INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-20-0000-6787

NAMECHEAP, INC.

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

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EX. RE-1

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)[1]

Adopted 25 October 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution's international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN's Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016[2]; (2) to the extent public comments received in response to the USP reflected clear movement away from either the current Supplementary Procedures or the

[1] CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

[2] *See* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en.

USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

1. Definitions

In these Interim Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

DISPUTES are defined as:

> (A) Claims that COVERED ACTIONS violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:
>
> 1) exceeded the scope of the Mission;
>
> 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
>
> 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
>
> 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
>
> 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN's Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant's filing of a written statement of a DISPUTE with the ICDR.

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws.

ICDR RULES refers to the ICDR's International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8)

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

2. Scope

The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

4. Time for Filing[3]

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies).The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an "in-person hearing" refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

[3] The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In 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.

person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed." Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency

in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT's proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN's language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

A CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT'S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN's Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall reasonably receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall undertake reasonable efforts to provide notice by electronic message within two business days (calculated at ICANN's principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMAINT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae,* and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.[4] The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

[4] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of ***amicus curiae*** and in then considering the scope of participation from ***amicus curiae***, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including, without limitation, disclosures to competitors of the dislosing person, group or entity, of any competition-sensitvie information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.

b. All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

e. IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN's Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

12. IRP PANEL Decisions

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

13. Form and Effect of an IRP PANEL DECISION

a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties. IRP PANEL DECISIONS shall be issued in English, and the English version will be authoritative over any translations.

b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.

c. Subject to Article 4, Section 4.3 of ICANN's Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under

the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

EX. RE-2

New Generic Top-Level Domains

Fact Sheet

New gTLD Program in Brief

ICANN is the organization responsible for coordinating the Internet's unique identifiers, including the domain name system. One of ICANN's core values is promoting competition in the domain-name market while ensuring Internet security and stability. Introducing new generic Top-Level Domains (gTLDs) will help achieve that commitment. ICANN is removing barriers and opening doors to innovation, paving the way for increased consumer choice by facilitating competition among registry service providers. Soon entrepreneurs, businesses, governments and communities around the world will be able to apply to introduce and operate a generic Top-Level Domain of their own choosing. What will be the next big .thing? You name it!

Fast Facts

WHAT are gTLDs?

gTLD stands for generic top-level domain. A gTLD is an Internet extension such as .COM, .ORG, or .INFO. It is part of the structure of the Internet's domain name system (DNS). There are roughly two dozen gTLDs now, but soon, there could be hundreds.

WHO can apply for a new gTLD?

Any established public or private organization located anywhere in the world can apply to form and operate a new gTLD Registry.

WHEN can I apply?

An upcoming application period will be announced as soon as possible, with a specific opening and closing date and time. Monitoricann.org for the official launch dates.

HISTORY

- Eight gTLDs predate ICANN's creation –.COM, .EDU, .GOV, .INT, .MIL, .NET, .ORG, and .ARPA
- ICANN successfully carried out two previous application rounds for new gTLDs: 2000 (.AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME, and .PRO); and 2004 (.ASIA, .CAT, .JOBS, .MOBI, .POST, .TEL, and .TRAVEL).
- ICANN's Generic Names Supporting Organization (GNSO) developed policy recommendations that serve as the foundation to the New gTLD Program criteria and processes. The policy work started in 2005 and concluded in 2007.
- In June 2008, during ICANN's Paris meeting, the ICANN Board approved the GNSO recommendations for introducing New gTLDs to the Internet's addressing system.
- The Applicant Guidebook documents how ICANN has implemented the GNSO policy recommendations and is a comprehensive guide for applicants on the program's requirements and evaluation process.
- The Applicant Guidebook has gone through several iterations in draft form and is the result of years of careful implementation of GNSO policy recommendations and thoughtful review and feedback from the ICANN stakeholder community. Each version of the Applicant Guidebook was posted for public comment. More than one thousand public comments have been reviewed and considered, making the program what it is today.

ICANN

FAQs

Will the introduction of new gTLDs change how the Internet operates?

The increase in number of gTLDs into the root is not expected to affect the way the Internet operates, but it will, for example, potentially change the way people find information on the Internet or how businesses plan and structure their online presence.

What is the "Applicant Guidebook"?

The Applicant Guidebook provides a step-by-step procedure for new gTLD applicants. It specifies what documents and information are required to apply; the financial and legal commitments; and what to expect during the application and evaluation periods.

Is this the only opportunity to apply for a new gTLD?

No. ICANN plans to hold additional application rounds in the future. The exact dates for these future rounds are not yet available.

How and when can I see which gTLDs are being applied for and who is behind the application?

After the application period closes, ICANN will verify all of the applications for completeness and will then release on its website the list of strings, applicant names, and other application data.

I have an idea for a new gTLD. Can I register my idea with ICANN in advance of the next application period?

No, ICANN does not accept reservations or preregistrations of new gTLDs. ICANN also does not endorse any third parties to do so. applicable, and should expect to account for their own business start up costs. See Section 1.5.2 of the Applicant Guidebook.

Can I apply for more than one gTLD?

Yes. Each applied-for gTLD string requires its own application.

Can I apply for any kind of gTLD or are there any specific restrictions?

ICANN has a set of specific technical rules that apply to all proposed gTLD strings. All the specific restrictions are outlined in the Applicant Guidebook.

Can I simply reserve a gTLD and decide later whether or not to use it?

ICANN expects all new gTLDs to be operational. gTLDs are expected to be delegated within one year of signing a registry agreement with ICANN.

How much is the evaluation fee?

The evaluation fee is estimated at US$185,000. Applicants will be required to pay a US$5,000 deposit fee per requested application slot when registering. The US$5,000 will be credited against the evaluation fee.

Are there any additional costs I should be aware of in applying for a new gTLD?

Yes. Applicants may be required to pay additional fees in certain cases where specialized process steps are applicable, and should expect to account for their own business startup costs. See Section 1.5.2 of the Applicant Guidebook.

What will happen during the application window and how long will it last?

The application window will likely last for three months. Applicants will use a dedicated web-based application interface named "TLD Application System" (TAS) to apply, where they will answer questions and upload supporting documents. After the application window, there are several evaluation stages, each with its own estimated duration.

How long will the evaluation process take?

The evaluation process is expected to last from 8 to 18 months. There are several stages that an application might be required to pass through prior to a final determination being rendered.

How will gTLD applications be assessed?

The Applicant Guidebook outlines the criteria and requirements. All applications will be assessed against these published criteria. Pre-selected evaluation panels

will be responsible for determining whether applicants successfully meet these pre-established requirements.

What happens if there are multiple applications for the same string?

It is not feasible for two or more identical strings to occupy the Internet space. Each name must be unique. If there are two or more applications for the same string (or confusingly similar strings), the String Contention procedures would come into effect.

If I want to apply for two similar or related TLDs, for example, ".thing" and ".thething" would that be two applications or one? And if two, do I have to pay $185,000 for each?

If an applicant applies for .thing and .thething, those would be considered two separate applications. (Applicants should note carefully that the application process is currently designed to not allow two strings that are "confusingly similar" to each other to both be delegated into the DNS – please refer to the full text of the Applicant Guidebook for details.) If both applications were approved, they would result in two separate TLDs. Each application will be treated individually and there is no discount on application fees based upon the filing of multiple applications.

What happens after a new gTLD application is approved?

Once an application is deemed to satisfy the Applicant Guidebook criteria and passes all evaluation and selection processes, including objection processes and final approval, the applicant is required to conclude an agreement with ICANN and pass technical pre-delegation tests before the new gTLD can be delegated to the root zone.

How can I object to an application?

After the list of all TLD applications has been published on ICANN's website, there will be a period of time for third-parties to file a formal objection using pre-established dispute resolution procedures. In all but exceptional circumstances, objections will be administered by independent Dispute Resolution Service Providers (DRSP), rather than by ICANN.

What can I do if someone applies for a string that represents my brand or trademark?

You can file an objection with the DRSP selected to administer "legal rights" objections. Details about these procedures, such as who has standing, where and how objections are filed, and how much objections will cost can be found in Module 3 of the Applicant Guidebook and the related New gTLD Dispute Resolution Procedure.

Next Steps

- Review the current version of the Applicant Guidebook.
  http://icann.org/en/topics/new-gtlds/dag-en.htm
- Review the full set of FAQs.
  http://icann.org/en/topics/new-gtlds/strategy-faq.htm
- Visit the New gTLD site.
  http://icann.org/en/topics/new-gtld-program.htm
- Follow us on Twitter @icann

- Email us.
  newgtld@icann.org

ICANN

The launch of the new gTLD Program is dependent upon ICANN Board approval of the final Applicant Guidebook

EX. RE-3

.com Registry Agreement
(1 March 2006, amended 22 September 2010)

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this "Agreement") is entered into by and between the Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN"), and VeriSign, Inc. a Delaware corporation.

WHEREAS, the parties wish to work together cooperatively to promote and facilitate the security and stability of the Internet and the DNS, and to that end, hereby agree as follows:

ARTICLE I Introduction

Section 1.1 Effective Date. The effective date ("Effective Date") for purposes of this Agreement shall be March 1, 2006.

Section 1.2 Top-Level Domain. The Top-Level Domain to which this Agreement applies is .com ("TLD").

Section 1.3 Designation as Registry Operator. Upon the Effective Date, until the Expiration Date as defined in Section 4.1 hereof, ICANN shall continue to recognize VeriSign, Inc. as the sole registry operator for the TLD ("Registry Operator").

ARTICLE II Representations and Warranties

Section 2.1 Registry Operator's Representations and Warranties.

(a) Organization; Due Authorization and Execution. Registry Operator is a corporation, duly organized, validly existing and in good standing under the laws of Delaware, and Registry Operator has all requisite power and authority to enter into this Agreement. All corporate approvals and actions necessary for the entrance by Registry Operator into this Agreement have been obtained and this Agreement has been duly and validly executed and delivered by Registry Operator.

(b) Statements made During Negotiation Process. The factual statements made in writing by Registry Operator in negotiating this Agreement were true and correct in all material respects at the time made. A violation or breach of any such representation or warranty shall not be a basis for termination, rescission or other equitable relief, and, instead shall only give rise to a claim for damages.

Section 2.2 ICANN's Representations and Warranties.

(a) Organization; Due Authorization and Execution. ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of

California. ICANN has all requisite corporate power and authority to enter into this Agreement. All corporate approvals and actions necessary for the entrance by ICANN into this Agreement have been obtained and this Agreement has been duly and validly executed and delivered by ICANN.

ARTICLE III Covenants

Section 3.1 Covenants of Registry Operator. Registry Operator covenants and agrees with ICANN as follows:

(a) Preserve Security and Stability.

(i) ICANN Temporary Specifications or Policies. Registry Operator shall comply with and implement all specifications or policies established by the ICANN Board of Directors on a temporary basis, if adopted by the ICANN Board of Directors by a vote of at least two-thirds of its members, so long as the ICANN Board of Directors reasonably determines that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the Stability or Security (as defined in Section 3.1(d)(iv)(G)) of Registry Services or the DNS ("Temporary Specification or Policies"). Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any specification or policy under this provision, the ICANN Board of Directors shall state the period of time for which the specification or policy is temporarily adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws. ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the temporary specification or policy and why the Board believes the specification or policy should receive the consensus support of Internet stakeholders. If the period of time for which the specification or policy is adopted exceeds 90 days, the ICANN Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such policy in effect until such time as it shall become a Consensus Policy as described in Section 3.1(b) below. If during such one year period, the temporary policy or specification does not become a Consensus Policy meeting the standard set forth in Section 3.1(b) below, Registry Operator shall no longer be required to comply with or implement such temporary policy or specification.

(b) Consensus Policies.

(i) At all times during the term of this Agreement and subject to the terms hereof, Registry Operator will fully comply with and implement all Consensus Policies found at http://www.icann.org/general/consensus-policies.htm, as of the Effective Date and as may in the future be developed and adopted in accordance with ICANN's Bylaws and as set forth below.

(ii) "Consensus Policies" are those specifications or policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 3.1(b)(iv) below. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with ICANN's Bylaws, and any Consensus Policy that is adopted through such a revised process and covering those topics listed in Section 3.1(b)(iv) below shall be considered a

Consensus Policy for purposes of this Agreement.

(iii) For all purposes under this Agreement, the policies identified at http://www.icann.org/general/consensus-policies.htm shall be treated in the same manner and have the same effect as "Consensus Policies."

(iv) Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following: (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 (as defined in Section 3.1(d)(iii) below); (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). Such categories of issues referred to in the preceding sentence shall include, without limitation:

(A) principles for allocation of registered names in the TLD (e.g., first-come, first-served, timely renewal, holding period after expiration);

(B) prohibitions on warehousing of or speculation in domain names by registries or registrars;

(C) reservation of registered names in the TLD 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., establishment of reservations of names from registration);

(D) maintenance of and access to accurate and up-to-date information concerning domain name registrations;

(E) procedures to avoid disruptions of domain name registration due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination; and

(F) resolution of disputes regarding whether particular parties may register or maintain registration of particular domain names.

(v) In addition to the other limitations on Consensus Policies, they shall not:

(A) prescribe or limit the price of Registry Services;

(B) modify the standards for the consideration of proposed

Registry Services, including the definitions of Security and Stability (set forth below) and the standards applied by ICANN;

(C) for two years following the Effective Date, modify the procedure for the consideration of proposed Registry Services;

(D) modify the terms or conditions for the renewal or termination of this Agreement;

(E) modify ICANN's obligations to Registry Operator under Section 3.2 (a), (b), and (c);

(F) modify the limitations on Consensus Policies or Temporary Specifications or Policies;

(G) modify the definition of Registry Services;

(H) modify the terms of Sections 7.2 and 7.3, below; and

(I) alter services that have been implemented pursuant to Section 3.1(d) of this Agreement (unless justified by compelling and just cause based on Security and Stability).

(vi) Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Specifications or Policies in which to comply with such policy or specification, taking into account any urgency involved.

In the event of a conflict between Registry Services (as defined in Section 3.1(d)(iii) below), on the one hand, and Consensus Policies developed in accordance with this Section 3.1(b) or any Temporary Specifications or Policies established pursuant to Section 3.1(a)(i) above, on the other hand, the Consensus Polices or Temporary Specifications or Policies shall control, notwithstanding any other provisions contained within this Agreement.

(c) Handling of Registry Data.

