations' duties as plan fiduciaries under ERISA § 404. *Varity,* 516 U.S. at 506, 116 S.Ct. 1065. Where there was a breach by the fiduciaries, the Court found that ERISA § 502(a)(3) permits lawsuits for equitable relief. *Varity,* 516 U.S. at 507–15, 116 S.Ct. 1065.

[6] *Varity* is consistent with our decision. Plaintiffs claim that after *Varity* ERISA § 502(a)(3) "provides a right of recovery on behalf of plan beneficiaries seeking appropriate equitable relief (unjust enrichment) due to an employer's having enriched itself by misleading employees." *Varity,* unlike here, involved the violation of a specific ERISA provision (ERISA § 404), and based on that allowed recovery as equitable relief under ERISA § 502(a)(3) where otherwise there would not have been a remedy. *Varity,* 516 U.S. at 507–15, 116 S.Ct. 1065. In the instant case we found *en banc* that Cone Mills as the manager of the ERISA protected plan did not breach its fiduciary duties to the employee plaintiffs. *Elmore,* 23 F.3d at 863. Significantly, ERISA § 502(a)(3) does not authorize a general form of "appropriate relief", but instead more narrowly circumscribes the availability of the remedy to situations involving the violation of an ERISA provision or the enforcement of the terms of an ERISA protected plan. *Mertens v. Hewitt Associates,* 508 U.S. 248, 253, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). The Court has noted that ERISA § 502(a)(3)

> does not, after all, authorize "appropriate relief" *at large,* but only "appropriate relief" for the purpose of "redress[ing any] violations or ... enforc[ing] any provisions" of ERISA or an ERISA plan.

Mertens, 508 U.S. at 253, 113 S.Ct. 2063 (emphasis in original). Thus the absence here of a violation of the plan administrator's fiduciary duty puts this case on a different legal and factual footing than *Varity.*

Further, we find the claim in *Varity* to be rooted in a wholly distinct factual scenario. In *Varity* the Court found that Varity had engaged in "deception" by "knowingly and significantly ... deceiving a plan's beneficiary in order to save the employer money at the beneficiaries expense". *Varity,* 516 U.S. at 506,

116 S.Ct. 1065. Again in contrast, in the present appeal the district court dismissed the fraud claim, and it is not disputed that Cone Mills exceeded its contribution commitment under the ESOP formula of 10%/10%/1%.

***451** The judgment of the district court is accordingly

AFFIRMED.

All Citations

187 F.3d 442, 23 Employee Benefits Cas. 1800, Pens. Plan Guide (CCH) P 23955Z

Legal Authority R-LA-8

2010 WL 669240
Only the Westlaw citation
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United States District Court,
N.D. California.

The ESTATE OF Jerry A. AMARO III, Geraldine Montoya, and Stephanie Montoya, Plaintiffs,
v.
CITY OF OAKLAND, Richard Word, Edward Poulson, R. Holmgren, S. Nowak, M. Battle, E. Karsseboom, C. Bunn, M. Patterson, individually and in their capacities as members of the City of Oakland Police Department, and Does 1–100, inclusive, Defendants.

No. C 09–01019 WHA.
|
Feb. 23, 2010.

West KeySummary

1 **Federal Civil Procedure** Civil Rights Cases in General

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 Civil Rights Cases in General

Genuine issues of material fact existed as to whether officer who told mother of decedent that her son's injuries were caused by gang violence and that her son's death was a drug-related gang murder intended mother to rely on his statements and not file suit. Therefore, summary judgment as to whether statute of limitations barred mother's § 1983 claim against officers who beat her son was precluded under California law. Decedent, severely beaten by his arresting officers and refused medical treatment during five days of incarceration, told mother that his five fractured ribs and collapsed lung, which resulted in his death approximately a month after the beating, were the result of police brutality. Mother made repeated efforts to corroborate son's allegations within one-year limitations period, but was lied to by officer and stonewalled by police department.

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ORDER ON MOTION FOR SUMMARY JUDGMENT AND CERTIFICATION UNDER 28 U.S.C. 1292(b)

WILLIAM ALSUP, District Judge.

INTRODUCTION

***1** This Section 1983 action poses a difficult limitations question. Before he died from his injuries, the son of plaintiff Geraldine Montoya told her that the Oakland police were the ones who had beaten him. She believed him. Upon his death shortly thereafter, she almost filed suit but was dissuaded from doing so by affirmative and misleading statements and conduct by Oakland police. Many years after the limitations period lapsed, a federal investigation into the matter revived her determination. She commenced this action, asserting equitable estoppel to avoid the time bar. This order agrees that a jury should determine whether defendants' affirmative statements and conduct misled and dissuaded Ms. Montoya from commencing suit within the limitations period. No decision of the court of appeals compels an outcome either way. Because an interlocutory appeal of this substantial question would materially advance the litigation, this order will also certify the issue for such an appeal under 28 U.S.C. 1292(b).

STATEMENT

On March 23, 2000, Jerry A. Amaro III was arrested in Oakland during a drug sting commanded by Oakland police officer Edward Poulson. Also involved in the arrest were police officers Eric Karsselboom, Clifford Bunn, Marcell Patterson, Roland Holmgren, Taiwo Pena, Mark Battle, and Steve Nowak (Chanin Decl. Exh. 9; Rowell Decl. Exh. 5).

A witness to the March 23 arrest, Timothy Murphy, testified under oath that he saw undercover officers kicking Amaro in the ribs, kneeing Amaro in the back, and punching Amaro in his face while being pinned to the ground (Murphy Dep. 24–31, 81). Another witness to the arrest, Theresa Batts, informed police during the course of an internal investigation into the arrest that officers were "overly violent" and inflicted blows that "were unnecessary" (Exh. 9 at 20). Batts also testified under oath corroborating these observations (Batts Dep. 11–21). A third witness to the arrest, Laureen White, also apparently saw officers "use their fists to strike Amaro ... in the back" during his arrest (*ibid.*). According to his March 23 arrest report, Amaro was five feet, five inches tall, and weighed 150 pounds (Chanin Decl. Exh. 20).

While being transported to jail, two witnesses testified that Amaro complained of pain in his ribs and requested medical attention from officers (Murphy Dep. 36, 46; Garry Dep. 24–30). Witness Murphy testified under oath that Amaro told two patrolmen, "I think you guys broke my ribs," "I'm having difficulty breathing," and "I need to see a doctor," and that Amaro displayed physical symptoms corroborating these statements (Murphy Dep. 36, 47). Jailer Khalid Mohammed, who was at the admitting desk of the jail when Amaro was admitted, also testified that Amaro had bruises on his face and complained of rib injuries at the time of booking (Mohammed Dep. 24, 33–35; Chanin Decl. Exh. 9 at 23). The jail medical pre-screening form corroborated these observations (Chanin Decl. Exh. 29).

***2** Witness Murphy also shared a jail cell with Amaro for five days following the March 23 arrest and testified that Amaro moaned in pain each day and could barely get up from his bed (*id.* at 51–53, 60). According to Murphy and Amaro was only given Tylenol for his pain, despite Murphy's opinion that "Ray Charles could have saw he was beat up" (*id.* at 51, 60). Oakland jail medical records corroborated that only painkillers were administered to Amaro while in custody (Chanin Decl. Exh. 32).

Amaro was released from custody on March 28 (*id.* Exh. 9 at 14). After returning home, Amaro informed his mother, plaintiff Geraldine Montoya, that he had been beaten by Oakland police officers and that he had asked for medical attention several times but was denied treatment (G. Montoya Dep. 43–45). Amaro showed his mother several large bruises on both his face and body in support of this assertion (*id.* at 44).

On or about April 18, Amaro sought medical treatment for his injuries and had x-rays taken of his chest and torso (Chanin Decl. Exh. 34). The examination by Dr. Angelica Green revealed that Amaro had suffered five fractured ribs and a collapsed lung (*ibid.;* Green Dep. 12; Chanin Decl. Exhs. 35, 36). Although Amaro appeared "stable," Dr. Green recommended that Amaro seek immediate emergency care to drain fluid from his chest, which Amaro —according to Dr. Green's notes in Amaro's medical records—did not agree to do (Chanin Decl. Exh. 34; Green Dep. 11, 17). Dr. Green also allegedly gave Amaro a paper—now non-existent—stating that his injuries were caused by Oakland police, which Amaro supposedly gave to his mother for safekeeping (G. Montoya Dep. 81–82).[1] Amaro told his mother that he believed the paper was important to the lawsuit he intended to file against the City of Oakland (*id.* at 73; 78–79). Between the time of his arrest and death, Amaro apparently told numerous individuals that he had been beaten by Oakland police officers, showing them his x-rays as evidence of his injuries (*id.* at 64–67; 90; Galindo Dep. 160).

1 The identity of this paper is unclear. Its existence is based solely upon Geraldine Montoya's deposition testimony. That said, Dr. Green noted in her deposition that she had written down "fist to left chest wall" (in shorthand) on Amaro's medical report during his April 18th medical examination (Green Dep. 13). This, however, was not her objective medical opinion, but simply a record of what Amaro had told her during the examination (*ibid.*).

Amaro died at the home of Gilbert Becerra on April 21, 2000 (Galindo Dep. 159; Chanin Decl. Exh. 37). According to the sworn testimony of Dr. Sharon Van Meter, the physician who performed Amaro's autopsy and prepared his autopsy report, the five rib fractures suffered by Amaro could only have been caused by "considerable force" beyond "being gently hit or falling ... on the floor" (Van Meter Dep. 28). In other words, Mr. Amaro's multiple rib injuries were either caused by "a severe blow" or "multiple blows ... at multiple times" (*id.* at 23–24, 28). The autopsy report prepared by Van Meter on April 23 described Amaro's cause of death as "brochopneumonia and hemothorax due to multiple rib fractures

due to blunt trauma to the chest" (Chanin Decl. Exh. 59). In other words, someone beat him severely and he died as a result.

Amaro's death was investigated by a team of Oakland homicide investigators led by Sergeant Gus Galindo. To be clear, it appears that numerous investigators were working under Galindo and reporting back to him on their findings. On the morning of Amaro's death, these investigators interviewed Becerra. He said that when Amaro had arrived at his home the evening before, he did not appear to be doing well (Galindo Dep. 159–160). Becerra told homicide investigators that Amaro had told him that his injuries were caused by being beaten by police during a recent arrest (*id.* at 160). Becerra's statement appeared in the "Crime Report" filed by the homicide investigators who responded to the 911 call reporting Amaro's death (Chanin Decl. Exhs. 37).

***3** A "Follow–Up Investigation Report" originally filed by Galindo on the day of Amaro's death also documented these statements by Becerra (Chanin Decl. Exh. 42 at 1, 2). This order notes that this follow-up investigation report appears to have been continually updated throughout the course of the homicide investigation, which extended well after February 21, 2000. In addition to Becerra's statements, the report contained a notation that "[h]ypodermic needles and narcotic paraphernalia" were located in Becerra's basement around Amaro's body (*ibid.*). This follow-up report, as well as Sergeant Galindo's sworn deposition, also indicated that Galindo (or the team of homicide investigators that were reporting to him) sought and reviewed Amaro's March 23 arrest report at around noon on April 21—the same day that Amaro passed away—and found that "[t]here was no indication [in the arrest report] that force was used by the officers" during the arrest (*id.* at 2; Galindo Dep. 56). At or around that time, Galindo was informed by the deputy coroner's office that Amaro's death did not seem unusual and was "a possible drug overdose" (Chanin Decl. Exh. 42 at 2).

Galindo and his team of homicide investigators, however, discovered at around 1:30 p.m. on April 21 that the intake correctional officer present at the police station on March 23 had documented that Amaro had complained of rib pain when taken into custody following his arrest (*id.* at 3). By 4 p.m. that same day, homicide investigators had (1) spoken with Dr. Green, who told investigators that Amaro alleged he had been beaten by police and had suffered broken ribs and possibly a punctured lung, (2) reviewed the Oakland County Jail nurses log that indicated Amaro had complained numerous times of rib pain and being hit by police, and (3) identified a witness to the March 23 arrest, Laureen White, who had seen Oakland police beating an individual matching Amaro's description (*ibid.;* Galindo Dep. 62–64).

At or around 5:30 p.m. on April 21, Sergeant Galindo went to Amaro's residence to inform plaintiff Geraldine Montoya (Amaro's birth mother) and Lou Montoya (Amaro's step father, who is not a party to this action) that Amaro had passed away (*id.* at 4; G. Montoya Dep. 74–81). According to Geraldine Montoya's deposition and sworn declaration, Sergeant Galindo informed her that "a gang

beat [Amaro] up" and that his death was "gang related, and [Amaro] died in the street" because he was "mixed up with a gang and drugs" (G. Montoya Dep. 75–79; G. Montoya Decl. Exh. A ¶ 5). He does not deny he said this. In response, she informed Galindo that her son was not in a gang, did not do drugs, and that her son had told her that he had been beaten during a recent arrest by Oakland police officers (G. Montoya Decl. Exh. A ¶ 6; Galindo Dep. 65–66). Amaro's step-father also informed Galindo of Amaro's allegations regarding his alleged beating by Oakland police officers (G. Montoya Decl. Exh. A ¶ 7). Despite being told these allegations, Galindo continued to represent to both Montoyas that Amaro's death was due to gang involvement or drug use (*ibid.*).

***4** In his deposition, Sergeant Galindo testified that while he remembered hearing the allegations from the Montoyas regarding Amaro being beaten by Oakland police, he "d[id]n't recall exactly what [he] told them" regarding Amaro's death because "[he] did not know what [Amaro] died of at that point" (Galindo Dep. 66). This was, according to Galindo, "standard police investigation" to see what the Montoyas knew first before giving them any details about Amaro's death (*id.* at 67). That said, Sergeant Galindo admitted that "there were things coming out at that point of the investigation" supporting the Montoyas' claim that Amaro had been beaten by police (*ibid.*). Galindo, however, did not reveal this corroborating information to the Montoyas because he "[di]dn't want to contaminate any statement they g[a]ve" to him by giving them information up front (*ibid.*). Even after he took a statement from Geraldine Montoya, however, Galindo did not inform the Montoyas that a witness to the alleged beating, Laureen White, had been discovered, or any other evidence existed that corroborated their claim that Amaro was beaten (*id.* at 67–68). After the April 21 conversation, Sergeant Galindo does not recall ever speaking with Geraldine or Lou Montoya again (*id.* at 107–108).

According to Geraldine Montoya, however, she spoke with Sergeant Galindo via telephone on April 22, the day after her son's death, to seek the release of Amaro's body from the morgue and to try to obtain copies of the police reports concerning her son's death (G. Montoya Decl. Exh. A ¶ 8). According to Montoya, Galindo denied her request to release Amaro's body until after an autopsy had been conducted—which was performed the next day—and informed Montoya that she would *not* have access to any police reports because the matter was still under investigation (*ibid.*). Later that week, Geraldine Montoya visited the police administration building in person to attempt to obtain police records concerning the death of her son. That request was too denied. The matter still "under investigation" (*id.* ¶ 9). While at the police building, Ms. Montoya attempted to speak with Sergeant Galindo. Galindo, however, was "unavailable." She left her name and phone number with a request for him to call her back (*ibid.*). Approximately a month and a half later, Sergeant Galindo phoned Geraldine Montoya. Galindo was allegedly "very rude and brusque." He questioned her "Why do you need the [police and autopsy] reports?" (*id.* ¶ 10). After Montoya told Sergeant Galindo that she wanted to find out why her son died, he

allegedly told her that he was "too busy" to speak to her and then hung up the phone (*ibid.*).

Because Amaro had been in police custody within a reasonable period of time prior to his death and there were early indications that "some force" was used to arrest Amaro on March 23, based upon a "totality of the circumstances," Sergeant Galindo and his team of homicide investigators treated Amaro's death as an "in custody" homicide (Berlin Dep. 39–40). To be clear, this was not a "new" homicide investigation, but a continuation of the same investigation that began with the discovery of Amaro's body.

***5** During the course of this homicide investigation, Galindo and other investigators developed concerns that the officers involved in Amaro's arrest may not have been telling the truth or had, at the very least, provided an incomplete account of the events that occurred on March 23, 2000 (Berlin Dep. 73–76; Chanin Decl. Exh. 42). Specifically, Galindo attended Amaro's autopsy conducted by Dr. Van Meter, and learned that Amaro's rib injuries were inflicted three-to-five weeks prior to Amaro's death. Later that day, an interview with witness Lauren White revealed that she had witnessed officers "us[ing] their right fists to strike down towards an object she later realized was a male Hispanic" (Chanin Decl. Exh. 42 at 5). Over the next three days, other witnesses and interviews, including a follow-up interview with Dr. Van Meter, provided evidence supporting the conclusion that force was used during Amaro's arrest despite the absence of any use of force in the police reports, and that this use of force was the cause of his death (*id* . at 5–12). On April 26, Sergeant Galindo received unsubstantiated information that some police officers who had already given statements to homicide investigators "may change their initial summary" of the incident (*id.* at 10).

Galindo briefed Oakland Police Chief Richard Word, who is also a named defendant in this action, about the homicide investigation on April 27, telling him "that the information ... received from the officers that had been interviewed was not what actually happened based on what we were learning in the investigation" (Galindo Dep. 20). Chief Word then referred the matter to Oakland Police Department's Internal Affairs Division on April 27 to begin a separate IA investigation (Chanin Decl. Exh. 42 at 10). According to Lieutenant Paul Berlin, who was present when Sergeant Galindo debriefed Chief Word on the investigation, this decision by Chief Word to refer the investigation to IA was necessary because "[a]ll the officers had given statements under *Miranda* during the criminal investigation, and he felt that the only way to try to get the officers to tell the truth ... was to grant immunity to the officers, and the only way [the police department] could do that was to take it to internal affairs" (Berlin Dep. 85–88).[2] That same day, Alameda District Attorney Thomas Orloff was briefed on the homicide investigation, and then directed homicide investigators to debrief the deputy district attorney assigned to the case (Chanin Decl. Exh. 42 at 10). On May 10, 2000, the deputy district attorney concluded that there was insufficient evidence to file charges against the officers (*id.* at 12). The homicide investigation was then designated as

"unfounded" that same day, and was never reopened (*ibid.*).

[2] In their depositions, various officers refer to *Lybarger* immunity. This immunity is conferred under *Lybarger v. City of Los Angeles,* 40 Cal.3d 822, 221 Cal.Rptr. 529, 710 P.2d 329 (1985), and precludes the use in subsequent criminal proceedings of statements coerced or compelled from a public employee under threat of dismissal during an administrative hearing.

The IA investigation—which was a separate investigation from the homicide investigation and did *not* involve Sergeant Galindo—was completed on August 14, 2000, over three months after the homicide investigation was closed. The final IA report included the following findings (Chanin Decl. Exh. 9 at 26):

> ***6** Jerry Amaro was severely injured during his arrest of 23 Mar 00. His five broken ribs were most likely a result of being forcibly taken to the sidewalk, but there were at least five officers who used some form of physical prowess on the 140 pound Amaro. There is no documentation of any use of force in the [police] report. While the force used by the officers in this case was justified, there is no indication of any resistance on the part of Amaro or explanation for the use of force in the report. Unfortunately, this was not an anomaly for the operation that night.
>
> There is very little doubt Amaro was struck by officers during his arrest.

The report then discussed the credibility of numerous witnesses to the arrest of Amaro, including an individual who "like[d] the police but did think the officers used too much violence in most of their arrests that night," and stated that "Amaro was struck by the uniformed officers arresting him" (*ibid.*). Additionally, the report found that signatures were forged on the police reports for Amaro's March 23 arrest, the use of force was unacceptably left out of the police reports, and that officers were "derelict" in not responding to Amaro's requests for medical treatment (*id.* at 25–27). Finally, the IA investigation concluded that defendant Poulson inappropriately met with other officers prior to their being interviewed by IA investigators, and that his failure to adequately handle or document Amaro's complaint of pain, passed on to him by some officer, could easily be considered contributory to his death" (*id.* at 27–28).

Notably, the IA investigation was only directed at "[u]ntruthfulness concerning a death in custody investigation," and *not* on whether excessive force had actually been used by the officers or whether Amaro had died as a result of excessive force (Chanin Decl. Exh. 42 at 1; Rachael Dep. 98–100). That said, the IA report noted that Dr. Van Meter, who performed the autopsy on Amaro, told IA investigators that Amaro's rib injuries were "not consistent with a blow and more likely resulted from falling to the ground" (*id.* at 25).[3] Additionally, according to Lieutenant Berlin, the decision by Chief Word to debrief the District Attorney's office before the IA investigation was completed was because the Mirandized statements from the police officers were "locked," and any evidence from the IA investigation that officers had changed their story could not be used by homicide

investigators and the District Attorney's office to determine if there was evidence of excessive force (Berlin Dep. 138–139). As such, the IA report was never presented to the District Attorney's office for reconsideration of whether charges should be filed or whether the homicide investigation should be reopened.

[3] As cited earlier in this order, Dr. Van Meter's sworn deposition, as well as statements made to Sergeant Galindo, are inconsistent with the opinion attributed to her in the IA report.

Geraldine Montoya was never informed about the outcome of either the homicide or IA investigation, and no efforts were made to do so (G. Montoya Decl. Exh. A; Rachael Dep. 84). According to Lieutenant Berlin, the protocol at the time of Amaro's death was that the Coroner's Office—not the Oakland Police Department—would notify a victim's family if foul play was suspected in the victim's death (Berlin Dep. 44). Chief Word, when asked if there was any policy or practice in 2000 about informing relatives of victims involved in an in-custody death investigation about the outcome of that investigation, stated that he "kn[e]w of no such policy" and "couldn't speak to the practice at homicide," but that "there may have been a practice" and "[c]ertainly in the more typical Oakland homicide, [investigators] maintain contact with family members" (Word Dep. 89). This was because family members were "often a key source of information" (*ibid.*). When prompted if there was any other reason why family members would be, as Word put it, "consulted and kept informed as to the status of the investigation," he simply answered "[r]espect" (*ibid.*).

***7** As for informing family members of IA investigations, Captain Anthony Rachal testified that if a member of the public told the Oakland Police Department in 2000 that police officers had beaten up a family member, the allegation would "more than likely" be treated as a complaint of misconduct against the police department and investigated by Internal Affairs (Rachal Dep. 84–87). The complainant would then receive a letter summarizing the allegations as well as the results of the IA investigation (*id.* at 84). Chief Word confirmed that this policy or practice of informing complainants of the results of IA investigations existed in 2000 (Word Dep. 90–91). Additionally, when asked "[i]f a family member told a police officer that they had information that the police beat their son and he died as a result, would that be considered a complaint," Chief Word responded "I would think so" because "it's an allegation" that "[i]f proven true [would be] a violation of policy of law" (*id.* at 91).

Montoya's documented complaint to Sergeant Galindo on April 21 that her son's injuries were caused by Oakland police officers was not treated as an IA complaint, and therefore no complaint of Amaro's alleged beating was filed with Internal Affairs. Because the IA investigation that did occur was initiated from within the Oakland Police Department, Amaro's family—under policy and practice at the time—did not receive notice of it (Rachal Dep. 84–87; Word Dep. 90–91). In sum, aside from being told by Sergeant Galindo on April 21, 2000, that her son was killed by gang members or drugs, plaintiff Geraldine Montoya received no information regarding the death of

her son from the Oakland Police Department, even though she asked for police and autopsy reports from the police department soon after her son's death. Montoya's only indication from Oakland police that something might have been improper regarding the death of her son was that an investigation was occurring, and a statement to her made by a pathologist at the police station that "there's apparently something here" with the investigation that "nobody's going to give away" (G. Montoya Dep. 154). [4]

4 This statement was apparently made when Montoya attempted to meet with Sergeant Galindo in person during the week following Amaro's death.

Following Amaro's death, his family put up posters throughout the neighborhood seeking information about the March 23 arrest (*id.* at 156–57, 160). The posters stated that Amaro had been arrested on March 23, 2000, that he had been beaten by "6 task force officers," and that he had sustained numerous broken ribs as a result of the beating but had been refused medical attention while in jail (Chanin Decl. Exh. 5). During this time period, Geraldine Montoya also approached approximately five Oakland attorneys—including her current counsel, John Burris—to pursue her son's claim (G. Montoya Dep. 152). At that time, she had not found any witnesses to the arrest of her son, and had received no police or autopsy reports corroborating her son's claim (G. Montoya Decl. Exh. A ¶¶ 11, 12). No lawyer was willing to take her case without corroboration of Amaro's claims, especially given the fact that Sergeant Galindo had informed Montoya that her son's death was caused by gang activity or drug use (G. Montoya Dep. 152–153; G. Montoya Decl. Exh. A ¶ 11). [5]

5 As the IA report and depositions indicate, Timothy Murphy and Theresa Batts, both witnesses to the arrest of Amaro, actually saw the fliers put up in the neighborhood by Amaro's family, but chose not to contact plaintiffs (Chanin Decl. Exh. 9; Batts Dep. 31).

***8** On September 13, 2000, Geraldine Montoya filed a government claim against the City of Oakland, based solely upon her son's allegations of excessive force during his March 23 arrest (G. Montoya Dep. 144–147; Rowell Decl. Exh. 6). While this claim was filed in *pro per,* her current counsel—Attorney John Burris—assisted Montoya in putting the document together (G. Montoya Dep. 146). According to Montoya, this claim was filed in order to preserve her right to bring a claim under state law while she continued to try to uncover evidence to corroborate her son's claims (G. Montoya Decl. Exh. A ¶¶ 13, 14). The government claim was brought on behalf of "the Estate of Jerry Amaro III and Geraldine Montoya" and asserted that Amaro was subjected to excessive force during the course of his arrest on March 23, 2000 (Rowell Decl. Exh. 6). It further alleged that Amaro complained of pain while incarcerated and that authorities failed to provide him with medical treatment, and that Amaro died as a result of the excessive force (*ibid.*). The claim sought damages for the violation of Amaro's constitutional and civil rights and failure to provide medical care, as well as loss of support, society, and comfort on behalf of Geraldine Montoya (*ibid* .). Montoya does not recall ever

receiving a formal rejection of the claim (*id.* ¶ 13).

After filing this government claim, Montoya attempted one last time to obtain a copy of police reports concerning her son's arrest and subsequent death in November 2000 (*id.* ¶ 15; Chanin Decl. Exh. 74). While both the homicide and IA investigations had long since concluded, her written request was denied because there was an "outstanding warrant" for her son, who all concerned knew was dead (Chanin Decl. Exh. 74).

* * *

More than eight years then passed. In January 2009, news reports surfaced that the FBI had begun an investigation into defendant Poulson based upon allegations involving the March 23 arrest and subsequent death of Amaro (*ibid.;* Chanin Decl. Exh. 68).[6] The FBI—according to these news reports—had received tips that Poulson had "kicked" Amaro during the arrest, thereby breaking his ribs, but had covered it up by instructing subordinate officers to lie (Chanin Decl. Exh. 55). Attorney Burris filed the instant action on March 2009, after the above-mentioned news reports purportedly provided "facts sufficient to commence litigation" (Opp.14).

6 Defendants' objections to Exhibit 68 are overruled. The news article cited is not being offered for the truth of the matters asserted, but rather for their effect on plaintiffs' decision to file this lawsuit. All other evidentiary objections raised by defendants are denied as moot, since they are not relied upon or cited by this order.

Shortly thereafter, defendants moved to dismiss plaintiffs' claims as time-barred under the applicable one-year statute of limitations (Dkt. No. 17). The motion was denied, since plaintiffs had shown "a plausible factual basis for their argument" of equitable estoppel (Dkt. No. 32). Discovery then proceeded on all issues, leading to the instant motion.

ANALYSIS

Summary judgment is granted under Rule 56 when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." A district court must determine, viewing the evidence in a light most favorable to the nonmoving party, whether there is any genuine issue of material fact. *Giles v. General Motors Acceptance Corp.,* 494 F.3d 865, 872 (9th Cir.2007). A genuine issue of fact is one that could reasonably be resolved, based on the factual record, in favor of either party. A dispute is "material," however, only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

***9** Defendants' instant motion is made on the following grounds: (1) as to all plaintiffs and causes of action, all claims are barred by the statute of limitations; (2) as to plaintiff Stephanie Montoya (Amaro's sister), she has standing only with respect to her equal

protection claim; (3) there is no merit to plaintiffs' equal protection claims; and (4) as to plaintiffs' substantive due process claims, defendants are entitled to judgment as a matter of law because there is no evidence of any intent on the part of any defendant to interfere with plaintiffs' familial relationships (Br.1). There arguments are now addressed in turn.

1. STATUTE OF LIMITATIONS

The limitations period in this action ran long ago. As such, plaintiffs' right to bring their claims depends upon the applicability of equitable estoppel.

Equitable estoppel, also referred to as fraudulent concealment, "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit ... [including] the plaintiff's actual and reasonable reliance on the defendant's conduct or representations." *Santa Maria v. Pac. Bell,* 202 F.3d 1170, 1176 (9th Cir.2000). In federal civil rights actions, such as the one brought by plaintiffs here, California equitable estoppel law applies to the extent it is not inconsistent with federal law. *Azer v. Connell,* 306 F.3d 930, 936 (9th Cir.2002). Under California law, plaintiff carries the burden of pleading and proving the following elements of equitable estoppel:

> (1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

Honig v. San Francisco Planning Dep't, 127 Cal.App.4th 520, 529, 25 Cal.Rptr.3d 649 (2005). This rule is "similar to and not inconsistent" with federal law, as both "focus on actions taken by the defendant which prevent the plaintiff from filing on time." *Lukovsky v. City and County of San Francisco,* 535 F.3d 1044, 1052 (9th Cir.2008); *see also Santa Maria,* 202 F.3d at 1176 (setting forth the federal rule for equitable estoppel and noting that courts must also consider "the extent to which the purposes of the limitations period have been satisfied").

This order has put forth a rich factual record to illustrate the full scope of activity on both sides of this dispute during the period immediately following Jerry Amaro's arrest and death. Defendants, however, would deem the vast majority of these facts irrelevant. Indeed, in their opening brief, defendants rely solely upon evidence that plaintiff Geraldine Montoya believed and had evidence prior to and after her son's death that he had been beaten by Oakland police and had been refused medical treatment to prove that equitable estoppel should not apply (Br.3).

***10** Specifically, defendants highlight the following five undisputed facts: (1) plaintiff Geraldine Montoya had been told by her son that he had been beaten and had been refused

medical treatment by Oakland police officers; (2) she had (or believed she had) in her possession a note from Amaro's physician, given to her by her son, that stated that her son's broken ribs and collapsed lung were caused by Oakland police; (3) she helped her family put up posters around the neighborhood after her son's death that demonstrated knowledge of the facts underlying her claims; (4) she approached attorneys in 2000 to file a claim on behalf of her son; and (5) she actually filed a government claim in September 2000 that included nearly the same claims as in the instant action.

This proves, according to defendants, that plaintiff Geraldine Montoya had in her possession a sufficient factual basis to file the instant litigation, and uncover—through the use of discovery—all the information that plaintiffs' believed had been fraudulently concealed by the Oakland Police Department. Moreover, these facts also prove, according to defendants, that Geraldine Montoya could not have reasonably relied upon Sergeant Galindo's representations that Amaro had been killed by gang members or drugs. As such, defendants argue that under *Gibson v. United States,* 781 F.2d 1334, 1345 (9th Cir.1986), the doctrine of equitable estoppel cannot apply (Br.8–15).

In *Gibson,* the plaintiffs alleged that the FBI had conspired to confiscate documents from their garage, and then burn it down to cover its misdeeds. 781 F.2d at 1343. They alleged further that the FBI attempted to hide its complicity by filing a concocted account of the incident with the Los Angeles fire department. *Id.* at 1344. The Ninth Circuit rejected the plaintiffs' equitable estoppel claim, holding that the plaintiffs could not reasonably have relied on the allegedly fraudulent representation because an incendiary device was discovered immediately after the fire. Thus, plaintiffs *knew* that the fire was not accidentally ignited. Additionally, plaintiffs failed to allege that they undertook diligent efforts within the limitations period to identify the source of the fire. *Id.* at 1345. As such, equitable estoppel could not apply.

Defendants then conclude their argument by characterizing plaintiffs' equitable estoppel claim as "little more than the assertion that the police officers told a story that was different from what Mr. Amaro told his mother," cautioning that "if denial of liability and a contrary version of the facts is enough to show fraudulent concealment, then *every* case would be subject to challenge, and statutes of limitations would have no force and effect" (Br.15).

Plaintiffs' response to defendants' argument is largely unpersuasive. *First,* plaintiffs argue that defendant Poulson's invocation of his Fifth Amendment testimonial privilege should result in the Court drawing "adverse inferences" against him, including that "[d]efendant Poulson actively and fraudulently concealed to what happened to Mr. Amaro" (Opp.16–17). This argument, however, ignores equitable estoppel's requirement of reasonable reliance, since there is no evidence in the record that plaintiffs relied, or could have relied, on any actions taken by Poulson. *Second,* both parties argue over whether Geraldine Montoya could have filed her suit within the limitations period under Rules 8 and 11 of the Federal Rules of Civil Procedure, and the pre-*Iqbal* world of notice pleading (Br. 13; Opp. 17–22).

***11** The doctrine of equitable estoppel, however, does not turn on ebb and flow of federal pleading standards.[7] Rather, it is built upon a "foundation of conscience and fair dealing" and the tenet that "no man may profit from his own wrongdoing in a court of justice." *Lantzy v. Centex Homes,* 31 Cal.4th 363, 383, 2 Cal.Rptr.3d 655, 73 P.3d 517 (2003); *City of Long Beach v. Mansell,* 3 Cal.3d 462, 488, 91 Cal.Rptr. 23, 476 P.2d 423 (1970).

7 This order rejects counsel's theory that, under Rule 11, there was insufficient evidence to file a Section 1983 action against the police. Even under *Iqbal,* if a son or daughter tells a parent that the police used excessive force to beat the child, shows the parent the bruises, tells the parent that the police denied requested medical attention while in custody, seeks a doctor's aid upon release, and then dies from the injuries sustained, the parent, as a plaintiff, has enough to satisfy Rule 11—as does the parent's lawyer. The lawyer may desire stronger evidence as a matter of identifying stronger cases, but even without additional evidence, a parent's first-hand knowledge of what the decedent child had said is enough to satisfy Rule 11.

In light of these principles, *Gibson* does not bar the application of equitable estoppel to this case. While it is clear Geraldine Montoya, as the victim's mother, believed her son's allegations that he had been beaten by police officers and had been denied medical treatment prior to and after his death, she had no evidence to support this claim other than his allegations, the fact that he had been injured, and a "piece of paper" supposedly from Amaro's examining physician, Dr. Green, that he had been beaten by police.[8] This falls far short of the literal smoking gun discovered by plaintiffs in *Gibson*—namely, the incendiary device that provided compelling proof that arson had been committed. 781 F.2d at 1345.

8 As mentioned earlier, the "piece of paper" was likely a copy of the medical report for Amaro's examination by Dr. Green that merely repeated Amaro's allegations that he had been beaten by police (Green Dep. 13).

Troubling to the Court's conscience and sense of fair dealing is that Geraldine Montoya and Amaro's family diligently tried to obtain evidence to corroborate their suspicions. Montoya approached the Oakland police department *three separate times*—the final attempt being nearly eight months after her son's March 23 arrest—to try to obtain documents pertaining to her son's arrest and death. All attempts were rebuffed. Fliers were put up in the community. No witnesses came forward. Legal advice was solicited from at least five attorneys. Each told Montoya that she needed something tangible, like documentation, to bring a worthwhile civil rights claim against the City of Oakland and the Oakland Police Department. On top of all this, Montoya even filed a government claim to diligently attempt to preserve her claim.[9] As such, it is clear that unlike the plaintiffs in *Gibson,* Geraldine Montoya *did* exercise diligence in trying to preserve her claims.

9 Filing such a claim does not bar applicability of equitable tolling. *See UA Local 343 v. Nor–Cal Plumbing, Inc.,* 48 F.3d 1465 (9th Cir.1994) (holding that equitable estoppel applied even though plaintiff had filed an earlier NLRB charge against defendant).

Most troubling of all, however, is that the Oakland Police Department affirmatively misled the Montoyas as to what had occurred. Geraldine and Lou Montoya told Sergeant Galindo of Amaro's allegations of being beaten by Oakland police officers and having been refused medical treatment. Sergeant Galindo replied that Amaro's injuries were caused by gang violence, and that their son had been involved in a drug-related murder by gang members. He knew this was not the truth, or so a reasonable jury could conclude. Galindo never revealed to the Montoyas that there was *any* evidence supporting their allegations, despite knowing otherwise.

Also troubling is the fact that Sergeant Galindo noted the Montoyas allegations of excessive (or at least questionable) force in his homicide log, but failed to submit a formal complaint to the Internal Affairs department regarding the alleged police misconduct. The record supports a finding that it was practice, if not procedure, in 2000 for Oakland police officers to report such complaints to Internal Affairs for further investigation. Had such a complaint been filed, the Montoyas would have received a written report summarizing the findings of the IA investigation into those allegations, and could have used this information to file this action. And why wasn't the victim's family kept informed as to the status of the homicide investigation into the death *of their own son,* which Police Chief Word said was common practice for typical Oakland homicide investigations? Had the victim's family been apprised of the investigation, they might have learned of the *numerous* witnesses who had provided statements to police, or at the very least, the suspicious results of their son's autopsy report. Any one of these sources of information could have corrected the affirmative misrepresentations made by Officer Galindo to the victim's family.

***12** Instead, plaintiff Geraldine Montoya was stonewalled in every attempt she made—within the limitations period, this order adds—to obtain evidence to corroborate her deceased son's allegations, and disprove the false story told by Sergeant Galindo. On this point, the undersigned acknowledges that records of ongoing criminal investigations are (and were, at the time of these events) exempt from disclosure under the Public Records Act. *See* Cal. Gov.Code § 6254(f); *see also Williams v. Superior Court,* 5 Cal.4th 337, 348–350, 19 Cal.Rptr.2d 882, 852 P.2d 377 (1993). This exemption, however, was far from absolute. While police had the right to withhold the police reports themselves, Section 6254(f) required police to disclose certain *information* within those records—such as "the names and addresses ... [and] statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof" as well as "the factual circumstances surrounding the arrest" of "every individual arrested by the agency." Cal. Gov.Code §§ 6254(f), (f)(1). The only statutory exception to this requirement is if the disclosure of such information would have

"endanger [ed] the safety of a witness" or "the successful completion of the investigation[.]" *Ibid.* Here, there is no evidence that any of the witnesses to Amaro's beating would have been endangered by such a disclosure. Moreover, the only threat to the police's "successful completion of the investigation" was the possibility that plaintiffs would have filed a timely suit. Finally, Geraldine Montoya's written request for her son's police reports in November 2000 was months after all investigations into her son's death had ended. As such, "the successful completion of [any] investigation" could not have been endangered by disclosure, and the information and records should have been made available to her. This order also notes that the reason given for the November 2000 denial—that her dead son had an "outstanding warrant"—was ridiculous at best and more likely part of a cover-up. Had these police and autopsy reports been made available to Ms. Montoya, it is a reasonable inference that plaintiffs would have had sufficient documentation to bring their suit within the limitations period.

Instead, plaintiffs reasonably relied upon the Oakland Police Department to hear their allegations of misconduct and act upon them. "In performing their official functions, government officers and employees owe unique duties of loyalty, trust, and candor to their employers, *and to the public at large.*" *Spielbauer v. County of Santa Clara,* 45 Cal.4th 704, 725, 88 Cal.Rptr.3d 590, 199 P.3d 1125 (2009) (emphasis added). Even in the face of troubling allegations concerning the misconduct of one of their own, law enforcement must continue to be guardians of the peace and seek justice for members of the public who rely upon them in this capacity. Indeed, in such a situation, law enforcement is in the *best* position to look inward, investigate, and uncover the truth.

***13** Here, the Oakland Police Department breached their duties of loyalty, trust, and candor to plaintiffs. Jerry Amaro's death was the subject of both a homicide and IA investigation involving the very allegations of misconduct plaintiffs presented to the police. Despite this fact, the *only* information police provided to the victim's family was the false story that Amaro had been beaten and killed by gang members due to drug involvement. Even if this affirmative misrepresentation had not been made by Sergeant Galindo, Oakland police knew *within hours* of investigating Amaro's death that plaintiffs' allegations had supporting evidence, and either should have instigated an IA investigation on plaintiffs' behalf or kept Amaro's family apprised of the status of the homicide investigation. Neither happened here. Every time Geraldine Montoya diligently tried to obtain information from the police department, she met a stonewall. Under these facts, this order finds that the defendants had an affirmative duty to correct the false statements made to the victim's family, file an IA claim based upon the Montoyas' allegations of excessive force, or keep the victim's family —who were obviously not suspects in the death of Amaro—apprised of the homicide investigation. None of these actions were taken.

Given these and all other reasons discussed above, it would not serve the principles of equitable estoppel or the purposes of the limitations period to bar plaintiffs claims in this action. Plaintiffs have, at the very least,

provided sufficient evidence to take to the jury the issue of whether under these facts, Sergeant Galindo intended plaintiffs to rely on his statement and not file suit, plaintiffs had a right to believe it was so intended, plaintiffs knew the true state of facts to bring their claim, and plaintiffs' reliance on Sergeant Galindo's statement was reasonable. As such, defendants' motion seeking to bar plaintiffs' claims under the statute of limitations must be **DENIED.** [10]

10 Both parties raised the issue of whether plaintiff Geraldine Montoya's alleged mental incapacity should be considered in determining whether equitable estoppel should apply. Because this order does not rely on Montoya's mental capacity, neither party's arguments on this issue are addressed.

2. ISSUES OF STANDING

Defendants separately challenge the standing of both Geraldine Montoya and Stephanie Montoya, the mother and sister of Amaro, to bring equal protection and substantive due process claims against defendants under the Fourteenth Amendment.

First, defendants argue that nothing in the record suggests any injury caused by an intent to discriminate against plaintiffs because of their membership in a protected class (Br.17). Plaintiffs expressly declined to oppose this assertion to "narrow the case for trial" (Opp.22). As such, defendants' motion with respect to plaintiffs' equal protection claims is **GRANTED.**

Second, defendants target the substantive due process claims raised by Geraldine and Stephanie Montoya. With respect to both Montoyas, defendants ask the Court to disregard Ninth Circuit precedent set forth in *Ward v. City of San Jose,* 967 F.2d 280 (9th Cir.1991), and *Smith v. City of Fontana,* 818 F.2d 1411, 1420 n. 12 (9th Cir.1987), and hold that a substantive due process claim based upon a deprivation of a liberty interest due to interference with familial relations must show *a specific intent to interfere with the familial relation itself* above and beyond an injury to the family member (Br.18). To support this good faith argument, defendants cite to numerous decisions from our sister circuits—specifically, the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits—supporting their proposed rule of law (Br.18). Under current Ninth Circuit precedent, however, plaintiffs need only show that the officials were "more than merely negligent" to state such a claim, which the factual record supports. *Smith v. City of Fontana,* 818 F.2d 1411, 1420 n. 12 (9th Cir.1987).

***14** While the undersigned acknowledges that the prevailing winds on this issue blow in the opposite direction of this circuit's controlling case law, the Ninth Circuit recently reiterated that the standards governing familial relations claims under the Fourteenth Amendment set forth in *City of Fontana* remain applicable. *See Crowe v. County of San Diego,* 593 F.3d 841, 2010 WL 293758, at *31 (9th Cir.2010) (citing the familial relations rule in *City of Fontana* with approval). As such, defendants' motion for summary judgment seeking a good faith departure from Ninth Circuit precedent is **DENIED.** No evidence of an intent to interfere

with the plaintiffs' familial relations is required —at least under current precedent—to maintain a familial relations claims under the Fourteenth Amendment.

Third, defendants argue that Stephanie Montoya, as the decedent's sister, lacks standing to assert a familial relations substantive due process claim against defendants under Section 1983. In Section 1983 actions, the survivors of an individual killed as a result of an officer's alleged excessive use of force may assert a Fourth Amendment claim on that individual's behalf if the relevant state's law authorizes a survival action. 42 U.S.C.1988(a); *Moreland v. Las Vegas Metro. Police Dept.,* 159 F.3d 365, 369 (9th Cir.1998). Under California Code of Civil Procedure Section 377.30, a survival action may be commenced by a decedent's personal representative or, if none, by the decedent's successor-in interest. The party seeking to bring a survival action bears the burden of demonstrating that a particular state's law allows for such an action and that she meets the state's requirements. *Moreland,* 159 F.3d at 369. Here, the parties agree that Geraldine Montoya is the successor-in-interest under Section 377.30. Stephanie Montoya, however, is *not* alleged to have standing under Section 377.30 (Compl. ¶ 5; Opp. 24). As such, she is not authorized to bring a survival action for the excessive-force claim.

With respect to Stephanie Montoya's substantive due process claim, defendants also assert that she lacks standing to bring her claim. Under the due process clause, both the parents and children of a person killed by a government officer have standing to assert claims for their own deprivations of liberty arising out of their loss of consortium. *Moreland,* 159 F.3d at 371; *City of Fontana,* 818 F.2d at 1418. Under *Ward,* however, the Ninth Circuit clearly stated that siblings do *not* have standing to assert such a claim. 967 F.2d at 284.

While both parties agree that this is the law, plaintiffs nonetheless argue that Stephanie Montoya has standing to bring her Section 1983 claim under the Fourteenth Amendment based upon California's wrongful death statute, California Code of Civil Procedure Section 377.60, because she was a "dependent" of Amaro and a minor at the time of his death. In essence, plaintiffs ask the Court to circumvent the rule in *Ward* and treat Stephanie Montoya as a *de facto* child of Amaro under Section 377.60. This argument is unpersuasive. While Section 377.60 defines the range of individuals who may bring a wrongful death tort claim in California, it does not (and cannot) define the outer bounds of constitutionally recognized liberty interests for substantive due process claims brought under Section 1983. Indeed, plaintiffs cite to no binding or persuasive case law supporting a departure from the clear rule set forth in *Ward.*

***15** As such, this order declines to extend standing to Stephanie Montoya to bring her substantive due process claims as the sibling of Jerry Amaro, and defendants' motion on this issue is **GRANTED.** Because this finding is not based upon "technical pleading issues," plaintiffs' request for leave to amend their complaint on this issue is **DENIED.** Stephanie Montoya does not have standing to bring any of her claims in this action.

3. CERTIFICATION UNDER 28 U.S.C. 1292(B)

The undersigned district judge is of the opinion that (1) this order involves a controlling question of law as to which there is a substantial ground for differences of opinion, namely whether the doctrine of equitable estoppel should apply where a plaintiff believes she has a Section 1983 claim but is dissuaded from bringing the claim by affirmative misrepresentations and stonewalling by the police, and (2) an immediate appeal from this order may materially advance the ultimate termination of the litigation, especially since a different outcome in the court of appeals would end the litigation. The undersigned therefore certifies the question for interlocutory appeal under 28 U.S.C. 1292(b). Defendants have **TEN DAYS** to apply to the court of appeals to permit an appeal. If such an application is timely made, the impending trial and final preparations therefor will be postponed.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment pertaining to plaintiffs' equal protection claims and all claims brought by Stephanie Montoya is **GRANTED.** The motion with respect to all remaining issues is **DENIED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 669240

Legal Authority R-LA-9

114 Cal.App.4th 411
Court of Appeal, Second District, Division 1, California.

EVEREST INVESTORS 8 et al., Plaintiffs and Appellants,
v.
McNEIL PARTNERS et al., Defendants and Respondents.

No. B159267.
|
Dec. 16, 2003.
|
Certified for Partial Publication. *

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part F.

|
Review Denied March 17, 2004. **

** George, C.J., and Brown, J., did not participate therein.

Synopsis

Background: Limited partners in real estate partnerships brought action for breach of fiduciary duty, unfair competition, and fraud against general partner, alleging that general partner benefitted itself to detriment of limited partners by retaining postmerger equity interest in partnerships, and selling postmerger entity at higher value than that allocated to limited partners in premerger cash-out. The Superior Court, Los Angeles County, No. BC243024, Andria K. Richey, J., granted summary judgment for general partner. Limited partners appealed.

Holdings: The Court of Appeal, Mallano, J., held that:

[1] limited partners' claims were individual, not derivative, in nature, and thus not barred by judgment in related class action, and

[2] genuine issues of triable fact as to defense of business judgment rule existed, precluding summary judgment.

Judgment reversed and order vacated.

See also 100 Cal.App.4th 1102, 123 Cal.Rptr.2d 297.

West Headnotes (18)

[1] **Partnership** Aggregate or entity theory
Partnership Interests of partners

289 Partnership
289I The Relation in General
289I(A) In General
289k409 Partnership as Distinct Entity
289k411 Aggregate or entity theory
(Formerly 289k63)
289 Partnership
289IV Mutual Rights, Duties, and Liabilities of Partners
289IV(B) Nature of Obligation Among Partners
289k556 Partnership Property and Funds
289k558 Interests of partners
(Formerly 289k76)

A "partnership" is an entity separate and apart from the partners of which it is comprised, and it is the partnership entity which owns its assets, not the partners.

6 Cases that cite this headnote

[2] Partnership Aggregate or entity theory

289 Partnership
289I The Relation in General
289I(A) In General
289k409 Partnership as Distinct Entity
289k411 Aggregate or entity theory
(Formerly 289k63)

A "partnership" is a "hybrid" organization that is viewed as an aggregation of individuals for some purposes, and as an entity for other purposes, such as ownership of property. West's Ann.Cal.Corp.Code § 15008 (Repealed).

1 Cases that cite this headnote

[3] Partnership Fiduciary Duty

289 Partnership
289IV Mutual Rights, Duties, and Liabilities of Partners
289IV(B) Nature of Obligation Among Partners
289k543 Fiduciary Duty
289k544 In general
(Formerly 289k70)

Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other.

11 Cases that cite this headnote

[4] Partnership Good faith

289 Partnership
289IV Mutual Rights, Duties, and Liabilities of Partners
289IV(B) Nature of Obligation Among Partners
289k543 Fiduciary Duty
289k545 Good faith
(Formerly 289k70)

In proceedings connected with the conduct of a partnership, partners are bound to act in the highest good faith to their copartners and may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

7 Cases that cite this headnote

[5] Partnership General Partner

289 Partnership
289IX Limited Partnerships
289IX(C) Relation Among Partners
289k1132 General Partner
289k1133 In general
(Formerly 289k353)

A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and to the other partners as in a general partnership.

3 Cases that cite this headnote

[6] Partnership Fiduciary duty to partnership and limited partners

289 Partnership
289IX Limited Partnerships
289IX(C) Relation Among Partners
289k1132 General Partner
289k1134 Fiduciary duty to partnership and limited partners
(Formerly 289k366)

The fiduciary obligations of a general partner with respect to matters fundamentally related to the partnership business cannot be waived or contracted away in the partnership agreement.

3 Cases that cite this headnote

[7] **Partnership** Good faith

Partnership Fair dealing

289 Partnership
289IV Mutual Rights, Duties, and Liabilities of Partners
289IV(B) Nature of Obligation Among Partners
289k543 Fiduciary Duty
289k545 Good faith
(Formerly 289k70)
289 Partnership
289IV Mutual Rights, Duties, and Liabilities of Partners
289IV(B) Nature of Obligation Among Partners
289k543 Fiduciary Duty
289k547 Fair dealing
(Formerly 289k70)

A partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other.

3 Cases that cite this headnote

[8] **Partnership** Fiduciary Duty

Partnership As to fiduciary relation of partners

289 Partnership
289IV Mutual Rights, Duties, and Liabilities of Partners
289IV(B) Nature of Obligation Among Partners
289k543 Fiduciary Duty
289k544 In general
(Formerly 289k70)
289 Partnership
289VII Dissolution, Settlement, and Accounting
289VII(B) Rights, Powers, and Liabilities After Dissolution
289k943 Effect of Dissolution
289k945 As to fiduciary relation of partners
(Formerly 289k277)

A partner's fiduciary duty extends to the dissolution and liquidation of partnership affairs, as well as to the sale by one partner to another of an interest in the partnership.

4 Cases that cite this headnote

[9] **Partnership** Control and disposition of partnership property

289 Partnership
289VII Dissolution, Settlement, and Accounting
289VII(B) Rights, Powers, and Liabilities After Dissolution
289k949 Continuance of Partnership for Purposes of Winding Up
289k953 Control and disposition of partnership property
(Formerly 289k282)

A partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his copartner for his share of the prospective business opportunity; such a partnership opportunity may not be appropriated by one partner to the detriment of a copartner even after dissolution.

7 Cases that cite this headnote

[10] **Corporations and Business Organizations** Nature and Form of Remedy

101 Corporations and Business Organizations
101VIII Derivative Actions; Suing or Defending on Behalf of Corporation
101VIII(A) In General
101k2022 Nature and Form of Remedy

101k2023 In general
(Formerly 101k207.5)

An action against a corporation is a "derivative action," that is, in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual partners, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.

12 Cases that cite this headnote

[11] Partnership Derivative Action

289 Partnership
289IX Limited Partnerships
289IX(D) Relation of Partners to Third Parties
289k1176 Actions by or Against Partnership or Partners
289k1179 Derivative Action
289k1179(1) In general
(Formerly 289k375)

The purpose of a limited partner's derivative action is to enforce a claim which the limited partnership possesses against others, including the general partners, but which the partnership refuses to enforce.

4 Cases that cite this headnote

[12] Partnership Derivative Action

289 Partnership
289IX Limited Partnerships
289IX(D) Relation of Partners to Third Parties
289k1176 Actions by or Against Partnership or Partners
289k1179 Derivative Action
289k1179(1) In general
(Formerly 289k375)

Like a shareholder's derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant, and, although a limited partner is named as the plaintiff, it is the limited partnership which derives the benefits of the action.

6 Cases that cite this headnote

[13] Partnership Persons entitled to sue; standing

289 Partnership
289IX Limited Partnerships
289IX(D) Relation of Partners to Third Parties
289k1176 Actions by or Against Partnership or Partners
289k1181 Persons entitled to sue; standing
(Formerly 289k375)

A limited partner may suffer an injury to its interest without the occurrence of any injury to the partnership entity or to the partnership assets, because the interest of a limited partner in a partnership is separate and apart from the partnership's ownership interest in its assets.

7 Cases that cite this headnote

[14] Partnership Derivative Action

289 Partnership
289IX Limited Partnerships
289IX(C) Relation Among Partners
289k1156 Actions Between Partners
289k1159 Derivative Action
289k1159(1) In general
(Formerly 289k370)

Limited partners' claims against general partner in action for breach

of fiduciary duty, unfair competition, and fraud were individual, not derivative, in nature, and thus not barred by judgment in related class action; gravamen of allegations that general partner benefitted itself to detriment of limited partners by retaining postmerger equity interest in partnerships, and selling postmerger entity at higher value than that allocated to limited partners in premerger cash-out, was injury to interests of limited partners, not injury to general partner or partnerships.

See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Partnership, §§ 20, 31, 107; Cal. Civil Practice, Business Litigation, § 19:38; Cal. Jur. 3d, Partnership, § 183.

15 Cases that cite this headnote

[15] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general
(Formerly 101k310(1))

The "business judgment rule" is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.

18 Cases that cite this headnote

[16] Corporations and Business Organizations Business judgment rule in general

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1842 Business judgment rule in general
(Formerly 101k310(1))

The business judgment rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes.

11 Cases that cite this headnote

[17] Corporations and Business Organizations Loyalty

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1845 Loyalty
(Formerly 101k310(1))

The business judgment rule establishes a presumption that corporate directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions

made by the directors in good faith, but an exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest, and the rule does not shield actions taken without reasonable inquiry, or with improper motives.

28 Cases that cite this headnote

[18] Judgment Particular Cases

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(15.1) In general

Genuine issues of material fact existed as to whether general partners were motivated by conflicts of interest, and thus were not entitled to business judgment defense in action by limited partners for breach of fiduciary duty, unfair competition, and fraud, precluding summary judgment based on theory that general partners conducted good faith and reasonable investigation.

2 Cases that cite this headnote

Attorneys and Law Firms

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Browne & Woods, Eric M. George and Miles J. Feldman, Beverly Hills, for Defendants and Respondents.

Opinion

MALLANO, J.

A real estate limited partnership merges into a new entity, becoming a wholly owned subsidiary of the new entity. The interests of the limited partners are liquidated or cashed out, while the general partner retains an equity interest in the postmerger entity, which then sells the assets of the limited partnership to third parties for more than the assets were valued for purposes of the cash-out and merger. Under those circumstances, we hold that a limited partner's claim against the general partner — that the merger transaction harms the limited partner by undervaluing its partnership interest or by depriving it of the future earnings and growth generated by the assets of the ***416** limited partnership — is individual in nature. The claim is not derivative because it is not based on any injury to the limited partnership or its assets, both of which survive the merger transaction intact.

Accordingly, we reverse the summary judgment in favor of defendants because the trial court erroneously determined that the claims asserted by plaintiffs limited partners are not individual but derivative in nature, and because triable issues of fact exist with respect to the defense of the business judgment rule.

**34 FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs [1] (referred to as Everest) are five California limited liability companies which held limited partnership interests in 14 public real estate limited partnerships (referred to as the McNeil Partnerships). [2] The McNeil Partnerships were all controlled by a general partner, defendant McNeil Partners, L.P., and defendants related entities (referred to as general partner or McNeil). [3] Together the McNeil Partnerships owned about 81 real estate holdings, including commercial property, apartment buildings, multi-family units and self-storage properties. The general partner owned a small percentage of the equity interests in the McNeil Partnerships; the limited partners together owned a 95 percent interest in McNeil Real Estate Funds IX, X, XI, and XII; the limited partners together owned a 99 percent interest in McNeil Real Estate Funds XIV, XV, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, and XXVII.

1 Plaintiffs are Everest Investors 8, Everest Investors 9, Everest Investors 12, Everest Management, and KM Investments.

2 The 14 limited partnerships at issue in this case are: McNeil Real Estate Funds IX, McNeil Real Estate Funds X, McNeil Real Estate Funds XI, McNeil Real Estate Funds XII, McNeil Real Estate Funds XIV, McNeil Real Estate Funds XV, McNeil Real Estate Funds XX, McNeil Real Estate Funds XXI, McNeil Real Estate Funds XXII, McNeil Real Estate Funds XXIII, McNeil Real Estate Funds XXIV, McNeil Real Estate Funds XXV, McNeil Real Estate Funds XXVI, and McNeil Real Estate Funds XXVII. The limited partners in each of the McNeil Partnerships were not identical.

3 Defendants are McNeil Partners, L.P., a Delaware limited partnership; McNeil Investors, Inc., a Delaware corporation; McNeil Real Estate Management, Inc., a Delaware corporation; and Robert A. McNeil.

The general partner in the McNeil Partnerships was McNeil Partners, a limited partnership. The general partner in McNeil Partners was McNeil Investors, Inc., the principal business of which was to act as general partner in McNeil Partners. Robert McNeil was the sole owner of McNeil Investors, Inc. Robert McNeil also owned a 25 percent limited partnership interest in McNeil Partners, with McNeil Investors, Inc. owning a 75 percent general partnership interest in McNeil Partners. McNeil Real Estate Management, Inc. (McREMI) was also wholly owned by Robert McNeil, and McREMI was the management company for the properties owned by the 14 McNeil Partnerships.

***417** In 1991 and 1992 the McNeil Partnerships were restructured, and the general partner agreed to commence a liquidation of the partnership properties seven years after the

restructuring date and to use reasonable efforts to complete the liquidation and termination of the McNeil Partnerships by December 31, 1999. In 1995, some of the limited partners of some of the McNeil Partnerships filed a class action lawsuit against Robert McNeil and the general partner alleging that they breached their fiduciary duties to the limited partners in various ways, including rendering the limited partner units highly illiquid, artificially depressing the prices available for limited partner units in private sales, by charging excessive management fees and by not selling the real estate holdings and distributing the proceeds to the limited partners.

In September 1998, the parties to the class action lawsuit (referred to as the *Schofield* action) entered into a "Stipulation of Settlement" of all derivative and class claims pursuant to which the general partner would provide the limited partners with over $35 million in cash distributions and would purportedly implement a fair and impartial bidding process, overseen by PaineWebber, Inc., "designed to obtain the maximum value in connection with the ****35** sale, as part of one transaction, of the [McNeil Partnerships] and the management assets owned by certain defendants [i.e., McREMI]."

Before the execution of the Stipulation of Settlement, the general partner had solicited bids and was then pursuing negotiations with the three highest bidders in order to finalize a transaction with the highest value. The Stipulation of Settlement set out the procedures for the sale of the McNeil Partnerships and the allocation of the net proceeds from such sale to the limited partners. The procedures set out in the Stipulation of Settlement included the following requirements: (1) that the plans for allocation of net proceeds be based upon arm's-length negotiations between the general partner and the limited partners, each side receiving advice and counsel from its own independent investment adviser; (2) that the limited partners retain an independent adviser to perform analyses of the partnership properties and management assets; and (3) that an independent investment adviser issue a fairness opinion that the proposed allocations are fair to the limited partners and the McNeil Partnerships from a financial point of view. The proposed plans for allocation of the proceeds of the sale were to be submitted to a vote of the limited partners of each McNeil Partnership.

In October 1998, the court in the *Schofield* action entered an order preliminarily approving the proposed settlement and providing that within a certain time period any member of the settlement class could "request exclusion from the class claims asserted in the Action," but that class members "cannot opt out of that portion of the Settlement which settles the ***418** derivative claims asserted in the Action." It is undisputed that Everest opted out of the class claims asserted in the *Schofield* action.

In March 1999, Whitehall Street Real Estate (Whitehall) sent to McNeil an outline of a proposed transaction, offering to "discuss an all cash purchase of the Commercial Properties by Whitehall directly." But McNeil refused to consider it, responding that "[a]n asset deal does not work for us" and that McNeil wanted "to share the proceeds of sales as partners."

Whitehall then made a "Total all-or-None Bid" for the McNeil Partnerships and McREMI in the total amount of $644,440,000, which PaineWebber deemed to be the highest bid. The general partner negotiated with Whitehall on the "possibility of the McNeil affiliates receiving an equity interest in the special purpose acquisition entity," namely the entity created to receive the assets of the McNeil Partnerships. The Whitehall transaction ultimately resulted in a merger of the McNeil Partnerships with Whitehall, pursuant to which the interests of Everest and all other limited partners in the McNeil Partnerships were liquidated. McNeil received an equity interest in the postmerger entity of about 46 percent, an increase from the 1***o***r 5 percent interest which McNeil had owned in the McNeil Partnerships. According to the proxy statement prepared in connection with the merger, as a result of the transaction, "each participating McNeil Partnership will become a direct and/or indirect wholly owned subsidiary of WXI/McN Realty [the entity acquiring the McNeil Partnerships]...."

In May 1999, the general partner set up an "independent special committee," comprised of a single individual, Paul Fay, Jr., an "independent director" on the general partner's board of directors, to negotiate the final terms and conditions of the transaction with Whitehall. Because the general partner and other McNeil affiliates would be acquiring an equity interest in the new entity created by the proposed ****36** transaction, the general partner's board of directors "determined that an independent special committee was necessary in light of the actual or potential conflicts of interest created by the acquisition by [McNeil] of equity in WXI/McN Realty as a result of the proposed transaction" and that the special committee was "to evaluate the transaction on behalf of the limited partners of the McNeil Partnerships."

Eastdil Realty Company was retained as the special committee's financial adviser. The McNeil Partnerships had previously, in January 1998, retained the investment banking firm Robert A. Stanger & Co. (Stanger) to render opinions as to the fairness of the consideration to be received by each of the McNeil Partnerships pursuant to a sale transaction. McNeil hired its own investment adviser, Houlihan Lokey Howard & Zukin Capital (Houlihan), to negotiate the terms of the merger and the final formula for allocation of the ***419** proceeds of the transaction. The plaintiffs in the *Schofield* action, on behalf of the limited partners, retained the investment banking firm CFC Capital Corp. to review the analyses performed by Stanger and Houlihan and to advise Lawrence Kolker, counsel for the *Schofield* action plaintiffs, during the negotiation process. After several days of negotiations characterized by Kolker as "arms-length" and "difficult," the parties reached an agreement as to the material terms of the merger transaction. According to Kolker, "virtually every valuation and allocation dispute was resolved in favor of the [*Schofield*] Class [of limited partners]."

Under Stanger's analysis of the Whitehall transaction, the McNeil Partnerships' real estate assets had an aggregate value of approximately $601.5 million, and the value of McREMI was $35 million. Of the total consideration of $644.5 million generated by

the transaction, the amount allocated to the limited partners' interests was $605.5 million. Stanger provided opinions that the following aspects of the merger transaction were fair and reasonable to the limited partners: (1) the aggregate consideration to be paid for McREMI, the limited partner interests and the general partner interests; (2) the allocation of the aggregate consideration between McREMI and the partnerships; (3) the per partnership allocated value; and (4) the methodology of the allocation. The "independent special committee" (namely Paul Fay) also concluded that Stanger's opinions were fair and reasonable and recommended the transaction to the limited partners.

On behalf of the plaintiffs in the *Schofield* action, CFC Capital Corp. agreed that the Stanger valuations and allocations were "well within a range of reasonableness" and that the valuation of McREMI reflected a conservative valuation "to the benefit of the limited partners." Kolker also agreed that the terms of the merger transaction "were resolved in a manner which is highly favorable to the Limited Partners" and recommended that the court approve the settlement.

Everest objected to the settlement. Nevertheless, the court in the *Schofield* action granted final approval of the settlement in July 1999 and entered a Final Order and Judgment authorizing the parties to consummate the settlement according to the terms of the Stipulation of Settlement and dismissing the action with prejudice. The Final Order and Judgment also provided that "there is no right to exclusion from the Settlement with respect to the derivative claims asserted in the Action" and that "each unitholder ... who owned Units ... during the Settlement Class Period, shall be bound by this Judgment and Settlement of the derivative claims in the Action regardless of whether ****37** or not any such persons timely and validly requested exclusion from the Settlement Class."

***420** A July 1999 "Supplemental Stipulation of Settlement and Order" provided in pertinent part: "Nothing contained herein shall act as a release of unknown, future claims whether derivative or individual for acts of the General Partner occurring after the date upon which the Final Order and Judgment is signed by the Court [(on July 8, 1999)]."

In January 2000, the merger transaction with Whitehall was consummated after the proposed transaction was submitted to the limited partners for approval. In December 1999, the limited partners had received a detailed proxy statement, including a description of the proposed terms of the settlement, the plan of allocation, and the fairness opinions prepared by Stanger. According to McNeil, the limited partners voted to approve the merger transaction by a vote of 62 percent, but the evidence offered by McNeil shows only that the limited partners of McNeil Real Estate Fund XXVII approved the transaction. But Everest maintained that each McNeil Partnership voted separately and some rejected the merger.

Brandon Flaming, a vice-president of McREMI, stated that the merger transaction resulted in Everest recouping more than a 150 percent return on its investment in the McNeil Partnerships. Everest, however, asserted that the limited partners should have recouped a

greater return on their investment. Everest discovered that Whitehall had projected before the consummation of the merger that it would be able to "flip" or resell the properties acquired in the transaction for more than the values they had been allocated in the settlement, and Whitehall admitted that it sold some of the acquired properties within a year of the merger for more money than it had paid for them. Whitehall itself had valued the assets of the McNeil Partnerships at over $668 million, assigning a value of $0 to McREMI.

In January 2001, Everest filed the instant action for breach of fiduciary duty, unfair competition, and constructive fraud. Everest alleged that defendants breached their fiduciary duties by engaging in wrongful actions which benefited themselves at the expense of the limited partners, causing Everest's return on its investments in the McNeil Partnerships to be 10 to 20 percent lower, representing a loss to Everest of about $3 million. (Later, Everest recalculated its damages as exceeding $7 million.) The wrongful actions of defendants, as alleged in the complaint, or asserted by Everest in interrogatories and in opposition to the summary judgment motion, include: (1) structuring the transaction as a merger of the entire group of McNeil Partnerships rather than conducting sales of each partnership's real estate holdings, resulting in a distribution to the limited partners of an amount less than the fair market value of an individual partnership; (2) allocating a portion of the settlement price ($35 million) to the management company controlled by Robert McNeil (McREMI), notwithstanding that McREMI possessed only ***421** contracts that could be canceled on short-term notice and otherwise had no meaningful assets and no function other than to manage the real estate holdings for the McNeil Partnerships; (3) including in the transaction oppressive "break-up" fees of $18 million that were designed to deter competing offers from third parties or rejection of the deal by the limited partners; (4) requiring that the limited partners pay nearly $2 million in "success fees" to corporate insiders employed by McREMI; (5) structuring the transaction so that McNeil acquired an ownership interest in the postmerger entity, ****38** effectively constituting a sale of the McNeil Partnership assets to itself, giving it more incentive to value the assets for purposes of the merger at a lowball price, and allowing it to profit from the sale of the assets to third parties at higher prices, which it did, thus obtaining a benefit from the transaction which the limited partners could not share.

Everest claimed that had the transaction been conducted properly, the total distribution to the limited partners and the general partner would have been increased by $159 million (comprised of $31 million improperly allocated as the value of McREMI, $126 million in higher purchase prices, and $2 million in improperly allocated success fees), with the limited partners receiving 95 percent of that increase, or about $151 million. Everest's share of the increased distribution to the limited partners, or 4.5 percent, would have been approximately $7.1 million.

McNeil moved for summary judgment on two grounds: (1) that Everest's claims are derivative in nature and therefore barred because they were released pursuant to the judgment in the *Schofield* action and because Everest

lacks standing to pursue the derivative claims; and (2) that Everest's claims are barred by application of the business judgment rule, by which the courts defer to the business decisions of managers whose actions are the product of negotiation, analysis, and approval of a disinterested special committee.

Everest opposed the motion, arguing as follows: Its action was individual or direct, and California law allows a limited partner to proceed directly against a general partner who breaches its fiduciary duty by misallocating proceeds among itself and the limited partners. In this situation, the action is direct and not derivative because the limited partners are harmed, but the general partner is not harmed, and the partnership as a whole is not harmed because its assets remain intact. The merger constituted a breach of fiduciary duty because it did not maximize the return to the limited partners in each individual McNeil Partnership, which would have occurred if the real estate holdings had been sold or liquidated on an individual basis. Because of the all-or-nothing aspect of the merger transaction, Whitehall had very little competition; the deal was structured "to eliminate buyers who could not finance an entire portfolio, and to eliminate buyers who want only a single property or property type (e.g., apartments), ***422** and thereby drive away competition for the properties.... The result? A substantially lower total price for the partnerships' properties.... [¶] ... Take, for example, the self-storage properties. In the Whitehall transaction, $35 million in value was attributed to the 8 self-storage properties in the portfolio [owned by McNeil Real Estate Funds XXVII]. Nonetheless, Whitehall sold all 8 of these properties to a single buyer for $42 million within weeks after the transaction closed, resulting in an immediate 20% profit."

With respect to the "business judgment rule," Everest contended that triable issues of material fact exist as to the applicability of the rule because of McNeil's conflicts of interest arising out of its increased equity ownership in the postmerger entity, facts which were admitted in the proxy statement sent to the limited partners in December 1999.

McNeil filed a reply, and after a hearing on the motion, the court granted summary judgment. The court's February 22, 2002 minute order provided in pertinent part that the motion was granted "as to all defendants on the ground that the claims are derivative in nature and are therefore barred by the Court's judgment in the *Schofield* action. Plaintiffs' interrogatory ****39** responses make clear that the types of wrongdoing alleged do not relate to a special duty owed to plaintiffs or have their origin in circumstances independent of plaintiffs' status as unitholders. *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124, 84 Cal.Rptr.2d 753. Rather, the types of wrongdoing alleged are 'incidental to an injury' to the entire partnership. [Citations.] [¶] Plaintiffs attempt to distinguish the case law relied upon by defendants on the ground that the cases do not involve partnerships; however, persuasive federal authority attached to defendants' Reply indicates that there is no basis for a special rule governing limited partners' claims against general partners. [(*Mieuli v. DeBartolo* (N.D.Cal. May 7, 2001, No. C-00-3225 JCS) 2001 WL 777091 at pp. *5-*7.)]"

Everest filed a timely notice of appeal from the April 9, 2002 judgment.[4] The principal issues presented are: (1) whether Everest's claims are barred on the ground that they are derivative in nature and seek recovery for injuries to the partnership entities, or whether the claims are actionable on the ground that they are individual or "direct" in nature and seek recovery for injuries sustained by Everest; and (2) even if the claims are individual, whether they are nevertheless barred under the business judgment rule.

[4] McNeil also prepared, and the judge signed, an 11–page order granting summary judgment which contains a detailed, though selective, factual background as well as five pages of legal analysis. Inasmuch as we review the record and the determination of the trial court de novo (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116), we need not summarize the order.

***423** The notice of appeal states that Everest also appeals from a January 29, 2002 order denying Everest's motion to set the discovery cutoff and deadline for expert witness disclosure. In the event that the summary judgment is reversed, Everest seeks to vacate a prior order cutting off discovery and precluding expert witness disclosure based on a previous March 20, 2002 trial date. Everest requests that on remand discovery should be reopened.

On this appeal, the parties do not dispute that any derivative claims sought to be asserted by Everest in this action are barred and that Everest can assert only claims that are properly classified as individual. Thus, the parties' disagreement concerns whether the nature of the claims asserted by Everest are derivative or individual.

DISCUSSION

A. Standard of Review

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The burden of persuasion remains with the party moving for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 861, 107 Cal.Rptr.2d 841, 24 P.3d 493....)" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002–1003, 75 P.3d 30.) We review the record and the determination of the trial court de novo. (*Id.* at p. 1003, 4 Cal.Rptr.3d 103, 75 P.3d 30.)

The general rule on summary judgment is that the evidence and the inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) And, when a motion for summary judgment includes a test as to whether the complaint states a viable claim, "the court will apply the rule applicable to demurrers and accept ****40** the allegations of the complaint as true," and we will also consider those matters subject to judicial notice. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118, 51 Cal.Rptr.2d 251, 912 P.2d 1198.)

Accordingly, considering Everest's allegations and accepting the facts offered by Everest and the reasonable inferences therefrom, our first task is to determine whether Everest's claims against McNeil are derivative or individual. In this case, that distinction involves a consideration of the nature of partnerships and the fiduciary obligations of general partners.

***424 B. Nature of Partnerships and Fiduciary Obligations of General Partners**

[1] [2] A partnership is an entity separate and apart from the partners of which it is comprised, and it is the partnership entity which owns its assets, not the partners. (*Evans v. Galardi* (1976) 16 Cal.3d 300, 307, 128 Cal.Rptr. 25, 546 P.2d 313 [limited partner has no property interest in specific partnership assets].) "California law treats a partnership as a 'hybrid' organization that is viewed as an aggregation of individuals for some purposes, and as an entity for others. (*Epstein v. Frank* (1981) 125 Cal.App.3d 111, 119, 177 Cal.Rptr. 831....) One of the primary areas in which a partnership is viewed as an entity is with respect to ownership of property. California Corporations Code section 15008 specifically provides that a partnership may hold title to real property...." (*Bartlome v. State Farm Fire & Casualty Co.* (1989) 208 Cal.App.3d 1235, 1240, 256 Cal.Rptr. 719.)

[3] [4] [5] [6] Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other. (*BT–I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410, 89 Cal.Rptr.2d 811.) In proceedings connected with the conduct of a partnership, partners are bound to act in the highest good faith to their copartners and may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. (*Id.* at pp. 1410–1411, 89 Cal.Rptr.2d 811.) A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and to the other partners as in a general partnership. (*Id.* at p. 1411, 89 Cal.Rptr.2d 811.) The fiduciary obligations of a general partner with respect to matters fundamentally related to the partnership business cannot be waived or contracted away in the partnership agreement.(*Id.* at pp. 1411–1412, 89 Cal.Rptr.2d 811 [fiduciary duty not to purchase partnership debt and foreclose on one's partner cannot be contracted away in the partnership agreement].)

[7] [8] [9] "There is an obvious and essential unfairness in one partner's attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners." (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514, 189 Cal.Rptr. 377, 658 P.2d 740.) Thus, a partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other. (*Laux v. Freed* (1960) 53 Cal.2d 512, 522, 2 Cal.Rptr. 265, 348 P.2d 873; see also *Smith v. Tele–Communication, Inc.* (1982) 134 Cal.App.3d 338, 345, 184 Cal.Rptr. 571(*Smith*) [fiduciary has burden of justifying conduct].) A partner's fiduciary duty extends to the dissolution and liquidation of partnership affairs, as well as to the sale by one partner to another of an interest in the partnership. (*Laux v. Freed, supra,* 53

Cal.2d at p. 522, 2 Cal.Rptr. 265, 348 P.2d 873.) " 'A partner **41 may not dissolve a partnership to gain the benefits of the business for himself, unless he fully *425 compensates his copartner for his share of the prospective business opportunity.' " (*Leff v. Gunter, supra,* 33 Cal.3d at p. 515, 189 Cal.Rptr. 377, 658 P.2d 740.) Such a partnership opportunity may not be appropriated by one partner to the detriment of a copartner even after dissolution. (*Ibid.*)

In the corporate context, it has also been held that directors breach their fiduciary duty to minority stockholders by using their control of the company to obtain an advantage not available to all stockholders to the detriment of the minority stockholders and without a compelling business purpose for the directors' conduct. (*Fisher v. Pennsylvania Life Co.* (1977) 69 Cal.App.3d 506, 513, 138 Cal.Rptr. 181.) "Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business." (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108, 81 Cal.Rptr. 592, 460 P.2d 464(*Jones*).) " 'Self-dealing in whatever form it occurs should be handled with rough hands for what it is — dishonest dealing. And while it is often difficult to discover self-dealing in mergers, consolidations, sale of all the assets or dissolution and liquidation, the difficulty makes it even more imperative that the search be thorough and relentless.' " (*Id.* at p. 111, 81 Cal.Rptr. 592, 460 P.2d 464.)

C. Derivative Versus Individual Actions

[10] An action is derivative, that is, in the corporate right, " 'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' " (*Jones, supra,* 1 Cal.3d at p. 106, 81 Cal.Rptr. 592, 460 P.2d 464.)

[11] **[12]** "The purpose of a limited partner's derivative action is to enforce a claim which the limited partnership possesses against others [including the general partners] but which the partnership refuses to enforce. [Citations.] Like a shareholder's derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant. Although a limited partner is named as the plaintiff, it is the limited partnership which derives the benefits of the action." (*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1449, 27 Cal.Rptr.2d 834 [under the California Uniform Limited Partnership Act, a limited partner may file a derivative action against general partners for self-dealing and breach of fiduciary duties by leasing partnership property to themselves without paying rent to partnership].)

*426 Thus, where the wrongful acts of a majority shareholder amounted to misfeasance or negligence in managing the corporation's business, causing the business to lose earnings, profits, and opportunities, and causing the stock to be valueless, the court held that the claim was derivative and not individual because the resulting injury was to the corporation and the whole body of its stockholders. (*Nelson*

v. Anderson (1999) 72 Cal.App.4th 111, 125–127, 84 Cal.Rptr.2d 753(*Nelson*).) In a case involving the fraudulent transfer of the assets of a limited liability company, without the payment of compensation to the company, a derivative, but not an individual, action was held to lie because the gravamen of the alleged wrongs was an ****42** injury to the company. (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964–965, 109 Cal.Rptr.2d 436(*PacLink*) [diminution in the value of the members' 38 percent ownership interest was incidental to injury to company, which was improperly deprived of its assets].)

Similarly, the allegations by shareholders of a bank — that the bank directors breached their duties of care and loyalty by mismanaging operations and improperly placing the bank into voluntary receivership — described an injury to the bank and not to the individual shareholders. (*Pareto v. FDIC* (9th Cir.1998) 139 F.3d 696, 699–700(*Pareto*) [depreciation of stock value was an indirect result of injury to the bank and an injury that fell on every stockholder alike, whether majority or minority].)

In *Mieuli v. DeBartolo, supra,* 2001 WL 777091(*Mieuli*), the court, applying California law, held that cases applying the derivative versus individual distinction in the corporate context also applied in the context of a limited partnership and that the limited partner had not asserted an individual claim. The limited partner alleged that the general partner breached his fiduciary duty by converting partnership funds and engaging in other acts of mismanagement and self-dealing which damaged the limited partner by depriving him of partnership distributions and reducing the value of his interest in the partnership. (*Mieuli, supra,* at p. *3.) Interpreting plaintiff's allegations of mismanagement and self-dealing as tantamount to the assertion that, as a limited partner, he was injured "only indirectly through an injury to the partnership," the court concluded that such claims must be brought derivatively. (*Id.* at p. *7.)

On the other hand, California cases recognize that a stockholder's individual suit " 'is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' " (*Jones, supra,* 1 Cal.3d at p. 107, 81 Cal.Rptr. 592, 460 P.2d 464.)*Jones,* a seminal case, involved a complaint by a minority shareholder for breach of fiduciary duties by majority stockholders in a savings and loan association. The majority shareholders allegedly took advantage of a bull market to render their own stock more valuable and the minority shareholders' stock less valuable by creating a holding company, transferring their ***427** control block of shares to the holding company, receiving a majority of the holding company shares, excluding the minority shareholders from participation in the holding company, and pledging the association's assets and earnings to secure the holding company's debt that had been incurred for the majority shareholders' own benefit. After the above actions had rendered the association stock unmarketable except to the holding company, the majority shareholders refused to either purchase the minority shareholder's stock at a fair price or exchange the stock for that of the holding company on the same basis afforded to the

majority. (*Id.* at p. 105, 81 Cal.Rptr. 592, 460 P.2d 464.)

The court in *Jones* concluded that the minority shareholder had asserted an individual (or nonderivative) action, reasoning that the plaintiff "does not seek to recover on behalf of the corporation for injury done to the corporation by defendants. Although she does allege that the value of her stock has been diminished by defendants' actions, she does not contend that the diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority stockholders. [¶] ... The individual wrong necessary to support a suit by a shareholder ****43** need not be unique to that plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists." (*Jones, supra,* 1 Cal.3d at p. 107, 81 Cal.Rptr. 592, 460 P.2d 464, fn. omitted; see also *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, 521–522, 123 Cal.Rptr. 419(*Crain*) [individual action stated by minority shareholders where majority shareholders engaged in self-enriching activities which rendered worthless only the stock of the minority shareholders].)

Jones expressly disapproved of the articulation of the test in *Shaw v. Empire Savings & Loan Assn.* (1960) 186 Cal.App.2d 401, 407, 9 Cal.Rptr. 204(*Shaw*), which required that a minority shareholder demonstrate that the injury to him was different from that suffered by other minority shareholders. (*Jones, supra,* 1 Cal.3d at pp. 107–108, 81 Cal.Rptr. 592, 460 P.2d 464.) The *Jones* court stated that "[a]nalysis of the nature and purpose of a shareholder's derivative suit will demonstrate that the test, adopted in the *Shaw* case does not properly distinguish the cases in which an individual cause of action lies." (*Jones, supra,* 1 Cal.3d at p. 106, 81 Cal.Rptr. 592, 460 P.2d 464.)

Shaw also stated in a one sentence dictum that a stockholder may maintain an individual action "where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a stockholder," citing only Annotation (1945) 167 A.L.R. 285 as its authority. (*Shaw, supra,* 186 Cal.App.2d at p. 407, 9 Cal.Rptr. 204, italics omitted.) Although the court in *Jones* did not specifically discuss the "special duty" language in *Shaw,* the test for an ***428** individual action as articulated in *Jones* does not require that the wrongdoer owe the plaintiff a "special duty" independent of the stockholder relationship. We decline to follow *Shaw*'s dictum because it is inconsistent with *Jones.* We note that other appellate courts (as well as McNeil herein) have continued to cite *Shaw* 's "special duty" language. (See, e.g., *Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75, 95, 121 Cal.Rptr. 348; *Nelson, supra,* 72 Cal.App.4th at p. 124, 84 Cal.Rptr.2d 753 [citing *Rankin*].)

Nor in an individual action must a plaintiff sue on behalf of all minority shareholders or limited partners, or must all minority shareholders or limited partners assert the same claim. In *Low v. Wheeler* (1962) 207 Cal.App.2d 477, 24 Cal.Rptr. 538, a case which predates *Jones,*

the court affirmed a judgment in favor of the plaintiff minority shareholder where the other minority shareholders had signed releases to the defendants as part of the sale of their stock. The court stated that the defendants "cannot be heard to complain that the other two [minority shareholders] were not parties, for if they had been successful parties, the judgment would have been larger." (*Low v. Wheeler, supra,* 207 Cal.App.2d at p. 483, 24 Cal.Rptr. 538; see also *Nelson, supra,* 72 Cal.App.4th at p. 127, 84 Cal.Rptr.2d 753.)

Following the test in *Jones,* the court in *Smith, supra,* 134 Cal.App.3d 338, 184 Cal.Rptr. 571, held that a minority shareholder in a subsidiary asserted an individual cause of action for fraud and breach of fiduciary duty against directors of the subsidiary and the parent corporation, when the defendants allegedly had manipulated a consolidated tax procedure to afford increased tax benefits to the corporations, which resulted in a decreased distributive share to the plaintiff upon a sale of the assets of the subsidiary. The court concluded that "[h]ere, it is clear that Smith ****44** does not seek to recover on behalf of Crystal Brite [(the subsidiary)]. He does not contend that the diminishment in his share of the assets reflects an injury to Crystal Brite and a resultant depreciation in the value of its stock. As in [*Jones*], the gravamen of the causes of action is injury to Smith as the only minority shareholder. Smith suffered sufficient injury to bring this action in his individual capacity." (*Smith, supra,* 134 Cal.App.3d at p. 343, 184 Cal.Rptr. 571.)

[13] In sum, a limited partner may suffer an injury to its interest without the occurrence of any injury to the partnership entity or to the partnership assets because the interest of a limited partner in a partnership is separate and apart from the partnership's ownership interest in its assets.

D. Everest's Claims Are Individual, Not Derivative

[14] Applying the foregoing principles, we conclude that the gravamen of the claims asserted by Everest is an injury only to the interests of the limited ***429** partners and not to the interests of the general partner or to the McNeil Partnerships. Everest asserts that McNeil used its management and control of the McNeil Partnerships to structure a merger transaction which afforded benefits and opportunities for itself from which the limited partners were excluded. McNeil allegedly breached its fiduciary duties by, among other things, appropriating for itself the opportunity to acquire an equity interest in the postmerger entity. Thus, as the assets of the McNeil Partnerships were sold to third parties for more than the value assigned to those assets when the limited partners' interests were cashed out, McNeil was able to enjoy a greater value or return on its investment than the limited partners.

Under Everest's claims, the merger transaction did not constitute an injury to the McNeil Partnerships or to the general partner, or result in a diminution in value of the assets of the McNeil Partnerships because the McNeil Partnerships and their assets survived the merger transaction intact and therefore the NcNeil Partnerships suffered no harm by the merger transaction. On the other hand, when, soon after the merger, the assets of the McNeil Partnerships were sold to third

parties for amounts more than the values they had been assigned for purposes of the merger and cashout, harm to the limited partners' interests became evident. Either the McNeil Partnerships were worth more than the values assigned to them for purposes of the merger and cashout, or the partnerships' real estate holdings had appreciated in value after the merger. In the first instance, Everest would be injured by the undervaluation of the McNeil Partnerships; in the second instance, Everest would be injured by its exclusion from partnership opportunities (an equity interest in the postmerger entity or a share of the proceeds from subsequent sales of the real estate holdings) which McNeil arrogated unto itself. We conclude that the circumstances here are analogous to those in *Jones, Smith,* and *Crain* and distinguishable from the circumstances in *Nelson,PacLink, Mieuli,* and *Pareto.* As a matter of law, Everest's claims are individual in nature and not derivative. The trial court erred in granting summary judgment on the ground that the claims were derivative. [5]

[5] We do not reach the issue, and express no opinion, as to whether all of the items of damages sought by Everest are recoverable in an individual, as opposed to a derivative, action.

****45 E. Business Judgment Rule**

McNeil argues that the business judgment rule is an independent ground on which summary judgment can be affirmed.

[15] [16] [17] The business judgment rule is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. ***430** (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 711, 57 Cal.Rptr.2d 798.) "The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. [Citations.] The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest." (*Ibid.*) An exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest. (*Id.* at p. 715, 57 Cal.Rptr.2d 798.) The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Ibid.*)

[18] We agree with Everest that triable issues of fact as to the existence of McNeil's improper motives and a conflict of interest preclude summary judgment based on the business judgment rule. The proxy statement identified the following conflicts of interest involved in the merger transaction: "[McNeil], including some members of the McNeil Investors board of directors, have interests in the transaction or relationships, including those referred to below, that may present actual or potential conflicts of interests in connection with the transaction.... [¶] ... The transaction provides some benefits to [McNeil] that may be in conflict with the benefits provided to the limited partners of the McNeil Partnerships.... The transaction

also provides some benefits to [McNeil] that are not provided to the limited partners of the McNeil Partnerships. [McNeil] had an economic interest, separate from that of the limited partners, in structuring the transaction to achieve these benefits. [¶] For example, McNeil Partners [[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[6]] will receive a significant, although non-controlling, equity interest in WXI/McN Realty [(the postmerger entity)] if the transaction is completed."

6 See footnote 3, *ante.* The general partner of McNeil Partners was McNeil Investors, Inc., whose sole owner was Robert McNeil. Robert McNeil individually owned a 25 percent interest in McNeil Partners, and McNeil Investors, Inc. owned a 75 percent interest in McNeil Partners.

The proxy statement also acknowledged that upon completion of the transaction McNeil Partners would receive membership interests in the postmerger entity and credit for a capital contribution in the amount equal to approximately $65 million. As structured, the transaction also allowed McNeil to make contributions to the postmerger entity on a tax-deferred basis and the partners of McNeil Partners to defer substantial income tax liability. "If the transaction had been structured as an acquisition of the entire McNeil portfolio for cash, it is estimated by Arthur Andersen LLP that the partners of McNeil Partners would have been required to pay approximately $30,563,000 in taxes in connection with the transaction. The transaction, as structured, will ***431** permit the partners of McNeil Partners to defer this tax liability until such time as the properties currently owned by the McNeil Partnerships are ****46** sold or until such time as McNeil Partners disposes of its equity interest in WXI/McN Realty."

The proxy statements were sent to the limited partners in December 1999, *after* the July 1999 final judgment in the *Schofield* action. And, Everest points to events subsequent to July 1999 which give rise to an inference of the existence of a conflict of interest, including the postmerger sale of the self-storage properties for more than the value assigned to them when the limited partners' interests were cashed out. Accordingly, even though the July 1999 final judgment in the *Schofield* action provides that the settlement "is hereby approved by this Court as fair, reasonable and adequate to the Settlement Class ... and the Partnerships," and even though various individuals in the *Schofield* action offered fairness opinions regarding the transaction, those findings and opinions were based on a different set of facts and circumstances than are presented in this record. Because triable issues of fact exist regarding McNeil's conflict of interest, summary judgment cannot be upheld based on the business judgment rule.

McNeil argues that "[e]ven if Everest could overcome the rule's presumption with specific factual evidence [regarding a conflict of interest], the business judgment rule bars Everest's suit based on McNeil's 'good faith and reasonable investigation.' " McNeil essentially maintains that its reliance on the special committee and the professional opinions of other business experts regarding the fairness of the merger transaction constitutes a separate defense to Everest's action, apart from the

business judgment rule. Yet McNeil cites no pertinent authority to support the proposition that such reliance constitutes a defense to claims of breach of fiduciary duty and constructive fraud in the context of an *individual* action.[7]

[7] McNeil concedes that "California has not expressly extended the business judgment rule to conduct approved by a special committee," but only to conduct approved by a special *litigation* committee. The special litigation committee defense "arises out of the interplay between the business judgment rule and the requirement in a stockholder's derivative action that the plaintiff must have made a demand on the board of directors to have the corporation pursue the action. (See Corp.Code, § 800, subd. (b)(2).) Thus, it has been held that, once a duly appointed committee of disinterested directors reasonably determines that it is not in the best interests of the corporation to pursue the claims asserted in the derivative action, that decision is protected by the business judgment rule. The trial court must determine, as a matter of fact, whether the committee members were disinterested and whether they conducted an adequate investigation. If it answers yes to both questions, however, it must dismiss the derivative action." (*Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1158, 96 Cal.Rptr.2d 128.)

McNeil intimates that a general partner can delegate or contract away to a special committee or other business experts those fiduciary duties owed by a general partner to a limited partner. No authority is cited for this proposition.

***432** In *Finley v. Superior Court, supra,* 80 Cal.App.4th 1152, 96 Cal.Rptr.2d 128, a derivative action, the court held that the special litigation committee defense is a valid defense in California (*id.* at p. 1158, 96 Cal.Rptr.2d 128), but that " 'judicial review of the independence, good faith, and investigative techniques of a special litigation committee is governed by traditional summary judgment standards.' " (*Id.* at pp. 1160–1161, 96 Cal.Rptr.2d 128; see also *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190, 133 Cal.Rptr.2d 408 [if a trial court detects a factual dispute concerning the independence of the special litigation committee or the adequacy of its investigation, the case may not be dismissed short of trial].)

****47** Even if we assume, without deciding, that McNeil can assert a defense based on a good faith and reasonable investigation, we would conclude that triable issues of fact exist as to this issue as well. "[T]he business judgment rule protecting the directors' decision does not apply in the case of bad faith or fraud. The purpose of the court's inquiry into the independence of the committee members and the adequacy of their investigation is to uncover the existence of circumstances that would preclude application of the rule. [Citation.]" " 'The policy reasons for keeping a court from evaluating after the fact the wisdom of a particular business decision do not apply when the issue is whether a party to that decision acted fraudulently or in bad faith.

The assessment of fraud or bad faith is a function courts are accustomed to perform, and in performing it the courts do not intrude upon the process of business decisionmaking beyond assuring that those decisions are not improperly motivated.'...." (*Desaigoudar v. Meyercord, supra,* 108 Cal.App.4th at p. 188, 133 Cal.Rptr.2d 408.) On this record, triable issues of fact exist regarding whether McNeil was motivated by conflicts of interest and whether the merger transaction was preceded by a good faith and reasonable investigation into whether the merger transaction was in the best interests of the limited partners. Accordingly, summary judgment cannot be upheld based on the theory that McNeil conducted a good faith and reasonable investigation.

F. January 29, 2002 Order [***]

[***] See footnote *, *ante*.

***433 DISPOSITION**

The summary judgment is reversed. The January 29, 2002 order denying further discovery and designation of experts is vacated. Everest is entitled to costs on appeal.

We concur: SPENCER, P.J., ORTEGA, J.

All Citations

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United States District Court,
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In re KATZ INTERACTIVE CALL PROCESSING PATENT LITIGATION.
This document relates to:
Ronald A. Katz Technology Licensing, L.P., Plaintiff,
v.
American Airlines, Inc., et al, Defendants.

Nos. 07–ML–1816–B–RGK (FFMx), 07–CV–2196–RGK (FFMx)).

May 1, 2009.

West KeySummary

1 Patents In general; products and devices

291 Patents
291VII Patent Infringement
291VII(C) Actions
291VII(C)6 Judgment
291k1932 Summary Judgment
291k1935 Particular Cases
291k1935(1) In general; products and devices (Formerly 291k323.2(3))

A genuine issue of material fact existed as to whether branching selected by callers within a computer program constituted a plurality of formats in a call processing system. Summary judgment was not appropriate in the action brought by a patent holder claiming that a shipping company had infringed upon its call processing system patents.

ORDER RULING ON AMERICAN AIRLINES, FEDERAL EXPRESS AND KATZ'S INDIVIDUAL SUMMARY JUDGMENT MOTIONS

R. GARY KLAUSNER, District Judge.

TABLE OF CONTENTS

I. INTRODUCTION

***1** In approximately fifty different lawsuits, plaintiff Ronald A. Katz Technology Licensing, L.P. ("Katz") has alleged that various defendants infringe claims from its family of related interactive call processing patents. The Judicial Panel on Multidistrict Litigation consolidated these cases for pretrial proceedings and transferred the consolidated case to this Court (07–MDL–1816). This Court grouped the different cases based roughly on the date they were transferred. The current case is part of the group B cases.

In managing the group B cases, this Court ordered Katz to eventually limit the number of claims it was asserting against each defendant group to sixteen. The parties have now filed individual summary judgment motions. Two separate defendant groups and the plaintiff have filed a total of three separate summary judgment motions in the current case. The defendant groups are: 1) Federal Express Corporation, FedEx Corporate Services, Inc., FedEx Corporation, and FedEx Customer Information Services, Inc. (collectively, "FedEx"); and 2) American Airlines, Inc. ("American").

In ruling on the group B defendants' two joint summary judgment motions, this Court has previously found that a number of these claims were invalid as obvious under Section 103 or invalid based on lack of written description and/or indefiniteness under 35 U.S.C. § 112. Only one claim remains asserted against American and FedEx, namely claim 43 of U.S. Patent No. 5,684,863 ("the '863 patent").

This decision addresses summary judgment motions filed by the plaintiff and both defendants, FedEx and American. FedEx's motion for summary judgment raises four primary issues. First, FedEx says that the accused services were provided by XO Interactive, Inc. ("XO") and AT & T, Inc. ("AT & T"). Since both those parties had licenses to Katz's patents, FedEx says that the accused services were also licensed. Moreover, even if they were not licensed, FedEx argues that Katz had exhausted its patents rights. Second, FedEx argues that it does not infringe the remaining claim for a number of different reasons. Third, FedEx argues that claim 43 is invalid as indefinite. Finally, FedEx argues that claim 43 is rendered obvious by the prior art.

American moves for summary judgment on three sets of issues. First, American asks for summary judgment with respect to the claims Katz is no longer pursuing. Second, American argues that Katz is not entitled to damages after December 21, 2005, based on the '863 patent's expiration date. Finally, American argues it is entitled to summary judgment as a matter of

law because it does not infringe the remaining claim for two separate reasons.

Katz's motion for summary judgment asks this Court to dismiss FedEx's and American's affirmative defenses of equitable estoppel and prosecution laches.

II. JUDICIAL STANDARD

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Karlin Tech., Inc. v. Surgical Dynamics, Inc.*, 177 F.3d 968, 970 (Fed.Cir.1999). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A party opposing a properly supported motion for summary judgment " 'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). "If the evidence [opposing summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–250 (citations omitted).

***2** Even where the movant does not seek judgment as to the whole action, "the court should, to the extent practicable, determine what material facts are not genuinely at issue." Fed.R.Civ.P. 56(d)(1). "It should then issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue." *Id.* Thus, "judgment may be rendered on liability alone ...." Fed.R.Civ.P. 56(d)(2).

III. FEDEX'S MOTION

A. License/Exhaustion

FedEx argues that Article 2.1(2) of the AT & T License applies to FedEx services and systems that use components supplied by both AT & T and FedEx. Article 2.1(2) grants AT & T a license "to use and have used (by a Person so authorized by Licensee) Licensed Products/Services to provide services to Customers." FedEx argues that it qualifies as "a Person so authorized by Licensee." As a result, FedEx says its system is covered by the AT & T license.

FedEx's argument ignores the phrase "to Customers" found in Article 2.1(2). Article 1.11 defines a "Customer" as a person receiving services either directly or indirectly from the Licensee, AT & T. Thus, Article 2.1(2) grants AT & T a license to provide services to its customers in two ways. First, AT & T can "use" Licensed Products/Services itself to provide services to customers. Second, the "have used" language grants AT & T a license to have other parties (i.e. third party vendors) use Licensed Products/Services to provide services to AT & T customers. FedEx argues that the "have used" language should also be interpreted to grant AT & T a license to have an AT & T customer

(e.g.FedEx) use Licensed Products/Services to provide services to itself.

This Court rejects FedEx's interpretation of Article 2.1(2) because another section of the AT & T license clearly applies to the situation where the customer supplements AT & T services with its own services/components. Specifically, Article 2.1(3) grants AT & T a license to "to use or have used Licensed Products/Services to provide services to a Customer's Customers where Licensee is under contract with its Customers to provide Licensed Products/Services." However, Article 2.1(3) contains a significant limitation on "Customer pass-through rights." Article 2.4 limits Article 2.1(3) and states that the licenses:

> ... do not pass through to Customer [e.g. FedEx] any express or implied license to use the portions licensed hereunder together with other products or service provided by the Customer or others ... in order to create Licensed Combination, unless such products or services are separately licensed or are staples in commerce capable of substantial non-infringing use ....

Thus, the AT & T License grants AT & T customers a right to use Licensed Products/Services provided by AT & T, but the license only allows AT & T customers to create licensed combinations under certain circumstances. Here, Katz has accused FedEx of infringing claim 43 based on a combination of components supplied by both AT & T and FedEx. Unless the components FedEx supplies are either separately licensed or staples in commerce capable of substantial non-infringing use, the entire combination is not licensed. FedEx's motion does not attempt to show that either of these conditions is satisfied. Accordingly, this Court finds insufficient evidence to show that the accused system is licensed under the AT & T License, and DENIES FedEx's motion for summary judgment as to this issue.

***3** In the introduction of its moving papers, FedEx indicated that it would also argue that it was licensed pursuant to the XO agreement and that Katz's patent rights had been exhausted. However, the body of FedEx's opening memorandum makes almost no mention of these arguments. With respect to the XO agreement, FedEx merely identified a few sections of the agreement in footnotes and characterized the agreement as similar to the AT & T license. FedEx fails to identify what language in Section 2.1 grants XO's customers a license to combinations that include the customer's own components/services. FedEx also fails to address how the limits on XO's rights to sublicense affects FedEx's claim to a license. Accordingly, FedEx has failed to satisfy its burden of proof, and this Court DENIES FedEx's motion for summary judgment with respect the XO license.

For exhaustion to apply, the Supreme Court has required that the patent holder or its licensee sell an article or device that embodies the

essential features of the patented invention and has no reasonable non-infringing uses. *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, ——, 128 S.Ct. 2109, 2119, 170 L.Ed.2d 996 (2008). FedEx makes no attempt to show that AT & T supplied the essential features of the patented invention and that there were no reasonable non-infringing uses. Accordingly, FedEx has failed to satisfy its burden of proof on this issue, and this Court DENIES FedEx's motion for summary judgment with respect to its exhaustion defense.

B. Non–Infringement

FedEx's motion for summary judgment raises three separate non-infringement arguments with respect to claim 43 of the '863 patent. Claim 43 of the ' 863 patent depends on claim 42 which in turn depends on claim 27. Together these claims recite:

> 27. An analysis control system for use with a communication facility including remote terminals for individual callers, wherein said remote terminals may comprise a conventional telephone instrument including voice communication means, and digital input means in the form of an array of alphabetic numeric buttons for providing data, said analysis control system comprising:
>
> interface structure coupled to said communication facility to interface said remote terminals for voice and digital communication, and including means to provide caller data signals representative of data relating to said individual callers developed by said remote terminals and including means to receive called number identification signals (DNIS) automatically provided by said communication facility to *identify a select one of a plurality of different called numbers associated with a select format of a plurality of different formats;*
>
> record structure, including memory and control means, said record structure connected to receive said caller data signals from said interface structure for accessing a file and storing certain of said data developed by said remote terminals relating to certain select ones of said individual callers;
>
> ***4** *qualification structure* coupled to said record structure for *qualifying access* by said individual callers to said select format *based on at least two forms of distinct identification* including caller customer number data and at least one other distinct identification data element consisting of personal identification data provided by a respective one of said individual callers; and
>
> switching structure coupled to said interface structure for switching certain select ones of said individual callers at said remote terminals to any one of a plurality of live operators wherein said live operators can enter at least a portion of said caller data relating to said select ones of said individual callers through interface terminals, which is stored in said record structure.
>
> 42. An analysis control system according to claim 27, wherein said called number identification signals (DNIS) are received by one of a plurality of call distributors.
>
> 43. An analysis control system according to claim 42, wherein said plurality of

call distributors are at different geographic locations.

(emphasis added).

1. Legal Standard—Non–Infringement

In determining whether an allegedly infringing device falls within the scope of the claims, a two-step process is used: first, the court must determine as a matter of law the meaning of the particular claim or claims at issue; and second, it must consider whether the accused product infringes one or more of the properly construed claims. *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1344 (Fed.Cir.2002). The second inquiry is a question of fact, although summary judgment of infringement or non-infringement may nonetheless be appropriate when no genuine dispute of material fact exists. *Irdeto Access, Inc. v. Echostar Satellite Corp.*, 38 3 F.3d 1295, 1299 (Fed.Cir.2004) (quoting *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed.Cir.1998)).

The patentee bears the burden of proving infringement by a preponderance of the evidence. *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1535 (Fed.Cir.1991). This burden can be met by showing that the patent is infringed either literally or under the doctrine of equivalents. *See Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1318 (Fed.Cir.2004). To support a finding of literal infringement, the patentee must establish that "every limitation recited in the claim appears in the accused product, i.e., the properly construed claim reads on the accused product exactly." *Jeneric/Pentron, Inc. v. Dillon Co.*, 205 F.3d 1377, 1382 (Fed.Cir.2000) (citing *Amhil Enters. Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed.Cir.1996)).

2. Qualifying Access Based on at Least Two Forms of Distinct Identification

FedEx's first non-infringement argument relates to how it qualifies calls. The qualification structure in claim 43 is for "qualifying access by said individual callers to said select format based on at least two forms of distinct identification including caller customer number data and *at least one other distinct identification data element consisting of personal identification data provided by a respective one of said individual callers.*" (emphasis added).

***5** FedEx argues that it does not qualify access based on "one other distinct identification data element." To evaluate FedEx's argument, we must examine how the accused services operate. In both FedEx's Pickup and Services Application and its Supplies Application, a caller first enters the caller's account number. Once an account number is verified, the caller is prompted to enter the caller's zip code. If the caller cannot provide the correct zip code, the system prompts the caller with the zip code on record and asks the caller to confirm the zip code. If the zip code is still not identified, the call is transferred to an operator to ascertain the correct zip code.

Katz asserts that FedEx is using both an account number and the zip code to qualify access to these two applications. FedEx disagrees and raises two non-infringement arguments with respect to entering zip codes. First, FedEx argues that a zip code does not qualify as the second form of distinct identification data

because it is not sufficiently "distinct" as required by claim 43. In other words, a zip code does not "permanently identify the caller to the world at large" as required by this Court's Claim Construction Order. In response, Katz points out that the patent does not require the identification to be unique. Other examples of personal identification data include a name, address, telephone number, or initials. (Claim Construction Order at p. 11.) These examples do not uniquely identify a caller. For example, the same initials can apply to different callers. Nonetheless, a system can use this information to help identify a caller.

This Court agrees with Katz's interpretation of the term "distinct." As the various examples of personal identification data demonstrate, the term does not require the data be unique. Rather "distinct" simply means that the identification data helps identify the caller. As a result, this Court finds that a zip code can be distinct and DENIES FedEx's motion for summary judgment on this issue of non-infringement.

FedEx also argues that the zip code provided by the caller is not used to "qualify access" as required by claim 43. [1] If the caller does not give the zip code, the FedEx's services look up the zip code associated with the ANI (i.e. calling number) and asks the caller if this is the caller's zip code. If the caller answers "yes," the caller continues the automated Pickup or Supply service without resort to a live operator. Thus, the accused apparatus allows access to the same portion of the FedEx's services regardless of whether the caller provides the zip code to the system or whether the system looks up the caller's zip code.

[1] Claim 43 specifically requires that the two forms of distinct identification be provided by the caller.

In response, Katz says that the alternative call-flow path FedEx identifies proves nothing about whether the system is qualifying a caller when it enters the proper zip code. Katz argues that FedEx is improperly attempting to limit the scope of the claim based on what happens to unqualified callers. Katz also says that this Court rejected a similar proposal when we interpreted the meaning of "qualify" in various other Katz patents. (Claim Construction Order at p. 44.) Under Katz's view, the caller is qualified if the caller enters a valid zip code or if the system provides the zip code to the caller.

***6** This Court rejects Katz's analysis. First, this Court notes that it previously defined "qualifying access" to mean determining whether a caller may enter or use. (Claim Construction Order a p. 29.) The undisputed evidence shows that regardless of whether a caller enters a correct zip code, the caller continues to use the FedEx Pickup and Services application and Supplies application. If the correct zip code is entered, the caller moves to the next step in the scenario. If the caller fails to enter the correct zip code, the applications prompt the caller with the zip code associated with the account. As a result, this Court finds that FedEx's Pickup and Services application and Supplies application do not qualify access based on the zip code a caller enters. Thus, this Court finds that FedEx does not literally infringe claim 43.

FedEx also asks this Court to rule that this limitation is not satisfied under the doctrine of equivalents. Under the doctrine of equivalents,

"a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Warner–Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 21, 117 S.Ct. 1040, 137 L.Ed.2d 146 (1997). FedEx argues that the doctrine of equivalents does not apply here for two reasons. First, FedEx argues that claim 43 is not entitled to any range of equivalents because the limitation in question was added to overcome a rejection. Second, FedEx argues that using one form of distinct identification is not equivalent to using "at least" two forms of identification to qualify a caller.

Although narrowing an amendment in response to a rejection during prosecution creates a presumption that the applicant surrendered the territory between the original claims and the amended claims (*see Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 740, 122 S.Ct. 1831, 152 L.Ed.2d 944 (2002), FedEx has failed to show that claim 43 was amended in response to a rejection. FedEx has not provided the amendment or the rejection in question. Thus, this Court cannot determine whether the presumption of prosecution history estoppel applies.

However, the "all limitations rule" restricts the doctrine of equivalents by preventing its application when doing so would vitiate a claim limitation. *See, Carnegie Mellon University v. Hoffmann–La Roche Inc.*, 541 F.3d 1115, 1129 (Fed.Cir.2008). Here, qualifying access based on one distinct identification cannot be considered equivalent to a limitation that requires qualifying access based on at least two distinct identifications. Indeed, by using the phrase "at least two", the limitation is expressly excluding using one identification. Any other interpretation would improperly vitiate the limitation. Accordingly, this Court finds that qualification structure limitation is not satisfied by the doctrine of equivalents. Based on the foregoing this Court GRANTS IN PART FedEx's motion for summary judgment and finds that it does not infringe claim 43 of the ′863 patent.

3. Plurality of Formats

***7** FedEx's second non-infringement argument relates to whether the accused systems include a plurality of separate formats. The interface structure of claim 43 includes a "means to receive called number identification signals (DNIS)." The recited function of the means to receive is "to identify a select one of a plurality of different called numbers associated with a select format of *a plurality of different formats.*"

Katz identifies a number of different applications that are accessed by calling different telephone numbers and argues that each of these applications correspond to a different format. These applications include: Network Prompter call processing flow (accessed via 800–463–3339 (800–Go–FedEx)), a Tracking call processing flow (accessed via 888–333–7150), a Pickup call processing flow (accessed via 888–333–7063), a Supplies call processing flow (accessed via 888–333–6582), a Revenue call processing flow (accessed via 800–622–1147), a Sales Support Hotline call processing flow (accessed via 877–522–7076), a Ratings call processing

flow (accessed via 888–333–6495), a Location call processing flow (accessed via 888–333–6206) and an International Shipping call processing flow (accessed via 800–247–4747).

FedEx argues that these services do not correspond to a plurality of formats because each service is linked through branches selected by the callers. In other words, each of these applications allows access to other applications or can be accessed from at least one other application. Since the Court previously stated that "selection of, or branching to, a module or subroutine within a computer program does not constitute selection of a separate format" (Claim Construction Order at p. 16), FedEx argues that the accused applications do not have separate formats.[2] FedEx overstates the significance in the Court's claim construction. Although branching does not constitute selection of a separate format, the existence of branching does not exclude the possibility of a separate format. Accordingly, FedEx has failed to offer evidence that conclusively demonstrates that the accused call processing flows Katz identified are not separate formats and this Court DENIES IN PART's FedEx's motion for summary judgment.

2 The Court's entire definition stated: "Format refers to a call processing flow implemented by at least one computer program that sets forth the content and sequence of steps to gather information from and convey information to callers through pre-recorded prompts and messages. Selection of, or branching to, a module or subroutine within a computer program does not constitute selection of a separate format. Selection of (or branching to), a second computer program by a first computer program, that together implement a call process flow application also does not constitute selection of a separate format." (Claim Construction Order at p. 16.)

C. Section 112, Indefiniteness

Relying on *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1383–84 (Fed.Cir.2005), FedEx argues that claim 43 of the '863 patent improperly include a step in a system claim. However, on August 27, 2008, this Court struck this argument from FedEx's motion because FedEx never raised it during discovery. Accordingly, this Court does not address whether claim 43 is indefinite.

D. Section 103, Invalidity

FedEx argues that claim 43 of the '863 patent is invalid as obvious under 35 U.S.C. § 103 in view of the combination of: (1) the Winter 1987 quarterly newsletter of Voice Computer Technologies Corporation ("VCT '87"), and (2) the June 1986 IEEE publication by A. Friedes entitled "ISDN Opportunities for Large Business—800 Service Customers" ("Friedes"). The '863 patent claims a priority date of May 16, 1988. Although Katz argues that FedEx has failed to prove that the prior art references were published on the dates indicated, Katz has failed to identify any reason why the Court should question those dates. Since Katz has failed to raise a triable issue of fact with respect to the two priority dates, this Court will consider VCT '87 and Friedes to be prior art.

1. Legal Standard—Obviousness

***8** If the claimed invention is not disclosed in a single prior art reference, a patent may still be invalid as obvious under § 103. In *Graham v. John Deere,* 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966), the Supreme Court set forth the test for obviousness:

> Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

Id., at 17–18.

This test is a question of law based on underlying factual inquiries. *See, e.g., Daiichi Sankyo Co. v. Apotex, Inc.,* 501 F.3d 1254, 1256 (Fed.Cir.2007).

2. VCT and Friedes

VCT ′87 discloses a customer service application in which a caller can call into the system, identify himself using the touch-tone keys, and be transferred to a customer service representative along with a "data screen" containing the data already entered by the caller. (VCT 1987, p. 1.) In addition, the customer service application can use a DNIS code received with the call to identify the particular application that should be used for the call. (VCT ′87 at pp. 1, 6.).

A customer service application disclosed by VCT ′87 uses the ANI code received with the call to identify the number from which the call is placed. (VCT ′87 at p. 6.) The application can then match the ANI code with the customer's account and automatically retrieve information about the caller. (VCT ′87 at p. 6.)

Friedes discloses several telephone based customer service applications, including Advanced 800 features and ISDN applications. In Friedes, the Advanced 800 features and services can be used by telephone customer service organizations. (Friedes at p. 28.) Among the Advanced 800 features disclosed by Friedes are: customized call routing, time manager, day manager, call allocator, call prompter, command routing, courtesy response, routing control service, and call attempt profile. (Friedes at p. 29.) Friedes also discloses using an ACD to route calls to multiple locations including the ability to redirect calls between locations. (Friedes at p. 32.)

3. Limitations of Claim 43

Claim 43 has a number of means plus function limitations governed by 35 U.S.C. § 112. These limitations include: "means to provide caller data signals," "means to receive called number identification signals (DNIS)," "memory and control means," and a "qualification structure ... for qualifying access." Although FedEx shows that VCT '87 discloses many of the recited functions of these elements, FedEx and its expert, Dr. Prieve, fail to show what structures perform the recited functions. Indeed, the VCT '87 reference appears to be primarily a functional description of what can be accomplished by partially or wholly automating a customer call service department. It may well be that once the functions are known, it would be obvious to use the specific structures required by claim 43's means plus function limitations. However, FedEx has failed to offer any such evidence.

***9** Claim 43 also requires using DNIS information to identify "a select one of a plurality of different called numbers associated with a select format of a plurality of formats." Although VCT '87 discusses using DNIS information to identify the application (VCT '87 at pp. 1, 6), FedEx's analysis assumes that a separate application corresponds to a separate format. In contrast, Katz's analysis appears to assume that VCT '87 applications do not correspond to a different format. This Court is under the impression that separate user applications somehow suggest separate formats. However, neither party appears to have briefed this issue nor have their experts explained what criteria they are using to determine whether there are multiple formats present or just one format. Based on this limited record, this Court cannot find that VCT '87 discloses multiple formats.

Thus, this Court finds that FedEx has failed to show that the combination of VCT '87 and Friedes render claim 43 obvious for at least two different reasons. Given these findings, this Court does not need to determine whether there is a reason to combine the two references under *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S.Ct. 1727, 167 L.Ed.2d 705 (2007). The Court also does not address Katz's other non-obviousness arguments including whether the VCT ' 87/Friedes combination disclose various other limitations and the secondary indicia of non-obviousness. Based on the foregoing, this Court DENIES FedEx's motion for summary judgment on obviousness and finds that FedEx has failed to offer sufficient evidence to prove that claim 43 is obvious.

IV. AMERICAN AIRLINES' DEFENSES

A. Dropped Claims

Although Katz provided preliminary infringement reports regarding claim 85 of U.S. Patent No. 5,561,707 ("the '707 patent"), claim 21 of U.S. Patent No. 5,815,551 ("the '551 patent"), claims 14 and 86 of U.S. Patent No. 6,678,360 ("the '360 patent"), and claim 34 of U.S. Patent No. 5,974,120 ("the '120 patent"), Katz's expert, Dr. Lucantoni, did not include those claims in his expert report. American has interpreted this omission to mean that Katz has dropped those claims from the lawsuit and asks this Court to grant summary judgment of non-infringement.

In response, Katz says that American is not entitled to summary judgment because Katz does not need to offer expert testimony to prove infringement. It can rely on the evidence disclosed in its earlier infringement charts. Noticeably, Katz's opposition does not say that: 1) it intends to pursue the claims that were omitted from Dr. Lucantoni's report, or 2) that American infringes those claims. From this Court's perspective, it does not appear that Katz is planning to continue to assert the claims at issue, and there appears to be a legitimate question of whether Katz has good faith basis to do so. Accordingly, this Court GRANTS American's motion for summary judgment with respect to the five claims that are not found in Dr. Lucantoni's report.

B. Damages After December 21, 2005

***10** Claim 43 of the '863 patent is the only claim remaining in Katz's lawsuit against American. The patent expired on December 20, 2005. Nonetheless, Katz's damages expert, Dr. Vellturo, calculated damages based on services that were performed after that date. American asks the Court to rule that Katz cannot recover damages for any activities that occurred on or after December 21, 2005.

In response Katz raises four arguments. First, relying on several patent misuse decisions, Katz argues that it can recover royalties after the expiration of some patents so long as other patents have not expired. However, in litigation, a patentee may only recover damages for patents that are found to be valid and infringed. Katz had the opportunity to assert other patents that have not expired. Katz has either failed to assert those patents or lost on the merits. Thus, these cases are inapposite.

Second, Katz points out that the Court limited the number of claims it could assert. As a result, Katz argues that its due process rights would be violated if it were not allowed to collect damages for the entire term of its patent portfolio. Katz's argument might make sense if this Court only allowed Katz to select a representative sample of claims. That is not the case. This Court's limits were intended to prevent litigation of duplicative claims. It was not intended to curtail any of Katz's rights, nor was its limits absolute. This Court specifically invited Katz to file a motion to exceed the limits provided Katz could justify each additional claim. Katz could have sought to add claims by explaining that they covered the same accused services, but had different terms. Katz did not do so. Accordingly, this Court rejects Katz's due process argument.

Third, Katz argues that factual issues preclude granting summary judgment. Essentially, Katz argues that there is sufficient evidence to suggest that in a hypothetical negotiation, the parties would have agreed to a portfolio license that included all of Katz's patents. However, Katz frames the negotiation incorrectly again. Here, we must assume that claim 43, the only remaining claim in Katz's suit against American, is the sole subject of the negotiation. When that assumption is made, Katz's argument collapses.

Finally, Katz argues that American's request is premature and points out the trial court could address this issue later. However, Katz fails to point to anything the trial court might learn that is not presently known.

Accordingly, this Court GRANTS American's motion for summary judgment as to the issue of damages. To the extent Katz prevails solely on claim 43 of the ' 863 patent, it may not recover damages for activities on or after December 21, 2005.

C. American's Periphonics System Does Not Infringe Claim 43 of the '863 Patent

American raises two non-infringement arguments with respect to claim 43 of the '863 patent.

1. Plurality of Formats

American's first non-infringement argument raises essentially the same argument FedEx raised above with respect to a "plurality of formats." Since the accused American services branch between each other, American argues that its system only operates a single format.

***11** Katz accuses American's Periphonics interactive voice response ("IVR") system of infringing claim 43. The system includes several different computer programs including AAdvantage Number ID, AAdvantage AutoUpgrade, Passenger Information and Automated Non–Revenue Travel. The AAdvantage Number ID collects the caller's American AAdvantage frequent flier account number. The application can be used by itself or in conjunction with the AutoUpgrade or Passenger Information applications. The AutoUpgrade application allows American's elite AAdvantage members to request an upgrade using their AAdvantage number. The Passenger Information application prompts callers to speak information about themselves, including their AAdvantage number. The Non–Revenue Travel application allows American's employees to book their own flights without the assistance of a reservations agent.

In the Periphonics system, the AAdvantage ID program is the first of a series of programs the caller encounters. The AAdvantage ID program asks the caller to speak their AAdvantage number. This program then collects the caller's AAdvantage number. In some cases, the AAdvantage ID program then selects or branches to another Periphonics program such as the Passenger Information or AutoUpgrade applications to complete the call.

Since the Court previously stated that "selection of, or branching to, a module or subroutine within a computer program does not constitute selection of a separate format" (Claim Construction Order at p. 16), American argues that the accused applications are not separate formats. Like FedEx, American overstates the significance in the Court's claim construction. Although branching does not constitute selection of a separate format, the existence of branching does not exclude the possibility of a separate format. Accordingly, American fails to demonstrate that these four applications correspond to a single format, not separate formats.

Moreover, even if this Court accepted American's claim interpretation, the evidence does not support summary judgment. Although the AAdvantage Number ID, AAdvantage AutoUpgrade and Passenger Information applications are linked by branching, there is no evidence that the Non–Revenue Travel application either branches to or from the other three applications. Accordingly, this Court

finds that American has failed to prove that the accused system only operates a single format and American's motion for summary judgment is DENIED as to this issue.

2. "Record Structure" that Stores Both Caller and Operator Entered Data

American argues that it also does not infringe clam 43 because the accused Periphonics system does not have record structure that stores both caller-entered data as well as operator-entered data.

Independent claim 27 recites a "record structure connected to receive said caller data signals from said interface structure for accessing a file and storing certain of said data developed by said remote terminals relating to certain select ones of said individual callers." The last element of the claim imposes an additional requirement on the "record structure." Specifically, the "switching structure" element switches calls to "live operators" who "can enter at least a portion of said caller data relating to said select ones of said individual callers through interface terminals, which is stored in said record structure." Accordingly, American concludes that the claim requires a "record structure" that stores both caller-entered data and operator-entered data. Katz does not challenge this claim interpretation.

***12** According to Katz's expert, Dr. Lucantoni, the record structure limitation is satisfied by: the Periphonics IVR; the SABRE database; and a Traveler database maintained by SABRE. (Amended Ex. 20, Lucantoni Dep. at pp. 52–53 and attached Ex. 9 to deposition.) American argues that Dr. Lucantoni is improperly grouping these systems together to find the required "record structure." Although the Periphonics IVR system can receive and store caller-entered data and the SABRE database can store and receive operator-entered data, American argues that the same record structure must serve both these functions. Since these systems are separate structures located in different physical locations (Tulsa, OK and Dallas, TX), American asks for summary judgment of non-infringement.

In its opposition brief, Katz does not defend the divided record structure theory offered by Dr. Lucantoni.[3] Rather, Katz revises its infringement theory. Instead of arguing that record structure is satisfied by both the Periphonics IVR system and SABRE system, Katz now argues that the SABRE system by itself satisfies the "record structure" limitation. Katz explains that callers enter reservation data into the Periphonics IVR which is "eventually" stored in the SABRE system to form or change a reservation.

[3] Accordingly, we find that the record structure of claim 43 is not satisfied by both the Periphonics IVR and SABRE systems.

However, Katz's new infringement theory is also flawed. Claim 27 also requires that the record structure is "connected to receive said caller data signals" from the interface structure. Here, there is no evidence that SABRE receives caller data signals. Indeed, Katz only says that "caller-entered reservation data was *eventually* stored in the SABRE system to form or change a reservation." (Katz Opp'n at p. 7 (emphasis

added).) Katz does not offer any evidence that the record structure in SABRE is connected to receive caller data signals. Accordingly, this Court GRANTS American's motion for summary judgment as to claim 43 of the '863 patent and finds that American does not infringe claim 43 because the accused systems do not satisfy the record structure limitation. [4]

4 This Court is also troubled by Katz's last minute revisions. By suggesting that a third party's system, SABRE, satisfies a limitation, Katz may have injected control/direction issues after the end of discovery. Since this Court finds that there is no infringement under Katz's new theory, this issue is moot.

V. KATZ'S CROSS MOTION FOR SUMMARY JUDGMENT

Although the Court has granted American's and FedEx's motions for summary judgment, the Court will nonetheless address Katz's cross-motions for summary judgment as to the defendants' affirmative defenses.

A. Equitable Estoppel

Katz's summary judgment motion asks this Court to dismiss both defendants American and FedEx's affirmative defense of equitable estoppel. Equitable estoppel comes into play when a patent owner represents to an infringer, expressly or implicitly, that he will not enforce his patent against the infringer's business, and the infringer relies on that representation. The Federal Circuit has stated that there are three elements to equitable estoppel: a) the patentee, through misleading conduct, leads the alleged infringer to reasonably infer that the patentee does not intend to enforce its patent against the alleged infringer; b) the alleged infringer relies on that conduct; and c) due to its reliance, the alleged infringer will be materially prejudiced if the patentee is allowed to proceed with its claim. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028 (Fed.Cir.1992) (*en banc*). Equitable estoppel must be shown by a preponderance of the evidence. *Id.* at 1046.

1. American Airlines

***13** Katz's motion argues that American has failed to present specific evidence showing either misleading conduct or reliance. In response, American argues that Katz's communications were misleading because they support two inferences. First, American points out that Katz sent a number of communications to American from August 1997 through 2004 without specifically identifying claim 43 of the '863 patent or American's Non–Rev's application. As a result, American argues that it could reasonably believe that both the claim and accused product were not at issue. Second, American points out that Katz's communications with American spanned a long period of time. When these events were compared to Katz's successes, American could reasonably believe that Katz would not file suit against American presumably because Katz's case against American was weaker.

Katz's reply brief correctly points out that by itself, silence cannot be the basis for an inequitable conduct claim. *See Hemstreet v. Computer Entry Sys. Corp.*, 972 F.2d 1290,

1295 (Fed.Cir.1992) ("equitable estoppel may, in some instances, be based upon a misleading silence, mere silence must be accompanied by some other factor which indicates that the silence was sufficiently misleading as to amount to bad faith." (internal citations omitted)); *see also ABB Robotics, Inc. v. GMFanuc Robotics Corp.*, 52 F.3d 1062, 1064 (Fed.Cir.1995) ("Misleading action by the patentee may be silence, if such silence is accompanied by some other factor indicating that the silence was sufficiently misleading to amount to bad faith."); *Aukerman*, 960 F.2d at 1042 ("inaction must be combined with other facts").

Here, American repeatedly suggests that Katz's conduct is misleading based on what American "could have" inferred from Katz's overtures. But American's argument focuses on the wrong question. The issue is not what American could have believed, but whether Katz's conduct was somehow misleading. Here, there was nothing misleading about Katz's actions. Katz sent a series of letters over the course of many years aimed at licensing American. The letters described Katz's litigation. This conduct plainly suggests that Katz was serially pursuing different targets, and American's turn would come. Thus, the Court finds that American has failed to raise a genuine issue of material fact with respect to misleading conduct.

With respect to the reliance element, American repeatedly suggests that it "could have" believed that Katz would not file suit against American, but American never says it actually had this belief. American fails to submit any declarations, cite to any deposition testimony or identify any other evidence that shows that American actually believed that Katz would not pursue American. Instead, American simply argues that it could have avoided expenditures if Katz had brought suit earlier. This shows harm, not reliance.

> An infringer can build a plant being entirely unaware of the patent. As a result of infringement, the infringer may be unable to use the facility. Although harmed, the infringer could not show reliance on the patentee's conduct.

***14** *Auckerman*, 960 F.2d at 1043. Thus, this Court finds that American has failed to provide any evidence to support the second element of estoppel, reliance.

Since American has failed to offer any substantial evidence of either misleading conduct or reliance, this Court GRANTS Katz's motion for summary judgment with respect to American's equitable estoppel defense.

2. FedEx

a. Misleading Conduct

Katz's motion argues that FedEx does not have evidence showing any of the three required elements of equitable estoppel. With respect to the first element, misleading conduct, FedEx argues that Katz's conduct between 1999 and 2004 led FedEx to believe that it could use a licensed provider to handle its calls without fear of being sued. To properly assess this argument,

we need to review the history of the FedEx/ Katz dialog.

Katz initially contacted FedEx on August 12, 1997 to take a license on the Katz portfolio. Subsequently, FedEx said that its systems and equipment were supplied by third parties that may have a license to the Katz patents. (October 14, 1999 letter, Ex. C to Boyle Decl.) As a result, FedEx asked for a list of Katz's licensees. In response, Katz provided a partial list of licensees, and said "if the [FedEx] equipment were already licensed," Katz "would not seek to claim royalties twice. However, most of the licenses under the portfolio have been issued to end users, not system manufacturers." (March 22, 1999 Letter, Ex D to Boyle Decl.) The list included NEXTLINK Interactive, Inc. (now XO Communications or "XO").

FedEx retained XO to process its calls until November 2003. The services XO supplied do not appear to have been an issue. On January 12, 2004, Katz sent a letter to FedEx stating that Katz had learned that FedEx was no longer using XO to handle its calls, and that FedEx needed a license to the extent that it was processing calls through any non-licensed entities. (Ex F to Boyle Decl.) By then FedEx had begun using a different vendor, AT & T.

However, FedEx claims it also understood that it did not need a separate license because AT & T also had a license from Katz. In fact, Katz's January 12, 2004 letter specifically listed AT & T as a vendor and attached a press release discussing the AT & T license. (Attachment to Ex. F to Boyle Decl.) The November 9, 2000 press release stated that "when AT & T performs all of the patented function for a business customer, that customer does not require an independent license from [Katz]."

FedEx argues that Katz's conduct during this time period was misleading because it led FedEx to believe that it did not need a license from Katz. Importantly, FedEx is not simply relying on silence, but also on affirmative statements Katz made in the March 22, 1999 letter, November 9, 2000 Press Release and January 12, 2004 letter.

In response, Katz argues that the March 22, 1999 letter was limited to "equipment" that was already licensed but not "systems ." However, the distinction that Katz attempts to draw is only one possible interpretation of the March 22, 1999 letter. Moreover, Katz never explains why the November 9, 2000 and the January 12, 2004 letter do not suggest that simply obtaining services from AT & T would avoid a lawsuit. Therefore, this Court finds FedEx has raised a factual issue with respect to whether Katz's conduct was misleading. [5]

[5] Katz also points out that AT & T informed FedEx about significant limitations on AT & T's ability to provide FedEx with a sublicense to Katz's patents. This argument goes to reliance and will be addressed below.

b. Reliance

***15** To show reliance, FedEx argues "that the objective evidence fully supports the inference that FedEx relied on [Katz's] misleading statements about the services its licensees could permissibly provide to FedEx." (FedEx. Opp'n at pp. 1314.) However, FedEx only points to Katz's misleading conduct and the fact that

FedEx used XO and AT & T to process its calls. This evidence merely shows that it would have been reasonable for FedEx to rely on Katz's misleading conduct, not that it actually did so. Essentially, FedEx is attempting to argue that reliance can be inferred from evidence of misleading conduct. That analysis impermissibly eliminates an essential element of estoppel.

In sum, FedEx has offered no witnesses or documents to show that FedEx evaluated the XO and AT & T platforms with the licenses to Katz's patents in mind. When one of FedEx's witnesses was asked a question directed at that subject, FedEx refused to let the witness answer based on privilege. (Nichols Dep. at pp. 160–162, Ex. to Boyle Decl.) However, invoking privilege does not relieve FedEx of its evidentiary burden. Based on the foregoing, this Court finds that FedEx has failed to offer any evidence of reliance.

In addition, Katz points out that before FedEx entered into a relationship with AT & T, the parties discussed whether AT & T could provide FedEx with a sublicense to the Katz patents. AT & T informed FedEx that any sublicense would have to be approved by Katz, and be royalty bearing at essentially the same rates offered by Katz. (April 18, 2002 email, Ex L to Boyle Decl.) Moreover, it was AT & T's policy not to offer such a sublicense. *Id.* This evidence shows that it would not have been reasonable for FedEx to believe that it could use AT & T to process its calls without fear of a lawsuit by Katz. Thus, with respect to using AT & T, the only evidence suggests that FedEx did not rely on Katz's misleading conduct.

Based on the foregoing, this Court GRANTS Katz's motion for summary judgment with respect to FedEx's equitable estoppel defense. This Court does not reach the prejudice element because it has already found that FedEx has not provided evidence of reliance.

B. Prosecution History Laches

Katz's summary judgment motion also asks this Court to dismiss both American and FedEx's affirmative defense of prosecution laches. The equitable doctrine of prosecution laches may bar enforcement of patent claims issuing after an unreasonable and unexplained delay in prosecution, even though the applicant complied with pertinent statutes and rules. *Symbol Techs., Inc. v. Lemelson Med., Educ., & Research Found.*, 277 F.3d 1361, 1363 (Fed.Cir.2002) (hereinafter *"Symbol I"*). In this case, American has filed an opposition to Katz's motion for summary judgment on laches.

FedEx says that its prosecution laches defense is only directed at claim 18 of the '547 patent. This Court previously declared that claim 18 was invalid as indefinite. As a result, FedEx argues that Katz's prosecution laches claim is moot and FedEx did not provide any substantive response. Based on the foregoing, this Court DENIES Katz's motion for summary judgment on the FedEx's prosecution laches defense WITHOUT PREJUDICE. The remainder of this section will address American's prosecution laches defense.

1. Legal Standard—Prosecution Laches

***16** In *Symbol I,* the Federal Circuit did not issue any "firm guidelines" for determining when laches exists. *Symbol Techs.,*

Inc. v. Lemelson Med., Educ., & Research Found., 422 F.3d 1378, 1385 (Fed.Cir.2005) (hereinafter *"Symbol II"*). Both Katz and American agree that prosecution laches requires an unreasonable and unexplained delay in the prosecution of a patent. However, they disagree about whether intervening adverse rights is also a requisite element. Katz argues that intervening rights is an essential element of the defense, while American argues that it is simply one factor to be considered in a totality of circumstances determination.

In support of its position Katz cites to *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.,* 304 U.S. 159, 167–68, 58 S.Ct. 842, 82 L.Ed. 1265 (1938), and *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 183, 58 S.Ct. 849, 82 L.Ed. 1273 (1938), and argues that these Supreme Court decisions have held that prosecution laches does not apply in the absence of intervening rights. Katz also points out that the Federal Circuit relied, in part, on these decisions to revive the doctrine of prosecution laches. *Symbol I,* 277 F.3d at 1365. Therefore, Katz concludes that the intervening rights requirement remains intact. Finally, Katz points out that this Court has arrived at the same conclusion in an earlier decision. *See Verizon California Inc. v. Ronald A. Katz Technology Licensing, L.P.,* No. 01–CV–9871 (RGK)(RCx), 2003 U.S. Dist. LEXIS 23553, at *62–63 (C.D.Cal. Dec. 2, 2003) ("it appears that proof of 'intervening adverse public rights' is a requisite element of a successful prosecution laches defense.").

In response, American argues that although "intervening public or private rights" could be a factor in evaluating the totality of circumstances, the Federal Circuit has never required the presence of intervening rights. *See Symbol II,* 422 F.3d at 1382 (citing intervening rights as additional factual considerations); *see also In re Bogese II,* 303 F.3d 1362, 1367 (Fed.Cir.2001) (affirming Board of Patent Appeal's forfeiture of patent based upon prosecution laches without requirement of intervening rights).

After reviewing the decisions, this Court concludes that Katz is correct and that the Supreme Court has addressed the issue of intervening rights. In both *Crown Cork* and *General Talking Pictures,* the Supreme Court held that prosecution laches would not apply absent intervening adverse rights. *Crown Cork,* 304 U.S. at 167 ("It is clear that, in the absence of intervening adverse rights, the decision in *Webster Electric Co. v. Splitdorf Co.,* supra, does not mean that an excuse must be shown for a lapse of more than two years in presenting the divisional application"); *General Talking Pictures,* 304. U.S. at 183 ("In the absence of intervening adverse rights for more than two years prior to the continuation applications, they were in time.") Although the precedent is old, it is controlling. Therefore, this Court likewise finds that to prevail on a claim of prosecution laches, the defendant must prove both: 1) unreasonable and unexplained delay, and 2) intervening adverse rights.

2. Unreasonable and Unexplained Delay

***17** Katz's summary judgment motion argues that American does not have evidence of unreasonable delay. The '863 patent is the only patent remaining against American. It was filed on June 7, 1995 and claims a priority date of May 16, 1988. The patent did not

issue until November 4, 1997. American points out that the delay between when Katz could have filed claim 43 and when it actually filed the claim was over seven years. According to the expert report of Professor Wagner, the prosecution of claim 43 took longer than 98% of all patent applications in the same time period and longer than 99% of the patent applications in its class. (Wagner Report at p. 23.) These delays are certainly significant and might provide a basis for finding prosecution laches. The question revolves on whether Katz can provide a reasonable explanation for that delay. Katz's motion argues that it was diligent and hastened the issue of patents by having at least one patent issue between 1988 and 2004. However, American's expert, Mr. Mossinghoff, says that Katz's delays were not reasonable. (Mossinghoff Decl. at ¶¶ 195–206.) Even absent Mr. Mossinghoff's declaration, this Court would find there is a factual issue as to whether the delays in prosecuting the '863 patent were warranted. Therefore, this Court finds that there is a genuine issue of material fact with respect to the issue of unreasonable and unexplained delay.

3. Intervening Adverse Rights

On October 10, 2008, this Court struck American's intervening rights arguments related to prosecution laches because American failed to identify any specific intervening rights during discovery. Instead, American's opposition to Katz's summary judgment motion made that identification for the first time. The Court found that the late disclosure prevented Katz from taking discovery on American's defense and struck those arguments. As a result, American cannot provide evidence of an essential element of its prosecution laches defense and this Court GRANTS Katz's motion for partial summary judgment as related to prosecution laches.

VI. SUMMARY

A. FedEx's License and Exhaustion Defense

1. This Court DENIES FedEx's motion for summary judgment on the issue of whether the accused system is licensed under the AT & T License.

2. Because FedEx has failed to satisfy its burden of proof, this Court DENIES FedEx's motion for summary judgment with respect to the XO license.

3. Because FedEx has failed to satisfy its burden of proof, this Court DENIES FedEx's motion for summary judgment with respect to its exhaustion defense.

B. FedEx's Non–Infringement Defense

1. This Court finds that a zip code can be distinct and DENIES FedEx's motion for summary judgment with respect to this portion of its non-infringement defense.

2. This Court finds that FedEx does not infringe claim 43 of the '863 patent because FedEx's Pickup and Services application and Supplies application do not qualify access based on the zip code a caller enters. Therefore, the Court GRANTS FedEx's motion for summary judgment as to non-infringement of claim 43.

***18** 3. This Court DENIES FedEx's motion for summary judgment with respect to its

non-infringement defense involving separate formats. Specifically, the Court finds that FedEx has failed to offer evidence that conclusively demonstrates that the accused call processing flows Katz identified are not separate formats.

C. FedEx's Invalidity Defenses

1. This Court does not address whether claim 43 is indefinite because its August 27, 2008 struck this argument from FedEx's motion for failing to raise this defense during discovery. This Court DENIES FedEx's motion for summary judgment with respect to invalidity because FedEx has failed to offer sufficient evidence to prove that the prior art reference discloses the structural limitation associated with the means plus function limitations and a plurality of format.

D. American's Defenses

1. This Court GRANTS American's motion for summary judgment with respect to the five claims that are not found in Dr. Lucantoni's report for failure to offer evidence of infringement.

2. This Court GRANTS American's motion for summary judgment and finds that, to the extent Katz prevails solely on claim 43 of the '863 patent, it may not recover damages for activities after December 20, 2005, when the patent expired.

3. This Court finds that American has failed to prove that the accused system only operates a single format and American's motion for summary judgment is DENIED as to this issue.

4. This Court GRANTS American's motion for summary judgment and finds that American does not infringe claim 43 of the '863 patent because the accused systems do not satisfy the record structure limitation.

E. Katz's Cross Motion for Summary Judgment

Notwithstanding the rulings above, the Court also makes the following findings as to Katz's cross-motion for summary judgment:

1. This Court GRANTS Katz's motion for summary judgment with respect to American's equitable estoppel defense because American has failed to offer evidence of misleading conduct and reliance.

2. This Court GRANTS Katz's motion for summary judgment with respect to FedEx's equitable estoppel defense because FedEx has not provided substantial evidence of reliance.

3. This Court DENIES Katz's motion for summary judgment on the FedEx's prosecution laches defense WITHOUT PREJUDICE because FedEx says it only raised this defense in response to claim 18 of the '547 patent, a claim that was previously found invalid for indefiniteness.

4. The Court GRANTS Katz's motion for partial summary judgment as related to prosecution laches because American has been unable to offer evidence of intervening rights.

To the extent the Court has relied on evidence to which the parties have objected, those objections are overruled. Based on these rulings, the Court believes that all of the claims

in this case have been resolved against Katz, and the Court directs America and FedEx to file Proposed Judgments consistent with the Order. The Proposed Judgments shall be filed within 10 days of the date of this Order. If Katz believes that some of its claims survive this ruling, it should file a short written statement explaining what portion of the case remains. Such statement shall also be filed within 10 days from the date of this Order.

***19 IT IS SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2009 WL 1351043

Legal Authority R-LA-11

318 F.R.D. 383
United States District
Court, C.D. California.

INLAND CONCRETE ENTERPRISES, INC. Employee Stock Ownership Plan, Nicolas L. Saakvitne (as Trustee of the Inland Concrete Enterprises, Inc. Employee Stock Ownership Plan), and Inland Concrete Enterprises Inc. (a California corporation), Plaintiffs,
v.
Rune KRAFT (an individual)[1], Defendant.

[1] The undersigned also presides over the related case *Kraft v. Oldcastle Precast, Inc. et al.*, LA CV 15–00701–VBF ("the 2015 case"). In the 2015 case, this Court issued an Order on April 15, 2016 dismissing Kraft's amended complaint *with* prejudice pursuant to FRCP 12(b)(6). *See* 15-701 Doc 44 (not on WestLaw). The Court entered final judgment in favor of defendants there on April 18, 2016 (15-701 Doc 46). By Order on August 2, 2016 (Doc 54), the Court denied Kraft's ensuing motion for reconsideration. *See Kraft v. Old Castle*, 15–701 Doc 54, 2016 WL 4120049 (C.D. Cal. Aug. 2, 2016) (Fairbank, J.).
Also in the 2015 case, this Court on March 24, 2016 declared Kraft a vexatious litigant and imposed pre-filing restrictions on him. *See* 15-701 Doc 40 at 30-33 (not on WestLaw). The same Order, though, denied without prejudice the motion to declare Kraft Americas Limited Partnership vexatious. *See id.* at 26–30. Kraft's ensuing motion for reconsideration (Doc 45) is briefed and will be decided by separate opinion.

Case No. LA CV 10-01776-VBF
|
Signed August 24, 2016

Synopsis

Background: Employer, its employee stock ownership plan (ESOP), and trustee of ESOP sued broker, claiming breach of fiduciary duty and seeking declaratory judgment that broker was not entitled to $5 million fees requested in connection with transaction in which ESOP sold all of ESOP's stock in employer. Broker counterclaimed for breach of contract, account stated, quantum meruit, fraud, and promissory estoppel. Nearly four years after the District Court entered $3 million default judgment against broker, broker moved for relief from judgment.

Holdings: The District Court, Valerie Baker Fairbank, J., held that:

[1] broker's failure to appeal barred motion for relief from judgment, and

[2] motion was untimely.

Motion denied.

West Headnotes (31)

[1] Judges Nature and effect in general

227 Judges
227IV Disqualification to Act
227k39 Nature and effect in general

Disability, mental or physical, is not a proper basis for seeking a judge's recusal.

[2] Federal Courts Substance or procedure; determinativeness

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(A) In General
170Bk3005 Substance or procedure; determinativeness

California rules of court apply only in state court, not federal court.

[3] Federal Courts Substance or procedure; determinativeness

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(A) In General
170Bk3005 Substance or procedure; determinativeness

Although a California rule of court prohibits citations to unpublished decisions, a federal court exercising diversity jurisdiction is not bound by a state's procedural rules. Cal. R. Ct. 8.1115.

[4] Federal Civil Procedure Nature and Form of Remedy

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2647 Nature and Form of Remedy
170Ak2647.1 In general

A court of appeals typically can remedy a legal error committed by a district court, but the rule permitting relief from a judgment is not meant to be a substitute for an appeal. Fed. R. Civ. P. 60(b).

[5] Federal Civil Procedure Nature and Form of Remedy

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2647 Nature and Form of Remedy
170Ak2647.1 In general

It is not proper to grant a motion for relief from judgment if the aggrieved could have reasonably sought the same relief by means of appeal. Fed. R. Civ. P. 60(b).

3 Cases that cite this headnote

[6] Federal Civil Procedure Nature and Form of Remedy

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2647 Nature and Form of Remedy
170Ak2647.1 In general

If the reason asserted for the motion for relief from judgment could have been addressed on appeal from the judgment, the motion must be denied

as merely an inappropriate substitute for an appeal. Fed. R. Civ. P. 60(b).

4 Cases that cite this headnote

[7] **Federal Civil Procedure** Time for motion

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)2 Setting Aside
170Ak2451 Proceedings
170Ak2451.5 Time for motion

Broker's failure to appeal $3 million default judgment against him for breach of fiduciary duty in connection with transaction in which employee stock ownership plan (ESOP) sold all of ESOP's stock in employer barred broker's motion for relief from judgment asserted years after his time for appeal elapsed, on grounds that broker's arguments supporting motion, that judge made errors of law, fact, and logic and that employer, ESOP, and trustee of ESOP perpetrated fraud on court, could have been raised in motion for reconsideration and then by appeal, since broker had knowledge of any errors or fraud at time that judgment was entered. Fed. R. Civ. P. 60(b).

[8] **Federal Civil Procedure** Relief from Judgment

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2641 In general

Allowing motions for relief from judgment after a deliberate choice has been made not to appeal would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting the finality of judgments. Fed. R. Civ. P. 60(b).

[9] **Federal Civil Procedure** Time for instituting proceedings

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2658 Time for instituting proceedings

Unlike motions for relief from judgment for mistakes of law, newly discovered evidence, or fraud, which must be filed within one year of the entry of judgment, or motions for relief from judgment due to inequity of prospective enforcement or under the catch-all provision, which must be filed within a reasonable time, motions to set aside a judgment as void may be brought at any time. Fed. R. Civ. P. 60(b), 60(c)(1).

2 Cases that cite this headnote

[10] **Federal Civil Procedure** Grounds and Factors

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)2 Setting Aside
170Ak2444 Grounds and Factors
170Ak2444.1 In general

Broker's allegation that employer, its employee stock ownership plan

(ESOP), and trustee of ESOP deceived and perpetrated fraud on court and on broker regarding broker's fiduciary relationship with employer, ESOP, and trustee was not basis for relief from $3 million default judgment against broker as void, since broker's allegations, if true, would only render judgment voidable, not void, as district court had jurisdiction over case and parties. Fed. R. Civ. P. 60(b)(4).

1 Cases that cite this headnote

[11] **Constitutional Law** Conclusiveness

Federal Civil Procedure Void judgments; jurisdictional defects

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k4007 Judgment or Other Determination
92k4012 Conclusiveness
170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2651.3 Void judgments; jurisdictional defects

Under rule providing for relief from a judgment if it is void as a matter of law, the list of such judgments is exceedingly short, and the rule applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. U.S. Const. Amend. 14; Fed. R. Civ. P. 60(b)(4).

1 Cases that cite this headnote

[12] **Federal Civil Procedure** Void judgments; jurisdictional defects

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2651.3 Void judgments; jurisdictional defects

A motion for relief from judgment may be treated as a motion to set aside a judgment as void only if the judgment at issue actually is void and not merely voidable. Fed. R. Civ. P. 60(b)(4).

2 Cases that cite this headnote

[13] **Federal Civil Procedure** Time for instituting proceedings

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2658 Time for instituting proceedings

The one-year time limit for motions for relief from judgment premised upon mistake, newly discovered evidence, or fraud is jurisdictional and cannot be extended. Fed. R. Civ. P. 60(b)(3), 60(c)(1).

1 Cases that cite this headnote

[14] **Federal Civil Procedure** Time for motion

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)2 Setting Aside
170Ak2451 Proceedings

170Ak2451.5 Time for motion

One-year filing period for broker's motion for relief from $3 million default judgment on breach of fiduciary duty claim by employer, its employee stock ownership plan (ESOP), and trustee of ESOP, in connection with transaction in which ESOP sold all of ESOP's stock in employer, began to run on date that judgment was entered. Fed. R. Civ. P. 60(b)(3), 60(c)(1).

[15] Federal Civil Procedure Error by court, clerk, or jury

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2653 Error by court, clerk, or jury

The rule permitting relief from a final judgment on the ground of mistake, inadvertence, surprise, or excusable neglect applies to errors by judicial officers as well as parties. Fed. R. Civ. P. 60(b)(1).

2 Cases that cite this headnote

[16] Federal Civil Procedure Time for motion

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)2 Setting Aside
170Ak2451 Proceedings
170Ak2451.5 Time for motion

Any motion by broker for relief from $3 million default judgment against him, for breach of fiduciary duty in connection with transaction in which employee stock ownership plan (ESOP) sold all of ESOP's stock in employer, on ground of alleged mistakes of law due to district judge's treatment for brain cancer during pendency of case, was not filed within reasonable time, where broker's motion was not filed within one year or within time for taking appeal, but rather was filed nearly four years after judgment was entered. Fed. R. Civ. P. 60(b)(1), 60(c)(1).

1 Cases that cite this headnote

[17] Federal Civil Procedure Time for instituting proceedings

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2658 Time for instituting proceedings

A court may not find a motion for relief from judgment on ground of mistake, inadvertence, surprise, or excusable neglect to be filed within a reasonable time unless it was filed within the time for taking an appeal. Fed. R. Civ. P. 60(b)(1), 60(c)(1).

4 Cases that cite this headnote

[18] Federal Civil Procedure Time for motion

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)2 Setting Aside
170Ak2451 Proceedings
170Ak2451.5 Time for motion

Any motion by broker for relief from $3 million default judgment against him, for breach of fiduciary duty in connection with transaction in which employee stock ownership plan (ESOP) sold all of ESOP's stock in employer, on ground of alleged newly discovered evidence not reasonably available shortly after judgment was issued, was not filed within reasonable time, where broker's motion was not filed within one year, but rather was filed nearly four years after judgment was entered. Fed. R. Civ. P. 60(b)(2), 60(c)(1).

1 Cases that cite this headnote

[19] Federal Civil Procedure Time for motion

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(B) By Default
170AXVII(B)2 Setting Aside
170Ak2451 Proceedings
170Ak2451.5 Time for motion

Any motion by broker for relief from $3 million default judgment against him, for breach of fiduciary duties in connection with transaction in which employee stock ownership plan (ESOP) sold all of ESOP's stock in employer, on ground that prospective application of judgment was no longer equitable based on district judge's alleged errors due to her treatment for brain cancer during pendency of case, was not filed within reasonable time, where broker's motion was not filed within one year, but rather was filed nearly four years after judgment was entered. Fed. R. Civ. P. 60(b)(5), 60(c)(1).

[20] Federal Civil Procedure Catch-all provisions

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2656.5 Catch-all provisions

A party may not seek relief from judgment under the catch-all subsection, for any other reason justifying such relief, on any ground that is already specifically enumerated in the other subsections. Fed. R. Civ. P. 60(b).

1 Cases that cite this headnote

[21] Federal Civil Procedure Catch-all provisions

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2656.5 Catch-all provisions

A movant for relief from judgment, under the catch-all provision for any other reason justifying such relief, but who failed to appeal from the judgment, must show that extraordinary circumstances essentially made the decision not to appeal an involuntary one. Fed. R. Civ. P. 60(b)(6).

[22] **Federal Civil Procedure** Catch-all provisions

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2656.5 Catch-all provisions

Gross negligence by counsel which is so serious as to amount to virtual abandonment can be an extraordinary circumstance justifying relief from a default judgment, on a motion for relief from judgment under the catch-all provision for any other reason justifying such relief. Fed. R. Civ. P. 60(b)(6).

[23] **Federal Civil Procedure** Catch-all provisions

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2656.5 Catch-all provisions

A party who failed to appeal a judgment may nonetheless seek relief from judgment under the catch-all provision for any other reason justifying such relief, if he shows that he suffered from a confluence of a disabling illness and a severe lack of financial resources during the appeal period, but not if he merely shows financial hardship alone or a medical problem alone. Fed. R. Civ. P. 60(b)(6).

[24] **Federal Civil Procedure** Change in law or facts in general

Federal Civil Procedure Catch-all provisions

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2655.3 Change in law or facts in general
170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2656.5 Catch-all provisions

Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief from judgment under the catch-all provision for any other reason justifying such relief. Fed. R. Civ. P. 60(b)(6).

[25] **Federal Civil Procedure** Time for instituting proceedings

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2658 Time for instituting proceedings

A district court is required to dismiss an untimely motion for relief from judgment for lack of subject matter jurisdiction. Fed. R. Civ. P. 60(c)(1).