(i) Data Escrow. Registry Operator shall establish at its expense a data escrow or mirror site policy for the Registry Data compiled by Registry Operator. Registry Data, as used in this Agreement, shall mean the following: (1) data for domains sponsored by all registrars, consisting of domain name, server name for each nameserver, registrar id, updated date, creation date, expiration date, status information, and DNSSEC delegation signer ("DS") data (if Registry Operator implements DNSSEC); (2) data for nameservers sponsored by all registrars consisting of server name, each IP address, registrar id, updated date, creation date, expiration date, and status information; (3) data for registrars sponsoring registered domains and nameservers, consisting of registrar id, registrar address, registrar telephone number, registrar e-mail address, whois server, referral URL, updated date and the name, telephone number, and e-mail address of all the registrar's administrative, billing, and technical contacts; and, (4) domain name registrant data collected by the Registry Operator from registrars as part of or following registration of a domain

name; The escrow agent or mirror-site manager, and the obligations thereof, shall be mutually agreed upon by ICANN and Registry Operator on commercially reasonable standards that are technically and practically sufficient to allow a successor registry operator to assume management of the TLD. To this end, Registry Operator shall periodically deposit into escrow all Registry Data on a schedule (not more frequently than weekly for a complete set of Registry Data, and daily for incremental updates) and in an electronic format mutually approved from time to time by Registry Operator and ICANN, such approval not to be unreasonably withheld by either party. In addition, Registry Operator will deposit into escrow that data collected from registrars as part of offering Registry Services introduced after the Effective Date of this Agreement. The escrow shall be maintained, at Registry Operator's expense, by a reputable escrow agent mutually approved by Registry Operator and ICANN, such approval also not to be unreasonably withheld by either party. The schedule, content, format, and procedure for escrow deposits shall be as reasonably established by ICANN from time to time, and as set forth in Appendix 1 hereto. Changes to the schedule, content, format, and procedure may be made only with the mutual written consent of ICANN and Registry Operator (which neither party shall unreasonably withhold) or through the establishment of a Consensus Policy as outlined in Section 3.1(b) above. The escrow shall be held under an agreement, substantially in the form of Appendix 2, as the same may be revised from time to time, among ICANN, Registry Operator, and the escrow agent.

(ii) Personal Data. Registry Operator shall notify registrars sponsoring registrations in the registry for the TLD of the purposes for which Personal Data (as defined below) submitted to Registry Operator by registrars, if any, is collected, the intended recipients (or categories of recipients) of such Personal Data, and the mechanism for access to and correction of such Personal Data. Registry Operator shall take reasonable steps to protect Personal Data from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars. "Personal Data" shall refer to all data about any identified or identifiable natural person.

(iii) Bulk Zone File Access. Registry Operator shall provide bulk access to the zone files for the registry for the TLD to ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time. Bulk access to the zone files shall be provided to third parties on the terms set forth in the TLD zone file access agreement reasonably established by ICANN, which initially shall be in the form attached as Appendix 3 hereto. Changes to the zone file access agreement may be made upon the mutual written consent of ICANN and Registry Operator (which consent neither party shall unreasonably withhold).

(iv) Monthly Reporting. Within 20 days following the end of each calendar month, Registry Operator shall prepare and deliver to ICANN a report providing such data and in the format specified in Appendix 4. ICANN may audit Registry Operator's books and records relating to data contained in monthly reports from time to time upon reasonable advance written notice, provided that such audits shall not exceed one per quarter. Any such audit shall be at ICANN's cost, unless such audit shall reflect a material discrepancy or discrepancies in the data provided by Registry Operator. In the latter event,

Registry Operator shall reimburse ICANN for all costs and expenses associated with such audit, which reimbursement shall be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(v) Whois Service. Registry Operator shall provide such whois data as set forth in Appendix 5.

(d) Registry Operations.

(i) Registration Restrictions. Registry Operator shall reserve, and not register any TLD strings (i) appearing on the list of reserved TLD strings attached as Appendix 6 hereto or (ii) located at http://data.iana.org/TLD/tlds-alpha-by-domain.txt for initial (i.e., other than renewal) registration at the second level within the TLD.

(ii) Functional and Performance Specifications. Functional and Performance Specifications for operation of the TLD shall be as set forth in Appendix 7 hereto, and shall address without limitation DNS services; operation of the shared registration system; and nameserver operations. Registry Operator shall keep technical and operational records sufficient to evidence compliance with such specifications for at least one year, which records ICANN may audit from time to time upon reasonable advance written notice, provided that such audits shall not exceed one per quarter. Any such audit shall be at ICANN's cost.

(iii) Registry Services. Registry Services are, for purposes of this Agreement, defined as the following: (a) those services that are both (i) operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry zone servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; and (ii) provided by the Registry Operator for the .com registry as of the Effective Date; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy (as defined in Section 3.1(b) above); (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above. Only Registry Services defined in (a) and (b) above are subject to the maximum price provisions of Section 7.3, below.

(iv) Process for Consideration of Proposed Registry Services. Following written notification by Registry Operator to ICANN that Registry Operator may make a change in a Registry Service within the scope of the preceding paragraph:

(A) ICANN shall have 15 calendar days to make a "preliminary determination" whether a Registry Service requires further consideration by ICANN because it reasonably determines such Registry Service: (i) could raise significant Security or Stability

issues or (ii) could raise significant competition issues.

(B) Registry Operator must provide sufficient information at the time of notification to ICANN that it may implement such a proposed Registry Service to enable ICANN to make an informed "preliminary determination." Information provided by Registry Operator and marked "CONFIDENTIAL" shall be treated as confidential by ICANN. Registry Operator will not designate "CONFIDENTIAL" information necessary to describe the purpose of the proposed Registry Service and the effect on users of the DNS.

(C) ICANN may seek expert advice during the preliminary determination period (from entities or persons subject to confidentiality agreements) on the competition, Security or Stability implications of the Registry Service in order to make its "preliminary determination." To the extent ICANN determines to disclose confidential information to any such experts, it will provide notice to Registry Operator of the identity of the expert(s) and the information it intends to convey.

(D) If ICANN determines during the 15 calendar day "preliminary determination" period that the proposed Registry Service, does not raise significant Security or Stability (as defined below), or competition issues, Registry Operator shall be free to deploy it upon such a determination.

(E) In the event ICANN reasonably determines during the 15 calendar day "preliminary determination" period that the Registry Service might raise significant competition issues, ICANN shall refer the issue to the appropriate governmental competition authority or authorities with jurisdiction over the matter within five business days of making its determination, or two business days following the expiration of such 15 day period, whichever is earlier, with notice to Registry Operator. Any such referral communication shall be posted on ICANN's website on the date of transmittal. Following such referral, ICANN shall have no further responsibility, and Registry Operator shall have no further obligation to ICANN, with respect to any competition issues relating to the Registry Service. If such a referral occurs, the Registry Operator will not deploy the Registry Service until 45 calendar days following the referral, unless earlier cleared by the referred governmental competition authority.

(F) In the event that ICANN reasonably determines during the 15 calendar day "preliminary determination" period that the proposed Registry Service might raise significant Stability or Security issues (as defined below), ICANN will refer the proposal to a Standing Panel of experts (as defined below) within five business days of making its determination, or two business days following the expiration of such 15 day period, whichever is earlier, and simultaneously invite public comment on the proposal. The Standing Panel shall have 45 calendar days from the referral to prepare a written report regarding the proposed Registry Service's effect on

Security or Stability (as defined below), which report (along with a summary of any public comments) shall be forwarded to the ICANN Board. The report shall set forward the opinions of the Standing Panel, including, but not limited to, a detailed statement of the analysis, reasons, and information upon which the panel has relied in reaching their conclusions, along with the response to any specific questions that were included in the referral from ICANN staff. Upon ICANN's referral to the Standing Panel, Registry Operator may submit additional information or analyses regarding the likely effect on Security or Stability of the Registry Service.

(G) Upon its evaluation of the proposed Registry Service, the Standing Panel will report on the likelihood and materiality of the proposed Registry Service's effects on Security or Stability, including whether the proposed Registry Service creates a reasonable risk of a meaningful adverse effect on Security or Stability as defined below:

Security: For purposes of this Agreement, an effect on security by the proposed Registry Service shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of Registry Data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

Stability: For purposes of this Agreement, an effect on stability shall mean that the proposed Registry Service (1) is not compliant with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs sponsored by the IETF or (2) creates a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant Standards-Track or Best Current Practice RFCs and relying on Registry Operator's delegation information or provisioning services.

(H) Following receipt of the Standing Panel's report, which will be posted (with appropriate confidentiality redactions made after consultation with Registry Operator) and available for public comment, the ICANN Board will have 30 calendar days to reach a decision. In the event the ICANN Board reasonably determines that the proposed Registry Service creates a reasonable risk of a meaningful adverse effect on Stability or Security, Registry Operator will not offer the proposed Registry Service. An unredacted version of the Standing Panel's report shall be provided to Registry Operator upon the posting of the report. The Registry Operator may respond to the report of the Standing Panel or otherwise submit to the ICANN Board additional information or analyses regarding the likely effect on Security or Stability of the Registry Service.

(l) The Standing Panel shall consist of a total of 20 persons expert in the design, management and implementation of the complex systems and standards-protocols utilized in the Internet infrastructure and DNS (the "Standing Panel"). The members of the Standing Panel will be selected by its Chair. The Chair of the Standing Panel will be a person who is agreeable to both ICANN and the registry constituency of the supporting organization then responsible for generic top level domain registry policies. All members of the Standing Panel and the Chair shall execute an agreement requiring that they shall consider the issues before the panel neutrally and according to the definitions of Security and Stability. For each matter referred to the Standing Panel, the Chair shall select no more than five members from the Standing Panel to evaluate the referred matter, none of which shall have an existing competitive, financial, or legal conflict of interest, and with due regard to the particular technical issues raised by the referral.

(e) Fees and Payments. Registry Operator shall pay the Registry-Level Fees to ICANN on a quarterly basis in accordance with Section 7.2 hereof.

(f) Traffic Data. Nothing in this Agreement shall preclude Registry Operator from making commercial use of, or collecting, traffic data regarding domain names or non-existent domain names for purposes such as, without limitation, the determination of the availability and health of the Internet, pinpointing specific points of failure, characterizing attacks and misconfigurations, identifying compromised networks and hosts, and promoting the sale of domain names; provided, however, that such use does not disclose domain name registrant, end user information or other Personal Data as defined in Section 3.1(c)(ii) for any purpose not otherwise authorized by this agreement. The process for the introduction of new Registry Services shall not apply to such traffic data. Nothing contained in this section 3.1(f) shall be deemed to constitute consent or acquiescence by ICANN to a re-introduction by Registry Operator of the SiteFinder service previously introduced by the Registry Operator on or about September 15, 2003, or the introduction of any substantially similar service employing a universal wildcard function intended to achieve the same or substantially similar effect as the SiteFinder service. To the extent that traffic data subject to this provision is made available, access shall be on terms that are non-discriminatory.

(g) Security and Stability Review. Twice annually Registry Operator shall engage in discussions with executive staff of ICANN and the Chairman of the Board of ICANN on trends impacting the Security and/or Stability of the Registry, the DNS or the Internet pursuant to the terms of confidentiality agreements executed both by the executive staff of ICANN and the Chairman of the Board.

(h) Centralized Whois. Registry Operator shall develop and deploy a centralized Whois for the .com TLD if mandated by ICANN insofar as reasonably feasible, particularly in view of Registry Operator's dependence on cooperation of third parties.

Section 3.2 Covenants of ICANN. ICANN covenants and agrees with Registry Operator as follows:

(a) Open and Transparent. Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

(b) Equitable Treatment. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

(c) TLD Zone Servers. In the event and to the extent that ICANN is authorized to set policy with regard to an authoritative root server system, it will ensure that (i) the authoritative root will point to the TLD zone servers designated by Registry Operator for the Registry TLD throughout the Term of this Agreement; and (ii) any changes to the TLD zone server designation submitted to ICANN by Registry Operator will be implemented by ICANN within seven days of submission.

(d) Nameserver Changes. Registry Operator may request changes in the nameserver delegation for the Registry TLD. Any such request must be made in a format, and otherwise meet technical requirements, specified from time to time by ICANN. ICANN will use commercially reasonable efforts to have such requests implemented in the Authoritative Root-Server System within seven calendar days of the submission.

(e) Root-zone Information Publication. ICANN's publication of root-zone contact information for the Registry TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN.

Section 3.3 Cooperation. The parties agree to cooperate with each other and share data as necessary to accomplish the terms of this Agreement.

ARTICLE IV Term of Agreement

Section 4.1 Term. The initial term of this Agreement shall expire on November 30, 2012. The "Expiration Date" shall be November 30, 2012, as extended by any renewal terms.

Section 4.2 Renewal. This Agreement shall be renewed upon the expiration of the term set forth in Section 4.1 above and each later term, unless the following has occurred : (i) following notice of breach to Registry Operator in accordance with Section 6.1 and failure to cure such breach within the time period prescribed in Section 6.1, an arbitrator or court has determined that Registry Operator has been in fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 and (ii) following the final decision of such arbitrator or court, Registry Operator has failed to comply within ten days with the decision of the arbitrator or court, or within such other time period as may be prescribed by the arbitrator or court. Upon renewal, in the event that the terms of this Agreement are not similar to the terms generally in effect in the Registry Agreements of the 5 largest gTLDs (determined by the number of domain name registrations under management at the time of renewal), renewal shall be upon terms reasonably necessary to render the terms of this Agreement similar to such terms in the Registry Agreements for those other gTLDs. The preceding sentence, however, shall not apply to the terms of this Agreement regarding the price of Registry Services; the standards for the consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN in the consideration process; the terms or conditions for the renewal or termination of this Agreement; ICANN's obligations to Registry Operator under Section 3.2 (a), (b), and (c); the limitations on Consensus Policies or Temporary Specifications or Policies; the definition of Registry Services; or the terms of Section 7.3.

Section 4.3 Failure to Perform in Good Faith. In the event Registry Operator shall have been repeatedly and willfully in fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3, and arbitrators in accordance with Section

5.1(b) of this Agreement repeatedly have found Registry Operator to have been in fundamental and material breach of this Agreement, including in at least three separate awards, then the arbitrators shall award such punitive, exemplary or other damages as they may believe appropriate under the circumstances.

ARTICLE V Dispute Resolution

Section 5.1 Resolution of Disputes.

(a) Cooperative Engagement. In the event of a disagreement between Registry Operator and ICANN arising under or out of this Agreement, either party may by notice to the other invoke the dispute resolution provisions of this Article V. Provided, however, that before either party may initiate arbitration as provided in Section 5.1(b) below, ICANN and Registry Operator must attempt to resolve the dispute by cooperative engagement as set forth in this Section 5.1(a). If either party provides written notice to the other demanding cooperative engagement as set forth in this Section 5.1(a), then each party will, within seven calendar days after such written notice is deemed received in accordance with Section 8.6 hereof, designate a single executive officer as its representative under this Section 5.1(a) with full authority to act on such party's behalf to resolve the dispute. The designated representatives shall, within 2 business days after being designated, confer by telephone or in person to attempt to resolve the dispute. If they are not able to resolve the dispute during such telephone conference or meeting, they shall further meet in person at a location reasonably designated by ICANN within 7 calendar days after such initial telephone conference or meeting, at which meeting the parties shall attempt to reach a definitive resolution. The time schedule and process set forth in this Section 5.1(a) may be modified with respect to any dispute, but only if both parties agree to a revised time schedule or process in writing in advance. Settlement communications within the scope of this paragraph shall be inadmissible in any arbitration or litigation between the parties.

(b) Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be resolved through binding arbitration conducted as provided in this Section 5.1(b) pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration shall be conducted in the English language and shall occur in Los Angeles County, California, USA only following the failure to resolve the dispute pursuant to cooperative engagement discussions as set forth in Section 5.1(a) above. There shall be three arbitrators: each party shall choose one arbitrator and, if the two arbitrators are not able to agree on a third arbitrator, the third shall be chosen by the ICC. The prevailing party in the arbitration shall have the right to recover its costs and reasonable attorneys' fees, which the arbitrators shall include in their awards. Any party that seeks to confirm or vacate an arbitration award issued under this Section 5.1(b) may do so only pursuant to the applicable arbitration statutes. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles County, California, USA; however, the parties shall also have the right to enforce a judgment of such a court in any court of competent jurisdiction. For the purpose of aiding the arbitration and/or preserving the rights of the parties during the pendency of an arbitration, the parties shall have the right to seek a temporary stay or injunctive relief from the arbitration panel or a court, which shall not be a waiver of this agreement to arbitrate.

Section 5.2 Specific Performance. Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrators

specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

Section 5.3 Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement shall not exceed the amount of Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to Section 7.2 of this Agreement. Registry Operator's aggregate monetary liability to ICANN for violations of this Agreement shall be limited to fees and monetary sanctions due and owing to ICANN under this Agreement. In no event shall either party be liable for special, indirect, incidental, punitive, exemplary, or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided pursuant to Section 4.3 of this Agreement. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, REGISTRY OPERATOR DOES NOT MAKE ANY WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES RENDERED BY ITSELF, ITS SERVANTS, OR ITS AGENTS OR THE RESULTS OBTAINED FROM THEIR WORK, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.

ARTICLE VI Termination Provisions

Section 6.1 Termination by ICANN. ICANN may terminate this Agreement if and only if: (i) Registry Operator fails to cure any fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 within thirty calendar days after ICANN gives Registry Operator written notice of the breach, which notice shall include with specificity the details of the alleged breach; and (ii) (a) an arbitrator or court has finally determined that Registry Operator is, or was, in fundamental and material breach and failed to cure such breach within the prescribed time period and (b) following the decision of such arbitrator or court, Registry Operator has failed to comply with the decision of the arbitrator or court.

Section 6.2 Bankruptcy. This Agreement shall automatically terminate in the event Registry Operator shall voluntarily or involuntarily be subject to bankruptcy proceedings.

Section 6.3 Transition of Registry upon Termination of Agreement. Upon any termination of this Agreement as provided in Sections 6.1 and 6.2, the parties agree to work cooperatively to facilitate and implement the transition of the registry for the TLD in accordance with this Section 6.4. Registry Operator shall agree to provide ICANN or any successor registry authority that may be designated for the TLD with any data regarding operations of the registry for the TLD necessary to maintain operations that may be reasonably requested in addition to that data escrowed in accordance with Section 3.1(c)(i) hereof.

Section 6.4 Rights in Data. Registry Operator shall not be entitled to claim any intellectual property rights in Registry Data. In the event that Registry Data is released from escrow as set forth in Section 3.1(c)(i), rights, if any, held by Registry Operator in the data shall automatically be licensed on a non-exclusive, irrevocable, royalty-free, paid-up basis to ICANN or to a party designated in writing by ICANN.

Section 6.5 No Reimbursement. Any and all expenditures, capital investments or other investments made by Registry Operator in connection with this Agreement shall be at Registry Operator's own risk and ICANN shall have no obligation to reimburse Registry Operator for any such expense, capital expenditure or investment. Registry Operator shall not be required to make any payments to a successor registry operator by reason of registry fees paid to Registry Operator prior to the effective date of (i) any termination or expiration of this Agreement or (ii) transition of the registry, unless any delay in transition of the registry to a successor operator shall be due to the actions of

Registry Operator.

ARTICLE VII Special Provisions

Section 7.1 Registry-Registrar Agreement.

(a) Access to Registry Services. Registry Operator shall make access to Registry Services, including the shared registration system, available to all ICANN-accredited registrars, subject to the terms of the Registry-Registrar Agreement attached as Appendix 8 hereto. Registry Operator shall provide all ICANN-accredited registrars following execution of the Registry-Registrar Agreement, provided registrars are in compliance with such agreement, operational access to Registry Services, including the shared registration system for the TLD. Such nondiscriminatory access shall include without limitation the following:

(i) All registrars (including any registrar affiliated with Registry Operator) can connect to the shared registration system gateway for the TLD via the Internet by utilizing the same maximum number of IP addresses and SSL certificate authentication;

(ii) Registry Operator has made the current version of the registrar toolkit software accessible to all registrars and has made any updates available to all registrars on the same schedule;

(iii) All registrars have the same level of access to customer support personnel via telephone, e-mail and Registry Operator's website;

(iv) All registrars have the same level of access to registry resources to resolve registry/registrar or registrar/registrar disputes and technical and/or administrative customer service issues;

(v) All registrars have the same level of access to data generated by Registry Operator to reconcile their registration activities from Registry Operator's Web and ftp servers;

(vi) All registrars may perform basic automated registrar account management functions using the same registrar tool made available to all registrars by Registry Operator; and

(vii) The shared registration system does not include, for purposes of providing discriminatory access, any algorithms or protocols that differentiate among registrars with respect to functionality, including database access, system priorities and overall performance.

Such Registry-Registrar Agreement may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN.

(b) Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. This shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar.

(c) Restrictions on Acquisition of Ownership or Controlling Interest in Registrar. Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar.

Section 7.2 Fees to be Paid to ICANN.

(a) Initial Fees. On the Effective Date, Registry Operator shall make a one-time lump sum payment of US$625,000 to an account designated by ICANN. The uses of these initial fees shall include meeting the costs associated with establishing structures to implement the provisions of this Agreement.

(b) Fixed Registry-Level Fee. Registry Operator shall pay ICANN, to an account designated by ICANN, a Fixed Registry-Level Fee as provided below. Payments shall be made as follows: Beginning 1 July 2006 through 31 December 2006, Registry Operator shall begin prepayment of the 2007 Fixed Registry-Level Fee in equal monthly payments such that the total payments per quarter is US$1,500,000. Beginning 1 January 2007, equal monthly payments for quarters ended 31 March 2007 and 30 June 2007 shall be paid such that the total payments per quarter, calculated net of the prepayments during the quarters ended 30 September 2006 and 31 December 2006, is US$1,500,000. Beginning 1 July 2007, equal monthly payments for quarters ended 30 September 2007, 31 December 2007, 31 March 2008, and 30 June 2008, shall be paid such that the total payments per quarter is US$2,000,000. Beginning 1 July 2008, equal monthly payments will increase such that the total payments per quarter will equal US$3,000,000. Equal monthly payments shall continue such that the total payment per quarter will equal US$3,000,000 except that after 1 July 2009: (i) if the total number of annual domain name registrations increases by a total of ten million over the total number of domain name registrations on the Effective Date of the Agreement, the equal monthly payments shall increase by an amount totaling $750,000 per quarter, for each quarter that the increased level of annual domain name registrations is maintained; (ii) if the total number of annual domain name registrations increases by a total of twenty million over the total number of domain name registrations at the time of the Effective Date of the Agreement, the equal monthly payments shall increase by an amount in addition to that set forth in 7.2(a)(i), totaling $750,000 per quarter, for each quarter that the increased level of annual domain name registrations is maintained; provided, however, if at any time after the Effective Date, the total number of annual domain name registrations falls below the total number of domain name registrations on the Effective Date of the Agreement, or, if applicable, the total number of annual domain name registrations in 7.2(a)(i) and 7.2(a)(ii) above, the equal monthly payments shall be reduced by US$25,000 per month for every 1 million annual domain name registrations reduction.

(c) Variable Registry-Level Fee. For fiscal quarters in which ICANN does not collect a variable accreditation fee from all registrars, upon receipt of written notice from ICANN, Registry Operator shall pay ICANN a Variable Registry-Level Fee. The fee will be calculated by ICANN. The Registry Operator shall invoice and collect the fees from the registrars who are party to a Registry-Registrar Agreement with Registry Operator and paid to ICANN by the Registry Operator by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN. The fee will consist of two components; each component will be calculated by ICANN for each registrar:

(i) The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the

ICANN Board of Directors for each fiscal year but shall not exceed US$0.25.

(ii) The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each fiscal year, but the sum of the per-registrar fees calculated for all registrars shall not exceed the total Per-Registrar Variable funding established pursuant to the approved 2004-2005 ICANN Budget.

(d) Interest on Late Payments. For any payments ten days or more overdue, Registry Operator shall pay interest on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

Section 7.3 Pricing for Domain Name Registrations and Registry Services.

(a) Scope. The Registry Services to which the provisions of this Section 7.3 shall apply are:

(i) the Registry Services defined in Section 3.1(d)(iii)(a), above, and

(ii) other products or services that the Registry Operator is required to provide within the scope of Section 3.1(d)(iii)(b), above, because of the establishment of a Consensus Policy (as defined in Section 3.1(b) above):

(1) to implement changes in the core functional or performance specifications for Registry Services (as defined in Section 3.1(d)(iii)(a)); or

(2) that are reasonably necessary to facilitate: (A) Security and/or Stability of the Internet or DNS; (B) Security and Stability of the registry database for the TLD; or (C) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).

Nothing contained herein shall be construed to apply the provisions of this Section 7.3 to the services enumerated in Appendix 9 of this Agreement.

(b) No Tying. Registry Operator shall not require, as a condition of the provision or use of Registry Services subject to this Section 7.3 in accordance with the requirements of this Agreement, including without limitation Section 7.1 and Appendix 10, that the purchaser of such services purchase any other product or service or refrain from purchasing any other product or service. Notwithstanding any other offering that may include all or any portion of the Registry Services at any price, Registry Operator shall offer to all ICANN-accredited registrars the combination of all Registry Services subject to this Section 7.3 at a total price for those Registry Services that is no greater than the Maximum Price calculated pursuant to Section 7.3(d) and that otherwise complies with all the requirements of Section 7.3.

(c) Price for Registry Services. The price for all Registry Services subject to this Paragraph 7.3 shall be the amount, not to exceed the Maximum Price, that Registry Operator charges for each annual increment of a new and renewal domain name registration and for each transfer of a domain name registration from one ICANN-accredited registrar to another.

(d) Maximum Price. The Maximum Price for Registry Services subject to this Paragraph 7.3 shall be as follows:

(i) from the Effective Date through 31 December 2006, US$6.00;

(ii) for each calendar year beginning with 1 January 2007, the smaller of the preceding year's Maximum Price or the highest price charged during the preceding year, multiplied by 1.07; provided, however, that such increases shall only be permitted in four years of any six year term of the Agreement. In any year, however, where a price increase does not occur, Registry Operator shall be entitled to increase the Maximum Price by an amount sufficient to cover any additional incremental costs incurred during the term of the Agreement due to the imposition of any new Consensus Policy or documented extraordinary expense resulting from an attack or threat of attack on the Security or Stability of the DNS, not to exceed the smaller of the preceding year's Maximum Price or the highest price charged during the preceding year, multiplied by 1.07.

(e) No price discrimination. Registry Operator shall charge the same price for Registry Services subject to this Section 7.3, not to exceed the Maximum Price, to all ICANN-accredited registrars (provided that volume discounts and marketing support and incentive programs may be made if the same opportunities to qualify for those discounts and marketing support and incentive programs is available to all ICANN-accredited registrars).

(f) Adjustments to Pricing for Domain Name Registrations. Registry Operator shall provide no less than six months prior notice in advance of any increase for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another and shall continue to offer for periods of up to ten years new and renewal domain name registrations fixed at the price in effect at the time such offer is accepted. Registry Operator is not required to give notice of the imposition of the Variable Registry-Level Fee set forth in Section 7.2(c).

(g) Maximum Price does not include ICANN Variable Registry-Level Fee. The Maximum Price does not include, and shall not be calculated from a price that includes, all or any part of the ICANN Variable Registry-Level Fee set forth in Section 7.2(c), above, or any other per-name fee for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another.

ARTICLE VIII Miscellaneous

Section 8.1 No Offset. All payments due under this Agreement shall be made in a timely manner throughout the term of this Agreement and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

Section 8.2 Use of ICANN Name and Logo. ICANN grants to Registry Operator a non-exclusive royalty-free license to state that it is designated by ICANN as the Registry Operator for the Registry TLD and to use a logo specified by ICANN to signify that Registry Operator is an ICANN-designated registry authority. This license may not be assigned or sublicensed by Registry Operator.

Section 8.3 Assignment and Subcontracting. Any assignment of this Agreement shall be effective only upon written agreement by the assignee with the other party to assume the assigning party's obligations under this Agreement. Moreover, neither party may assign this Agreement without the prior written approval of the other party. Notwithstanding the foregoing, ICANN may assign this Agreement

(i) in conjunction with a reorganization or re-incorporation of ICANN, to another nonprofit corporation organized for the same or substantially the same purposes, or (ii) as may be required pursuant to the terms of that certain Memorandum of Understanding between ICANN and the U.S. Department of Commerce, as the same may be amended from time to time. Registry Operator must provide notice to ICANN of any subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder. Any subcontracting of technical operations shall provide that the subcontracted entity become party to the data escrow agreement mandated by Section 3.1(c)(i) hereof.