[26] **Federal Civil Procedure** Relief from Judgment

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2641 In general

Where district court lacks jurisdiction over a motion for relief from judgment, the court may not reach the merits of the motion. Fed. R. Civ. P. 60(b), 60(c)(1).

1 Cases that cite this headnote

[27] Federal Civil Procedure Power of Court

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2643 Power of Court
170Ak2643.1 In general

The rule permitting relief from judgment as part of a federal court's other powers to grant relief is not an affirmative grant of power; no part of the rule confers any authority to vacate a judgment that the court does not already have pursuant to statute, case law, or some other rule. Fed. R. Civ. P. 60(d).

[28] Federal Civil Procedure Power of Court

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2643 Power of Court
170Ak2643.1 In general

The rule permitting relief from judgment as part of a federal court's other powers to grant relief merely reserves whatever power federal courts had prior to the adoption of the rule to relieve a party of a judgment by means of an independent action according to traditional principles of equity; thus, the rule does not itself offer the authority to bring an independent action to attack a judgment. Fed. R. Civ. P. 60(d).

[29] Attorneys and Legal Services Role of court in general

46H Attorneys and Legal Services
46HXX Pro Se Litigants; Self-Representation
46Hk1292 Role of court in general
(Formerly 45k62 Attorney and Client)

The court has no obligation to act as counsel or paralegal to pro se litigants.

[30] Federal Civil Procedure Construction

170A Federal Civil Procedure
170AVII Pleadings
170AVII(A) Pleadings in General
170Ak654 Construction
170Ak654.1 In general

With the exception of subject matter jurisdiction, the district court is obligated and authorized to address only those claims and issues that have been expressly pled.

[31] Federal Civil Procedure Construction

Federal Civil Procedure Pro Se or Lay Pleadings

170A Federal Civil Procedure
170AVII Pleadings
170AVII(A) Pleadings in General
170Ak654 Construction
170Ak654.1 In general
170A Federal Civil Procedure
170AVII Pleadings
170AVII(A) Pleadings in General
170Ak654 Construction

170Ak657.5 Pro Se or Lay Pleadings
170Ak657.5(1) In general
A district court may not conjure up questions not squarely presented by the parties' submissions, and the court need not argue a pro se litigant's case nor create a case for him.

Attorneys and Law Firms

***387** Joseph Charles Faucher, Michael A. Vanic, Ryan Salsig, Drinker Biddle & Reath LLP, Los Angeles, CA, for Plaintiffs.

Daniel M. Noveck, Law Offices of Daniel Noveck, Beverly Hills, CA, for Defendant.

PROCEEDINGS (IN CHAMBERS): ORDER Determining that Kraft's FRCP 60(b)(3) Motion for Relief from June 22, 2011 Judgment is Untimely & Barred By His Failure to Appeal;

Dismissing #271 (Motion for Relief from Judgment) With Prejudice for Lack of Jurisdiction;

Denying #288 (Inland's Evidentiary Objections)

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

This was a diversity action sounding in contract and fraud. In March 2010, Inland Concrete Enterprises Inc. and its Employee Stock Ownership Plan ("Inland ESOP") and the ESOP's Trustee (collectively "Inland") filed the complaint against Kraft Americas, L.P. ("KALP")[2] and Rune Kraft (an individual) ("Kraft"), *see* Document ("Doc") 1. Kraft and KALP jointly filed an answer and counterclaims through counsel in June 2010 (Doc 16). In July 2010, KALP alone filed an amended answer (Doc 43) which counterclaimed for breach of contract, account stated, quantum meruit, fraud, and promissory estoppel. A week later, Kraft filed a separate answer (Doc 47) in the name of "Rune Kraft, as Chairman of Defendant Kraft Americas, L.P., for himself only."

[2] In another related case, *KALP v. Oldcastle Precast, Inc.*, where Kraft was not a party, KALP claimed that Oldcastle, a maker of precast concrete and polymer concrete products, had breached a confidentiality agreement and misappropriated trade secrets in connection with Oldcastle's acquisition of Inland. Judge Kronstadt dismissed KALP's claims as time-barred and entered final judgment against KALP in January 2014. *See* 12-3681 Docs 1, 21, 188, 195, and 196. On appeal, the Circuit affirmed by Order filed February 23, 2016. *See KALP v. Oldcastle Precast*, 641 Fed.Appx. 718 (9th Cir. 2016). The time for KALP to petition for a writ of certiorari elapsed on about May 23, 2016, *see Canchola*

v. Biter, 2014 WL 3055914, *3 (C.D. Cal. July 2, 2014) (citations omitted).

In August 2010, this Court issued an Order (Doc 61) granting Inland's motion to dismiss KALP's *quantum meruit* counterclaim as barred by the two-year statute of limitations.

Inland moved to compel discovery. On January 7, 2011, the Magistrate granted one motion to compel and denied the other without prejudice. On February 3, 2011, the Magistrate issued an Order (Doc 134) granting Inland's third motion to compel, directing Kraft to produce documents by March 4, 2011 and, finding that his failure to comply with FRCP 34 was substantially unjustified, directing him to pay a sanction of $6,142.50.

On December 6, 2010, this Court issued an Order (Doc 93) directing KALP to show cause why the court should not enter default against KALP and dismiss its counterclaim because it was no longer represented by counsel. On December 20, 2010, having received no filing from KALP, this Court issued an order (Doc 96) directing entry of default against KALP; the Clerk entered default against KALP that same day (Doc 97). In February 2011, this Court denied without prejudice Inland's application for default judgment against KALP.

COURT FOUND THAT RUNE KRAFT AND KALP COMMITTED INTENTIONAL SPOLIATION

In March 2011, this Court denied KALP's motion to vacate default and partially granted ***388** Inland's motion to sanction KALP and Kraft for spoliation. **The Court found that Kraft had fabricated documents and willfully destroyed a hard drive which was a potential source of discovery material.** The Court explained the parties' dispute regarding the authenticity of certain documents Kraft had filed as evidence in this case:

> **3. Dispute Regarding Authenticity of Documents.**
>
> On May 28, 2010, Rune Kraft brought a motion to dismiss for lack of personal jurisdiction. Dkt. 13. In support of that motion, he swore in a declaration that attached several copies of proposed broker fee agreements and letters purportedly transmitting the proposed broker fee agreements. Kraft Decl. ¶¶ 21-26, Exs. B, C, D, E, F, [and] G.
>
> Exhibit B to the Kraft Decl. purports to be a May 17, 2007 letter from Rune Kraft and Vicarea to Tom Lynch of Inland, Inc., which sets forth general details about the parties' dealings and attaches a May 13, 2007 proposed fee agreement including Vicarea as a party. Plaintiffs contend that Kraft never delivered the purported May 13, 2007 agreement to Lynch until December 12, 2007 and that Lynch had never seen this letter until this litigation. Lynch Decl. ¶ 22.
>
> Exhibit C to the Kraft Decl. purports to be a May 31, 2007 letter from Kraft and Vicarea to Lynch, attaching a May 13, 2007 proposed fee agreement including Vicarea as a party. Plaintiffs contend that Kraft never delivered this letter to Lynch and that Lynch had never seen this letter until this litigation. Lynch Decl. ¶ 30.

Exhibit D to the Kraft Decl. purports to be an August 2, 2007 letter from Kraft and Vicarea to Lynch, attaching a July 31, 2007 proposed fee agreement including Vicarea as a party. Plaintiffs contend that Kraft never delivered this letter to Lynch and that Lynch had never seen the letter until this litigation. Lynch Decl. ¶¶ 35-36.

4. Discovery in This Action

Plaintiffs contend that they sought discovery in order to obtain meta-data evidence that the documents Rune Kraft attached to his declarations [purported May 2007 and August 2007 letters] were created after the Complaint was filed [in 2010].

Plaintiffs propounded an interrogatory asking Kraft to identify the computer use[d] to create Exhibits B, C, D, E, F, and G to the Kraft Decl. Salsig Decl. ¶ 7, Ex. D. In response, Kraft wrote: "The documents were prepared on a Gateway computer owned by Kraft Americas, L.P. The computer is no longer in use. It was destroyed and then disposed of as waste. [I]ts present location is unknown, but likely a landfill." Salsig Decl. ¶ 8, Ex. E.

Plaintiffs propounded a Rule 34 request seeking the native files and all electronically store[d] information relating to the documents attached to the Kraft Decl. Salsig Decl. ¶ 9, Ex. F (RFPs 15-26). In response, Kraft Americas, L.P. produced a CD containing Microsoft Word files corresponding to the [Kraft] declaration exhibits. Salsig Decl. ¶ [¶] 1-4, Ex. A. Plaintiffs contend that the files, including the meta-data associated with the files, contain significant anomalies showing their lack of authenticity.

Plaintiffs propounded a second set of interrogatories requesting that Kraft state all facts related to the destruction of the Kraft's [sic] computer and requesting identification of each person who had knowledge of the destruction. Salsig Decl. ¶ 10, Ex. G.

Kraft responded that the computer "was disposed of on February 21, 2008. The hard drive on the computer was bad. Kraft Americas, L.P. authorized the disposal of the computer. Justicia, Inc. destroyed the hard drive and disposed of the computer. Kraft Americas, L.P. had copies of all the files on the Gateway computer." Salsig Decl. ¶ 10, Ex. H. Kraft identified Dale Maloof as the only other person having knowledge of the destruction. *Id.*

In a second set of Rule 34 requests, [Inland] asked the Kraft defendants to produce all documents relating to the destruction of the Gateway computer and to produce for inspection any and all electronic media containing back-ups, copies, etc. of the data on the destroyed Gateway computer. Salsig Decl. ¶ 12, Ex. I.

***389** In response, Kraft produced three documents purporting to bolster Kraft's claims that the computer was destroyed due to its hard drive being "bad." Salsig Decl[.] ¶ 13, Ex. J. Included in these documents is a purported facsimile from "Justicia Asset Recovery" dated February 19, 2008. The body of the document reads:

> "Rune, We have completed our diagnostics of the computer to determine if the hard drive is bad. The findings are that the hard drive is bad. Since you already have copies of all of the files on CDs, I recommend that we destroy the hard drive and dispose of the computer as waste in the proper manner. Please let me kn ow if this is what you want me to do. Also confirm that you have copies of all of the files on CDs."

This document is purportedly signed by Dale Maloof of Justicia, Inc. Salsig Decl. ¶ 13, Ex. J. [Inland] contest[s] the authenticity of the purported facsimile from Justicia, Inc.

Doc 170 at 7-9 (alterations added). **The Court's March 9, 2011 Order Granting Inland's Motion for Spoliation Sanctions went on to find that Kraft and KALP willfully directed the destruction of the hard drive and fabricated the aforementioned documents, with a "high" degree of fault.** The Court provided the following analysis, in pertinent part, regarding the computer hard-drive spoliation by Rune Kraft and KALP:

> **B. Analysis**
>
> [Inland] assert[s] that, while it is unlikely that the Gateway computer was actually destroyed, it certainly was not destroyed because it had a "bad" hard drive as claimed by Defendants. Thus, [Inland] assert[s], now that Rune Kraft has taken the position that the computer was destroyed at his instruction, Defendants have breached their duty to preserve evidence and should be sanctioned. The Court agrees with [Inland].
>
> **1. Standard * * ***
>
> **2. Duty to Preserve Evidence and Breach**
>
> The Court finds that [Kraft and KALP] had a duty to preserve the Gateway computer. Defendants had notice of a likely claim before they purportedly [according to Kraft and KALP themselves] destroyed the Gateway computer.
>
> For example, the email sent by Kraft to [Inland] on December 11, 2007 clearly threatened litigation over the fees he claimed to be owed. *See* [("]Spoliation Saakvitne Decl.") ¶ 1, Ex. A. Kraft sent an additional email to Oldcastle on December 12, 2007, again threatening litigation. Salsig Decl. ¶ 6, Ex. C. On December 17, 2007, Kraft sent a letter to [Inland] demanding payment of $5,000,000. Kraft Decl. ¶ 17, Ex. A.
>
> [Kraft and KALP] also had notice that the data on their computer wold be relevant to the potential claim. First, Kraft would have known that the documents on [the] Gateway computer that he used would be relevant to his threatened claim for fees; he used the computer to generate his purported proposed fee agreements. Salsig Decl. ¶ 8, Ex. E.

In addition, [he] had notice that the meta-data would be relevant. Kraft was informed of Lynch's belief that before December 12, 2007, Lynch had never seen a purported fee agreement dated May 13, 2007. Supp. Saakvitne Decl. ¶ 50, Ex. 45. The meta-data surrounding that document [the purported May 13, 2007 fee agreement] would be highly relevant to prove or disprove Defendants' claim as to its date of creation.

[Kraft and KALP] contend that they could not be expected to reasonably foresee [Inland's] actions, as [Inland] ... initiated this lawsuit. However, the fact that another party initiated the lawsuit does not exempt a party from its duty to preserve evidence once a potential claim is identified. *See In re Napster*, 462 F.Supp.2d [1060] at 1078 [(N.D.Cal.2006)].... As stated above, [Kraft and KALP] clearly had notice of a potential claim as shown by their own emails threatening litigation.

The Court also finds that [they] breached their duty to preserve evidence when they purportedly ordered the destruction of the ***390** computer in February, 2008. *See* Salsig Decl. ¶ 10, Ex. H.

[Kraft and KALP] contend that because they backed up files pertaining to the Transaction on a CD, any destruction of the computer hard drive did not entail an intentional destruction of the evidence at hand. This contention is unpersuasive.

As a preliminary matter, even if the hard drive were "bad," there was not sufficient justification to destroy it. Kraft admitted that "you can extract information from a hard drive if it is not disposed of properly ... to remove any possibility of any information on the hard drive getting out ever they recommend that you physically destroy the drive." Salsig Decl[.] ¶ 19, Ex. M (Feb. 11, 2011 Kraft Depo. at 346:9-16). If the hard drive had been preserved, [Inland] could have had forensic experts attempt to extract data from it.

In addition, [Inland has] provided sufficient evidence in support of their contentions that

(1) Rune Kraft created documents attached to the Kraft Decl. that, if authentic, would provide some evidence that the name Vicarea was included in documents relating to the transaction as early as May 2007;

(2) Plaintiffs were told that there were no issues regarding the destruction or preservation of evidence (*see* Joint Rule 26 Report (dkt. 11));

(3) When Plaintiffs sought to discover the computers on which the challenged documents [had been] created in order to prove that they were fabrications, Kraft contended that the computer was purportedly destroyed more than two years prior because the hard drive was "bad";

(4) Kraft then produced a set of documents attesting to the badness of the ... hard drive and evidencing destruction of the computer by a man who does not appear to be a computer expert.

All of this indicates that (5) the computer was not "bad," and that the computer, assuming it was destroyed as Kraft claims, was destroyed willfully.

For example, the Court finds that the purported facsimile from Justicia to [Kraft and KALP] regarding the destruction of the computer (Salsig Decl. Ex. J) was fabricated.

First, the statements that Justicia ran "diagnostics of the computer to determine if the hard drive is bad" and that its "findings are that the hard drive is bad," without any further explanation provided, do not read like the statements of a professional computer company ....

Second, the document, while it contains a date stamp that appears to have been put on by a fax machine, does not include sending or receiving fax numbers in the header or footer.

Third, the document does not list the physical address, telephone number, fax number, email address, or any other contact information for either Justicia or Dale Maloof.

Fourth, although Kraft testified that he had no business or personal relations with either Justicia or Dale Maloof other than his destruction of the computer and a vague discussion of a business tracking cars (*see* Salsig Decl. ¶ 19, Ex. M (Kraft Feb. 11, 2011 Depo. 342:18 [through] 345:21)), Dale Maloof has been identified by the California Court of Appeals [as] a "corporate representative of the Kraft Companies" in an unrelated lawsuit involving Rune Kraft. *See Oliver v. Pac. Real Estate Holdings, Inc.*, 2008 WL 3198223 (Cal. App. 5th Aug. 8, 2008).

Fifth, Justicia, Inc. was dissolved in 2003, over five years before the purported facsimile; Justicia also lists Laverne Guthrie as its statutory agent, and Kraft testified that Laverne Guthrie is a director of Vicarea. *See* Salsig Decl. ¶ 20, Ex. N; Salsig Decl. ¶ 18, Ex. L (Jan. 26, 2011 Kraft Depo. 72:2-15).

And sixth, [Kraft and KALP] do not provide sufficient explanation for these highly suspicious occurrences in the[ir] Opposition [to Inland's motion for spoliation sanctions].

***391 In sum,** [Inland has] **adequately demonstrated [Kraft & KALP] had a duty to preserve the Gateway computer, and that ... [it] was wilfully destroyed at [their] instruction** ....

Doc 170 at 9 and 10-12 (boldface and some ¶ breaks added). **That same March 2011 Order found that Kraft and KALP had a "high" degree of fault with regard to the destruction and fabrication of evidence:**

For reasons stated in the Spoliation Motion, [the notion that Kraft purportedly created and transmitted] Kraft Decl. Exs. B, C, D, E, F, and G at or near the times that appear on the face of the documents are [sic] highly questionable.

[Inland] present[s] sufficient evidence that [Kraft and KALP] intentionally destroyed the computer that may have shown the actual creation date of the disputed documents through forensic examination. [They] then

> *attempted to support their contention that the hard drive on the computer was "bad" by producing a fabricated document* [purported 2/19/2008 fax from Justicia to Kraft].

Doc 170 at 13 (emphasis added). **The March 2011 Order further found that Kraft and KALP's spoliation had caused a high degree of prejudice to Inland, and that a lesser sanction would be inadequate**:

> The Court also considers the degree of prejudice suffered by [Inland], and determines that the degree of prejudice suffered is high. [Inland's] ability to determine the creation date of the challenged documents by forensically examining the computer for evidence of altered meta-data was cut off by the destruction of the Gateway computer. In addition, [Inland] Plaintiffs are precluded from discovering other documents favorable to their declaratory judgment and breach of fiduciary duty claims that may have been on the computer before it was destroyed.
>
> The Court also considers whether there is a lesser sanction that would avoid substantial unfairness to the opposing party and will serve to deter such conduct by others in the future. The Court determines that the sanction issued is not substantially unfair to the opposing parties [Kraft and KALP] in light of their conduct, and that a lesser sanction (such as by granting [sic] part (a) of [Inland's] request but not part (b)) would not serve to deter evidence destruction by parties such as [Kraft and KALP] in the future.
>
> The Court also considers the relationship between the destroyed evidence and the sanctions requested. The sanctions issued here are reasonably tailored to sanction parties for destroying the evidence that could have shown whether the documents parties rely on to prove the involvement of Vicarea early in the Transaction were indeed created at or near the dates that appear on the documents [the purported letters from Kraft and Vicarea to Tom Lynch of Inland, Inc. dated May 17, 2007 and August May 31, 2007 and August 2, 2007, *see* Kraft Decl. Exhibits B, C, and D].

Doc 170 at 13.

The Court also permitted defense counsel Berkes Crane to withdraw, based in part on their representation that KALP owed its lawyers $94,000 in fees as of July 2010 and had ignored requests for payment.

Kraft and KALP filed a motion to vacate the Spoliation / Default Order, which this Court denied in April 2011 (Doc 198). The Court denied KALP's ensuing Ex Parte Application for Leave to File Motion for Reconsideration" (Doc 212). By Order issued May 2, 2011 (Doc 217), this Court explained as follows:

> Grounds for ex parte relief, including a true emergency not of [KALP]'s creation, have not adequately been shown. * * * Defendant has been warned repeatedly that it cannot appear without counsel, yet has failed to maintain its representation. Even if the Court were to assume that defendant Kraft Americas LP was completely without fault in the withdrawal of its prior attorney, its current attorney has been substituted since March 29, 2011 [about five weeks earlier].

> Insufficient explanation is given for why a motion to vacate entry of default could not have been brought without requiring a compressed ***392** briefing schedule to the prejudice of [Inland].
>
> In addition, the Application does not sufficiently show a likelihood of success on the merits. Insufficient information is given for the Court to assess whether good cause exists to vacate the default. The only new fact presented is that 20 days after the Court granted [KALP]'s prior counsel's motion to withdraw, [KALP] obtained new counsel. However, [KALP] gives insufficient explanation regarding the circumstances under which previous counsel withdrew, and thus has given insufficient information for the Court to assess whether [KALP]'s failure to have counsel until the eve of trial is excusable, or whether [KALP] is at fault due to failed gamesmanship.

Doc 217 at 1-2.

On April 1, 2011, Inland filed a motion for default judgment against KALP alone (Docs 190-194). KALP through counsel filed opposition, and Inland filed a reply. By Order issued April 25, 2011 (Doc 211), this Court denied the motion without prejudice to re-filing later if appropriate. Relying on Fed. R. Civ. P. 54(b)'s presumption against the entry of judgment as to fewer than all claims and all parties, the Court stated, "in light of the interest in avoiding potentially conflicting outcomes, [Inland] has not shown that default judgment against only [KALP] should be entered at this time when the action is continuing against ... Kraft." Doc 211 at 2.

COURT ADOPTS RECOMMENDATION TO ENTER DEFAULT AGAINST RUNE KRAFT

On May 12, 2011, the Magistrate issued an R&R recommending that the Court strike Kraft's answer and enter default judgment against him because he had "demonstrated willfulness and bad faith in failing to respond to the Court's discovery orders" and "his disobedient conduct [wa]s not beyond his control." R&R at 6. The Magistrate recounted Kraft's discovery conduct:

> Here, [Kraft] has failed to provide further responses to [Inland's] First Set of Interrogatories and failed to pay sanctions as ordered by the Court on January 7, 2011.
>
> Defendant has also failed to provide further responses to [Inland's] First Set of RFPs [Requests for Production] and failed to pay sanctions as ordered by the Court on February 3, 2011. (Dkt. No. 179 at 2, Salsig Decl. at 3-4, Ex. I.) Indeed, [Kraft] has unequivocally refused to comply.
>
> For instance, at his deposition, Defendant [Kraft] testified that "[a]nd I'm here to tell you, Judicial Officer P[a]rada, that none of the answers that I have given to the First Set of Interrogatories, none of the answers that I have given to the First Set For [sic] Requests for Production of Documents, none of the responses that I have given to the First Set of Requests for Admissions, will be changed." (Dkt. No. 179–1 at 2, Salsig Decl. Ex. A at 378-79).
>
> [He] further testified that "[i]t does not matter, Judicial Officer ... P[a]rada, whether

> you issue a sanction in the amount of a trillion dollars, or if you issue a sanction of death by lethal injection, none of the answers will ever be changed from the first time, period." (*Id.* Ex. A at 379.)
>
> Finally, [Kraft] sent an ex parte letter and email directly to the Court stating that "[t]he United States District Court [for the] Central District of California is hereby informed that Rune Kraft will not be coerced by judicial officers to change any of his answers to discovery against his will." (Dkt. No. 173); *see also* Dkt. No. 179–1 Ex. I ("Rune Kraft will under no circumstances change his answers to any discovery as a result of coercion.").
>
> Based on the foregoing, the Court finds that [Rune Kraft] has demonstrated willfulness and bad faith in failing to respond to the Court's discovery orders and that his disobedient conduct is not outside of his control. Thus, drastic sanctions are warranted.

Doc 222 (May 12, 2011 R&R) at 5-6 (some ¶ breaks added) (concluding citations omitted).

Noting the undersigned's prior determination that Kraft and KALP had also intentionally fabricated documents and destroyed a computer which was an obvious potential source of discoverable information, the Magistrate ***393** recommended striking Kraft's answer and entering default (not yet default judgment) against him, *see id.* at 7–9. **The Magistrate reasoned that lesser sanctions would be insufficient because it was**

> clear that [Kraft] has no intention of complying with the Court's discovery orders. ([Doc 179-1] at 23.) Despite the imposition of less drastic sanctions monetary sanctions imposed on [Kraft], he has failed to pay those sanctions and has flatly refused to comply with the discovery orders. Based on Defendant's deposition testimony, his communications with the Court, and his previous misconduct involving the fabrication of ... documents and the willful destruction of a computer, the potential source of discovery relevant to this action, the Court finds that less drastic sanctions have had no impact on Defendant. Thus, the final factor [of the five factors set forth in *Porter v. Martinez*, 941 F.2d 732, 733 (9th Cir. 1991)] weighs in favor of terminating sanctions.

Doc 222 (May 12, 2011 R&R) at 8-9. The Magistrate also recommended requiring Kraft to pay $8,865 to Inland for attorneys fees that Inland incurred in bringing the motion for default judgment, *see* Doc 222 at 9.

Four days later, on May 16, 2011, all parties, including Kraft and KALP *through counsel*, filed a joint notice stating that "neither Plaintiffs nor Defendants intend to file a written statement of Objections with points and authorities in support thereof or to otherwise object to the Report and Recommendations [sic, plural]." Doc 224 at 2. This Court issued an Order on May 18, 2011 adopting the R&R without objection. As recommended, the Court sanctioned Kraft by striking his answer and entering default against him pursuant to FRCP 55(a). *See* Doc 226 at 1-2. In light of the fact that default had then been entered against both Kraft and KALP, the Court vacated the trial and invited Inland to move for default judgment, *id.* at 2.

JUNE 22, 2011 ENTRY OF DEFAULT JUDGMENT AGAINST RUNE KRAFT AND KALP

In May 2011, Inland filed a motion for a $3 million default judgment against Kraft and KALP. After briefing, the Court issued an Order on June 22, 2011 granting Inland's motion. As a consequence of the default, the Court took as true "the well-pleaded allegations of the complaint relating to liability ... but not the allegations as to the amount of damages." Doc 247 at 2 (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987)); *see also Alutiiq Int'l Solutions, LLC v. OIC Marianas Ins. Corp.*, 149 F.Supp.3d 1208, 1217 n.69 (D. Nev. 2016) (citing *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977)).

As to plaintiffs' first and second claims for declaratory relief, the Court concluded that plaintiffs were entitled to a declaration that Kraft and KALP were not entitled to any fee or compensation from any plaintiff in connection with the December 17, 2007 sale by Inland ESOP to Oldcastle of all of Inland ESOP's stock in Inland, Inc. ("the Transaction"). *See* Doc 247 at 2. Noting that Kraft's opposition did not contest Inland's entitlement to judgment on the first two claims, the Court determined that "default judgment is consistent with" the Court's March 9, 2011 Spoliation Sanction Order (Doc 170), the March 25, 2011 Order on Inland's summary-judgment motion (Doc 185), and the May 18, 2011 Order adopting the R&R (Doc 226). *See* Doc 247 at 3.

As to the third claim, damages for breach of fiduciary duty, the Court concluded that Inland ESOP and its Trustee were entitled to $3 million in compensatory damages. *See* Doc 247 at 2. The Court held that Kraft and KALP had violated California's requirement that a broker adhere to "the same obligation of undivided service and loyalty that [the law] imposes on a trustee in favor of his beneficiary." Doc 247 at 3 (quoting *Ford v. Cournale*, 36 Cal.App.3d 172, 180, 111 Cal.Rptr. 334 (Cal. App. 1973)); *see also Kornievsky v. CBRE, Inc.*, Nos. G050319, G050320, and G050675, 2016 WL 520285, *12 (Cal. App. Feb. 9, 2016) (not in Cal. App.) ("[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty.' ") (quoting *Field v. Century 21 Klowden–Forness Realty*, 63 Cal.App.4th 18, 25, 73 Cal.Rptr.2d 784 (Cal. App. 1998)).

***394** The Court determined that the Kraft parties had "functioned as brokers in the Transaction and represented to Inland ESOP that they were acting solely as its broker and

were 'trying to get the highest and best value for Inland and its shareholders.' " Doc 247 at 4 (quoting Salsig Dec. Ex. D & Saakvitne Dec. ¶ 22). The Court also determined the Kraft parties breached the fiduciary duty applicable to brokers by failing to provide the "fullest disclosure of all material facts concerning the transaction that might affect the principal's decision." Doc 247 at 3 (cite omitted). The Court explained the Kraft parties' breach of their fiduciary duty to plaintiffs as follows:

> On July 26, 2007, Kraft and Oldcastle came to an agreement that Oldcastle would acquire Inland and Pre-con Products, Inc. ("Precon") for approximately $62 million.
>
> Plaintiffs present sufficient evidence that Oldcastle initially suggested allocating $27,607,000 for the purchase of the stock of Inland Inc., but that the Kraft Defendants told Oldcastle to reduce its $27,607,000 allocation by $3,000,000 so that the difference could be put into a "Reserve" for the benefit of the Kraft Defendants and one of their other clients. [citations omitted] *Kraft did not inform Trustee Saakvitne of these facts and had Kraft done so, Saakvitne would not have agreed that the purchase price could be reduced by $3,000,000 for a "Reserve."* Saakvitne Decl. ¶ 13.
>
> *Plaintiffs also present sufficient evidence that on July 27, 2007 Kraft received from Oldcastle a letter of intent offering a net purchase price* for Inland ESOP's shares of Inland Inc. of $25,440,000, which required only $3,000,000 cash in the company at closing.
>
> *Kraft did not provide a copy of, or otherwise disclose to Inland, the Oldcastle-Inland LIO [Letter of Intent] or its content or the substance of the July negotiations.*
>
> *Instead, Kraft created and presented his own letter of intent for the transaction, changing the material terms of the Oldcastle-Inland LOI by (I) reducing the net purchase price from $25,440,000 to $24,607,000; and (ii) increasing the amount of cash and liquid investment in the company required at closing from $3,000,000 to $4,890,000 in cash and $414,000 in other liquid investment for a total of $5,304,000.*
>
> *These changes to the Oldcastle-Inland LOI ... had the net effect of creating a deal that was $3,000,000 worse for Inland ESOP. Kraft made the changes for the purpose of removing $3,000,000 from the purchase price of Inland ESOP's stock and moving it to the "Reserve."*

Doc 247 at 4 (emphasis added, other internal citations omitted, paragraph breaks added). **The Court further found that the plaintiffs would not have entered into the transaction under the terms they did, if the Kraft parties had honored their fiduciary duty to provide full and honest disclosure to plaintiffs:**

> * * * Had Kraft informed [Inland ESOP Trustee] Saakvitne that he [had] altered the Oldcastle-Inland LOI to the detriment of Inland ESOP for the purpose of establishing a $3,000,000

> "Reserve" not solely for the benefit of Inland ESOP, Saakvitne would not have agreed that $3,000,000 or any other amount could be taken from the purchase price for Inland ESOP's stock for the financial benefit of Precon and Kraft Americas. Saakvitne would have insisted that the Kraft Defendants present to him the actual Oldcastle-Inland LOI for his review and consideration.

Doc 247 at 5 (record citations omitted). **The Court then found that the plaintiffs relied to their detriment on the incomplete and inaccurate information provided to them by the Kraft parties:**

> On August 16, 2007 [Inland ESOP Trustee] Saakvitne signed the Kraft LOI, relying on Kraft's statements that Kraft was "working for Inland Concrete Enterprises, Inc. in this transaction trying to get the highest and best value for Inland and its shareholders." Oldcastle signed the Kraft LOI on or about August 21, 2007.
>
> On October 23, 2007, Trustee Saakvitne negotiated the final deal terms at a meeting with Oldcastle *based on the information he had at the time.* The $24,607,000 purchase price stated in the Kraft LOI was reduced by $400,000 representing Oldcastle's ***395** estimate of a tax liability, and by and [sic] additional $207,000 representing an adjustment to value of certain deeds of trust. On or about December 17, 2007, the Transaction closed for a purchase price of $24,000,000, ...

Doc 247 at 5 (citations omitted). The Court determined that "Plaintiffs would have achieved a $3,000,000 higher purchase price but for the wrongful acts of the Kraft Defendants...." *Id.* at 6. That was because, due to the actions and omissions of Kraft and KALP, "Plaintiffs ... did not know of the $3,000,000 additional benefit they could have received from the Transaction," and "the benefit would have been achieved if Plaintiffs had been informed of Oldcastle's initial valuation and initial LOI [Letter of Intent]." *Id.* at 6.

The Court declined, however, to award punitive damages to Inland. *See* Doc 247 at 7 (citations omitted)

THE TERMS OF THE JUNE 22, 2011 DEFAULT JUDGMENT AGAINST KRAFT AND KALP

Also on June 22, 2011, the Court entered default judgment (Doc 247) holding Kraft dnd KALP jointly and severally liable for $3 million in compensatory damages pursuant to FRCP 55(b)(2). On claim one, by Inland, Inc. alone, the Court declared that Inland, Inc., never hired the Kraft parties and never agreed orally or in writing to pay them; that the Kraft parties provided *no* services to Inland, Inc., in connection with the transaction; and that Inland and was not liable to the Kraft parties. *See* Doc 248 at 2 ¶¶ 2a-2c.

The Court did find that Kraft and KALP rendered brokers services in connection with

the transaction, *see* Doc 248 at 2 ¶ d, but held that Kraft and KALP "acted unlawfully when it/he rendered broker's services" because neither had a real-estate broker or securities broker-dealer license as required by California statute before, during, or after the transaction, Doc 248 at 2-3 ¶¶ 2d-2f. Consequently, the Court determined that "any express or implied agreement for such a fee [broker's fee] is void and both" KALP and Kraft "are barred from recovering a fee from Inland, Inc. in connection with the ... Transaction", Doc 248 at 3 ¶ 2f.

The Court considered whether Kraft and KALP might be entitled to compensation as "finders" but found they "did not render the limited services of a finder" under state law because their "actions extended far beyond simply introducing Oldcastle and Inland ESOP and included, among other things, 'running this transaction [KALP's and/or Kraft's] way' " and " 'handl[ing] the negotiations between the parties' ", Doc 248 at 3 ¶ 2h.

The Court also declared that any claims which KALP and Rune Kraft might have had against Inland, Inc., for compensation in connection with the transaction were barred by the two-year statute of limitations set forth in Cal. Code Civ. Pro. § 339 subdiv. 1; and were barred because both the Kraft parties "had multiple undisclosed conflicts of interest", breached their duties of undivided loyalty, and breached their fiduciary duties to Inland, Inc., by failing to disclose material facts to Inland, Inc. *See* Doc 248 (Judgment) at 3-4 ¶¶ 2h-2i.

On claim two, asserted by Inland ESOP and its Trustee, the Court made similar declarations. *See* Doc 248 at 4-5 ¶¶ 3a-g. Because the Court found Inland ESOP was an "employee benefit plan" and the Kraft parties were "parties in interest" as defined by ERISA, the Kraft parties' relationship to Inland ESOP and its Trustee were subject to the prohibited-transaction rules in 29 U.S.C. §§ 1106(a) and 1108. *See* 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan" and "welfare plan") and (3) ("employee benefit plan") and (14) ("party in interest"). Applying those rules, the Court declared that "the $5 million fee demanded by" KALP was "beyond the realm of a reasonable fee in the industry." The Court found that the $5 million fee demanded "would reduce the proceeds of the sale to the Inland ESOP participants substantially below the fairness level determined by BCC [Valuation Services]." In turn, that would render payment of KALP's requested fee a void or voidable transaction subject to disgorgement. *See* Doc 248 at 6-7 ¶ 3i (cite omitted).

***396** POST-JUDGMENT PROCEEDINGS

On August 1, 2011, plaintiffs filed a Local Civil Rule 7-9 notice noting that the Kraft parties had failed to file any opposition to the fee motion by the deadline, which had elapsed. On August 2, 2011, this Court issued an order (Doc 256) treating as unopposed and granting plaintiffs' renewed motion for $552,623 in fees and costs. Kraft and KALP did not move for reconsideration of the default judgment or the fee award. Nor did they file a notice of appeal, a motion to extend appeal time, or a motion to re-open the time for filing a notice of appeal.

Nearly four years after entry of judgment, Kraft filed the instant motion for relief from judgment pursuant to FRCP 60(b). Pursuant to Fed. R. Civ. P. 78 and C.D. Cal. LCivR

7–15, the Court finds this motion suitable for determination without oral argument. **The Court will dismiss the motion for relief from judgment on two grounds. First, a party who fails to appeal from a judgment is presumptively barred from later seeking relief from that judgment pursuant to FRCP 60(b). Second, the motion is untimely under FRCP 60(c), and a district court lacks jurisdiction over an untimely FRCP 60(b) motion.**

JUDGE WILSON DENIES RUNE KRAFT'S MOTION TO DISQUALIFY THE UNDERSIGNED

On July 20, 2015, Kraft filed a Motion for Change of Assigned Judge, which was construed as a motion to disqualify the undersigned. Kraft's motion was randomly assigned to District Judge Wilson (Doc 282), who issued an order on July 28, 2015 denying it. Judge Wilson found that "Kraft's arguments do not reveal any impropriety cognizable on a motion to recuse" and further that "[n]othing about Judge Fairbank's memory or medical history bears on the appearance of impartiality." Doc 283 at 2. Moreover, Judge Wilson concluded,

> the record contradicts Kraft's contentions. Although Kraft maintains that Judge Fairbank cannot remember basic facts or legal precepts, her rulings reflect a thorough understanding of the case and careful application of the law. She issued reasoned, even-handed orders on several contested motions. Sometimes her rulings favored Kraft; sometimes they went against him. But they always demonstrated facility with the facts of the case as well as the applicable law. There is, in short, no evidence suggesting that Judge Fairbank cannot fairly and competently adjudicate the case before her.

Doc 283 at 2-3 (internal citations omitted).

KRAFT'S FIRST GROUND FOR RELIEF FROM THE 2011 JUDGMENT

In his motion for relief from the June 2011 judgment, filed four years after that judgment issued, Kraft seeks to re-open the case. By this Kraft apparently means vacate the default judgment, proceed to dispositive motions and, if appropriate, trial. He may also be seeking sanctions against plaintiffs and their counsel.

First, Kraft asserts that the judgment must be vacated because the undersigned was impaired because she "was undergoing treatment for brain cancer while presiding over the case." Doc 271 at 3 ¶ 1. Citing www.cancer.org, Kraft states that "the effects of the illness and the treatment" generally include memory lapses, trouble concentrating, short attention span and "spacing out", trouble remembering details, "[t]rouble multi-tasking, like answering the phone while cooking, without losing track of one task", taking longer to finish things, being disorganized, thinking

more slowly, and trouble remembering words. Doc 271 at 3 ¶ 2.

Kraft provides examples of how the medical condition (or treatment), in his opinion, affected the conduct or outcome of this case. *See* Doc 271 at 4-7 ¶¶ 4-15. For example, Kraft alleges that because of a medical condition and treatment, the undersigned had trouble remembering "details related to the acceptance of jurisdiction based on specific sworn in facts [sic] by Rune", such as the number and identity of the general and limited partners in KALP (*id.* at 4 ¶ 4); "details related to the fact that Vicarea Real Estate, Inc. was a licensed California real estate broker" (*id.* at 4 ¶ 5); "details related to the fact that no broker agreement had been entered into" (*id.* at 4 ¶ 6); "details ***397** related to the law in California which requires a broker agreement to be in writing" and what type of terms such a writing must contain (*id.* at 4 ¶ 7); "details related to the fact that [KALP] and Vicarea Real Estate, Inc. sent a book account stated based upon an account in writing to ... Inland, Inc.... reflecting the work performed", "not for brokerage services but rather research and analysis done for Inland, Inc. about construction materials markets, products, and companies" (*id.* at 4–5 ¶ 8).

Kraft also asserts that the undersigned "forgot or ignored a book account stated based upon an account in writing" (Doc 271 at 5 ¶ 11) and "did not comprehend, ignored or forgot the basics of how American companies do business", namely that "American companies hire employees and contractors to create value; i.e., to make sure customers are satisfied; to find the next big product; to create the best service etc" (*id.* at 5–6 ¶ 12).

Kraft further asserts that the undersigned judge "did not comprehend, ignored or forgot the particulars of this matter", Doc 271 at 6 ¶ 13, and he proceeds to describe the version of events which this Court should have accepted and the conclusions this Court should have drawn from that version of events. *See id.* at 6–7 ¶ 13 (describing the nature, scope, and value of the work that KALP and Vicarea Real Estate, Inc., allegedly performed for Inland, and the benefits that Inland and its owners allegedly derived from that work).

Kraft fails, however, to cite any passage from any order of the Court in this case, or a transcript of any in-court proceeding held in this case, to substantiate any such instance of a judicial officer's failure to comprehend or remember. Much less has Kraft provided citations to the record, and accompanying analysis, to substantiate his theory that the judge's alleged difficulty comprehending or remembering led to some erroneous legal conclusion or factual finding, or some denial of his rights to due process of law[3] and an impartial tribunal.

3 Kraft's opening brief asserts that the undersigned judge "forgot or ignored that Rune Kraft did not receive motions, rulings and/or orders and that he had expressly informed her that he had not received any court filings since March 9, 2011." *See* Doc 271 at 7 ¶ 14. But that paragraph does not specify *when* Kraft allegedly filed a document stating that he had not been receiving copies of documents filed by the Court or by the plaintiffs. Nor does

> Kraft explain how he was prejudiced by allegedly not receiving any particular document.
>
> Specifically, Kraft does not allege that he or his counsel did not receive all filed documents in time to prepare meaningful briefs and argument with regard to default, or with regard to plaintiffs' subsequent motion for default judgment. Nor does Kraft show that he or his counsel were deprived of timely access to filed documents sufficient to enable him to challenge some other ruling in this case.

[1] Moreover, "[a]s Judge Kozinski observed in *United States v. Washington*, 98 F.3d 1159 (9th Cir. 1996), ...: Disability, mental or physical, is not one of the grounds enumerated in sections 144, 455, or any other [federal] statute; it is, therefore, not a proper basis for seeking a judge's recusal." *Peterson v. U.S.*, 2006 WL 2252862, *7 (D. Utah May 1, 2006) (quoting *State of Wash.*, 98 F.3d at 1164–65 (Kozinski, J., concurring)), *aff'd*, 239 Fed.Appx. 428 (9th Cir. 2007).

KRAFT'S SECOND GROUND FOR RELIEF FROM THE 2011 JUDGMENT

Kraft's second basis for relief from judgment is the allegation that "Evidence Was Forged", and that the forgery of evidence constituted obstruction of justice in violation of 18 U.S.C. sections 1503, 1512, 1513, and 1962. *See* Doc 271 at 7 (section heading). According to Kraft's reply (Doc 293 at 7), "plaintiffs' attorneys weren't deceived but decided to deceive the Court and Deceived the Court."

Under the heading "Deception—Undisclosed Conflicts", Kraft alleges that he, "on behalf of the corporate entities, explained to [plaintiff] ... Saakvitne (attorney, officer of the court, Inland ESOP's investment advisor, special trustee and de facto broker) the proposal and Saakvitne clearly understood." *See* Reply (Doc 293) at 7. Kraft quotes a purported September 17, 2007 e-mail from Saakvitne, presumably sent to Kraft, as follows:

> [Y]ou have explained to me that your proposal provides for 100% of such increases ***398** to be paid to your firm, because any such increase in the $24,607,000.00 purchase price (apart from the balance sheet adjustment described above) will be attributable to the value added by the multiple company package you have assembled for Oldcastle (of which the ESOP's stock represents 25% of [sic] less), not to additional intrinsic value in the ESOP's shares[.]

Kraft's Reply (Doc 293) at 7. Under the heading "Deception—Confusion", Kraft alleges that "Saakvitne just didn't accept the proposal—and neither did the other side (see attached declaration Exhibit 4):

> Representations made to BCC Valuation Services Letter and opinion issued by BCC Valuation Services referring to an agreement

> to pay Kraft Americas, L.P.—December 7, 2007
>
> "[T]he client negotiated a compensation agreement with Kraft Americas, L.P. ("broker") for its role in brokering and structuring the stock sale on behalf of the selling shareholder. Under the proposed agreement, the selling shareholder will receive the first $23.0 million of available stock sale proceeds; the broker will receive the next $1.6 million, and; the selling shareholder and the broker will divide equally the remaining sale proceeds."

Kraft's Reply (Doc 293) at 8. Kraft's next reply section, "Deception—Protection from Their Own Acts", focuses on Kraft's conception of a "market-maker" as opposed to a "fiduciary." It provides in its entirety as follows:

> 6. Courts are not intended to be used to extend protection so that one first can engage in certain acts and then afterwards, if the result is not as desired, ask the court to issue protection from the acts—for example note one of California's Maxims of Jurisprudence—Civil Code 3517 "no one can take advantage of his own wrong".
>
> 7. For example, if somebody buys shares at any stock exchange and the shares subsequently decline in value, is the stock exchange at fault? For good reason, such protection has never been extended to anybody. A market maker's role is to offer prices at which a client may buy or sell a given asset, and an investment advisor's role is to act in the interest of the client as a fiduciary.
>
> 8. Kraft Americas, L.P. and Vicarea Real Estate, Inc. (hereinafter Kraft) [sic] was a market-maker, not a fiduciary. Inland wanted Kraft to be a market-maker, not a fiduciary. Inland hired an investment advisor to act in the interest of the client as a fiduciary. Inland hired legal counsel, an accounting firm, a valuation firm and several real estate appraisers to act in the interest of the client as a fiduciary. The investment advisor or special trustee even acted as a "broker" and represented that he dealt with "four other buyers."
>
> 9. The work that Kraft performed from 1998 to 2007—Kraft's research, analysis, information, ideas, strategic plans and tactical plans related to the creation of a dominant precast group—created a market for Inland. Inland ... had a demand for $20,690,000 (the intrinsic value of the ESOP's shares) and Kraft offered ... $20,690,000 (the intrinsic value of the ESOP's shares).
>
> Oldcastle Precast, Inc. had a demand for the creation of a dominant precast group and Kraft offered a multiple[-]company package assembled by Kraft.
>
> The Inland Concrete Enterprises, Inc. Employee Stock Ownership Plan (and Inland Concrete Enterprises, Inc.?) asks the court to protect it from having a demand for $20,690,000 (the intrinsic value of the ESOP's shares) reasoning that Kraft's research enabled Oldcastle to value Inland at $55.7 million—$79.5 million immediately following the transaction. In other words, the court should protect the ESOP because: (a)

> the value of Kraft's research was so high; (b) the ESOP's demand did not incorporate the value of Kraft's research; (c) the ESOP is not going to benefit any further from Kraft's research (other than having its demand of $20,690,000 met) so Kraft should not be paid for his work. This is wicked. (That the opposing side—see first claim for relief—includes Inland Concrete Enterprises, Inc. is perverse.)

Kraft's Reply (Doc 293) at 8-9 ¶¶ 6-9 (paragraph nine internal break added).

***399 Under the heading "But He Isn't Wearing Anything At All!", Kraft asserts that plaintiffs have yet to introduce "any evidence that a transaction actually occurred on December 17, 2007",** and "[t]he record ... in this case does not contain a transaction document." Reply (Doc 293) at 9 ¶¶ 10 and 12. Kraft goes on to explain that he "discovered on July 21, 2013, during discovery in another legal proceeding and discovery that is the subject of a protective order, a copy of an alleged signed document related to a transaction on December 17, 2007 ('the Stock Purchase Agreement[']) that was allegedly entered into between Inland, Inc., the Inland ESOP and Oldcastle on December 17, 2007)", Doc 293 at 9 ¶ 11 (note 2 citing Kraft Dec (Doc 15) ¶¶ 56-79). That document, says Kraft, "names Rune Kraft as the Broker in 'Schedule 2.5 Brokers' ", Doc 293 at 9 ¶ 13.

Kraft then appears to allege that plaintiffs merely pretended to hire him or sometimes falsely claimed for self-serving reasons that they had hired him as a broker for the transaction. Kraft states that

> Rune Kraft "was hired" as a broker by way of being named as a broker in an exhibit of a clandestine document allegedly dated and signed by Plaintiffs on December 17, 2007; whilst never actually informing him that they had hired him as a broker and what he was going to be paid, let alone if he agreed to serve as a broker, and without inviting him to take any part in the closing of the transaction and never actually providing to him the transaction document that he was allegedly responsible for; and despite allegedly having hired him to be the broker, ... offered to hire Vicarea Real Estate, Inc. as the broker.
>
> This would appear to be a chaotic, if not plainly illegal, way of hiring anybody and particularly somebody hired for the purpose of serving in a role with fiduciary duties.... [T]hese practices of hiring contractors and/or employees are illegal and Plaintiffs' attorneys knew they were illegal.

Doc 293 at 10 ¶¶ 15-16 (n.3 citing, *inter alia*, Kraft Dec (Doc 15) ¶ 27). According to Kraft, plaintiffs, "[k]nowing [they] had never offered to hire Rune Kraft for anything—including a broker or any other fiduciary capacity; never hired him; never employed him ...; [and] never paid him", nonetheless "wrapped themselves in the flag of the employee stock ownership plan and filed [this] lawsuit ... claiming to have been hurt by Rune Kraft because he was acting for them in the capacity of a fiduciary and that ... despite his 'bad work for them as a fiduciary', was now demanding to be paid." Doc 293 at 11 ¶ 17 (n.4 citing, *inter alia*, Doc 15 ¶ 15).

Kraft charges that plaintiffs' counsel "systematically used acts and statements in

interacting with the court to perpetuate this fraudulent scheme. And the judicial officers were either impaired, misled or decided to join in the conspiracy and continued to perpetuate this fraudulent scheme on the court." Doc 293 at 12 ¶ 19; *see also id.* at 12–13 ¶¶ 20–22. Specifically, Kraft explains,

> The purpose was to deceive the court's records [sic] in a manner that would prevent [Kraft] from fully and fairly presenting his case [counterclaim] or defense. It was essential to [Kraft]'s case to show that he was not a party to any of the documents and that Vicarea Real Estate, Inc. was a party to the documents as he performed his work as a duly authorized representative of Vicarea. The acts and statements [of counsel] were part of an overall scheme to establish a fiduciary relationship without having one ... when such a relationship had never even been discussed.

Reply (Doc 293) at 24 ¶ 66.

KRAFT'S CHARGE THAT INLAND FALSELY ACCUSED HIM OF SPOLIATION

Kraft alleges that Inland made or caused to be made false and misleading representations regarding six electronic documents Kraft delivered to their lawyers' assistant on November 15, 2010, *see* Doc 271 at 7 ¶ 16. Kraft names plaintiffs' counsel and plaintiff-trustee Saakvitne, a California-licensed attorney, as the perpetrators of the alleged fraud on the court, including perjury. *See* Doc 293 at 13-14 ¶¶ 24-36.

According to Kraft, "[t]he six electronic files showed the true times that the authorized representative of Vicarea Real Estate, ***400** Inc., Rune Kraft, had: created, modified, accessed and printed the six electronic documents and that the authorized representative had: created, modified, accessed and printed the six electronic documents contemporaneously, as he actually performed the tasks", Doc 271 at 7-8 ¶ 16.

Kraft elaborates, in part, that "[t]his CD was ordered by the Inland ESOP and Inland, Inc. as part of discovery", that he "swore under penalty of perjury that the facts contained on the CD were true", and that "[t]he CD did not reflect any of the 'shenanigans' that the Inland ESOP and Inland, Inc. would portray to the court 2.5 months after they received it", Doc 271 at 8 ¶ 16.

Kraft proceeds to describe in detail the misrepresentations Inland allegedly made as to each document, *see* Doc 271 at 9-13. **According to Kraft, Inland's attorneys requested discovery from Kraft and KALP,**

> **received a CD containing the evidence, including the six Microsoft Word files, by personal delivery by Rune Kraft on November 15, 2010, and then either caused the metadata of the six Microsoft**

> **Word files to be forged, forged the metadata of the six Microsoft Word files[,] or knew that the metadata of the Microsoft Word files were forged.**
>
> **After the fabrication of evidence**—implicating [Inland's attorneys], as they received the evidence, had a duty to investigate the evidence, had custody over the evidence, had a duty to preserve the evidence and under no circumstances forge the evidence or take part of a scheme to forge the evidence—on January 30, 2011 caused Salsig to swear in statements and Salsig swore in statements, under penalty of perjury—[Doc 126-2 at 1-4 and Doc 126-3 at 1-7]—that deceived the court by falsely stating that their investigation had uncovered that six electronic documents were "Modified" 4 hours before they were "Created" by Rune Kraft and "Accessed" about 3.5 years after they were last "Modified" and "Printed" by Rune Kraft[,] and Plaintiffs' attorneys['] acts and statements found their way into rulings by the court[.] [citing Salsig Dec—Ex F (Requests for Production No. 15—No. 26)]
> * * *

Doc 293 at 15-16 ¶ 37. Kraft notes characteristics that he says are "universal to the six forged electronic documents", Doc 271 at 14 ¶¶ 36-42, then describes how plaintiffs benefitted from the alleged forgery and mischaracterization, Doc 271 at 14-15 ¶¶ 43-46 and 15-16 ¶¶ 52-55. "The forgeries," Kraft asserts, "were used to threaten and extort and make the court do their bidding." Doc 293 at 17 ¶ 41.

Ultimately, Kraft charges, "[t]he public recordings [sic] portraying Rune Kraft as a forger were obtained based on acts and practices that were criminal and were criminally derived", Doc 271 at 17 ¶ 63. His allegations are less than clear. Kraft alleges that "Inland ESOP and Inland, Inc. did not disclose to, and actively concealed from, the public, the court and others the fact that pseudo legal proceedings [sic] at the court created sham judgments and claims against [Kraft and KALP]", Doc 271 at 16 ¶ 58. In this paragraph, Kraft does not identify the cases in which the so-called "sham judgments" against him and/or KALP had been won.

Kraft further alleges, unclearly, that "[i]n public recordings, the Inland ESOP and Inland, Inc. and others reported that they had obtained judgments against Petitioners and that Petitioners were their pawn" and that "the public recordings were used by the Inland ESOP and Inland, Inc. and others to portray Rune Kraft as a person with bad character that [sic] could not be trusted", Doc 271 at 16 ¶¶ 50-60. In this paragraph, Kraft does not identify the "public records" in question.

Kraft argues that if the Court had the true facts, including dates and times when the documents had been created, modified, and accessed, the Court would have found it "had no authority to re-organize [KALP] and/or appoint, whether retroactively or otherwise, its General Partner", that Vicarea Real Estate, Inc. was a California licensed real estate broker", and that Vicarea "performed all work related to this matter as the General Partner of [KALP] and as a stand-alone entity", Doc 271 at 15 ¶¶ 47-50.

***401** Furthermore, Kraft argues, if the Court had the true facts about the six electronic documents, the Court also would have realized that "Kraft had never done any business with the Inland ESOP and Inland, Inc. in his personal capacity (as an individual) and had at all times acted as an authorized representative of [KALP]'s General Partner Vicarea Real Estate, Inc. (a Delaware corporation) that was a licensed California real estate broker", Doc 271 at 16 ¶ 61. Finally, the Court would have found that Kraft had "never offered to do any work for the Inland ESOP and Inland, Inc., never performed any work for them, never asked for any considerations of any kind from them and never received any consideration of any kind from them", Doc 271 at 16-17 ¶ 62.

Ground 2B for Rule 60(b) Relief: Inland Fabricated Evidence and Made False Statements to the Court

Kraft also charges that "as part of the scheme, Plaintiffs' attorneys fabricated information about one of the Defendant Kraft Americas' [sic] vendors," Justicia, stating that the vendor was used by Kraft Americas in February 2008 was dissolved in 2003 when the vendor is an active corporation in good standing...." Doc 293 (Kraft Reply) at 16 ¶ 38. Kraft charges that Inland's counsel made false statements about Justicia's statutory agent and the Court relied on those statements in at least one ruling: the Court cited defense counsel Salsig's declaration etc. for its statement that "Justicia, Inc. was dissolved in 2003, over five years before the purported facsimile; Justicia also lists Laverne Guthrie as its statutory agent, and Kraft testified that Laverne Guthrie is a director of Vicarea [Real Estate]." Doc 293 at 16 ¶ 38.

Kraft's Third Ground for Rule 60(b) Relief from the 2011 Judgment

Kraft's third ground for relief is that "Evidence was Withheld", constituting obstruction of justice in violation of 18 U.S.C. §§ 1503, 1512, and 1513. Generally, het alleges that "[a]s part of their work to do research and analysis for Inland, Inc. about construction materials markets, products, and companies[,] Kraft Americas, L.P. and Vicarea Real Estate, Inc. did not get access to the deal documents that the Inland ESOP, Inland, Inc., and Oldcastle signed related to the transaction between Inland, Inc., the Inland ESOP [sic, sentence ends here]." Doc 271 at 17 ¶ 64. **"It was not until discovery in another legal proceeding by Kraft Americas, L.P. against Oldcastle that [KALP and Kraft] discovered" six electronic documents or e-mails:**

— a December 7, 2007 BCC Valuation Services letter to Inland ESOP listing KALP as "the broker";

— apparently two versions of a December 17, 2007 Stock Purchase Agreement, one referring to "brokers to be listed in schedule 2.5" and the other listing Rune Kraft as a broker in schedule 2.5;

— a January 15, 2008 letter from Inland ESOP to Oldcastle that referred to "claims by Rune Kraft", "liability to Rune Kraft", and "proposed fees to Rune Kraft";

— a March 7, 2008 e-mail from Inland ESOP to Oldcastle that referred to "[Rune]

Escrow", "Rune Escrow", the "Rune claim" and a "Rune Kraft claim"; and

— a September 11, 2008 e-mail from Inland ESOP which referred to a "Rune Kraft claim."

Doc 271 at 17 ¶ 65. **According to Kraft, "these six documents were not disclosed in this case and go to the core of this case." Doc 271 at 17 ¶ 66. Kraft asserts that, contrary to the information in those six allegedly withheld documents, Inland and its ESOP had no contacts with "the individual Rune Kraft** (who is an authorized representative of Vicarea Real Estate, Inc., the General Partner of Kraft Americas, L.P.)"; Inland and its ESOP never proposed to enter into any contract with the individual Rune Kraft; Inland and its ESOP never paid or proposed paying the individual Rune Kraft; and Rune Kraft "in his capacity as an individual" never asked to be paid, never asked to enter into a contract, and never did business with any party, Doc 271 at 18 ¶¶ 69-70.

According to Kraft, Oldcastle is "attempting to extort money based on this conduct in a fraudulent 'round trip' transaction." Doc ***402** 271 at 19 ¶ 74. Kraft explains that "[d]uring discovery ... in the aforementioned active legal proceeding by [KALP] against Oldcastle, [KALP and Kraft] found evidence of the following: ...." Doc 271 at 19 ¶ 74. He describes the fraudulent "round trip" transaction allegedly attempted or intended by Oldcastle:

(1) Oldcastle buys Inland, knowing Inland owes KALP and Vicarea Real Estate for services rendered;

(2) Rather than causing Inland to pay, Oldcastle selectively leaks trade secrets and confidential information to Inland ESOP and the two develop a fraudulent scheme; and

(3) "Inland ESOP assigns back to Oldcastle the 'winnings' as this will enable Oldcastle to use the scheme in an effort to run an extortion scheme to avoid the obligations."

Doc 271 at 19 ¶ 74.

Kraft's fourth ground for FRCP 60(b) relief **is that "The Buyer Selectively Leaked Trade Secrets and Confidential Information to the Seller in Violation of a Confidentiality Agreement."** Doc 271 at 20. Kraft alleges details of the violations, as well as their "corrupt intent" and purpose, in Doc 271 at 19-20 ¶¶ 75-81.

Kraft's Fifth Ground for Relief from Judgment **appears to be that Inland misled the Court about the identity of the defendant and refused to correct the error to have a summons issued to the correct defendant.** *See* Doc 271 at 20. Kraft complains that he was named as General Partner of KALP, which he has never been, and when none of the documents exchanged, "including the proposal issued and made by Inland, Inc., Oldcastle and the Inland ESOP to retain Vicarea Real Estate, Inc. as a broker the day after the transaction's close, had Rune Kraft as a party to the contract." Doc 271 at 22 ¶¶ 82-83. According to Kraft, Inland was notified on three occasions—June 8, 2006, May 16, 2007, and August 1, 2007—that Vicarea was General

Partner of KALP. Kraft alleges that someone further communicated to Inland on March 17, 2010 that "Kraft is not the General Partner of Kraft Americas, L.P." and "[I or we] urge you to correct this error immediately", Doc 271 at 22 ¶¶ 86-87.

Kraft's Sixth Ground for relief from judgment **seems to be that plaintiffs filed a complaint (about six years ago) "built on a series of falsehoods"**, Doc 271 at 22. By Kraft's reckoning, the complaint contained a total of 85 factual statements: 51 false statements, 28 deceptive statements, two statements which "make no sense", and 4 statements that are true but not material. *See* Doc 271 at 22 ¶¶ 88-89.

Kraft charges that exhibits 42 and 43 to the Trustee's declaration contained "false statements, perjury, subornation of perjury, obstruction of justice, conspiracy, wire fraud, and mail fraud[.]" Doc 271 at 23-25. Kraft further charges, without explanation or citation to the record, that Inland "fabricated an e[-]mail Ex[.] 130 shown to Rune Kraft during a deposition on February 24, 2011", Doc 271 at 25 ¶ 94. Finally, he charges that Inland

> made a filing with the court stating that a vendor used by [KALP] in February 2008 was dissolved in 2003 and made false statements about the statutory agent of the vendor (Justicia), when in truth and in fact the corporation (Justicia) was ad continues to be [a] corporation in good standing and having a qualified registered agent (Corporate Service Center). The Inland ESOP and Inland, Inc. knew that this was false and this fraud upon the court was again done to make sure that the court did not have the true facts.

Doc 271 at 25 ¶ 95.

Kraft concludes his opening brief with a Prayer for Relief asserting that the court has power to grant relief from judgment pursuant to FRCP 60(b)(4) because the judgment is void, 60(b)(5) because prospective enforcement is no longer equitable, and 60(b)(6) for "any other reason that justifies relief." Doc 271 at 29; *see also* Doc 293 at 26 ¶ 70. He ends by stating that "[p]ursuant to Federal Rule 60(d) the court has powers to grant relief based on fairness, due process, equal protection, equity and/or fraud upon the court", *id.*

***403 In his reply, Kraft appears to contend that the 2011 Judgment was internally inconsistent and inconsistent with record evidence, and that those errors and infirmities resulted from plaintiff counsel's alleged fraud on this Court.** *See* Doc 293 at 17 ¶ 43 ("The contradictions in the ruling are the symptoms. The causation is the fraud on the court."). **As examples, Kraft argues as follows:**

> 44. In paragraph 2.h the document [the Judgment?] states that there were was no instrument in writing (California Code of Civil Procedure § 339, subdivision 1

pertaining to an action upon a contract, obligation or liability not founded upon an instrument of writing) whilst in paragraph 2.f the judge describes the services as broker's services, which require an instrument in writing.

45. The records of the court show that there were several instruments in writing but that the instruments in writing related to a broker relationship that was never agreed to.

46. In paragraph 3.a the document states that Defendant has not entered into a binding and enforceable express oral or written agreement, implied in fact agreement, or implied in law agreement with Plaintiff Inland ESOP whilst in paragraph 3.b of the document Defendant has rendered broker's services.

47. In paragraph 3.a the document states that Defendant has not entered into a binding and enforceable express oral or written agreement, implied in fact agreement, or implied in law agreement with Plaintiff Inland ESOP whilst in paragraph 3.d of the document Defendant has rendered broker's services pursuant to an express or implied agreement.

48. In paragraph 3.a the document states that Defendant has not entered into a binding and enforceable express oral or written agreement, implied in fact agreement, or implied in law agreement with Plaintiff Inland ESOP whilst in paragraph 4 of the document Defendant has breached fiduciary duties to Plaintiff Inland ESOP.

49. In paragraph 3.g the document states that Defendant had multiple undisclosed conflicts of interest, breached his duties of undivided loyalty and breached his fiduciary duties owed to Inland, Inc. by failing to disclose material facts to Plaintiff Inland ESOP whilst in paragraph 2.a of the document it states that no services were provided by Defendant to Inland, Inc. and in paragraph 2.b that Inland, Inc. never retained Defendant to provide any services to, or for, Inland, Inc.

50. In paragraph 2.a the document states that no services were provided by Defendant to Inland, Inc. and in paragraph 2.b that Inland, Inc. never retained Defendant to provide any services to, or for, Inland, Inc. whilst in paragraph 2.d of the document it states that Defendant rendered broker[']s services.

Doc 293 at 17-18 ¶¶ 43-50; *see also id.* at 18–19 ¶ 51–53. Per Kraft, the foregoing inconsistencies in the June 2011 decision "perpetuate the fraud on the court" because the Court's records contain evidence as to

> [t]he corporate structure of [KALP] and the facts that Vicarea Real Estate, Inc. performed services as both the General Partner of [KALP] and as a stand-alone entity
>
> Vicarea Real Estate, Inc. being a licensed broker in California
>
> Rune Kraft doing his work as the duly authorized representative of two Delaware corporate entities
>
> No broker agreements (which in California must be in writing and signed by all parties)

> No broker agreements (which in California is a requirement to establish a relationship enabling broker services to be rendered)
>
> The book account stated based upon an account in writing being issued to Inland, Inc.
>
> The value of the work created by the contractor was distributed to the company. * * *

* * *

Doc 293 at 19-20 ¶ 54. **At no point does Kraft show that he only recently became aware of these putative bases for attacking the Court's decision. Absent evidence *404 to the contrary, the Court finds that Kraft knew these bases for attacking the decision in June 2011, when he still could have filed a timely motion for reconsideration, a timely appeal, or both.** Yet Kraft never moved for reconsideration, nor did he appeal.

At most, Kraft might show that while he was aware of all the purported errors in the Court's rulings when judgment issued, it was not until years later that he came to suspect those errors were somehow related to the judge's medical condition or treatment. This provides no justification for Kraft's failure to make these assignments of error on appeal to the Ninth Circuit back in 2011.

ADDITIONAL BASES FOR RELIEF FROM JUDGMENT RAISED OR EXPANDED IN THE REPLY

In his reply, Kraft identifies an additional basis for relief from the 2011 Judgment: he alleges that when this Court granted the motion of KALP and Kraft's counsel to withdraw from representation in March 2011, "[n]ew counsel had already been secured and was never allowed to represent the interests of Defendants and Counterclaimant[,] which prevented the natural person [Kraft] from fully and fairly presenting his case or defense...." Doc 293 at 20-21 ¶ 57 (generally citing Kraft Dec and U.S. Const. Fifth Amendment Due Process Clause). In addition, Kraft now alleges that although plaintiffs' counsel deposed him in his personal capacity for four days, he "requested an opportunity to review the deposition testimony and if necessary make changes, but was never deposition of Rune Kraft Vol I (01.26.11), Vol. II (02.11.11) and Vol III (02.24.11). Rune Kraft has only been shown Vol IV (03.25.11)." Doc 293 at 21 ¶ 59.

The Court finds that Kraft likewise knew of these "new counsel" and "deposition transcript access" bases for challenging the Court's decision no later than when the Judgment issued in June 2011, at the beginning of his time for appeal. *See Giblin v. Sliemers*, 2016 WL 3078741, *2 (D. Colo. May 18, 2016) ("[A] Rule 60(b) motion is not a substitute for direct appeal, ... Advancing new arguments or supporting facts which were otherwise available for presentation' " when issues were briefed pre-judgment, " 'is likewise inappropriate.' ") (quoting *Van Skiver v. U.S.*, 952 F.2d 1241, 1243 (10th Cir. 1991)).

Again in his reply, Kraft asserts an additional basis for relief from the

Judgment: the Court erroneously conflated him with KALP, holding him responsible for wrongs allegedly committed by KALP. As his first example of this conflation, Kraft alleges that plaintiffs' counsel took advantage of the fact that his "last name is Kraft and ... the limited partnership's name starts with Kraft ... to group the two distinct legal entities together...." Doc 293 at 22 ¶ 61. In turn, the conflation "found its way into orders, including the March 9, 2011 ruling that 'Kraft sent a letter to Plaintiffs demanding payment of $5,000,000'—[Doc 170 at 10]—when in truth and in fact the demand for payment came from [KALP] and Vicarea Real Estate, Inc., as plaintiffs' attorneys and Judge Baker Fairbank knew all along...." Doc 293 at 22 ¶ 61 (citing n.4).

As his second example of the conflation of Kraft with KALP, Kraft states that this Court "would find that the defendant, who did not even own the computer in question, should have saved the computer because the computer was evidence and then went on to refer to cases none of which stated that a computer should be saved...." Doc 293 at 22 ¶ 62. In so doing, Kraft contends, the Court "ignor[ed]" the fact that "Defendant was an officer of a Delaware corporation [KALP] that had issued a corporate policy [he] was required to follow", *id.*

As his third example of the conflation of Kraft with KALP, Kraft takes issue with this Court's statement, in a March 9, *2011* Order, that "the email sent by Kraft to plaintiffs on December 11, 2007 clearly threatened litigation over the fees he claimed to be owed" and with the Court's statement that "Kraft would have known that the documents on [the] Gateway computer that he used would be relevant to his threatened claim for fees; he used the computer to generate his purported proposed fee agreements." Doc 293 at 22-23 ¶ 63 (citing Doc 170 at 10 lines 24-25 and 31-35 (citing Salsig Dec ¶ 8 and Ex E)). Kraft complains that the email actually stated that "*Kraft Americas, L.P.* will make a claim ***405** against any amounts above $20,690,000", not that he, Rune Kraft, would sue to recover such amounts. *See* Doc 293 (Kraft Reply) at 23 ¶ 63 (citing Doc 170 at 6 lines 30-31).

The Court finds that Kraft knew of all these instances of the Court's allegedly erroneous conflation of Kraft with KALP no later than when the Court entered final judgment in June 2011, at the beginning of his time for filing a notice of appeal. *See U.S. v. 2002 Pontiac Bonneville SE*, 2015 WL 8331144, *6 (D.N.M. Dec. 7, 2015) ("*Rule 60(b) 'is not a vehicle* to reargue the merits of the underlying judgment*, to advance new arguments which could have been presented in the parties' original motion papers [before judgment], or as a substitute for appeal.*' ") (quoting *Davis v. Simmons*, 165 Fed.Appx. 687, 690 (10th Cir. 2006)) (emphasis added).

This case was referred to then-Magistrate Judge Parada, but he resigned on June 30, 2014, at the end of his term (three years after the undersigned entered default judgment). *See* http://www.uscourts.gov/judicial-milestones/oswald-parada, last retrieved on August 5, 2016. Because pre-trial proceedings had already concluded, the case has not been referred to any other Magistrate Judge.

RUNE KRAFT'S "OBJECTION" TO CITATION OF UNPUBLISHED 2016 FEDERAL DECISION

On March 25, 2016, Inland filed a Notice of Ruling in Related Case (Doc 296). The notice advised the Court and Kraft that the Ninth Circuit had issued an unpublished panel decision affirming District Judge Kronstadt's grant of summary judgment to the defense in *KALP v. Oldcastle Precast, Inc.*, 641 Fed.Appx. 718 (9th Cir. 2016) ("*KALP v. Oldcastle*"). The plaintiffs' notice attached a copy of that brief unpublished Ninth Circuit opinion as an exhibit, *see* Doc 296 at 5-8.

On April 7, 2016, Kraft filed a document entitled "Objection" (Doc 301). He complains that his adversaries violated the law by calling the Court's attention to the recent Ninth Circuit decision adverse to KALP in *KALP v. Oldcastle* because that decision was designated as not precedentially binding and not published in the Federal Reporter Third casebooks. Kraft notes that "California Rules of Court 8.1115(e) prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published. Defendant have flagrantly disregarded this rule which has now become prejudicial." Doc 301 at 1.

Similarly, in his Rule 60(b) reply, Kraft alleges that Inland attorney Ryan R. Salsig

> deceived the court by intentionally misquoting to a tribunal the language of a decision applying the case law to facts that the rules of the court explicitly prohibits [sic]. Salsig illegally cited *J. Oliver v. Pacific Real Estate Holdings, Inc.*, referring to the case as 2008 WL 3198223—Cal. App. 2008. This is despite the fact that this case—No. F051193 (Super. Ct. No. 005–213991) is nonpublished / uncitable. California Rules of Court 8.1115(e) prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published. Salsig flagrantly disregarded this rule and Plaintiffs' attorneys acts and statements [sic] found their way into rulings by the court. [citing Doc 270 (Order filed March 9, 2011) at 12]

Doc 293 at 17 ¶ 39.

[2] Kraft's objections to the citation of the unpublished Ninth Circuit opinion *KALP v. OldCastle* and the unpublished California Court of Appeal opinion *Oliver* lack merit, however, because "California Rules of Court apply only in state court, not federal court." *Kraft v. Oldcastle Precast, Inc.*, LA CV 15–00701 Doc 44 at 4 (C.D. Cal. Apr. 15, 2016) (citing, *inter alia*, *Hubbard v. Sherman,* 2015 WL 10557486, *6 (C.D. Cal. Dec. 4, 2015), *R&R adopted*, 2016 WL 1180134 (C.D. Cal. Mar. 25, 2016)).

[3] " 'Although California Rules of Court, [R]ule 8.1115 prohibits citations to unpublished decisions, a federal court exercising diversity jurisdiction is not bound by a state's procedural rules.' " *Kraft v. Oldcastle Precast, Inc., et al.*, No. LA CV 15–00701–VBF Doc. 44 at 4 (C.D. Cal. Apr. 15, 2016) (not yet on WL) (citing *Widman v. Keene*, 2015 WL 5918396, *3 n.5 (D. Utah Oct. 9, 2015) (citing, *inter alia*, ***406** *Siteworks Solutions, Inc. v. Oracle Corp.*, 2010 WL 890941, *2 n.8 (W.D. Tenn. Mar. 9, 2010) ("Rule 8.1115(a), however, is a procedural rather than a substantive rule of law.")) and *Baltazar v. Yates*, 2010 WL 2195979, *11 n.8 (C.D. Cal. Apr. 28, 2010) (Fairbank, J.) (acknowledging that state court rule prohibited citation of unpublished Cal. Court of Appeal opinions but noting, "California's Rules of Court also are not binding on this federal Court")).

Kraft fails to identify any *Federal* Rule, Circuit Rule, or Local Rule, that was violated by his adversaries' citation of an unpublished *federal* decision *issued in 2016.* Circuit Rule 36-3 subsec. c substantially restricts citation "to the courts of this circuit" of unpublished dispositions and orders of the Ninth Circuit issued *before 2007.* By contrast, Circuit Rule 36-3(b) provides, in its entirety, "Unpublished dispositions and orders of this court issued on or after January 1, 2007 *may be cited* to the courts of this circuit in accordance with FRAP 32.1." In turn, FRAP 32.1 provides that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (I) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007."

Consequently, Kraft's adversaries did not violate FRAP 32.1, Ninth Circuit Rule 36–3, or any other law by citing an unpublished 2016 Ninth Circuit decision in their February 25, 2016 filing (Doc 296). *See, e.g., Dewey v. City of Los Angeles*, 2014 WL 5464901, *4 (C.D. Cal. Oct. 27, 2014) (unpublished Ninth Circuit order issued in 2014 was "now citable for its persuasive value pursuant to Ninth Circuit Rule 36–3"); *Smith v. Sanders*, 2009 WL 2900317, *5 n.7 (C.D. Cal. Sept. 3, 2009) ("The Court may cite unpublished Ninth Circuit decisions issued on or after January 1, 2007.") (citing Fed. R. App. 32.1(a) and 9th Cir. R. 36–3(b)).

"Finally, our Court's Local Civil Rule 11-3.9, Citations, does not purport to restrict the right of judges or parties to cite unpublished decisions." *Kraft*, LA CV 15–00701–VBF Doc. 44 at 5 (not yet on WL).

In any event, according to the certificate of service (Doc 38 at 3), defendants also mailed Kraft a copy of *KALP v. Oldcastle.* That was more than required by FRAP 32.1(b), which provides only that "[i]f a party cites a federal judicial opinion *...not available in a publicly accessible electronic database*, the party must file a serve a copy ... with the brief or other paper in which it is cited." Emphasis added. Nothing suggests that *KALP* was not available to Kraft "in a publicly accessible electronic database", e.g., WestLaw or Lexis.

Independently, Kraft argues that *KALP v. Oldcastle* is distinguishable from this

case because it was "about breach of a confidentiality and no-use agreement and misappropriation of trade secrets." Doc 43 at 1-2. This objection is unavailing, because the Court did not rely on *KALP v. Oldcastle* in reaching today's conclusion that Kraft's motion for relief from judgment is untimely and barred by his failure to appeal.

ANALYSIS: RULE 60(b)(3) MOTION IS BARRED BY FAILURE TO APPEAL THE JUDGMENT

[4] "A court of appeals typically can remedy a legal error committed by a district court", *Glacier Elec. Coop., Inc. v. Gervais*, 2015 WL 5437615, *2 (D. Mont. Sept. 15, 2015), and FRCP 60(b) is not meant to be a substitute for an appeal. *See U.S. v. N.E. Med. Servs., Inc.*, 2016 WL 627417, *3 (N.D. Cal. Feb. 17, 2016) (citing *20th Century–Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338 (9th Cir. 1981)); *accord Borne v. River Parishes Hosp., LLC*, 548 Fed.Appx. 954, 959 (5th Cir. 2013) ("[A] Rule 60(b) motion may not be used as a substitute for timely appeal.") (citing *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993) (collecting cases)). [4]

4 *Accord Giroux v. FNMA*, 810 F.3d 103, 108 (**1st Cir.** 2016) ("Giroux 'may not use Rule 60(b) as a substitute for a timely appeal' ....") (cite omitted); *Stevens v. Miller*, 676 F.3d 62, 67 (**2d Cir.** 2012) ("In no circumstances ... may a party use a Rule 60(b) motion as a substitute for an appeal it failed to take in a timely fashion."); *Bush v. DHS*, 642 Fed.Appx. 84, 85 (**3d Cir.** 2016) (per curiam)(citing *Reform Party of Allegheny Cty. v. Dep't of Elections*, 174 F.3d 305, 311–12 (3d Cir. 1999)); *Coleman v. Jabe*, 633 Fed.Appx. 119, 120 (**4th Cir.** 2016) (" '[A] Rule 60(b) motion may not substitute for a timely appeal.' ") (quoting *In re John Burnley*, 988 F.2d 1, 3 (4th Cir. 1992)); *Walker v. Transfrontera CV de SA*, 634 Fed.Appx. 422, 426 n.3 (**5th Cir.** 2015) (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)); *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 906 **(6th Cir. 2006) (Richard Allen Griffin, J.)** (" 'A party may not use a Rule 60(b)(4) motion as a substitute for a timely appeal.' ") (cite omitted)); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (**7th Cir.** 2000) ("a collateral attack on a final judgment is not a permissible substitute for appealing the judgment within ... 30 days") (cites omitted); *Rhines v. Young*, 2016 WL 614665, *3 (D.S.D. Feb. 16, 2016) (" '60(b) was not intended as a substitute for a direct appeal from an erroneous judgment. The fact that a judgment is erroneous does not constitute a ground for relief under the rule.' ") (quoting *Hartman v. Lauchli*, 304 F.2d 431, 432 (**8th Cir.** 1962)); *U.S. v. 31.63 Acres of Land*, 840 F.2d 760, 762 (**10th Cir.** 1988) ("Even if the district court's construction of the EAJA requirements was clearly wrong, Tinker would not be entitled to relief under Rule 60(b)(6). * * * Tinker is simply attempting to use Rule 60(b) as a substitute for a timely appeal on the merits and that is not permitted.");

Salazar v. DC, 177 F.Supp.3d 418, 441 (D.D.C. 2016) (" '[I]t is a commonplace that Rule 60(b)(6) may not be used as a for an appeal not taken.' ") (quoting *Twelve John Does v. DC*, 841 F.2d 1133, 1141 (**D.C. Cir.** 1988)); *In re Chartier*, 2015 WL 7074294, *2 (M.D. Fla. Aug. 13, 2015) (" 'A party my not use Rule 60(b)(6) as a substitute for a timely and proper appeal' " and "Rule 60(b)(6) does not reward a party that seeks to avoid the consequences of its own free, calculated, deliberate choices,' as when a party chooses not to file an appeal.") (quoting *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838, 840 (**11th Cir.** 1982) and *Aldana v. Del Monte Fresh Produce, N.A.*, 741 F.3d 1349, 1357 (11th Cir. 2014), respectively); *Patton v. Sec'y of Dep't of HHS*, 25 F.3d 1021, 1028 (**Fed. Cir.** 1994).

[5] *407 Accordingly, "it is not proper to grant relief under" 60(b) " 'if the aggrieved could have reasonably sought the same relief by means of appeal.' " *Hibbard v. Penn–Trafford Sch. Dist.*, 621 Fed.Appx. 718, 723 (3d Cir. 2015) (quoting *Martinez–McBean v. Gov't of V.I.*, 562 F.2d 908, 911 (3d Cir. 1977)), *reh'g denied* (3d Cir. Sept. 8, 2015); *accord William v. Sahli*, 292 F.2d 249 (6th Cir. 1961); *Warren v. Uribe*, 2015 WL 8207526, *8 (E.D. Cal. Dec. 8, 2015) (60(b) may not be used to bring the underlying judgment up for review) (quoting *Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993)), *COA denied*, No. 16–15331 (9th Cir. Apr. 25, 2016).

[6] In other words, "if the reason asserted for the Rule 60(b)[ ] motion could have been addressed on appeal from the judgment," the motion must be denied "as merely an inappropriate substitute for an appeal." *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (citing, *inter alia*, 11 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure § 2864 at 359-60 and n.25 (2d ed. 1995)). *See, e.g., Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000) ("A lack of subject-matter jurisdiction is not by itself a basis for deeming a judgment void, that is, open to collateral attack. For ordinarily that is a ground for reversal that can be presented to the appellate court on direct appeal.") (internal citations omitted).

The Supreme Court enshrined this principle in *Ackermann v. U.S.*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). In *Ackermann*, a district court had issued judgment cancelling the Ackermanns' certificates of naturalization. After entry of judgment, a co-defendant appealed, but the Ackermanns did not. After the Circuit granted relief to co-defendant on appeal, the Ackermanns filed a 60(b) motion. The district court denied the 60(b), and the Supreme Court affirmed. The Court reasoned that Ackermann "made a considered choice not to appeal" and that he "cannot be relieved of [the consequences] of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong." *Ackermann*, 340 U.S. at 194–95, 71 S.Ct. 209. *Accord Salazar v. DC*, 633 F.3d 1110, 1120 (D.C. Cir. 2011) ("Rule 60(b)(6) should be only 'sparingly used' and may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.' ") (cite omitted).

The Seventh Circuit illustrated this principle in *Banks* v. *Chicago Bd. of Ed.*, 750 F.3d 663 (7th Cir. 2014). It affirmed the denial of a Title VII plaintiff's motion for relief from judgment, holding that

> [t]he district court did not abuse its discretion by denying Banks's post-judgment motion for relief. In her motion, Banks ***408** argued that the district court erred by finding that she had not offered sufficient evidence to support her claims and by misinterpreting the [statute]. In her brief before this court, she advances the same errors of fact and law.
>
> *These arguments could have been raised in a direct appeal, but Banks forfeited her opportunity to appeal the judgment because she failed to file a notice of appeal that would have been timely with respect to the entry of judgment. To protect her ability to raise these arguments, she had to file either a timely Rule 59(e) motion or a timely notice of appeal, and she did neither.*

Banks, 750 F.3d at 667–68. The Second Circuit states the rule in absolute terms as well: "In no circumstances, though, may a party use a Rule 60(b) motion as a substitute for an appeal it failed to take in timely fashion." *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) (cite omitted).

[7] **This alone is dispositive of Kraft's motion, because Kraft and KALP elected, for whatever reason, not to appeal this Court's June 22, 2011 default judgment.** Nor did they appeal any of the interlocutory orders, particularly those determining that Kraft committed willful bad-faith destruction of evidence, committed fabrication of evidence, and failed to cooperate with discovery. *See, e.g., Hibbard*, 621 Fed.Appx. at 723 (granting motion to dismiss appeal in part for lack of jurisdiction and otherwise summarily affirming the denial of *pro se* appellant's Rule 60(b)(6) motion, Court found "the conclusion is inescapable that Hibbard made a considered decision not to appeal the ... order" dismissing her complaint with prejudice); *Winterthur Int'l Am. Ins. Co. v. Garamendi*, 2005 WL 3440266, *3 (E.D. Cal. Dec. 14, 2005) ("[P]laintiffs here made the decision not to appeal and Rule 60(b)(5) cannot save them from that miscalculation."); *cf. Hawkins v. Borsey*, 319 Fed.Appx. 195, 196 (4th Cir. 2008) ("Appellants failed to appeal the entry of default judgment. [T]heir history of litigating portions of the case and then failing to respond during other portions shows that the decision not to appeal was a conscious choice. Thus, appellants' motion was merely an untimely attempt to appeal the final judgment.").

[8] **As our Circuit explained in *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291 (9th Cir. 1982),**

> **[a]llowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting the finality of judgments.** Litigants unsuccessful at trial could forgo available appeals

> and, should subsequent decisions in other cases render their positions viable, they could move to have adverse judgments vacated. The uncertainty resulting from such a rule would be unacceptable.

Id. at 1293 (boldface added) (affirming dismissal of a 60(b) motion filed only 48 days after judgment where the movant had failed to appeal and his appeal time had elapsed).

Indeed, "[t]he concern that parties or courts could use Rule 60(b) to circumvent the time limit for filing appeals animates our case law." *Banks*, 750 F.3d at 667 (citations omitted). "If parties or courts could use Rule 60(b) to revive cases in which a party failed to appeal within the standard deadline, Appellate Rule 4 would lose much of its force." *Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir. 2013); *accord In re Ray Jasper, Debtor*, 559 Fed.Appx. 366, 372 (5th Cir.), *cert. denied sub nom. Jasper v. Stephens*, —— U.S. ——, 134 S.Ct. 1536, 188 L.Ed.2d 466 (2014).

FRAP 4's strict time limit for filing appeals would be circumvented by allowing Rune Kraft to raise alleged errors of law and fact by way of this 60(b) motion, *Plotkin*, 688 F.2d at 1293, which is "nothing more than the first step in an attempt to take an untimely appeal" from the *2011* judgment. *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000) ("The appeal ... from the denial of the [60(b)] motion is in fact an untimely appeal from the final judgment that the Rule 60(b) motion challenged, and ... must be dismissed.").

Here, any errors of law, fact, or logic committed by the Magistrate or the undersigned *409 had occurred, and were obvious, by the time this Court entered judgment in 2011. Kraft could and should have raised those assignments of error by way of a Fed. R. Civ. P. 59(e) reconsideration motion in this Court in June-July 2011, and then by appealing to the U.S. Court of Appeals if this Court denied reconsideration. *See* Doc 286 (Inland's Opp) at 8 ("If Judge Fairbank's condition resulted in an incorrect decision (which it did not), Kraft had a ready remedy—an appeal—of which he did not avail himself."); *see, e.g., Ziglar v. U.S.*, 2010 WL 4647248, *3 (M.D. Ala. Nov. 10, 2010) (although 60(b)movant complained that court had wrongly denied a continuance, he "presents no circumstance that would have prevented him from raising this ground in his Objections to the [R&R]."") (citing *Gardner v. Martino*, 563 F.3d 981, 992 (9th Cir. 2009) (60(b)(6) movant must show circumstances beyond his control that prevented him from taking timelier action)).

As to Kraft's theory about Inland perpetrating "fraud on the court", Kraft does not show that he lacked knowledge of the alleged fraud at the time judgment was entered; that is, he does not show that he could not have argued fraud on the court in a timely reconsideration motion in this Court and/or on appeal to the Ninth Circuit. *See* Inland Opp (Doc 286) at 15 ("[N]othing impaired Kraft's practical ability to learn earlier of the grounds relied upon. He had access to and

awareness of the judgment in this case and the reasons underlying its entry."); *accord Jasper*, 559 Fed.Appx. at 372 ("[A]ny error, if any, related to 28 U.S.C. § 2254(f) in the habeas proceedings occurred—and was obvious—in 2011 and 2012 when the district court and this court denied Jasper's habeas petition. Jasper should have appealed the error at that point on direct appeal, and we believe that the district court's determination that Jasper's motion was untimely did not constitute an error—much less an abuse of discretion.") (citing *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir.), *cert. denied*,—— U.S. ——, 134 S.Ct. 1021, 187 L.Ed.2d 867 (2014), and *Tamayo*, 740 F.3d 986 (Higginbotham, J., concurring) ("I would affirm the district court's rejection of the Rule 60 submission as untimely.")). On the contrary, Inland points out (Doc 286 at 18), "it appears that Kraft is arguing that Plaintiffs falsified the documents at issue in the Spoliation Motion. But Kraft made those same arguments in his unsuccessful (1) opposition to the Spoliation Motion, and (2) motion for reconsideration."

Thus, Kraft's decision not to raise any alleged errors on appeal bars his attempt to raise them through this 60(b) motion years after his time for appeal elapsed. "Rule 60(b) simply may not be used as an end run to effect an appeal outside the specified time limits, [for] otherwise those limits become essentially meaningless." *Pryor v. USPS*, 769 F.2d 281, 288 (5th Cir. 1985); *see, e.g., Jones v. Frazesn*, 2010 WL 3504847, *3 (E.D. Cal. Sept. 3, 2010) (Tallman, Cir. J., by designation) ("Even if his claim were not untimely, Plaintiff is not entitled to Rule 60(b) relief ... after deliberately choosing not to pursue his judicial mistake claims on appeal.") (citing *Plotkin*, 688 F.2d at 1293); *Wadley v. Equifax Info. Servs., LLC*, 296 Fed.Appx. 366, 369 (4th Cir. 2008) ("Wadley may not use Rule 60(b) as a vehicle to excuse his failure to seek review of the final judgment granted ... almost two years earlier and from which he chose not to take an appeal.").

The Court has not located any precedent suggesting that this long-standing rule may not or should not be applied to *pro se* Rule 60(b) movants who failed to appeal the errors which they seek to redress through their 60(b) motion. Thus, the Court's analysis is not changed by the fact that Kraft was pro se when he filed this motion. Nor is the Court's analysis changed by the fact that Kraft may have been unrepresented by counsel during the standard period for appeal of the June 2011 Judgment. *See Regan v. Hawaii Dep't of Public Safety*, 334 Fed.Appx. 848, 849 (9th Cir. 2009) ("[A]rguments not raised on appeal *by a pro se litigant* are deemed abandoned.") (citing *Wilcox v. Commissioner*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988)) (emphasis added).

ANALYSIS: THE RULE 60(b)(3) MOTION FOR RELIEF FROM JUDGMENT IS UNTIMELY

The Court has already concluded that Kraft's failure to appeal the 2011 Judgment ***410** bars him from seeking relief from that judgment pursuant to Fed. R. Civ. P. 60(b). **The Court now concludes that, even if Kraft were not barred from seeking 60(b) relief, this motion is untimely. Because the Court lacks jurisdiction over untimely Rule 60(b) motions, that is a second, independent basis requiring dismissal of the motion be.**

1. Rune Kraft is Not Making a "Voidness" Argument that Could Be Raised Under Rule 60(b)(4)

[9] Unlike motions for relief from judgment pursuant to Rule 60(b)(1), (2), or (3) (which must be filed within one year of the entry of judgment) or motions for relief from judgment pursuant to Rule 60(b)(5) or (6) (which must be filed within a reasonable time), "[m]otions to set aside a judgment as void under Rule 60(b)(4) may be brought at any time." *Million (Far East), Ltd. v. Lincoln Provisions, Inc. USA*, 581 Fed.Appx. 679, 682 (9th Cir. 2014) (citing *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987)); *see also Lee v. AFT–Yakima*, 2011 WL 4703106, *2 (E.D. Wash. Oct. 4, 2011) ("[M]otions for relief from judgment on the basis that the judgment was void are not subject to the one-year limitation period in Rule 60(c)(1)."); *In re Sillman*, 2014 WL 223099, *5 (E.D. Cal. Jan. 21, 2014) (because "[a] void judgment is from its inception a legal nullity," "relief from a void judgment has no time limitations") (quoting *Boch Oldsmobile*, 909 F.2d at 661).

[10] [11] The instant motion for relief from judgment, however, is not a 60(b)(4) motion because it does not argue that the judgment was void as our case law narrowly defines that term for purposes of this Rule. Our Circuit holds that although Rule 60(b)(4) provides for relief from a judgment if it is void as a matter of law,

> [t]he list of such judgments is exceedingly short, and **"Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard."** *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010) [citing for comparison *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S.Ct. 317, 84 L.Ed. 329 (1940) and *Stoll v. Gottlieb*, 305 U.S. 165, 171–72, 59 S.Ct. 134, 83 L.Ed. 104 (1938))].

Dietz v. Bouldin, 794 F.3d 1093, 1095 (9th Cir. 2015), *aff'd o.g.*, —— U.S. ——, 136 S.Ct. 1885, 195 L.Ed.2d 161 (2016); *accord U.S. v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990).

Moreover, " '[f]ederal courts considering [whether] a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." *Espinosa*, 559 U.S. at 270, 130 S.Ct. 1367. *See, e.g., Reardon v. Reardon*, 421 Fed.Appx. 141, 142 (3d Cir. 2011) ("Reardon alleges that the District Court erred in applying the doctrine of absolute immunity ..., but this is an allegation of legal error only; it is not an allegation that

the federal court lacked jurisdiction over his section 1983 action such that the judgment rendered is void.") (n.1 omitted).

[12] Moreover, a motion for relief from judgment may be treated as a 60(b)(4) motion "only if the judgment at issue actually is void and not merely voidable...." *Zone Sports Ctr., Inc., LLC v. Red Head, Inc.*, 2013 WL 2252016, *6 (N.D. Cal. May 22, 2013) (citing 12 James William Moore et al., Moore's Federal Practice ¶ 60.44 (3d ed. 1997)). As the Supreme Court held over a century ago, "[i]f the court had jurisdiction of the cause and the party, its judgment is not void, but only voidable by writ of error." *Ball v. U.S.*, 163 U.S. 662, 669–70, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Therefore, even if the Court reached the merits and credited Kraft's allegations that plaintiffs deceived and perpetrated fraud upon the Court and its adversaries, the judgment would be at most voidable, not void. *Accord Brumfiel v. U.S. Bank*, 2014 WL 4395044, *3 (D. Colo. Sept. 5, 2014) ("Plaintiff argues that ... because Defendants' attempt to foreclose was 'manufactured on fraud ... any judgment is rendered ***411** void *ab initio*....' * * * Even if Plaintiff's allegations of forged documents are taken as true, however, the judgment is not rendered void. * * * The fraud alleged in Plaintiff's Rule 60(b) Motion does not constitute a jurisdictional defect or evidence a deprivation of procedural due process."). **Thus, Kraft's motion does not qualify as a motion for relief from judgment under 60(b)(4) due to voidness. As shown below, the motion may be construed only as a 60(b)(*3*) motion.**

2. Rule 60(c) Imposes an Inflexible One-Year Time Limit on Rule 60(b)(3) Motions

[13] [14] As a Rule 60(b)(3) motion, it had to be filed within one year from entry of judgment. *See* Fed. R. Civ. P. 60(c)(1). As Inland points out, "60(c)(1)'s one-year time limit for motions premised upon mistake, newly discovered evidence, or fraud is jurisdictional and cannot be extended." Doc 286 at 9-10 (citing *Nevitt v. U.S.*, 886 F.2d 1187, 1188 (9th Cir. 1989)). Accordingly, if Kraft's motion is construed as a 60 (b)(3) motion as it should be, it is untimely and must be dismissed with prejudice for lack of subject-matter jurisdiction. *Cf. U.S. v. Samish, Snohomish, Snoqualmie, and Steilacoom Indian Tribes*, 1995 WL 911759, *2 n.2 (W.D. Wash. Jan. 23, 1995) ("Insofar as the tribes seek to conduct discovery about the existence of any ex parte communications ..., the court finds that this request is untimely. A motion for relief from a final order for reasons of misconduct by an opposing party must be filed within one year after the order was entered.").

3. Even Construed as a Motion for Relief Under **60(b)(1)**, Kraft's Motion Would Still be **Untimely**

Rule 60(b)(1) provides that a court may grant relief from a final judgment on the ground of mistake, inadvertence, surprise, or excusable neglect. Kraft's motion does not identify any purported error or impropriety that could qualify as inadvertence, surprise, or excusable neglect on the part of the Court or otherwise.

[15] [16] There is some persuasive authority that "Rule 60(b)(1) applies to errors by judicial officers as well as parties." *U.S. v. Craft*, 2016

WL 160734, *1 (N.D. Ind. Jan. 13, 2016) (citing *Brandon v. Chicago Board of Ed.*, 143 F.3d 293, 295 (7th Cir. 1998)). To the extent that Kraft's motion might be construed as seeking relief from judgment under Rule 60(b)(1) for an alleged mistake of law or other mistake by the Court, however, the motion would be untimely: Rule 60 subsection (c)(1) provides that a motion for relief under 60(b)(1) must be made within a reasonable time, which must be "no more than *a year* after the entry of the judgment or order", and Kraft did not attempt to file the instant motion until *more than three and a half years* after the June 22, 2011 judgment.

[17] Rule 60(c)(1) permits a district court to find that it was "reasonable" for a party to file a 60(b)(1) motion as long as a year after entry of judgment, depending on circumstances. Circuit precedent, however, holds that a court may not find a 60(b)(1) motion to be filed "within a reasonable time" unless it was filed within the time for taking an appeal. *See Arrieta v. County of Kern*, 161 F.Supp.3d 919, 931 (E.D. Cal. 2016) ("Rule 60(b)(1) allows the Court" to grant relief from judgment if the motion is "filed within a reasonable time *not exceeding the time for appeal.*") (citing *Gila River Ranch, Inc. v. U.S.*, 368 F.2d 354, 357 (9th Cir. 1966)); *accord Lebahn v. Owens*, 813 F.3d 1300, 1305 (10th Cir. 2016) ("[A] Rule 60(b)(1) motion asserting mistake of law is untimely—and therefore gives the district court no authority to grant relief—unless brought within the time to appeal.") (citing *Van Skiver v. U.S.*, 952 F.2d 1241, 1244 (10th Cir. 1991)).

Thus, Kraft's motion would be untimely if construed as seeking relief under 60(b)(1) for mistakes of law.

4. Even If Construed as a Rule **60(b)(2)** Motion, Kraft's Motion Would Still be **Untimely**

[18] Rule 60(b)(2) provides that a court may grant relief from a final judgment on the ground that the movant has presented "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under ***412** Rule 59(b)." To the extent that Kraft's motion might be construed as seeking relief under 60(b)(2) on the basis of newly discovered evidence not reasonably available shortly after the judgment issued, the motion would be untimely: 60(c)(1) provides that a motion for relief under 60(b)(2) must be made within a reasonable time, "no more than *a year* after the entry of the judgment or order", and Kraft did not attempt to file the instant motion until *more than three and a half years* after the June 22, 2011 judgment.

5. Construed as a Motion for Relief Under Rule **60(b)(5)**, the Motion Would Still be **Untimely**

Rule 60(b)(5) provides that a court may grant relief from judgment if "the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated, or applying it prospectively is no longer equitable." Kraft does not allege that the judgment has been satisfied, released or discharged. Nor does he allege that it is based on an earlier judgment that has been reversed or vacated.

[19] The only way Kraft's motion can be construed as a 60(b)(5), then, is if he is contending that prospective application of the

judgment is no longer equitable. Even if the Court construed Kraft's motion as a 60(b)(5), however, it would still be untimely: a 60(b)(5) motion must be filed within a reasonable time under the circumstances. Whatever errors Kraft believes this Court made in its terminating-sanction opinion or any earlier ruling, he was aware of those alleged errors at the time this Court entered judgment, whether or not anything had yet led him to speculate that the alleged errors were caused by this judge's medical condition. Thus, construed as a 60(b)(5) motion, this motion was not filed within a reasonable time and thus would be untimely.

6. KRAFT CANNOT HAVE THIS MOTION HEARD AS A RULE 60(b)(6) MOTION

Fed. R. Civ. P. 60(b)(6) provides that in addition to the grounds set forth in subsections (1) through (5), a federal court may grant relief from judgment for "any other reason" that justifies such relief.

[20] A party may not seek relief from judgment under 60(b)(6), however, on any ground that is already specifically enumerated in 60(b) subsections (1) through (5). *See Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012) (" 'In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified*, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.' ") (quoting *Klapprott v. U.S.*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949)) (emphasis added); *see also In re Macklin*, 2015 WL 1945160, *17 (E.D. Cal. Bankr. Apr. 8, 2015) ("The other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, ...") (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)), *aff'd sub nom. Macklin v. Deutsche Bank Nat'l Trust Co*, 2015 WL 9274103 (E.D. Cal. Dec. 21, 2015); *accord Branca v. Security Benefit Line Ins. Co.*, 773 F.2d 1158, 1164 (11th Cir. 1985) ("[M]otions under 60(b)(6)", the catch-all provision, "may not be supported by the same reasons that might support a motion under" the more specific provisions) (applied in context of a Rule 60(b)(2) motion); *see also Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (applied in context of a Rule 60(b)(1) motion)). "This is true even where the movant cannot satisfy the requirements of the specific subsection [60(b)(1) through (5)]." *U.S. v. Lopez*, 2016 WL 742111, *2 (S.D. Ala. Feb. 24, 2016) (citing *Solaroll Shade & Shutter Corp. v. Bio–Energy Sys., Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986)).

Thus, because Rule 60(b)(1) alone specifically governs relief from judgment for mistakes of law, 60(b)(2) alone specifically governs relief for newly discovered evidence, 60(b)(3) alone specifically governs relief due to fraud, and 60(b)(5) alone specifically governs relief due to the inequity of prospective enforcement, Kraft may not seek relief from judgment on any of those grounds pursuant to the catch-all provision, Rule 60(b)(6).

***413 This determination is consistent with the principle that parties should not be allowed to circumvent the bright-line one-year time limit applicable to 60(b)(1) through (3) motions by characterizing their motions for relief from judgment as 60(b)**

(6) motions, which are subject only to a "reasonable time" requirement. *See Walsh v. U.S.*, 639 Fed.Appx. 108, 111 (3d Cir. 2016) (per curiam) ("The basis for his motion was more suited for the new[-]evidence provision of Rule 60(b)(2), but such motions must be filed within one year of the entry of judgment. Walsh's motion, filed more than six years after judgment, was too late for such relief. *He cannot avoid that time bar by resorting to Rule 60(b)(6).*") (citing *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975) and *Arrieta v. Battaglia*, 461 F.3d 861, 865 (7th Cir. 2006) ("[I]f the asserted ground for relief falls within one of the enumerated grounds ... subject to the one-year time limit of Rule 60(b), relief under the residual provision of Rule 60(b)(6) is not available.")) (emphasis added).

Moreover, our Circuit's precedent forecloses Kraft from seeking relief pursuant to 60(b)(6) for a second, independent reason. Interpreting *Ackermann* (U.S. 1950), our Circuit has explained as follows:

> The Supreme Court first addressed Rule 60(b)(6) in *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949), stating, "[i]n simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." [*Id.*] at 614–15, 69 S.Ct. 384 ....
>
> Thereafter, in *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950), the Supreme Court somewhat narrowed the scope of the rule, holding that it would not provide relief for a "free, calculated, deliberate choice [ ]" not to appeal, where "[n]either the circumstances of [movant] nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60(b)(6)." 340 U.S. at 198, 202, 71 S.Ct. 209.
>
> This Court has held that "[i]n order to bring himself within the limited area of Rule 60(b)(6) a [movant] is required to establish the existence of extraordinary circumstances which prevented [him from prosecuting] or rendered him unable to prosecute an appeal."

Mackey, 682 F.3d at 1251 (paragraph breaks added) (quoting *Martella v. Marine Cooks & Stewards Union, Seafarers Int'l Union of North America, AFL-CIO*, 448 F.2d 729, 730 (9th Cir. 1971)).

[21] Under this demanding standard, a Rule 60(b) movant who failed to appeal from the judgment, must show that the extraordinary " 'circumstances ... essentially made the decision not to appeal an involuntary one.' " *Salazar v. DC*, 633 F.3d 1110, 1121 (D.C. Cir. 2011) (quoting *Twelve John Does v. DC*, 841 F.2d 1133, 1141 (D.C. Cir. 1988)); *see also Walker v. Puget Sound Naval Shipyard*, 2015 WL 519741, *2 (W.D. Wash. Feb. 6, 2015) (" 'The residual clause, like Rule 60(b) generally, is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause.").

[22] According to our Circuit's precedents applying *Klapprott* (U.S. 1950) and *Martella* (9th Cir. 1971), gross negligence by counsel which is so serious as to amount to "virtual abandonment" can be an extraordinary

circumstance justifying relief from a default judgment under Rule 60(b)(6). *See Community Dental Servs. v. Tani*, 282 F.3d 1164, 1169–71 (9th Cir. 2002) ("*Tani* ")[5]; *see* ***414** *also Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097 (9th Cir. 2006) (limiting scope of *Tani*); *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (relief from judgment was warranted under Rule 60(b)(6) due to counsel's failure to prosecute).

5 *Accord Salazar*, 633 F.3d at 1121 (citing *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234 (**D.C. Cir.** 1964)); *Boughner v. Sec'y of HEW*, 572 F.2d 976, 978 (**3d Cir.** 1978), *cited by Gallagher v. Farm Family Ins. Co.*, 2016 WL 158520, *2 (D.N.J. Jan. 12, 2016) (13-month delay in filing motion for relief from judgment was caused not by movant but by counsel, where plaintiff "made repeated unsuccessful attempts to contact his former attorneys, was 'always ready, willing, and able to provide the [required] information,' and was not even notified that his case had been dismissed until about five months after this Court's Order.").; *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 398–404 (**5th Cir.** Unit A 1981) (district court abused its discretion in denying relief from judgment where "unbeknowst to these two defendants, their counsel later withdrew from the case, and the defendants were consequently absent from and unrepresented at trial", leading the district court to strike those defendants' pleadings and enter default judgment against them, and the movants "immediately retained new counsel" and moved for relief as soon as they learned of the judgment); *Shepard Claims Serv., Inc. v. Wm. Darrah & Assocs.*, 796 F.2d 190, 195 (**6th Cir.** 1986) (Lively, C.J.).

[23] There is also persuasive authority that a party who failed to appeal a judgment may nonetheless seek relief from judgment pursuant to Rule 60(b)(6) if he shows that he suffered from a confluence of a disabling illness *and* a severe lack of financial resources during the appeal period, but not if he merely shows financial hardship alone or a medical problem alone. *See Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987).

Kraft has not identified any extraordinary circumstance which prevented him from timely appealing the judgment shortly after it was entered and thereby raising any alleged legal or factual errors to the Circuit. He has not shown that circumstances were so extraordinarily difficult that his decision not to appeal the June 2011 judgment was "involuntary", *Salazar*, 633 F.3d at 1121. *Cf. Hale d/b/a Data Base Techs. v. Belton Assocs., Inc.*, 305 Fed.Appx. 987, 989 (4th Cir. 2009) ("Here, there was no abuse of discretion. Under the cited authorities [including *Ackermann*], Hale's negligent failure to not[ic]e a timely appeal from the district court's final order precluded relief under Rule 60(b). This case simply does not present exceptional circumstances...."). As noted above, any error by the Magistrate or by this Judge was made in the judgment and opinion issued on June 22, 2011, and would have been recognizable as arguable reversible error immediately.

[24] Rune Kraft does not claim that his asserted bases for relief from judgment came into being only upon the issuance of new binding precedent by the Supreme Court or our Circuit in the period between the entry of judgment and his filing of this motion. In any event, "the Supreme Court [has] noted that '[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).' " *Gates v. Ryan*, 2011 WL 6369731, *2 (D. Ariz. Dec. 20, 2011) (quoting *Agostini v. Felton*, 521 U.S. 203, 239, 117 S.Ct. 1997, 2018, 138 L.Ed.2d 391 (1997)), *COA denied*, No. 12–15011 (9th Cir. Feb. 17, 2012).

Therefore, the Court is unable to construe the motion as one for relief from judgment under Rule 60(b)(6) (subject only to a "reasonable time" filing requirement) rather than Rule 60(b)(3) (subject to a strict bright-line limit of one year after the entry of judgment). [6]

6 Alternatively, plaintiffs to point Ninth Circuit Judge Kozinski's warning against using Rule 60(b)(6) as a way to set aside a judgment based on a "perceived lack of mental competence" because that could serve as "[a]n open invitation to parties to rummage through the health records of judges who ruled against them five, ten, even twenty years ago, in the hope of coming up with a more compelling showing—or a district judge more receptive to the idea of reopening past judgments." *U.S. v. State of Washington*, 98 F.3d 1159, 1167 (9th Cir. 1996) (Kozinski, J., concurring). "This," cautioned Judge Kozinski, "is very bad medicine." *State of Washington*, 98 F.3d at 1167 (Kozinski, J., concurring).

Plaintiffs contend that Kraft's motion "embodies exactly this type of improper probe" into a judge's alleged medical impairments. *See* Doc 286 at 13. *Cf. U.S. v. State of Washington*, 19 F.Supp.3d 1184, 1189, 1191 (W.D. Wash. 1995) (Rothstein, J., joined by Rafeedie, J.) ("The ... Tribes now move to reopen the judgment of March 23, 1979 pursuant to Fed. R. Civ. P. 60(b)(6) for the purpose of conducting discovery into the state of Judge Boldt's mental health at the time he rendered his decision. The motion is prompted by an article published on June 11, 1992 by the Seattle Post-Intelligencer which states that, according to Judge Boldt's death certificate issued in March of 1984, he suffered the onset of Alzheimer's Disease on 1978, the year before the decision at issue was made. * * * The Court concludes that the moving tribes have failed to demonstrate the existence of any extraordinary circumstances which would warrant reopening the final order ... for the purpose of conducting discovery into Judge Boldt's mental health.").

Cf. also No. Beverly Park Homeowners Ass'n v. Bisno, 147 Cal.App.4th 762, 782, 54 Cal.Rptr.3d 644, 659 (Cal. App. 2007) (affirming denial of a party's post-judgment motion to dissolve a permanent injunction) ("[W]e find no reasonable basis to

> permit the Bisnos to depose the trial judge's wife, or to obtain his medical records. [E]ven if we assume the remedy of dissolving the permanent injunction ... is available [under 60(b)] on the basis of the trial judge's mental infirmity, the Bisnos have made no showing to reasonably suggest that such an infirmity infected the issuance of the permanent injunction in their case. Absent such a showing, the Bisnos[']request for discovery is nothing more than an attempt 'to rummage through the health records of a judge who ruled against them ... in the hope of coming up with a more compelling showing.") (brackets omitted), *reh'g denied* (Cal. App. Mar. 2, 2007), *rev. den.* (Cal. May 16, 2008). **Having concluded that Kraft may not seek 60(b)(6) relief for other reasons, the Court need not rely on Kozinski's public-policy argument against considering 60(b)(6) relief** when a losing party makes a belated self-serving claim that a judge's medical condition led to the alleged errors in her decision.

***415** THE COURT LACKS JURISDICTION OVER AN UNTIMELY RULE 60(b) MOTION

The Court has determined above that Kraft's motion cannot be construed as arguing voidness under 60(b)(4) or inequitable prospective enforcement under (b)(5) and cannot be treated as a motion under the catchall, (b)(6). The Court then determined that the motion is untimely if construed as seeking relief under any of the other three subdivisions of: (b)(1) (mistake of law etc.), (b)(2) (newly discovered evidence), or (b)(3) (fraud).

[25] A court is required to dismiss an untimely Rule 60(b) motion for relief from judgment for lack of subject-matter jurisdiction. *See Norwood v. Vance*, 517 Fed.Appx. 557 (9th Cir. 2013) ("To the extent that Norwood's motion seeks relief under Rule 60(b)(1) or Rule 60(b)(3), the district court lacked jurisdiction to consider it because Norwood filed the motion more than one year after judgment was entered.") (citing *Nevitt v. U.S.*, 886 F.2d 1187, 1188 (9th Cir. 1989) (district court lacks jurisdiction to consider an untimely motion for relief from judgment)), *cert. denied*, —— U.S. ——, 134 S.Ct. 1344, 188 L.Ed.2d 349 (2014); *see also Burton v. Spokane Police Dep't*, 517 Fed.Appx. 554, 555 (9th Cir. 2013) (same); *SEC v. Amundsen*, 470 Fed.Appx. 651, 652 (9th Cir. 2012) (same); *De Adams v. Hedgpeth*, 2015 WL 114163, *3 (C.D. Cal. Jan. 7, 2015) ("The judgment challenged by the instant motion was entered in March 2012, and petitioner did not file the instant motion until December 2014, more than two and a half years later. Accordingly, to the extent that the motion seeks relief from judgment pursuant to Rule 60(b)(1)..., the motion is untimely and the Court would lack jurisdiction to consider it.").

THE COURT CANNOT REACH THE MERITS OF THE RULE 60(b) MOTION

As noted above, Rune Kraft's motion for relief from judgment is untimely, and the Court lacks subject-matter jurisdiction over untimely motions for relief from judgment. *See, e.g., Abet Justice, LLC v. America First Credit Union*, 2015 WL 4110800, *1 (D. Nev. July 7,

2015) ("A district court lacks jurisdiction over an untimely Rule 60(b)(2) motion.") (citing *Nevitt v. U.S.*, 886 F.2d 1187, 1188 (9th Cir. 1989)).

[26] Where the Court lacks jurisdiction over a motion for relief from judgment, the Court may not reach the merits of the motion. *See Mayhan v. Ryan*, 2012 WL 122783, *2 (D. Ariz. Jan. 17, 2012) ("Before the Court can reach the merits of any Rule 60(b) issue, the petitioner must first meet the rule's requirement that such a motion be brought in a timely manner, ..., *Gonzalez* [*v. Crosby*], 545 U.S. [524] at 535 [125 S.Ct. 2641, 162 L.Ed.2d 480 (2005)], and he has not made such a showing.") (other internal citation omitted); *cf. In re Stephen Lee Beck and Donita M. Beck, Debtors*, BAP No. NC–15–1095–JuKuW, 2016 WL 399455, *7 (9th Cir. BAP Feb. 1, 2016) ("If a Civil Rule 60(b)(1) motion is untimely, the bankruptcy court lacks jurisdiction to consider the merits of the motion."); *cf. Baugh v. Holder*, 2015 WL 3946897, *2 (D. Or. June 29, 2015) (noting District Judge's explanation "that even if the court had jurisdiction to rule on Baugh's Rule 60(b) motion, he declined to address the merits of that motion because it was untimely ***416** filed."), *app. dis.*, No. 15–35693 (9th Cir. Dec. 31, 2015).

RULE 60(d) IS OF NO AVAIL TO KRAFT HERE

Federal Rule of Civil Procedure 60(d), Other Powers to Grant Relief, provides in its entirety as follows:

> This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
>
> (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
>
> (3) set aside a judgment for fraud on the court.

Kraft has moved for relief from judgment in the same action where the judgment was rendered; he has not filed an independent action to relieve him from judgment, so 60(d)(1) is inapposite. *Accord Taylor v. U.S.*, 2014 WL 1652348, *2 (E.D. Mo. Apr. 24, 2014) ("As a threshold matter, movant has not filed an independent action, but rather has filed a motion in his closed § 2255 matter. Movant therefore does not invoke Rule 60(d) and is not entitled to relief under it."), *aff'd*, No. 14–2066 (8th Cir. July 1, 2014); *Best v. U.S.*, 2010 WL 3782160, *2 (N.D. Ind. Sept. 22, 2010) ("First, the Court notes that Best has not filed an "independent action," but rather has filed a motion in this terminated § 2255 matter. Thus, he has not properly invoked Rule 60(d)(1)."") (citing *Bailey v. City of Ridgeland*, 2008 WL 4793738, *2 (S.D. Miss. Oct. 30, 2008) ("[B]ecause Bailey has not filed an independent action, he is not entitled to relief under Rule 60(d)(1).")).

In any event, FRCP " '60(d)(1) is not an affirmative grant of power but merely allows continuation of whatever power the court would have had to entertain an independent action [for relief from judgment] if the rule had not been adopted.' " *Bailey v. U.S.*,

2013 WL 6800900, *2 (D. Ariz. Dec. 23, 2013) (quoting 11 Wright, Miller & Kane, Fed. Prac. & Proc. § 2868 (3d ed. Apr. 2013) (cite omitted)). *Accord U.S. v. Guillory*, 2013 WL 4782211, *8 (W.D. La. Sept. 5, 2013) ("To the extent that petitioner also argues that this Court should have granted relief under the independent[-]action doctrine set forth in Rule 60(d), that claim is without merit. '[60(d)(1)] is not an affirmative grant of power....") (citing *Hess v. Cockrell*, 281 F.3d 212, 217 (5th Cir. 2002)).

As for Rule 60(d)(2), it merely states that Rule 60 does not limit the power that the court otherwise already had—before the enactment of Rule 60(b)—to grant relief to a defendant who was not personally notified of an action (which does not apply here). As a sister court cogently explained,

> Rule 60(d)(2)... merely confirms a district court's power "to grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action." This statute applies to actions to enforce a lien or claim to property, or to remove an encumbrance or cloud on title to property, where a defendant cannot be served within the state and does not voluntarily appear. The statute authorizes an absent defendant who was not personally served or notified of an order to appear, to have a judgment adjudicating his interest in the property set aside within one year. *See* 28 U.S.C. § 1655. This statute and the reference to it in Rule 60(d)(2) have no bearing on this action or Plaintiff's motion to vacate the dismissal of his case.

Jones v. State of Oklahoma, 2014 WL 536008, *2 (W.D. Okla. Feb. 7, 2014) (DeGiusti, J.).

As for Rule 60(d)(3), it merely states that Rule 60 does not limit the power that the court otherwise already had—before the enactment of Rule 60(b)—to set aside a judgment for fraud on the court (which is one of the grounds on which Kraft seeks relief through the instant Rule 60(b) motion).

[27] [28] In other words, "Rule 60(d) is not an affirmative grant of power." *U.S. v. Brown*, 2013 WL 3742444, *6 (E.D. Pa. July 17, 2013). No part of 60(d) confers any authority to vacate a judgment that the court does not already have pursuant to statute, case law, or some *other* rule. As a sister court stated in a similar situation,

> [A]lthough [movant] calls his motion a motion under ***417** Federal Rule of Civil Procedure 60(d)(3), "Rule 60(d) merely reserves whatever power federal courts had prior to the adoption of Rule 60 to relieve a party of a judgment by means of an independent action according to traditional principles of equity,", i.e., Rule 60(d) does not itself offer the authority to bring an independent action to attack a judgment. *See* 12 ...Moore's Federal Practice § 60.80 (3d ed. 2007). * * *

U.S. v. Spikes, 2015 WL 5460567, *2 n.3 (E.D. Pa. Sept. 16, 2015); *see also U.S. v. Angle*, 2009 WL 1212240, *1 (E.D. Cal. May 5, 2009) ("Fed. R. Civ. P. 60(d)(3), although not a grant of power for reconsideration, recognizes the court's pre-existing power to set aside a judgment for fraud on the court.").

NO NEED TO ADDRESS PLAINTIFFS' EVIDENTIARY OBJECTIONS TO KRAFT'S MOTION

Inland filed "Evidentiary Objections to Declaration of Rune Kraft." Inland begins by stating as follows:

> Plaintiffs generally object to Kraft's declaration to the extent that it contains irrelevant and immaterial "testimony." For example, after declaring that "[Judge Fairbank] did not comprehend, ignored or forgot the particulars of this matter," paragraph 14 contains an additional 13 sentences, comprising 26 additional lines, of irrelevant material regarding the "efforts of every [Inland] employee and contractor" dating back to 1969. It is unclear how this information has any bearing on Kraft's "Request to Reopen Case."

Doc 288 at 2. **Plaintiffs proceed to assert two specific objections—Lacks Foundation and Lacks Personal Knowledge in Violation of Federal Rule of Evidence 602—to fourteen paragraphs of Kraft's declaration:**

Objection #1 is to Kraft Dec ¶ 3, where Kraft stated, "During interaction with attorneys in Los Angeles around January 15, 201, [sic], I learned that Judge Valerie Baker Fairbanks [sic] had been undergoing treatment for brain cancer while presiding over this legal matter."

Plaintiffs also object to Paragraph 3 as inadmissible hearsay in violation of Federal Rule of Evidence 602. Rule 602, entitled Need for Personal Knowledge, provides in its entirety as follows: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703." *See also* Fed. R. Evid. 801(a) through (c) (defining hearsay); Fed. R. Evid. 801(d) (excluding certain types of statements from the definition of hearsay that would otherwise meet the definition); Fed. R. Evid. 802, The Rule Against Hearsay ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court."), subject to the exceptions enumerated in Fed. R. Evid. 803; *cf., e.g., Amorosi v. Comp USA*, 2005 WL 66605, *4 (S.D.N.Y. Jan. 12, 2005) ("[A] litigant may be entitled to relief under subsection (6) where the neglect of an attorney results from mental illness or other severe personal problem. * * * In each of the cases referenced above, the party seeking relief under Rule 60(b)(6) or their [sic] counsel provided some *evidence* of the attorney's mental illness. In this case, however, plaintiff has not provided the Court with *any* evidence regarding extraordinary circumstances that would have prevented [counsel] from pursuing the case, and therefore the court finds that Plaintiff is not entitled to relief under this doctrine.") (first italics added).

Objection #2 is to Kraft Dec ¶ 4, where Kraft stated, "It is my testimony that this health condition and the treatment of the health condition according to my investigation of the website of The American Cancer Society renders a person unable to function normally and that a person's physical condition, mental

state of mind and level of competency would be greatly impaired. If that person was a judge the judicial officer would be unable to deal with all of the facts and the proper application of the law to the facts and thus perform the duties of the office fairly, impartially, intelligently, and diligently. [T]hat is what happened in this case."

*418 **Objection #3 is to Kraft Dec ¶ 5,** which stated, "[S]he forgot things, had trouble concentrating and trouble remembering details related to the acceptance of jurisdiction based on specific sworn in facts by me describing and supported by documentation showing that [KALP] was a Delaware limited partnership that had one General Partner, Vicarea Real Estate, Inc. (A Delaware corporation), and 4 limited partners (all Delaware corporations) and that I had at all times acted as an authorized representative of Vicarea Real Estate, Inc."

Objection #4 is to Kraft Dec ¶ 6, which stated, "[S]he forgot things, had trouble concentrating and trouble remembering details related to the fact that Vicarea ... was a licensed California real estate broker."

Objection #5 is to Kraft Dec ¶ 7, which stated, "[S]he forgot things, had trouble concentrating and trouble remembering details related to the fact that no broker agreement had been entered into."

Objection #6 is to Kraft Dec ¶ 8, which stated, "[S]he forgot things, had trouble concentrating and trouble remembering details related to the law in California which requires a broker agreement to be in writing."

Objection #7 is to Kraft Dec ¶ 9, which stated, "[S]he forgot things, had trouble concentrating and trouble remembering details related to the fact that Kraft Americas, L.P. and Vicarea Real Estate, Inc. sent a book account stated based upon an account in writing to Inland, Inc. reflecting the work performed."

Objection #8 is to Kraft Dec ¶ 10, which stated, "[S]he claimed powers her office does not have or ignored or forgot the powers of her office by retroactively appointing me the General Partner of Kraft Americas, L.P. when Vicarea Real Estate, Inc. had been the sole General Partner since September 23, 2005 and she had been presented with sworn in facts supported by documents showing this fact."

Objection #9 is to Kraft Dec ¶ 11, which stated, "[S]he believed that she had the power to rewrite the laws or ignored the laws or forgot the laws governing Delaware limited partnerships"

Objection #10 is to Kraft Dec ¶ 12, which stated, "[S]he forgot or ignored a book account stated based upon an account in writing."

Objection #11 is to Kraft Dec ¶ 13, where Kraft stated in general and conclusory fashion, "For example, she did not comprehend, ignored or forgot the basics of how American companies do business."

Objection #12 is to Kraft Dec ¶ 14, where Kraft stated in general and conclusory fashion, "For example she did not comprehend, ignored or forgot the particulars of this matter."

Objection #13 is to Dec ¶ 15, which stated, "[S]he forgot or ignored that I did not receive motions, rulings or orders and ... expressly informed her that I had not received any court filings since March 9, 2011."

Objection #14 is to Dec ¶ 16, which stated, "[S]he forgot or ignored that I demanded that the case be tried by a jury." The Court would note that in many instances, Kraft's assertion that the undersigned "forgot" or "could not comprehend" or "ignored" some principle of law, boils down merely to *disagreement* with this Court's deliberate interpretation and application of the applicable law.

In his response to the evidentiary objections, Kraft states in pertinent part as follows:

> 2. In Paragraphs 1 and 2 of the Declaration of Rune Kraft ..., he explicitly states that he makes this declaration on "own personal knowledge" as to "the facts contained herein."
>
> Since (a) his declarations are based on direct personal knowledge that (b) stem from his role as the Defendant in this legal matter and duly authorized representative of Kraft Americas, L.P., the Defendant and Counterclaimant in this legal matter and (c) Judge Valerie Baker Fairbank currently presides over this legal matter, Rune Kraft has therefore successfully laid a foundation for his knowledge which makes no claim to be, nor is it, based on hearsay, speculation, or impermissible opinions.
>
> ***419 * * ***
>
> 29. The evidence ... also: (a) have [sic] equivalent circumstantial guarantees of trustworthiness; (b) is offered as evidence of a material fact; (c) the statements are more probative on the point for which they are offered than any other evidence which the proponent can procure through reasonable efforts; and (d) the general purposes of the rules and the interests of justice will best be served by admission of the statements into evidence. Fed. R. Evid. 803, 804(b) and 807.

Doc 294 at 2 and 8. The remainder of Kraft's response, indeed the bulk of his response, has nothing to do with plaintiffs' objections to his declaration or the admissibility of that declaration. *See* Doc 294 at page 2 line 14 through page 7 line 26 (entitled "Standards for Considering Conduct of United States Judges").

The Court determined above that (1) Kraft failed to file his motion for relief from judgment within the time allowed by Federal Rule of Civil Procedure 60 subsection c, and (2) his motion's untimeliness deprives the Court of subject-matter jurisdiction. **Because the Court lacks jurisdiction to entertain the merits of Kraft's motion for relief from judgment, there is no need to address the**

plaintiffs' evidentiary objections to Kraft's declaration to the extent that the declaration goes to the merits. The Court will consider the plaintiffs' evidentiary objections only to the extent that the targeted paragraphs of Kraft's declaration may be relevant to timeliness or to application of the failure-to-appeal waiver rule.

First, none of the targeted paragraphs of Kraft's declaration was relevant to the Court's application of the rule that a party who fails to appeal thereby waives his right to seek relief from judgment under FRCP 60(b) later.

Of the paragraphs to which plaintiffs object, only paragraphs 3 and 4 of Kraft's declaration are arguably relevant to his motion's timeliness. For Kraft's sake, the Court has elected not to consider plaintiffs' objections to ¶¶ 3 and 4 of his declaration. Instead, the Court has assumed arguendo that paragraphs 3 and 4 are admissible, and the Court has considered those paragraphs. The Court therefore will deny plaintiffs' evidentiary objections.

In any event, nothing asserted in paragraphs 3 and 4 of Kraft's Declaration undermines the Court's determination that his motion for relief from judgment is untimely and barred by his failure to appeal.

Kraft's Comments About the Court "Forgetting" or "Ignoring" His Demand for a Jury Trial and His Allegedly Not Receiving Document Filed by Plaintiffs During Part of March 2011

Kraft's briefs state that the undersigned "forgot or ignored that [KALP and Kraft] demanded that the case be tried by a jury" and "are still waiting to receive any notices from the court as to the trial date and what happened to the trial." Doc 271 at 7 ¶ 15; *see also* Reply (Doc 293) at 20 ¶ 55 ("The [Judgment] further ignores that the defendant did not receive court filings and that Defendant demanded a jury trial.").

First, although Kraft has long had access to the complete docket sheet for this case to see which documents have been filed by the Court and by the parties, he still fails to identify which documents he allegedly never received. Kraft merely asserts, without specifying any document numbers, that the nefarious scheme of plaintiffs' counsel included "a series of filings (motions) falsely informing the court that the Defendant was notified and provided with copies of the filings when in truth and in fact the Defendant was not notified and/or provided copies of the filings." Doc 293 (Reply) at 23 ¶ 64. Without explaining why he could not check the docket to ascertain which documents he supposedly never received, Kraft writes only, "It is unknown to Defendant exactly how many, when and what the issues were" in those unidentified documents, *see id.* The only specific allegation by Kraft on this score is that he did not receive any documents that plaintiffs filed between March 9,2011 and March 31, 2011, as he had claimed in a notice sent to the Court on April 6, 2011. *See id.*

In any event, other than notices advising the Court of a change to the name and ***420** address of counsel's firm (Docs 175-177), the only documents plaintiffs filed between March 9 and 31, 2011 were their summary-judgment reply (Doc 171 filed March 9, 2011), a Report Re: Settlement (Doc 178 filed March 21, 2011),

and plaintiffs' opposition to Kraft's motion to void an interlocutory ruling due to "fraud on the court." As to plaintiffs' summary-judgment reply (Doc 171), Kraft had no right to file a sur-reply in any event. As to the mediation report (Doc 178), the Court neither required nor permitted the parties to file responses to that report. As to plaintiffs' opposition to Kraft's motion to void a ruling due to fraud, Kraft points to no authority giving him a right to reply, and the Court properly ruled on his "motion to void" as soon as it received plaintiffs' opposition.

Second, the Court's orders made perfectly clear what "happened to" to Kraft's demand for a jury trial: his willful and prolonged bad-faith litigation misconduct in this case, as determined by both the Magistrate and the undersigned, led to enter default judgment against Kraft as a sanction—a sanction this Court amply justified in its Terminating-Sanction Order over five years ago. After the entry of judgment that disposed of all claims and defenses as to all parties, there was no possibility of, and no need for, a trial (by jury or otherwise).

The very concept of a "trial" of claims, counterclaims, and defenses that have already been conclusively disposed of by entry of final judgment, is incoherent. *See, e.g., Gainey v. B'hood of Railway & Steamship Clerks*, 303 F.2d 716, 718 (3d Cir. 1962) ("Of course, technically there is no trial when summary judgment is granted."); *Wyden v. Comm'r of Patents & Trademarks*, 807 F.2d 934, 937 (Fed. Cir. 1986) ("Of course, there having been a summary judgment, there has been no trial."); *see generally Holland v. County of Macomb, Michigan*, 2016 WL 3569409, *3 (E.D. Mich. July 1, 2016) (" '[T]he lenient treatment generally accorded to pro se litigants has limits,' and such litigants are 'not automatically entitled to take every case to trial.' ") (quoting *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996)). Moreover, Kraft never filed a motion for reconsideration or an appeal arguing that this Court somehow violated his right to a jury trial.

KRAFT'S VIEW THAT THE COURT HAS KNOWLEDGE OF DISPUTED MATERIAL FACTS

Finally, Kraft filed a document entitled "Notice to Court About 28 U.S.C. Section 455(b)(1), Code of Conduct for United States Judges and Intent to Obtain the Testimony of Judicial Officers and Other Individuals" (Doc 295). Kraft explains that he will need to seek testimony from the undersigned judge, from physicians, from two former chief judges of this court (Aubrey Collins 2009-2012 and George King 2012-2016), from a retired magistrate judge "and his clerk", and from court staff who previously worked with the undersigned judge. *See* Doc 295 at 2 ¶ 1. Kraft appears to be arguing that he needs their testimony in order to demonstrate that the undersigned judge should recuse or be disqualified because the undersigned has knowledge of the disputed facts that Kraft has asserted in his Rule 60(b) declaration. Kraft writes in part as follows:

> 2. *Plaintiffs have filed evidentiary objections —... Document 288 ...—and Defendant disagrees with the filed evidentiary objections.*

3. Judge Valerie Baker Fairbank has personal knowledge of the disputed evidentiary facts and the facts concern this proceeding.

4. The other individuals named in paragraph 1 above also have relevant knowledge.

5. 28 U.S. Code section 455(b)(1) states that *a judge shall disqualify himself*"*Where he has* a personal bias or prejudice concerning a party, or *personal knowledge of disputed evidentiary facts concerning the proceeding.*"

6. The Code of Conduct for United States Judges state that "a judge shall accord to every person" ... "the full right to be heard":

Canon 3A(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. ***421** Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. * * *

Canon 3B(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

Canon 3B(5). [sic] Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, ... Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be honest with disciplinary authorities.

Doc 295 at 2 ¶¶ 2-6 (emphasis added). As noted above, the Court has dismissed the plaintiffs' evidentiary objections to Kraft's declaration and has not stricken any of Kraft's declaration.

The Court has also considered whether Kraft may be attempting, however inartfully, to make the broader argument that he needs testimony from the individuals mentioned in order to prove the *merits* of his motion for relief from judgment. To the extent that Kraft is making such an argument, it fails because the Court lacks jurisdiction to consider the merits of the motion as stated above.

For all the foregoing reasons, the Court will dismiss Kraft's Rule 60(b) motion with prejudice.

THE COURT MAY NOT SERVE AS AN ADVOCATE OR PARALEGAL FOR ANY PARTY

Kraft concludes his reply with a footnote **asserting that "if there is any possible theory that would entitle the Defendant to relief, even one that Defendant hasn't thought of, the court should consider it." Doc 293 at 33 n.9. Kraft cites no authority for this assertion, and the Court finds none.**

It was plaintiffs' burden to show that they were entitled to relief on their claims under a cognizable legal theory properly applied to

the demonstrated facts. By the same token, it was a defendant's burden to show that he was entitled to relief on any counterclaims. As to this motion, it is Kraft's burden to show he is entitled to relief from judgment under a cognizable legal theory and consistent with the FRCP and cases interpreting them.

[29] If the Court had acted as an advocate or researcher for either side, it would contravene a court's fundamental duty to be impartial. This was true during the proceedings leading to the judgment, and it is true in proceedings on this post-judgment motion. "The Supreme Court has made it clear that the Court has 'no obligation to act as counsel or paralegal to pro se litigants.' " *Davis v. Riverside County Sheriff's Dep't*, 2016 WL 1642558, *5 (C.D. Cal. Apr. 25, 2016); *see also Mir v. Kirchmeyer*, 2016 WL 2745338, *5 (S.D. Cal. May 11, 2016) ("[I]n giving liberal interpretation to a pro se complaint, the court is not permitted to 'supply essential elements of the claim that were not initially pled.' ") (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)); *Lambert v. Mecklenburg Cty.*, 2016 WL 3176593, *2 (W.D.N.C. June 2, 2016) (" '[A]lthough district courts must liberally construe pro se complaints, courts cannot act as the pro se plaintiff's advocate and cannot develop claims which the plaintiff failed to clearly raise on the face of the Complaint.' ") (citing, *inter alia*, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978)); *see, e.g., Biers v. Wash. State Liquor & Cannabis Board*, 2016 WL 3079025, *9 (W.D. Wash. June 1, 2016) ("[T]he Court is under no obligation to ... scour large portions of Mr. Biers' complaint to find support for his conclusory statements, nor will the Court attempt on its own to piece together plausible claims from Mr. Biers' voluminous allegations.").

[30] If Kraft failed to include or cite to any relevant factual allegations, legal theories, or authorities in this motion, the Court may not supply such for him. With ***422** the exception of subject-matter jurisdiction, the court is obligated and authorized to address only those claims and issues that have been expressly pled. *See, e.g., 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) ("Because Robinson never pleaded breach of express and implied trust, the district court did not err in failing to consider them.").

[31] A district court may not "conjure up questions not squarely presented" by the parties' submissions, *see Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985), **and the Court " 'need not argue a pro se litigant's case nor create a case for the pro se' ",** *Campbell v. Accounts Receivable Mgmt.*, 2016 WL 3212084, *1 (E.D.N.Y. June 8, 2016) (citation omitted). *Accord Fesenmeyer v. City of Kansas City, Mo.*, 2016 WL 3167264, *1 (W.D. Mo. June 6, 2016) ("[A] court 'need not supply additional facts' nor 'construct a legal theory ... that assumes facts that have not been pleaded.' ") (quoting *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989)), *app. filed*, No. 16–2997 (8th Cir. June 30, 2016). *Cf. Holland v. Macomb Cty., Mich.*, 2016 WL 3569409, *3 (E.D. Mich. July 1, 2016) (even where the litigant is pro se, " 'courts should not have to guess at the nature of the claim asserted.' ") (quoting *Frengler v. GM*, 482 Fed.Appx. 975, 976–77 (6th Cir. 2012)); *Martin v. Harshman*, 2016 WL 3196667, *1 (D.

Md. June 9, 2016) (while a court "must hold [a] pro se complaint to less stringent standards than pleadings drafted by attorneys and must read the complaint liberally", the court "need not look beyond the complaint's allegations") (quoting *White v. White*, 886 F.2d 721, 722–23 (4th Cir. 1989)).

ORDER

Defendant Rune Kraft's Fed. R. Civ. P. 60(b) motion to vacate the June 22, 2011 judgment [Doc #280] is DISMISSED with prejudice for lack of subject-matter jurisdiction because the motion is untimely and because the motion is barred by his failure to appeal from said judgment.

Plaintiffs' "Evidentiary Objections to Declaration of Rune Kraft in Support of Request to Reopen Case" **[Doc #288] are DISMISSED**.

Any motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) must be filed within twenty-eight calendar days of the date of this order. *See Amerson v. Kindredcare, Inc.*, 606 Fed.Appx. 371, 372 (9th Cir. 2015) ("The time period for filing a Rule 59(e) motion is jurisdictional and cannot be extended by the court.") (citing Fed. R. Civ. P. 6(b) and *Carter v. U.S.*, 973 F.2d 1479, 1488 (9th Cir. 1992)).

Any motion for reconsideration must comply with Local Civil Rule 7-18." [7]

7 By operation of FRAP4(a)(4), the filing of a timely Rule 59(e) motion for reconsideration of today's Order will defer the time to appeal today's Order. *See The York Group, Inc. v. Wuxi Taihu Tractor Co., Ltd.*, 632 F.3d 399, 401 (7th Cir. 2011) (citing, *inter alia*, 16A Wright, Miller, Cooper, & Struve, Fed. Prac. & Proc. § 3950.4 (2d ed. 2008)). FRAP 4(a)(4)(A)(iv) provides that "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion[.]"

Kraft should **not** file another Rule 60(b) motion on grounds already stated in the instant motion. *Accord Smith v. Siarnicki*, 397 Fed.Appx. 250, 252 (7th Cir. 2010) (affirming denial of motion for relief from judgment, "If Smith was dissatisfied with the district court's ruling on his first postjudgment motion, then his recourse was to appeal to this court, not to file a second motion raising similar arguments.") (internal citation omitted).

This is an immediately appealable order. *See Zurich No. Am. v. Matrix Service, Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).[8] IT IS SO ORDERED.

8 An appeal from the denial of a 60(b) motion, however, is not a means to challenge the underlying decision. *See Blue v. IBEW Local Union 159*, 676 F.3d 579, 584 (7th Cir. 2012); *U.S. v. Booker*, 352 Fed.Appx. 102, 103 (7th Cir. 2009) ("[I]n reviewing the denial of a 60(b) motion, an appellate court does not have jurisdiction to review arguments attacking the merits of the underlying decision that could have been raised on direct appeal.") (citing

Browder v. Director, Dep't of Corrs. of Ill., 434 U.S. 257, 263 n.7, 98 S.Ct. 556, 560 n.7, 54 L.Ed.2d 521 (1978)). "The only reviewable decision is that on the Rule 60(b) motion itself. Antecedent decisions cannot be reviewed, because they were final and the time to appeal expired." *York Group*, 632 F.3d at 401 (cite omitted).

All Citations

318 F.R.D. 383

Legal Authority R-LA-12

24 Cal.App.5th 537
Court of Appeal, Fourth
District, Division 1, California.

Vincent KROLIKOWSKI,
Plaintiff and Appellant,
v.
SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM,
Defendant and Respondent.
Connie Van Putten,
Plaintiff and Appellant,
v.
San Diego City Employees' Retirement System, Defendant and Respondent.

D071119
|
Filed 5/23/2018

Synopsis

Background: Members of city employees' retirement system who were receiving monthly pension payments brought separate actions against retirement system, seeking declaratory relief and writ of mandate and alleging conversion and breach of fiduciary duty stemming from retirement system's recoupment of overpayments. Following sustaining of demurrer as to tort claims and bench trial of consolidated actions, the Superior Court, San Diego County, Nos. 37–2015–00006255–CU–OE–CTL and 37–2015–00021007–CU–OE–CTL, entered judgment in favor of retirement system. Members appealed.

Holdings: The Court of Appeal, Irion, J., held that:

[1] breach of fiduciary duty claim was based on discretionary acts, and therefore system had discretionary act immunity under Government Claims Act;

[2] conversion claim was also based on discretionary acts, and therefore system had discretionary act immunity under Government Claims Act;

[3] fact that breach of fiduciary duty claim was based on constitutional provision did not preclude application of immunity to claim;

[4] system permissibly sought to recoup overpayments through its own internal administrative process rather than by filing a lawsuit;

[5] even if three-year statute of limitations applied to recoupment of overpayments, system did not discover facts constituting mistake, as would trigger accrual of limitations, until date system conducted audit; and

[6] evidence was sufficient to support finding that system had not been apprised, prior to audits, of incorrect payments, as would support finding that system was not equitably estopped from recouping overpayments.

Affirmed.

Procedural Posture(s): On Appeal; Judgment; Demurrer to Complaint.

West Headnotes (35)

[1] **Appeal and Error** Objections and exceptions; demurrer

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)4 Pleading
30k3279 Objections and exceptions; demurrer

On appeal from an order of dismissal after an order sustaining a demurrer, Court of Appeal's standard of review is de novo, that is, it exercises its independent judgment about whether the complaint states a cause of action as a matter of law.

5 Cases that cite this headnote

[2] **Appeal and Error** Objections and exceptions; demurrer

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3892 Pleading
30k3895 Objections and exceptions; demurrer

On appeal from an order of dismissal after an order sustaining a demurrer, Court of Appeal must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable.

7 Cases that cite this headnote

[3] **Appeal and Error** Pleadings

30 Appeal and Error
30XVI Review
30XVI(H) Theory and Grounds of Decision Below and on Review
30k4065 Particular Orders or Rulings Below, Theory and Grounds Supporting
30k4068 Pleadings

On appeal from an order of dismissal after an order sustaining a demurrer, Court of Appeal may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling.

7 Cases that cite this headnote

[4] **Public Employment** Discretionary function immunity

316P Public Employment
316PXI Liabilities
316PXI(A) In General
316Pk896 Privilege or Immunity; Good Faith
316Pk901 Discretionary function immunity

Discretionary act immunity for public employees is reserved for those basic policy decisions which have been expressly committed to coordinate branches of government and as to which judicial interference would thus be unseemly. Cal. Gov't Code § 820.2.

[5] **Public Employment** Discretionary function immunity

316P Public Employment
316PXI Liabilities
316PXI(A) In General
316Pk896 Privilege or Immunity; Good Faith
316Pk901 Discretionary function immunity

There is no basis, under discretionary act immunity afforded to public employees, for immunizing lower-level, or ministerial, decisions that

merely implement a basic policy already formulated. Cal. Gov't Code § 820.2.

[6] **Public Employment** Discretionary function immunity

316P Public Employment
316PXI Liabilities
316PXI(A) In General
316Pk896 Privilege or Immunity; Good Faith
316Pk901 Discretionary function immunity

The application of discretionary act immunity for a public employee requires a showing that the specific conduct giving rise to the suit involved an actual exercise of discretion, that is, a conscious balancing of risks and advantages. Cal. Gov't Code § 820.2.

[7] **Public Employment** Discretionary function immunity

316P Public Employment
316PXI Liabilities
316PXI(A) In General
316Pk896 Privilege or Immunity; Good Faith
316Pk901 Discretionary function immunity

For application of discretionary act immunity to a public employee, there is no requirement that the public employee's exercise of discretion be based on a strictly careful, thorough, formal, or correct evaluation, because such a standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy. Cal. Gov't Code § 820.2.

[8] **Fraud** Defenses
Municipal Corporations Pensions and benefits

184 Fraud
184II Actions
184II(A) Rights of Action and Defenses
184k36 Defenses
268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits

Breach of fiduciary duty claim against city retirement system by members of system was based on discretionary acts by retirement system board, and therefore system had discretionary act immunity under Government Claims Act, where complaint alleged that board members refused to follow state law regarding statute of limitations and exempting pensions from levy or attachment, and this act was based on board's careful evaluation of issues at board meetings in which it considered members' appeals. Cal. Gov't Code § 820.2.

[9] **Conversion and Civil Theft** Privilege and immunity
Municipal Corporations Pensions and benefits

97C Conversion and Civil Theft
97CII Actions

97CII(A) Right of Action and Defenses
97Ck129 Defenses
97Ck137 Privilege and immunity
268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits

Conversion claim against city retirement system by members of system was based on discretionary acts by retirement system board, and therefore system had discretionary act immunity under Government Claims Act, where claim was based on system's refusal to return recouped overpayments after members demanded return of those funds, and such refusal was based on board's careful consideration of issues such as whether law required recoupment and whether it would be fair to proceed in that manner. Cal. Gov't Code § 820.2.

[10] Fraud Defenses

Municipal Corporations Pensions and benefits

184 Fraud
184II Actions
184II(A) Rights of Action and Defenses
184k36 Defenses
268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits

Fact that breach of fiduciary duty claim asserted by members of city employees' retirement system against system was based on constitutional provision, which established that members of public pension board were fiduciaries, did not preclude application of Government Claims Act immunity to claim; constitutional provision said nothing about creating liability for money damages against public pension plan members in instances when such liability would otherwise be barred by statutory governmental immunity. Cal. Const. art. 16, § 17; Cal. Gov't Code § 815.2(b).

1 Cases that cite this headnote

[11] Constitutional Law Statutory abrogation of constitutional right

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k658 Statutory abrogation of constitutional right

Under the "constitutional supremacy doctrine," a statute cannot trump the constitution.

[12] Constitutional Law Constitution as supreme, paramount, or highest law

92 Constitutional Law
92I Nature and Authority of Constitutions
92k502 Constitution as supreme, paramount, or highest law

When the constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state.

[13] Municipal Corporations Pensions and benefits

Public Employment Recovery Back of Payments; Overpayment

Public Employment Time for proceedings; limitations

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits
316P Public Employment
316PVII Employment Practices
316PVII(H) Pensions and Benefits
316Pk411 Recovery Back of Payments; Overpayment
316Pk412 In general
316P Public Employment
316PVIII Proceedings
316PVIII(E) Actions
316Pk794 Time for proceedings; limitations

Recoupment of overpayments from city employees' retirement system members, by retirement system, was not controlled by three-year statute of limitations applicable to causes of action based on mistake, where retirement system sought recoupment through its own internal administrative process rather than by filing a lawsuit. Cal. Civ. Proc. Code § 338(d).

1 Cases that cite this headnote

[14] Municipal Corporations Pensions and benefits

Public Employment Recovery Back of Payments; Overpayment

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits
316P Public Employment
316PVII Employment Practices
316PVII(H) Pensions and Benefits
316Pk411 Recovery Back of Payments; Overpayment
316Pk412 In general

City employees' retirement system permissibly sought to recoup overpayments to its members through system's own internal administrative process rather than by filing a lawsuit, even though city had not expressly enacted any law stating that retirement system could take action to seek recoupment; retirement system generally had discretion to administer benefits in manner that it deemed was in best interest of system and members, and nothing in city's laws prevented use of administrative process for recoupment. Cal. Const. art. 16, § 17(a).

[15] Limitation of Actions Discovery of mistake

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k96 Mistake as Ground for Relief
241k96(2) Discovery of mistake

Even if three-year statute of limitations for actions based on mistake applied to city employees' retirement system's recoupment of overpayments from system members, system did not discover facts constituting the mistake, as

would trigger accrual of limitations period, until date that system conducted an audit and discovered that members' pension benefits had been incorrectly calculated, regardless of whether system previously had all the information available to conduct a correct calculation. Cal. Civ. Proc. Code § 338(d).

[16] Limitation of Actions Fraud or concealment of cause of action

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k194 Evidence
241k195 Presumptions and Burden of Proof
241k195(5) Fraud or concealment of cause of action

Under three-year limitations statute providing that a cause of action based on fraud or mistake does not accrue until discovery of facts constituting the fraud or mistake, a plaintiff must affirmatively excuse his or her failure to discover the fraud within three years after it took place, by establishing facts showing that he or she was not negligent in failing to make the discovery sooner and that he or she had no actual or presumptive knowledge of facts sufficient to put him or her on inquiry. Cal. Civ. Proc. Code § 338(d).

1 Cases that cite this headnote

[17] Equity Application of doctrine in general

150 Equity
150II Laches and Stale Demands
150k84 Application of doctrine in general

The party asserting laches bears the burden of production and proof on each element of the defense.

[18] Limitation of Actions Constructive notice of fraud

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k98 Fraud as Ground for Relief
241k100 Discovery of Fraud
241k100(13) Constructive notice of fraud

Means of knowledge are equivalent to knowledge, as would trigger accrual of a cause of action for mistake or fraud pursuant to discovery rule, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. Cal. Civ. Proc. Code § 338(d).

2 Cases that cite this headnote

[19] Limitation of Actions Diligence in discovering fraud

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k98 Fraud as Ground for Relief
241k100 Discovery of Fraud
241k100(11) Diligence in discovering fraud

Under the discovery rule for causes of action for mistake or fraud, a plaintiff is not barred because the

means of discovery were available at an earlier date provided he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period. Cal. Civ. Proc. Code § 338(d).

[20] Municipal Corporations Pensions and benefits

Public Employment Factors precluding recovery; waiver of overpayment

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits
316P Public Employment
316PVII Employment Practices
316PVII(H) Pensions and Benefits
316Pk411 Recovery Back of Payments; Overpayment
316Pk413 Factors precluding recovery; waiver of overpayment

Statutes exempting benefits under public retirement system from levy and attachment did not bar city employees' retirement system from recouping overpayments made to system members; retirement system did not have any money judgment against members regarding the overpayment and was not a judgment creditor. Cal. Civ. Proc. Code §§ 487.020, 695.040, 704.110(b).

1 Cases that cite this headnote

[21] Estoppel Essential elements

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.15 Essential elements

Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

5 Cases that cite this headnote

[22] Estoppel Estoppel Against Public, Government, or Public Officers

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.1 In general

Where a party seeks to invoke doctrine of equitable estoppel against a government entity, in addition to usual elements of equitable estoppel, an additional element applies; the government may not be bound by an equitable estoppel in same manner as a private party unless, in considered view of court of equity, the injustice which would result from failure to uphold an estoppel was of sufficient dimension to justify any effect upon

public interest or policy which would result from the raising of an estoppel.

3 Cases that cite this headnote

[23] Estoppel Questions for jury

156 Estoppel
156III Equitable Estoppel
156III(G) Trial
156k119 Questions for jury

The existence of an estoppel is generally a factual question.

3 Cases that cite this headnote

[24] Appeal and Error Estoppel and waiver

Appeal and Error Judgment in General

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)3 Procedural Matters in General
30k3236 Estoppel and waiver
30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3946 Judgment in General
30k3947 In general

Appellate court reviews the trial court's ruling on the existence of estoppel in the light most favorable to the judgment and determines whether it is supported by substantial evidence.

2 Cases that cite this headnote

[25] Estoppel Questions for jury

156 Estoppel
156III Equitable Estoppel
156III(G) Trial
156k119 Questions for jury

Where estoppel is sought against the government, the weighing of policy concerns is, in part, a question of law.

[26] Estoppel Municipal corporations in general

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.4 Municipal corporations in general

Evidence was sufficient to support bench trial finding that city employees' retirement system had not been apprised, prior to audits, of fact that it had been paying system members more pension benefits than they were entitled to receive, as would support finding that system was not equitably estopped from recouping overpayments after audits showed error; there was no evidence that anything occurred prior to audits that raised system's suspicions, and system's chief benefits officer testified that system first discovered the errors during the audits.

[27] Estoppel Knowledge of facts

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k54 Knowledge of facts

For the purposes of the first element of equitable estoppel, the party to be estopped need not have actual knowledge of the true facts; instead, it may be shown that the party,

although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge will be imputed to him.

3 Cases that cite this headnote

[28] **Municipal Corporations** Pensions and benefits

Public Employment Factors precluding recovery; waiver of overpayment

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(C) Agents and Employees
268k220 Compensation
268k220(9) Pensions and benefits
316P Public Employment
316PVII Employment Practices
316PVII(H) Pensions and Benefits
316Pk411 Recovery Back of Payments; Overpayment
316Pk413 Factors precluding recovery; waiver of overpayment

Evidence was sufficient to support bench trial finding that city employees' retirement system did not engage in unreasonable delay in taking action to recoup overpayment of pension benefits to system members, as would support finding that laches did not bar system from recouping overpayments, where, promptly upon learning of mistakes, system notified members and began administrative process to recoup the overpayments, and there was no evidence to suggest that system had previous knowledge that there may have been a problem with calculation of pension benefits.

[29] **Equity** Acquiescence

Equity Prejudice from Delay in General

150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar
150k71 Lapse of Time
150k71(4) Acquiescence
150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar
150k72 Prejudice from Delay in General
150k72(1) In general

The elements required to support a defense of laches include unreasonable delay and either acquiescence in the matter at issue or prejudice to the defendant resulting from the delay.

2 Cases that cite this headnote

[30] **Equity** Application of doctrine in general

150 Equity
150II Laches and Stale Demands
150k84 Application of doctrine in general

Generally, laches is a question of fact, but where the relevant facts are undisputed, it may be decided as a matter of law.

1 Cases that cite this headnote

[31] **Administrative Law and Procedure** Time for proceedings; limitation and laches

15A Administrative Law and Procedure
15AIII Administrative Powers and Proceedings
15AIII(D) Adjudications
15AIII(D)2 Proceedings in General

15Ak1333 Time for proceedings; limitation and laches
(Formerly 15Ak468)

Under appropriate circumstances, the defense of laches may operate as a bar to a claim by a public administrative agency if the requirements of unreasonable delay and resulting prejudice are met.