Section 8.4 Amendments and Waivers. No amendment, supplement, or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided.

Section 8.5 No Third-Party Beneficiaries. This Agreement shall not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

Section 8.6 Notices, Designations, and Specifications. All notices to be given under or in relation to this Agreement shall be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. Any change in the contact information for notice below shall be given by the party within 30 days of such change. Any notice required by this Agreement shall be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server. Whenever this Agreement shall specify a URL address for certain information, Registry Operator shall be deemed to have been given notice of any such information when electronically posted at the designated URL. In the event other means of notice shall become practically achievable, such as notice via a secure website, the parties shall work together to implement such notice means under this Agreement.

If to ICANN, addressed to:

Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina Del Rey, California 90292
Telephone: 1-310-823-9358
Facsimile: 1-310-823-8649
Attention: President and CEO
With a Required Copy to: General Counsel
Email: (As specified from time to time.)

If to Registry Operator, addressed to:

VeriSign, Inc.
21355 Ridgetop Circle
Dulles, VA 20166
Telephone: 1-703-948-4463

Facsimile: 1-703-450-7326
Attention: VP, Associate General Counsel, VNDS
With a Required Copy to: General Counsel
Email: (As specified from time to time.)

Section 8.7 Language. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

Section 8.8 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Section 8.9 Entire Agreement. This Agreement (including its Appendices, which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject. In the event of a conflict between the provisions in the body of this Agreement and any provision in its Appendices, the provisions in the body of the Agreement shall control.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By:_____
Paul Twomey
President and CEO

Date: 1 March 2006

VeriSign, Inc.

By:_____
Stratton Sclavos
President and CEO, VeriSign, Inc.

Date: 1 March 2006

EX. RE-4

Final Report - Introduction of New Generic Top-Level Domains

Last Updated: 01 May 2018

Date:
08 August 2007

ICANN Generic Names Supporting Organisation

Final Report

Introduction of New Generic Top-Level Domains

8 August 2007

Part A: Final Report

Introduction of New Generic Top-Level Domains

FINAL REPORT: PART B

ABSTRACT

This is the Generic Names Supporting Organization's Final Report on the Introduction of New Top-Level Domains. The Report is in two parts. Part A contains the substantive discussion of the Principles, Policy Recommendations and Implementation Guidelines and Part B contains a range of supplementary materials that have been used by the Committee during the course of the Policy Development Process.

The GNSO Committee on New Top-Level Domains consisted of all GNSO Council members. All meetings were open to a wide range of interested stakeholders and observers. A set of participation data is found in Part B.

Many of the terms found here have specific meaning within the context of ICANN and new top-level domains discussion. A full glossary of terms is available in the Reference Material section at the end of Part A.

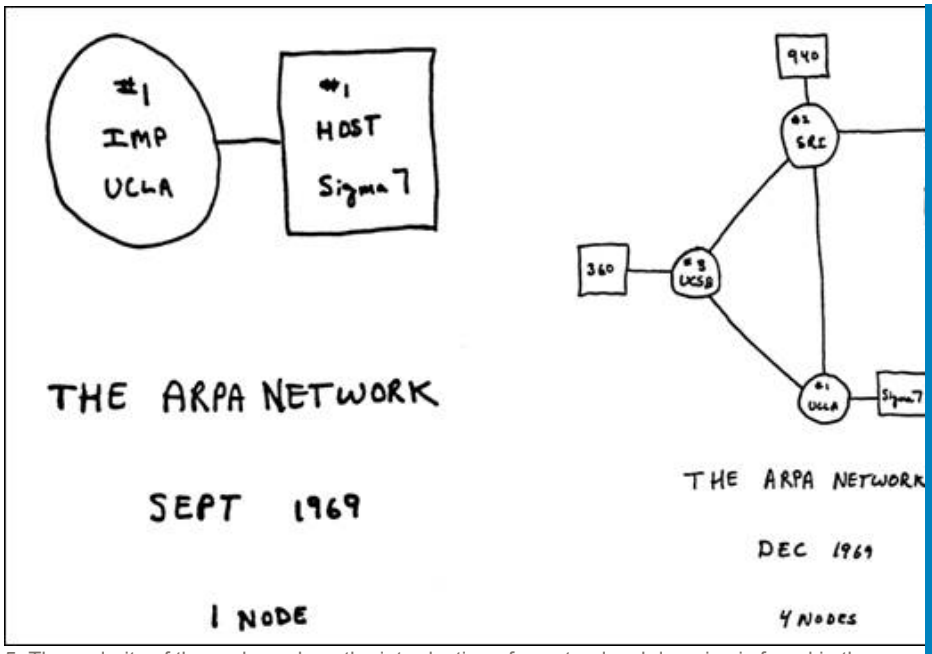
BACKGROUND

1. The Internet Corporation for Assigned Names and Numbers (ICANN) is respons ble for the overall coordination of "the global Internet's system of unique identifiers" and ensuring the "stable and secure operation of the Internet's unique identifier systems. In particular, ICANN coordinates the "allocation and assignment of the three sets of unique identifiers for the Internet". These are "domain names"(forming a system called the DNS); Internet protocol (IP) addresses and autonomous system (AS) numbers and Protocol port and parameter numbers". ICANN is also responsible for the "operation and evolution of the DNS root name server system and policy development reasonably and appropriately related to these technical functions". These elements are all contained in ICANN's Mission and Core Values[1] in addition to provisions which enable policy development work that, once approved by the ICANN Board, become binding on the organization. The results of the policy development process found here relate to the introduction of new generic top-level domains.

2. This document is the *Final Report* of the Generic Names Supporting Organisation's (GNSO) Policy Development Process (PDP) that has been conducted using ICANN's Bylaws and policy development guidelines that relate to the work of the GNSO. This *Report* reflects a comprehensive examination of four Terms of Reference designed to establish a stable and ongoing process that facilitates the introduction of new top-level domains. The policy development process (PDP) is part of the Generic Names Supporting Organisation's (GNSO) mandate within the ICANN structure. However, close consultation with other ICANN Supporting Organisations and Advisory Committees has been an integral part of the process. The consultations and negotiations have also included a wide range of interested stakeholders from within and outside the ICANN community[2].

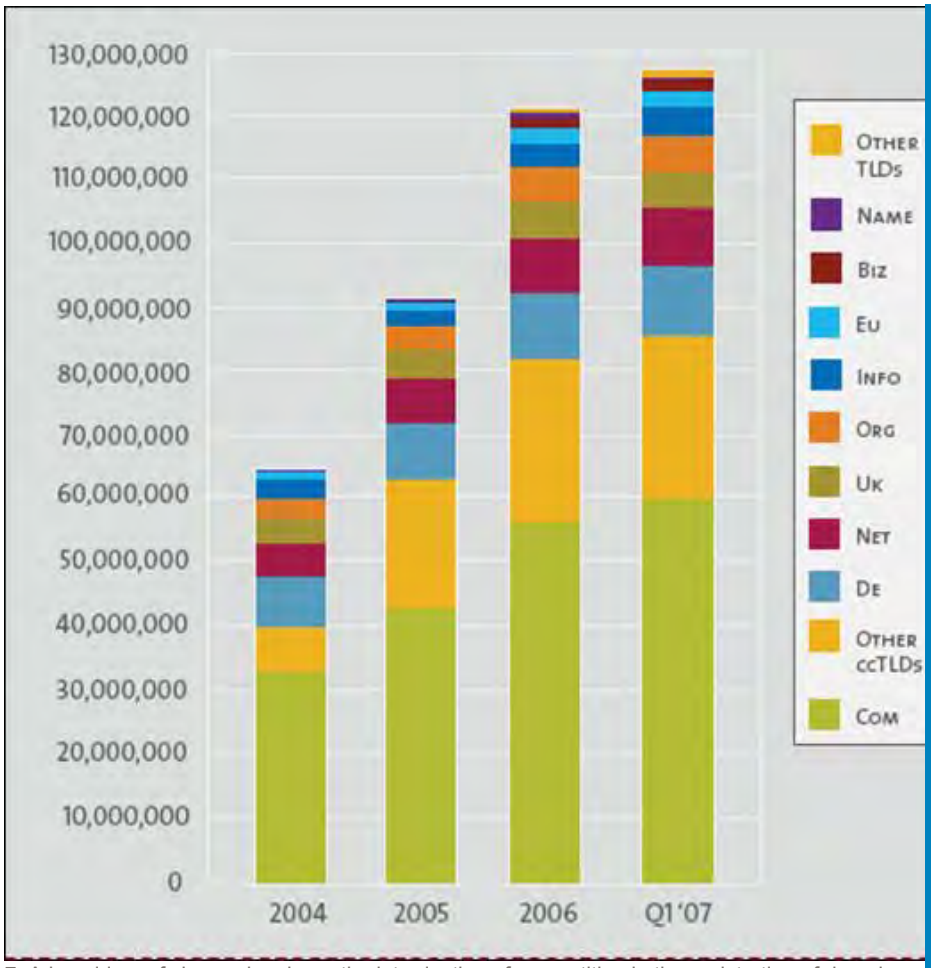
3. The *Final Report* is in two parts. This document is Part A and contains the full explanation of each of the Principles, Recommendations and Implementation Guidelines that the Committee has developed since December 2005[3]. Part B of the *Report* contains a wide range of supplementary materials which have been used in the policy development process including Constituency Impact Statements (CIS), a series of Working Group Reports on important sub-elements of the Committee's deliberations, a collection of external reference materials, and the procedural documentation of the policy development process[4].

4. The finalisation of the policy for the introduction of new top-level domains is part of a long series of events that have dramatically changed the nature of the Internet. The 1969 ARPANET diagram shows the initial design of a network that is now global in its reach and an integral part of many lives and businesses. The policy recommendations found here illustrate the complexity of the Internet of 2007 and, as a package, propose a system to add new top-level domains in an orderly and transparent way. The ICANN Staff Implementation Team, consisting of policy, operational and legal staff members, has worked closely with the Committee on all aspects of the policy development process[5]. The ICANN Board has received regular information and updates about the process and the substantive results of the Committee's work.



5. The majority of the early work on the introduction of new top-level domains is found in the IETF's Request for Comment series. RFC 1034[6] is a fundamental resource that explains key concepts of the naming system. Read in conjunction with RFC920[7], an historical picture emerges of how and why the domain name system hierarchy has been organised. Postel & Reynolds set out in their RFC920 introduction about the "General Purpose Domains" that ..."While the initial domain name "ARPA" arises from the history of the development of this system and environment, in the future most of the top level names will be very general categories l ke "government", "education", or "commercial". The motivation is to provide an organization name that is free of undesirable semantics."

6. In 2007, the Internet is multi-dimensional and its development is driven by widespread access to inexpensive communications technologies in many parts of the world. In addition, global travel is now relatively inexpensive, efficient and readily available to a diverse range of travellers. As a consequence, citizens no longer automatically associate themselves with countries but with international communities of linguistic, cultural or professional interests independent of physical location. Many people now exercise multiple citizenship rights, speak many different languages and quite often live far from where they were born or educated. The 2007 OECD *Factbook*[8] provides comprehensive statistics about the impact of migration on OECD member countries. In essence, many populations are fluid and changing due in part to easing labour movement restrictions but also because technology enables workers to live in one place and work in another relatively easily. As a result, companies and organizations are now global and operate across many geographic borders and jurisdictions. The following illustration[9] shows how rapidly the number of domain names under registration has increased and one could expect that trend to continue with the introduction of new top-level domains.



7. A key driver of change has been the introduction of competition in the registration of domain names through ICANN Accredited Registrars[10]. In June 2007, there were more than 800 accredited registrars who register names for end users with ongoing downward pressure on the prices end-users pay for domain name registration.

8. ICANN's work on the introduction of new top-level domains has been underway since 1999. By mid-1999, Working Group C[11] had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.

9. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel[12].

10. The July 2007 zone file survey statistics from www.registrarstats.com[13] shows that there are slightly more than 96,000,000 top level domains registered across a selection of seven top-level domains including .com, .net and .info. Evidence from potential new applicants provides more impetus to implement a system that enables the ongoing introduction of new top level domains[14]. In addition, interest from Internet users who could use Internationalised Domain Names (IDNs) in a wide variety of scripts beyond ASCII is growing rapidly.

11. To arrive at the full set of policy recommendations which are found here, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[15], and which was augmented by a full set of GNSO Constituency Statements[16]. These are all found in Part B of the *Final Report* and should be read in conjunction with this document. In addition, the Committee received detailed responses from

the Implementation Team about proposed policy recommendations and the implementation of the recommendations package as an on-line application process that could be used by a wide array of potential applicants.

12. The Committee reviewed and analysed a wide variety of materials including Working Group C's findings, the evaluation reports from the 2003 & 2004 round of sponsored top-level domains and a full range of other historic materials[17].

13. In the past, a number of different approaches to new top level domains have been considered including the formulation of a structured taxonomy[18] of names, for example, .auto, .books, .travel and .music. The Committee has opted to enable potential applicants to self-select strings that are either the most appropriate for their customers or potentially the most marketable. It is expected that applicants will apply for targeted community strings such as .travel for the travel industry and .cat for the Catalan community as well as some generic strings. The Committee identified five key drivers for the introduction of new top-level domains.

(i) It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated

(ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds

(iii) Expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.

(iv) There is demand for additional top-level domains as a business opportunity. The GNSO Committee expects that this business opportunity will stimulate competition at the registry service level which is consistent with ICANN's Core Value 6.

(v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

14. The remainder of this Report is structured around the four *Terms of Reference.* This includes an explanation of the Principles that have guided the work taking into account the Governmental Advisory Committee's March 2007 *Public Policy Principles for New gTLDs*[19]; a comprehensive set of Recommendations which has majority Committee support and a set of Implementation Guidelines which has been discussed in great detail with the ICANN Staff Implementation Team. The Implementation Team has released two *ICANN Staff Discussion Points* documents (in November 2006 and June 2007). Version 2 provides detailed analysis of the proposed recommendations from an implementation standpoint and provides suggestions about the way in which the implementation plan may come together. The ICANN Board will make the final decision about the actual structure of the application and evaluation process.