1 Cases that cite this headnote

[32] Equity Application of doctrine in general

Equity Following Statute of Limitations

150 Equity
150II Laches and Stale Demands
150k84 Application of doctrine in general
150 Equity
150II Laches and Stale Demands
150k87 Following Statute of Limitations
150k87(1) In general

In cases in which no statute of limitations directly applies but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit or reasonable delay in determining laches; the effect of the violation of the analogous statute of limitations is to shift the burden of proof to the plaintiff to establish that the delay was excusable and the defendant was not prejudiced thereby.

[33] Pretrial Procedure Facts taken as established or denial precluded; preclusion of evidence or witness

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 Facts taken as established or denial precluded; preclusion of evidence or witness

Trial court acted within its discretion in excluding expert testimony of city employees' retirement system board member, regarding reasonableness of time that system waited before checking to see that pension calculations were correct, at bench trial of system members' declaratory judgment action against system challenging system's recoupment of overpayments to members, where expert had not been named in members' expert witness designation, and members did not attempt to file supplemental designation. Cal. Civ. Proc. Code §§ 2034.260, 2034.300.

[34] Evidence Knowledge of witness

Witnesses Source of knowledge

157 Evidence
157XII Opinion Evidence
157XII(A) Conclusions and Opinions of Witnesses in General
157k471 Conclusions and Matters of Opinion or Facts
157k471(11) Knowledge of witness
410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k37 Knowledge or Means of Knowledge of Facts
410k37(2) Source of knowledge

Trial court acted within its discretion in admitting testimony of chief executive officer (CEO) of city employees' retirement system, regarding tax regulations

that applied to system as a tax qualified plan, at bench trial of system members' declaratory judgment action against system challenging system's recoupment of overpayments to members, even if such testimony could be characterized as lay opinion testimony given that CEO was not a lawyer, where CEO was testifying about his own personal experience of system's policies and its implementation of applicable tax regulations. Cal. Evid. Code § 800.

1 Cases that cite this headnote

[35] Evidence Determination of question of competency

157 Evidence
157XII Opinion Evidence
157XII(A) Conclusions and Opinions of Witnesses in General
157k498.5 Determination of question of competency

A trial court has broad discretion to admit lay opinion testimony, especially where adequate cross-examination has been allowed. Cal. Evid. Code § 800.

Witkin Library Reference: 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 419 [Discretionary Acts; Causes of Action Subject to Immunity.]

2 Cases that cite this headnote

****503** APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed. (Super. Ct. No. 37–2015–00006255–CU–OE–CTL), (Super. Ct. No. 37–2015–00021007–CU–OE–CTL)

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Opinion

IRION, J.

****504** ***543** Appellants Vincent Krolikowski and Connie Van Putten (collectively appellants) are former employees of the City of San Diego (the City) and members of the San Diego City Employees' Retirement System (SDCERS) who receive monthly pension payments from SDCERS, the administrator of the City's pension plan. Krolikowski and Van Putten separately filed lawsuits against SDCERS after SDCERS discovered an error in calculating their monthly pension benefits and took action to recoup the past overpayments. In their now-consolidated lawsuits, Krolikowski and Van Putten assert causes of action for conversion, breach of fiduciary duty, writ of mandate (Code Civ. Proc., § 1085) and declaratory relief, all of which challenge SDCERS's ability to implement a recoupment procedure to collect the overpayments from Krolikowski and Van Putten. After a bench trial, the trial court entered judgment in favor of SDCERS.

Krolikowski and Van Putten contend that the trial court erred in (1) sustaining SDCERS's demurrer to the conversion and breach of fiduciary ***544** duty causes of action; and (2) finding in favor of SDCERS after conducting a bench trial on the remaining causes of action for writ of mandate and declaratory relief. As we will explain, we conclude that appellants' arguments are without merit, and we accordingly affirm the judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Van Putten worked for the City's police department from 1965 to 1988, having reached the rank of police lieutenant. Van Putten then worked for the Union City Police Department, and deferred her retirement from the City until she retired from the Union City Police Department in December 2000, at which time she began receiving monthly pension payments from SDCERS. [1]

1 Our Supreme Court has summarized the role of SDCERS in administering the City's pension system: "San Diego is a charter city. It maintains a pension plan for its employees, the San Diego City Employees' Retirement System (SDCERS). (San Diego City Charter, art. IX, § 141; San Diego Mun. Code, § 24.0101.) SDCERS is a defined benefit plan in which benefits are based upon salary, length of service, and age. (San Diego Mun. Code, §§ 24.0402–24.0405.) The plan is funded by contributions from both the City and its employees. (San Diego City Charter, art. IX, § 143; San Diego Mun. Code, § 24.0402.) ... [¶] The pension fund is overseen by a 13–member board of administration (SDCERS Board or Board). (San Diego City Charter, art. IX, § 144.) Although established by the City, the Board is a separate entity. (*Ibid.*; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 571, 262 Cal.Rptr. 566.) The SDCERS Board is a fiduciary charged with administering the City's pension fund in a fashion that preserves its long-term solvency; it must ensure that through actuarially sound contribution rates and prudent investment, principal is conserved, income is generated, and the fund is able to meet its ongoing disbursement obligations. (Cal. Const., art. XVI, § 17; San Diego City Charter, art. IX, § 144.) Consistent with that central mission, the SDCERS Board has a range of ancillary obligations, including but not limited to providing for actuarial services, determining member eligibility for and ensuring receipt of benefits, and minimizing employer contributions. (Cal. Const., art. XVI, § 17, subds. (b), (e); San Diego City Charter, art. IX, §§ 142, 144; San Diego Mun. Code, § 24.0901.) To carry out these duties, the Board is granted the power to make such rules and regulations as it deems necessary. (San Diego City Charter, art. IX, § 144; San Diego Mun. Code,

§§ 24.0401, 24.0901; see generally *Bianchi,* at p. 571, 262 Cal.Rptr. 566; *Grimm v. City of San Diego* (1979) 94 Cal.App.3d 33, 39–40, 156 Cal.Rptr. 240.)" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1063–1064, 103 Cal.Rptr.3d 767, 222 P.3d 214 (*Lexin*).)

****505** Krolikowski worked for the City's police department from 1972 to 1990, having reached the rank of detective. Krolikowski then worked for the County of San Diego as an investigator for the district attorney's office, and deferred his retirement from the City until he retired from the County of San Diego in 2006, at which time he began receiving monthly pension payments from SDCERS.

***545** As Krolikowski and Van Putten testified, before they retired they both consulted with SDCERS about the amount of the pension benefit they would receive from their employment with the City, and they used that information in deciding when to retire.

In 2013, SDCERS performed an audit of the pension benefits that it was paying to Krolikowski and Van Putten, and it discovered that it made an error in calculating the monthly payments that Krolikowski and Van Putten had been receiving since they retired. With respect to both Van Putten and Krolikowski, SDCERS had used the wrong retirement factor, in that it did not use the retirement factor that corresponded with the date that Van Putten and Krolikowski left their employment with the City. As to Van Putten, SDCERS also discovered that it had used the wrong annuity factor.

SDCERS determined that, without accrued interest, the overpayments were $18,739.88 for Krolikowski and $17,049.48 for Van Putten.[2] If SDCERS had correctly calculated the pension benefits when Krolikowski and Van Putten retired, Van Putten would have received approximately $295 per month less at the time she started to collect her pension in 2001, and Krolikowski would have received $191.74 less per month at the time he started to collect his pension in 2006.

2 We note that when SDCERS first contacted Krolikowski and Van Putten about the errors, SDCERS presented them with higher figures for the amount of the overpayments. Those figures, however, were mistakenly based on erroneous assumptions about Krolikowski and Van Putten's participation in the social security program. SDCERS subsequently corrected those errors, which resulted in the overpayment figures we have set forth herein.

In 2013, after discovering the errors, SDCERS contacted Van Putten and Krolikowski to explain that they would be required to pay back the overpayments.[3] SDCERS also explained that, going forward, Van Putten's and Krolikowski's monthly pension benefit would be reduced to reflect the correct calculation of benefits. SDCERS gave Van Putten and Krolikowski the option of making the repayment of the past overpayments by either (1) having a specific amount deducted from their monthly pension payments over time, while incurring interest on the unpaid balance; or (2) making a lump sum payment

to SDCERS, which would stop the accrual of interest on the amount owed. SDCERS also explained to Van Putten and Krolikowski that they had the right to file an administrative appeal to dispute the fact that an overpayment occurred or the amount of the overpayment.

3 When interest on the overpayments was included, SDCERS sought recoupment of $19,109.06 from Van Putten, as of July 25, 2014. As to Krolikowski, when interest was included SDCERS sought recoupment of $24,785.20 as of January 2014.

Krolikowski and Van Putten both pursued unsuccessful administrative appeals of SDCERS's decision to recoup the overpayments from them. An ***546** administrative appeal of SDCERS's decision to recoup overpayments consists of several steps: (1) the filing of a written appeal with SDCERS's member services director; (2) a review by SDCERS's chief executive officer (CEO); (3) an appearance before ****506** SDCERS's business and governance committee at a regularly scheduled meeting; and (4) a final decision by SDCERS's Board based on a recommendation of the business and governance committee.[4] As the final step of the appeal process, SDCERS's Board of Administration denied Krolikowski's appeal on November 14, 2014, and denied Van Putten's appeal on May 8, 2015.

4 SDCERS's appeal policy states that the Business and Governance Committee "may recommend referral to a hearing before an Adjudicator if the Committee deems that appropriate." No such referral to an adjudicator for an evidentiary hearing occurred here, and neither of the parties requested that the Business and Governance Committee make such a referral. Indeed, as the issues presented are primarily legal, revolving around SDCERS's authority to recoup past overpayments, it is unclear what factual disputes could have been resolved by an adjudicator.

After the appeal process was over, to stop the accrual of further interest Van Putten made a lump sum payment to SDCERS in May 2015, under protest, in the amount of $21,512.54. In March 2015, SDCERS began making monthly deductions from Krolikowski's monthly pension payment in the amount of $269.25 to recoup the overpayment.

On February 24, 2015, Krolikowski filed a complaint against SDCERS challenging its recoupment of the overpayments of his pension benefits, and on June 22, 2015, he filed a first amended complaint. The first amended complaint contained causes of action for (1) declaratory relief; (2) writ of mandate (Code Civ. Proc., § 1085); (3) breach of fiduciary duty, based on both common law and "constitutional" grounds (Cal. Const. art. XVI, § 17); and (4) conversion. The writ of mandate and declaratory relief causes of action both presented the issue of whether "SDCERS is subject to, at most, a three-year statute of limitations and therefore may not collect any arrears overpayments;" and whether "SDCERS is subject to California law exempting pensions from levy or attachment (e.g., Code Civ. Proc., §§ 695.040, 704.11, sub[d.] (b)) and therefore may not simply take money from Krolikowski's pension." The

breach of fiduciary duty cause of action was based on SDCERS's alleged wrongful "refusal to follow California law regarding the statute of limitations and exempting pensions from levy or attachment." The conversion cause of action was based on the allegation that SDCERS "intentionally and substantially interfered with Krolikowski's property by taking possession of funds that should have been paid to Krolikowski, by preventing Krolikowski from having access to these funds, and by refusing to return these funds to Krolikowski after he demanded the return of these funds."

***547** On June 23, 2015, Van Putten filed a complaint against SDCERS that contained the same causes of action as Krolikowski's first amended complaint and asserted the same legal theories, using largely identical language.[5] Both cases were assigned to the same trial court department.

[5] Krolikowski's and Van Putten's complaints also alleged, as a basis for their causes of action, that the amount of SDCERS's original pension benefit calculations at the time of their retirement was correct. Appellants did not pursue that theory at trial, and we do not address it here. We note also that appellants expressly do not challenge the right of SDCERS to pay them the corrected amount of pension payments *going forward*. Their appeal challenges only the recoupment of the *past* overpayments.

SDCERS filed a demurrer to each of the causes of action in Krolikowski's first amended complaint. The trial court overruled the demurrer to the declaratory relief and writ of mandate causes of action. However, it sustained the demurrer to the ****507** breach of fiduciary duty and conversion causes of action. In explaining its ruling sustaining the demurrer to those causes of action, the trial court stated that "SDCERS had an obligation to comply with the law and correct errors in benefit payments.... The exercise of attempting to correct an error in benefit payments cannot subject defendant to tort liability." SDCERS also had demurred to the breach of fiduciary duty and conversion causes of action on the ground that SDCERS was protected by immunity for tort liability for its employees' discretionary acts. However, the trial court did not rule on that ground for the demurrer.

Because of the similarity of the Krolikowski and Van Putten complaints, the parties stipulated that the trial court's ruling on the demurrer to Krolikowski's complaint "shall be applicable to" Van Putten's case, and the parties reserved all rights to appeal in Van Putten's case as if the trial court had made the demurrer ruling in that case as well.

The trial court later granted a motion to consolidate the Krolikowski and Van Putten cases, and it then considered cross-motions for summary judgment that were filed in the consolidated actions.

At issue in the summary judgment motions were the remaining causes of action for writ of mandate and declaratory relief, both of which raised the issue of (1) whether SDCERS was subject, at most, to a three-year statute of limitations to collect any overpayments; and (2) whether SDCERS's actions to recoup

the overpayments were prohibited because they constituted an illegal levy or attachment. Krolikowski and Van Putten further argued in their summary judgment motions that SDCERS was barred by the doctrines of equitable estoppel and laches from recovering the overpayments. SDCERS pointed out in opposition that the doctrines of equitable estoppel and laches were not pled in the operative complaints. However, in ruling on the ***548** summary judgment motions, the trial court concluded that Krolikowski and Van Putten would be permitted to pursue those issues as part of its declaratory relief and writ of mandate causes of action, and that "the pleadings can be amended to allege these doctrines." [6]

6 Krolikowski and Van Putten subsequently filed amended complaints alleging in the declaratory relief and writ of mandate causes of action that the doctrines of equitable estoppel and laches applied to prevent SDCERS from demanding repayment from them.

The trial court denied the cross-motions for summary judgment. In its summary judgment ruling, the trial court concluded that (1) the collection of an overpayment of pension benefits was not a levy or attachment; and (2) SDCERS's "administrative correction process ... is not subject to the statute of limitations for civil court actions." However, the court concluded that there were triable issue of material fact as to whether the doctrines of equitable estoppel or laches applied to bar SDCERS from collecting the overpayments.

The trial court held a bench trial on the remaining issues of whether the doctrines of equitable estoppel and laches applied in this case to support Krolikowski and Van Putten's contention that SDCERS may not demand recoupment of the pension benefit overpayments made to them. At the conclusion of trial, the trial court requested that the parties submit proposed statements of decision. The trial court adopted the proposed statement of decision submitted by SDCERS and issued it as the trial court's decision in favor of SDCERS on the remaining causes of action for writ of mandate and declaratory relief.

In the statement of decision, the trial court set forth its findings that appellants ****508** had not met their burden to establish that the doctrine of laches applied because they did not establish unreasonable delay and did not establish prejudice from any delay. Similarly, the trial court explained that the doctrine of equitable estoppel did not apply because Krolikowski and Van Putten did not establish that SDCERS was apprised of its mistake before 2013, and did not establish that they sustained an injury in reliance on SDCERS's conduct. The statement of decision also reasserted the rulings made in the context of the summary judgment motion that (1) SDCERS was not subject to the statute of limitations for civil court actions in implementing its administrative recoupment process; and (2) SDCERS's act of seeking recoupment for the overpayments was not subject to the exemption against levy or attachment on a pension. The trial court thereafter entered judgment in favor of SDCERS, and Krolikowski and Van Putten filed a notice of appeal.

***549** II.

DISCUSSION

A. *The Trial Court Did Not Err in Sustaining the Demurrer to the Breach of Fiduciary Duty and Conversion Causes of Action*

We first consider Krolikowski and Van Putten's contention that the trial court erred in sustaining the demurrer to the two tort-based causes of action they alleged, namely breach of fiduciary duty and conversion.

1. *Standard of Review*

[1] **[2]** **[3]** " 'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650, 43 Cal.Rptr.3d 434.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814, 107 Cal.Rptr.2d 369, 23 P.3d 601.) We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324, 182 Cal.Rptr. 506, 644 P.2d 192.)

2. *The Tort–based Causes of Action Are Barred by Government Claims Act Immunity*

As one ground for its demurrer to the causes of action for breach of fiduciary duty and conversion, SDCERS argued that the Government Claims Act (Gov. Code, § 815 et seq.) provided it with immunity for the acts underlying those causes of action. The trial court sustained the demurrer on different grounds and did not reach the immunity issue. However, SDCERS contends on appeal that we should affirm the trial court's order sustaining the demurrer to those causes of action by concluding that it is immune from tort liability under the Government Claims Act. As we will explain, we conclude that SDCERS's immunity argument has merit and serves as a sound basis for affirming the demurrer to the causes of action for breach of fiduciary duty and conversion.

a. *Legal Basis for Immunity Argument*

Within the Government Claims Act, the statutory immunity applicable to SDCERS in this context is set forth in ***550** Government Code section 815.2, subdivision (b), which creates immunity for a public entity when its employees are immune from liability for ****509** the act or omission at issue. As set forth in that provision, "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (*Ibid.*; see also *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980, 42 Cal.Rptr.2d 842, 897 P.2d 1320 (*Caldwell*) [explaining that under Gov. Code, § 815.2, subd. (b) "public entities are immune where their employees are immune, except as otherwise provided by statute"];

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal.App.4th 30, 49, 37 Cal.Rptr.2d 860 [to the extent that the public pension system board had discretionary immunity, the public entity itself was also immune].) As SDCERS points out, the breach of fiduciary duty and conversion causes of action are based on acts by the SDCERS Board members, who are employed by SDCERS, and thus to the extent the Board members are protected by immunity, SDCERS is as well.

Here, the immunity provision that applies to the individual SDCERS Board members is set forth in Government Code section 820.2. Under that provision, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (*Ibid.*)

[4] **[5]** Our Supreme Court's case law has provided guidance on the type of decisions that fall under the discretionary act immunity set forth in Government Code section 820.2. Immunity under this provision "is reserved for those '*basic policy decisions* [which have] ... been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' ... Such 'areas of quasi-legislative policy-making ... are sufficiently sensitive' ... to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process.' " (*Caldwell, supra,* 10 Cal.4th at p. 981, 42 Cal.Rptr.2d 842, 897 P.2d 1320, citations omitted.) In contrast, "there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated." (*Ibid.*)

[6] **[7]** The application of discretionary act immunity "requires a showing that 'the specific conduct giving rise to the suit' involved an *actual* exercise of discretion, i.e., a '[conscious] balancing [of] risks and advantages....' " (*Caldwell, supra,* 10 Cal.4th at p. 983, 42 Cal.Rptr.2d 842, 897 P.2d 1320, citation omitted.) However, there is no requirement that the public employee's exercise of discretion be based on "a *strictly careful, thorough, formal, or correct* evaluation" because "[s]uch a standard would swallow an immunity designed to protect against claims of ***551** carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy." (*Id.* at pp. 983–984, 42 Cal.Rptr.2d 842, 897 P.2d 1320.)

b. *The Breach of Fiduciary Duty and Conversion Causes of Action Are Based on Discretionary Acts by the SDCERS Board*

[8] **[9]** Based on the legal standards set forth above, SDCERS has immunity under the Government Claims Act if the breach of fiduciary duty and conversion causes of action are based on an exercise of discretion by the SDCERS Board members.

Here, as pled in the operative complaints, the breach of fiduciary duty cause of action is based on the SDCERS Board's alleged "refusal to follow California law regarding the statute of limitations and exempting pensions from levy or attachment." The conversion cause of action is ****510** based on SDCERS's

"refusing to return" the recouped overpayments after appellants "demanded the return of these funds." Both of those acts are based on the SDCERS Board's careful evaluation of the issues at the Board meetings at which it considered Krolikowski's and Van Putten's appeals, during which it explicitly decided that it would reject the statute of limitations and exemption arguments, and that it would instead take steps to recoup the overpayments from Krolikowski and Van Putten. Indeed, as shown by the transcript of the SDCERS Board meetings regarding Krolikowski's and Van Putten's administrative appeals, the Board was grappling with a policy-level decision in concluding that it would go forward and recoup the overpayments. It considered, among other things, whether the law required such an action, whether it would be fair to proceed in that manner, whether other options were available, and whether it should proceed with the recoupment in order to set up a litigation scenario in which the courts could give the final word on whether SDCERS was permitted to seek recoupment for overpayments. The decision was clearly discretionary and was not merely the carrying out of a ministerial duty. Therefore, SDCERS is immune to tort liability for the acts underlying the causes of action for breach of fiduciary duty and conversion under the legal standards governing the immunity created by the Government Claims Act.

c. *The Tort-based Causes of Action Are Subject to Immunity Even Though They Are Based on Provisions in the State Constitution*

[10] Krolikowski and Van Putten do not attempt to contest that, as we have discussed above, the acts of the SDCERS Board giving rise to the breach of fiduciary duty and conversion causes of action are the type of discretionary ***552** decisions that normally would give rise to immunity from tort-based causes of action under the Government Claims Act. Instead, the sole argument that appellants make to us on the immunity issue focuses on the fact that they have pled a cause of action for breach of fiduciary duty that is based on the *constitutional* fiduciary duties of the SDCERS Board, rather than on *common law* fiduciary duties. Specifically, appellants argue that the immunity in Government Code section 815.2, subdivision (b) does not bar the breach of fiduciary duty cause of action because it arises under provisions of the California Constitution that establish the fiduciary duties of public pension boards. They contend that Government Claims Act immunity applies only when a tort claim is based on statutory or common law authority, but not when it is based on a constitutional provision. [7]

7 As a matter of logic, although not expressly acknowledged by appellants, their argument against SDCERS's immunity claim would appear to apply only to the breach of fiduciary cause of action, not the conversion cause of action, as that cause of action is not based on a constitutional duty.

As the basis for their claim that their breach of fiduciary duty causes of action arise under our state's Constitution, appellants rely on article XVI, section 17 of the California Constitution, which describes the fiduciary responsibilities of the members of a public pension board. In part, that section provides:

"Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

****511** "(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

"(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

***553** "(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims." (Cal. Const., art. XVI, § 17.) [8]

[8] The current version of article XVI, section 17 of the California Constitution was put in place as a result of Proposition 162 (The California Pension Protection Act of 1992) "to 'insulate the administration of retirement systems from oversight and control by legislative and executive authorities' ..., and to protect retirement boards from ' " 'political meddling and intimidation.' " ' " (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 226, fn. 8, 169 Cal.Rptr.3d 51 (*City of Oakland*), citation omitted.)

In short, California Constitution, article XVI, section 17 establishes that members of a public pension board, such as the SDCERS Board members, are fiduciaries; that they must exercise their fiduciary duties with the purpose, among others, of providing benefits to participants and their beneficiaries; and that the Board Members' duty to pension plan participants and beneficiaries takes precedence over any other duty. However, as relevant to the following discussion, the plain language of the provision says *nothing* about creating liability for money damages against public

pension plan members in instances when such liability would otherwise be barred by statutory governmental immunity.

[11] **[12]** Appellants rely on the doctrine of constitutional supremacy to argue that their breach of fiduciary cause of action is not subject to Government Claims Act immunity because it arises under the Constitution. Under that doctrine, "it is well established that '[a] statute cannot trump the Constitution.' " (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 788, 175 Cal.Rptr.3d 670; see also *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, 527, 11 Cal.Rptr.3d 671 ["The California Constitution trumps any conflicting provision of the Family Code."].) As stated in the case law upon which appellants rely, "It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, ****512** it must be given effect as the paramount law of the state." (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28, 201 Cal.Rptr. 207.)

The doctrine of constitutional supremacy does not apply here because appellants have not identified any *conflict* between the constitutional provisions and the Government Claims Act immunity provisions. As we have explained, the constitutional provisions we have cited above merely establish ***554** that public pension board members have certain fiduciary duties to participants and beneficiaries, but those provisions do not address whether beneficiaries and participants have the right to recover monetary damages from pension board members who breach those duties. Therefore, no constitutional provision is trumped when Government Claims Act immunity is applied to bar liability for monetary damages based on the SDCERS Board members' alleged breach of fiduciary duty.

There *are* instances—such as in suits for inverse condemnation—where the Constitution specifically provides for a monetary remedy against a public entity that trumps any Government Claims Act immunity that might otherwise apply. Indeed, the legislative committee comments to Government Code section 815, which sets forth the general rule of immunity for public entities, acknowledges that in some instances, such as inverse condemnation, constitutional provisions will trump Government Claims Act immunity.[9] "This section abolishes all common law or judicially declared forms of liability for public entities, *except for such liability as may be required by the state or federal constitution,* e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable." (Legis. Com. com.—Sen., 32 pt. 1 West's Ann. Gov. Code (2012 ed.) foll. § 815, p. 215, italics added.) Here, because the constitutional provisions at issue do not expressly create a monetary remedy for breach of fiduciary duty against public pension board members, this is not a case where the Constitution *requires* liability and therefore trumps the Government Claims Act immunity provisions.

9 Regarding inverse condemnation, the California Constitution provides in part: "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19, subd. (a).)

Appellants cite two cases that relied on the legislative committee comment to Government Code section 815 in analyzing whether a constitutionally-based cause of action was barred. Based on the legislative committee comment, *Young v. County of Marin* (1987) 195 Cal.App.3d 863, 241 Cal.Rptr. 169 (*Young*) stated that "it is clear that although Government Code section 815 provides that public entities are not liable for injuries '[e]xcept as otherwise provided by statute,' they are not immune from constitutionally created claims." (*Id.* at p. 869, 241 Cal.Rptr. 169.) *Young* concluded that the plaintiff could therefore state a cause of action against a public entity for wrongful termination based on the reasonable exercise of her First Amendment rights, regardless of the immunity for public entities stated in Government Code section 815. (*Young,* at p. 871, 241 Cal.Rptr. 169.) Similarly, *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 185 Cal.Rptr. 758 (*Fenton*) cited the legislative ***555** committee comment in stating that "the Legislature has recognized that the state Constitution may provide a cause of action independent from any statute providing ****513** for liability." (*Id.* at p. 804, 185 Cal.Rptr. 758.) *Fenton* concluded that Government Code section 815 did not bar a cause of action based on the state constitution's right-to-vote provision. (*Fenton,* at p. 805, 185 Cal.Rptr. 758.)

Fenton and *Young* are not dispositive of the issue presented here. Those cases concerned different constitutional provisions, and thus their conclusion as to whether *those* provisions, with the specific language at issue, *required* liability against a public entity, does not resolve the issue of whether article XVI, section 17 of the California Constitution *requires* liability for any breach of fiduciary duty that it describes. As we have explained, article XVI, section 17 contains no suggestion that a cause of action for money damages is *required* to be available against public pension board members.

Turning to the language of article XVI, section 17 of the California Constitution, appellants contend that provision expressly excepts breach of fiduciary duty claims from Government Claims Act immunity, because it includes the phrase "[n]otwithstanding any other provisions of law or this Constitution to the contrary." We reject this argument because it takes the phrase out of context. The full phrase provides that "[n]otwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following...." (Cal. Const., art. XVI, § 17.) Nothing in this phrase communicates an intent to create a constitutional monetary damages claim against public pension board members or to abrogate Government Claims Act immunity. Instead, the phrase is directed at the scope of a public

pension board's authority to invest and manage pension system funds.

As further support for their argument that Government Claims Act immunity does not apply here, appellants briefly refer to a statement by our Supreme Court in *Lexin, supra,* 47 Cal.4th 1050, 103 Cal.Rptr.3d 767, 222 P.3d 214. *Lexin* was an appeal in a criminal proceeding against several former members of the SDCERS Board, in which they were charged with violating state conflict of interest statutes (Gov. Code, § 1090 et seq.). (*Lexin,* at p. 1062, 103 Cal.Rptr.3d 767, 222 P.3d 214.) *Lexin* concluded that the criminal informations should be set aside as to most of the board members, but made a comment at the end of the opinion, in dicta, explaining that even though the board members could not be criminally prosecuted, other avenues existed to address the type of misconduct alleged. "In closing, we note that, the applicability of [Government Code] section 1090 aside, a wealth of other legal remedies exists to ensure municipalities and retirement boards do not abuse the public trust. Both groups are subject to actions for declaratory relief ***556** or mandamus challenging their decisions ..., as the City and SDCERS Board were sued here. Retirement board trustees are fiduciaries (Cal. Const., art. XVI, § 17) and as such are subject to suit for breach of fiduciary duty when their decisions fall short of the standard the law demands. We express no opinion as to whether the Lexin defendants breached their fiduciary duties here, nor whether they might otherwise have been subject to civil liability for their actions." (*Lexin,* at p. 1102, 103 Cal.Rptr.3d 767, 222 P.3d 214, citations omitted.) *Lexin* does not mention the issue of immunity, and there is no indication that our Supreme Court even considered the issue when stating that the SDCERS Board members were subject to suit. Indeed, in stating that it was expressing no opinion ****514** on "whether the Lexin defendants ... might otherwise have been subject to civil liability for their actions" (*ibid.*), our Supreme Court strongly implied that it had *not* considered whether immunity might apply to the specific conduct at issue. Thus, *Lexin* does not advance appellants' argument that a constitutionally-based breach of fiduciary duty claim is not subject to Government Claims Act immunity.

Finally, we note that our decision is consistent with the only other published authority to consider the issue of whether Government Claims Act immunity applies to constitutionally-based breach of fiduciary claims against public pension plan members. In *Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 179 Cal.Rptr.3d 813, beneficiaries of a county employees' pension trust brought suit against the public pension association, alleging that the association breached its fiduciary duty to them by failing to file a lawsuit against actuaries whose negligence allegedly caused the pension trust to be underfunded. *Nasrawi* concluded that the breach of fiduciary duty claims were barred by Government Claims Act immunity (Gov. Code, §§ 815, 815.2, 820.2) because the association's board members exercised their discretion in deciding whether to file suit against the actuaries. (*Nasrawi,* at pp. 342–343, 179 Cal.Rptr.3d 813.) As do Krolikowski and Van Putten here, the plaintiffs in *Nasrawi* argued that "because they allege a constitutionally based duty, [the court] should not consider

the question of immunity," and contended that "the immunity question" was "answered by the mere fact that the Constitution is the source of the duties at issue." (*Id.* at p. 341, 179 Cal.Rptr.3d 813.) *Nasrawi* rejected the argument, explaining that "[u]ndoubtedly, the board owes fiduciary duties under [California Constitution, article XVI,] section 17, but whether it is immune from alleged violations of those duties is a separate question." (*Nasrawi,* at p. 341, 179 Cal.Rptr.3d 813.) Consistent with our conclusion here, *Nasrawi* explained that plaintiffs had not identified any authority that supported their contention that "public entity employees are liable for injuries caused by their *discretionary* acts or omissions that violate *constitutionally* imposed duties." (*Id.* at p. 342, 179 Cal.Rptr.3d 813, italics added.)

In sum, we conclude that based on the Government Claims Act, SDCERS is immune from the tort-based causes of action for breach of fiduciary duty ***557** and conversion asserted by Krolikowski and Van Putten, despite the fact that the breach of fiduciary cause of action was based on duties set forth in the California Constitution. Accordingly, the trial court did not err in sustaining SDCERS's demurrer to those causes of action.

B. *No Legal Doctrine Identified by Krolikowski and Van Putten Prevents SDCERS From Requiring Recoupment of the Overpayments*

We next turn to the several legal issues that the trial court resolved in the course of rejecting Krolikowski's and Van Putten's causes of action for writ of mandate and declaratory relief, both of which sought an order establishing that SDCERS was not legally authorized to take unilateral action to recoup the overpayments of pension benefits that it made to Krolikowski and Van Putten.

1. *The Statute of Limitations for Causes of Action Based on Mistake Does Not Bar SDCERS From Requiring Recoupment of the Pension Overpayments*

[13] Appellants' first argument is that the three-year statute of limitations applicable ****515** to causes of action based on mistake in Code of Civil Procedure section 338, subdivision (d) applies to SDCERS's recoupment of the overpayments from them and thus bars recoupment.[10] According to appellants, even though SDCERS sought recoupment through its own administrative process rather than by filing a lawsuit, it should be barred from seeking recoupment by the statute of limitations *as if* the recoupment were sought through a lawsuit. The trial court rejected that contention, concluding that SDCERS's administrative process for seeking a recoupment was not controlled by the statute of limitations applicable to a lawsuit filed in court. As we will explain, we agree with the trial court's analysis.

10 Code of Civil Procedure section 338, subdivision (d) sets forth a three-year statute of limitations for "[a]n action for relief on the ground of fraud or mistake." That provision further states that "[t]he cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Code Civ. Proc., § 338, subd. (d).) It is not clear from

> appellants' pleadings or briefing what they are contending the impact of the statute of limitation would be in this case, if we were to determine that it applies. Specifically, it is not clear whether appellants are claiming that (1) the three-year statute of limitations period had already expired by the time SDCERS began the recoupment process, so that all recoupment is barred; or (2) that SDCERS may only reach back to recoup three years of overpayments from the time it discovered the error. As we will conclude, neither contention would have merit, as the statute of limitations does not apply.

[14] As a first step in their argument, appellants contend that SDCERS has no legal authority to recoup overpayments, in that the City has not expressly enacted a law stating that SDCERS may take action to seek recoupment. ***558** Appellants argue that in the absence of any express authority, SDCERS is required to file a lawsuit, and that accordingly, we should apply the statute of limitations here *as if* a lawsuit had been filed by SDCERS.

In arguing that SDCERS was not authorized to seek recoupment through an administrative process rather than through a lawsuit, SDCERS relies on the statement in *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 78, 111 Cal.Rptr.3d 418 (*City of San Diego*) that "while SDCERS had exclusive authority to administer plan assets, it did not have plenary authority to evade the law." Appellants contend that SDCERS is evading the law by seeking recoupment through an administrative process rather than by filing a lawsuit because no express enactment by the City gives SDCERS recoupment authority. Appellants point out that with respect to certain other pension systems, the Legislature has given the plan sponsors the express authority to obtain recoupment within a certain timeframe, [11] but the City did not do so in the portion of the San Diego Municipal Code governing the operations of SDCERS.

11 As appellants point out, the statutes governing CalPERS, California State Teachers' Retirement System, and certain county pension systems, give those entities the right to collect overpayments, limited to a three-year timeframe from the date of payment. (Gov. Code, §§ 20160, 20164, subd. (b)(1); Ed. Code, §§ 22008, subd. (b), 24617; Gov. Code, §§ 31539, subd. (c), 31540, subd (b)(1).)

We reject the argument. Nothing in the City's laws establishing the scope of SDCERS's authority to administer the City's pension system *prevents* SDCERS from seeking recoupment of overpayments through an administrative process. Moreover, SDCERS generally has discretion to administer benefits to its members in a manner that it determines is in the best interest of the pension system and its ****516** members. "[P]ublic employee retirement system boards operate under a constitutional grant of plenary authority which grants to them 'sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system.' (Cal. Const., art. XVI, § 17, subd. (a) (article XVI, section 17(a)).) ... Similarly, the City's charter gives the board 'exclusive control of

the administration and investment of such fund or funds as may be established.' (City Charter, art. IX, § 144.)" (*City of San Diego, supra,* 186 Cal.App.4th at pp. 78–79, 111 Cal.Rptr.3d 418.) The City's municipal code states that SDCERS "may modify benefits for service ... and is the sole judge of the conditions under which persons may receive benefits from the system." (San Diego Mun. Code, § 24.0901.) As important here, although the City gives SDCERS wide authority to administer the pension system, SDCERS may not afford benefits that exceed the amounts authorized by the City in the City's ordinances governing pension benefits. "The granting of retirement benefits is a legislative action within the exclusive jurisdiction of the City. (City Charter, art. IX, § 141.) ... [¶] It is not within SDCERS's ***559** authority to expand pension benefits beyond those afforded by the authorizing legislation. This is because the granting of retirement benefits is a power resting exclusively with the City. The scope of the board's power as to benefits is limited to administering the benefits set by the City." (*City of San Diego, supra,* 186 Cal.App.4th at pp. 79–80, 111 Cal.Rptr.3d 418.) Because SDCERS is not authorized to have made the overpayments by paying out an amount of benefits *in excess of* the amounts authorized by the City, its action in recouping those overpayments is *consistent* with the scope of its authority as granted by the City, rather than *inconsistent* as appellants contend. Accordingly, SDCERS did not exceed the scope of the authority conferred upon it by the City by seeking recoupment of the overpayment through an administrative process rather than by filing a lawsuit.

Our decision is consistent with *City of Oakland, supra,* 224 Cal.App.4th 210, 169 Cal.Rptr.3d 51, which considered the extent of a retirement system board's discretion in deciding whether to recover overpayments it had made to its members.[12] Focusing on the general grants of authority in the California Constitution and the city's charter, *City of Oakland* concluded that "[s]ince the Charter does not contain any express provisions regarding the collection of improper payments from retirees, any such overpayments must be analyzed under these general grants of Board authority."[13] (*Id.* at p. 244, 169 Cal.Rptr.3d 51.) The court concluded that "[g]iven this statutory backdrop—where the Board's decisionmaking must prioritize the rights of retirees while making complex decisions impacting multiple variables—we believe that the Board has discretion to decide whether, how and to what extent any overpayments made to ... retirees should be repayable." (*Ibid.*; *see also Foster v. Pension Board of City of Alameda* (1937) 23 Cal.App.2d 550, 555, 73 P.2d 631 [rejecting a writ of mandate brought by pension member of a city pension system who was overpaid pension benefits, and holding that ****517** the pension board could dock the member's future payments to recoup the overpayments].)

12 *City of Oakland* 's discussion of the board's authority was set forth in the course of considering the argument that equitable estoppel did not bar recoupment of overpayments made to members in that recoupment would enlarge the statutory power of the board. (*City of Oakland, supra,* 224

Cal.App.4th at p. 243, 169 Cal.Rptr.3d 51.)

13 Oakland's city charter contained similar general grants of authority to the retirement system as we have cited above with respect to the City and SDCERS.

Case law establishes that when, as here, recoupment is obtained through an *administrative process*, rather than through a lawsuit filed in court, the statute of limitations does not apply. (*Little Co. of Mary Hosp. v. Belshe* (1997) 53 Cal.App.4th 325, 329, 61 Cal.Rptr.2d 626; *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 72 Cal.Rptr.2d 180.) Both cases involved writs of mandate filed by hospitals challenging the California Department of Health Services's decision to recoup the overpayment of funds by the Medi–Cal program. ***560** Under Welfare and Institutions Code section 14177, the department may recoup such overpayments by offsetting future payments to the hospital rather than by filing a court action to recover the overpayments. (*Robert F. Kennedy Medical Center*, at p. 1361, 72 Cal.Rptr.2d 180 [explaining offset procedure].) Both courts concluded that various three-year and four-year statutes of limitations set forth in the Code of Civil Procedure did not apply to bar the recoupment because " '[s]tatutes of limitations found in the Code of Civil Procedure ... do not apply to administrative actions.' " (*Ibid.*, quoting *Little Co. of Mary Hosp.*) [14] Witkin summarizes the principle relied on in those cases, stating that "[t]he general and special statutes of limitation referring to actions and special proceedings are applicable only to judicial proceedings; they do not apply to administrative proceedings." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 430, p. 547.) Here, because SDCERS did not file a lawsuit to recoup the overpayments, but instead pursued recoupment through its own internal administrative process, it is not subject to a statute of limitations period set forth in the Code of Civil Procedure. [15]

14 Appellants rely on the recent decisions in *Yuba City Unified School District v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 648, 227 Cal.Rptr.3d 130 and *Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 227 Cal.Rptr.3d 37 (*Baxter*) to argue that "the statute of limitations applies to public pension systems, like SDCERS." We disagree, as *Yuba City* and *Baxter* are inapposite. *Yuba City* and *Baxter* both concerned challenges to the State Teacher's Retirement System's decision to recoup overpayments of pension benefits under Government Code section 22008, which permits such recoupment only for three years from "the discovery of the incorrect payment." (Ed. Code, § 22008, subd. (c).) Here, in contrast, no statutory authority applicable to SDCERS creates any time limitations on SDCERS's ability to recoup overpayments. As such, *Baxter* and *Yuba City* do not establish that a public pension system such as SDCERS is subject to any limitations period for recoupment in the absence of any

specific statutory time limitation for recoupment.

15 Appellants rely on *County of Marin Assn. of Firefighters v. Marin County Employees Retirement Assn.* (1994) 30 Cal.App.4th 1638, 36 Cal.Rptr.2d 736 to argue that the statute of limitations applies to an administrative process to recoup overpayments of pension benefits. However, that case arose in a different posture than this action, and not in the context of an administrative process to recoup overpayments, and thus is not persuasive. In *County of Marin* an employee association successfully filed a lawsuit to obtain a higher benefit payment retroactively by requiring the retirement association to include holiday pay in the pension benefit calculation. As part of the litigation, the retirement association contended that because it was required to retroactively pay higher pension benefits, it was entitled to recover contributions from the member *in arrears* to fund the higher benefits. *County of Marin* concluded that in the context of the lawsuit, the retirement association was barred by the statute of limitations from collecting contributions in arrears. The arrears issue was first raised by the retirement association in the context of litigation, and thus *County of Marin* did not address the issue presented here, namely whether *an administrative process* to recover overpayments is controlled by the statute of limitations. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 49, 115 Cal.Rptr.2d 151 [explaining that *County of Marin* should not be misapplied to support the application of the statute of limitations to an administrative reclassification proceeding because "*County of Marin* was discussing a claim made in a civil action"].) Because *County of Marin* did not consider or discuss whether it was proper to apply the statute of limitations to an administrative recoupment process as opposed to a civil litigation proceeding, we find it to be inapposite to the issue presented here.

****518** ***561** Appellants argue that case law discussing administrative processes of recoupment do not apply here because SDCERS did not provide an *adequate* administrative process to appellants, in that it "did not provide the appellants with a bona fide administrative hearing." According to appellants, the rules allowed their attorney to speak for only three minutes at the business and governance committee and at the SDCERS Board hearings, and no hearing before an adjudicator was made available to them. In short, they contend that because they were not afforded "the type of administrative hearing contemplated under [Code of Civil Procedure section] 1094.5," SDCERS "did not have an administrative process such that the 'administrative process exception' to the statute of limitations would apply." We reject the argument. Appellants have identified no case law stating that a certain type of administrative process must be provided to avoid the application of the statute of limitations set forth in the Code of Civil Procedure. The proper focus in not on the

nature of the administrative process, but rather on the fact that SDCERS's recoupment decision was made through an internal agency procedure that did not involve SDCERS filing a recoupment lawsuit in court. [16] In the absence of any lawsuit, the statute of limitations set forth in Code of Civil Procedure section 338, subdivision (d) does not apply.

16 We note that, as we have explained, SDCERS has an express written procedure for evaluating appeals of benefit determinations, and SDCERS followed its established process in both Krolikowski's and Van Putten's cases. SDCERS's procedures give it the discretion to refer the dispute to an adjudicator, but it did not elect to do so here, and neither Krolikowski nor Van Putten requested that SDCERS exercise its discretion to make a referral to an adjudicator.

[15] Further, even if the statute of limitations set forth in Code of Civil Procedure section 338, subdivision (d) applied here, the undisputed facts presented at trial and in connection with the summary judgment motions show that SDCERS took action against Krolikowski and Van Putten to recover the overpayments within the time period allowed by the statute of limitations.

[16] Code of Civil Procedure section 338, subdivision (d) states that a cause of action "for relief on the ground of fraud or mistake" is "not deemed to have accrued until the discovery, by the aggrieved party ... of the facts constituting the fraud or mistake." (Code Civ. Proc., § 338, subd. (d).) "Although the statute does not expressly provide that the claim will accrue based upon either actual *or inquiry* notice of the claimant, California courts have long construed it in such a fashion." (*Baxter, supra,* 18 Cal.App.5th at p. 359, 227 Cal.Rptr.3d 37.) As our Supreme Court has long held, under Code of Civil Procedure section 338, subdivision (d), a "plaintiff must affirmatively excuse his [or her] ***562** failure to discover the fraud within three years after it took place, by establishing facts showing that he [or she] was not negligent in failing to make the discovery ****519** sooner and that he [or she] had no actual or presumptive knowledge of facts sufficient to put him [or her] on inquiry." (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 437, 159 P.2d 958 (*Hobart*).) When inquiry notice applies, "if [a party] became aware of facts which would make a reasonably prudent person suspicious, [the party] had a duty to investigate further, and [is] charged with knowledge of matters which would have been revealed by such an investigation." (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875, 191 Cal.Rptr. 619, 663 P.2d 177.)

[17] Here, no evidence in the record supports a finding that SDCERS became aware of facts that should have reasonably made it suspicious that appellants' pension benefits had been incorrectly calculated prior to the date that it conducted an audit and discovered the error. The undisputed evidence further shows that SDCERS took action within months of discovering the errors by notifying appellants that it would require recoupment. Therefore, SDCERS instituted the administrative process to recoup the overpayments to appellants long before the expiration of the three-year statute of

limitations in Code of Civil Procedure section 338, subdivision (d). [17]

17 Appellants contend that the trial court's statement of decision improperly placed the burden on them to prove that SDCERS should have discovered its error sooner rather than placing the burden on SDCERS to show that it was not on inquiry notice more than three years prior to discovering the mistake. We reject appellants' argument because the portion of the statement of decision to which they refer concerns the trial court's analysis of the laches issue. "The party asserting laches bears the burden of production and proof on each element of the defense." (*Highland Springs Conference and Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 282, 199 Cal.Rptr.3d 226.)

[18] **[19]** Appellants contend that the statute of limitations should start running from the date that SDCERS made the mistaken calculations of the pension benefits because SDCERS always had *available* the information with which it could correctly determine the pension benefits, and SDCERS was therefore negligent in not discovering the errors more promptly. We reject this argument because it is based on a flawed understanding of the law governing delayed discovery of a cause of action for mistake or fraud under Code of Civil Procedure section 338, subdivision (d). As our Supreme Court has explained, "In many cases it has been said that means of knowledge are equivalent to knowledge. [Citations.] This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious.... [¶] It follows that plaintiff is not barred because the means of discovery were available at an earlier date *provided* he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period." (*Hobart, supra,* 26 Cal.2d at pp. 438–439, 159 P.2d 958.) " 'Where ***563** no duty is imposed by law upon a person to make inquiry, and where under the circumstances "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*' " (*Id.* at p. 438, 159 P.2d 958.) Thus, without some evidence that SDCERS was aware of facts that should have made it *suspicious* that appellants' pension benefits were erroneously calculated, the mere fact that SDCERS had all of the information available to conduct a correct calculation ****520** does not cause the limitations period to begin to accrue.

2. *The Exemption from Levy and Attachment for Benefits Under Public Retirement System Does Not Bar SDCERS from Recouping the Overpayments*

[20] Under Code of Civil Procedure section 704.110, subdivision (b), with certain exceptions that are not relevant here, "[a]ll amounts held, controlled, or in process of distribution by a public entity derived from contributions by the public entity or by an officer or employee of the public entity for

public retirement benefit purposes, and all rights and benefits accrued or accruing to any person under a public retirement system, are exempt" from all procedures for enforcement of a money judgment. Further, Code of Civil Procedure section 695.040 provides that "[p]roperty that is not subject to enforcement of a money judgment may not be levied upon or in any other manner applied to the satisfaction of a money judgment." Similarly, property exempt from enforcement of a money judgment is also exempt from prejudgment attachment. (Code Civ. Proc., § 487.020.) Based on these provisions, a pension benefit from a public entity such as SDCERS may not be levied upon or made subject to attachment to satisfy a money judgment.

According to appellants, the provisions creating an exemption from levy and attachment for their pension benefits also prevents SDCERS from recouping its overpayment of pension benefits because the recoupment process is equivalent to a levy or attachment. The trial court rejected this theory in ruling on the summary judgment motions, explaining that "recouping the overpayment is not a levy or attachment as SDCERS is not executing on or enforcing a money judgment."

We agree with the trial court's reasoning. Appellants cite no authority that would support their position that the exemption against levy and attachment applies here. SDCERS does not have a money judgment against Krolikowski or Van Putten regarding the overpayment of pension benefits. Accordingly, in taking action to recoup those overpayments, SDCERS is not levying upon or ***564** attaching any funds to satisfy a money judgment, and SDCERS is therefore not barred from recoupment by the provisions in the Code of Civil Procedure preventing levy and attachment of benefits accrued under a public retirement system. (Cf. *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 646–647, 199 Cal.Rptr. 72 [in deducting amounts from the plaintiffs' pension benefits based on their outside income, the city was not undertaking an "execution" on their pension benefits, as a writ of execution is the process of "authorizing the seizure and appropriation of the property of a defendant for the satisfaction of a money judgment against him"].)

In the absence of any authority supporting their position, appellants make a policy argument. They contend that we would be ignoring "the policies embodied in the[ ] Legislative enactments" prohibiting levy and attachment of public pension benefits if we were to allow SDCERS to recoup the overpayments. According to appellants, "SDCERS should have no greater rights than any other creditor." We are not persuaded. While the Legislature undoubtedly had sound policy reasons for exempting public pension benefits from levy and attachment *by a judgment creditor*, so as to "allow[ ] the debtor to retain all or part of it to protect himself and his family" despite a money judgment (*Kilker v. Stillman* (2015) 233 Cal.App.4th 320, 329, 182 Cal.Rptr.3d 712), that is not the situation presented here. In this case it is the public ****521** retirement system *itself*, rather than a judgment creditor, that is seeking to recoup the overpayment of funds relating to appellants' pension benefits. Those overpayments are amounts that appellants should have not been paid as pension benefits in the first place. In short, the policies behind the

exemption do not apply here because SDCERS is not a judgment creditor; it is the entity with the authority to ensure that appellants have been paid the correct amount of pension benefits and to take action to make corrections.

3. *The Trial Court Properly Concluded That the Doctrine of Equitable Estoppel Does Not Apply Here*

In its statement of decision, the trial court found that appellants did not meet their burden to establish that SDCERS was equitably estopped to recoup the overpayments. Appellants challenge the trial court's decision.

[21] **[22]** "The doctrine of equitable estoppel is founded on notions of equity and fair dealing and provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment.... ' "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so ***565** intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." ' ... Where, as here, a party seeks to invoke the doctrine of equitable estoppel against a governmental entity, an additional element applies. That is, the government may not be bound by an equitable estoppel in the same manner as a private party unless, 'in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.' " (*City of Oakland, supra,* 224 Cal.App.4th at pp. 239–240, 169 Cal.Rptr.3d 51, citations omitted.) Further, the doctrine of equitable estoppel has been applied in cases involving a retirement system's right to recoup the overpayment of pension benefits. (See, e.g., *id.* at pp. 239–248, 169 Cal.Rptr.3d 51.) [18]

18 Based on the specific facts before it, *City of Oakland* concluded that the retirement system was estopped from recouping one type of overpayment (based on shift differential pay treatment) but not estopped from recouping another type of overpayment (based on a temporary reduction in the number of designated holidays). (*City of Oakland*, *supra*, 224 Cal.App.4th at pp. 239–248, 169 Cal.Rptr.3d 51.)

Here, appellants contend that the doctrine of equitable estoppel prevents SDCERS from denying that appellants were entitled to the full amount of the pension benefits that were paid to them. The trial court found against appellants based on their failure to establish two of the four required elements of equitable estoppel. Specifically, the trial court explained that based on the evidence presented at trial, appellants did not meet their burden to establish (1) that SDCERS was "apprised of the facts" prior to 2013 when it conducted the audits of appellants pension benefits; and (2) that appellants sustained an injury in reliance on SDCERS's failure to earlier inform them of the error in the calculation of their pension payments.

[23] **[24]** **[25]** "The existence of an estoppel is generally a factual question. [Citation] Therefore, we review the trial court's ruling ****522** in the light most favorable to the judgment and determine whether it is supported by substantial evidence." (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1360, 56 Cal.Rptr.3d 591.) [19]

19 "[W]here estoppel is sought against the government, 'the weighing of policy concerns' is, in part, a question of law ... 'Whether the injustice [that] would result from a failure to uphold an estoppel is of sufficient dimension to justify the effect of the estoppel on the public interest must be decided by considering the matter from the point of view of a court of equity' " (*Feduniak v. California Coastal Com., supra,* 148 Cal.App.4th at p. 1360, 56 Cal.Rptr.3d 591, citations omitted.) However, because the trial court did not find against appellants on this ground, we do not reach the issue, and accordingly we have no occasion to apply a de novo standard of review on that question of law.

[26] We first consider whether substantial evidence supports the trial court's finding that appellants did not establish the first element of equitable estoppel, ***566** namely that SDCERS was "apprised of the fact[ ]" that it had been paying appellants more pension benefits than they were entitled to receive. (*City of Oakland, supra,* 224 Cal.App.4th at p. 239, 169 Cal.Rptr.3d 51.)

[27] For the purposes of the first element of equitable estoppel, the party to be estopped need not have actual knowledge of the true facts. Instead, it may be shown that the party " 'although ignorant or mistaken as to the real facts, was in such a position that he *ought* to have known them, so that knowledge will be imputed to him. In such a case, ignorance or mistake will not prevent an estoppel.' " (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 491, fn. 28, 91 Cal.Rptr. 23, 476 P.2d 423.) [20] Thus, the factual question for the trial court was whether, even though SDCERS did not know that it was making overpayments to appellants, it was in such a position that it *ought to* have known.

20 Citing *Green v. MacAdam* (1959) 175 Cal.App.2d 481, 487, 346 P.2d 474, appellants contend that " 'negligence satisfies the element of knowledge.' " They argue that because the miscalculation of the pension benefits was necessarily based on negligence by SDCERS, and because SDCERS had all the necessary information to discover the error sooner had it attempted to do so, we should conclude that SDCERS was apprised of the fact that the benefits were incorrectly calculated. We are not persuaded. *Green's* statement that " 'negligence satisfies the elements of knowledge' " is too simplistic. As we have stated, the proper inquiry, as stated by our Supreme Court is whether a party is "in such a position that he ought to have known" that a mistake was made, not simply whether the party was originally negligent in making the mistake. (*City*

of Long Beach v. Mansell, supra, 3 Cal.3d at p. 491, fn. 28, 91 Cal.Rptr. 23, 476 P.2d 423.)

Here, the evidence presented at trial supported a finding that prior to the audits conducted in 2013, SDCERS was not in a position that it *ought to* have known that it was making overpayments to appellants. There was no evidence presented at trial that anything occurred prior to the audits to raise SDCERS's suspicions that there had been an error in the original calculations or that the error was so obvious on its face that SDCERS should have discovered it earlier. At trial, SDCERS's chief benefits officer testified that SDCERS first discovered the errors during the 2013 audits, and no contrary evidence was presented. Accordingly, substantial evidence supports the trial court's finding that SDCERS was not apprised of the fact that it had been making overpayments to appellants.

Appellants cite *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 108 Cal.Rptr. 293 (*Crumpler*) and *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 61 Cal.Rptr. 661, 431 P.2d 245 (*Driscoll*) ****523** to support their claim that the trial court erred in denying their estoppel claim. However, as we will explain, neither case requires a different result here.

***567** In *Crumpler* the city misclassified animal control officers as safety officers, which impacted their pension benefits when the error was discovered. (*Crumpler*, *supra*, 32 Cal.App.3d at pp. 570–573, 108 Cal.Rptr. 293.) *Crumpler* concluded that the city would be estopped from seeking retroactive reclassification of the employees because "[t]he city was apprised of the facts" in that it "knew that petitioners were being employed by the police department as animal control officers at the time it erroneously advised them they would be entitled to retirement benefits as local safety members." (*Id.* at p. 582, 108 Cal.Rptr. 293.) Here, in contrast, SDCERS did not have any basis for knowing that it had miscalculated appellants' pension benefits until years later when it conducted the audits because the miscalculation was not based on an obvious and known fact such as that the employees in *Crumpler* were being employed as animal control officers.

In *Driscoll,* the city erroneously advised widows that they were not entitled to pension benefits, causing them to delay in filing a claim. (*Driscoll*, *supra*, 67 Cal.2d at pp. 300–305, 61 Cal.Rptr. 661, 431 P.2d 245.) *Driscoll* concluded that the city was estopped from relying on the three-year statute of limitations to deny the widows' claims to future benefit payments. (*Id.* at p. 310, 61 Cal.Rptr. 661, 431 P.2d 245.) In doing so, it relied on a particular rule governing the circumstances in which a public entity may rely on the statute of limitations to deny a claim when public entity's erroneous advice caused the delay. As *Driscoll* explained, "a city or other public agency is not estopped from asserting the statute of limitations if under all the circumstances 'the nature of the conduct or advice of the city is reasonable when given.' " (*Id.* at p. 306, 61 Cal.Rptr. 661, 431 P.2d 245.) When "the inaccurate advice or information is negligently ascertained or given, the city's conduct may then be deemed to be unreasonable" and estoppel will arise. (*Id.* at p. 307, 61 Cal.Rptr. 661, 431 P.2d

245.) Although *Driscoll* discusses the concept of negligence while considering the issue of equitable estoppel, that discussion is clearly in the specific context of a statute of limitations claim made by a public entity. Here, the issue is not whether SDCERS is estopped to rely on the statute of limitations to bar a party from seeking relief, and *Driscoll* is accordingly inapposite.

In sum, we conclude that substantial evidence supports the trial court's finding that SDCERS was not apprised of the facts as required for the first element of equitable estoppel, and appellants cite no persuasive authority to convince us to the contrary.[21] As we conclude that the trial ****524** court properly ***568** denied the equitable estoppel claim based on its finding on the first element, we need not and do not consider the trial court's second basis for rejecting equitable estoppel, namely that the fourth element of equitable estoppel was not established because appellants did not sustain an injury based on SDCERS's incorrect representation as to the amount of monthly pension benefits that they would receive.[22]

21 We afforded the parties the opportunity to provide supplemental briefing to address an argument concerning the equitable estoppel cause of action that SDCERS extensively discussed it in its trial brief but that it did not identify in its respondent's brief as a ground for affirming the judgment. Specifically, SDCERS argued in the trial court that, as a matter of law, an order equitably estopping SDCERS from recouping the overpayments is not available because such an order would require it to take an action contrary to what is required of it under law. (See, e.g., *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 870, 5 Cal.Rptr.3d 634 [estoppel could not be applied to retirement board to require members to be classified as safety members when they did not meet the applicable statutory definition]; *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 542, 149 Cal.Rptr.3d 729 [estoppel could not be applied to require the treatment of standby pay as pensionable compensation when the applicable statute precluded such treatment].) SDCERS indicated in response to our request for supplemental briefing that to the extent the issue is whether SDCERS is equitably estopped to recoup the overpayments, it does not continue to assert that equitable estoppel is unavailable to appellants as a matter of law.

22 Because we do not discuss the trial court's finding that appellants did not sustain an injury, we need not consider and resolve the parties' dispute as to whether appellants have been injured in that they may not be able to recover from the Internal Revenue Service (IRS) or the State of California the income taxes that they paid on the pension benefits that they now have to repay to SDCERS.

4. *The Trial Court Properly Concluded That the Doctrine of Laches Does Not Apply Here*

[28] We next consider appellants' challenge to the trial court's conclusion in its statement of decision that SDCERS is not barred by the doctrine of laches from recouping the overpayments made to Krolikowski and Van Putten.

[29] **[30]** **[31]** "Laches is based on the principle that those who neglect their rights may be barred, in equity, from obtaining relief.... The elements required to support a defense of laches include unreasonable delay and either acquiescence in the matter at issue or prejudice to the defendant resulting from the delay.... Generally, laches is a question of fact, but where the relevant facts are undisputed, it may be decided as a matter of law." (*City of Oakland, supra,* 224 Cal.App.4th at p. 248, 169 Cal.Rptr.3d 51, citations omitted; see also *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67, 99 Cal.Rptr.2d 316, 5 P.3d 874 ["Generally, a trial court's laches ruling will be sustained on appeal if there is substantial evidence to support the ruling."].) "Under appropriate circumstances, the defense of laches may operate as a bar to a claim by a public administrative agency ... if the requirements of unreasonable delay and resulting prejudice are met." (*Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal.4th 748, 760, fn. 9, 55 Cal.Rptr.2d 107, 919 P.2d 721.) " '[L]aches is not available where it would nullify an important policy adopted for the benefit of the public.' " (*City of Oakland,* at p. 248, 169 Cal.Rptr.3d 51.)

***569** **[32]** " 'In cases in which no statute of limitations directly applies but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit or reasonable delay in determining laches....' [Citation.] The effect of the violation of the analogous statute of limitations is to shift the burden of proof to the plaintiff to establish that the delay was excusable and the defendant was not prejudiced thereby." (*Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29, 37, 40 Cal.Rptr.2d 137.)

Here, appellants argue that the analogous statute of limitations is the three-year limitations period for causes of action based on mistake set forth in Code of Civil Procedure section 338, subdivision (d). According to appellants, SDCERS failed to seek recoupment within the three-year limitations period, so that the burden of proof was shifted to SDCERS to establish that its delay in seeking recoupment was ****525** excusable and that appellants were not prejudiced. Appellants contend that the trial court therefore erroneously placed the burden on them to prove unreasonable delay and prejudice.

In part II.B.1, *ante*, we discussed and rejected appellants' contention that SDCERS failed to seek recoupment within the three-year statute of limitations period contained in Code of Civil Procedure section 338, subdivision (d). We incorporate that discussion here, and on that basis, we conclude that appellants did not succeed in shifting the burden to SDCERS on the laches claim. Therefore, it remained appellants' burden to establish unreasonably delay and prejudice resulting from the delay.

The trial court found that appellants did not establish SDCERS engaged in unreasonable delay in taking action to recoup the overpayment of pension benefits. That finding is supported by substantial evidence.[23] Specifically, as we have previously explained, SDCERS did not know of the error in calculating appellants' pension benefits until it conducted the audits in 2013. Promptly upon learning of the mistakes, SDCERS notified appellants and began the administrative process to recoup the overpayments. Further, no evidence was presented at trial to suggest that SDCERS had any suspicion that there may have been a problem with the calculation of appellants' pension benefits, and thus it had no reason to conduct an audit prior to ***570** 2013.[24] Under those circumstances, the evidence amply supported the trial court's finding that SDCERS did not engage in any unreasonable delay.[25]

23 The trial court also found that appellants did not establish prejudice resulting from the delay. Because we conclude that the trial court's finding regarding the first element of laches is supported by substantial evidence, we need not and do not consider the trial court's finding regarding lack of prejudice.

24 In their reply brief, appellants contend that a 1992 legal memorandum written by the city attorney to a SDCERS administrator shows that SDCERS engaged in unreasonable delay in discovering the overpayments to appellants and acting to recoup them. We disagree. Based on the controlling law at the time, the 1992 memorandum offers an opinion on the steps that SDCERS could take to recoup an overpayment of pension benefits. It does not discuss any specific problems with calculating benefits that might have led to any overpayments to SDCERS members, and it certainly does not discuss whether the pension benefit calculations were correct as to Van Putten and Krolikowski, as they did not retire until 2000 and 2006 respectively, which is long after the 1992 memorandum was written. Accordingly, the 1992 memorandum does not provide evidence of unreasonable delay.

25 Although we have concluded that substantial evidence supports the trial court's decision that the doctrines of laches and equitable estoppel do not apply because SDCERS promptly took action once it learned of its errors, we are nevertheless sympathetic to appellants' situation as they did not find out until many years after the fact that SDCERS made mistakes in calculating their pension benefits, by which time the overpayments and associated interest amounted to a substantial sum.

C. *The Trial Court Did Not Abuse Its Discretion in Making the Evidentiary Rulings Challenged by Appellants*

Appellants challenge two evidentiary rulings made by the trial court during trial. We review the trial court's evidentiary rulings

by applying an abuse of discretion standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203, 58 Cal.Rptr.2d 385, 926 P.2d 365 [“appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion”]); (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773, 149 Cal.Rptr.3d 614, 288 P.3d 1237 [a ruling excluding or admitting expert testimony is reviewed for abuse of discretion].) ****526** “A ruling that constitutes an abuse of discretion has been described as one that is ‘so irrational or arbitrary that no reasonable person could agree with it’ ” but the trial court must exercise its discretion “within the confines of the applicable legal principles.” (*Id.* at p. 773, 149 Cal.Rptr.3d 614, 288 P.3d 1237.)

1. *The Trial Court Did Not Abuse Its Discretion in Excluding Conny Jamison's Opinion That SDCERS Acted Unreasonably*

[33] At the beginning of the bench trial, the trial court considered appellants' request that they be able to introduce the testimony of Conny Jamison, who was a SDCERS Board member and the City's treasurer until 2001. Appellants explained that Jamison would testify regarding her opinion that it was unreasonable for SDCERS “to wait so long before double-checking to see that the pension calculations are correct.” The proposed testimony was expected to track Jamison's declaration submitted in connection with the summary judgment motions, in which she stated, “Based on my experience ***571** and training as a public pension trustee, it would be unreasonable and imprudent not to ensure that staff accurately calculated a beneficiary's pension, and then failed to audit or double check those calculations promptly.”

The trial court ruled that it would exclude Jamison's testimony. As an initial matter, the trial court noted that because Jamison was not a percipient witness to the calculation of appellants' pension benefits, she would be testifying as an expert witness. The trial court stated that it would not admit Jamison's expert testimony for two independent reasons. First, Jamison had not been designated as an expert witness. Second, the trial court stated that as the trier of fact, “I don't think I need the assistance of an expert to tell me what is reasonable and what's not reasonable in this area.”

Appellants contend that the trial court erred in making the ruling for two reasons. First, addressing the trial court's first basis for the ruling, appellants contend that by submitting Jamison's declaration in connection with the summary judgment motions, they “substantially complied” with the requirement that Jamison be designated as an expert witness at trial as required by Code of Civil Procedure section 2034.260. Next, addressing the second basis for the trial court's ruling, appellants point out that Evidence Code section 805 states that “[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.”

We conclude that the first ground set forth by the trial court was a sufficient ground for excluding Jamison's testimony, and we accordingly need not, and do not, reach the second ground.

It is undisputed that Jamison was not designated as an expert witness. Appellants

both filed expert witness designations, which stated they do "not designate any expert witnesses at this time," and neither of them attempted to file a supplemental designation. Code of Civil Procedure section 2034.300 states that "the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following," including "(a) List that witness as an expert under Section 2034.260" and "(b) Submit an expert witness declaration." Here, even though appellants could plausibly argue that they substantially complied with the requirement that they "[s]ubmit an expert witness declaration" (Code Civ. Proc., § 2034.300, subd. (b)) by submitting Jamison's declaration in connection with the summary ****527** judgment motions, they clearly did *not* comply with the additional requirement that they "[l]ist that witness as an expert ***572** under Section 2034.260." (Code Civ. Proc., § 2034.300, subd. (a).) Accordingly, the trial court was well within its discretion to exclude Jamison's expert testimony because she was not properly designated as an expert witness.

2. *The Trial Court Did Not Abuse Its Discretion by Admitting Testimony from SDCERS's CEO About the IRS Rules That SDCERS Follows*

[34] During trial, the trial court overruled appellants' objections to certain testimony by SDCERS's CEO Mark Hovey about the IRS regulations that apply to SDCERS as a tax qualified plan. Appellants contend that the trial court should have sustained their objections to that testimony as it constituted expert testimony on subjects that Hovey was not qualified to opine upon because he is not an attorney.[26] In their appellate brief, appellants summarize Hovey's relevant testimony as follows:

> "• an opinion regarding whether the Internal Revenue Service has regulations that recite what a tax qualified plan such as [SDCERS] can do or should do in the event of a plan failure or error ...;
>
> "• an opinion that tax law gives SDCERS no flexibility as to whether or not to collect overpayments ...;
>
> "• an opinion regarding whether the San Diego Municipal Code requires SDCERS to follow IRS regulations ...; [¶] and
>
> "• an opinion regarding the ramifications from the IRS if SDCERS did not collect in full from Krolikowski and Van Putten."

26 We note that although Hovey is not a lawyer, he is a certified public accountant.

In admitting the testimony, the trial court overruled appellants' continuing objection that the questions "call[ed] for a tax opinion ... from a lay witness who has no legal training." The trial court explained it was overruling the objection because Hovey was SDCERS's CEO and "is the one that implements" the IRS regulations at SDCERS. Appellants contend the trial court abused its discretion in admitting the evidence.

As an initial matter, we note that appellants' argument depends on the premise that Hovey's testimony constituted *opinion* rather than percipient witness testimony. We note that

it appears from the trial court's comments that it overruled appellants' objection, at least in part, because it concluded that Hovey was *not* offering opinion testimony. Instead, the trial court appears ***573** to have concluded that Hovey was testifying about his own personal experience as CEO of SDCERS, including about SDCERS's policies and its implementation of the applicable IRS regulations.

[35] However, even if Hovey's testimony could be characterized as lay opinion testimony, "[a] trial court has broad discretion to admit lay opinion testimony, especially where adequate cross-examination has been allowed." (*In re Automobile Antitrust Cases I and II* (2016) 1 Cal.App.5th 127, 145, 204 Cal.Rptr.3d 330.) Under Evidence Code section 800, "[i]f a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." Here, the trial court reasonably could conclude that because Hovey was SDCERS's CEO and was the person who implemented the IRS regulations ****528** at SDCERS, his testimony about the IRS regulations that applied to SDCERS was a matter within his own perception and was useful to an understanding of his testimony about SDCERS's practices and procedures, despite the fact that Hovey was not a lawyer. Accordingly, it was within the trial court's discretion to admit Hovey's testimony as lay opinion testimony.

Based on the above, we conclude that the trial court did not abuse its discretion in overruling appellants' objections to Hovey's testimony.

DISPOSITION

The judgment is affirmed.

Benke, Acting P. J., and Aaron, J., concurred.

The petition of all appellants for review by the Supreme Court was denied September 19, 2018, S249655.

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21 Cal.4th 249, 980 P.2d 940, 87 Cal.Rptr.2d 237, 99 Cal. Daily Op. Serv. 6358, 1999 Daily Journal D.A.R. 8073

GERTRUDE M. LAMDEN,
Plaintiff and Appellant,
v.
LA JOLLA SHORES CLUBDOMINIUM HOMEOWNERS ASSOCIATION,
Defendant and Respondent.

No. S070296.
Supreme Court of California
Aug. 9, 1999.

SUMMARY

The board of directors of a condominium community association elected to spot-treat termite infestation rather than to fumigate. The owner of a condominium unit brought an action for an injunction and declaratory relief, alleging that the she had suffered diminution in the value of her unit as the result of the association's decision. The trial court found for the association, applying a deferential business judgment test. (Superior Court of San Diego County, No. 677082, Mack P. Lovett, Judge. *) The Court of Appeal, Fourth Dist., Div. One, No. D025485, reversed. It held that the trial court should have analyzed the association's actions under an objective standard of reasonableness test, and that had it done so, an outcome more favorable to the homeowner would have resulted.

* Retired Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the business judgment rule did not directly apply to this case, but that the trial court correctly deferred to the board's decision. The court further held that a court should defer to a community association board's authority and presumed expertise, regardless of the association's corporate status, when a duly constituted board, upon reasonable investigation, in good faith, and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants, and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. (Opinion by Werdegar, J., expressing the unanimous view of the court.) ***250**

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e, 1f)
Condominiums and Cooperative Apartments § 2--Condominiums--Associations--Treatment of Termite Infestation-- Owner's Legal Challenge--Judicial Standard of Review.
In an action for an injunction and declaratory relief brought by a condominium owner against the condominium community association, alleging that the association's election of spot

treatment rather than fumigation to remedy termite infestation diminished the value of her unit, the trial court did not err in deferring to the decisions of the association's board of directors. Although the business judgment rule, on which the court relied, did not directly apply, a court should defer to a community association board's authority and presumed expertise, regardless of the association's corporate status, when a duly constituted board, upon reasonable investigation, in good faith, and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants, and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. Judicial deference is appropriate, since owners and directors of common interest developments are more competent than the courts to make the detailed and peculiar economic decisions necessary to maintain their developments.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 322, 328. See also 7 Miller & Starr, Cal. Real Estate (2d ed. 1990) §§ 20:11, 20:12.]

(2a, 2b)
Corporations § 39--Directors, Officers, and Agents--Liability-- Business Judgment Rule.
The common law business judgment rule has two components, one that immunizes corporate directors from personal liability if they act in accordance with its requirements, and another that insulates from court intervention those management decisions that are made by directors in good faith in what they believe is the organization's best interest. A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. The business judgment rule has been justified primarily on two grounds. First, directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, the rule ***251** recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.

(3a, 3b)
Condominiums and Cooperative Apartments § 2--Condominiums-- Associations--Standard of Care--Residents' Safety in Common Areas.
A community association may be held to a landlord's standard of care as to residents' safety in the common areas. The association is, for all practical purposes, the development project's landlord. Traditional tort principles impose on landlords, no less than on homeowner associations that function as landlords in maintaining the common areas of large condominium complexes, a duty to exercise due care for the residents' safety in those areas under their control. This general duty includes the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.

(4)

Condominiums and Cooperative Apartments § 2--Condominiums-- Associations--Enforcement of Use Restrictions.

An equitable servitude will be enforced unless it violates public policy, it bears no rational relationship to the protection, preservation, operation, or purpose of the affected land, or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced. A common interest development's recorded use restrictions are enforceable equitable servitudes, unless unreasonable (Civ. Code, § 1354, subd. (a)). Hence, those restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. When an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly. Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.

(5)

Condominiums and Cooperative Apartments § 2--Condominiums--Legal Action by Homeowner--Enforcement of Use Restrictions.

Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel ***252** the association to enforce the provisions of the governing declaration of restrictions. The homeowner can also sue directly to enforce the declaration.

COUNSEL

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June Babiracki Barlow and Neil D. Kalin for California Association of Realtors as Amicus Curiae on behalf of Defendant and Respondent.

WERDEGAR, J.

A building in a condominium development suffered from termite infestation. The board of directors of the development's community association [1] decided to treat the infestation locally ("spot-treat"), rather than fumigate. Alleging the board's decision diminished the value of ***253** her unit, the owner of a condominium in the development sued the community association. In adjudicating her claims, under what standard should a court evaluate the board's decision?

1 In 1985, the Legislature enacted the Davis-Stirling Common Interest Development Act (Davis-Stirling Act) as division 2, part 4, title 6 of the Civil Code, "Common Interest Developments" (Civ. Code, §§ 1350-1376; Stats. 1985, ch. 874, § 14, pp. 2774-2787), which encompasses community apartment projects, condominium projects, planned developments and stock cooperatives (Civ. Code, § 1351, subd. (c)). "A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association." (Civ. Code, § 1363, subd. (a).)

As will appear, we conclude as follows: Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. Thus, we adopt today for California courts a rule of judicial deference to community association board decisionmaking that applies, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.* (1990) 75 N.Y.2d 530, 537-538 [554 N.Y.S.2d 807, 811, 557 N.E.2d 1317, 1321] [analogizing a similarly deferential rule to the common law "business judgment rule"].)

Accordingly, we reverse the judgment of the Court of Appeal.

Background

Plaintiff Gertrude M. Lamden owns a condominium unit in one of three buildings comprising the La Jolla Shores Clubdominium condominium development (Development). [2] Over some years, the board of governors (Board) of defendant La Jolla Shores Clubdominium Homeowners Association (Association), an unincorporated community association, elected to spot treat (secondary treatment), rather than fumigate (primary treatment), for termites the building in which Lamden's unit is located (Building Three).

2 The Development was built, and its governing declaration of restrictions recorded, in 1971. In 1973 Lamden and her husband bought unit 375, one of 42 units in the complex's largest building.

> Until 1977 the Lamdens used their unit only as a rental. From 1977 until 1988 they lived in the unit; since 1988 the unit has again been used only as a rental.

In the late 1980's, attempting to remedy water intrusion and mildew damage, the Association hired a contractor to renovate exterior siding on all three buildings in the Development. The contractor replaced the siding on ***254** the southern exposure of Building Three and removed damaged drywall and framing. Where the contractor encountered termites, a termite extermination company provided spot treatment and replaced damaged material.

Lamden remodeled the interior of her condominium in 1990. At that time, the Association's manager arranged for a termite extermination company to spot-treat areas where Lamden had encountered termites.

The following year, both Lamden and the Association obtained termite inspection reports recommending fumigation, but the Association's Board decided against that approach. As the Court of Appeal explained, the Board based its decision not to fumigate on concerns about the cost of fumigation, logistical problems with temporarily relocating residents, concern that fumigation residue could affect residents' health and safety, awareness that upcoming walkway renovations would include replacement of damaged areas, pet moving expenses, anticipated breakage by the termite company, lost rental income and the likelihood that termite infestation would recur even if primary treatment were utilized. The Board decided to continue to rely on secondary treatment until a more widespread problem was demonstrated.