15. In each of the sections below the Committee's recommendations are discussed in more detail with an explanation of the rationale for the decisions. The recommendations have been the subject of numerous public comment periods and intensive discussion across a range of stakeholders including ICANN's GNSO Constituencies, ICANN Supporting Organisations and Advisory Committees and members of the broader Internet-using public that is interested in ICANN's work[20]. In particular, detailed work has been conducted through the Internationalised Domain Names Working Group (IDN-WG)[21], the Reserved Names Working Group (RN-WG)[22] and the Protecting the Rights of Others Working Group (PRO-WG) [23]. The Working Group Reports are found in full in Part B of the *Final Report* along with the March 2007 GAC Public Policy Principles for New Top-Level Domains, Constituency Impact Statements. A minority statement from the NCUC about Recommendations 6 & 20 are found Annexes for this document along with individual comments from Nominating Committee

appointee Ms Avri Doria.

SUMMARY -- PRINCIPLES, RECOMMENDATIONS & IMPLEMENTATION GUIDELINES

1. This section sets out, in table form, the set of Principles, proposed Policy Recommendations and Guidelines that the Committee has derived through its work. The addition of new gTLDs will be done in accordance with ICANN's primary mission which is to ensure the security and stability of the DNS and, in particular, the Internet's root server system[24].

2. The Principles are a combination of GNSO Committee priorities, ICANN staff implementation principles developed in tandem with the Committee and the March 2007 GAC Public Policy Principles on New Top-Level Domains. The Principles are supported by all GNSO Constituencies.[25]

3. ICANN's Mission and Core Values were key reference points for the development of the Committee's Principles, Recommendations and Implementation Guidelines. These are referenced in the right-hand column of the tables below.

4. The Principles have support from all GNSO Constituencies.

	PRINCIPLES	MISSION & CORE VALUES
A	**New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.**	**M1 & CV1 & 2, 4-10**
B	Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.	M1-3 & CV 1, 4 & 6
C	The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.	M3 & CV 4-10
D	A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.	M1-3 & CV 1
E	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN's registry agreement.	M1-3 & CV 1
F	**A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.**	**M1-3 & CV 1**
G	**The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.**	

	RECOMMENDATIONS[26]	MISSION &

		CORE VALUES
1	**ICANN must implement a process that allows the introduction of new top-level domains.** **The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.** **All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the** selection process.	**M1-3 & CV1-11**
2	Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.	M1-3 & C1-6-11
3	Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).	CV3
4	Strings must not cause any technical instability.	M1-3 & CV 1
5	Strings must not be a Reserved Word[27].	M1-3 & CV 1 & 3
6*	**Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.** **Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).**	**M3 & CV 4**
7	**Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.**	**M1-3 & CV1**
8	Applicants must be able to demonstrate their financial and organisational operational capability.	M1-3 & CV1
9		

	There must be a clear and pre-published application process using objective and measurable criteria.	**M3 & CV6-9**
10	**There must be a base contract provided to applicants at the beginning of the application process.**	**CV7-9**
11	**[Replaced with Recommendation 20 and Implementation Guideline P and inserted into Term of Reference 3 Allocation Methods section]**	
12	**Dispute resolution and challenge processes must be established prior to the start of the process.**	**CV7-9**
13	Applications must initially be assessed in rounds until the scale of demand is clear.	**CV7-9**
14	The initial registry agreement term must be of a commercially reasonable length.	**CV5-9**
15	**There must be renewal expectancy.**	**CV5-9**
16	**Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.**	**CV5-9**
17	**A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.**	**M1 & CV1**
18	If an applicant offers an IDN service, then ICANN's IDN guidelines[28] must be followed.	M1 & CV1
19	Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.	M1 & CV1
20*	An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.	

* The NCUC submitted Minority Statements on Recommendations 6 and 20. The remainder of the Recommendations have support from all GNSO Constituencies.

	IMPLEMENTATION GUIDELINES	**MISSION & CORE VALUES**
IG A	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.	CV 2, 5, 6, 8 & 9
IG B	Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants.	CV 5, 6, 8 & 9
IG C	ICANN will provide frequent communications with applicants	CV 9 &

	and the public including comment forums.	10
IG D	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.	CV 8-10
IG E	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.	CV 9 & 10
IG F*	**If there is contention for strings, applicants may[29]:** **i) resolve contention between them within a pre-established timeframe** **ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;** **iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.**	CV 7-10
IG H*	Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions: (i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and (ii) a formal objection process is initiated. Under these exceptions, Staff Evaluators will devise criteria and procedures to investigate the claim. Under exception (ii), an expert panel will apply the process, guidelines, and definitions set forth in IG P.	CV 7 - 10
IG H	External dispute providers will give decisions on objections.	CV 10
IG I	An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.	CV 10
IG J	The base contract should balance market certainty and flex bility for ICANN to accommodate a rapidly changing market place.	CV 4-10
IG K	ICANN should take a consistent approach to the establishment of registry fees.	CV 5

IG L	The use of personal data must be limited to the purpose for which it is collected.	CV 8
IG M	ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way that no longer requires all participants in the conversation to be able to read and write English[30].	CV 3 - 7
IG N	ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.	CV 3 - 7
IG O	ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.	CV 8 -10
IG P*	The following process, definitions and guidelines refer to Recommendation 20. **Process** Opposition must be objection based. Determination will be made by a dispute resolution panel constituted for the purpose. The objector must provide verifiable evidence that it is an established institution of the community (perhaps I ke the RSTEP pool of panelists from which a small panel would be constituted for each objection). **Guidelines** The task of the panel is the determination of substantial opposition. a) **substantial** – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment b) **significant portion** – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.	

	c) **community** – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted. d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application. e) **implicitly targeting** – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use. f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years. Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community. The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO. g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar. **h) detriment** – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.	
IG Q	ICANN staff will provide an automatic reply to all those who submit public comments that will explain the objection procedure.	
IG R	Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.	

* The NCUC submitted Minority Statements on Implementation Guidelines F, H & P. The remainder of the Implementation Guidelines have support from all GNSO Constituencies.

1. This set of implementation guidelines is the result of detailed discussion, particularly with respect to the two *ICANN Staff Discussion Points*[31] documents that were prepared to facilitate consultation with the GNSO Committee about the implementation impacts of the proposed policy Recommendations. The Implementation Guidelines will be used to inform the final Implementation Plan which is approved by the ICANN Board

2. The *Discussion Points* documents contain draft flowcharts which have been developed by the Implementation Team and which will be updated, based on the final vote of the GNSO Council and the direction of the ICANN Board. The *Discussion Points* documents have been used in the ongoing internal implementation discussions that have focused on ensuring that draft recommendations proposed by the Committee are implementable in an efficient and transparent manner[32]. The flowchart setting out the proposed Contention Evaluation Process is a more detailed component within the Application Evaluation Process and will be amended to take into account the inputs from Recommendation 20 and its related Implementation Guidelines.

3. This policy development process has been designed to produce a systemised and ongoing mechanism for applicants to propose new top-level domains. The Request for Proposals (RFP) for the first round will include scheduling information for the subsequent rounds to occur within one year. After the first round of new applications, the application system will be evaluated by ICANN's TLDs Project Office to assess the effectiveness of the application system. Success metrics will be developed and any necessary adjustments made to the process for subsequent rounds.

4. The following sections set out in detail the explanation for the Committee's recommendations for each Term of Reference.

TERM OF REFERENCE ONE -- WHETHER TO INTRODUCE NEW TOP-LEVEL DOMAINS

1. **Recommendation 1 Discussion – All GNSO Constituencies supported the introduction of new top-level domains.**

2. The GNSO Committee was asked to address the question of whether to introduce new top-level domains. The Committee recommends that ICANN should implement a process that allows the introduction of new top level domains and that work should proceed to develop policies that will enable the introduction of new generic top-level domains, taking into account the recommendations found in the latter sections of the *Report* concerning Selection Criteria (Term of Reference 2), Allocation Methods (Term of Reference 3) and Policies for Contractual Conditions (Term of Reference 4).

3. ICANN's work on the introduction of new top-level domains has been ongoing since 1999. The early work included the 2000 Working Group C Report[33] that also asked the question of "whether there should be new TLDs". By mid-1999, the Working Group had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.

4. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel.

5. In addressing Term of Reference One, the Committee arrived at its recommendation by reviewing and analysing a wide variety of materials including Working Group C's findings; the evaluation reports from the 2003-2004 round of sponsored top-level domains and full range of other historic materials which are posted at http://gnso.icann.org/issues/new-

gtlds//

6. In addition, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[34]. These papers augmented a full set of GNSO Constituency Statements[35] and a set of Constituency Impact Statements[36] that addressed specific elements of the Principles, Recommendations and Implementation Guidelines.

7. The Committee was asked, at its February 2007 Los Angeles meeting, to confirm its rationale for recommending that ICANN introduce new top-level domains. In summary, there are five threads which have emerged:

(i) It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated

(ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds

(iii) It is hoped that expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.

(iv) In addition, the introduction of a new top-level domain application process has the potential to promote competition in the provision of registry services, and to add to consumer choice, market differentiation and geographic and service-provider diversity which is consistent with ICANN's Core Value 6.

(v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

8. Article X, Part 7, Section E of the GNSO's Policy Development Process requires the submission of "constituency impact statements" which reflect the potential implementation impact of policy recommendations. By 4 July 2007 all GNSO Constituencies had submitted Constituency Impact Statements (CIS) to the gtld-council mailing list[37]. Each of those statements is referred to throughout the next sections[38] and are found in full in Part B of the *Report*. The NCUC submitted Minority Statements on Recommendations 6 & 20 and on Implementation Guidelines F, H & P. These statements are found in full here in Annex A & C, respectively, as they relate specifically to the finalised text of those two recommendations. GNSO Committee Chair and Nominating Committee appointee Ms Avri Doria also submitted individual comments on the recommendation package. Her comments are found in Annex B here.

9. All Constituencies support the introduction of new TLDs particularly if the application process is transparent and objective. For example, the ISPCP said that, "...the ISPCP is highly supportive of the principles defined in this section, especially with regards to the statement in [principle A] (A): New generic top-level domains must be introduced in an orderly, timely and predictable way. Network operators and ISPs must ensure their customers do not encounter problems in addressing their emails, and in their web searching and access activities, since this can cause customer dissatisfaction and overload help-desk complaints. Hence this principle is a vital component of any addition sequence to the gTLD namespace. The various criteria as defined in D, E and F, are also of great importance in contributing to minimise the risk of moving forward with any new gTLDs, and our constituency urges ICANN to ensure they are scrupulously observed during the applications evaluation process". The Business Constituency's (BC) CIS said that "...If the outcome is the best possible there will be a beneficial impact on business users from: a reduction in the competitive concentration in the Registry sector; increased

choice of domain names; lower fees for registration and ownership; increased opportunities for innovative on-line business models." The Registrar Constituency (RC) agreed with this view stating that "...new gTLDs present an opportunity to Registrars in the form of additional products and associated services to offer to its customers. However, that opportunity comes with the costs if implementing the new gTLDs as well as the efforts required to do the appropriate business analysis to determine which of the new gTLDs are appropriate for its particular business model."

10. The Registry Constituency (RyC) said that "...Regarding increased competition, the RyC has consistently supported the introduction of new gTLDs because we believe that: there is a clear demand for new TLDs; competition creates more choices for potential registrants; introducing new TLDs with different purposes increases the public benefit; new gTLDS will result in creativity and differentiation in the domain name industry; the total market for all TLDs, new and old, will be expanded." In summary, the Committee recommended, "ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process". Given that this recommendation has support from all Constituencies, the following sections set out the other Terms of Reference recommendations.

TERM OF REFERENCE -- SELECTION CRITERIA

1. **Recommendation 2 Discussion -- Strings must not be confusingly similar to an existing top-level domain.**

   i) This recommendation has support from all the GNSO Constituencies. Ms Doria accepted the recommendation with the concern expressed below[39].

   ii) The list of existing top-level domains is maintained by IANA and is listed in full on ICANN's website[40]. Naturally, as the application process enables the operation of new top-level domains this list will get much longer and the test more complex. The RyC, in its Impact Statement, said that "...This recommendation is especially important to the RyC. ... It is of prime concern for the RyC that the introduction of new gTLDs results in a ubiquitous experience for Internet users that minimizes user confusion. gTLD registries will be impacted operationally and financially if new gTLDs are introduced that create confusion with currently existing gTLD strings or with strings that are introduced in the future. There is a strong possibility of significant impact on gTLD registries if IDN versions of existing ASCII gTLDs are introduced by registries different than the ASCII gTLD registries. Not only could there be user confusion in both email and web applications, but dispute resolution processes could be greatly complicated." The ISPCP also stated that this recommendation was "especially important in the avoidance of any negative impact on network activities." The RC stated that "...Registrars would likely be hesitant to offer confusingly similar gTLDs due to customer demand and support concerns. On the other hand, applying the concept too broadly would inh bit gTLD applicants and ultimately limit choice to Registrars and their customers".

   iii) There are two other key concepts within this recommendation. The first is the issue of "confusingly similar" [41] and the second "likelihood of confusion". There is extensive experience within the Committee with respect to trademark law and the issues found below have been discussed at length, both within the Committee and amongst the Implementation Team.

   iv) The Committee used a wide variety of existing law[42], international treaty agreements and covenants to arrive at a common understanding that strings

should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademarks[43]. For example, the Committee considered the World Trade Organisation's TRIPS agreement, in particular Article 16 which discusses the rights which are conferred to a trademark owner.[44] In particular, the Committee agreed upon an expectation that strings must avoid increasing opportunities for entities or individuals, who operate in bad faith and who wish to defraud consumers. The Committee also considered the Universal Declaration of Human Rights[45] and the International Covenant on Civil and Political Rights which address the "freedom of expression" element of the Committee's deliberations.

v) The Committee also benefited from the work of the Protecting the Rights of Others Working Group (PRO-WG). The PRO-WG presented its *Final Report*[46] to the Committee at the June 2007 San Juan meeting. The Committee agreed that the Working Group could develop some reference implementation guidelines on rights protection mechanisms that may inform potential new TLD applicants during the application process. A small ad-hoc group of interested volunteers are preparing those materials for consideration by the Council by mid-October 2007.

vi) The Committee had access to a wide range of differing approaches to rights holder protection mechanisms including the United Kingdom, the USA, Jordan, Egypt and Australia[47].

vii) In addition, the Committee referred to the 1883 *Paris Convention on the Protection of Industrial Property*[48]. It describes the notion of confusion and describes creating confusion as "to create confusion by any means whatever" {Article 10bis (3) (1} and, further, being "liable to mislead the public" {Article 10bis (3) (3)}. The treatment of confusingly similar is also contained in European Union law (currently covering twenty-seven countries) and is structured as follows. "...because of its identity with or similarity to...there exists a l kelihood of confusion on the part of the public...; the likelihood of confusion includes the likelihood of association..." {Article 4 (1) (b) of the 1988 EU Trade Mark directive 89/104/EEC}. Article 8 (1) (b) of the 1993 European Union Trade Mark regulation 40/94 is also relevant.