In 1991 and 1992, the Association engaged a company to repair water intrusion damage to four units in Building Three. The company removed siding in the balcony area, repaired and waterproofed the decks, and repaired joints between the decks and the walls of the units. The siding of the unit below Lamden's and one of its walls were repaired. Where termite infestation or damage became apparent during this project, spot treatment was applied and damaged material removed.

In 1993 and 1994, the Association commissioned major renovation of the Development's walkway system, the underpinnings of which had suffered water and termite damage. The $1.6 million walkway project was monitored by a structural engineer and an on-site architect.

In 1994, Lamden brought this action for damages, an injunction and declaratory relief. She purported to state numerous causes of action based on the Association's refusal to fumigate for termites, naming as defendants certain individual members of the Board as well as the Association. Her amended complaint included claims sounding in breach of contract (viz., the governing declaration of restrictions [Declaration]), breach of fiduciary duty and negligence. She alleged that the Association, in opting for secondary over primary treatment, had breached Civil Code section 1364, subdivision ***255** (b)(1)[3] and the Declaration[4] in failing adequately to repair, replace and maintain the common areas of the Development.

3 As discussed more fully *post*, "In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).)

4 The Declaration, which contained the Development's governing covenants, conditions, and restrictions (CC&R's), stated that the Association was to provide for the management, maintenance, repair and preservation of the complex's common areas for the enhancement of the value of the project and each unit and for the benefit of the owners.

Lamden further alleged that, as a proximate result of the Association's breaching its responsibilities, she had suffered diminution in the value of her condominium unit, repair expenses, and fees and costs in connection with this litigation. She also alleged that the Association's continued breach had caused and would continue to cause her irreparable harm by damaging the structural integrity and soundness of her unit, and that she has no adequate remedy at law. At trial, Lamden waived any damages claims and dismissed with prejudice the individual defendants. Presently, she seeks only an injunction and declaratory relief.

After both sides had presented evidence and argument, the trial court rendered findings related to the termite infestation affecting plaintiff's condominium unit, its causes, and the remedial steps taken by the Association. The trial court found there was "no question from all the evidence that Mrs. Lamden's unit ... has had a serious problem with termites." In fact, the trial court found, "The evidence ... was overwhelming that termites had been a problem over the past several years." The court concluded, however, that while "there may be active infestation" that would require "steps [to be] taken within the future years," there was no evidence that the condominium units were in imminent structural danger or "that these units are about to fall or something is about to happen."

The trial court also found that, "starting in the late '80's," the Association had arranged for "some work" addressing the termite problem to be done. Remedial and investigative work ordered by the Association included, according to the trial court, removal of siding to reveal the extent of damage, a "big project ... in the early '90's," and an architect's report on building design factors. According to the court, the Board "did at one point seriously consider" primary treatment; "they got a bid for this fumigation, and there was discussion." The court found that the Board also considered possible problems entailed by fumigation, including relocation costs, lost rent, concerns about pets and plants, human health issues and eventual termite reinfestation. ***256**

As to the causes of the Development's termite infestation, the trial court concluded that "the key problem came about from you might say a poor design" and resulting "water intrusion." In short, the trial court stated, "the real culprit

is not so much the Board, but it's the poor design and the water damage that is conducive to bringing the termites in."

As to the Association's actions, the trial court stated, "the Board did take appropriate action." The court noted the Board "did come up with a plan," viz., to engage a pest control service to "come out and [spot] treat [termite infestation] when it was found." The trial judge opined he might, "from a personal relations standpoint," have acted sooner or differently under the circumstances than did the Association, but nevertheless concluded "the Board did have a rational basis for their decision to reject fumigation, and do ... what they did." Ultimately, the court gave judgment for the Association, applying what it called a "business judgment test." Lamden appealed.

Citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] (*Frances T.*), the Court of Appeal agreed with Lamden that the trial court had applied the wrong standard of care in assessing the Association's actions. In the Court of Appeal's view, relevant statutes, the governing Declaration and principles of common law imposed on the Association an objective duty of reasonable care in repairing and maintaining the Development's common areas near Lamden's unit as occasioned by the presence of termites. The court also concluded that, had the trial court analyzed the Association's actions under an objective standard of reasonableness, an outcome more favorable to Lamden likely would have resulted. Accordingly, the Court of Appeal reversed the judgment of the trial court.

We granted the Association's petition for review.

Discussion

"In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).) The Declaration in this case charges the Association with "management, maintenance and preservation" of the Development's common areas. Further, the Declaration confers upon the Board power and authority to maintain and repair the common areas. Finally, the Declaration provides that "limitations, restrictions, conditions and covenants set forth in this Declaration constitute a general scheme for (i) the maintenance, protection and enhancement of value of the Project and all Condominiums and (ii) the benefit of all Owners." ***257**

(1a) In light of the foregoing, the parties agree the Association is responsible for the repair and maintenance of the Development's common areas occasioned by the presence of termites. They differ only as to the standard against which the Association's performance in discharging this obligation properly should be assessed: a deferential "business judgment" standard or a more intrusive one of "objective reasonableness."

The Association would have us decide this case through application of "the business judgment rule." As we have observed, that rule of judicial deference to corporate decisionmaking "exists

in one form or another in every American jurisdiction." (*Frances T.*, *supra*, 42 Cal.3d at p. 507, fn. 14.)

(2a) "The common law business judgment rule has two components-one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714 [57 Cal.Rptr.2d 798], citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. (See generally, *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681].) As discussed more fully below, in California the component of the common law rule relating to directors' personal liability is defined by statute. (See Corp. Code, §§ 309 [profit corporations], 7231 [nonprofit corporations].)

(1b) According to the Association, uniformly applying a business judgment standard in judicial review of community association board decisions would promote certainty, stability and predictability in common interest development governance. Plaintiff, on the other hand, contends general application of a business judgment standard to board decisions would undermine individual owners' ability, under Civil Code section 1354, to enforce, as equitable servitudes, the CC&R's in a common interest development's declaration.[5] Stressing residents' interest in a stable and predictable living environment, as embodied in a given development's particular CC&R's, ***258** plaintiff encourages us to impose on community associations an objective standard of reasonableness in carrying out their duties under governing CC&R's or public policy.

5 Civil Code section 1354, subdivision (a) provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both."

For at least two reasons, what we previously have identified as the "business judgment rule" (see *Frances T.*, *supra*, 42 Cal.3d at p. 507 [discussing Corporations Code section 7231] and fn. 14 [general discussion of common law rule]; *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594 [83 Cal.Rptr. 418, 463 P.2d 770] [reference to common law rule]) does not directly apply to this case. First, the statutory protections for individual directors (Corp. Code, §§ 309, subd. (c), 7231, subd. (c)) do not apply, as no individual directors are defendants here.

Corporations Code sections 309 and 7231 (section 7231) are found in the General Corporation Law (Corp. Code, § 100 et seq.) and the Nonprofit Corporation Law (*id.*, § 5000 et seq.), respectively; the latter incorporates

the standard of care defined in the former (*Frances T.*, *supra*, 42 Cal.3d at p. 506, fn. 13, citing legis. committee com., Deering's Ann. Corp. Code (1979 ed.) foll. § 7231, p. 205; 1B Ballantine & Sterling, Cal. Corporation Laws (4th ed. 1984) § 406.01, p. 19-192). Section 7231 provides, in relevant part: "A director shall perform the duties of a director ... in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (§ 7231, subd. (a); cf. Corp. Code, § 309, subd. (a).) "A person who performs the duties of a director in accordance with [the stated standards] shall have no liability based upon any alleged failure to discharge the person's obligations as a director ...." (§ 7231, subd. (c); cf. Corp. Code, § 309, subd. (c).)

Thus, by its terms, section 7231 protects only "[a] person who performs the duties of a director" (§ 7231, subd. (c), italics added); it contains no reference to the component of the common law business judgment rule that somewhat insulates ordinary corporate business decisions, per se, from judicial review. (See generally, *Lee v. Interinsurance Exchange*, *supra*, 50 Cal.App.4th at p. 714, citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law, *supra*, § 11.3, pp. 796-797.) Moreover, plaintiff here is seeking only injunctive and declaratory relief, and it is not clear that such a prayer implicates section 7231. The statute speaks only of protection against "liability based upon any alleged failure to discharge the person's obligations ...." (§ 7231, subd. (c), italics added.)

As no compelling reason for departing therefrom appears, we must construe section 7231 in accordance with its plain language. (*Rossi v. Brown* ***259** (1995) 9 Cal.4th 688, 694 [38 Cal.Rptr.2d 363, 889 P.2d 557]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) It follows that section 7231 cannot govern for present purposes.

Second, neither the California statute nor the common law business judgment rule, strictly speaking, protects noncorporate entities, and the defendant in this case, the Association, is not incorporated. [6]

6 The parties do not dispute that the component of the common law business judgment rule calling for deference to corporate decisions survives the Legislature's codification, in section 7231, of the component shielding individual directors from liability. (See also *Lee v. Interinsurance Exchange*, *supra*, 50 Cal.App.4th at p. 714; see generally, *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [65 Cal.Rptr.2d 872, 940 P.2d 323] [unless expressly provided, statutes should not be interpreted to alter the common law]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 80 [276 Cal.Rptr. 130, 801 P.2d 373] ["statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject"].)

(2b) Traditionally, our courts have applied the common law "business judgment rule" to shield from scrutiny qualifying decisions made by a corporation's board of directors. (See, e.g., *Marsili v. Pacific Gas & Elec. Co.* (1975) 51 Cal.App.3d 313, 324 [124 Cal.Rptr. 313, 79 A.L.R.3d 477]; *Fairchild v. Bank of America* (1961) 192 Cal.App.2d 252, 256-257 [13 Cal.Rptr. 491]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421]; *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, 429 [4 Cal.Rptr.2d 334] [rule applied to decision by board of incorporated community association]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865 [137 Cal.Rptr. 528] [same].) The policies underlying judicial creation of the common law rule derive from the realities of business in the corporate context. As we previously have observed: "The business judgment rule has been justified primarily on two grounds. First, that directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, '[t]he rule recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.' " (*Frances T.*, *supra*, 42 Cal.3d at p. 507, fn. 14, quoting 18B Am.Jur.2d (1985) Corporations, § 1704, pp. 556-557; see also *Findley v. Garrett*, *supra*, 109 Cal.App.2d at p. 174.)

(1c) California's statutory business judgment rule contains no express language extending its protection to noncorporate entities or actors. ***260** Section 7231, as noted, is part of our Corporations Code and, by its terms, protects only "director[s]." In the Corporations Code, except where otherwise expressly provided, "directors" means "natural persons" designated, elected or appointed "to act as members of the governing body of the corporation." (Corp. Code, § 5047.)

Despite this absence of textual support, the Association invites us for policy reasons to construe section 7231 as applying both to incorporated and unincorporated community associations. (See generally, Civ. Code, § 1363, subd. (a) [providing that a common interest development "shall be managed by an association which may be incorporated or unincorporated"]; *id.*, subd. (c) ["Unless the governing documents provide otherwise," the association, whether incorporated or unincorporated, "may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code."]; *Oil Workers Intl. Union v. Superior Court* (1951) 103 Cal.App.2d 512, 571 [230 P.2d 71], quoting *Otto v. Tailors' P. & B. Union* (1888) 75 Cal. 308, 313 [17 P. 217] [observing that when courts take jurisdiction over unincorporated associations for the purpose of protecting members' property rights, they " 'will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character' "]; *White v. Cox* (1971) 17 Cal.App.3d 824, 828 [95 Cal.Rptr. 259, 45 A.L.R.3d 1161] [noting "unincorporated associations are now entitled to general recognition as separate legal entities"].) Since other aspects of this case-apart from the Association's corporate status-render section 7231 inapplicable, anything we might say on

the question of the statute's broader application would, however, be dictum. Accordingly, we decline the Association's invitation to address the issue.

For the foregoing reasons, the "business judgment rule" of deference to corporate decisionmaking, at least as we previously have understood it, has no direct application to the instant controversy. The precise question presented, then, is whether we should in this case adopt for California courts a rule-analogous perhaps to the business judgment rule-of judicial deference to community association board decisionmaking that would apply, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 811] [referring "for the purpose of analogy only" to the business judgment rule in adopting a rule of deference].)

Our existing jurisprudence specifically addressing the governance of common interest developments is not voluminous. While we have not previously ***261** examined the question of what standard or test generally governs judicial review of decisions made by the board of directors of a community association, we have examined related questions.

Fifty years ago, in *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442 [211 P.2d 302, 19 A.L.R.2d 1268], we held that the decision by the board of directors of a real estate development company to deny, under a restrictive covenant in a deed, the owner of a fractional part of a lot permission to build a dwelling thereon "must be a reasonable determination made in good faith." (*Id.* at p. 447, citing *Parsons v. Duryea* (1927) 261 Mass. 314, 316 [158 N.E. 761, 762]; *Jones v. Northwest Real Estate Co.* (1925) 149 Md. 271, 278 [131 A. 446, 449]; *Harmon v. Burow* (1919) 263 Pa. 188, 190 [106 A. 310, 311].) Sixteen years ago, we held that a condominium owners association is a "business establishment" within the meaning of the Unruh Civil Rights Act, section 51 of the Civil Code. (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796 [191 Cal.Rptr. 320, 662 P.2d 427]; but see *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [278 Cal.Rptr. 614, 805 P.2d 873] [declining to extend *O'Connor*]; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 697 [72 Cal.Rptr.2d 410, 952 P.2d 218] [same].) And 10 years ago, in *Frances T.*, *supra*, 42 Cal.3d 490, we considered "whether a condominium owners association and the individual members of its board of directors may be held liable for injuries to a unit owner caused by third-party criminal conduct." (*Id.* at p. 495.)

(3a) In *Frances T.*, a condominium owner who resided in her unit brought an action against the community association, a nonprofit corporation, and the individual members of its board of directors after she was raped and robbed in her dwelling. She alleged negligence, breach of contract and breach of fiduciary duty, based on the association's failure to install sufficient exterior lighting and its requiring her to remove additional lighting

that she had installed herself. The trial court sustained the defendants' general demurrers to all three causes of action. (*Frances T.*, *supra*, 42 Cal.3d at p. 495.) We reversed. A community association, we concluded, may be held to a landlord's standard of care as to residents' safety in the common areas (*id.* at pp. 499-500), and the plaintiff had alleged particularized facts stating a cause of action against both the association and the individual members of the board (*id.* at p. 498). The plaintiff failed, however, to state a cause of action for breach of contract, as neither the development's governing CC&R's nor the association's bylaws obligated the defendants to install additional lighting. The plaintiff failed likewise to state a cause of action for breach of fiduciary duties, as the defendants had fulfilled their duty to the plaintiff as a shareholder, and the plaintiff had alleged no facts to show that ***262** the association's board members had a fiduciary duty to serve as the condominium project's landlord. (*Id.* at pp. 512-514.)

In discussing the scope of a condominium owners association's common law duty to a unit owner, we observed in *Frances T.* that "the Association is, for all practical purposes, the Project's 'landlord.' " (*Frances T.*, *supra*, 42 Cal.3d at p. 499, fn. omitted.) And, we noted, "traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control." (*Ibid.*, citing *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 328 [176 Cal.Rptr. 494]; *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802-803 [142 Cal.Rptr. 487]; *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (1970) 439 F.2d 477, 480-481 [141 App.D.C. 370, 43 A.L.R.3d 311]; *Scott v. Watson* (1976) 278 Md. 160 [359 A.2d 548, 552].) We concluded that "under the circumstances of this case the Association should be held to the same standard of care as a landlord" (*Frances T.*, *supra*, 42 Cal.3d at p. 499; see also *id.* at pp. 499-501, relying on *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796 ["association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders"] and *White v. Cox*, *supra*, 17 Cal.App.3d at p. 830 [association, as management body over which individual owner has no effective control, may be sued for negligence in maintaining sprinkler].)

More recently, in *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375 [33 Cal.Rptr.2d 63, 878 P.2d 1275] (*Nahrstedt*), we confronted the question, "When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability?" [7]

7 Our opinion in *Nahrstedt* also contains extensive background discussion, which need not be reproduced here. *Nahrstedt*'s background materials discuss the origin and development of condominiums, cooperatives and planned unit developments as widely accepted forms of real property ownership (*Nahrstedt*, *supra*, 8 Cal.4th at pp. 370-375, citing numerous

authorities); California's statutory scheme governing condominiums and other common interest developments (*id.* at pp. 377-379 [describing the Davis-Stirling Act]); and general property law principles respecting equitable servitudes and their enforcement (*Nahrstedt*, *supra*, at pp. 380-382).

(4) In *Nahrstedt*, an owner of a condominium unit who had three cats sued the community association, its officers and two of its employees for declaratory relief, seeking to prevent the defendants from enforcing against ***263** her a prohibition on keeping pets that was contained in the community association's recorded CC&R's. In resolving the dispute, we distilled from numerous authorities the principle that "[a]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 382.) Applying this principle, and noting that a common interest development's recorded use restrictions are "enforceable equitable servitudes, unless unreasonable" (Civ. Code, § 1354, subd. (a)), we held that "such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit" (*Nahrstedt*, *supra*, at p. 382). (See also *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349 [47 Cal.Rptr.2d 898, 906 P.2d 1314] [previously recorded restriction on property use in common plan for ownership of subdivision property enforceable even if not cited in deed at time of sale].)

In deciding *Nahrstedt*, we noted that ownership of a unit in a common interest development ordinarily "entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 373, citing Cal. Condominium and Planned Development Practice (Cont.Ed.Bar 1984) § 1.7, p. 13; Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine* (1988) 64 Chi.-Kent L.Rev. 653; Natelson, Law of Property Owners Associations (1989) § 3.2.2, p. 71 et seq.) "Because of its considerable power in managing and regulating a common interest development," we observed, "the governing board of an owners association must guard against the potential for the abuse of that power." (*Nahrstedt*, *supra*, at pp. 373-374, fn. omitted.) We also noted that a community association's governing board's power to regulate "pertains to a 'wide spectrum of activities,' such as the volume of playing music, hours of social gatherings, use of patio furniture and barbecues, and rental of units." (*Id.* at p. 374, fn. 6.)

We declared in *Nahrstedt* that, "when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied

uniformly." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 383, ***264** citing *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [224 Cal.Rptr. 18]; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [191 Cal.Rptr. 209].) Nevertheless, we stated, "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, at p. 374, citing Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association* (1990) 51 Ohio State L.J. 41, 43.)

The plaintiff in this case, like the plaintiff in *Nahrstedt*, owns a unit in a common interest development and disagrees with a particular aspect of the development's overall governance as it has impacted her. Whereas the restriction at issue in *Nahrstedt* (a ban on pets), however, was promulgated at the development's inception and enshrined in its founding CC&R's, the decision plaintiff challenges in this case (the choice of secondary over primary termite treatment) was promulgated by the Association's Board long after the Development's inception and after plaintiff had acquired her unit. Our holding in *Nahrstedt*, which established the standard for judicial review of recorded use restrictions that satisfy the requirements of covenants running with the land or equitable servitudes (see *Nahrstedt*, *supra*, 8 Cal.4th at p. 375), therefore, does not directly govern this case, which concerns the standard for judicial review of discretionary economic decisions made by the governing boards of community associations.

In *Nahrstedt*, moreover, some of our reasoning arguably suggested a distinction between originating CC&R's and subsequently promulgated use restrictions. Specifically, we reasoned in *Nahrstedt* that giving deference to a development's originating CC&R's "protects the general expectations of condominium owners 'that restrictions in place at the time they purchase their units will be enforceable.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 377, quoting Note, *Judicial Review of Condominium Rulemaking* (1981) 94 Harv. L.Rev. 647, 653.) Thus, our conclusion that judicial review of a common interest development's founding CC&R's should proceed under a deferential standard was, as plaintiff points out, at least partly derived from our understanding (invoked there by way of contrast) that the factors justifying such deference will not necessarily be present when a court considers subsequent, unrecorded community association board decisions. (See *Nahrstedt*, *supra*, at pp. 376-377, discussing *Hidden Harbour Estates v. Basso* (Fla.Dist.Ct.App. 1981) 393 So.2d 637, 639-640.)

(1d) Nevertheless, having reviewed the record in this case, and in light of the foregoing authorities, we conclude that the Board's decision here to ***265** use secondary, rather than primary, treatment in addressing the Development's termite problem, a matter entrusted to its discretion under the Declaration and Civil Code section 1364, falls within *Nahrstedt*'s pronouncement that, "Generally, courts will uphold decisions made by the governing board of an owners association

so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374.) Moreover, our deferring to the Board's discretion in this matter, which, as previously noted, is broadly conferred in the Development's CC&R's, is consistent with *Nahrstedt*' s holding that CC&R's "should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Id.* at p. 382.)

Here, the Board exercised discretion clearly within the scope of its authority under the Declaration and governing statutes to select among means for discharging its obligation to maintain and repair the Development's common areas occasioned by the presence of wood-destroying pests or organisms. The trial court found that the Board acted upon reasonable investigation, in good faith, and in a manner the Board believed was in the best interests of the Association and its members. (See generally, *Nahrstedt*, *supra*, 8 Cal.4th at p. 374; *Frances T.*, *supra*, 42 Cal.3d at pp. 512-514 [association's refusal to install lighting breached no contractual or fiduciary duties]; *Hannula v. Hacienda Homes*, *supra*, 34 Cal.2d at p. 447 ["refusal to approve plans must be a reasonable determination made in good faith"].)

Contrary to the Court of Appeal, we conclude the trial court was correct to defer to the Board's decision. We hold that, where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

The foregoing conclusion is consistent with our previous pronouncements, as reviewed above, and also with those of California courts, generally, respecting various aspects of association decisionmaking. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 [116 Cal.Rptr. 245, 526 P.2d 253] [holding "whenever a private association is legally required to refrain from arbitrary action, the association's action must be substantively rational and procedurally fair"]; *Ironwood Owners Assn. IX* ***266** v. *Solomon*, *supra*, 178 Cal.App.3d at p. 772 [holding homeowners association seeking to enforce CC&R's to compel act by member owner must "show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious"]; *Cohen v. Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d at p. 650 [noting "a settled rule of law that homeowners associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith"]; *Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683-684 [174 Cal.Rptr. 136] [in purporting to

test "reasonableness" of owners association's refusal to permit transfer of interest, court considered "whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments" and "whether the power was exercised in a fair and nondiscriminatory manner"].) [8]

8 Courts in other jurisdictions have adopted similarly deferential rules. (See, e.g., *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 812, 553 N.E.2d at pp. 1321-1322] [comparing benefits of a "reasonableness" standard with those of a "business judgment rule" and holding that, when "the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's"]; see also authorities cited there and *id*. at p. 545 [554 N.Y.S.2d at p. 816, 553 N.E.2d at p. 1326] (conc. opn. of Titone, J.) [standard analogous to business judgment rule is appropriate where "the challenged action was, in essence, a business judgment, i.e., a choice between competing and equally valid economic options" (italics omitted)].)

Our conclusion also accords with our recognition in *Frances T.* that the relationship between the individual owners and the managing association of a common interest development is complex. (*Frances T.*, *supra*, 42 Cal.3d at pp. 507-509; see also *Duffey v. Superior Court*, *supra*, 3 Cal.App.4th at pp. 428-429 [noting courts "analyze homeowner associations in different ways, depending on the function the association is fulfilling under the facts of each case" and citing examples]; *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 844 [182 Cal.Rptr. 813]; *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796; *Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d at pp. 865-867.) On the one hand, each individual owner has an economic interest in the proper business management of the development as a whole for the sake of maximizing the value of his or her investment. In this aspect, the relationship between homeowner and association is somewhat analogous to that between shareholder and corporation. On the other hand, each individual owner, at least while residing in the development, has a personal, not strictly economic, ***267** interest in the appropriate management of the development for the sake of maintaining its security against criminal conduct and other foreseeable risks of physical injury. In this aspect, the relationship between owner and association is somewhat analogous to that between tenant and landlord. (See generally, *Frances T.*, *supra*, 42 Cal.3d at p. 507 [business judgment rule "applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation," but "does not abrogate the common law duty which every person owes to others-that is, a duty to refrain from conduct that imposes an unreasonable risk of injury on third parties"].)

Relying on *Frances T.*, the Court of Appeal held that a landlord-like common law duty required Association, in discharging

its responsibility to maintain and repair the common areas occasioned by the presence of termites, to exercise reasonable care in order to protect plaintiff's unit from undue damage. (3b) As noted, "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], citing, inter alia, *Frances T.*, *supra*, 42 Cal.3d at pp. 499-501.) (1e) Contrary to the Court of Appeal, however, we do not believe this case implicates such duties. *Frances T.* involved a common interest development resident who suffered " 'physical injury, not pecuniary harm ....' " (*Frances T.*, *supra*, 42 Cal.3d at p. 505, quoting *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, *supra*, 1 Cal.3d at p. 595; see also *id.* at p. 507, fn. 14.) Plaintiff here, by contrast, has not resided in the Development since the time that significant termite infestation was discovered, and she alleges neither a failure by the Association to maintain the common areas in a reasonably safe condition, nor knowledge on the Board's part of any unreasonable risk of physical injury stemming from its failure to do so. Plaintiff alleges simply that the Association failed to effect necessary pest control and repairs, thereby causing her pecuniary damages, including diminution in the value of her unit. Accordingly, *Frances T.* is inapplicable.

Plaintiff warns that judicial deference to the Board's decision in this case would not be appropriate, lest every community association be free to do as little or as much as it pleases in satisfying its obligations to its members. We do not agree. Our respecting the Association's discretion, under this Declaration, to choose among modes of termite treatment does not foreclose the ***268** possibility that more restrictive provisions relating to the same or other topics might be "otherwise provided in the declaration[s]" (Civ. Code, § 1364, subd. (b)(1)) of other common interest developments. As discussed, we have before us today a declaration constituting a general scheme for maintenance, protection and enhancement of value of the Development, one that entrusts to the Association the management, maintenance and preservation of the Development's common areas and confers on the Board the power and authority to maintain and repair those areas.

Thus, the Association's obligation at issue in this case is broadly cast, plainly conferring on the Association the discretion to select, as it did, among available means for addressing the Development's termite infestation. Under the circumstances, our respecting that discretion obviously does not foreclose community association governance provisions that, within the bounds of the law, might more narrowly circumscribe association or board discretion.

Citing Restatement Third of Property, Servitudes, Tentative Draft No. 7,[9] plaintiff suggests that deference to community

association discretion will undermine individual owners' previously discussed right, under Civil Code section 1354 and *Nahrstedt*, *supra*, 8 Cal.4th at page 382, to enforce recorded CC&R's as equitable servitudes, but we think not. (5) "Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration. [Citation.] More importantly here, the homeowner can sue directly to enforce the declaration." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246-1247 [280 Cal.Rptr. 568], citing *Cohen* ***269** v. *Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d 642.) Nothing we say here departs from those principles.

9 The Restatement tentative draft proposes that "In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common interest community: [¶] (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control." (Rest.3d Property, Servitudes (Tent. Draft No. 7, Apr. 15, 1998) ch. 6, § 6.13, p. 325.) "The business judgment rule is not adopted, because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs." (*Id.*, com. b at p. 330.) It is not clear to what extent the Restatement tentative draft supports plaintiff's position. As the Association points out, a "member challenging an action of the association under this section has the burden of proving a breach of duty by the association" and, when the action is one within association discretion, "the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common interest community." (Rest.3d Property (Tent. Draft No. 7), *supra*, § 6.13, p. 325.) Depending upon how it is interpreted, such a standard might be inconsistent with the standard we announced in *Nahrstedt*, viz., that a use restriction is enforceable "*not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 386, italics in original.)

(1f) Finally, plaintiff contends a rule of judicial deference will insulate community association boards' decisions from judicial review. We disagree. As illustrated by *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 754-755 [79 Cal.Rptr.2d 248] (*Fountain Valley*), judicial oversight affords significant protection against overreaching by such boards.

In *Fountain Valley*, a homeowners association, threatening litigation against an elderly homeowner with Hodgkin's disease, gained access to the interior of his residence and demanded he remove a number of personal items, including books and papers

not constituting "standard reading material," claiming the items posed a fire hazard. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 748.) The homeowner settled the original complaint (*id.* at p. 746), but cross-complained for violation of privacy, trespass, negligence and breach of contract (*id.* at p. 748). The jury returned a verdict in his favor, finding specifically that the association had acted unreasonably. (*Id.* at p. 749.)

Putting aside the question whether the jury, rather than the court, should have determined the ultimate question of the reasonableness *vel non* of the association's actions, the Court of Appeal held that, in light of the operative facts found by the jury, it was "virtually impossible" to say the association had acted reasonably. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 754.) The city fire department had found no fire hazard, and the association "did not have a good faith, albeit mistaken, belief in that danger." (*Ibid.*) In the absence of such good faith belief, the court determined the jury's verdict must stand (*id.* at p. 756), thus impliedly finding no basis for judicial deference to the association's decision.

Plaintiff suggests that our previous pronouncements establish that when, as here, a community association is charged generally with maintaining the common areas, any member of the association may obtain judicial review of the reasonableness of its choice of means for doing so. To the contrary, in *Nahrstedt* we emphasized that "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used in a way that benefits the commonality but harms the individual.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374, quoting Natelson, *Consent, Coercion, and "Reasonableness" in Private* ***270** *Law: The Special Case of the Property Owners Association*, *supra*, 51 Ohio State L.J. at p. 67.) [10]

10 In this connection we note that, insofar as the record discloses, plaintiff is the only condominium owner who has challenged the Association's decision not to fumigate her building. To permit one owner to impose her will on all others and in contravention of the governing board's good faith decision would turn the principle of benefit to " 'the commonality but harm[to] the individual' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374) on its head.

Nor did we in *Nahrstedt* impose on community associations strict liability for the consequences of their ordinary discretionary economic decisions. As the Association points out, unlike the categorical ban on pets at issue in *Nahrstedt*-which arguably is either valid or not-the Declaration here, in assigning the Association a duty to maintain and repair the common areas, does not specify how the Association is to act, just that it should. Neither the Declaration nor Civil Code section 1364 reasonably can be construed to mandate any particular mode of termite treatment.

Still less do the governing provisions require that the Association render the Development constantly or absolutely termite-free. Plainly, we must reject any per se rule "requiring a condominium association

and its individual members to indemnify any individual homeowner for any reduction in value to an individual unit caused by damage.... Under this theory the association and individual members would not only have the duty to repair as required by the CC&Rs, but the responsibility to reimburse an individual homeowner for the diminution in value of such unit regardless if the repairs had been made or the success of such repairs." (*Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1487 [252 Cal.Rptr. 67] [disapproving cause of action for lateral and subjacent support based on association's failure, despite efforts, to remedy subsidence problem].)

The formulation we have articulated affords homeowners, community associations, courts and advocates a clear standard for judicial review of discretionary economic decisions by community association boards, mandating a degree of deference to the latter's business judgments sufficient to discourage meritless litigation, yet at the same time without either eviscerating the long-established duty to guard against unreasonable risks to residents' personal safety owed by associations that "function as a landlord in maintaining the common areas" (*Frances T.*, *supra*, 42 Cal.3d at p. 499) or modifying the enforceability of a common interest development's CC&R's (Civ. Code, § 1354, subd. (a); *Nahrstedt*, *supra*, 8 Cal.4th at p. 374).

Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make ***271** the detailed and peculiar economic decisions necessary in the maintenance of those developments. A deferential standard will, by minimizing the likelihood of unproductive litigation over their governing associations' discretionary economic decisions, foster stability, certainty and predictability in the governance and management of common interest developments. Beneficial corollaries include enhancement of the incentives for essential voluntary owner participation in common interest development governance and conservation of scarce judicial resources.

Disposition

For the foregoing reasons, the judgment of the Court of Appeal is reversed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred. ***272**

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Court of Appeal, Second District, Division 6, California.

Abel LARA, et al.,
Plaintiffs and Appellants,
v.
WILLOWS JOINT VENTURE, et al., Defendants and Respondents.

2d Civil No. B145113.
|
(Los Angeles County Super. Ct. No. KC027094).
|
April 24, 2002.

Synopsis

Homeowners brought action against developer, builder, and grading contractor for negligence, strict liability, breach of warranty, and fraudulent concealment. The Superior Court, Los Angeles County, No. KC027094, Theodore H. Piatt, J., entered summary judgment for defendants. Homeowners appealed. The Court of Appeal, Yegan, J., held that: (1) homeowners' causes of action accrued, and statutes of limitations began to run, when their attorney informed them of subsidence of land and probable liability of defendants; (2) defendants were not estopped to assert defense of statute of limitations; and (3) statute of limitations was not tolled.

Affirmed.

West Headnotes (4)

[1] **Appeal and Error** 🔑 Judgment

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k223 Judgment

Homeowners waived for appeal their objections to the form of builder's motion for summary judgment, in action for property damage, where they failed to raise the issue at trial.

[2] **Limitation of Actions** 🔑 Injuries to Property

Limitation of Actions 🔑 Contracts; Warranties

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(7) Injuries to Property
241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(9) Contracts; Warranties

Homeowners' cause of action against builder and other defendants for

faulty construction accrued, and three-year statute of limitations for property damage, and four-year statute governing written contracts, began to run, when owners' attorney notified them that property had settled, and that builder and other defendants were probably liable. West's Ann.Cal.C.C.P. §§ 337, 338.

[3] Limitation of Actions Estoppel to Rely on Limitation

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k13 Estoppel to Rely on Limitation

Builder and grading contractor were not estopped to raise statute of limitations as defense in homeowners' action for property damage; owners were represented by counsel, and defendants did nothing to induce owners' delay in filing suit.

[4] Limitation of Actions Injuries to Property in General

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k55 Torts
241k55(5) Injuries to Property in General

Statute of limitations on homeowners' claims against builder and grading contractor for property damage was not tolled, where homeowners failed to present any evidence that defendants performed or promised to perform repairs.

Theodore H. Piatt, Judge, Superior Court County of Los Angeles.

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Opinion

YEGAN, J.

***1** Abel and Olga Lara and Rodolfo and Maclovia Beltran appeal from the summary judgment granted to respondents Willows Joint Venture and Socaland Group (collectively, Socaland), and to respondents Benik Partners and the Estate of Albert Levinson (collectively, Benik). The trial court ruled that the applicable statutes of limitation bar appellants' claims for negligence, strict liability, breach of warranty and fraudulent concealment of defective soil conditions beneath their homes. Appellants contend the trial court erred because Socaland never properly moved for summary judgment, and because issues of material fact exist

concerning whether respondents are estopped to assert the statute of limitations as a defense and whether the limitations period was tolled. We affirm.

Facts

In 1987, the Laras and Beltrans each bought a single family home built by Socaland. Benik performed grading on its adjacent property during the summer of 1992. By 1993, appellants noticed cracks in the ground, foundations, walls and chimneys of their houses.

On December 1, 1993, appellants' counsel notified Socaland and Benik of the soil conditions and resulting damages to appellants' homes. The letter stated that Keith Ehlert, "a licensed engineering geologist indicates that the cause of damage relates to long term settlement, aggravated by the grading operations occurring on [Benik's property]. In other words, both of you are responsible for the damages incurred by our clients." Counsel further informed respondents that appellants intended "to file an action against each of you ...," if the matter "is not immediately resolved ...." He suggested that the parties, their insurance adjusters and geologists meet at the site within two weeks. "If a satisfactory remedial scheme can be mutually agreed upon, it will save all parties the expense and inconvenience of litigation." The letter ended with a warning that, if the parties did not contact counsel "immediately" to schedule the meeting, "we will file an action on behalf of our clients without further notice."

For the next four years, the parties exchanged correspondence held meetings, and retained experts to test the soil and identify needed repairs. In late 1994 or early 1995, a second soils expert, A.J. Jessup, conducted tests and concluded that the soil problems observed by appellants were caused by seismic activity. At a November 1995 meeting, the parties could not agree on the repairs that were needed. They instead agreed to have a third expert review Jessup's work. Avram Ninyo was retained nearly one year later, in December 1996. His report, issued in March 1997, concluded that both Socaland and Benik were at fault. Appellants' homes were built on a "fill slope" constructed by Socaland. "[T]he toe of the existing fill slope was not adequately founded in competent material prior to placing fill during rough grading of the subject lots." The resulting slope movement was "aggravated by off-site grading performed on the adjacent [Benik property]."

***2** The parties solicited repair plans and bids from contractors but were again unable to settle the matter. On December 31, 1997, appellants filed their complaint. It alleges causes of action against Socaland for negligence, strict liability, breach of warranty and fraudulent concealment relating to the rough grading performed by Socaland during construction. It alleges a cause of action for negligence against Benik relating to grading and fill work it performed on the adjacent property in 1992.

The Motion for Summary Judgment

Benik filed its motion for summary judgment in May 2000, contending that appellants'

negligence claim against Benik was barred by the applicable statute of limitations because appellants knew about Benik's potential liability when their attorney sent the December 1, 1993 letter. Benik contended it was not estopped to assert the statute of limitations defense because it had never promised to settle the dispute or to repair appellants' property, and because appellants were always represented by counsel.

Socaland filed a "notice of joinder" in Benik's motion. This document stated that Socaland "hereby joins" in Benik's motion and "hereby incorporates" Benik's moving papers and "all supporting exhibits and declarations as if presented directly herein." In addition, it filed the declaration of its counsel who stated that he had "thoroughly reviewed the entire file ... and am not aware of any correspondence from any source which agreed to 'toll' the statute of limitations as to plaintiffs ...."

Appellants' opposition contended that their causes of action accrued in March 1997 when they received the Ninyo report. Before that time, they did not understand that their damages were caused by the wrongdoing of Benik and Socaland. Appellants further contended that Benik was estopped to assert the statute of limitations defense because, between December 1993 and 1998, "the parties were jointly attempting to determine the cause of [appellants'] damage, establish a repair scope, and engage a mutually agreeable contractor to perform the repairs as part of the agreed approach to resolve the claims with the aid of experts instead of litigation." Appellants also filed an opposition to Socaland's joinder which incorporated all of their opposing documents "as if set forth herein."

The trial court granted summary judgment to both Benik and Socaland. It concluded that appellants' causes of action accrued, at the latest, by December 1, 1993. Their complaint was filed more than four years later, on December 31, 1997. The trial court rejected appellants' contentions that the limitations period had been tolled and that respondents were estopped to assert it as a defense. It later denied appellants' motion to reconsider this ruling.

Contentions on Appeal

Appellants contend the trial court erred in granting summary judgment to Socaland because Socaland never itself moved for summary judgment, and its "joinder" in Benik's motion was ineffective. Appellants further contend that issues of fact exist on the questions of when their causes of action accrued, whether respondents are estopped to assert the statute of limitations as a defense, and whether repair work tolled the limitations period. Socaland contends appellants waived their procedural objections, that appellants' causes of action accrued when counsel sent the December 1, 1993 letter, and that appellants have no evidence to support their estoppel and tolling arguments.

Discussion

Procedural Issues

***3** Appellants contend that, because Socaland filed no moving papers, evidence or argument of its own, it was not entitled to summary judgment. Socaland contends the objection has been waived by appellants' failure to raise it below and that, in any event, the trial court had discretion to ignore any procedural irregularity in its "joinder." We do not want to encourage the potentially confusing practice of simply joining another party's motion for summary judgment. We agree, however, that the objection has been waived and that the trial court had discretion to consider Socaland's joinder.

Code of Civil Procedure section 437c [1] provides that a motion for summary judgment "shall be supported" by declarations and other documentary evidence, and that the "supporting papers shall include" a separate statement of undisputed material facts. (§ 437c, subd. (b).) The trial court has discretion to ignore facts not included in a separate statement and to deny a motion for summary judgment on the sole ground that the moving party did not file a separate statement. (*Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1916 fn. 3, 58 Cal.Rptr.2d 645.) These requirements exist for the convenience of the trial court which has discretion to ignore a party's lack of compliance. The trial court may, for example, search the record itself to locate the undisputed facts or legal theories necessary to support a summary judgment. (*Id.;* see also *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69, 15 Cal.Rptr.2d 598 [trial court may, but is not required to grant summary judgment on a legal ground not raised by the moving party, where opposing party has a reasonable opportunity to respond].) Objections to the form or content of a moving party's supporting papers are waived if not raised in the trial court. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 71 fn. 2, 41 Cal.Rptr.2d 404; *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1084 fn. 4, 1 Cal.Rptr.2d 215.)

1 Statutory references are to the Code of Civil Procedure unless otherwise stated.

[1] Here, appellants' opposition to Benik's motion included a response to the separate statement of undisputed facts, a statement of additional facts in dispute, declarations with supporting evidence, and a memorandum of points and authorities. Although they filed an "opposition" to Socaland's joinder, appellants did not object to the joinder procedure itself, and submitted no evidence or arguments separately addressing their claims against Socaland. There is no indication that appellants misunderstood the fact that Socaland wanted summary judgment in its favor, or that appellants were misled into believing that no response was required. Socaland's counsel participated in the hearing without objection from appellants' counsel. Appellants made no argument that the evidence or legal issues relating to Socaland differed from those relating to Benik. In fact, appellants have never suggested that they would raise different legal arguments or rely on different evidence if required to address directly the timeliness of their complaint against Socaland. Under these circumstances, we conclude that appellants have waived their objections to the form of

Socaland's motion and that the trial court did not abuse its discretion in considering the motion.

The Statute of Limitations

***4** Causes of action for latent defects in the development of real property must be brought within three years (§ 338) or four years (§ 337) of their discovery by the plaintiff, but in any event within 10 years of substantial completion of the development. (§ 337.15; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 27, 21 Cal.Rptr.2d 104.) A cause of action is "discovered," or accrues, when the plaintiff becomes aware, or in the exercise of reasonable diligence should have become aware, of both the injury "and its negligent cause." (*Jolly v. Eli Lilly Co.* (1988) 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923; see also *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 409, 163 Cal.Rptr. 711 [cause of action for property damages accrues "from the point in time when plaintiffs became aware of defendant's negligence as a cause [of their property damage] .... "].) The plaintiff must have factual information sufficient to put a reasonable person on inquiry. "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [he or] she must decide whether to file suit or sit on [his or] her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he or] she cannot wait for the facts to find [him or] her." (*Jolly v. Eli Lilly Co., supra,* 44 Cal.3d at p. 1111, 245 Cal.Rptr. 658, 751 P.2d 923.)

[2] Here, appellants' counsel notified respondents on December 1, 1993, that property damage had occurred and that "a licensed engineering geologist indicates that the cause of damage relates to long term settlement .... In other words, both [Benik and Socaland] are responsible for the damages incurred ...." By this date, then, appellants knew they had suffered damage and suspected, based upon a preliminary investigation conducted by a competent expert, that respondents' conduct was a cause of that damage. The trial court correctly concluded that appellants' causes of action had accrued by December 1, 1993. Their complaint, filed more than four years later, was time-barred.

The declaration of appellants' counsel, Dale Ortmann, submitted in support of their motion for reconsideration does not alter this result. First, the trial court had discretion to ignore the declaration because it was untimely. (*City and County of San Francisco v. Superior Court* (1993) 21 Cal.App.4th 1031, 1034, fn. 3, 27 Cal.Rptr.2d 201.) Second, the declaration shows that appellants knew respondents' conduct was a cause of their damages, even if they lacked a precise technical explanation for the cause or of the respondents' relative degrees of fault. Appellants' knowledge, while incomplete, was sufficient to start the limitations period running. (*Jolly v. Eli Lilly Co., supra,* 44 Cal.3d at p. 1111, 245 Cal.Rptr. 658, 751 P.2d 923.)

For the same reason, we conclude the trial court properly granted summary judgment

on appellants' cause of action for fraudulent concealment. By December 1, 1993, appellants had knowledge of facts sufficient to put them on inquiry that such a cause of action might exist. (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374, 105 Cal.Rptr.2d 699 [fraud cause of action accrues "not when the plaintiff became aware of the specific wrong alleged, but when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing."]; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1525, 37 Cal.Rptr.2d 810.) The three-year limitations period applicable to fraud claims commenced to run on December 1, 1993, and the complaint was, therefore, time barred.

Estoppel

***5** Appellants contend respondents are estopped to assert the statute of limitations defense because they were negotiating with appellants during the entire period between counsel's initial letter and the date the complaint was filed. We are not persuaded.

A party may be estopped to assert the statute of limitations as a defense "where there has been 'some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.' (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 523, p. 550.) It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43, 21 Cal.Rptr.2d 110.) Estoppel is established by showing: " ' "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury." ' (*DRG/ Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1949) 30 Cal.App.4th 54, 59 [35 Cal.Rptr.2d 515].)" (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268, 84 Cal.Rptr.2d 552.)

[3] Whether an estoppel exists is generally a question of fact and not of law. Here, however, the undisputed facts show that, as a matter of law, the doctrine of estoppel does not apply. (*General Accident Ins. Co. v. Workers' Comp. Appeals Bd.* (1996) 47 Cal.App.4th 1141, 1149, 55 Cal.Rptr.2d 272.) First, appellants were always represented by counsel. "Where one has been represented by an attorney in connection with a claim the necessary elements for estoppel are not established as a matter of law." (*Romero v. County of Santa Clara* (1970) 3 Cal.App.3d 700, 705, 83 Cal.Rptr. 758; see also *Kuntsman v. Mirizzi* (1965) 234 Cal.App.2d 753, 757, 44 Cal.Rptr. 707 [party represented by counsel cannot claim to have been ignorant of the true facts or to have detrimentally relied on conduct of opposing party].) Second, the undisputed facts show that respondents did nothing to induce appellants' delay. They did not promise to toll the limitations period while the experts investigated, to repair defects identified by the experts, or to settle appellants' claims. Instead, they agreed to pay for the

soil tests, described themselves as "interested" in resolving the matter, and told appellants' counsel they expected "serious settlement negotiations will begin" after Jessup completed his report. This conduct neither implicitly nor explicitly encouraged appellants to delay filing their complaint.

Appellants contend respondents always understood that they delayed filing their complaint on the condition that respondents pay for the soils tests and expert evaluations. According to appellants, all parties considered this investigation a necessary "first step" in developing a plan to repair the damage at respondents' expense. Appellants failed, however, to submit any evidence of a tolling agreement and the parties' correspondence does not support its existence. During the four years in which they corresponded with respondents' counsel, appellants never reduced their "understanding" to writing in a confirming letter or a tolling agreement. Even Ortmann's declarations stop short of claiming that respondents induced the delay by agreeing to toll the statute of limitations or forego it as a defense. Ortmann declares that he "agreed to defer litigation as a result of" respondents' commitment to hire a neutral expert. He does not state that respondents funded the investigation in exchange for the delay, or even understood the delay was a result of, or in reliance on, an agreement to investigate and repair. In the absence of such evidence, the trial court properly concluded the undisputed facts do not support estoppel.

Tolling

***6** **[4]** Appellants contend disputed issues of fact exist on the question of whether the limitations period was tolled by respondents' promises or attempts to repair the damage. (See, e.g., *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 354–355, 30 Cal.Rptr.2d 418; *Cascade Gardens Homeowners Assn. v. McKellar & Associates* (1987) 194 Cal.App.3d 1252, 1256, 240 Cal.Rptr. 113 ["repairs ... toll statutes of limitations as a matter of law."].) There is, however, no evidence that respondents performed, or promised to perform any repair work. We reject the contention for that reason.

Conclusion

The judgment is affirmed. Costs to respondents.

We concur: GILBERT, P.J., and COFFEE, J.

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WOO CHUL LEE et al., Plaintiffs and Appellants,
v.
INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.

No. B089335.
Court of Appeal, Second District, Division 3, California.
Oct 31, 1996.

SUMMARY

Subscribers and former subscribers of an interinsurance exchange (a reciprocal insurer) brought an action against the exchange, its board of governors, the exchange's parent organization, and the exchange's corporate attorney-in-fact, to compel defendants to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts. The trial court entered a judgment of dismissal after sustaining defendants' demurrer to plaintiffs' third amended complaint without leave to amend. (Superior Court of Los Angeles County, No. BC062630, Barnet M. Cooperman, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly sustained defendants' demurrer. Decisions for managing surplus funds of an insurer are exercises of business judgment, and courts are unqualified to second-guess determinations made by an insurer as to the amount of funds necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. The business judgment rule applies to reciprocal insurers, just as it applies to other business concerns. The court also held that Ins. Code, § 1282, did not preclude the exchange's board from the protection of the business judgment rule. The court further held that plaintiffs failed to allege facts that established an exception to the business judgment rule. More was needed than conclusory allegations of improper motives and conflict of interest. The court held that the trial court properly sustained defendants' demurrer, since plaintiffs, in executing the subscriber's agreement, contractually agreed to grant the exchange's board discretion concerning the maintenance and use of surplus funds. Although plaintiffs asserted that they were fraudulently induced to enter into the agreement, based on misrepresentations regarding subscribers' personal liability for the exchange's debts, there were no such misrepresentations, nor did the agreement conceal material facts. (Opinion by Croskey, Acting P. J., with Kitching and Aldrich, JJ., concurring.) ***695**

HEADNOTES

Classified to California Digest of Official Reports

(1)

Appellate Review § 128--Scope of Review--Function of Appellate Court-- Rulings on Demurrers.
In matters coming to the appellate court on a judgment of dismissal following the trial court's order sustaining a defendant's demurrer without leave to amend, the appellate court assumes the truth of all properly pleaded facts, but not contentions, deductions, or conclusions of fact or law. Assuming the truth of the plaintiff's factual allegations, the appellate court then independently determines whether the plaintiff has alleged cognizable claims.

(2a, 2b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule.
The trial court properly sustained the demurrer of an interinsurance exchange (a reciprocal insurer) to an action by subscribers of the exchange that sought to compel it to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts. Decisions for managing surplus funds of an insurer are exercises of business judgment, and courts are unqualified to second-guess determinations made by an insurer as to the amount of funds necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. Assuring availability of funds to cover losses is a rational business purpose for an insurer. Moreover, the business judgment rule applies to reciprocal insurers, just as it applies to other business concerns; the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants. Where the reason is the same, the rule should be the same (Civ. Code, § 3511). Moreover, management of the exchange's funds did not constitute an unlawful business practice (Bus. & Prof. Code, § 17200). Actions that are reasonable exercises of business judgment, that are not forbidden by law, and that fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices.

(3)
Corporations § 39--Officers and Agents--Liability--Business Judgment Rule:Words, Phrases, and Maxims--Business Judgment Rule.
The business judgment rule is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. The rule is based on the ***696** premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Corporations, § 110.]

(4)

Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule--Applicability of Common Law Rule.

In an action by interinsurance exchange subscribers to compel the exchange (a reciprocal insurer) to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained defendants' demurrer. Ins. Code, § 1282, did not preclude the exchange's board from the protection of the business judgment rule. Although Ins. Code, § 1282, provides that certain provisions of the Insurance Code do not apply to reciprocal insurers, and while that section apparently precludes application of the statutory business judgment rule (Corp. Code, § 309) to reciprocal insurers, it does not preclude application of the common law business judgment rule. The common law business judgment rule has two components-one that immunizes directors from personal liability if they act in accordance with its requirements and another that insulates from court intervention those management decisions that are made by directors in good faith in what the directors believe is the organization's best interest. Only the first component is embodied in Corp. Code, § 309. Thus, even if Ins. Code, § 1282, makes Corp. Code, § 309, inapplicable to reciprocal insurers, the second component of the common law rule was unaffected, and it was the second component of the rule that applied to reciprocal insurers.

(5a, 5b)

Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule--Failure to Allege Exceptions to Rule.

In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally ***697** required amounts, the trial court properly declined to interfere with the decisions of the exchange's board respecting management of surplus funds, where plaintiffs failed to allege facts that established an exception to the business judgment rule. More was needed to establish an exception to the business judgment rule than conclusory allegations of improper motives and conflict of interest. Nor was it sufficient to generally allege the failure to conduct an active investigation, in the absence of allegations of facts that reasonably called for such an investigation, or allegations of facts that would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment. While the interlocking boards of the exchange, its parent organization, and its attorney-in-fact may have created an opportunity for the parent organization to exercise undue influence over the exchange, that bare opportunity did not establish that fraud, bad faith, or gross overreaching had actually occurred. The parent organization's contingent future interest in the surplus remaining upon dissolution of the exchange was too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the exchange was at all

likely to be dissolved within the foreseeable future.

(6)
Corporations § 39--Officers and Agents--Liability--Business Judgment Rule--Presumption of Good Faith Decisions--Exceptions.
The business judgment rule sets up a presumption that directors' decisions are made in good faith and are based upon sound and informed business judgment. An exception to this presumption exists in circumstances that inherently raise an inference of conflict of interest. Such circumstances include those in which directors, particularly inside directors, take defensive action against a takeover by another entity, which may be advantageous to the corporation, but threatening to existing corporate officers. Similarly, a conflict of interest is inferable where the directors of a corporation that is being taken over approve generous termination agreements-"golden parachutes"-for existing inside directors. In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. But in most cases, the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching, or an unreasonable failure to investigate material facts. Interference with the discretion of directors is not warranted in doubtful cases.

(7)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Ripeness.
In an action ***698** by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly found that the issue was not ripe for decision as to whether, upon dissolution of the exchange, the exchange's parent organization or the subscribers would be entitled to the exchange's assets. There had been no showing or any allegation of a likelihood that the exchange would be dissolved within the foreseeable future. Moreover, if the exchange was dissolved, the disposition of its assets would necessarily be overseen by the Commissioner of Insurance (Ins. Code, § 1070 et seq.), and persons claiming an interest in the assets would have the chance to challenge the parent organization's claims in the administrative proceedings.

(8)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Subscribers' Agreement to Grant Exchange Discretion to Handle Surplus--Misrepresentations.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer, since the subscribers agreed in the subscriber's agreement to grant the exchange's board discretion concerning the maintenance and use of surplus. Although the

subscribers asserted that they were fraudulently induced to enter into the agreement, based on misrepresentations regarding subscribers' personal liability for the exchange's debts, there were no such misrepresentations. The agreement stated, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This statement was true since the Commissioner of Insurance had granted the exchange a certificate of perpetual nonassessability under Ins. Code, § 1401.5. A subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear" (Ins. Code, § 1450). This limitation means that a subscriber is liable for the amount for which each subscriber could be assessed by the exchange's attorney-in-fact or the Commissioner of Insurance. For subscribers of exchanges that are exempt from assessments under Ins. Code, § 1401 or 1401.5, there is no liability beyond the subscriber's paid premium for any debts of the exchange, including judgment debts.

(9a, 9b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Subscribers' ***699** Agreement to Grant Exchange Discretion to Handle Surplus--Concealment of Material Facts.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer, since the subscribers agreed in the subscriber's agreement to grant the exchange's board discretion concerning the maintenance and use of surplus, and the agreement did not conceal material facts. Disbursements and withdrawal rights are entirely at the discretion of the insurers' directors (Ins. Code, § 1420). Thus, the subscribers could have no reasonable expectation of such rights, and there was no basis for claiming they were fraudulently induced to waive them. Nor could plaintiffs legitimately claim rights based upon the representative's manual of the parent organization; the manual was an internal document, was not intended to be communicated to potential subscribers, and made no promises to them. Plaintiffs failed to establish either that the agreement was fraudulent, or that the exchange's management of surplus was an unlawful business practice under Bus. & Prof. Code, § 17200.

(10)
Insurance Contracts and Coverage § 34--Avoidance of Policy-- Limitations Upon Enforcement.
There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision that does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable.

(11)

Pleading § 67--Amendment--Sustaining Demurrer Without Leave to Amend-- Action Against Interinsurance Exchange--Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange.

In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment, but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action. Plaintiffs had three opportunities to amend their complaint and were ***700** unable to successfully state a cause of action. Moreover, the defects in the complaints were not defects of form. Rather, the problem was that plaintiffs sought judicial intervention in management decisions as to the level and form of surplus funds of the exchange, even though such matters were within the discretion of the exchange's board and management, provided that those institutions acted in good faith. Since plaintiffs failed to allege facts that tended to establish an absence of good faith and reasonable inquiry, no cause of action existed by which the exchange's actions could be challenged.

COUNSEL

Keith E. Hall, Arter & Hadden, Edwin W. Duncan, Richard N. Ellner, Richard L. Fruin and William S. Davis for Plaintiffs and Appellants.

Morrison & Foerster, Seth M. Hufstedler and John Sobieski for Defendants and Respondents.

Greines, Martin, Stein & Richland, Robert A. Olson, Barry M. Wolf, Pillsbury, Madison & Sutro, Robert M. Westberg and Joseph A. Hearst as Amici Curiae on behalf of Defendants and Respondents.

CROSKEY, Acting P. J.

Three years ago, in *Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365 [20 Cal.Rptr.2d 87] (hereafter, *Barnes*), this court considered, among other issues, the question of whether a policyholder of a mutual insurance company can object to, or seek judicial assistance to control, the insurer's maintenance, management and disbursement of surplus funds. We answered that question in the negative. (*Id.* at pp. 378-380.)

The present action, brought by subscribers and former subscribers of the Interinsurance Exchange of the Automobile Club of Southern California (hereafter, the Exchange), raises essentially the same question.[1] However, unlike the defendant mutual insurer in *Barnes*, the Exchange is a reciprocal ***701** insurer, organized under chapter 3 (§ 1280 et seq., "Reciprocal Insurers,") of division 1, part 2 of the Insurance Code.[2]

1 Plaintiffs Woo Chul Lee and Rosemarie Flocken are current subscribers; plaintiff Jeung Sook Han, a subscriber for 10 years, withdrew in 1992. The lawsuit is designated in the complaint and in plaintiff-appellants' opening brief on appeal as a class action.

However, it does not appear that a class has been certified.

2 All statutory references are to the Insurance Code unless otherwise indicated.

Reciprocal insurers, alternatively called interinsurance exchanges, differ from mutual insurers in some details of structure and legal status. However, as we shall explain, the differences between mutual and reciprocal insurers are not of a kind which justifies different rules respecting their insured's right to control business decisions of the insurer's governing board. We thus conclude that a reciprocal insurer, like a mutual insurer, is subject to the common law business judgment rule, which we relied upon in *Barnes*, and which protects the good faith business decisions of a business organization's directors, including decisions concerning the maintenance, management and disbursement of an insurer's surplus funds, from interference by the courts.

This action is against the Exchange; its board of governors and 11 of its members and former members (hereafter, collectively, the Board); the Automobile Club of Southern California (the Club); and ACSC Management Services, Inc. (ACSC). The plaintiffs appeal from a judgment of dismissal after the defendants' demurrer to the third amended complaint was sustained without leave to amend. We agree with the trial court's conclusion that plaintiffs failed to allege facts sufficient to constitute a cause of action against the defendants on any theory, because (1) the business judgment rule precludes judicial interference with the Board's good faith management of Exchange assets, (2) the plaintiffs have not alleged facts which establish a lack of good faith or a conflict of interest in the Board's management of Exchange assets, and (3) the plaintiffs, in executing subscriber's agreements with the Exchange, have contractually agreed to delegate control over Exchange assets to the Board, and such agreement is neither unconscionable nor unenforceable. We therefore affirm the judgment.

Factual and Procedural Background

1. *Introduction*

The Exchange is a reciprocal insurer, organized by the Club to provide insurance to Club members. The Club is a nonprofit corporation. In addition to the Exchange, the Club also organized, and is the parent organization of, ***702** codefendant ACSC. Section 1305 provides for a reciprocal insurer's insurance contracts to be executed by an attorney-in-fact, which may be a corporation. ACSC is the attorney-in-fact for the Exchange. [3]

3 Section 1305 provides that the contracts of insurance that are exchanged by subscribers of a reciprocal insurer "may be executed by an attorney-in-fact, agent or other representative duly authorized and acting for such subscribers under powers of attorney. Such authorized person is termed the attorney, and may be a corporation."

ACSC derives its management authority from powers of attorney which are included in the subscriber's agreements executed by

subscribers when they purchase insurance from the Exchange. The subscriber's agreements also (1) delegate to the Board the subscribers' rights of supervision over the attorney-in-fact; (2) provide that the subscriber agrees to be bound by the bylaws and rules and regulations adopted by the Board; (3) warrant that subscribers shall not be liable in excess of their premiums for any debts or liabilities of the Exchange; and (4) provide that dividends or credits may, by resolution of the Board, be returned to subscribers.

The plaintiffs' theories of recovery have shifted somewhat over the course of this litigation. However, the lawsuit's primary aim throughout the litigation has been to alter the Exchange's practice of maintaining large amounts of unallocated surplus. The plaintiffs claim, in effect, that it is inherent in the concept of interinsurance that subscribers have a greater ownership interest in the funds of an exchange and greater rights of control over the funds than are recognized by the operating rules and practices of the Exchange. They also claim it would be in the best interests of the Exchange and its subscribers if surplus funds were maintained, not as unallocated surplus, but in subscriber savings accounts, from which subscribers may withdraw their accumulated funds upon withdrawal from membership in the Exchange.

2. *The Historical and Current Nature of Reciprocal Insurance*

The first interinsurance exchanges were formed in the 1880's by groups of merchants and manufacturers. These exchanges were a form of organization by which individuals, partnerships or corporations, which were engaged in a similar line of business, undertook to indemnify each other against certain kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of a common attorney-in-fact, who was appointed for that purpose by each of the underwriters, or "subscribers." (Reinmuth, The Regulation Of Reciprocal Insurance Exchanges (1967) ch. I, The Development and Classification of Reciprocal Exchanges, pp. 1-2 (hereafter, Reinmuth); see also ***703** *Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 652 [155 Cal.Rptr. 843].) In the early 20th century, the concept of reciprocal insurance spread to consumer lines. The Exchange, organized by the Club in 1912, was the first reciprocal to offer automobile insurance. (Reinmuth, *supra*, ch. I, p. 3.)

Under the historical form of interinsurance contracts, each subscriber became both an insured and an insurer, and had several, not joint, liability on all obligations of the exchange. (*Delos v. Farmers Insurance Group, Inc.*, *supra*, 93 Cal.App.3d at p. 652; 2 Couch on Insurance 2d (rev. ed. 1984) § 18.11, p. 613) (hereafter, Couch); Reinmuth, *supra*, ch. II, The Legal Status Of Reciprocal Exchanges, pp. 10-20.) Accordingly, reciprocal insurers originally had no stock and no capital. The subscribers' contingent liability stood in place of capital stock. (*Mitchell v. Pacific Greyhound Lines* (1939) 33 Cal.App.2d 53, 59-60 [91 P.2d 176]; Couch, *supra*, § 18.11, pp. 614-615; Reinmuth, *supra*, ch. I, p. 2.) Originally, funds for the payment of losses and other debts were collected from subscribers as they occurred. However, this system resulted in frequent delays, hence subscribers later agreed to pay annual "premium deposits." (Reinmuth, *supra*,

ch. I, p. 2.) These deposits remained to the credit of each subscriber in a separate account. (*Ibid.*; see also *Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 879-880 [216 P.2d 882].) Subscribers' pro rata shares of losses and expenses, including a commission to the attorney-in-fact, were deducted as they occurred. Any balance remaining in a subscriber's account at the end of the year reverted to the subscriber as his or her "savings" or "surplus" and was distributed to the subscriber or was available to the subscriber upon withdrawal from the exchange. (Reinmuth, *supra*, ch. I, p. 2, ch. II, pp. 30-31.) On the other hand, if the subscriber's share of losses and expenses was greater than his deposit, the subscriber could be assessed for a specified maximum amount beyond the deposit. (Couch, *supra*, §§ 18:26-18:30, pp. 633-641; Reinmuth, *supra*, ch. I, p. 2.) By approximately the 1960's, this amount, in a number of states, came to be specified by statute and was commonly limited to an amount equal to one additional premium deposit. (Reinmuth, *supra*, ch. II, pp. 17-19; see, e.g., §§ 1397, 1398.)

The original concept of reciprocal insurance contemplated the allocation of all surplus to the individual subscribers. (Reinmuth, *supra*, ch. II, pp. 30-31.) Over time, however, it became customary for reciprocals to accumulate unallocated surplus, which was not subject to withdrawal by departing subscribers, but was held perpetually in anticipation of catastrophic losses. (Reinmuth, *supra*, ch. II, pp. 32-37; ch. X, Conclusions and Policy Alternatives, pp. 186-187.) By maintaining substantial surpluses of this kind, many reciprocals eventually obtained statutory rights to issue nonassessable policies, ***704** under which subscribers had no contingent liability for claims, expenses or losses of the exchange. The practice of issuing nonassessable policies is now common both in California and elsewhere. (Reinmuth, *supra*, ch. II, p. 18.) This, together with other lesser differences between today's reciprocals and those of the past, has led one commentator to conclude that the only remaining substantive difference between a reciprocal exchange and a mutual company is that some exchanges are managed by corporate proprietary attorneys-in-fact. (Reinmuth, *supra*, ch. II, p. 39.)

The reciprocal form of insurance organization as it now exists in California has been characterized by both parties to this action as difficult to define. However, the trial court gave an apt definition of this kind of enterprise: "This is what it is: it's an interinsurance exchange defined by the Insurance Code." As defined by the Code, a California reciprocal insurer retains little similarity to the reciprocals of the 19th century. The defining statutory characteristics of an interinsurance exchange which are relevant to the present controversy are as follows.

First, section 1303 now provides that reciprocals are no longer truly reciprocal enterprises, i.e., it is no longer true that each subscriber is both an insurer and an insured. Rather, section 1303 provides that a reciprocal insurance company, or interinsurance exchange, "shall be deemed the insurer while each subscriber shall be deemed an insured."

As in historical times, a present-day interinsurance exchange is managed by an

attorney-in-fact, who is appointed pursuant to powers-of-attorney executed by the exchange's subscribers. (§ 1305.) The attorney-in-fact may be a corporation (*ibid.*); the code does not require an exchange's attorney-in-fact to be a nonprofit corporation. An exchange's power of attorney and contracts may provide for the exercise of the subscribers' rights by a board. (§ 1307, subd. (d).) The board must be selected under rules adopted by the subscribers and is required to supervise the exchange's finances and operations to assure conformity with the subscriber's agreement and power of attorney. (§ 1308.) The board must be composed of subscribers or agents of subscribers; not more than one-third of the board members may be agents, employees or shareholders of the attorney-in-fact. (§ 1310.)

In accord with the modern trend toward accumulating unallocated reserves rather than distributing surplus to the subscribers, the directors of a modern ***705** California exchange may, but are not required to, return savings or credits to the subscribers. (§ 1420.) However, such distributions are permissible only if there is no impairment of the assets required to be maintained by sections 1370 and following. (*Ibid.*) [4]

4 Section 1370 provides for the forms of investment in which a reciprocal's surplus must be maintained. Section 1370.2 requires most reciprocal insurers to maintain minimum surplus governed by the same standards for minimum paid-in capital and surplus applicable to capital stock insurers. Section 1370.4 provides that reciprocal insurers established before October 1, 1961, were initially exempt from section 1370.2 and establishes a schedule of the dates after which such reciprocals became progressively subject to section 1370.2. Under the schedule in section 1370.4, all reciprocals were fully subject to section 1370.2 by 1976.
The minimum surplus requirements do not apply to all exchanges. An exchange formed by a local hospital district and its staff physicians under section 32000 et seq., of the Health and Safety Code is not subject to the above requirements if it meets alternative requirements. (§ 1284.)

In accord with the modern trend away from subscriber liability for a reciprocal's debts, section 1401 provides that, if an exchange maintains surpluses that are sufficiently beyond the legal minimum, it may obtain a certificate from the Insurance Commissioner authorizing the issuance of nonassessable policies. While such a certificate is in effect, subscribers have no contingent liability for claims, expenses or losses of the exchange. Under section 1401.5, an exchange which maintains surpluses of more than $3 million for five successive years may obtain a certificate of perpetual nonassessability. [5]

5 The Exchange obtained such a perpetual certificate in 1987.

If an exchange issues assessable policies, each subscriber is liable, beyond his or her annual premium, for assessments levied by the attorney-in-fact or the commissioner to satisfy claims against the exchange which exceed the exchange's surplus. (§§ 1391, 1392, 1398.)

An exchange's power of attorney may limit the amount of assessments (§ 1397), but each subscriber's contingent liability must be at least equal to one additional premium (§ 1398). The personal liability of subscribers can be asserted by the attorney-in-fact or the commissioner. (§ 1391.) However, if a debtor of the exchange obtains a judgment against the exchange, and it remains unsatisfied for 30 days, such debtor may proceed directly against the subscribers for any amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. (§§ 1450, 1451.) An individual subscriber can avoid liability for assessments, even if the exchange issues assessable policies, if the subscriber, in addition to his or her annual premium, maintains a surplus deposit in an amount equal to the annual premium. (§§ 1399, 1400.) ***706**

3. *Procedural History of This Action*

This action began as a challenge to the composition of the Board, which the plaintiffs claimed was in violation of section 1310.[6] On August 5, 1992, plaintiffs' attorney wrote a letter to the defendants' attorney, in which counsel said he had recently discovered that the Exchange was being operated in violation of section 1310, in that, of eight Board members listed in the letter, all were also directors or officers of the Club, and three were also directors or officers of ACSC. Counsel demanded that the entire Board resign and that control of the Exchange be vested in the subscribers. Counsel also expressed the view, among others, that the Exchange's policyholders should be the ones to determine the amount of surplus retained by the Exchange, and that the amount then retained appeared excessive. Counsel threatened a lawsuit if an agreement concerning the matters raised by his letter were not reached by August 14..

6 Section 1310 provides that: "Such body shall be composed of subscribers or agents of subscribers. Not more than one-third of the members serving on such body shall be agents, employees or shareholders of the attorney."

On August 21, 1992, the plaintiffs filed their original complaint. The defendants generally demurred, and on October 30, before the date set for the hearing on the demurrer, the plaintiffs filed a first amended complaint, in which they alleged that more than one-third of the Board members were agents, employees or shareholders of the attorney-in-fact, ACSC, in violation of section 1310. The plaintiffs also alleged that the Board's unlawful composition violated Business and Professions Code section 17200.[7] Plaintiffs prayed that the defendants be enjoined from continuing to allow the Board to be so constituted. They further alleged that, because of the unlawful constitution of the Board, its actions were not protected by the business judgment rule, respecting directors' discretion over the management of a company's funds, and consequently, the subscribers were entitled to an accounting and distribution of improperly retained surplus.

7 Business and Professions Code section 17200 provides that any "unlawful," "unfair," or "fraudulent" business act or practice is deemed to be unfair competition. Business and Professions Code section 17203

> authorizes injunctive relief to prevent such conduct and/or restitution of money or property wrongfully obtained "by means of such unfair competition."

A demurrer to the first amended complaint was sustained with leave to amend, and plaintiffs thereafter filed a second amended complaint, in which it was alleged that (1) the Board was not selected by subscribers, in what the plaintiffs now claimed was a violation of section 1308[8] ; (2) the subscribers were unlawfully deprived of control over the conduct of the Exchange; (3) ***707** the subscriber's agreement was a contract of adhesion; (4) the Board was a fiduciary of the subscribers; and (5) the Board had breached its fiduciary duties by failing to provide insurance at cost and by mismanaging and misappropriating surplus funds which rightfully belonged to the subscribers. The second amended complaint prayed for declaratory and injunctive relief, an accounting, a constructive trust over improperly held surplus and compensatory and punitive damages.

8 Section 1308 provides that: "The body exercising the subscribers' rights shall be selected under such rules as the subscribers adopt. It shall supervise the finances of the exchange and shall supervise its operations to such extent as to assure conformity with the subscriber's agreement and power of attorney."

After the filing of a demurrer to the second amended complaint, the action was referred to the Commissioner of Insurance pursuant to the "primary jurisdiction doctrine." (*Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 386-392 [6 Cal.Rptr.2d 487, 826 P.2d 730].) However, the commissioner refused to assume jurisdiction and also declined a request by the plaintiffs to intervene.[9] The trial court then sustained the defendants' demurrer to the second amended complaint with leave to amend and issued a detailed explanation of its ruling.

9 In an apparent effort to provide guidance to both the trial court and the parties, the commissioner did express the following comments: (1) The Exchange has no duty to limit its surplus funds to the statutory minimum surplus amount; (2) the Exchange has no duty to pay dividends; (3) Exchange subscribers do have ownership rights in surplus funds; (4) the Exchange has no duty to provide insurance coverage "at cost," but has a duty to exercise sound accounting principles in managing surplus; (5) the manner in which the Board is selected appears to violate section 1308 (see fn. 10, *post*); (6) the plaintiffs' challenge to the structure of the Board reflects inadequacies in the statutes governing reciprocals, which, in the commissioner's view, do not provide for sufficient accountability of reciprocal governing boards to subscribers; and (7) the question of how surplus funds of the Exchange should be disposed of upon any dissolution of the Exchange is not ripe for decision.

The court held, as a general matter, that the common law business judgment rule applies to the directors of a reciprocal insurer and

precludes the courts from interfering with the management of such an insurer's surplus funds. The court further held that the plaintiffs: (1) did not allege that the delegation of authority and waiver of the right of control over the Exchange, which is included in the subscriber's agreement, is contrary to section 1308; (2) did not allege sufficient facts to render the subscriber's agreement unenforceable under the doctrine of unconscionability set out in *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758 [259 Cal.Rptr. 789]; (3) cited no legal authority for their claim that a reciprocal insurer must provide insurance at cost; (4) did not plead facts showing that the Exchange maintained more than a reasonably necessary level of surplus; (5) did not allege facts which establish an exception to the business judgment rule; (6) cited no authority for their claim that, upon expiration of their policies, they have a legal right to repayment of sums paid by them and ***708** placed in surplus; (7) failed to state a presently cognizable claim of entitlement to a distribution of surplus upon dissolution of the Exchange; and (8) did not state facts sufficient to give the defendants notice of claimed misconduct by ACSC, for which expenses were allegedly incurred and then allegedly defrayed with funds properly belonging to the subscribers.

The plaintiffs' third amended complaint, the one before us, is substantially similar to the second. However, the plaintiffs have deleted their previous allegations that ACSC has committed misconduct for which the Exchange has incurred expenses and that the Board is illegally constituted.[10] The third amended complaint adds to the plaintiffs' previous allegations the further claims that: (1) an interinsurance exchange is similar to a joint venture, in which the general partners have fiduciary duties to the limited partners; and (2) the defendants have engaged in unlawful and fraudulent business practices, as defined in Business and Professions Code section 17200 by: (a) mismanaging Exchange funds; (b) failing to inform potential subscribers of all provisions of the Exchange's bylaws and rules and regulations; and (c) affirmatively representing in the subscriber's agreement that subscribers are not personally liable on judgments against the Exchange, a representation that plaintiffs claim is false.

10 For reasons not appearing in the record, the plaintiffs deleted the latter allegation despite the fact that the commissioner, in his letter to the trial court declining jurisdiction over the case, expressed the view that the manner of selecting the Exchange's Board appeared to violate section 1308. (See fns. 8 & 9, *ante*.) Inasmuch as the plaintiffs have apparently abandoned their claims respecting the selection and composition of the Board, and the trial court therefore did not take such claim into account, we shall give no further consideration to this issue.

The defendants again demurred, and this time the trial court sustained the demurrer without leave to amend. The trial court ruled essentially as it did on the previous demurrer, with additional findings that (1) there is no basis for the claim that an interinsurance exchange is a kind of joint venture, although an exchange's board and attorney-in-fact do have fiduciary duties to the subscribers; (2) subscribers of the Exchange are not liable beyond their premium

deposits for judgments against the Exchange; and (3) neither the Exchange's failure to fully spell out its rules in the subscriber's agreement nor the rules themselves are unconscionable.

A judgment of dismissal was then entered, and the plaintiffs filed this timely appeal.

Contentions

The plaintiffs challenge the practices of the Exchange, the Board and ACSC in managing surplus funds of the Exchange; they challenge the ***709** practices of the Club in marketing subscriptions to the Exchange. They contend that (1) the Exchange, the Board and ACSC mismanage Exchange funds by maintaining funds as unallocated surplus, rather than in subscriber savings accounts; (2) the Club misinformed them, when they became subscribers, as to the structure and rules of the Exchange, and consequently the plaintiffs are not bound by the subscriber's agreement, by which they delegated to the Board the authority to manage Exchange assets; (3) the defendants' mismanagement of Exchange assets and misrepresentations when marketing Exchange subscriptions constitute unlawful and fraudulent business practices under Business and Professions Code section 17200.

The plaintiffs further contend the Exchange should be compelled to (1) maintain surplus funds in subscriber savings accounts, and (2) expunge from its rules and regulations certain rules which limit subscribers' rights respecting surplus funds. They contend the Club should be compelled to disclose all material facts about the Exchange to future subscribers and make restitution to the Exchange's present and former subscribers of funds that were unlawfully and fraudulently obtained. Finally, plaintiffs claim the trial court abused its discretion in denying leave to amend the complaint.

Discussion

1. *Standard of Review*

(1) As this matter comes to us on a judgment of dismissal following the trial court's order sustaining the defendants' demurrer without leave to amend, we assume the truth of all properly pleaded facts, but not contentions, deductions or conclusions of fact or law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].) Assuming the truth of the plaintiffs' factual allegations, we then independently determine whether they have alleged cognizable claims. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) As we shall explain, they have not.