viii)In the United States, existing trade mark law requires applicants for trademark registration to state under penalty of perjury that "...to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive..." which is contained in Section 1051 (3) (d) of the US Trademark Act 2005 (found at http://www.bitlaw.com/source/15usc/1051.html.)[49]

ix) In Australia, the Australian Trade Marks Act 1995 Section 10 says that "...For the purposes of this Act, a trade mark is taken to be deceptively similar to another trade mark if it so nearly resembles that other trade mark that it is likely to deceive or cause confusion" (found at http://www.ipaustralia.gov.au/resources/legislation_index.shtml)

x) A number of different trademark offices provide guidance on how to interpret confusion. For example, the European Union Trade Mark Office provides guidance on how to interpret confusion. *"...confusion may be visual, phonetic or conceptual. A mere aural similarity may create a likelihood of confusion. A mere visual similarity may create a likelihood of confusion. Confusion is based on the fact that the relevant public does not tend to analyse a word in detail but pays more attention to the distinctive and dominant components. Similarities are more significant than dissimilarities. The visual comparison is based on an analysis of the number and sequence of the letters, the number of words and the structure*

of the signs. Further particularities may be of relevance, such as the existence of special letters or accents that may be perceived as an indication of a specific language. For words, the visual comparison coincides with the phonetic comparison unless in the relevant language the word is not pronounced as it is written. It should be assumed that the relevant public is either unfamiliar with that foreign language, or even if it understands the meaning in that foreign language, will still tend to pronounce it in accordance with the phonetic rules of their native language. The length of a name may influence the effect of differences. The shorter a name, the more easily the public is able to perceive all its single elements. Thus, small differences may frequently lead in short words to a different overall impression. In contrast, the public is less aware of differences between long names. The overall phonetic impression is particularly influenced by the number and sequence of syllables." (found at http://oami.europa.eu/en/mark/marque/direc.htm).

xi) An extract from the United Kingdom's Trade Mark Office's Examiner's Guidance Manual is useful in explaining further the Committee's approach to developing its Recommendation. *"For likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average consumer. Likelihood of association is not an alternative to likelihood of confusion, "but serves to define its scope". Mere association, in the sense that the later mark brings the earlier mark to mind is insufficient to find a likelihood of confusion, unless the average consumer, in bringing the earlier mark to mind, is led to expect the goods or services of both marks to be under the control of one single trade source. "The risk that the public might believe that the goods/services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion...".* (found at http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm)

xii) The Committee also looked in detail at the existing provisions of ICANN's Registrar Accreditation Agreement, particularly Section 3.7.7.9[50] which says that "...The Registered Name Holder shall represent that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party."

xiii)The implications of the introduction of Internationalised Domain Names (IDNs) are, in the main, the same as for ASCII top-level domains. On 22 March 2007 the IDN-WG released its *Outcomes Report*[51] that the Working Group presented to the GNSO Committee. The Working Group's exploration of IDN-specific issues confirmed that the new TLD recommendations are valid for IDN TLDs. The full IDN WG Report is found in Part B of the *Report*.

xiv) The technical testing for IDNs at the top-level is not yet completed although strong progress is being made. Given this and the other work that is taking place around the introduction of IDNs at the top-level, there are some critical factors that may impede the immediate acceptance of new IDN TLD applications. The conditions under which those applications would be assessed would remain the same as for ASCII TLDs.

xv) Detailed work continues on the preparation of an Implementation Plan that reflects both the Principles and the Recommendations. The proposed Implementation Plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of

users[52].

xvi) The draft Implementation Plan (included in the *Discussion Points* document), illustrates the flow of the application and evaluation process and includes a detailed dispute resolution and extended evaluation tracks designed to resolve objections to applicants or applications.

xvii) There is tension between those on the Committee who are concerned about the protection of existing TLD strings and those concerned with the protection of trademark and other rights as compared to those who wish, as far as possible, to preserve freedom of expression and creativity. The *Implementation Plan* sets out a series of tests to apply the recommendation during the application evaluation process.

2. **Recommendation 3 Discussion -- Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).**

i. This recommendation has support from all GNSO Constituencies. Ms Doria supported the recommendation with concern expressed below[53].

ii. This recommendation was discussed in detail in the lead up to the Committee's 7 June 2007 conference call and it was agreed that further work would be beneficial. That work was conducted through a series of teleconferences and email exchanges. The Committee decided to leave the recommendation text as it had been drafted and insert a new Principle G that reads "...The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."

iii. Prior to this, the Committee engaged in comprehensive discussion about this recommendation and took advice from a number of experts within the group[54]. The original text of the recommendation has been modified to recognise that an applicant would be bound by the laws of the country where they are located and an applicant may be bound by another country that has jurisdiction over them. In addition, the original formulation that included "freedom of speech" was modified to read the more generally applicable "freedom of expression".

iv. Before reaching agreement on the final text, the IPC and the NCUC, in their respective Constituency Impact Statements (CIS), had differing views. The NCUC argued that "...there is no recognition that trade marks (and other legal rights have legal limits and *defenses*." The IPC says "agreed [to the recommendation], and, as stated before, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the IP rights of others."

3. **Recommendation 4 Discussion -- Strings must not cause any technical instability.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. It was agreed by the Committee that the string should not cause any technical issues that threatened the stability and security of the Internet.

iii. In its CIS, the ISPCP stated that "...this is especially important in the avoidance of any negative impact on network activities...The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organizational and operational capability of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of

many other sectors)." The IPC also agreed that "technical and operational stability are imperative to any new gTLD introduction." The RC said "...This is important to Registrars in that unstable registry and/or zone operations would have a serious and costly impact on its operations and customer service and support."

iv. The Security and Stability Advisory Committee (SSAC) has been involved in general discussions about new top level domains and will be consulted formally to confirm that the implementation of the recommendations will not cause any technical instability.

v. A reserved word list, which includes strings which are reserved for technical reasons, has been recommended by the RN-WG. This table is found in the section below.

4. **Recommendation 5 Discussion -- Strings must not be a Reserved Word.**[55]

i. This recommendation is supported by all GNSO Constituencies. Ms Doria supported the recommendation but expressed some concerns outlined in the footnote below.[56]

ii. The RN WG developed a definition of "reserved word" in the context of new TLDs which said "...depending on the specific reserved name category as well as the type (ASCII or IDN), the reserved name requirements recommended may apply in any one or more of the following levels as indicated:

1. At the top level regarding gTLD string restrictions
2. At the second-level as contractual conditions
3. At the third-level as contractual conditions for any new gTLDs that offer domain name registrations at the third-level.

iii. The notion of "reserved words" has a specific meaning within the ICANN context. Each of the existing ICANN registry contracts has provisions within it that govern the use of reserved words. Some of these recommendations will become part of the contractual conditions for new registry operators.

iv. The Reserved Names Working Group (RN-WG) developed a series of recommendations across a broad spectrum of reserved words. The Working Group's *Final Report*[57] was reviewed and the recommendations updated by the Committee at ICANN's Puerto Rico meeting and, with respect to the recommendations relating to IDNs, with IDN experts. The final recommendations are included in the following table.

	Reserved Name Category	Domain Name Level(s)	Recommendation
1	ICANN & IANA	All ASCII	The names listed as ICANN and IANA names will be reserved at all levels.
2	ICANN & IANA	Top level, IDN	Any names that appear in the IDN evaluation facility[58] which consist exclusively of translations of 'example' or 'test' that appear in the document at http://www.icann.org/topics/idn/idn-evaluation-

			plan-v2%209.pdf shall be reserved.
3	ICANN & IANA	2nd & 3rd levels, IDN	Any names that appear in the IDN evaluation facility which consist exclusively of translations of 'example' or 'test' that appear in the document at http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf shall be reserved.
4	Symbols	All	We recommend that the current practice be maintained, so that no symbols other than the '-' [hyphen] be considered for use, with further allowance for any equivalent marks that may explicitly be made available in future revisions of the IDNA protocol.
5	Single and Two Character IDNs	IDNA-valid strings at all levels	Single and two-character U-labels on the top level and second level of a domain name should not be restricted in general. At the top level, requested strings should be analyzed on a case-by-case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be granted for allocation in the DNS with particular caution applied to U-labels in Latin script (see Recommendation 10 below). Single and two character labels at the second level and the third level if applicable should be available for registration, provided they are consistent with the IDN Guidelines.
6	Single Letters	Top Level	We recommend reservation of single letters at the top level based on technical questions raised. If sufficient research at a later date demonstrates that the technical issues and concerns are addressed, the topic of releasing reservation status can be reconsidered.
7	Single Letters and Digits	2nd Level	In future gTLDS we recommend that single letters and single digits be available at the second (and third level if applicable).
8	Single and Two Digits	Top Level	A top-level label must not be a plausible component of an IPv4 or IPv6 address. (e.g., .3, .99, .123, .1035, .0xAF, .1578234)
9	Single Letter, Single Digit Combinations	Top Level	Applications may be considered for single letter, single digit combinations at the top level in accordance with the terms set forth in the new gTLD process. Examples include .3F, .A1, .u7.
10	Two Letters	Top Level	We recommend that the current practice of allowing two letter names at the top level, only for

			ccTLDs, remains at this time.[59] Examples include .AU, .DE, .UK.
11	Any combination of Two Letters, Digits	2nd Level	Registries may propose release provided that measures to avoid confusion with any corresponding country codes are implemented.[60] Examples include ba.aero, ub.cat, 53.com, 3M.com, e8.org.
12	Tagged Names	Top Level ASCII	In the absence of standardization activity and appropriate IANA registration, all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved at the top-level.[61]
13	N/A	Top Level IDN	For each IDN gTLD proposed, applicant must provide both the "ASCII compatible encoding" ("A-label") and the "Unicode display form" ("U-label")[62] For example: • If the Chinese word for 'Beijing' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1lq90i) and the U-label (北京). • If the Japanese word for 'Tokyo' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1lqs71d) and the U-label (東京).
14	Tagged Names	2nd Level ASCII	The current reservation requirement be reworded to say, "*In the absence of standardization activity and appropriate IANA registration,* all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the second (2nd) level.[63] – added words in *italics.* (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
15	Tagged Names	3rd Level ASCII	All labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the third (3rd level) for gTLD registries that register names at the third level."[64] – added words in *italics.* (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
16	NIC, WHOIS, WWW	Top ASCII	The following names must be reserved: nic, whois, www.
17			

	NIC, WHOIS, WWW	Top IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist.
18	NIC, WHOIS, WWW	Second and Third* ASCII	The following names must be reserved for use in connection with the operation of the registry for the Registry TLD: nic, whois, www Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the Registry TLD, they shall be transferred as specified by ICANN. (*Third level only applies in cases where a registry offers registrations at the third level.)
19	NIC, WHOIS, WWW	Second and Third* IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist, except on a case by case basis as proposed by given registries. (*Third level only applies in cases where a registry offers registrations at the third level.)
20	Geographic and geopolitical	Top Level ASCII and IDN	There should be no geographical reserved names (i.e., no exclusionary list, no presumptive right of registration, no separate administrative procedure, etc.). The proposed challenge mechanisms currently being proposed in the draft new gTLD process would allow national or local governments to initiate a challenge, therefore no additional protection mechanisms are needed. Potential applicants for a new TLD need to represent that the use of the proposed string is not in violation of the national laws in which the applicant is incorporated. However, new TLD applicants interested in applying for a TLD that incorporates a country, territory, or place name should be advised of the GAC Principles, and the advisory role vested to it under the ICANN Bylaws. Additionally, a summary overview of the obstacles encountered by previous applicants involving similar TLDs should be provided to allow an applicant to make an informed decision. Potential applicants should also be advised that the failure of the GAC, or an individual GAC member, to file a challenge during the TLD application process, does not constitute a waiver of the authority vested to the GAC under the ICANN Bylaws. *Note New gTLD Recommendation 20*

21	Geographic and geopolitical	All Levels ASCII and IDN	The term 'geopolitical names' should be avoided until such time that a useful definition can be adopted. The basis for this recommendation is founded on the potential ambiguity regarding the definition of the term, and the lack of any specific definition of it in the WIPO Second Report on Domain Names or GAC recommendations. *Note New gTLD Recommendation 20*
22	Geographic and geopolitical	Second Level & Third Level if applicable, ASCII & IDN	The consensus view of the working group is given the lack of any established international law on the subject, conflicting legal opinions, and conflicting recommendations emerging from various governmental fora, the current geographical reservation provision contained in the sTLD contracts during the 2004 Round should be removed, and harmonized with the more recently executed .COM, .NET, .ORG, .BIZ and .INFO registry contracts. The only exception to this consensus recommendation is those registries incorporated/organized under countries that require additional protection for geographical identifiers. In this instance, the registry would have to incorporate appropriate mechanisms to comply with their national/local laws. For those registries incorporated/organized under the laws of those countries that have expressly supported the guidelines of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications as adopted by the WIPO General Assembly, it is strongly recommended (but not mandated) that these registries take appropriate action to promptly implement protections that are in line with these WIPO guidelines and are in accordance with the relevant national laws of the applicable Member State. *Note New gTLD Recommendation 20*
23	gTLD Reserved Names	Second & Third Level ASCII and IDN (when applicable)	Absent justification for user confusion[65], the recommendation is that gTLD strings should no longer be reserved from registration for new gTLDs at the second or when applicable at the third level. Applicants for new gTLDs should take into consideration possible abusive or confusing uses of existing gTLD strings at the second level of their corresponding gTLD, based on the nature of their gTLD, when developing the startup process for their gTLD.