2. *Issues Concerning the Ownership and Management of Surplus*

a. *Decisions as to the Manner of Maintaining Surplus Constitute Exercises of Business Judgment*

(2a) Plaintiffs make a point of distinguishing their claim-that the Exchange has a duty to maintain a substantial surplus in subscriber savings accounts-from claims like that made in *Barnes*, *supra*, 16 Cal.App.4th 365 that a corporation or other organization has a duty to pay a dividend or ***710** other distribution. In 1993, according to the plaintiffs, the Exchange had approximately $787 million in unallocated surplus funds, a surplus which is significantly

greater than is required by law. The plaintiffs do not ask us to compel a distribution or otherwise dictate actions affecting the *level* of surplus. Instead, they ask us to make orders respecting the *form* in which surplus is held. Specifically, the plaintiffs pray for an order requiring the Exchange to deposit into subscriber savings accounts all surplus that exceeds the legally required amounts.

The plaintiffs argue that the use of subscriber savings accounts will bring about substantial savings in federal taxes for the Exchange, because, under section 832(f) of the Internal Revenue Code (26 U.S.C. § 832(f)), surplus funds deposited by a reciprocal insurer into such accounts is not taxable income to the insurer, and under section 172(a) and (b) of the Internal Revenue Code (26 U.S.C. § 172(a), (b)), up to three years of prior taxes can be recaptured by depositing into subscriber accounts funds which were previously maintained as general surplus. The plaintiffs also argue that the use of subscriber savings accounts will protect subscribers' legitimate interests in surplus funds. Finally, they argue that subscriber savings accounts are successfully used by other reciprocal insurers.

The defendants and amici curiae respond with several arguments tending to show that deposits of surplus into subscriber saving accounts would reduce the funds which the Exchange could rely upon in the event of catastrophic losses, and thus would not be advantageous to the Exchange or its subscribers. However, the defendants do not ask us to resolve the question of whether the use of subscriber savings accounts would be beneficial. To the contrary. The defendants and amici contend the resolution of that question depends upon how one weighs the potential tax advantages of subscriber savings accounts against the risks entailed if large amounts of surplus are held in a form which can be withdrawn by subscribers. The defendants contend, and the trial court so held, that such a weighing of benefits against costs and risks is a prototypical application of business judgment. The defendants thus argue, and the trial court also so held, that, as is the case with other forms of business organization, courts may not interfere with such decisions of a reciprocal insurer if the decision made by the directors can be attributed to a rational business purpose. The defendants rely primarily on our decision in *Barnes*, *supra*, 16 Cal.App.4th 365 for this proposition.

We can hardly disagree with the proposition that decisions as to strategies for managing the surplus funds of an insurer are quintessential exercises of business judgment. Likewise, there can be no doubt that the courts are ***711** unqualified to second-guess the determinations made by an insurer, based upon actuarial analysis, as to the amount of funds that are reasonably necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Gaillard v. Natomas Co.* (1989) 208 Cal.App.3d 1250, 1263 [256 Cal.Rptr. 702].) Finally, assuring the availability of adequate funds to cover losses is plainly a rational business purpose for an insurer. Thus, if the business judgment rule applies to reciprocal insurers, it would preclude plaintiffs' efforts to dictate the form in which the Exchange maintains its surplus. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378.)

(3) The business judgment rule is " 'a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.' " (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at p. 1263.) The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776 [230 Cal.Rptr. 815].) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681]; *Barnes*, *supra*, 16 Cal.App.4th at pp. 379-380.)

(2b) In *Barnes*, we concluded that the rule applies to mutual insurance companies and that it precluded Barnes's effort to compel the defendant insurance company to pay a dividend. (16 Cal.App.4th at p. 378.) We now must consider whether the rule applies to reciprocals.

b. *The Governing Board of a Reciprocal Insurer Is Entitled to the Protection of the Business Judgment Rule*

The trial court in this case recognized that the business judgment rule is most commonly applied to corporations, but nevertheless held that "practical experience and common sense suggest that the rule is appropriately extended to members of the Board of Governors of the Exchange." We agree.

The plaintiffs contend that, for two reasons, the business judgment rule does not and should not apply to an interinsurance exchange. First, they contend there are significant differences between reciprocal insurers on the ***712** one hand and corporate and mutual insurers on the other, which make it inappropriate to apply the business judgment rule to reciprocals. In particular, the plaintiffs argue that, unlike the policyholders of a mutual insurer, subscribers to a reciprocal insurer execute subscriber's agreements and powers-of-attorney, which create contractual and fiduciary duties that are not subject to the business judgment rule. Secondly, they argue that section 1282, subdivision (a)(7) and (a)(20), preclude application to reciprocal insurers of the statutes governing corporations and mutual insurers, including the statutory business judgment rule stated in Corporations Code section 309.

The contention that the business judgment rule should not apply to reciprocal insurers because the boards and attorneys-in-fact of reciprocals are the agents of the subscribers and have fiduciary duties to them is without a legal basis. The existence of a fiduciary relationship between the board and the participants in an enterprise has never precluded application of the rule. For example, the courts have applied the business judgment rule to limited partnerships, although general partners are held to be agents and fiduciaries of the

limited partners. (*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1453-1454 [27 Cal.Rptr.2d 834]; *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 402 [149 Cal.Rptr. 626].) Similarly, the directors and controlling shareholders of for-profit corporations and the directors of nonprofit corporations and mutual insurance companies are deemed to be agents and fiduciaries of the shareholders and members (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 114-115 [81 Cal.Rptr. 592, 460 P.2d 464]; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505, 507 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447]; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 31 [216 Cal.Rptr. 130, 702 P.2d 212]; *Barnes*, *supra*, 16 Cal.App.4th at p. 375), yet their management decisions are shielded by the business judgment rule. (*Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d at pp. 507-509; *Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at p. 1366; *Barnes*, *supra*, 16 Cal.App.4th at p. 379.)

Courts which have considered the relationship between a reciprocal insurer's board, its attorney-in-fact and its subscribers have concluded the relationship is analogous to the relationship between the directors, management and participants in other kinds of organizations. For example, at least one court has held that "[t]he position of the attorney-in-fact of a reciprocal insurance exchange, who manages the business of the exchange under powers of attorney of the subscribers ... is fiduciary in character *to the same extent as that of the management of an incorporated mutual insurance company* ...." (*Industrial Indem. Co. v. Golden State Co.* (1953) 117 Cal.App.2d 519, 533 [256 P.2d 677], italics added.) Another court has ***713** observed that a reciprocal insurer's "basic differences from [a mutual insurance company] are in mechanics of operation and in legal theory, rather than in substance." (*Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 880 [216 P.2d 882].)

If we look to the substance of the matter, it is clear that the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants-*the directors are entrusted with the governance and management of the organization's affairs*. This being the case, the directors of a reciprocal exchange should be entitled to the protection of the business judgment rule to the same extent as the directors of other concerns. For reasons which have been fully discussed in numerous judicial authorities, California courts have consistently refused to interfere with directors' exercise of business judgment in making business decisions. (See, e.g., *Mutual Life Insurance v. City of Los Angeles* (1990) 50 Cal.3d 402, 417 [267 Cal.Rptr. 589, 787 P.2d 996] [declining to constrain insurers' business judgment as to how to maximize return on investment]; *Barnes*, *supra*, 16 Cal.App.4th at p. 378 [declining to interfere with insurer's business judgment as to level of surplus]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865-867 [137 Cal.Rptr. 528] [refusing to compel homeowners association to pay attorney fees incurred by member in enforcing "CC & R's"]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421]

[refusing to overturn directors' decision not to commence a lawsuit].)

Where the reason is the same, the rule should be the same. (Civ. Code, § 3511.) The boards of reciprocal insurers, based upon recommendations by the attorneys-in-fact, must make substantive financial decisions, such as setting and investing premiums and arriving at appropriate surplus levels, which are no different from those required of corporate and mutual insurers, and courts are no better qualified to second-guess the directors of reciprocal insurers than we are to second-guess the directors of other organizations as to similar decisions. Thus, for the same reasons that apply to other organizations, the courts may not interfere with the reasonable business decisions of reciprocal insurers. We therefore fully agree with the trial court's conclusion that practical experience and common sense require application of the business judgment rule to reciprocal insurers.

For the same reasons, we also reject the plaintiffs' claims that the defendants' management of Exchange funds constitutes an unlawful business practice. (Bus. & Prof. Code, § 17200.) Obviously, actions which are reasonable ***714** exercises of business judgment, are not forbidden by law, and fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices. (Cf. *Farmers' Ins. Exchange v. Superior Court*, *supra*, 2 Cal.4th at pp. 383-384.)

c. *Section 1282* Does Not Affect the Common Law Business Judgment Rule

(4) The plaintiffs claim section 1282 precludes application of the business judgment rule to reciprocal insurers. We disagree. The most that can be said for plaintiffs' argument is that it suggests reciprocal insurers are not subject to the *statutory* business judgment rule. (Corp. Code, § 309.) Section 1282 provides that certain provisions of the Insurance Code do not apply to reciprocal insurers. Among these are section 1140 and all of chapter 4 of part I, division 2, which relates to general mutual insurers. (§ 1282, subd. (a)(7) & (a)(20).) Section 1140 provides that incorporated insurers are subject to general corporation law; the statutes in chapter 4 of part I of division 2 set forth the special characteristics of mutual insurance plans. While section 1282 would seem to preclude application of Corporations Code section 309 to reciprocal insurers, it by no means precludes application of the common law business judgment rule.

The common law business judgment rule has two components-one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. (2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) Only the first component is embodied in Corporations Code section 309. Thus, even if Insurance Code section 1282 makes Corporations Code section 309 inapplicable to reciprocals, the second component of the common law rule is unaffected. It was, of course, the second component of the rule which we applied to mutual insurers in *Barnes*, *supra*,

16 Cal.App.4th 365, 378-379, and which we here apply to reciprocals.

d. *The Plaintiffs Have Not Alleged Facts Which Establish an Exception to the Business Judgment Rule*

(5a) The plaintiffs contend that even if the business judgment rule applies to reciprocal insurers, they have alleged facts constituting exceptions to the rule. Specifically, they allege that (1) the Exchange and the Board did not make a reasonable inquiry concerning the advisability of maintaining surplus in subscriber savings accounts, and (2) in managing surplus funds, ***715** the Exchange has acted for improper motives and as a result of a conflict of interest. It is, of course, true that the business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1263-1264; *Eldridge v. Tymshare, Inc.*, *supra*, 186 Cal.App.3d at pp. 776-777.) However, the plaintiffs have not alleged sufficient facts to establish such exceptions in this case. More is needed to establish an exception to the rule than conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an active investigation, in the absence of (1) allegations of facts which would reasonably call for such an investigation, or (2) allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.

(6) The business judgment rule sets up a *presumption* that directors' decisions are made in good faith and are based upon sound and informed business judgment. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at pp. 1366-1367.) An exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest. (*Id.* at p. 1367.) Such circumstances include those in which directors, particularly inside directors, take defensive action against a take-over by another entity, which may be advantageous to the corpor ation, but threatening to existing corporate officers. (*Ibid.*) Similarly, a conflict of interest is inferrable where the directors of a corporation which is being taken over approve generous termination agreements-"golden parachutes"-for existing inside directors. (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1268-1271.) In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. (*Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at p. 1367; cf. *Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at p. 1271 [under circumstances raising an inference that corporate interests were not served, trier of fact could find that directors should have independently reviewed the terms of challenged "golden parachutes"].) But in most cases, the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. (*Eldridge v. Tymshare, Inc.*, *supra*, 186 Cal.App.3d at p. 776-777.) Interference with the discretion of directors is not warranted in doubtful cases. (*Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d 858, 865.)

(5b) The plaintiffs do not claim that the defendants failed to ascertain that federal tax savings could result from depositing surplus funds in subscriber savings accounts. The true thrust of their argument is that the ***716** defendants have refused to avail the Exchange of such savings. In effect, the argument is that the defendants' inquiry into the use of subscriber saving accounts was not a reasonable inquiry because the defendants reached a conclusion with which the plaintiffs disagree. However, it is the essence of the business judgment rule that the conclusions of an entity's directors concerning business strategy will not be scrutinized by the courts absent allegations of facts tending to show that the conclusions were based upon inadequate information or were made in bad faith.

The plaintiffs contend bad faith and overreaching are established by the facts that (1) the Club, the Exchange and ACSC have interlocking boards, (2) the Club appoints the Exchange's Board, and (3) the Exchange makes certain payments to the Club. Plaintiffs contend that, through the interlocking boards and the Club's power to appoint the Exchange's Board, the Club is able to exert undue influence on the Exchange's Board, resulting in the Exchange's (1) having a conflict of interest between the Club and its subscribers, (2) operating for the benefit of the Club and adverse to the interests of the subscribers, and (3) paying allegedly "secret profits" to the Club.

Plaintiffs claim that two categories of secret profits are paid to the Club: (1) current distributions to the Club and ACSC and (2) a contingent future interest retained by the Club in Exchange assets upon dissolution of the Exchange. The challenged current distributions consist of the following: (1) ACSC is compensated for its services to the Exchange at the actual cost of the services plus 1 percent of annual earned premiums; (2) ACSC, a wholly owned subsidiary of the Club, pays dividends to the Club; and (3) the Club receives directly from the Exchange 1 percent of the net annual premium deposits, a payment which the plaintiffs allege has exceeded $48 million since 1989.

The Club's contingent future interest in Exchange assets arises from rules 24 through 27 of the Exchange's rules and regulations. Rule 24 authorizes, but does not require, the Board to declare dividends and return savings to subscribers upon expiration of their policies; rule 25 declares that subscribers have no entitlement to a repayment of any sums upon expiration of their policies; rule 26 provides that, upon dissolution of the Exchange, all of its assets remaining after the repayment of debts are to become the property of the Club; rule 27 provides that rule 26 shall operate to the same effect and purpose as if each subscriber made an individual assignment to the Club of his or her interest in Exchange upon its dissolution. The plaintiffs claim the above rules effect a forfeiture of subscriber rights in Exchange assets.

The plaintiffs allege that the Exchange's decision to forfeit subscriber rights in favor of the Club is motivated by a desire to perpetuate the current ***717** and future transfers of Exchange assets to the Club and ACSC, not by the defendants' avowed purpose of funding adequate reserves against

contingencies. However, it is the very essence of the business judgment rule that, where a reasonable business purpose is asserted, the motives of directors will not be scrutinized, absent a basis for overcoming the presumption of good faith embodied by the business judgment rule. (*Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at pp. 1366-1367.) Examples of such a basis include actions (1) which are inconsistent with the business purpose that is asserted (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1269-1271 ["golden parachutes," which were challenged by the plaintiffs, encouraged officers of a taken-over corporation to leave the company, an effect inconsistent with the asserted corporate purpose of ensuring continuity of management]), (2) or which are so clearly against the interests of the affected organization that the challenged actions must have been the result of undue influence or a conflict of interest. (*Findley v. Garrett*, *supra*, 109 Cal.App.2d at p. 177.)

Here, the defendants assert they have determined it is prudent for the Exchange to maintain large unallocated surpluses in order to ensure that adequate funds will be available to cover the risks the Exchange insures. The plaintiffs have not alleged conduct which would establish that the defendants have acted for any other purpose. While the interlocking boards of the Club, the Exchange and ACSC may create an opportunity for the Club to exercise undue influence over the Exchange, that bare opportunity does not establish that fraud, bad faith or gross overreaching has actually occurred. Moreover, no facts are alleged which establish that the ongoing payments to ACSC of the actual costs of its services plus 1 percent of annual earned premiums, and to the Club of an additional 1 percent of annual earned premiums, are either inconsistent with the asserted goal of maintaining adequate reserves or so clearly against the interests of the Exchange and its subscribers that the payments must be the result of undue influence or a conflict of interest. The Club's contingent future interest in the surplus remaining upon dissolution of the Exchange is simply too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the Exchange is at all likely to be dissolved within the foreseeable future.

In sum, the plaintiffs have not alleged facts which establish an exception to the business judgment rule. The trial court thus properly declined to interfere with the decisions of the Board respecting the management of surplus funds of the Exchange.

e. *Issues Respecting the Disposition of Accumulated Surplus Upon Dissolution of the Exchange Are Not Ripe for Decision*

(7) Little discussion need be devoted to the plaintiffs' claim that the Exchange must be compelled to expunge from its rules and regulations rules ***718** 26 and 27, which assign to the Club a contingent future interest in Exchange assets in the event of its dissolution. As we have observed above, there has been no showing nor any allegation of a likelihood that the Exchange will be dissolved within the foreseeable future. Moreover, if the Exchange is dissolved, the disposition of its assets will necessarily be overseen by the commissioner. (§ 1070 et seq.) Persons claiming an interest in the assets will have

the chance to challenge the Club's claims in the administrative proceedings. Under these circumstances, the trial court correctly held that the issue of whether the Club or the subscribers are entitled to Exchange assets upon dissolution is not now ripe for decision.

3. *Issues Concerning the Marketing of Subscriptions*

a. *Introduction*

(8) The business judgment rule was not the sole basis for the court's determination not to interfere with the Exchange's management of its surplus. The court also observed that Exchange subscribers agreed in the subscriber's agreement to grant the Board discretion concerning the maintenance and use of surplus, and they are bound by that agreement.

The plaintiffs claim they are not bound by limitations in the subscriber's agreement upon their claimed rights respecting surplus funds, because they were fraudulently induced to enter into the agreement. The plaintiffs contend the subscriber's agreement affirmatively and falsely represents to potential subscribers that subscribers have no personal liability for losses and debts of the Exchange, although sections 1450, 1451 and 1453 provide that a judgment creditor of a reciprocal insurance company can proceed directly against the subscribers if the judgment remains unsatisfied after 30 days. They also contend the subscriber's agreement fails to disclose the material facts that (1) an exchange's subscribers have inherent rights in the exchange's assets; (2) the representative's manual, which is provided to sales personnel of the Club, states that the Exchange is "organized as a not-for-profit reciprocal insurer" and that premium deposits which are not used to assure the adequacy of reserves against contingencies "are returned to subscribers as policyholder's dividends"; and (3) the ownership and distribution rights which subscribers have under general law and the Club's internal operating rules are limited by the rules and regulations of the Exchange. They contend the subscriber's agreement is an insurance contract of adhesion, requiring that any limitations upon subscriber rights must be plain and conspicuous, or will be denied enforcement. They cite *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808 [180 Cal.Rptr. 628, 640 P.2d 764]; *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 719 [***719** 193 Cal.Rptr. 632]; and *Westrick v. State Farm Ins.* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214] for this proposition.

The plaintiffs also contend that, by making the foregoing misrepresentations and failing to fully inform potential subscribers of the rules and regulations which govern the Exchange and the subscriber rights which are limited by the rules, the defendants have fraudulently induced subscribers to execute the subscriber's agreement, and therein have engaged in a fraudulent business practice within the meaning of Business and Professions Code section 17200. [11] The plaintiffs contend the defendants must make restitution to the Exchange's subscribers for all funds obtained through the misrepresentations and nondisclosures complained of.

11 We have recently held that an insured can maintain an action under section 17200 and following for acts by an

insurer amounting to fraud. (*State Farm Fire Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1110-1111 [53 Cal.Rptr.2d 229].)

There is no merit in the above claims. As we shall explain, all material representations in the subscriber's agreement are true, and no material facts are concealed.

b. *The Subscriber's Agreement Contains No Misrepresentations*

It is simply not true that the subscriber's agreement includes misrepresentations regarding subscribers' personal liability for the Exchange's debts. The truth is that, just as the subscriber's agreement states, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This is so, because, in 1987, the commissioner granted the Exchange a certificate of perpetual nonassessability pursuant to section 1401.5.

The plaintiffs insist that a certificate under section 1401.5 eliminates only a subscriber's liability for assessments by an exchange's attorney-in-fact or the commissioner; they contend the certificate has no effect upon subscribers' contingent liability to unpaid judgment creditors of an exchange. However, a fair reading of the statutes governing assessments (§ 1390 et seq.) and those governing lawsuits against reciprocal insurers (§ 1450 et seq.) demonstrates that this contention is not correct.

In the absence of a certificate of nonassessability, the subscribers of a reciprocal insurer are liable for "all liabilities" of the exchange, including claims, debts and any deficiency in required surplus. (§§ 1391-1392.) Subscriber liability is subject to certain limits which are stated in the statutes and other limits which may be stated in an exchange's power of attorney. ***720** (§§ 1397-1400.) Whenever the assets of an exchange are insufficient to meet *all* of its liabilities of every kind and maintain the required surplus, an assessment must be made by the attorney-in-fact or by the commissioner. (§ 1391.) Subscribers are required to pay their proportionate share of assessments, except as provided by statute. (§ 1392.)

Contrary to the plaintiffs' argument, nothing in sections 1391, 1392 or the statutes governing lawsuits against reciprocals suggests that liabilities to judgment creditors are not among the liabilities for which assessments must be made. It is quite correct that, if a judgment is obtained against an exchange, and it is not paid within 30 days either out of the exchange's surplus or through an assessment, the judgment creditor is entitled to proceed directly against the subscribers. (§ 1451.) However, a subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear." (§ 1450.) This limitation logically means that a subscriber is liable for the amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. For subscribers of exchanges which issue assessable policies, that amount is limited to an amount equal and in addition to one annual premium, or any greater amount which is provided in the exchange's power of attorney. (§§ 1397, 1398; cf. *Mitchell v. Pacific Greyhound Lines* (1939) 33 Cal.App.2d

53, 66-68 [91 P.2d 176] [Upon liquidation of the California Highway Indemnity Exchange, subscribers' liability to creditors was limited to the amount agreed upon in the subscribers' agreement, namely an amount in addition and equal to each subscriber's annual premium].) [12] For subscribers of exchanges that are exempt from assessments under section 1401 or 1401.5, there is *no liability* beyond the ***721** subscriber's paid premium for any debts of the exchange, including judgment debts.

12 *Mitchell* is the only case of which we are aware, which considers the manner in which subscriber liability may be enforced by judgment creditors of an exchange. The defendants, who were subscribers of the exchange, contended that any personal liability which they might have to the exchange's creditors *must* be enforced by actions brought by the creditors directly against each subscriber, and could not be enforced through an assessment. (33 Cal.App.2d at pp. 61, 64.) The Court of Appeal rejected this contention and ruled that, under the exchange's subscriber agreement, the then existing statutes governing reciprocals and the then existing liquidation statutes, subscriber liability to exchange creditors, like other obligations, was enforceable through an assessment. (*Id.* at pp. 64-65.) It is even more clear today than it was when *Mitchell* was decided that subscriber liability to an exchange's judgment creditors is one of the obligations covered by subscriber liability for assessments, and is not, as the plaintiffs contend, a distinct obligation unaffected by a certificate of nonassessability. The *Mitchell* court observed that the statute then governing subscribers' contingent liability gave exchanges "the right to limit 'the contingent liability for the payment of losses' but not for other expenses." (*Id.* at p. 60.) The present statutes are more inclusive. Section 1391 provides that assessments must be made when an exchange is not possessed of admitted assets sufficient to discharge "all liabilities" and maintain required surplus. Section 1397 allows an exchange to limit liability for "assessments *under this article* [i.e.. article 6 (§§ 1391-1400.5) of chapter 3 ("Reciprocal Insurers") of part 2 of division 1 of the Insurance Code)]...."

The Exchange has obtained a certificate of perpetual nonassessability under section 1401.5. The representation in subscriber agreements executed since 1987, that "no present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange," is thus true. [13]

13 In their reply, plaintiffs assert that the existence of the Exchange's certificate under section 1401.5 *establishes* the *falsity* of the representation that subscribers are not personally liable for Exchange debts. They base this assertion upon language in section 1401.5, subdivision (b), which states that an exchange which obtains an order of perpetual nonassessability

"shall no longer be subject to or entitled to the benefits of: subdivision (c) of Section 1307 ... and Article 6 (commencing with Section 1390) of this chapter." Article 6 provides for assessments; section 1307, subdivision (c) authorizes limits upon assessments. We disagree with the plaintiffs' reading of the provision in section 1401.5, subdivision (b), that article 6 and section 1307, subdivision (c), do not apply to a holder of a perpetual nonassessability certificate. That provision can only sensibly mean that an exchange whose subscribers have *no* personal liability for its debts will have no need to provide in its power of attorney for *limits* to such liability.

c. *The Subscriber's Agreement Does Not Conceal Material Facts*

(9a) The plaintiffs contend that, because the subscriber's agreement is an insurance contract of adhesion, any limitations upon subscriber rights must be plain and conspicuous, or such limitations will be denied enforcement. (See *Reserve Insurance Co. v. Pisciotta*, *supra*, 30 Cal.3d at p. 808; *Ponder v. Blue Cross of Southern California*, *supra*, 145 Cal.App.3d at p. 719; *Westrick v. State Farm Ins.*, *supra*, 137 Cal.App.3d at p. 692; see also *Shepard v. Cal. Life Ins. Co., Inc.* (1992) 5 Cal.App.4th 1067, 1077 [7 Cal.Rptr.2d 428].) Plaintiffs claim that the limitations which the subscriber's agreement places upon their rights of ownership and control of surplus are not plain and conspicuous, hence the subscriber's agreement is not binding upon them.

Initially, we note that the plaintiffs are relying upon principles stated in *Reserve Insurance*, *Ponder*, and related cases, which exist to protect an insured's reasonable expectations of *coverage.* The rights which plaintiffs assert here are of a different character, being more analogous to rights held by a shareholder in a corporation, and it is not clear that the principles stated in *Reserve Insurance* and *Ponder* should apply with the same force and effect to rights other than coverage. However, assuming arguendo that they do, we nevertheless are unable to conclude that the reasonable expectations of Exchange subscribers are frustrated by the matters complained of in this lawsuit. ***722**

(10) There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 669-670 [42 Cal.Rptr.2d 324, 897 P.2d 1]; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 213 [27 Cal.Rptr.2d 396].) Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable. (*California Grocers Assn. v. Bank of America*, *supra*, 22 Cal.App.4th at p. 213; *Dean Witter Reynolds, Inc. v. Superior Court*, *supra*, 211 Cal.App.3d at pp. 767-768.)

(9b) Here, we have already concluded that the challenged provisions of the subscriber's agreement are in accord with well-established

principles of law under which the directors of an insurance concern have discretion in the management of surplus funds. It follows that, as the trial court found, the provisions are not unduly oppressive or unconscionable. However, we must consider whether they are within the reasonable expectations of the parties.

The plaintiffs claim that, as subscribers of the Exchange, they have reasonable expectations of distributions of surplus, either as dividends, withdrawal rights upon expiration of their policies, or an interest in Exchange assets upon its dissolution. It is axiomatic that the reasonable expectations of the parties to a contract are defined in the first instance by the provisions of the contract. In this case, that would be the subscriber's agreement. However, the plaintiffs base their claims not upon the subscriber's agreement, but upon matters outside of it. Specifically, they base their claim upon (1) supposed obligations of reciprocal insurers in general, and (2) statements in the Club's representative's manual to the effect that the Exchange is organized as a not-for-profit reciprocal insurer, that premium deposits collected from subscribers are to be at the lowest level necessary to pay losses and expenses and to fund adequate reserves, and that deposits not used for these purposes are returned to subscribers as dividends.

The plaintiffs claim that the subscriber's agreement conceals from potential subscribers that (1) the subscribers of an interinsurance exchange have property interests in the exchange's surplus funds and (2) such property interests of Exchange subscribers are purportedly waived by provisions in the subscriber's agreement by which subscribers agree to give the Board discretion over the management of surplus. The plaintiffs further contend that the nondisclosures in the subscriber's agreement are exacerbated by the ***723** fact that the Exchange's rules and regulations are not provided to prospective subscribers except upon request, and the Club's sales personnel do not discuss them. Thus, unless a subscriber makes extraordinary efforts, he or she is kept unaware of ownership rights of subscribers in the Exchange's assets and is likewise kept unaware of rules 26 and 27 in the Exchanges rules and regulations, by which subscribers' ownership rights are allegedly forfeited. Finally, the plaintiffs contend that potential subscribers are misled and confused by the placement of the signature line on the form which serves both as the Exchange's application for insurance and as its subscriber's agreement. The plaintiffs complain that the text of the subscriber's agreement and the signature line appear on separate pages, with the result that many potential subscribers do not read the subscriber's agreement or even notice that they are executing such an agreement. The plaintiffs claim that, through the combined impacts of the material nondisclosures in the subscriber's agreement, the failure of Club personnel to inform potential subscribers of Exchange rules and regulations, and the misleading placement of the subscriber's agreement signature line, consumers are deceived into believing they are only purchasing insurance and never realize they are in truth becoming participants in an insurance enterprise in which they have an interest as owners as well as insureds.

The above contentions are without merit. First, the claims based upon general law are

mistaken. As we have observed, the plaintiffs' claim that reciprocal insurers generally have an obligation to return surplus to their subscribers is based upon a misunderstanding of the nature of a California reciprocal insurer, as presently defined in the Insurance Code. Whatever may have been the case in the past, California reciprocal insurers of the present day have no obligation to disburse accumulated surplus to subscribers or to maintain it in a form which can be withdrawn by subscribers upon departure from the exchange. Under the Insurance Code, disbursements and withdrawal rights are entirely at the discretion of the insurers' directors. (§ 1420.) Where the plaintiffs have no withdrawal rights or rights to disbursements of Exchange surplus under general laws governing reciprocal insurers, they can have no reasonable expectation of such rights, and there is no basis for claiming they were fraudulently induced to waive them. Secondly, the plaintiffs cannot legitimately claim rights based upon the Club's representative's manual, which describes the Exchange's vision of itself as a not-for-profit enterprise and its aspirations to distribute to subscribers surplus that is not needed to maintain adequate reserves. The manual is an internal document, is not intended to be communicated to potential subscribers, and makes no promises to them.

In truth, the reasonable expectation of one who executes a subscriber's agreement with the Exchange is that he or she is purchasing insurance and ***724** *may*, in the discretion of the Board, receive dividends or other distributions. Plaintiffs do not complain that they have not obtained the coverage for which they bargained. [14] Instead, they contend that, in addition to the bargained-for coverage, they are entitled to the distributions which are plainly designated in the subscriber's agreement as discretionary. However, they allege no factual or legal basis for such entitlement.

14 Nor, as the trial court observed, do the plaintiffs complain that they are charged an unreasonable rate for their coverage.

In sum, under the law governing reciprocal insurance companies, all representations in the subscriber's agreement are truthful, and the plaintiffs' objectively reasonable expectations of insurance coverage based upon the agreement have been met. There is thus no basis for the plaintiffs' argument that they were fraudulently induced to execute the agreement and are therefore not bound by it. For the same reasons, the plaintiffs have not established either that the subscriber's agreement is fraudulent, or that the Exchange's management of surplus is unlawful within the meaning of Business and Professions Code section 17200. The trial court thus correctly sustained the defendants' demurrers.

4. *Leave to Amend*

(11) Finally, the trial court properly sustained the defendants' demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967), but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that plaintiff cannot state a cause of action.

(*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967 [257 Cal.Rptr. 610].) Plaintiffs have had three opportunities to amend their complaint and have been unable to successfully state a cause of action against the defendants. Moreover, the defects in the complaints have not been defects of form. Rather, the problem is that plaintiffs seek judicial intervention in management decisions as to the level and form of surplus funds of the Exchange. Under well-established rules devised in enterprises to which the Exchange is sufficiently analogous, these matters lie within the discretion of the Board and management of the Exchange, where these institutions act in good faith. The plaintiffs having failed to allege facts which tend to establish an absence of good faith and reasonable inquiry, no cause of action exists by which the defendants' actions can be challenged. ***725**

Disposition

The judgment of dismissal is affirmed. Costs on appeal are awarded to the defendants.

Kitching, J., and Aldrich, J., concurred.

A petition for a rehearing was denied December 2, 1996, and appellants' petition for review by the Supreme Court was denied January 22, 1997. ***726**

Legal Authority R-LA-16

535 F.3d 1044
United States Court of Appeals,
Ninth Circuit.

Alex LUKOVSKY; Muhammed Khan; Larry Mitchell; Antonio Huggins; Samson Asrat, Plaintiffs, and
Anatoliy Zolotarev; Yevgeniy Skuratovsky, individually and on behalf of class members, Plaintiffs–Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO; John Sadorra; Renato Solomon; Vernon Crawley; Michael Ellis; Doris Lanier, Defendants–Appellees.
Richard Glassman; Morris Jacobs; Michael Hall; Ignacio Reyes, Plaintiffs–Appellants,
v.
City and County of San Francisco; Elson Hao; Jim Wachob; Alan Deguzman; Tom Hidayat, Defendants–Appellees.

Nos. 06–16665, 06–16946.
|
Argued and Submitted May 13, 2008.
|
Filed Aug. 7, 2008.

Synopsis

Background: Applicants for jobs with city and county brought two separate suits against city and county employers, alleging race and national origin discrimination in violation of §§ 1981 and 1983, based on preferential hiring treatment given to Asian and Filipino workers. The United States District Court for the Northern District of California, William Haskell Alsup, J., 2006 WL 2644890,dismissed one action, and 2006 WL 2038465, granted summary judgment in favor of defendants in the other action. Applicants appealed, and the two cases were consolidated for appeal.

Holdings: The Court of Appeals, Hawkins, Circuit Judge, held that:

[1] claims accrued, for limitations purposes, on the date the applicants were informed that they were not hired, and

[2] equitable estoppel did not bar employers from asserting statute of limitations defense.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (11)

[1] **Federal Courts** Civil rights and discrimination cases

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3022 Procedural Matters
170Bk3034 Limitations and Laches
170Bk3034(5) Civil rights and discrimination cases
(Formerly 170Bk425)

When a federal civil rights statute does not include its own statute of

limitations, federal courts borrow the forum state's limitations period for personal injury torts.

126 Cases that cite this headnote

[2] Federal Courts Computation and tolling

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3022 Procedural Matters
170Bk3034 Limitations and Laches
170Bk3034(7) Computation and tolling (Formerly 170Bk427)

Although state law determines the length of the limitations period for a federal civil rights suit, federal law determines when a civil rights claim accrues.

135 Cases that cite this headnote

[3] Limitation of Actions Causes of action in general

Limitation of Actions In general; what constitutes discovery

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k43 Causes of action in general
241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(1) In general; what constitutes discovery

"Accrual" is the date on which the statute of limitations begins to run; under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.

268 Cases that cite this headnote

[4] Limitation of Actions Civil rights

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(15) Civil rights

Claims of race and national origin discrimination under § 1981 and § 1983 brought by applicants for city and county jobs accrued, for limitations purposes, on the date the applicants were informed that they would not be hired, or when they should have realized that they had not been hired, rather than on date that they had reason to know of employers' alleged discrimination, which allegedly involved preferential hiring of Asian and Filipino workers. 42 U.S.C.A. §§ 1981, 1983.

6 Cases that cite this headnote

[5] Limitation of Actions Civil rights

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(15) Civil rights

Employment discrimination claims accrue, for limitations purposes, upon plaintiff's awareness of the

actual injury, that is, the adverse employment action, and not when the plaintiff suspects a legal wrong.

64 Cases that cite this headnote

[6] **Limitation of Actions** Estoppel to rely on limitation

Limitation of Actions Suspension or stay in general; equitable tolling

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k13 Estoppel to rely on limitation
241 Limitation of Actions
241II Computation of Period of Limitation
241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War
241k104.5 Suspension or stay in general; equitable tolling

Under federal law, the doctrines of equitable tolling and equitable estoppel may apply to extend the limitations period or preclude a defendant from asserting the limitations defense.

104 Cases that cite this headnote

[7] **Limitation of Actions** Suspension or stay in general; equitable tolling

241 Limitation of Actions
241II Computation of Period of Limitation
241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War
241k104.5 Suspension or stay in general; equitable tolling

If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.

90 Cases that cite this headnote

[8] **Limitation of Actions** Estoppel to rely on limitation

Limitation of Actions Concealment of Cause of Action

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k13 Estoppel to rely on limitation
241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k104 Concealment of Cause of Action
241k104(1) In general

Under federal common law, the equitable estoppel doctrine, which may bar defendant from asserting a statute of limitations defense, focuses primarily on actions taken by the defendant to prevent a plaintiff from filing suit, sometimes referred to as fraudulent concealment.

77 Cases that cite this headnote

[9] **Estoppel** Essential elements

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.15 Essential elements

Under California law, equitable estoppel requires that: (1) the party to be estopped must be apprised of

the facts, (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended, (3) the party asserting the estoppel must be ignorant of the true state of facts, and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

30 Cases that cite this headnote

[10] Limitation of Actions Estoppel to rely on limitation

Limitation of Actions Concealment of Cause of Action

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k13 Estoppel to rely on limitation
241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k104 Concealment of Cause of Action
241k104(1) In general

For equitable estoppel to bar the defendant from asserting a statute of limitations defense, the plaintiff must point to some fraudulent concealment, some active conduct by the defendant above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.

80 Cases that cite this headnote

[11] Limitation of Actions Estoppel to rely on limitation

Limitation of Actions What constitutes concealment

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k13 Estoppel to rely on limitation
241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k104 Concealment of Cause of Action
241k104(2) What constitutes concealment

Under either California or federal common law, equitable estoppel did not bar city and county employers from asserting statute of limitations defense, in job applicants' race and national origin discrimination claims under § 1981 and § 1983, absent showing that employers made any affirmative misrepresentation that concealed the composition of the applicant pool, or the qualifications of those actually hired, or that employers made any promise by which applicants were discouraged from timely asserting their rights. 42 U.S.C.A. §§ 1981, 1983.

3 Cases that cite this headnote

Attorneys and Law Firms

***1046** Edith J. Benay, San Francisco, CA, for the plaintiffs-appellants.

Jonathan C. Rolnick, City of San Francisco, San Francisco, CA, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California; William H. Alsup, District Judge, Presiding. D.C. Nos. CV–05–00389–WHA, CV–06–02304–WHA.

Before: DIARMUID F. O'SCANNLAIN, HAWKINS, and M. MARGARET McKEOWN, Circuit Judges.

Opinion

HAWKINS, Circuit Judge:

These consolidated appeals involve suits against the City and County of San Francisco, San Francisco Municipal Transportation Agency ("MUNI"), and various individual defendants (collectively, "Defendants") for race and national origin discrimination in violation of 42 U.S.C. §§ 1981, 1983, 1985 & 1986. Plaintiffs allege that Defendants discriminated against them by giving preferential hiring treatment to Asian and Filipino workers. We do not consider the merits of the plaintiffs' allegations, however, as the only issue before us is whether their claims are barred by the statute of limitations, as the district court found. We agree with the district court that (1) the cause of action accrued and the statute of limitations began to run when the plaintiffs received notice they would not be hired, and (2) equitable estoppel does not prevent the Defendants from asserting a statute of limitations defense. Accordingly, we affirm the district court in all respects.

FACTS AND PROCEDURAL HISTORY

Zolotarev, Appeal No. 06–16665:

In 1999 through 2000, MUNI advertised various provisional positions for electrical transit system mechanics ("7371 positions"). MUNI considered applications and written-performance tests, as well as some in-person interviews. In October 2000, MUNI obtained funding to hire several permanent 7371 mechanics, and issued a job announcement for these permanent positions. The announcement contained the following requirement:

> Verification (proof) of all experience and/or training needed to qualify must be submitted with the application.... Verification may be waived if impossible to obtain. The applicant must submit a signed statement with the application explaining why verification cannot be obtained ... Failure to submit the required verification or request for waiver in a timely manner may result in the rejection of the application.

Two plaintiffs, Anatoliy Zolotarev and Yevgeniy Skuratovsky, filed their initial complaint in January 2005, together with several other plaintiffs who are not a party to this appeal ("the Lukovsky action").[1] ***1047** These plaintiffs alleged that the Defendants

discriminated on the basis of race—giving preferential treatment to Asian and Filipino applicants for the provisional and permanent 7371 positions by hiring Asian and Filipino applicants who did not meet the minimum qualifications. They also alleged Defendants failed to provide information about the 7371 openings to potential candidates who were not Asian or Filipino.

[1] The remaining plaintiffs dismissed their claims with prejudice.

Plaintiff Skuratovsky applied for two provisional 7371 positions in 1999 and 2000, but was ranked below the hiring cutoff for both. He applied for a permanent 7371 position in October 2000, but failed to include an experience verification or seek a waiver of the requirement. He received notice in November 2000 that his application had been disqualified for failure to provide the verification.

Plaintiff Zolotarev did not apply for any of the 7371 positions in 1999 or 2000, However, he had previously applied for a similar mechanic position in 1998, and claims to have been informed that his application "would remain in the active file should a vacancy occur in the Division." He was not contacted by MUNI about any jobs in 2000 or 2001.

The Lukovsky plaintiffs sought and were denied class certification. The court's order, however, permitted the plaintiffs' counsel to send letters to other individuals who could potentially have similar claims, so that all such claims might be tried by the same judge. The district court then granted summary judgment in favor of the Defendants as to Skuratovsky and Zolotarev on statute of limitations grounds, concluding that these plaintiffs knew or should have known of their injury—i.e., that they had not been hired for the permanent position—for several years before they filed their complaint.

Glassman, Appeal No. 06–16946:
Four plaintiffs—Richard Glassman, Morris Jacobs, Michael Hall and Ignacio Reyes—were applicants for 7371 positions with MUNI during 2000. Glassman applied in June 2000 and was disqualified in November 2000, purportedly for failing to provide a written verification of his prior work experience. Jacob's application was rejected in October 2000 on the same grounds, as was Reyes's application in November 2000. Hall applied for a 7371 position in October 2000 and claims he never received notification that his application was rejected.

These plaintiffs received letters regarding the Lukovsky action in January–February 2006 and filed their complaint on March 31, 2006, alleging that Defendants gave preferential treatment to Asian and Filipino applicants who did not meet the minimum qualifications for the job. They also contend Defendants modified the requirements for 7371 positions in late 2000 to purportedly make it easier to hire Asian and Filipino applicants, and that the Defendants failed to provide sufficient information about the 7371 positions to non-Asian and non-Filipino candidates.

The district court granted the Defendants' motion to dismiss the complaint under Rule 12(b)(6) of Civil Procedure on statute of limitations grounds, concluding that the plaintiffs had notice of their injury when they received the notices informing them they were

not being hired, or, in the case of Hall, by early 2001 (when those accepted for the position would have reported to work).

STANDARD OF REVIEW

We review de novo the district court's dismissal on statute of limitations grounds, *Mann v. American Airlines,* 324 F.3d 1088, 1090 (9th Cir.2003), and the court's ruling on summary judgment, *General* ***1048** *Bedding Corp. v. Echevarria,* 947 F.2d 1395, 1396 (9th Cir.1991). We review for an abuse of discretion the district court's decision that defendants should not be equitably estopped from asserting a statute of limitations defense. *See Santa Maria v. Pac. Bell,* 202 F.3d 1170, 1175 (9th Cir.2000).

DISCUSSION

I. When did Plaintiffs' claims accrue?

[1] **[2]** **[3]** When, as here, a federal civil rights statute does not include its own statute of limitations, federal courts borrow the forum state's limitations period for personal injury torts, which the parties agree in this case is one year under California law. *Taylor v. Regents of Univ. Of Cal.,* 993 F.2d 710, 711 (9th Cir.1993) (applying one-year limitations period to claims brought pursuant to 42 U.S.C. §§ 1981, 1983 and 1985).[2] Although California law determines the *length* of the limitations period, federal law determines when a civil rights claim *accrues*. *Olsen v. Idaho State Bd. of Med.,* 363 F.3d 916, 926 (9th Cir.2004) (quoting *Morales v. City of Los Angeles,* 214 F.3d 1151, 1153–54 (9th Cir.2000)). Accrual is the date on which the statute of limitations begins to run; under federal law, a claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quoting *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir.1999)).

[2] Section 1981 was amended in 1990 to include a four-year limitations period for certain actions; however, this period does not apply to those actions which were cognizable under the pre–1990 version, such as plaintiffs' failure to hire claim. *See Cholla Ready Mix, Inc. v. Civish,* 382 F.3d 969, 974 n. 5 (9th Cir.2004); *Patterson v. McLean Credit Union,* 491 U.S. 164, 180–82, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

[4] Plaintiffs argue that their claims did not accrue until they knew both that they were not being hired *and* of the Defendants' alleged discriminatory intent. In other words, plaintiffs contend that knowledge of "injury" includes both the actual injury (failure to hire) and the legal wrong (racial discrimination). The Zolotarev plaintiffs assert they had no reason to know of the legal injury until informed years later by a MUNI employee that allegedly unqualified Asians and Filipinos had been hired; the Glassman plaintiffs claim they had no reason to know of the Defendants' discriminatory conduct until they received the letter informing them of the Zolotarev lawsuit.

Plaintiffs frame their argument in terms of the "discovery rule," which postpones the beginning of the limitations period from the date the plaintiff is actually injured to the date when he discovers (or reasonably should

discover) he has been injured. *See O'Connor v. Boeing North Am., Inc.,* 311 F.3d 1139, 1147 (9th Cir.2002). However, this rule is already incorporated into federal accrual law. *See Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450–51 (7th Cir.1990). The real question, as noted above, is what do we mean by "injury," that is, what must the plaintiffs "discover"—that there has been an adverse action, or that the employer acted with discriminatory intent in performing that act?

This issue has not been expressly addressed in this circuit. *See Lyons v. England,* 307 F.3d 1092, 1107 n. 9 (9th Cir.2002) (noting that prior cases dealing with accrual under Title VII had not resolved "the more subtle question of when the date of a plaintiff's notice that the act was discriminatory, and not the date of the act's occurrence" should be the preferred date for commencing the statute of limitations).[3] Nor has the Supreme Court had ***1049** occasion to clarify the issue. *See Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 114 n. 7, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002); *id.* at 123–24, 122 S.Ct. 2061 (O'Connor, J., concurring) (recognizing that "although Supreme Court precedents seem to establish a relatively simple 'notice' rule ..., courts continue to disagree on what the notice must be *of* ") (quotations omitted) (emphasis in original); *but see id.* at 114, 122 S.Ct. 2061 (noting that discrete acts, such as termination and refusal to hire, are easy to identify).

3 Although the plaintiffs' actions in this case arise under §§ 1981, 1983, 1985, and 1986, we note that, of course, the majority of employment cases involve private employers. We therefore consider cases arising under other federal laws, such as Title VII or the ADEA, to be instructive. *See, e.g., Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) (analyzing commencement of statute of limitations under both Title VII and Section 1981).

[5] However, numerous other circuits have explicitly addressed this precise question in a variety of employment contexts, and have concluded that the claim accrues upon awareness of the actual injury, i.e., the adverse employment action, and not when the plaintiff suspects a legal wrong. For example, in *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380 (3d Cir.1994), the court explained:

> The question arises whether a plaintiff's discovery of the actual, as opposed to the legal, injury is sufficient to trigger the running of the statutory period. In other words, does the statutory period begin to run upon a plaintiff's learning that he or she has been discharged from employment, for example, or does it begin to run only after a plaintiff comes to realize that the discharge constituted a legal wrong? We have in the past stated that a claim accrues in a federal cause of action upon awareness of the actual injury, not upon

> awareness that this injury constitutes a legal wrong.

Id. at 1386. The Sixth Circuit similarly opined in *Amini v. Oberlin College,* 259 F.3d 493 (6th Cir.2001):

> Amini learned of his injury when Oberlin informed him that he would not be hired for its vacant statistics position. As stated, the proper focus for purposes of determining the commencement of the [statute of] limitations period is on the discriminatory act itself and when that act was communicated to the plaintiff. Amini's attempt to stop the running of the [ ] clock until he discovered the facts that led him to suspect discrimination is best addressed as a question of equitable tolling.

Id. at 500; *see also Thelen v. Marc's Big Boy Corp.,* 64 F.3d 264, 267 (7th Cir.1995) (claim accrued upon termination, even though plaintiff did not discover he was replaced by younger employee until later; "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful"); *Dring v. McDonnell Douglas Corp.,* 58 F.3d 1323, 1327–28 (8th Cir.1995) (limitations period runs from date discriminatory act occurs, not when victim first perceives discriminatory motive); *Hulsey v. Kmart, Inc.,* 43 F.3d 555, 558–59 (10th Cir.1994) ("notice or knowledge of discriminatory motivation is not a prerequisite for a cause of action to accrue .... it is the knowledge of the adverse employment decision itself that triggers the running of the statute of limitations"); *Hamilton v. 1st Source Bank,* 928 F.2d 86, 88–89 (4th Cir.1990) ("To the extent that notice enters the analysis, it is the notice of the employer's actions, *not* the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period."); *Merrill v. S. Methodist Univ.,* 806 F.2d 600, 604–05 (5th Cir.1986) (rejecting argument that court should focus on the date the victim perceives a discriminatory motive rather than the actual date of the act itself).

***1050** We find these opinions persuasive. Moreover, they are consistent with the Supreme Court's opinion in *Ricks,* which involved an action under Title VII and Section 1981, and focused on when the plaintiff became aware of the adverse employment decision. *Ricks* concluded the statute of limitations under both commenced when the adverse decision was communicated to Ricks, even though the consequences of the action were not fully felt at that time. 449 U.S. at 258–59, 261–62, 101 S.Ct. 498; *see also Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007). In this circuit, we have similarly emphasized the plaintiff's awareness of the adverse employment action as critical to the accrual analysis. *See Olsen,* 363 F.3d at 927 (section 1983 claim accrued on date when plaintiff received letter notifying her that medical board was denying her license reinstatement).

In addition, this view also seems analogous to cases in this circuit under the Federal Tort Claims Act ("FTCA"). For example, we have held that an FTCA claim accrues when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and the cause of that injury, but is not deferred until the plaintiff has evidence of fault. *Davis v. United States,* 642 F.2d 328, 331 (9th Cir.1981) (citing *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)). Thus, in *Davis,* we determined that the statute of limitations accrued when plaintiff knew he had been injured and that the likely cause was the Sabin vaccine; however, accrual was not further deferred until plaintiff had reason to suspect governmental negligence. *Id.* at 331. We noted that once a plaintiff knows that harm has been done to him, he must "determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make." *Id.* (internal quotation marks omitted).

To counter this wealth of authority, plaintiffs point to language in *Aronsen v. Crown Zellerbach,* 662 F.2d 584, 593 (9th Cir.1981), in which we stated that in ADEA suits, the limitations period is activated once "the employee knows or should know that an unlawful employment practice has been committed." In the context of the case, however, the clear focus of this sentence is on *when* plaintiff received notice of his termination—on the date the termination was informally communicated to him, or when he was officially terminated and his paychecks ceased nearly a year later. *Id.* at 585–86. We went on to note in passing that receipt of "written notice of termination would clearly shorten the inquiry concerning the employee's knowledge of termination date (though not necessarily knowledge of an unlawful employment practice)." *Id.* at 593–94. We did not decide the issue presented in this case, however, because we remanded the case for further proceedings in light of the factual debate about when Aronsen actually knew of his termination. *Id.* at 594.

Plaintiffs also attempt to rely on language in *Morales v. City of Los Angeles,* in which we quoted a Second Circuit case to say that a "claim accrues when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm." 214 F.3d at 1154 (quoting *Veal v. Geraci,* 23 F.3d 722, 724 (2d Cir.1994)). However, the holding of *Morales* (and *Veal* for that matter) was limited to the *finality* of the harm; we concluded that the plaintiffs had been injured when they lost their lawsuits, not when the losses were subsequently upheld on appeal. *See id.* Again, we had no occasion to consider or decide the question we now face.

***1051** These stray remarks in cases that did not actually confront the issue before us do not compel us to disagree with our sister circuits that a claim accrues under federal law when the plaintiff knows or has reason to know of the actual injury. *See, e.g., Inlandboatmens Union of Pac. v. Dutra Group,* 279 F.3d 1075, 1081 (9th Cir.2002) (later panel not bound by tangential remark made in earlier case). In this case, as the district court found, the claim accrued when the plaintiffs received notice they would not be hired (or, in the case of

plaintiffs Zolotarev and Hall, when they should have realized they had not been hired for the position). *Cf. Grimes v. City and County of San Francisco,* 951 F.2d 236, 239 (9th Cir.1991) (termination is discrete act that triggers running of statute of limitations); *see also Morgan,* 536 U.S. at 114, 122 S.Ct. 2061 ("Discrete acts such as ... refusal to hire are easy to identify."). At this point, the plaintiffs knew they had been injured and by whom, *see Kubrick,* 444 U.S. at 113, 100 S.Ct. 352, even if at that point in time the plaintiffs did not know of the legal injury, i.e., that there was an allegedly discriminatory motive underlying the failure to hire. [4]

4 We note that various other circuits have also considered whether a reasonable plaintiff should have suspected discrimination and discovered the legal wrong within the limitations period as relevant to the issue of equitable tolling. *See Amini,* 259 F.3d at 501; *Thelen,* 64 F.3d at 267–68 and *Dring,* 58 F.3d at 1328–29. As discussed in Section II below, we are not called upon to decide this issue today.

II. Equitable Tolling/Equitable Estoppel

[6] [7] [8] Notwithstanding the foregoing, there are two doctrines which may apply to extend the limitations period or preclude a defendant from asserting the defense—equitable tolling and equitable estoppel. The federal version of these doctrines is concisely explained in *Johnson v. Henderson,* 314 F.3d 409 (9th Cir.2002). "Equitable tolling" focuses on "whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." *Id.* at 414 (quotation omitted). Equitable estoppel, on the other hand, focuses primarily on actions taken by the *defendant* to prevent a plaintiff from filing suit, sometimes referred to as "fraudulent concealment." *Id.* (citing *Cada v. Baxter Healthcare Corp.* 920 F.2d 446, 450–51 (7th Cir.1990)).

The plaintiffs in this case have expressly disavowed any reliance on equitable tolling. We therefore leave for another day the consideration of what circumstances would justify equitable tolling of the statute of limitations in this type of case. [5] However, they do argue that Defendants should be equitably estopped from asserting a statute of limitations defense because, they contend, the Defendants' misrepresentations about requiring written verification of qualifying experience concealed that they were hiring unqualified Asian and Filipino applicants instead.

5 The plaintiffs' position seems driven by California's equitable tolling principles. We note, however, that California tolling law only applies to the extent it is not inconsistent with federal law. *Azer v. Connell,* 306 F.3d 930, 936 (9th Cir.2002). The plaintiffs do not argue that California's requirements are inconsistent with federal equitable tolling principles, and we decline to sua sponte reach issues which have not been raised.

[9] Under California law, equitable estoppel requires that:

> (1) the party to be estopped must be apprised of the facts; (2) that party ***1052** must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

Honig v. San Francisco Planning Dep't, 127 Cal.App.4th 520, 529, 25 Cal.Rptr.3d 649 (2005). California equitable estoppel is thus similar to and not inconsistent with federal common law, as both focus on actions taken by the defendant which prevent the plaintiff from filing on time. *See Santa Maria,* 202 F.3d at 1176.

[10] The primary problem with plaintiffs' argument is that their alleged basis for equitable estoppel is the same as their cause of action. As we have previously explained, the plaintiff must point to some fraudulent concealment, some active conduct by the defendant "*above and beyond* the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Guerrero v. Gates,* 442 F.3d 697, 706 (9th Cir.2006) (quoting *Santa Maria,* 202 F.3d at 1176–77) (emphasis added). The Seventh Circuit persuasively explains why this rule must be the case:

> If [defendant] had told [plaintiff] that it would not plead the statute of limitations as a defense to any suit for age discrimination that he might bring, this would be a case for equitable estoppel; so also if [defendant] had presented [plaintiff] with forged documents purporting to negate any basis for supposing that [plaintiff's] termination was related to his age. [Plaintiff] tries to bring himself within the doctrine by contending that [stated reason for termination] was a ruse to conceal the plan to fire him because of his age. This merges the substantive wrong with the tolling doctrine.... It implies that a defendant is guilty of fraudulent concealment unless it tells the plaintiff, "We're firing you because of your age." It would eliminate the statute of limitations....

Cada, 920 F.2d at 451.

[11] The plaintiffs in this case make a similar attempt to circumvent the requirements of equitable estoppel. They do not point to any misrepresentation by the Defendants that concealed the composition of the applicant pool, the qualifications of those actually hired, or any promise by which the Defendants discouraged plaintiffs from timely asserting their rights. The district court properly denied the claim for equitable estoppel. [6]

6 The Zolotarev plaintiffs also argue that, if their claims were timely, the district court abused its discretion by denying them leave to file a Third Amended Complaint. We deny this claim as moot.

CONCLUSION

The district court correctly determined that the plaintiffs' claims accrued at the time they received notice they would not be hired or, in the case of plaintiffs Zolotarev and Hall, when a reasonable person would have realized he had not been hired. The plaintiffs in this case have waived any claim for equitable tolling and the district court did not abuse its discretion in rejecting the plaintiffs' claim for equitable estoppel, as the plaintiffs did not allege any fraudulent concealment or misrepresentation above and beyond the actual basis for the lawsuit.

AFFIRMED.

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REPUBLIC INSURANCE COMPANY, Plaintiff and Appellant,
v.
GREAT PACIFIC INSURANCE COMPANY et al., Defendants and Respondents.

No. A043151. *

* The Supreme Court ordered that the opinion be not officially published on January 4, 1990.

Aug. 31, 1989.

Synopsis

Homeowners' insurer brought action against prior insurers to recover contribution after paying claim. The Superior Court, San Mateo County, Clarence B. Knight, J., granted summary judgment in favor of prior insurers. Homeowners' insurer appealed. The Court of Appeal, White, P.J., held that: (1) private statute of limitations in policies of prior insurers applied to contribution action; (2) one prior insurer did not waive statute of limitations defense; and (3) prior insurer was not estopped from relying on statute of limitations defense.

Affirmed.

Attorneys and Law Firms

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Timothy E. Herr, Collins & Zapala, San Jose, Reilly Atkinson, Long & Levit, San Francisco, for defendants and respondents.

Opinion

WHITE, Presiding Justice.

Plaintiff Republic Insurance Company (Republic) appeals after the trial court granted motions for summary judgment in favor of defendants Great Pacific Insurance Company (Great Pacific) and the Fire Insurance Exchange (Fire Exchange). We affirm.

FACTS

Defendant Fire Exchange insured the Kenny's home in San Jose from 1976 to October of 1981. Defendant Great Pacific insured the Kenny's home for only two months—from November 1981 to January of 1982—before plaintiff Republic issued a policy for the house in January of 1982. In November of 1984, while Republic was still on the risk, the Kennys submitted an insurance claim for damage to their home caused by settlement and/or earth movement.

A geologist hired by Republic to help investigate the claim concluded that the damage

to the Kenny home was caused by expansion and contraction of the highly expansive soils underlying the house. According to the geologist, this condition existed at the time the home was built, and damage to the home started shortly after construction. Consequently, Republic concluded that the damage to the Kenny property occurred in part during the time the home was insured by Fire Exchange and Great Pacific.

In August of 1985, Republic wrote to Great Pacific and Fire Exchange to advise those companies that Republic would be seeking contribution from them for any compensation paid to the Kennys.

In September of 1986, Republic paid more than $46,000 to the Kennys in full settlement of their claim.

In April of 1987, Fire Exchange wrote to Republic and denied liability on the claim.

On April 23, 1987—more than 27 months after the Kennys had submitted their claim to Republic and more than 18 months after Republic had advised Great Pacific and Fire Exchange that it would be seeking contribution—Republic filed suit against ***865** Great Pacific and Fire Exchange [1] for pro rata contribution to the Kenny's claim. Both Great Pacific and Fire Exchange brought motions for summary judgment on the ground that the private one-year statute of limitations contained in their respective policies barred Republic's action for contribution. This contractual statute of limitations required that suit be brought within 12 months of the inception of the loss. The trial court agreed that the statute of limitations barred Republic's suit for contribution, and granted summary judgment in favor of Fire Exchange and Great Pacific. This appeal followed.

1 Republic also filed suit against Old Republic Insurance Company. However, Old Republic did not move for summary judgment and is not a party to this appeal.

DISCUSSION

A. *The One–Year Statute of Limitations Applies to Republic's Contribution Action.*

Both the Great Pacific and Fire Exchange policies contain the contractual statute of limitations found in the California Standard Form Fire Insurance Policy (Insurance Code, § 2071.). This clause provides: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss." (Ins.Code, § 2071.) [2]

2 During the five and one-half years Fire Exchange insured the Kenny home, two separate policies were in effect at different times. The first policy contained the statute of limitations language quoted in the text. The second policy—which was in effect from July of 1980 until the Kenny's cancelled the policy in October of 1981—also contained a one year statute of limitations, although in different language. The second policy provided:

> "We may not be sued unless there has been full compliance with all the terms of this policy. Suit must be brought within one year after the loss."

There is no real dispute in this case that Republic's lawsuit was brought more than 12 months after the inception of the loss. Rather, the issue is whether the one-year statute of limitations should bar an action for contribution brought by one insurer against a predecessor insurer who covered the same risk. We conclude that the statute of limitations *does* apply in these circumstances.

The parties' positions on this issue can be summarized as follows: Great Pacific and Fire Exchange argue that Republic's action for "contribution" is nothing more than an action for subrogation of contractual rights, and, under well established subrogation principles, the subrogee (Republic) has no greater rights than its subrogor (the Kennys). (*Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 878, 243 Cal.Rptr. 256; *Iusi v. City Title Ins. Co.* (1963) 213 Cal.App.2d 582, 588, 28 Cal.Rptr. 893; *Meyer Koulish Co. v. Cannon* (1963) 213 Cal.App.2d 419, 424, 28 Cal.Rptr. 757.) Consequently, Republic must stand in the shoes of the Kennys vis-a-vis the other insurers, and must abide by the terms and conditions of their respective policies, including the statute of limitations. (See *Iusi v. City Title Ins. Co., supra,* 213 Cal.App.2d at p. 588, 28 Cal.Rptr. 893.)

Republic, on the other hand, disputes that this is an action for subrogation and instead claims that its suit is one for "contribution" which "arises only between insurers due to equitable principles, and not from any contractual relationship." Because of this, Republic contends the provisions in the insurance policies "should be construed to ... bind only those parties who executed the contract."

[1] In a strict sense, Republic is correct in describing its action as one for contribution rather than subrogation. Witkin has described equitable contribution as "the right to recover from a *co-obligor,*" which arises, for example, when several insurance companies are jointly liable and one has paid more than its share. (7 Witkin, Summary of Cal.Law (8th ed. 1974) Equity, § 123, p. 5341, see also 6 Appleman, Insurance Law & Practice (1972) § 3902, p. 422 ["Contribution is a principle sanctioned in equity, and arises between co-insurers only, permitting one who has paid the whole loss to obtain reimbursement from the other insurers who are also liable therefor."].) ***866** By contrast, the right to subrogation arises when " 'one person, not a volunteer, pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter.' " (*Meyer Koulish Co. v. Cannon, supra,* 213 Cal.2d at pp. 423–424, 28 Cal.Rptr. 757, fn. omitted.) Thus, Witkin defines subrogation as "the right to recover from the *debtor-obligor.*" (7 Witkin, Summary of Cal. Law, *supra,* Equity, § 124, p. 5342.) In the insurance context it arises, for example, when an insurance company pays its insured for damage caused by a third party tortfeasor; when it does so, the insurer is subrogated to the insured's rights against the tortfeasor. (*Meyer Koulish Co. v. Cannon, supra,* 213 Cal.App.2d at p. 424, 28 Cal.Rptr. 757.)

In the present case, Republic is contending that Great Pacific and Fire Exchange are *co*-obligors, and consequently its action is best described as one for contribution. However, this description does not alter the essential fact that the action is derivative of the Kennys' rights under their insurance contracts with Great Pacific and Fire Exchange.

[2] Republic argues, of course, that its action for contribution is based on "equitable principles," and is not tied to the contracts between the Kennys and their prior insurers. However, the rights of the parties cannot be determined by equitable principles floating in the ether. Clearly, Republic would not now be arguing that it is entitled to contribution from the prior insurers had the prior policies unequivocally excluded the type of risk at issue here. Of necessity, we *must* look to the prior insurance contracts to determine if Republic is entitled to contribution. Only then can we determine whether the risk is of the type covered by the earlier policies. The issue simply cannot be determined—as Republic would have it—on disembodied equitable principles. [3]

[3] Republic's reliance on *Pacific Indemnity Co. v. Fireman's Fund Ins. Co.* (1985) 175 Cal.App.3d 1191, 223 Cal.Rptr. 312 is misplaced. Although Republic cites language in that case which, at first blush, seems to support their position (*id.,* at pp. 1197–1198, 223 Cal.Rptr. 312), *Pacific Indemnity* in fact had nothing to do with contribution, but instead concerned a dispute between two insurance companies over which had the duty to defend an insured. It is simply not apposite to the case before us.

[3] [4] However, we need not determine in this case whether a subsequent insurer seeking contribution from a prior insurer is bound by every comma, period, and clause of the prior contract. For our purposes, it is enough to decide that subsequent insurers are bound by the private statute of limitations present in all California fire insurance policies. Although we have not found any California cases on point, we find support for this position in a Michigan case addressing a nearly identical issue. In *Fremont Mut. v. Michigan Basic Property* (1988) 171 Mich.App. 500, 430 N.W.2d 764, two fire insurers insured the same property simultaneously. The property was destroyed by fire during the period of simultaneous coverage. A claim was made against the second insurer which paid the claim and then sought contribution from the first insurer. The first insurer defended on the ground that the second insurer's action for contribution was barred by the one-year statute of limitations applicable to fire insurance policies. The Michigan statute of limitations is identical to that found in the California Standard Form Fire Insurance Policy (Insurance Code, § 2071.) [4] The Michigan court rejected the plaintiff insurer's claim that the one-year statute of limitations did not apply to its action for contribution: "Plaintiff's claim against defendant, filed some 3 ½ years after the fire and after defendant's refusal to pay, *is derivative of plaintiff's payment [to the insured]*. Because there is no privity of contract between the plaintiff and defendant insurers, plaintiff's action is clearly one 'on the policy,' governed by the one-year limitation period contained therein. [Citation.].... Characterizing the action ***867** as one for contribution does

not alter its nature as an action 'on the policy.' " (*Fremont Mut. v. Michigan Basic Property, supra,* 430 N.W.2d at pp. 765–766, emphasis added.)

4 Lines 157–161 of Michigan Compiled Laws Annotated § 500.2832 provide: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

Similarly, in the present case, Republic's claim for contribution is derived from its payment to the Kennys. Because there is no contract between Republic and the prior insurers, its action is clearly on the policies between the Kennys and the prior insurers. Characterizing the action as one for contribution does not alter its nature as an action "on this policy." (Ins.Code, § 2071.) Consequently, Republic is bound by the one-year statute of limitations contained in the prior policies. (See also *Insurance Co. of N. America v. Fire Ins.* (Tex.1979) 590 S.W.2d 642.)

B. *Fire Exchange Did Not Waive the Statute of Limitations Defense.*

[5] Republic next contends that Fire Exchange waived the statute of limitations defense because it did not specify that defense in its letter stating the reasons Fire Exchange was denying liability for the claim. We reject this argument.

Republic relies on *McLaughlin v. Connecticut General Life Ins. Co.* (N.D.Cal.1983) 565 F.Supp. 434—a federal case interpreting California law—which holds that an insurance company which relies on specified grounds for denying a claim thereby waives the right to rely in subsequent litigation on any other grounds which a reasonable investigation would have uncovered. (*Id.,* at p. 451.) However, in a subsequent case, the same court held that the *McLaughlin* rule does not apply to a statute of limitations defense. (*Becker v. State Farm Fire and Cas. Co.* (N.D.Cal.1987) 664 F.Supp. 460, 461–462.) The *Becker* court reasoned that the *McLaughlin* rule is designed to provide an incentive to insurance companies to investigate claims before denying them, and, consequently, the defenses subject to the waiver rule go to whether the claimed loss is covered by the policy. Since a statute of limitations defense is unrelated to any investigation of whether the claimed loss is covered by the policy, it is not subject to the waiver rule. (664 F.Supp. at p. 462.) We follow *Becker* and reject Republic's waiver argument.

C. *Defendants Are Not Estopped From Relying On the Statute of Limitations Defense.*

[6] Finally, Republic contends that both Fire Exchange and Great Pacific should be estopped from relying on the statute of limitations as a defense because they "induced" Republic to delay filing suit by representing that ongoing investigations of the claim were underway. We reject this contention.

[7] First, Republic did not plead estoppel in its complaint. Estoppel must be pleaded and proved as an affirmative bar to a statute of limitations defense. (*Hanson v. Garden Grove*

Unified School Dist. (1982) 129 Cal.App.3d 942, 948, 181 Cal.Rptr. 378.)

Second, the authority Republic relies on is inapposite. In *Muraoka v. Budget Rent–A–Car, Inc.* (1984) 160 Cal.App.3d 107, 206 Cal.Rptr. 476, the individual plaintiff alleged in his complaint that while he was unrepresented by counsel the defendant car rental agency affirmatively represented that he would be fully compensated without litigation, and that this caused him to delay contacting counsel or filing suit until after the statute had run. The *Muraoka* court found these pleaded facts sufficient to estop the car rental agency from relying on the statute of limitations. (*Id.,* at pp. 115–118, 206 Cal.Rptr. 476.) By contrast, Republic is a presumably sophisticated insurance company which was represented by counsel at an early stage of its investigation of the claim. It has been said that where a plaintiff has been represented by an attorney in connection with a claim, he may not, as a matter of law, claim that the defendant is estopped from relying on the statute of limitations as a defense. (*Romero v. County of Santa Clara* (1970) 3 Cal.App.3d 700, 705, 83 Cal.Rptr. 758.) We believe this rule may be properly applied in the present case.

The judgment is affirmed.

MERRILL and STRANKMAN, JJ., concur.

All Citations

261 Cal.Rptr. 863

Legal Authority R-LA-18

3 Cal.App.3d 700, 83 Cal.Rptr. 758

JUANITA C. ROMERO,
Plaintiff and Appellant,
v.
COUNTY OF SANTA CLARA et al., Defendants and Respondents

Civ. No. 25221.
Court of Appeal, First District, Division 2, California.
January 21, 1970.

SUMMARY

Plaintiff sought damages from the county for the destruction of her dogs, which had been impounded. The complaint stated that plaintiff did not file suit on her claim within six months from the date of rejection of her claim, as required, and represented that various employees in the municipal court and the superior court had told her that she had one year within which to file suit against the county. A judgment of dismissal was entered following the granting of defendant's motion for summary judgment. (Superior Court of Santa Clara County, Bruce F. Allen, Judge.)

On appeal, the judgment was affirmed. Plaintiff's affidavit, opposing the motion for summary judgment, and showing that she had been advised by and represented by attorneys with respect to her claim sufficiently destroyed the issue whether the county was estopped to claim the defense that suit was not timely filed. (Opinion by David, J. pro tem.,* with Shoemaker, P. J., and Taylor, J., concurring.)

* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1)
Limitation of Actions § 122--Estoppel.
For a governmental agency to be estopped to assert the defense that suit was not filed on a claim within the statutory time allowed, the estoppel must arise by conduct of one who legally exercises some duty or function in relation to the claim.

(2)
Counties § 157--Actions--Pleading.
Personnel in the municipal court do not legally exercise some duty or function in relation to claims ***701** against the county government, nor do those of the superior court; but a clerk of the superior court is the county clerk (Gov. Code, § 26800) authorized to act by deputies (Gov. Code, § 24101), and an amended complaint was sufficient in asserting that the clerk of the superior court represented plaintiff had one year to file suit against the county and the county was thereby estopped to claim the defense of a late filing, as against general demurrer.

(3)

Estoppel and Waiver § 49--Procedure--Need for Plaintiff to Plead Estoppel.
A plaintiff relying on estoppel must aver and prove all the required elements.

(4)
Counties § 157--Actions--Pleading.
In a complaint against a county asserting that the actions of individual defendants were within the scope of their employment by the county, the county's liability as pleaded derives from their action, if at all; and since the law attaches the presumption that official duty was regularly performed (Evid. Code, § 664), which presumption attends the complaint, the pleading, to state a cause of action, must aver facts which, if proved, would rebut the presumption.

(5)
Appeal § 40(1)--Decisions Appealable--Orders Sustaining Demurrer.
An order sustaining a general demurrer is not appealable.

(6)
Judgments § 8a(9)(d)--Summary Judgments--Opposing Affidavits-- Construction.
On a motion by defendant for summary judgment, the affidavit of plaintiff opposing the motion is accepted as true, even if it includes nonevidentiary matter.

(7)
Nuisances § 16--Defenses--Abatement.
It is presumed that official duty has been regularly performed (Evid. Code, § 664), and the presumption is conclusive in the absence of contrary proof, even in abatement of nuisances.

(8)
Limitation of Actions § 122--Estoppel.
Where one has been represented by an attorney in connection with a claim against a governmental agency, the necessary elements for estoppel of the agency to claim that suit was not filed within the required time are not established as a matter of law.

(9)
Counties § 157--Actions--Pleading.
In an action against the county, plaintiff's admitted failure to sue within the time specified was fatal to her causes of action where it appeared that she had been represented and advised by attorneys in connection with the claim. ***702**

COUNSEL
Juanita C. Romero, in pro. per., for Plaintiff and Appellant.
Popelka, Graham, Van Loucks & Allard and Keith A. Miller for Defendants and Respondents.

DAVID, J. pro tem. *

* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

By her amended complaint, appellant, Juanita C. Romero, sought damages for the destruction of her 48 dogs; and for great bodily harm and mental suffering when she allegedly called to see the pile of her deceased dogs at the animal shelter where the massacre occurred. The

defendants, who "intentionally, wrongfully, and maliciously[1] and with intent to injure plaintiff's said property" did the deed, were alleged to be respondent, County of Santa Clara, and certain of its employees, acting in the scope of their employment, namely, defendants Roy Barghini, Phillip Haims and Herbert Hawkins. Dogs are property, and in proper cases, the owner may sue for their death. (*Roos v. Loeser*, 41 Cal.App. 782 [183 P. 204].)

1 "Wrongfully and maliciously" do not tender any issue (*Going v. Dinwiddie*, 86 Cal. 633, 638 [25 P. 129]).

The amended complaint alleged that the claim presented to the County of Santa Clara was deemed rejected as of November 22, 1967, and that she "did not file suit upon her claim within six months from the date her claim was rejected," as required by Government Code, sections 945.6, subdivision (a), and 950.2.

It is then alleged that four unnamed "assistants in the office of the clerk in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, and in the office of the Clerk of the Superior Court in and for the County of Santa Clara," on or about July 8, 1967 (*sic*) "represented to plaintiff that she had one year within which to file suit against the county for recovery of damages suffered by her by reason of the acts recited above"; that she relied upon their superior knowledge of such matters and forebore from filing her lawsuit within the six-month period, but did file on June 1, 1967, within the one-year period.

The respondent county interposed both a general and special demurrer, ***703** and a motion for summary judgment. The first was sustained without leave to amend and the motion was granted. This appeal is from the judgment of dismissal. But we conclude that the contentions made are no more effective than baying at the moon.

In reference both to the amended complaint and the motion for summary judgment, the first question is whether the pleading on the one hand, and the second is whether the affidavits on the other, raise a triable issue of estoppel, in avoidance of the acknowledged bar of the statutory limitation on this action. The decisions permit such an estoppel to be raised. (*Driscoll v. City of Los Angeles*, 67 Cal.2d 297, 305-306 [61 Cal.Rptr. 661, 431 P.2d 245].) (1) But the estoppel must arise by the conduct of one who legally exercises some duty or function in relation to such claims. A gardener in front of the courthouse, a janitor within, a bailiff within a courtroom, a judge's stenographer in the ante-room, are certainly not agents of the county for such a purpose, nor are the attaches of a court generally.

(2) Those in the municipal court do not occupy such relationship to the county government, nor do those of the superior court, as such (Charter, Santa Clara County, Stats. 1951, §§ 601, 602, 701, pp. 4642-4655; Gov. Code, § 24000). But inasmuch as the clerk of the superior court is the county clerk (Gov. Code, § 26800) authorized to act by deputies (Gov. Code, § 24101), the amended complaint is sufficient in this assertion, as against general demurrer. The special demurrer was valid, as directed to the uncertainty as to the names and capacities of the "assistants."

(3) A plaintiff relying on estoppel must aver and prove all of the required elements. (*McGranahan* v. *Rio Vista etc. School Dist.*, 224 Cal.App.2d 624, 630 [36 Cal.Rptr. 798].) While the allegations of the amended complaint are ambiguous, so far as the necessary scienter and purpose of those allegedly making the statement, they are subject to amendment. Therefore, if this dismissal rested upon the ruling sustaining the general demurrer directed to the estoppel alone, we would be impelled to reverse it. (*Lord v. Garland*, 27 Cal.2d 840, 850 [168 P.2d 5].)