24	Controversial Names	All Levels, ASCII & IDN	There should not be a new reserved names category for Controversial Names.
25	Controversial Names	Top Level, ASCII & IDN	There should be a list of disputed names created as a result of the dispute process to be created by the new gTLD process. *Note New gTLD Recommendation 6*
26	Controversial Names	Top Level, ASCII & IDN	In the event of the initiation of a CN-DRP process, applications for that label will be placed in a HOLD status that would allow for the dispute to be further examined. If the dispute is dismissed or otherwise resolved favorably, the applications will reenter the processing queue. The period of time allowed for dispute should be finite and should be relegated to the CN-DRP process. The external dispute process should be defined to be objective, neutral, and transparent. The outcome of any dispute shall not result in the development of new categories of Reserved Names.[66] *Note New gTLD Recommendation 6*
27	Controversial Names	Top Level, ASCII & IDN	The new GTLD Controversial Names Dispute Resolution Panel should be established as a standing mechanism that is convened at the time a dispute is initiated. Preliminary elements of that process are provided in this report but further work is needed in this area. *Note New gTLD Recommendation 6*
28	Controversial Names	Top Level, ASCII & IDN	Within the dispute process, disputes would be initiated by the ICANN Advisory Committees (e.g, ALAC or GAC) or supporting organizations (e.g, GNSO or ccNSO). As these organizations do not currently have formal processes for receiving, and deciding on such activities, these processes would need to be defined: o The Advisory Groups and the Supporting Organizations, using their own processes and consistent with their organizational structure, will need to define procedures for deciding on any requests for dispute initiation. o Any consensus or other formally supported position from an ICANN Advisory Committee or ICANN Supporting Organization must

			document the position of each member within that committee or organization (i.e., support, opposition, abstention) in compliance with both the spirit and letter of the ICANN bylaws regarding openness and transparency. *Note New gTLD Recommendation 6*
29	Controversial Names	Top Level, ASCII & IDN	Further work is needed to develop predictable and transparent criteria that can be used by the Controversial Resolution Panel. These criteria must take into account the need to: ▪ ▻❒□♦♏♍♦ ➚❒♏♏⏢□❍ □➚ ♏⊠□❒♏♦♦♓□■ ▪ ✌➚➚♓❒❍ ♦♒♏ ➚◆■⏢♋❍♏■♦♋● ♒◆❍♋■ ❒♓♈♒♦♦🖃 ♓■ ♦♒♏ ⏢♓♈■♓♦🖂 ♋■⏢ ♦□❒♦♒ □➚ ♦♒♏ ♒◆❍♋■ □♏❒♦□■ ♋■⏢ ♦♒♏ ♏❑◆♋● ❒♓♈♒♦♦ □➚ ❍♏■ ♋■⏢ ♦□❍♏■ ▪ ❄♋🖒♏ ♓■♦□ ♋♍♍□◆■♦ ♦♏■♦♓♦❖♓♦♓♏♦ ❒♏♈♋❒⏢♓■♈ ♦♏❑❍♦ ♦♓♦♒ ♍◆●♦◆❒♋● ♋■⏢ ❒♏●♓♈♓□◆♦ ♦♓♈■♓➚♓♍♋■♍♏🖒 *Note New gTLD Recommendation 6*
30	Controversial Names	Top Level, ASCII & IDN	In any dispute resolution process, or sequence of issue resolution processes, the Controversial name category should be the last category considered. *Note New gTLD Recommendation 6*

v. With respect to geographic terms, the NCUC's CIS stated that "...We oppose any attempts to create lists of reserved names. Even examples are to be avoided as they can only become prescriptive. We are concerned that geographic names should not be fenced off from the commons of language and rather should be free for the use of all...Moreover, the proposed recommendation does not make allowance for the duplication of geographic names outside the ccTLDs – where the real issues arise and the means of resolving competing use and fair and nominative use."

vi. The GAC's Public Policy Principle 2.2 states that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant government or public authorities."

vii. The Implementation Team has developed some suggestions about how this recommendation may be implemented. Those suggestions and the process flow

were incorporated into the Version 2 of the ICANN Staff *Discussion Points* document for consideration by the Committee.

5. **Recommendation 6 Discussion -- Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.**
Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention of the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

i. This Recommendation is supported by all GNSO Constituencies except the NCUC. The NCUC has submitted a Minority Statement which is found in full in Annex A. The NCUC's earlier Constituency Impact Statement is found, along with all the GNSO Constituency Impact Statements, in Part B of this report. Ms Doria has submitted individual comments[67]. The Committee has discussed this recommendation in great detail and has attempted to address the experiences of the 2003-2004 sTLD round and the complex issues surrounding the .xxx application. The Committee has also recognised the GAC's Public Policy Principles, most notably Principle 2.1 a) and b) which refer to both freedom of expression and terms with significance in a variety of contexts. In addition, the Committee recognises the tension respecting freedom of expression and being sensitive to the legitimate concerns others have about offensive terms. The NCUC's earlier CIS says "...we oppose any string criteria based on morality and public order".

ii. Other Constituencies did not address this recommendation in their CISs. The Implementation Team has tried to balance these views by establishing an Implementation Plan that recognises the practical effect of opening a new top-level domain application system that will attract applications that some members of the community do not agree with. Whilst ICANN does have a technical co-ordination remit, it must also put in place a system of handling objections to strings or to applicants, using pre-published criteria, that is fair and predictable for applicants. It is also necessary to develop guidance for independent evaluators tasked with making decisions about objections.

iii. In its consideration of public policy aspects of new top-level domains the Committee examined the approach taken in a wide variety of jurisdictions to issues of morality and public order. This was done not to make decisions about acceptable strings but to provide a series of potential tests for independent evaluators to use should an objection be raised to an application. The use of the phrase "morality and public order" within the recommendation was done to set some guidelines for potential applicants about areas that may raise objections. The phrasing was also intended to set parameters for potential objectors so that any objection to an application could be analysed within the framework of broadly accepted legal norms that independent evaluators could use across a broad spectrum of poss ble objections. The Committee also sought to ensure that the objections process would have parameters set for who could object. Those suggested parameters are found within the Implementation Guidelines.

iv. In reaching its decision about the recommendation, the Committee sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union

Trade Mark Regulation 40/94. In addition, the phrasing "contrary to morality or public order and in particular of such a nature as to deceive the public" comes from Article 6quinques (B)(3) of the 1883 *Paris Convention*. The reference to the *Paris Convention* remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.

v. The concept of "morality" is captured in Article 19 United Nations Convention on Human Rights (http://www.unhchr.ch/udhr/lang/eng.htm) says "...Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 29 continues by saying that "...In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

vi. The EU Trade Mark Office's Examiner's guidelines provides assistance on how to interpret morality and deceit. "...Contrary to morality or public order. Words or images which are offensive, such as swear words or racially derogatory images, or which are blasphemous are not acceptable. There is a dividing line between this and words which might be considered in poor taste. The latter do not offend against this provision." The further element is deception of the public which is treated in the following way. "...Deceive the public. To deceive the public, is for instance as to the nature, quality or geographical origin. For example, a word may give rise to a real expectation of a particular locality which is untrue." For more information, see Sections 8.7 and 8.8 at http://oami.europa.eu/en/mark/marque/direc.htm

vii. The UK Trade Mark office provides similar guidance in its Examiner's Guidance Manual. "Marks which offend fall broadly into three types: those with criminal connotations, those with religious connotations and explicit/taboo signs. Marks offending public policy are likely to offend accepted principles of morality, e.g. illegal drug terminology, although the question of public policy may not arise against marks offending accepted principles of morality, for example, taboo swear words. If a mark is merely distasteful, an objection is unlikely to be justified, whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. Offence may be caused on matters of race, sex, religious belief or general matters of taste and decency. Care should be taken when words have a religious significance and which may provoke greater offence than mere distaste, or even outrage, if used to parody a religion or its values. Where a sign has a very sacred status to members of a religion, mere use may be enough to cause outrage." For more information, see http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm)

viii. This recommendation has been the subject of detailed Committee and small group work in an attempt to reach consensus about both the text of the recommendation and the examples included as guidance about generally accepted legal norms. The work has been informed by detailed discussion within the GAC and through interactions between the GNSO Committee and the GAC.

6. **Recommendation 7 Discussion -- Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. The Committee agreed that the technical requirements for applicants would include compliance with a minimum set of technical standards and that this requirement would be part of the new registry operator's contractual conditions included in the proposed base contract. The more detailed discussion about technical requirements has been moved to the contractual conditions section.

iii. Reference was made to numerous Requests for Comment (RFCs) and other technical standards which apply to existing registry operators. For example, Appendix 7 of the June 2005 .net agreement[68] provides a comprehensive listing of technical requirements in addition to other technical specifications in other parts of the agreement. These requirements are consistent with that which is expected of all current registry operators. These standards would form the basis of any new top-level domain operator requirements.

iv. This recommendation is referred to in two CISs. "The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organisational and operational capabilities of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The NCUC submitted "...we record that this must be limited to transparent, predictable and minimum technical requirements only. These must be published. They must then be adhered to neutrally, fairly and without discrimination."

v. The GAC supported this direction in its Public Policy Principles 2.6, 2.10 and 2.11.

7. **Recommendation 8 Discussion -- Applicants must be able to demonstrate their financial and organisational operational capability.**

i. This recommendation is supported by all GNSO Constituencies and accepted with concern by Ms Doria[69].

ii. The Committee discussed this requirement in detail and determined that it was reasonable to request this information from potential applicants. It was also consistent with past practices including the prior new TLD rounds in 2000 and 2003-2004; the .net and .org rebids and the conditions associated with ICANN registrar accreditation.

iii. This is also consistent with best practice procurement guidelines recommended by the World Bank (www.worldbank.org), the OECD (www.oecd.org) and the Asian Development Bank (www.adb.org) as well as a range of federal procurement agencies such as the UK telecommunications regulator, Ofcom; the US Federal Communications Commission and major public companies.

iv. The challenging aspect of this recommendation is to develop robust and objective criteria against which applicants can be measured, recognising a vast array of business conditions and models. This will be an important element of the ongoing development of the Implementation Plan.

v. The ISPCP discussed the importance of this recommendation in its CIS, as found in Recommendation 7 above.

vi. The NCUC's CIS addressed this recommendation by saying "...we support this recommendation to the extent that the criteria is truly limited to minimum financial and organizational operationally capability...All criteria must be transparent, predictable and minimum. They must be published. They must then be adhered to neutrally, fairly and without discrimination."

vii. The GAC echoed these views in its Public Policy Principle 2.5 that said "...the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."

8. **Recommendation 9 Discussion -- There must be a clear and pre-published process using objective and measurable criteria.**

i. This recommendation is supported by all GNSO Constituencies and by Ms Doria. It is consistent with ICANN's previous TLD rounds in 2000 and 2003-2004 and with its re-bid of both the .net and .org registry contracts.

ii. It is also consistent with ICANN's Mission and Core Values especially 7, 8 and 9 which address openness in decision-making processes and the timeliness of those processes.

iii. The Committee decided that the "process" criteria for introducing new top-level domains would follow a pre-published application system including the levying of an application fee to recover the costs of the application process. This is consistent with ICANN's approach to the introduction of new TLDs in the previous 2000 and 2004 round for new top-level domains.

iv. The RyC reiterated its support for this recommendation in its CIS. It said that "...this Recommendation is of major importance to the RyC because the majority of constituency members incurred unnecessarily high costs in previous rounds of new gTLD introductions as a result of excessively long time periods from application submittal until they were able to start their business. We believe that a significant part of the delays were related to selection criteria and processes that were too subjective and not very measurable. It is critical in our opinion that the process for the introduction of new gTLDs be predictable in terms of evaluation requirements and timeframes so that new applicants can properly scope their costs and develop reliable implementation plans." The NCUC said that "...we strongly support this recommendation and again stress the need for all criteria to be limited to minimum operational, financial, and technical considerations. We all stress the need that all evaluation criteria be objective and measurable."

9. **Recommendation 10 Discussion -- There must be a base contract provided to applicants at the beginning of the process.**

i. This recommendation is supported by all GNSO Constituencies and by Ms Doria.

ii. The General Counsel's office has been involved in discussions about the provision of a base contract which would assist applicants both during the application process and in any subsequent contract negotiations.

iii. A framework for the base contract was developed for discussion at the June 2007 ICANN meeting in Puerto Rico. The base contract will not be completed until the policy recommendations are in place. Completion of the policy recommendations will enable the completion of a draft base contract that would be available to applicants prior to the start of the new gTLD process, that is, prior to the beginning of the four-month window preceding the application submittal period.

iv. The RyC, in its CIS, said, "...like the comments for Recommendation 9, we believe that this recommendation will facilitate a more cost-effective and timely application process and thereby minimize the negative impacts of a process that is less well-defined and objective. Having a clear understanding of base contractual requirements is essential for a new gTLD applicant in developing a complete business plan."

10. **Recommendation 11 Discussion** -- (This recommendation has been removed and is left intentionally blank. Note Recommendation 20 and its Implementation Guidelines).

11. **Recommendation 12 Discussion -- Dispute resolution and challenge processes must be established prior to the start of the process.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. The Committee has provided clear direction on its expectations that all the dispute resolution and challenge processes would be established prior to the opening of the application round. The full system will be published prior to an application round starting. However, the finalisation of this process is contingent upon a completed set of recommendations being agreed; a public comment period and the final agreement of the ICANN Board.

iii. The draft Implementation Plan in the Implementation Team *Discussion Points* document sets out the way in which the ICANN Staff proposes that disputes between applicants and challenge processes may be handled. Expert legal and other professional advice from, for example, auctions experts is being sought to augment the Implementation Plan.

TERM OF REFERENCE THREE -- ALLOCATION METHODS

12. **Recommendation 13 Discussion -- Applications must initially be assessed in rounds until the scale of demand is clear.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. This recommendation sets out the principal allocation methods for TLD applications. The narrative here should be read in conjunction with the draft flowcharts and the draft Request for Proposals.

iii. An application round would be opened on Day 1 and closed on an agreed date in the future with an unspecified number of applications to be processed within that round.

iv. This recommendation may be amended, after an evaluation period and report that may suggest modifications to this system. The development of objective "success metrics" is a necessary part of the evaluation process that could take place within the new TLDs Project Office.

v. The ISPCP expressed its support for this recommendation. Its CIS said that "...this is an essential element in the deployment of new gTLDs, as it enables any technical difficulties to be quickly identified and sorted out, working with reduced numbers of new strings at a time, rather than many all at once. Recommendation 18 on the use of IDNs is also important in preventing any negative impact on network operators and ISPs."

13. **Recommendation 20 Discussion -- An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.**

i. This recommendation is supported by the majority of GNSO Constituencies. Ms Doria

supports the recommendation but has concerns about its implementation[70]. The NCUC has submitted a Minority Statement which is found in full in Annex C about the recommendation and its associated Implementation Guidelines F, H and P.

ii. This recommendation was developed during the preparations for the Committee's 7 June 2007 conference call and during subsequent Committee deliberations. The intention was to factor into the process the very likely possibility of objections to applications from a wide variety of stakeholders.

iii. The language used here is relatively broad and the implementation impact of the proposed recommendation is discussed in detail in the Implementation Team's *Discussion Points* document.

iv. The NCUC's response to this recommendation in its earlier CIS says, in part, "...recommendation 20 swallows up any attempt to narrow the string criteria to technical, operational and financial evaluations. It asks for objections based on entirely subjective and unknowable criteria and for unlimited reasons and by unlimited parties." This view has, in part, been addressed in the Implementation Team's proposed plan but this requires further discussion and agreement by the Committee.