But here, another principle is operative. (4) The amended complaint asserts the actions of the individual defendants were within the scope of their employment by the county, and its liability as pleaded is derivative from their action, if at all. To their acts, as pleaded, the law attaches the presumption that official duty was regularly performed (Evid. Code, § 664), which presumption attends the complaint. To state a cause of action, the pleading must aver facts which, if proved, would rebut the presumption. (*Going* v. *Dinwiddie*, 86 Cal. 633, 637 [25 P. 129]; *De Luca v. Board of Supervisors*, 134 Cal.App.2d 606, 610 [286 P.2d 395]; cf. the following cases: *Dillon v. Haskell*, 78 Cal.App.2d 814, 816 [178 P.2d 462]; *Stuart* ***704** *Arms Co. v. City & County of San Francisco*, 203 Cal. 150, 152 [263 P. 218]; *Rogers v. De Cambra*, 132 Cal. 502, 506 [60 P. 863, 64 P. 894].)

The amended complaint does not aver that the myrmidons of the animal shelter or pound did something the laws or ordinances did not authorize them to do, at the end of 60 days, but we note Agricultural Code, sections 31107 and 31108. (*Kane* v. *County of San Diego*, 2 Cal.App.3d 550 [83 Cal.Rptr. 19].)

Appellant seeks to limit her attack on the judgment of dismissal, to the order relative to the general demurrer. This is barking up the wrong tree. (5) The order sustaining the demurrer is not appealable. (*Beazell* v. *Schrader*, 59 Cal.2d 577, 580 [30 Cal.Rptr. 534, 381 P.2d 390].) But the judgment of dismissal was the sequel also to the contemporaneous motion for summary judgment, which was granted.

(6) On such a motion, the affidavit of Juanita Romero is accepted as true, even if it includes nonevidentiary matter. (*Eagle Oil & Refining Co. v. Prentice*, 19 Cal.2d 553, 556 [122 P.2d 264], cited by this court in *McGranahan v. Rio Vista, etc. School Dist., supra*, 224 Cal.App.2d 624, 627.)

From her affidavit, it appears that in 1965 she lived at 179 Sunset Avenue, San Jose, with 50 dogs. Mr. Roy Barghini caused a complaint to be filed against her for keeping a public nuisance. To this charge, she pleaded guilty in the municipal court. She was placed on probation for one year; and in February 1966 was brought before the court for violation of probation. The court modified the terms of probation, ordering her to move her dogs to a more suitable location within 10 days. “If I had not done so, the Court directed the Rabies Control to pick up all but two of the dogs and hold them for me at the Animal Shelter for 60 days; during which time I could find a suitable place for them.” The dogs went to the shelter on May 5. Further efforts to modify probation to permit her to keep the dogs at her home

were denied. "After the last of these hearings on June 30, Mr. Hawkins [District Attorney] told Mr. Barghini to destroy my dogs on the 6th of July [the expiration of 60 days from May 5]. I told him there was no order by the Court to destroy my dogs, and not to do it. He did not answer. *My attorney, Mr. Alfonso Romero, was present* [italics supplied] and he also told Mr. Hawkins and Mr. Barghini that the Court had made no order to this effect, and that he should not do so without one. Neither of them answered. ... Notwithstanding all the above, on July 6th between 5:00 a.m. and 6:00 a.m., Mr. Barghini and Dr. Phillip Hains [*sic*] went to the animal Shelter and destroyed all of my 48 dogs."[2] ***705**

2 Appellant's affidavit on summary judgment proceedings did not support her broad allegations of representations allegedly made by county officials or employees: "I talked ... with several people who knew of the facts of the case, and who told me I had a year within which to file suit, among them was a man at the clerk's office of the Municipal Court, Mr. Nave, and also several people at the Humane Society and the receptionist at the County Counsel's office. She told me I had a year."

(7) It is presumed official duty has been regularly performed (Evid. Code, § 664) and is conclusive in the absence of contrary proof (*Page v. City of Santa Rosa*, 8 Cal.2d 311, 314 [65 P.2d 775]) even in abatement of nuisances (*Irvine v. Citrus Pest Dist.*, 62 Cal.App.2d 378, 383-384 [144 P.2d 857]).

The moving affidavits for the county have singular lacunae, for they do not present the facts which would illuminate the incident as a product of official action. When one wants to get a bear up a tree, he should use the whole pack and not a single dog.[3] The affidavits principally are directed to one element of the complaint, the estoppel. They do not aver that the statements alleged as the estoppel were not made, but could not very well do so when the complaint did not name those to whom they were attributed. The affidavits must be by those who can testify competently to the included matters. (Code Civ. Proc., § 437c.) Appellant's affidavit, quoted above, shows she was represented by an attorney, Mr. Alfonso Romero, and also Mr. Livak, who in May 1967 told her "time was running short" in which to file. Respondents' uncontroverted affidavits reflect also that she was represented by another attorney in the course of the matter, i.e., Miss Molly H. Minudri; and other attorneys contacted the county counsel's office in her behalf.

3 Power to order destruction of dogs: Consult: note, 56 A.L.R.2d 1024; *Simpson* v. *City of Los Angeles*, 40 Cal.2d 271, 279 [253 P.2d 464]; *In re Ackerman*, 6 Cal.App. 5 [91 P. 429].

These facts were sufficient to destroy the issue of estoppel. (8) Where one has been represented by an attorney in connection with a claim the necessary elements for estoppel are not established as a matter of law. (*Tubbs* v. *Southern Cal. Rapid Transit Dist.*, 67 Cal.2d 671, 679 [63 Cal. Rptr. 377, 433 P.2d 169].) (9) Therefore, the admitted failure to sue within the time specified was fatal to the causes of action.

No application was made under Code of Civil Procedure, section 473, assuming that surprise, inadvertence or excusable neglect of herself or her attorney could have been adequately supported.

We regret that appellant suffered the loss of her pets. But a nuisance is a right thing in the wrong place, like a pig in a parlor, or 50 dogs where the ***706** law says they should not be maintained under the conditions specified. (*Cook v. Hatcher*, 121 Cal.App. 398 [9 P.2d 231].)

The judgment is affirmed.

Shoemaker, P. J., and Taylor, J., concurred.

Legal Authority R-LA-19

Court of Appeal, Sixth District, California.

Victoria Tran SOOD,
Petitioner and Appellant,
v.
Karline GRIEF, et al., Respondents.

No. H033875.
|
(Santa Clara County
Super. Ct. No. PR161665).
|
June 29, 2010.

Attorneys and Law Firms

Victoria Tran Sood, Milpitas, CA, Pro Per.

Blake Alexandra Rummel, Weinstock Manion et al, Los Angeles, CA, Janet M. Boessenecker, Fairfax, CA, for Defendant and Respondent.

Opinion

McADAMS, J.

***1** This appeal follows the denial of an attorney fee petition brought in probate court. The court denied the petition on the grounds that it was time-barred and that there was no evidence to support a claim of equitable estoppel.

For reasons explained below, we shall affirm.

BACKGROUND

The petitioner and appellant, Victoria Tran Sood, is an attorney who previously represented Marjorie Grief (Marjorie or Mrs. Grief). Appellant represented Marjorie from December 2005 until August 2006. At the outset of the representation, Marjorie gave appellant an initial deposit of $3,000, but she paid no fees thereafter. The attorney-client relationship ended when the court granted appellant's motion to withdraw as attorney of record.

The respondents are beneficiaries of the Grief Living Trust, which was established by Marjorie and her husband Gene Grief, acting through his conservator. The trust was created in February 2007, months after appellant had ceased representing Marjorie. The trust is part of an estate plan for Marjorie and Gene Grief, established following a long, difficult, and contentious process involving many parties and their representatives. That process was finally concluded by settlement, approved by the court in February 2007. The settlement agreement includes a provision for the payment of attorney fees to named counsel, upon court approval, when the trust estate had "sufficient liquidity." Appellant was not among the attorneys specified in the settlement agreement. At the time the settlement was

approved, appellant withdrew her request for special notice in the conservatorship case.

Marjorie died on February 27, 2007, four days after the court approved the settlement agreement creating the trust. Appellant learned of Marjorie's death the following summer, when she ran into Diane Brown, one of the attorneys involved in the case.

In December 2007, after learning of other counsel's plans to petition the court for fees, appellant submitted her "fee declaration and invoices" to Richard Gorini, counsel for Gene Grief's conservator, "to file together with other counsel's fee declarations in one fee petition." In early January 2008, Gorini returned appellant's papers, explaining in a cover letter that counsel were petitioning for fees separately, from either the conservatorship or the trust.

In March 2008, more than a year after Marjorie's death, appellant sought her unpaid fees from the Grief Living Trust. After an evidentiary hearing in July 2008, the court denied appellant's fee petition. The court concluded that appellant's claim for fees was "barred by the statute of limitations." The court also rejected appellant's equitable estoppel argument on the ground of insufficient evidence.

This appeal followed. (Prob.Code, § 1300, subd. (e).)

DISCUSSION

I. Statute of Limitations

A. Legal Principles

The relevant limitations statute is Code of Civil Procedure section 366.2. [1]

1 That provision states in pertinent part: "If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." (§ 366.2, subd. (a).)
Unspecified statutory references are to the Code of Civil Procedure.

***2** Section 366.2 "provides for an outside time limit of one year for filing any type of claim against a decedent." (*Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 89 Cal.App.4th 530, 535.) "This uniform one-year statute of limitations applies to actions on all claims against the decedent which survive the decedent's death." (*Ibid.*) It applies to all claims that "exist at the time of a person's death." (*Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 846.) If the time limit is not met, "a creditor will be forever barred from asserting a claim against the decedent." (*Dobler v. Arluk Medical Center Industrial Group, Inc.*, at p. 536.) These time limits apply both to claims against probate estates and to claims against "the assets of a revocable trust of a deceased settlor." (*Id.* at p. 537.) "The language is clear that the one-year statute applies to all debts of the decedent regardless of whom the

claims are brought against." (*Levine v. Levine* (2002) 102 Cal.App.4th 1256, 1265.)

As appellant observes, however, the statutory "language contemplates a cause of action that could have been asserted against the decedent while he was alive." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 552.) "A cause of action *exists* (or 'arises') when all the elements it comprises have come into being so that an action may be brought." (*Id.* at p. 553.) The existence of a cause of action is distinct from its accrual. (*Ibid.;* see also, e.g., *In re Estate of Yool* (2007) 151 Cal .App.4th 867, 876–877.)

B. Analysis

In this case, appellant contends, her claim for fees against Marjorie did not exist "until her estate had liquidity." Although appellant's written fee agreement with Marjorie contains no provision making payment contingent on liquidity, appellant asserts that the fee agreement was modified by an executed oral agreement. (See Civ.Code, § 1698, subd. (b); *Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 Cal.App.3d 272, 279, disapproved in part by *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1370–1371 ["burden of proof for oral modification of a written contract is a preponderance of the evidence"].)

At the hearing on her fee petition, appellant submitted in evidence the written fee agreement, which Marjorie had signed in December 2005. By its terms, the agreement required Marjorie to make an initial deposit of $3,000; to maintain a balance of $5,000 in a trust account during the engagement; and to pay monthly invoices "upon presentation." The agreement recites that it "constitutes the entire agreement between Attorneys and Client" and it explicitly requires any modification to be in writing.

Despite the fee agreement's written terms, appellant asserts that she and her client "orally and through conducts agreed that Mrs. Grief did not owe Appellant until Mrs. Grief had liquidity of funds." In appellant's words, "the evidence overwhelmingly shows that Mrs. Grief and Appellant's conducts, which were in conformity with their oral agreement, replaced the payment terms in the Fee Agreement with the payment term that allowed Mrs. Grief to delay payment until she had liquidity of funds." The only evidence cited by appellant in support of that assertion is her own testimony. [2]

2 Appellant testified that her fee agreement "usually requires the client to pay within 30 days after the invoice is presented. But ... usually it's not strongly enforced and it's always the understanding between the client [*sic*] as the case be developed [*sic*]. In Ms. Grief's case the—the understanding was that she's not going to have any cash any time until one of the real property [*sic*] was sold." When asked by the court whether she "had an agreement collecting your fees that's not in this agreement," appellant replied: "It's more of an oral discussion and understanding that's not part of this agreement. I would say that as [*sic*] evolved from this agreement. The hourly rate and—and how that rate increases or decreases would be based upon this agreement. But the parties

> define their—their—the terms of the payment as the case develop [*sic*].”

***3** The trial court rejected appellant's assertion of oral modification, saying: “There is no credible evidence before the Court that the Fee Agreement was modified by the parties.”

Appellant posits the court's finding on this point as an error of law, subject to de novo review. We disagree with appellant's characterization. “Resolution of the statute of limitations issue is normally a question of fact.” (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 810.) Here, the trial court applied the limitations statute based on its factual determination that appellant failed to prove oral modification of the written fee agreement. Our review, therefore, is deferential.

Where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570–571.) The question on appeal is not whether the appellants “failed to prove their case by a preponderance of the evidence. That was a question for the trial court and it was resolved against them. The question for this court to determine is whether the evidence compelled the trial court to find in their favor on that issue.” (*Ibid.*) To decide that question, the reviewing court considers whether the appellant's evidence was both “uncontradicted and unimpeached” and “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” (*Id.* at p. 571; cf. *In re Sheila B.* (1993) 19 Cal.App.4th 187, 198–199 [“court's conclusion that the evidence presented by the moving party was insufficient to prove its case” reviewed for substantial evidence].)

On this record, we are compelled to uphold the trial court's determination that appellant failed to prove oral modification of the fee agreement. The trial court is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence. (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App .2d 733, 742.) Indeed, the trial court may entirely reject uncontradicted testimony of a witness if it concludes the testimony is not believable. (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659–660 .) The trial court did so here, finding “no credible evidence” to support appellant's claim of modification. That finding is unassailable. Patently, appellant's testimony is not “of such a character and weight” that it compels a judicial finding in her favor. (*Roesch v. De Mota, supra,* 24 Cal.2d at p. 571.)

Lacking proof of oral modification, the written terms of the fee agreement govern. Under those terms, appellant's fee claim could have been asserted against Marjorie while she was alive. “Since such a cause of action existed, section 366.2 applied to this case.” (*Battuello v. Battuello, supra,* 64 Cal.App.4th at p. 847.)

II. Equitable Estoppel

A. Legal Principles

***4** “The doctrine of equitable estoppel affirms that a defendant may not by his statements or conduct lull the plaintiff into a false sense of security resulting in inaction.” (*Cuadros v. Superior Court* (1992) 6 Cal.App.4th 671, 675; see Evid.Code, § 623.) The doctrine thus prevents parties from asserting the statute

of limitations as a defense in cases where their conduct has induced a delay in filing suit. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.) As this court put it: "If, by misrepresenting or concealing the facts, a defendant induces a plaintiff to delay filing an action, the defendant will be estopped from taking advantage of his wrongful conduct." (*Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 931.) For the equitable estoppel doctrine to apply, the plaintiff must have "reasonably relied" on the claimed concealment or misrepresentation "in not bringing a lawsuit within the statutory period." (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1154; accord, *Lantzy v. Centex Homes,* at p. 384.) Equitable estoppel principles may forestall the operation of section 366.2, where the decedent's representative has induced a creditor not to timely file a claim. (*Bradley v. Breen* (1999) 73 Cal.App.4th 798, 803; *Battuello v. Battuello, supra,* 64 Cal.App.4th at p. 848.)

"The determination of whether a defendant's conduct is sufficient to invoke the doctrine is a factual question entrusted to the trial court's discretion." (*Cuadros v. Superior Court, supra,* 6 Cal.App.4th at p. 675.) "Therefore, we review the trial court's ruling in the light most favorable to the judgment and determine whether it is supported by substantial evidence." (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1360.)

B. Analysis

Appellant asserts several factual bases for her equitable estoppel claim. According to appellant: "The failure of Mrs. Grief and/or her estate to notify Appellant about the Settlement Agreement and Mrs. Grief's death constitutes constructive fraud, and thus equitable estoppel applies to avoid inequities." Appellant also mentions a request by attorney Gorini that she lift her request for special notice, characterizing it as another ploy to keep her "in the dark" about developments in the case. According to appellant: "By hiding the information from Appellant, Mrs. Grief or estate was hoping that the statute of limitations would run to bar Appellant from asserting her interest in Mrs. Grief's estate."

The trial court rejected these assertions, finding neither concealment nor inducement. The record amply supports the court's findings.

1. Concealment

Addressing appellant's ignorance about developments in the case, the trial court placed responsibility squarely on appellant herself. The court found that appellant "made no real effort to keep informed about what was going on in the case. She did not look at the court file and did not pursue collection of the fees she claimed she was due." In the court's words, "it is very clear that Petitioner did not review the court files in the various cases involving the Griefs after her withdrawal. Had she done so, she would have seen the Trust file, which brought the trust created in the settlement before the Court. She would also have seen the settlement agreement, which had been approved by the Court in February, 2007. Her failure to review the court files was not induced by any of the parties involved in the case." As for appellant's decision to lift her request for special notice, the court said: "This was apparently done as part of a refinancing process on some property. There is no credible evidence

that the lifting of the Special Notice Request induced or in any way caused Petitioner to fail to pursue her fee claim until after the one year statute had run."

***5** The trial court's findings enjoy ample evidentiary and legal support. "It is settled that when the party to be estopped does not say or do anything, its silence and inaction may support estoppel only if it had a duty to speak or act under the particular circumstances." (*Feduniak v. California Coastal Com., supra,* 148 Cal.App.4th at p. 1362.) Here, appellant acknowledges that Marjorie and her representatives were "not required under the law to serve Appellant" with the pertinent documents after her "Request for Special Notice was withdrawn." But appellant nevertheless argues that "Mrs. Grief and her estate could not hide behind the curtain of 'no duty' to keep Appellant in the dark." That argument lacks merit.

Appellant relies on *Cuadros v. Superior Court, supra,* 6 Cal.App.4th 671. That case does not assist her. As the court said there: "While we do not impose upon defendants an affirmative duty to disclose to petitioner her error, defense counsel is prohibited from taking willful action to mask that error from petitioner." (*Id.* at 677.) The element of willful action is missing here. There is no evidence that any counsel prevented appellant from learning about the Grief cases. To the contrary, by the summer of 2007—well before the statute of limitations had run—appellant had been advised by attorney Diane Brown that Marjorie had died, that the parties "had reached a settlement agreement" and that the attorneys involved would be seeking their fees. As the trial court determined, appellant simply failed to act on this information. This is not a case of concealment or misrepresentation.

2. Inducement

The court likewise rejected appellant's "claims that she was induced to delay filing her claim for fees by the actions of other attorneys in the case." In the court's words: "There is simply insufficient evidence to support that any of the attorneys induced or promised Petitioner anything which related to her fees."

The record supports that determination. Attorney Diane Brown testified that she never told appellant "that she did not need to pursue" her own bill for legal services rendered to Marjorie. The same is true of attorney Richard Gorini, who testified that he never advised appellant "that she did not need to present her fee request" to the court. Appellant herself testified only that her "understanding ... after talking to Ms. Brown was that counsel involved in the case would be paid from the settlement agreement." Appellant did not realize until later that the settlement agreement did not include her. But there is no evidence that Brown, or Gorini, or anyone else said or did anything to indicate either that appellant would be paid under the settlement agreement or that she should delay seeking her fees.

This evidentiary record "is devoid of any indication that [counsel's] conduct *actually and reasonably induced [appellant] to forbear suing within* " the statutory period. (*Lantzy v. Centex Homes, supra,* 31 Cal.4th at p. 385.) Nothing in counsel's conduct or statements "would have obviated the need for suit." (*Ibid.;* see also, e.g., *Stalberg v. Western Title Ins. Co., supra,* 27 Cal.App.4th at p.

932 [defendant's misrepresentations "could not have induced plaintiffs to delay filing" their action].) Contrary to appellant's contentions, this case is not like *Battuello v. Battuello, supra,* 64 Cal.App.4th 842. In that case, the defendant "convinced" the plaintiff "not to file a timely suit." (*Id.* at p. 848.) Here, by contrast, evidence of inducement is lacking.

CONCLUSION

***6** As the trial court properly determined, (1) appellant's claim for attorney fees is time-barred under section 366.2, and (2) there is no basis for applying the doctrine of equitable estoppel.

DISPOSITION

We affirm the order filed August 14, 2008, which denied appellant's petition for fees. Respondents shall have their costs on appeal.

WE CONCUR: BAMATTRE–MANOUKIAN, Acting P.J., and DUFFY, J.

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United States District Court,
E.D. California.

General Charles "Chuck" YEAGER, (Ret.), and General Chuck Yeager Foundation, Plaintiffs,
v.
Connie BOWLIN, Ed Bowlin, David McFarland, Aviation Autographs, a non-incorporated Georgia business entity, Bowlin & Associates, Inc., a Georgia corporation, International Association of Eagles, Inc., an Alabama corporation, Spalding Services, Inc., and Does 1 through 100, inclusive, Defendants.

No. CIV. 2:08–102 WBS JFM.
|
Jan. 6, 2010.

West KeySummary

1 Limitation of Actions Contracts; Warranties

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(9) Contracts; Warranties

Under California law, plaintiffs' breach of oral contract claims were time-barred, as the two-year limitations began to run in 2004, and plaintiffs failed to file until 2008. The alleged breaches should have been apparent to plaintiffs, at the latest, four year prior to when plaintiffs filed, putting plaintiffs' claims outside the statute period. West's Ann.Cal.C.C.P. § 339.

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MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

WILLIAM B. SHUBB, District Judge.

***1** Plaintiffs General Charles "Chuck" Yeager, (Ret.) ("Yeager") and the General Chuck Yeager Foundation ("Foundation") filed this lawsuit alleging various claims against defendants Connie Bowlin, Ed Bowlin, David McFarland, Aviation Autographs, Bowlin and Associates, Inc. ("B & A"), Spalding Services, Inc., and International Association of Eagles, Inc. Currently before the court is defendants Connie Bowlin, Ed Bowlin, Aviation Autographs, and B & A's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. [1]

[1] Defendants David McFarland, International Association of Eagles. Inc., and Spalding Services, Inc. have not been served in this action. As it has been well over 120 days since the Second Amended Complaint was filed, discovery is closed, and the law and motion deadline has passed, these defendants must be dismissed from this action. *See* Fed.R.Civ.P. 4(m).

I. *Summary Judgment Standard*

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Alternatively, the moving party can demonstrate that the non-moving party cannot produce evidence to support an essential element upon which it will bear the burden of proof at trial. *Id.*

Once the moving party meets its initial burden, the non-moving party "may not rely merely on allegations or denials in its own pleading," but must go beyond the pleadings and, "by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e); *Celotex Corp.,* 477 U.S. at 324; *Valandingham v. Bojorquez,* 866 F.2d 1135, 1137 (9th Cir.1989). In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party, but may not engage in credibility determinations or weigh the evidence. *Anderson,* 477 U.S. at 255; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

II. *Evidentiary Objections*

Despite the frustrations repeatedly expressed by this and other courts,[2] the practice of cluttering the record with unnecessary evidentiary objections in connection with summary judgment motions appears to have become institutionalized. In this case for example, plaintiffs filed 86 separate evidentiary objections to defendants' proffered evidence and declarations in support of the motion, contending that many of the submitted facts are "irrelevant," lack personal knowledge, or are supported by evidence which is hearsay. Not to be outdone, in reply, defendants filed 57 evidentiary objections to the declarations submitted by plaintiffs in their opposition.

[2] *See Burch v. Regents of Univ. of Cal.,* 433 F.Supp.2d 1110, 1118–22 (E.D.Cal.2006); *Marceau v. International Broth. Of Elec. Workers,* 618 F.Supp.2d 1127, 1141 (D.Ariz.2009).

***2** At trial, most lawyers do not object to questions when the answers are not likely to be damaging to their client's position in the case or where it is clear that the information sought by the question can eventually be elicited by proper questioning. Not so in the context of a summary judgment motion. In that context, lawyers routinely make every conceivable objection to the statements contained in a declaration submitted by the other party. Just as an example, in this case defendants object to the statements in Yeager's declaration to the effect that Dave McFarland made the F–15 print and First Day Covers, that Yeager sent McFarland the prints so that McFarland could sell them for Yeager, and that the Bowlins found the warehouse where McFarland stored the Hey Pard and F–15 prints and First Day Covers. All of these statements are perfectly consistent with, and indeed would tend to support, defendants' interpretation of the facts.

The court perceives at least two reasons for this difference in practice. First, in the setting of a jury trial, counsel run the risk of antagonizing the jury by repeatedly making unnecessary objections. An irritated jury might retaliate by deciding the case against their client. In the context of a summary judgment motion, however, lawyers are entitled to assume that even an irritated judge will decide the motion on its merits and will not retaliate against them.

Second, particularly in the larger law firms, the lawyer or lawyers who prepare the materials in support of, or in opposition to, motions for summary judgment are typically not the same lawyers who will try the case. The task of combing through the opponent's declarations and looking for evidentiary objections may seem to be one that is easily turned over to an associate who does not need to have any trial experience or particular knowledge of the case. Even when the trial attorney does have a hand in preparing the motion or opposition, that attorney typically has not fully developed his or her trial strategy by the time the motion for summary judgment is briefed. Accordingly, not wishing to waive *any* conceivable objection the trial attorney may want to eventually make at trial, the attorneys heed the admonition of the Rutter Group:

> Failure to object as waiver: Evidentiary objections must be raised, either orally or in writing, at or before the hearing. Otherwise such objections are deemed waived. [3]

3 That advice, as this court reads it, refers to whether the objection will be waived on appeal, not to whether it will be waived at trial. *See FDIC v. New Hampshire Ins. Co.,* 953 F.2d 478, 484–85 (9th Cir.1991). To this court's knowledge, failure to object to evidence presented in connection with a summary judgment motion does not waive any objection to that evidence at trial. *See Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 118 (2d Cir.2004) (noting in connection with an appeal from an order granting summary judgment that on remand "at trial, plaintiffs are free to reiterate

> their objections to [the district court's evidentiary] rulings").

William W. Schwarzer, et al., *California Practice Guide: Federal Civil Procedure Before Trial* § 14:111 (2009).

The problem with this practice is not just that it frustrates judges. It frustrates the very purpose of Rule 56 of the Federal Rules of Civil procedure by turning summary judgment practice from an inquiry into whether there are truly disputed issues of material fact into a contest to determine which side can come up with the most sustainable evidentiary objections. If the rulings on the evidentiary objections result in the motion being denied, the case will of course proceed to trial. If those rulings result in the motion being granted, the matter will proceed to appeal, where the trial court's rulings on each of the objections can be scrutinized, presumably under *de novo* review, by the Court of Appeals.

***3** While this focus on the technical compliance of the declarations with the Federal Rules of Evidence does not appear to be in the spirit of Rule 56, or what the Supreme Court contemplated when it clarified the summary judgment procedure in *Celetex, Anderson,* and *Matsushita,* it is what has evolved in practice and what the parties have invited in this case. Accordingly, the court will proceed to rule upon the parties' evidentiary objections.

In the interest of brevity, as the parties are aware of the substance of their objections and the grounds asserted in support of each objection, the court will not review the substance or grounds of all the objections here. Plaintiffs' objections 1–5, 7, 9–12, 14–18, 20–23, 26–28, 30–33, 35, 38, 40, 42, 44, 46–47, and 49–86 are overruled. Plaintiffs' objections 4, 8, 13, 19, 24–25, 29, 34, 36–37, 41, 43, 45, and 48 are sustained. Defendants' objections to the Declaration of General Yeager 1, 2, 10, and 22–23 are overruled. Defendants' objections to the Declaration of Charles Yeager 3–9, and 11–21 are sustained. Defendants' objections to the Declaration of Victoria Yeager 1–4, 6, 14, 31, and 35 are overruled. Defendants' objections to the declaration of Victoria Yeager 5, 7–13, 15–30, and 32–34 are sustained.

III. *The Sham Affidavit Rule*

In addition to their evidentiary objections, defendants contend that certain portions of plaintiffs' declarations should be excluded from consideration by the "sham affidavit rule." "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.,* 952 F.2d 262, 266 (9th Cir.1991). This is because "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* at 266 (quoting *Foster v. Arcata Assocs., Inc.,* 772 F.2d 1453, 1462 (9th Cir.1985)).

The sham affidavit rule may be invoked only if a district court makes "a factual determination that the contradiction was actually a sham" and "the inconsistency between a party's deposition testimony and subsequent affidavit ... [is] clear and unambiguous." *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 998–99 (9th Cir.2009)

(internal quotations marks, citations omitted). Accordingly, "the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir.1995). Yeager and Victoria Yeager each submitted a declaration in opposition to defendants' motion for summary judgment portions of which defendants contend ought to be striken as sham.

A. *Yeager Declaration*

***4** At his deposition, Yeager stated that he did not recall answers to approximately 185 different questions, including questions that go to the heart of this action. (*See* Noonan Decl. Ex. B.) For instance, Yeager indicated he did not recall what concerns he had about the Bowlins selling the Gathering of the Eagles prints, whether any agreement existed between himself and the Bowlins, whether the Bowlins made any misrepresentations to him concerning their sale of his memorabilia, whether he entered an agreement with the Bowlins concerning the development of the Leiston Legends print or attended the Tribute to the Aces, whether the Bowlins are selling the Hey Pard print, what is illegal about the Bowlins' use of his name, and other critical issues in the case. [4] (Gen. Yeager Depo. 13:17–19, 20:10–21, 21:1–5, 29:21–30:11, 31:13–22, 42:11–17, 66:7–17, 94:19–22.)

[4] Especially troubling is that Yeager seemed to be unable to recall significant, and what would be unforgettable events for many, such as testifying in the earlier state court action against his children, his initial complaint in this action, or even his involvement in a plane crash in the Bowlins' aircraft. (Gen. Yeager Depo. 14:7–15:13, 22:17–23:10, 46:19–22.)

However, in Yeager's Corrected Declaration, he now states that he is able to recall these same matters in detail after "having his recollection refreshed," including the amount he typically charged for signing items, the oral agreements he made with the Bowlins, and his participation in the Tribute to Aces. (*See* Gen. Yeager Corrected Decl. ¶¶ 16, 21, 22–26, 27.) It is clear that Yeager's declaration is a sham. In his declaration, Yeager gives no explanation as to why he suffered from such extensive memory loss at his deposition, other than to say his recollection was refreshed by a series of documents which are not attached to his declaration. (*Id.* ¶ 14.) This claim is unbelievable given that Yeager was shown over twenty exhibits during his deposition in an attempt to refresh his recollection, but was consistently unable to recall any of the matters now elaborated on in his declaration. (*See, e.g.,* Yeager Depo. 14:7–25; 19:7–20:6; 21: 10–22:2; 23:17–26:20; 38:24–40:3; 41:1–42:17; 44:9–25; 45:10–46:22; 55:7–21; 57:9–58:2; 62:14–63:7; 65:7–17; 66:7–17; 67:10–68:3; 69:9–70:17; 70:21–71:11; 71:15–72:17; 72:20–73:10; 73:13–74:4; 78:4–24; 83:22–84:12; 94:2–95:10.) This is not a case of a simple misunderstanding of a few questions that requires additional explanation, but instead one where Yeager repeatedly refused to answer *hundreds* of material questions.

Just because Yeager's responses at his deposition were to the effect that he did "not recall" certain events does not mean those responses do not contradict his later recollection of those same events. Courts have found that the sham affidavit rule may be applied when a matter that a witness fails to remember during a deposition is then remembered with clarity in an affidavit used to defeat summary judgment. *Mitchael v. Intracorp, Inc.,* 179 F.3d 847, 854–55 (10th Cir.1999); (finding an affidavit from a witness that "more clearly recalled discussions and meetings" that the witness could not remember during his deposition "arguably contradicted his deposition" and therefore "represent [ed] an attempt to create a sham issue of fact"); *accord Juarez v. Utah,* 263 Fed. Appx. 726, 735–36 (10th Cir.2008) (excluding plaintiff's affidavit referencing racial slurs used against her as a sham affidavit because she stated she could not recall any such slurs at her deposition); *see also Gilani v. GNOC Corp.,* No. 04–CV–2935 (ILG), 2006 WL 1120602, at *3 (E.D.N.Y. April 26, 2006) (applying the sham affidavit rule when plaintiff "admitted in her deposition she did not recall seeing the cleaning staff before she entered the restroom" but then recalled that she did see a staff member in an affidavit with "no other evidence corroborating the recollection.")

***5** Yeager's declaration is far more questionable than any of the aforementioned affidavits excluded by courts under the sham affidavit rule. In a case such as this, where the deponent remembers almost nothing about the events central to the case during his deposition, but suddenly recalls those same events with perfect clarity in his declaration in opposition to summary judgment without any credible explanation as to how his recollection was refreshed, the disparity between the affidavit and deposition is so extreme that the court must regard the differences between the two as contradictions. *See Mitchael,* 179 F.3d at 854–55.

Yeager has failed to "provide[ ] a sufficient explanation for the contradiction" between his deposition testimony, where he was unable to remember almost anything about the details of this action, and his declaration where those details are suddenly perfectly clear. *Martinez v. Marin Sanitary Serv.,* 349 F.Supp.2d 1234, 1242 (N.D.Cal.2004). There was nothing confusing about the questions posed to Yeager. The clear disparity between the sweeping lack of knowledge of Yeager at his deposition and the information presented in his declaration leaves no conclusion other than that his declaration is a self-serving attempt to manufacture issues of fact to defeat summary judgement. Accordingly, the court will disregard the contradictions between Yeager's deposition testimony and his Declaration when evaluating defendants' motion for summary judgment.

B. *Victoria Yeager Declaration*

Defendants additionally contend that various statements made by Victoria Yeager in her Declaration in opposition to the motion for summary judgment contradict both her earlier statements and plaintiffs' responses to interrogatories during discovery. Throughout the various iterations of their complaint, plaintiffs have consistently alleged that defendants agreed to provide plaintiffs with one-third of the Leiston Legends prints signed

at the Gathering of Aces event. (*See* Original Compl. ¶¶ 24, 27; First Am. Compl. ¶¶ 24, 27; SAC ¶¶ 25, 28.) In addition, in their interrogatory responses plaintiffs continued to advocate that the agreement between the Bowlins and Yeager "provided that GENERAL YEAGER would appear and speak at the [Tribute to Aces] ... and would be entitled to retain one-third (1/3) of [the] signed lithographs for his own use." (Noonan Decl. Ex. E.) Plaintiffs did not supplement or correct these discovery responses pursuant to Rule 26(e).

In her Declaration, Victoria Yeager now contends that she knew at the time of the signing of the Leiston Legends prints that the Bowlins wanted to give the Yeagers 100 prints and that in response the Yeagers "said to hold onto the other 200 and maybe [the Bowlins] could sell them for" the Yeagers. (V. Yeager Decl. ¶ 15 .) While there is tension between this statement and the previous allegations by plaintiffs, Victoria Yeager is not a named plaintiff in this action. As such, unlike in *Wasco Products, Inc. v. Southwall Technologies, Inc.,* 25 F.3d 989 (9th Cir.2006), plaintiffs have not presented a new theory of liability based upon Victoria Yeager's declaration. In fact, at no point in plaintiffs' Opposition to this motion do they advance Victoria Yeager's theory of the Leiston Legends agreement. Accordingly, the court finds it unnecessary to strike this portion of Victoria Yeager's declaration. Plaintiffs remain bound by their responses to defendants' interrogatories and admissions, irrespective of Victoria Yeager's declaration. *See Wasco Products,* 25 F.3d at 992; *Conlon v. U.S.,* 474 F.3d 616, 621–22 (9th Cir.2007); *School Dist. No. 1J, Multnomah County, Or. v. AC & S, Inc.,* 5 F.3d 1255, 1264 (9th Cir.1993).

IV. *Relevant Facts*

***6** Excluding the evidence to which the court has sustained the parties' objections above, and disregarding those portions of the Yeager declaration which are contradicted by his deposition testimony as discussed above, the following facts are undisputed.

Yeager is a well-known figure in American aviation history. (Second Am. Compl. ("SAC") ¶¶ 15–17.) Connie and Ed Bowlin ("the Bowlins") are retired Delta Airlines captains who are active in the aviation community. (Bowlin Decl. ¶¶ 5–13.) The Bowlins are owners of Aviation Autographs, a non-incorporated Georgia business entity that sells and markets aviation memorabilia, and B & A, a Georgia corporation in the business of aviation sales and consulting. (SAC ¶¶ 7, 11–12.) The Bowlins met Yeager in the mid 1980s and became friends with him. (Bowlin Decl. ¶¶ 18–20; Gen. Yeager Dep. 56:23–57:3, 60:20–61:14, 61:20–62:9.)

Defendant David McFarland met Yeager through the "Gathering of the Eagles" program, which was initiated and organized by McFarland beginning in 1982. (McFarland Decl. ¶¶ 12–20.) The Gathering of the Eagles brought distinguished aviators to the Air Command and Staff College ("ACSC") at Maxwell Air Force Base to give talks to the ACSC class. (*Id.*) Yeager attended all of the Gathering of the Eagles events coordinated by McFarland as an "Eagle." (*Id.* ¶ 20; Gen. Yeager Depo. 25:11–28:24.) The program was funded through the painting, production, and

sale of a limited number of lithographic prints signed by Eagles. (SAC ¶ 20; McFarland Decl. ¶ 14.) Additional financial support for the program was provided not by the ACSC itself, but by the ACSC Foundation and the International Association of Eagles, Inc. ("IAE"). (Statement of Undisputed Facts ("UF") 14–19.)

McFarland accumulated a substantial collection of aviation memorabilia through the Gathering of Eagles and did not have the means to market the merchandise. (McFarland Decl. ¶ 32; Bowlin Decl. ¶ 23.) As a result, the Bowlins and McFarland began discussing selling the memorabilia through a website in 2000. (*Id* .) The Bowlins created Aviation Autographs and its website, www.aviationautographs.com, in the summer of 2000. (Bowlin Decl. ¶ 23.) In June 2000, IAE and McFarland entered into a marketing agreement with Aviation Autographs with respect to the Gathering of the Eagles lithographs. (McFarland Decl. ¶ 33, Ex. D; Bowlin Decl. ¶ 24.)

During this time period, Yeager wanted to market three items that he developed and signed in conjunction with McFarland and Yeager, Inc. [5] : a lithograph known as the "Hey Pard" print, which depicts Yeager breaking the sound barrier; a lithograph known as the "F–15" print, which depicts this same event; and a series of commemorative stamped envelopes known as the "First Day Covers," which were letters with a canceled stamp from Edwards Air Force Base, where an event celebrating the 50th anniversary of the breaking of the sound barrier was held. (McFarland Decl. ¶¶ 28–31; Bowlin Decl. ¶ 27, Donald Yeager Decl. ¶ 6, Exs. A, B; Noonan Decl. ¶¶ 17, 19 Exs. O, Q.) Yeager originally authorized McFarland to market these items until Yeager reached an oral agreement with Aviation Autographs to sell them for a fifty-fifty split of the proceeds. [6] (Bowlin Decl. ¶ 26.) Aviation Autographs then began marketing and selling these prints on their website and provided Yeager with regular summaries concerning sales of these prints from 2000 through 2004. (Bowlin Decl. ¶¶ 52–54, 75–81; Noonan Decl. ¶ 18, Ex. P.)

5 Yeager, Inc. was a corporation set up by Yeager and his first wife, Glennis Yeager, for the benefit of their children. The corporation is presently run by the children of Yeager.

6 A discrete number of prints were sold to a collector in bulk and were subject to slightly different terms, with 40% of proceeds going to Yeager, 40% to Aviation Autographs, and 20% to McFarland. (Bowlin Decl. ¶ 26.)

***7** In 2003, Yeager was invited to an event coordinated by the Bowlins called the "Tribute to Aces." The idea for the Tribute to Aces developed from discussions between the Bowlins, a Georgia developer Mike Ciochetti, and famed aviator General Tex Hill. (V. Yeager Depo. 44:10–45:25.) Ciochetti and Hill arranged for famous aviators, including Yeager, to come to Georgia to dedicate roads named after each of them in a housing development planned by Ciochetti. (Anderson Decl. ¶ 9; V. Yeager Depo. 44:10–47:6.)

The Bowlins formally coordinated the Tribute to Aces, which included the dedication of the roads, a symposium at which the "Aces"—the aviation legends in attendance—would speak,

and the signing of a number of lithographic prints by the attending Aces. (Bowlin Decl. ¶ 41; Anderson Decl. ¶ 9.) Connie Bowlin sent each attending Ace a two-page letter explaining the background of the event, that an artist would be creating prints for each Ace to sign, and that Aviation Autographs would sell these prints. (Bowlin Decl. ¶¶ 31–32, Ex. 9.) Each Ace negotiated his own deal with respect to the prints. Victoria Yeager, Yeager's current wife, claims that Yeager made a deal to receive one-third of the lithographs Connie Bowlin said were being produced. (V. Yeager Depo. 106:16–18.) The Bowlins contend the agreement was actually for Yeager to receive 100 prints, which Connie Bowlin confirmed with Yeager at an air show in Detroit in August 2003. (Bowlin Decl. ¶¶ 38–39.) Plaintiffs also contend that the Bowlins indicated the money from these lithographs would be used to pay the Aces travel expenses and the rest would go to charity, while defendants argue that plaintiffs have not shown any indication of the existence of such an agreement. (V. Yeager Depo. 107:13–18; Bowlin Decl. ¶¶ 38–39.)

Yeager attended the Gathering of Aces event in October 2003, including the symposium and dedication of a street sign bearing his name. (Bowlin Decl. ¶¶ 40–42, Ex. 25; Anderson Decl. ¶ 9; V. Yeager Depo. 46:7–47:6.) Yeager signed approximately 900 prints of the lithograph made for him at the event, known as the Leiston Legends print, at the Bowlins' home. (SAC ¶ 26; Bowlin Decl. ¶ 43; V. Yeager Depo. 39:24–41:4.) Yeager was provided with 100 prints from the event, which were shipped to him directly from the artist. (Bowlin Decl. ¶ 43, Ex. 26.)

The Yeagers were reimbursed for a number of travel expenses associated with the Gathering of Aces event by October of 2003. (V. Yeager Depo. 35:9–36:14.) On October 14, 2003, Victoria Yeager sent an email to the Bowlins concerning the disposition of the extra prints signed by Yeager. (Bowlin Decl. ¶ 44; Exs. 27, 28; V. Yeager Depo. 141:11–143:6.) Connie Bowlin responded that 100 of the prints went to Yeager, 100 went to Jack Roush, who made two air craft available for the Tribute to Aces, 200 went to the Bowlins, and the rest were distributed among volunteers or kept by the artist. (*Id.*) In December 2003, Yeager acknowledged that he received 100 Leiston Legends prints in a letter to Connie Bowlin. (Bowlin Decl. ¶ 45, Ex. 29.)

***8** In 2004, the Yeagers became involved in litigation between themselves and Yeager's children and Yeager, Inc. in California state court over the use of funds by Yeager, Inc. In this ligation, *Yeager v. D'Angelo, et al.,* No. 68834, whether Yeager or Yeager, Inc. owned the Hey Pard and F–15 prints and First Day Covers was directly in dispute. [7] (Noonan Decl. ¶¶ 17, 19, Exs. O, Q; D. Yeager Decl. ¶ 6, Exs. A, B.) Between 2004 and 2005, Victoria Yeager sent several emails to Connie Bowlin requesting delivery of the Hey Pard, F–15, and First Day Covers, which were in the possession of Aviation Autographs, to Yeager. (Bowlin Decl. ¶¶ 55–81.) In January 2005, the Bowlins refused to provide these items to the Yeagers, stating that given the ongoing litigation over ownership of the items they would prefer to maintain possession of the items until the final resolution of the state court action and would remove them for sale from the Aviation Autographs website. (Bowlin Decl. ¶¶ 63–69.)

7 The court will grant defendants' Request for Judicial Notice and Supplemental Request for Judicial Notice, as the documents are all public documents of related court proceedings whose accuracy cannot be questioned. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992).

On February 7, 2005, the Bowlins received a letter from Steven Thomas, an attorney retained by the Yeagers from Sullivan & Cromwell LLP, who requested that the Bowlins deliver the prints in dispute as well as "all other merchandise with General Yeager's likeness to him" in exchange for indemnity. (Bowlin Decl. ¶ 68, Ex. 47.) In June 2005, Victoria Yeager sent the Bowlins a series of emails demanding to remove the First Day Covers as for sale from the Aviation Autographs website, as well as all pictures of Yeager and references to Yeager's name from the site. (Bowlin Decl. ¶¶ 71–74. Exs. 51–57.) On August 16, 2005, Sullivan & Cromwell sent a cease and desist letter to the Bowlins, accusing them of "continued unauthorized and unlawful use of General Chuck Yeager's name, image and likeness ...." (Bowlin Decl. Ex. 58.)

On October 11, 2005, the referee in the state court action involving the Yeagers preliminarily ruled that Yeager, Inc., not Yeager, owned the Hey Pard and F–15 prints and the First Day Covers. (D. Yeager Decl. ¶ 6, Exs. A, B.) The state court entered a final judgment adopting the referee's Statement of Decision in *Yeager v. D'Angelo* on March 29, 2006. (D. Yeager Decl. ¶ 6, Exs. A, B; Noonan Decl. ¶¶ 17, 19, Exs. O, Q.) Yeager, Inc.'s ownership of the Hey Pard and F–15 prints and First Day Covers was affirmed by the California Court of Appeal on August 22, 2008. (Noonan Decl ¶ 20, Ex. R.) The Bowlins subsequently ceased selling these products and returned them to Yeager, Inc. (Bowlin Decl. ¶ 54; D. Yeager Decl. ¶ 7.)

Victoria Yeager continued to send emails requesting that the Bowlins remove all references to Yeager from the Aviation Autographs website through October 2005. (Bowlin Decl. ¶¶ 80–81.) The Aviation Autographs website contains several references to Yeager. The Aviation Autographs home page contains one such reference to Yeager:

> www.AviationAutographs.com proudly offers rare lithographs, books, prints, photos and "one of a kind" collectables to aviation enthusiasts, all of which contain the original signatures of the history's most famous people! Commissioned and/or collected over the past 20 years by a single collector. There are several hundred historic items, offered for the first time to the public. Don't miss the opportunity to own a piece of history! Famous aviators autographs add priceless value to these unique items. You will find aviation heroes, such as General Charles E Chuck

> Yeager, Col. C.E. Bud Anderson, General Tex Hill, Gunther Rall, Bob Hoover and more. Our personal friendship with many of these living legends gives us a unique opportunity to bring them closer to you.

***9** (Bowlin Decl. ¶ 85; Noonan Decl. ¶ 8, Ex. G.) The home page also makes reference to the Tribute to Aces event, and contains a picture of "[f]our of the five Aces who attended," but does not mention Yeager or contain his picture. (Bowlin Decl. ¶ 86.) The home page previously had displayed a statement, added in October 2003, which mentioned Yeager's attendance at the Tribute to Aces event. (*Id.*) The home page was last edited with respect to Yeager in August 2005, when Connie Bowlin cropped a picture to remove Yeager from the photograph and deleted the reference to him as an attending Ace. (*Id.*)

The "About Aviation Autographs" page contains a picture of Yeager and Gunther Rall with the caption "Left, Chuck Yeager and Gunther Rall sort through our selection of signature edition collectibles on other combat aces." (Bowlin Decl. ¶ 87; Noonan Decl. ¶ 8, Ex. G.) The page also mentions that the Bowlins "are best of friends with aviation legend Gen. Chuck Yeager and are selling items from his personal collection." (*Id.*) The text on the page was authored by Ray Fowler, an F–16 fighter pilot, and has not been changed since June 2000, when the website first went online. (Bowlin Decl. ¶ 87.)

The "Tribute to Aces" page contains one reference to Yeager, thanking him and the other aviation legends who attended the Tribute to Aces. (Bowlin Decl. ¶ 88; Noonan Decl. ¶ 8, Ex. G.) The page also describes the Tribute to Aces event and identifies the four prints for sale from the event, including the Leiston Legends print. (*Id.*) The last revision of the page that made reference to Yeager was made in October 2003, when the Bowlins added the aforementioned sentence thanking Yeager for his attendance at the Tribute to Aces. (*Id.*)

Yeager is additionally referenced on the "News and Current Events" page on defendants' website. The page refers to Yeager directly once in an entry describing the Tribute to Aces, listing him as an attendee of the event. (Bowlin Decl. ¶ 90.) This entry was added in 2003 and has not been changed since that time. (*Id.*) The page also references the crash of the Bowlins' T–6 airplane. (*Id.*) Although Yeager was flying the Bowlins' plane when it crashed, he is not mentioned by name in the entry. (*Id.*)

Yeager is lastly referenced on pages selling various memorabilia relating to Yeager that are not owned by Yeager. (SAC ¶¶ 54, 59 .) Plaintiffs have admitted they have no right to restrict the sale of these items and are not entitled to damages in connection with the sale of these products. (Noonan Decl. ¶¶ 6–7, Exs. E, F.)

Yeager's name also appears in the metadata of the Aviation Autographs website. (Bowlin Decl. ¶ 89.) Metadata entries are not displayed to the viewers of the website, but are contained in the source script of a web page and utilized by internet search engines to locate

and organize internet websites in response to inquiries by search engine users. Defendants have made no changes to the references to Yeager in the metadata of their site since October 2001. (*Id.*)

***10** On January 14, 2008, plaintiffs filed their initial complaint in this action. (Docket No. 1.) After this court granted in part defendants' motion to dismiss the Complaint, plaintiffs filed their SAC on March 3, 2009. (Docket Nos. 17, 77.) The SAC alleges eleven causes of action against defendants relating to their sale of lithographs for plaintiffs and usage of the likeness and image of Yeager: 1) breach of the California common law right to privacy/ right to control publicity and likeness; 2) violation of California Civil Code section 3344 (statutory right of publicity); 3) violation of the Lanham Act, 15 U.S.C. § 1125(a), for false endorsement; 4) violation of the California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code §§ 17200–17210; 5) violation of the California False Advertising Act, Cal. Bus. & Prof.Code § 17500; 6) fraud; 7) breach of oral contract; 8) breach of written contract; 9) unjust enrichment; 10) accounting; and 11) equitable rescission. The Bowlins, Aviation Autographs, and B & A now move for summary judgment on all claims pursuant to Rule 56.

V. *DISCUSSION*

A. *Time–Barred Claims*

Plaintiffs' action was filed in January of 2008, while many of the events giving rise to the claim occurred between 2000 and 2004. Defendants have accordingly challenged many of plaintiffs' claims as time-barred. The statute of limitations generally begins to run at "the time when the cause of action is complete with all its elements. An exception is the discovery rule, which postpones accrual of a cause of action until ... [the plaintiff] suspects, or has reason to suspect, a factual basis for its elements." *Nogart v. Upjohn Co.,* 21 Cal.4th 383, 389, 87 Cal.Rptr.2d 453, 981 P.2d 79 (1999); *Apple Valley Unified School Dist. V. Vavrinek, Trine, Day & Co.,* 98 Cal.App.4th 934, 943, 120 Cal.Rptr.2d 629 (2002).

1. *Breach of Oral Contract*

The statute of limitations for breach of oral contract under California law is two years. Cal.Civ.Proc.Code § 339.

A cause of action on an oral contract accrues, and the statute of limitations begins to run, at the time the contract is breached. *Cochran v. Cochran,* 56 Cal.App.4th 1115, 1124, 66 Cal.Rptr.2d 337 (1997). Plaintiffs allege breaches of multiple oral agreements with defendants. Specifically, plaintiffs allege that they were inadequately compensated for the Leiston Legends prints and travel to the Tribute to Aces weekend, that defendants breached an oral agreement that all proceeds from the Tribute to Aces weekend would go to charity, and that plaintiffs were not adequately compensated with regards to the profits and proceeds of the Hey Pard prints and First Day Covers. (SAC ¶ 118.)

These breaches all should have been apparent to plaintiffs between 2000 and at the latest in July 2004, putting plaintiffs' claim well outside the statute of limitations. Plaintiffs allege that defendants breached an oral contract with Yeager with respect to the Legion Legends prints and the Gathering of Aces when they

(1) failed to provide one-third of the Legion Legends prints to plaintiffs (2) did not pay plaintiffs the royalties owed from the prints, (3) did not reimburse Yeager for travel and lodging, and (4) did not give funds from the lithograph to a charity as promised. (*Id.* ¶ 118, 66 Cal.Rptr.2d 337(a).) Plaintiffs would have been aware of any breaches relating to the these events as early as October 2003, when Yeager only received 100 prints from defendants, was not paid any royalties, and did not allegedly receive adequate reimbursement for travel expenses. Victoria Yeager specifically asked about what the Bowlins planned to do with the extra prints signed by Yeager on October 14, 2003, putting her on notice of the Bowlins' alleged breaches of the oral contract surrounding the Tribute to Aces event such that she should have pursued litigation. *See Nogart,* 21 Cal.4th at 398 n. 2, 87 Cal.Rptr.2d 453, 981 P.2d 79. As such, plaintiffs' breach of oral contract claims related to the Leiston Legends prints and Gathering of Aces events are time-barred.

***11** Plaintiffs' breach of oral contract claims related to the Hey Pard and F–15 prints and First Day Covers are similarly time-barred. Plaintiffs allege that they were not provided with adequate accounting of the profits from these prints and were not adequately compensated for them by defendants. (SAC ¶¶ 118(c), (d).) However, defendants have provided evidence that plaintiffs received regular accounting from the Bowlins through January of 2004, and that Victoria Yeager corresponded with the Bowlins about Aviation Autographs's inventory at that time. (Bowlin Decl. ¶¶ 52–54, 75–81; Noonan Decl. ¶ 18, Ex. P.) Additionally, as previously noted by the court in its August 6, 2008 Order re: defendants' motion to dismiss, plaintiffs themselves contended that they were on notice of the breach of contract claim no later than July 2004, well outside of the two year statute of limitations period. (*See* Docket No. 17; Docket No. 11, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss 7:4–6 ("The documents attached and incorporated by [ ][d]efendants show that [ ][p]laintiffs were not provided with a detailed inventory and report on commissions paid by [d]efendants until July 6, 2004 ...."); *id.* at 2:19–20 ("[T]he [judicially noticed] documents clearly demonstrate [d]efendants did not provide the information serving to put [p]laintiffs on notice of their [breach] claim until July, 2004 ...."); *id.* at 7:7–8 (stating plaintiffs "would not have been aware of the improper accounting and financial underpayments until this point in time"). [8]

8 Plaintiffs contend that the Bowlins' ongoing retention of sales proceeds for the Leiston Legends prints is an ongoing breach and that therefore that the statute of limitations continues to run until their wrongful conduct is ceased. This is clearly incorrect, since the statute of limitations period would never run on any fraud or breach of contract case until a plaintiff's money was refunded, effectively nullifying the statute of limitations.

At the latest the statute of limitations began running for defendants' alleged breaches of oral contract in July 2004, and accordingly plaintiffs' oral contract claim is time-barred.

2. *Fraud and Unjust Enrichment*

The statute of limitations for fraud and unjust enrichment is three years. Cal. Civ.Code § 338(d); *First Nationwide Sav. v. Perry,* 11 Cal.App.4th 1657, 1670, 15 Cal.Rptr.2d 173 (1992). Plaintiffs' fraud claims are based upon the same actions by defendants as those outlined in plaintiffs' breach of oral contract claim. In fact, plaintiffs do not distinguish their arguments as to why plaintiffs satisfy the statute of limitations for the contract claim and the fraud claim in their own Opposition. (*See* Pls.' Corrected Opp'n Mot. Summary Judgment 33:1–35:6.) As previously discussed, plaintiffs were well aware that they may have a fraud claim against defendants based on the accountings they received, and communications with the Bowlins in October 2003. Plaintiffs even went so far as to hire counsel to deal with the very issues before the court in August 2005. Although plaintiffs may not have been aware of all facts underlying their fraud claim, a plaintiff need not be aware of all these specific facts and "may seek to learn such facts through ... pretrial discovery ...." *Norgart,* 21 Cal.4th at 398, 87 Cal.Rptr.2d 453, 981 P.2d 79. Accordingly, defendants were on notice of the facts underlying the fraud at issue well over three years ago, and their claims are time-barred as a result.

3. *Privacy Claims*

***12** Defendants contend that plaintiffs' first, second, and third claims—breach of the California common law right to privacy/right to control publicity and likeness; violation of California Civil Code section 3344 (statutory right of publicity); and violation of the Lanham Act, 15 U.S.C. § 1125(a), for false endorsement —are time—barred because of the single publication rule.

The single publication rule provides that "[n]o person shall have more than one cause of action for damages for ... invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture." Cal. Civ.Code § 3425.3. "Under the single-publication rule, with respect to the statute of limitations, publication generally is said to occur on the 'first general distribution of the publication to the public' .... the period of limtations commences, regardless of when the plaintiff secured a copy or became aware of the publication." *Shively v. Bozanich,* 31 Cal.4th 1230, 1245, 7 Cal.Rptr.3d 576, 80 P.3d 676 (2003) (citations omitted).

The applicable statute of limitations as to the first and second claims regarding plaintiffs' right to privacy is two years. Cal.Civ.Proc.Code § 339; *Long v. Walt Disney Co.,* 116 Cal.App.4th 868, 873, 10 Cal.Rptr.3d 836 (2004); *Cusano v. Klein,* 264 F.3d 936, 949–50 (9th Cir.2001). The statute of limitations for plaintiffs' third claim is less certain since the Lanham Act does not contain its own statute of limitations provision. The general rule in the absence of such a provision is to borrow the most analogous statute of limitations from state law. *See Polar Bear Prods., Inc. v. Timex Corp.,* 384 F.3d 700, 720 n. 17 (9th Cir.2004); *Jarrow Formulas, Inc. v. Nutrition Now, Inc.,* 304 F.3d 829, 836–37 (9th Cir.2002). Given the nature of plaintiffs' allegations, the most analogous statute of limitations from state law would be either the two-year statute applicable

to right to privacy claims, or the three-year statute applicable to fraud claims.

Plaintiffs' claims are are based on statements on defendants' website—which has been in existence since 2000. The single publication rule has been held to apply to statements published on the internet. *Traditional Cat Ass'n, Inc. v. Gilbreath,* 118 Cal.App.4th 392, 394, 13 Cal.Rptr.3d 353 (2004); *see Oja v. U.S. Army Corps of Engineers,* 440 F.3d 1122, 1131 (9th Cir.2006). Plaintiffs' website is a "single integrated publication" for marketing aviation memorabilia and providing aviation related news and information, and accordingly is protected by the single-publication rule. *See Christoff v. Nestle USA, Inc.,* 47 Cal.4th 468, 482–83, 97 Cal.Rptr.3d 798, 213 P.3d 132 (2009). Many of the references to Yeager on plaintiffs' website have been in existence since 2000, including the references to Yeager on the home page, the "About Aviation Autographs" page, and the references to Yeager in the website's metadata.

***13** Plaintiffs contend that the single publication rule does not apply in this case because the rule does not apply when a defendant engages in ongoing sales of a product for commercial gain. Plaintiffs argue that each sale of a product as to which Yeager was mentioned restarted the statue of limitations.[9] In support of this contention, plaintiffs cite *Miller v. Collectors Universe,* in which an authenticator's name was used without his consent on 14,000 separate certificates of authenticity. 159 Cal.App.4th 988, 998–99, 72 Cal.Rptr.3d 194 (2008). *Miller* held that each certificate was intended for a different consumer in connection with different products and therefore was not an "identical communication or display of identical content to multiple persons" protected by the singe publication rule. *Id.* at 999, 72 Cal.Rptr.3d 194. However, this case is distinguishable because Aviation Autographs does not display different individualized content to different consumers, but rather displays an identical set of content to all viewers of its website.

9 At oral argument and in the declaration submitted by Yeager, plaintiffs contend that the sale of the Leiston Legends print violated a trademark of Yeager. However, plaintiffs have presented no evidence of the existence of any trademarks supposedly held by Yeager.

Furthermore, California courts have explicitly found that the repeated sale of identical products is subject to the single publication rule. For example, in *Kanarek v. Bugliosi,* the court noted that the sale of copies of the same edition of a book is subject to the single publication rule. 108 Cal.App.3d at 332, 166 Cal.Rptr. 526; *see also Christoff,* 47 Cal.4th at 479, 97 Cal.Rptr.3d 798, 213 P.3d 132 (noting the reason for the single publication rule is that under a rule where the statute of limitations restarts when each copy of a book is sold would create the absurd result that "the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public." (citations omitted)); *Hebrew Acad. of San Francisco v. Goldman,* 42 Cal.4th 883, 892, 70 Cal.Rptr.3d 178, 173 P.3d 1004 (2007) ("The statute of limitations could be tolled indefinitely, perhaps forever, under this approach.").

The end result of plaintiffs' interpretation would be that the statute of limitations would never run on their claim so long as the Bowlins' website remained in existence with plaintiffs' items for sale. This is the exact result the single publication rule seeks to avoid. Plaintiffs' argument that the single publication rule is inapplicable is therefore without merit.

Nevertheless, courts have held that the single publication rule many not be available when a defendant republishes information. *Kanarek v. Bugliosi,* 108 Cal.App.3d 327, 332, 166 Cal.Rptr. 526 (1980). Defendants admit that they altered their website in October 2003 to add information about the Tribute to Aces event, which constituted a republication of the information about Yeager so as to restart the statute of limitations. *Id.* However, plaintiffs have provided no other evidence indicating that defendants republished the information about Yeager at any point in time after October 2003, when defendants added information about the Tribute to Aces event.[10] Accordingly, the statute of limitations has run as to all of plaintiffs' privacy causes of action relating to the use of plaintiffs' name on the Aviation Autographs website.

10 While defendants removed Yeager's name from a discussion of the Tribute to Aces event on Aviation Autograph's home page and cropped him out of a photograph, such minimal editing of information does not constitute a republication. *See Traditional Cat Ass'n,* 118 Cal.App.4th at 404, 13 Cal.Rptr.3d 353; *Oja,* 440 F.3d at 1128, 1130–33.

***14** Even if the single publication rule did not apply, plaintiffs' privacy based claims are still time barred. Defendants have proven that plaintiffs had actual notice of the alleged privacy violations in August 2005, when plaintiffs had an attorney from Sullivan & Cromwell send a cease and desist letter to defendants and threaten litigation over the very same issues before this court. It is therefore clear that plaintiffs' claims are well outside the statue of limitations, and accordingly the court must grant defendants' motion for summary judgment on plaintiffs' first, second, and third causes of action.

4. *Equitable Tolling*

Plaintiffs also contend that their claims are subject to equitable tolling because defendants induced plaintiffs not to sue by promising to take the Hey Pard and F–15 prints and First Day Covers off their website and entering into an agreement that the Bowlins could use Yeager's name and image until the state court proceedings involving the Yeagers were resolved. (Pls.' Opp'n Mot. Summary Judgment 37:7–13.) Generally, federal courts grant equitable relief from the statute of limitations in only two kinds of situations: (1) when delay in filing a claim is excusable and does not unduly prejudice the defendant (equitable tolling); or (2) when the defendant prevented the plaintiff from asserting her claim by some kind of wrongful conduct (equitable estoppel). *See Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1178 (9th Cir.2000).

Plaintiffs' argument for equitable estoppel is based on the defendants' allegedly misleading conduct. Indeed, plaintiffs are not entitled to equitable tolling because equitable tolling

ceases once a claimant retains counsel because the claimant "has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law's requirements." *Leorna v. United States Dep't of State,* 105 F.3d 548, 551 (9th Cir.1997). Since plaintiffs had counsel at least as early as August 2005 when a letter was sent from Sullivan & Cromwell to defendants, the statute of limitations could not be tolled beyond August 2005 in any event. Additionally, as previously addressed, plaintiffs were well aware of the actions at issue in the SAC well over four years ago, and as such have not presented a legitimate basis for equitable tolling.

Courts will toll the statute of limitations based on equitable estoppel when the plaintiff is prevented from asserting his claim due to the wrongful conduct of the defendant. *See Irwin v. Department of Veteran Affairs,* 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); *Santa Maria,* 202 F.3d 1170 at 1178. Factors which the court should consider when deciding whether equitable estoppel should be applied include:

> (1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied.

***15** *Santa Maria,* 202 F.3d at 1176; *see also Johnson v. Henderson,* 314 F.3d 409, 414 (9th Cir.2002). Equitable estoppel, then, may come into play "if the defendant takes active steps to prevent the plaintiff from suing in time." *Santa Maria,* 202 F.3d at 1176–77.

While plaintiffs contend they need not show bad faith on the part of defendants to invoke equitable estoppel, citing *Shaffer v. Debbas,* 17 Cal.App.4th 33, 21 Cal.Rptr.2d 110 (1993), this court is not bound by that decision. The California Courts of Appeal are rife with contradictory decisions, where judges openly disagree with decisions by judges from other districts. *See, e.g., Lobrovich v. Georgison,* 144 Cal.App.2d 567, 573–74, 301 P.2d 460 (1956) (finding the presence of settlement negotiations does not entitle a party to equitable estoppel). This court instead is bound by the Ninth Circuit's interpretation of the doctrine of equitable estoppel under California law and accordingly will abide by it. Moreover, even if plaintiffs' interpretation is correct, defendants have produced clear evidence indicating that plaintiffs did not rely on any actions by defendants which "induced the plaintiff[s] to refrain from instituting legal proceedings." *Shaffer,* 17 Cal.App.4th at 43, 21 Cal.Rptr.2d 110.

Plaintiffs have not shown that defendants took active steps to prevent them from suing before the statute of limitations period ended. Plaintiffs have not provided any evidence evincing the existence of any agreement

between the Bowlins and plaintiffs where plaintiffs promised to delay suing until after the Yeagers' state court action was final. In fact, the evidence indicates that Victoria Yeager continued to aggressively confront the Bowlins over ownership issues relating to the Hey Pard and F–15 prints and First Day Covers and accused the Bowlins of behaving unlawfully while the state court litigation was ongoing. (Bowlin Decl. Exs 34, 35, 37, 50, 53.) The Yeagers obtained representation and continued to ask that the items in the state court action be delivered to them throughout 2004 and 2005. (*Id.* Exs. 47, 48.) Victoria Yeager also repeatedly insisted that the Bowlins cease to use any reference to Yeager on their website. (*Id.* Exs. 52–54, 56.) Plaintiffs were not waiting to pursue litigation against the Bowlins based on their representations, but rather were continually objecting to the Bowlins' practices and actively preparing for litigation against them with the assistance of an attorney.

There is also no evidence that the defendants misled the plaintiffs into waiting for the statute of limitations to run before suing. The Bowlins did not instruct the Yeagers not to take action against them, but simply stated that they would wait for the state lawsuit to end before delivering the Hey Pard and F–15 prints and First Day Covers to any party. (*Id.* Ex. 49.) Defendants did not engage in any aggressive action to induce plaintiffs not to sue them that would warrant tolling the statute of limitations. *See, e.g., Union Oil Co. of Cal. v. Greka Energy Corp.,* 165 Cal.App.4th 129, 138, 80 Cal.Rptr.3d 738 (2008) (finding equitable estoppel appropriate where defendant repeatedly engaged in settlement talks with plaintiff and asked plaintiff to withhold litigation until defendant resolved the matter). The Bowlins simply articulated their views on the legality of their position to plaintiffs, which in no way deceived the plaintiffs into delaying this action.

***16** The alleged violations of plaintiffs' privacy rights were vividly apparent on defendants' website since its inception and plaintiffs were well aware of any contractual breaches by defendants throughout 2003 and 2004. Plaintiffs have presented no evidence that indicates they reasonably relied on any representations by defendants that induced them to delay from filing this action until the statue of limitations had run. In fact, all evidence indicates that plaintiffs were preparing for litigation and did not delay the filing of this action based on the Bowlins' statements. Accordingly, equitable tolling and estoppel are inappropriate.

B. *Breach of Written Contract*

Under California law, the elements of a claim for breach of written contract are (1) the existence of a contract; (2) plaintiffs' performance or excuse for nonperformance of the contract; (3) defendants' breach of the contract; and (4) resulting damages. *Armstrong Petroleum Corp.,* 116 Cal.App.4th at 1390, 11 Cal.Rptr.3d 412. Plaintiff has not provided any evidence indicating that any written contract ever existed between plaintiffs and defendants. Plaintiff testified at his deposition that he usually did business on a handshake basis and did not recall any written contracts with defendants. (Gen. Yeager Depo. 12:12–13:15.) Plaintiffs in fact conceded during discovery that no such contracts exist, and neither General nor Victoria Yeager could identify any such

contract at their depositions. (Noonan Decl. Exs. E, F; Gen. Yeager Depo 12:12–13:15; V. Yeager Depo. 191:10–194:3.) Accordingly, the court will grant defendants' motion for summary judgment as to plaintiffs' breach of written contract claim.

C. *Derivative Claims*

1. *UCL Claim*

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof.Code § 17200. It incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co.,* 225 F.3d 1042, 1048 (9th Cir.2000). Plaintiffs' fourth claim for violation of the UCL and is dependent on proof of a predicate violation of plaintiffs' first three claims for breach of the common law right to privacy, breach of California Civil Code section 3344, or of the Lantham Act. *See Chabner v. United Omaha Life Ins. Co.,* 225 F.3d 1042, 1048 (9th Cir.2000). As these cause of action are time-barred, they cannot be used at the basis for plaintiffs' UCL claim.

In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health,* 30 Cal.4th 798, 827, 135 Cal.Rptr.2d 1, 69 P.3d 927 (2003). With respect to fraudulent conduct, the UCL prohibits any activity that is "likely to deceive" members of the public. *Puentes v. Wells Fargo Home Mortg., Inc.,* 160 Cal.App.4th 638, 645, 72 Cal.Rptr.3d 903 (2008). Plaintiffs argue that even if their other derivative claims fail, defendants' practices are still "unfair" because their harm to plaintiffs outweighs the utility to defendants.

***17** However, any such claim would be time-barred as well, as plaintiffs claims fail to meet the statute of limitations for the UCL. The UCL has a four-year statute of limitations. Cal. Bus. & Prof Code § 17208. The UCL is subject to the single publication rule, as it is based on the same publications that underlie plaintiffs' privacy causes of action. *See Baugh v. CBS, Inc.,* 828 F.Supp. 745, 755–56 (N.D.Cal.1993); *see also, Long v. Walt Disney Co.,* 116 Cal.App.4th 868, 873, 10 Cal.Rptr.3d 836 (2004) (finding that plaintiffs have not been allowed to circumvent the statute of limitation based on the single publication rule by simply pursuing another theory of relief based on the same publication). Accordingly, as discussed previously, the statute of limitations for plaintiffs' UCL claim began running in 2003, after the information concerning the Tribute to Aces was added to defendants' website. *See Karl Storz Endoscopy–Am., Inc. v. Surgical Tech., Inc. .,* 285 F.3d 848, 857 (9th Cir.2002) (finding UCL claims "are subject to a four-year statute of limitations which [begins] to run on the date the cause of action accrue[s], not on the date of discovery."); *see also Rambus Inc. v. Samsung Elecs. Co.,* Nos. C–05–02298 & C–05–00334, 2007 WL 39374, at *3 (N.D.Cal. Jan.4, 2007). As such, plaintiffs' claim is time barred, as plaintiff may only have one cause of action to pursue their claims based on plaintiffs' single publication, beginning at the time of the last republication.

2. *False Advertising*

California's False Advertising Law prohibits the dissemination in any advertising media of

any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof.Code § 17500. The statements underlying plaintiffs' false advertising claim are the same references to Yeager on the Aviation Autographs website that are involved in the plaintiffs' first three causes of action. As such, plaintiffs' false advertising claim is also subject to the single publication rule. *See Baugh,* 828 F.Supp. at 755–56; *Long,* 116 Cal.App.4th at 873, 10 Cal.Rptr.3d 836. As the False Advertising Law has a statue of limitations of three years, Cal.Code Civ. Proc. § 338(a), plaintiffs' false advertising claim is also time-barred for the same reason as plaintiffs' UCL claim.

3. *Accounting and Equitable Rescission*

Plaintiffs' accounting and equitable rescission claims are merely derivative of their fraud and contract claims. *See Janis v. Cal. State Lottery Com.,* 68 Cal.App.4th 824, 833–834, 80 Cal.Rptr.2d 549 (1998) ("A right to an accounting is derivative; it must be based on other claims."); *Nakash v. Superior Court,* 196 Cal.App.3d 59, 70, 241 Cal.Rptr. 578 (1987) (finding rescission is a remedy that is dependant on another claim). As defendants' motion for summary judgment will be granted on those claims, the court must also grant defendants' motion for summary judgment on these claims as well.

***18** IT IS THEREFORE ORDERED that defendants' motion for summary judgment be, and hereby the same is, GRANTED.

IT IS FURTHER ORDERED that plaintiffs' complaint be, and the same hereby is, DISMISSED as to the remaining defendants.

All Citations

Not Reported in F.Supp.2d, 2010 WL 95242

End of Document

Legal Authority R-LA-21

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 4. Miscellaneous Provisions (Refs & Annos)
Title 1. Of the General Principles of Evidence

West's Ann.Cal.C.C.P. § 1859

§ 1859. Construction of statutes or instruments; intent

Currentness

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

Credits
(Enacted in 1872.)

West's Ann. Cal. C.C.P. § 1859, CA CIV PRO § 1859
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

End of Document

Legal Authority R-LA-22

West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 1. Corporations
Division 2. Nonprofit Corporation Law (Refs & Annos)
Part 2. Nonprofit Public Benefit Corporations (Refs & Annos)
Chapter 2. Directors and Management (Refs & Annos)
Article 3. Standards of Conduct (Refs & Annos)

West's Ann.Cal.Corp.Code § 5231

§ 5231. Good faith; standard of care; reliance on information presented by others; liability

Effective: January 1, 2010
Currentness

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;

(2) Counsel, independent accountants or other persons as to matters which the director believes to be within that person's professional or expert competence; or

(3) A committee upon which the director does not serve that is composed exclusively of any or any combination of directors, persons described in paragraph (1), or persons described in paragraph (2), as to matters within the committee's designated authority, which committee the director believes to merit confidence, so long as, in any case, the director acts in good faith, after reasonable inquiry

when the need therefor is indicated by the circumstances and without knowledge that would cause that reliance to be unwarranted.

(c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.

Credits

(Added by Stats.1978, c. 567, p. 1750, § 5, operative Jan. 1, 1980. Amended by Stats.1979, c. 724, p. 2242, § 24, operative Jan. 1, 1980; Stats.2009, c. 631 (A.B.1233), § 14.)

West's Ann. Cal. Corp. Code § 5231, CA CORP § 5231
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

End of Document

Legal Authority R-LA-23

West's Annotated California Codes
California Rules of Court (Refs & Annos)
Title 8. Appellate Rules (Refs & Annos)
Division 7. Publication of Appellate Opinions (Refs & Annos)

Cal.Rules of Court, Rule 8.1105
Formerly cited as CA ST MISC Rule 976

Rule 8.1105. Publication of appellate opinions

Currentness

(a) Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b) Courts of Appeal and appellate divisions

Except as provided in (e), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(c) Standards for certification

An opinion of a Court of Appeal or a superior court appellate division--whether it affirms or reverses a trial court order or judgment--should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

(d) Factors not to be considered

Factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person should not affect the determination of whether to publish an opinion.

(e) Changes in publication status

(1) Unless otherwise ordered under (2):

(A) An opinion is no longer considered published if the rendering court grants rehearing.

(B) Grant of review by the Supreme Court of a decision by the Court of Appeal does not affect the appellate court's certification of the opinion for full or partial publication under rule

8.1105(b) or rule 8.1110, but any such Court of Appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order depublication of part of an opinion at any time after granting review.

(f) Editing

(1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 8.887.

(2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

Credits

(Formerly Rule 976, adopted, eff. Jan. 1, 2005. Renumbered Rule 8.1105 and amended, eff. Jan. 1, 2007. As amended, eff. April 1, 2007; July 23, 2008; July 1, 2009; July 1, 2016.)

Cal. Rules of Court, Rule 8.1105, CA ST APPELLATE Rule 8.1105

California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through March 1, 2020. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through March 1, 2020.

Legal Authority R-LA-24

West's Annotated California Codes
California Rules of Court (Refs & Annos)
Title 8. Appellate Rules (Refs & Annos)
Division 7. Publication of Appellate Opinions (Refs & Annos)

Cal.Rules of Court, Rule 8.1115
Formerly cited as CA ST MISC Rule 977

Rule 8.1115. Citation of opinions

Currentness

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

On request of the court or a party, a copy of an opinion citable under (b) must be promptly furnished to the court or the requesting party.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

(e) When review of published opinion has been granted

(1) *While review is pending*

Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

(2) *After decision on review*

After decision on review by the Supreme Court, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter, and any published opinion of a Court of Appeal in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court.

(3) *Supreme Court order*

At any time after granting review or after decision on review, the Supreme Court may order that all or part of an opinion covered by (1) or (2) is not citable or has a binding or precedential effect different from that specified in (1) or (2).

Credits

(Formerly Rule 977, adopted, eff. Jan. 1, 2005. Renumbered Rule 8.1115 and amended, eff. Jan. 1, 2007. As amended, eff. July 1, 2016.)

Cal. Rules of Court, Rule 8.1115, CA ST APPELLATE Rule 8.1115

California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through March 1, 2020. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments,

Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through March 1, 2020.

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