TERM OF REFERENCE FOUR -- CONTRACTUAL CONDITIONS

14. **Recommendation 14 Discussion -- The initial registry agreement term must be of a commercially reasonable length.**

i. The remainder of the recommendations address Term of Reference Four on policies for contractual conditions and should be read in conjunction with Recommendation 10 on the provision of a base contract prior to the opening of an application round. The recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. This recommendation is consistent with the existing registry contract provisions found in, for example, the .com and .biz agreements.

iii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.

iv. The RyC commented on this recommendation in its CIS saying that "...the members of the RyC have learned first hand that operating a registry in a secure and stable manner is a capital intensive venture. Extensive infrastructure is needed both for redundant registration systems and global domain name constellations. Even the most successful registries have taken many years to recoup their initial investment costs. The RyC is convinced that these two recommendations [14 & 15] will make it easier for new applicants to raise the initial capital necessary and to continue to make investments needed to ensure the level of service expected by registrants and users of their TLDs. These two recommendations will have a very positive impact on new gTLD registries and in turn on the quality of the service they will be able to provide to the Internet community."

15. **Recommendation 15 -- There must be renewal expectancy.**

i. This recommendation is consistent with the existing registry contract provisions

found in, for example, the .com and .biz agreements and is supported by all Constituencies. Ms Doria supported the recommendation and provided the comments found in the footnote below.[71]

ii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.

iii. See the CIS comments from the RyC in the previous section.

16. **Recommendation 16 -- Registries must apply existing Consensus Policies[72] and adopt new Consensus Policies as they are approved.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. The full set of existing ICANN registry contracts can be found here http://www.icann.org/registries/agreements.htm and ICANN's seven current Consensus Policies are found at http://www.icann.org/general/consensus-policies.htm.

iii. ICANN develops binding Consensus Policies through its policy development processes, in this case, through the GNSO[73].

17. **Recommendation 17 -- A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. Referring to the recommendations on contractual conditions above, this section sets out the discussion of the policies for contractual conditions for new top-level domain registry operators. The recommendations are consistent with the existing provisions for registry operators which were the subject of detailed community input throughout 2006[74].

iii. The Committee developed its recommendations during the Brussels and Amsterdam face-to-face consultations, with assistance from the ICANN General Counsel's office. The General Counsel's office has also provided a draft base contract which will be completed once the policy recommendations are agreed. Reference should also be made to Recommendation 5 on reserved words as some of the findings could be part of the base contract.

iv. The Committee has focused on the key principles of consistency, openness and transparency. It was also determined that a scalable and predictable process is consistent with industry best practice standards for services procurement. The Committee referred in particular to standards within the broadcasting, telecommunications and Internet services industries to examine how regulatory agencies in those environments conducted, for example, spectrum auctions, broadcasting licence distribution and media ownership frameworks.

v. Since then ICANN has developed and published a new approach to its compliance activities. These are found on ICANN's website at http://www.icann.org/compliance/ and will be part of the development of base contract materials.

vi. The Committee found a number of expert reports[75] beneficial. In particular, the World Bank report on mobile licensing conditions provides some guidance on best practice principles for considering broader market investment conditions. "...A major challenge facing regulators in developed and developing countries alike is the need to strike the right balance between ensuring certainty for market

players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. As much as poss ble, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favouring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process. For example, by providing details for license renewal or reissue, clearly establishing what is the discretion offered to the licensing body, or ensuring sufficient lead-times and transitional arrangements in the event of non-renewal or changes in licensing conditions. Public consultation procedures and guaranteeing the right to appeal regulatory decisions maximizes the prospects for a successful renewal process. As technological changes and convergence and technologically neutral approaches gain importance, regulators and policy makers need to be ready to adapt and evolve licensing procedures and practices to the new environment."

vii. The Recommendations which the Committee has developed with respect to the introduction of new TLDs are consistent with the World Bank principles.

18. **Recommendation 18 Discussion -- If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria. The introduction of internationalised domain names at the root presents ICANN with a series of implementation challenges. This recommendation would apply to any new gTLD (IDN or ASCII TLD) offering IDN services. The initial technical testing[76] has been completed and a series of live root tests will take place during the remainder of 2007.

ii. The Committee recognises that there is ongoing work in other parts of the ICANN organisation that needs to be factored into the application process that will apply to IDN applications. The work includes the President's Committee on IDNs and the GAC and ccNSO joint working group on IDNs.

19. **Recommendation 19 Discussion -- Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.**

i. This recommendation is supported by all GNSO Constituencies and Ms Doria.

ii. There is a long history associated with the separation of registry and registrar operations for top-level domains. The structural separation of VeriSign's registry operations from Network Solutions registrar operations explains much of the ongoing policy to require the use of ICANN accredited registrars.

iii. In order to facilitate the stable and secure operation of the DNS, the Committee agreed that it was prudent to continue the current requirement that registry operators be obliged to use ICANN accredited registrars.

iv. ICANN's Registrar Accreditation Agreement has been in place since 2001[77]. Detailed information about the accreditation of registrars can be found on the ICANN website[78]. The accreditation process is under active discussion but the critical element of requiring the use of ICANN accredited registrars remains constant.

v. In its CIS, the RyC noted that "...the RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The poss ble impact on the latter is that they can be at the mercy of registrars for

whom there is no good business reason to devote resources. In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted registry would become a registrar for its own TLD, with appropriate controls in place. The RyC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution."

NEXT STEPS

1. Under the GNSO's Policy Development Process, the production of this *Final Report* completes Stage 9. The next steps are to conduct a twenty-day public comment period running from 10 August to 30 August 2007. The GNSO Council is due to meet on 6 September 2007 to vote on the package of principles, policy recommendations and implementation guidelines.

2. After the GNSO Council have voted the Council Report to the Board is prepared. The GNSO's PDP guidelines stipulate that "the Staff Manager will be present at the final meeting of the Council, and will have five (5) calendar days after the meeting to incorporate the views of the Council into a report to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

    a. A clear statement of any Supermajority Vote recommendation of the Council;

    b. If a Supermajority Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the constituency(ies) that held the position;

    c. An analysis of how the issue would affect each constituency, including any financial impact on the constituency;

    d. An analysis of the period of time that would likely be necessary to implement the policy;

    e. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest;

    f. The Final Report submitted to the Council; and

    g. A copy of the minutes of the Council deliberation on the policy issue, including the all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

3. It is expected that, according to the Bylaws, "...The Board will meet to discuss the GNSO Council recommendation as soon as feas ble after receipt of the Board Report from the Staff Manager. In the event that the Council reached a Supermajority Vote, the Board shall adopt the policy according to the Council Supermajority Vote recommendation unless by a vote of more than sixty-six (66%) percent of the Board determines that such policy is not in the best interests of the ICANN community or ICANN. In the event that the Board determines not to act in accordance with the Council Supermajority Vote

recommendation, 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. The Council shall review the Board Statement for discussion with the Board within twenty (20) calendar days 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. 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 its current recommendation. In the event that the Council is able to reach a Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than sixty-six (66%) percent of the Board determines that such policy is not in the interests of the ICANN community or ICANN. In any case in which the Council is not able to reach Supermajority, a majority vote of the Board will be sufficient to act. When a final decision on a GNSO Council Recommendation or Supplemental Recommendation is timely, the Board shall take a preliminary vote and, where practicable, will publish a tentative decision that allows for a ten (10) day period of public comment prior to a final decision by the Board."

4. The final stage in the PDP is the implementation of the policy which is also governed by the Bylaws as follows, "...Upon a final decision of the Board, the Board shall, as appropriate, give authorization or direction to the ICANN staff to take all necessary steps to implement the policy."

Annex A – NCUC Minority Statement: Recommendation 6

STATEMENT OF **DISSENT** ON RECOMMENDATION **#6** OF

GNSO'S NEW GTLD REPORT FROM

the Non-Commercial Users Constituency (NCUC)

20 July 2007

NCUC supports most of the recommendations in the GNSO's Final Report, but Recommendation #6 is one we cannot support.[79]

We oppose Recommendation #6 for the following reasons:

1) It will completely undermine ICANN's efforts to make the gTLD application process predictable, and instead make the evaluation process arbitrary, subjective and political;

2) It will have the effect of suppressing free and diverse expression;

3) It exposes ICANN to litigation risks;

4) It takes ICANN too far away from its technical coordination mission and into areas of legislating morality and public order.

We also believe that the objective of Recommendation #6 is unclear, in that much of its desirable substance is already covered by Recommendation #3. At a minimum, we believe that the words "relating to morality and public order" must be struck from the recommendation.

1) Predictability, Transparency and Objectivity

Recommendation #6 poses severe implementation problems. It makes it imposs ble to achieve the GNSO's goals of predictable and transparent evaluation criteria for new gTLDs.

Principle 1 of the New gTLD Report states that the evaluation process must be "predictable," and Recommendation #1 states that the evaluation criteria must be transparent, predictable, and fully available to applicants prior to their application.

NCUC strongly supports those guidelines. But no gTLD applicant can possibly know in advance what people or governments in a far away land will object to as "immoral" or contrary to "public order." When applications are challenged on these grounds, applicants cannot poss bly know what decision an expert panel – which will be assembled on an ad hoc basis with no precedent to draw on – will make about it.

Decisions by expert panels on "morality and public order" *must* be subjective and arbitrary, because there is no settled and well-established international law regarding the relationship between TLD strings and morality and public order. There is no single "community standard" of morality that ICANN can apply to all applicants in every corner of the globe. What is considered "immoral" in Teheran may be easily accepted in Los Angeles or Stockholm; what is considered a threat to "public order" in China and Russia may not be in Brazil and Qatar.

2) Suppression of expression of controversial views

gTLD applicants will respond to the uncertainty inherent in a vague "morality and public order" standard and lack of clear standards by suppressing and avoiding any ideas that might generate controversy. Applicants will have to invest sizable sums of money to develop a gTLD application and see it through the ICANN process. Most of them will avoid risking a challenge under Recommendation #6. In other words, the presence of Recommendation #6 will result in self-censorship by most applicants.

That policy would strip citizens everywhere of their rights to express controversial ideas because someone else finds them offensive. This policy recommendation ignores international and national laws, in particular freedom of expression guarantees that permit the expression of "immoral" or otherwise controversial speech on the Internet.

3) Risk of litigation

Some people in the ICANN community are under the mistaken impression that suppressing controversial gTLDs will protect it from litigation. Nothing could be further from the truth. By introducing subjective and culturally divisive standards into the evaluation process Recommendation #6 will increase the likelihood of litigation.

ICANN operates under authority from the US Commerce Department. It is undisputed that the US Commerce Department is prohibited from censoring the expression of US citizens in the manner proposed by Recommendation #6. The US Government cannot "contract away" the constitutional protections of its citizens to ICANN any more than it can engage in the censorship itself.

Adoption of Recommendation #6 invites litigation against ICANN to determine whether its censorship policy is compat ble with the US First Amendment. An ICANN decision to suppress a gTLD string that would be permitted under US law could and probably would lead to legal challenges to the decision as a form of US Government action.

If ICANN left the adjudication of legal rights up to courts, it could avoid the legal risk and legal liability that this policy of censorship brings upon it.

4) ICANN's mission and core values

Recommendation #6 exceeds the scope of ICANN's technical mission. It asks ICANN to create rules and adjudicate disputes about what is permiss ble expression. It enables it to censor expression in domain names that would be lawful in some countries. It would require ICANN and "expert panels" to make decisions about permitting top-level domain names based on arbitrary "morality" judgments and other subjective criteria. Under Recommendation #6,

ICANN will evaluate domain names based on ideas about "morality and public order" -- concepts for which there are varying interpretations, in both law and culture, in various parts of the world. Recommendation #6 risks turning ICANN into the arbiter of "morality" and "appropriate" public policy through global rules.

This new role for ICANN conflicts with its intended narrow technical mission, as embodied in its mission and core values. ICANN holds no legitimate authority to regulate in this entirely non-technical area and adjudicate the legal rights of others. This recommendation takes the adjudication of people's rights to use domain names out of the hands of democratically elected representatives and into the hands of "expert panels" or ICANN staff and board with no public accountability.

Besides exceeding the scope of ICANN's authority, Recommendation #6 seems unsure of its objective. It mandates "morality and public order" in domain names, but then lists, as examples of the type of rights to protect, the WTO TRIPS Agreement and all 24 World Intellectual Property (WIPO) Treaties, which deal with economic and trade rights, and have little to do with "morality and public order". Protection for intellectual property rights was fully covered in Recommendation #3, and no explanation has been provided as to why intellectual property rights would be listed again in a recommendation on "morality and public order", an entirely separate concept.

In conclusion Recommendation #6 exceeds ICANN's authority, ignores Internet users' free expression rights, and its adoption would impose an enormous burden on and liability for ICANN. It should not be adopted by the Board of Directors in the final policy decision for new gtlds.

Annex B – Nominating Committee Appointee Avri Doria[80]: Individual Comments

Comments from Avri Doria

The "Personal level of support" indications fall into 3 categories:

I Support: these are principles, recommendations or guidelines that are compatible with my personal opinions

I Support with concerns: While these principles, recommendations and guidelines are not incompatible with my personal opinions, I have some concerns about them.

I Accept with concern: these recommendations and guidelines do not necessarily correspond to my personal opinions, but I am able to accept them in that they have the broad support of the committee. I do, however, have concerns with these recommendations and guideline.

I believe these comments are consistent with comments I have made throughout the process and do not constitute new input.

Principles

#	Personal level of support	Explanation
A	Support	
		While I strongly support the introduction of IDN TLDS, I am concerned

B	Support with concerns	that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of IDN TLDs. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers.
C	Support	
D	Support with concerns	While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability.
E-G	Support	

Recommendations

#	Level of support	Explanation
1	Support	
2	Accept with concern	My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria. I In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologues, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on. I By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation. I As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages.
3	Support with concerns	My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice. I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compat ble

		with a general and global naming system.
4	Support	
5	Support with concerns	Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to IDNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration.
6	Accept with concern	My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order. This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all poss ble religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality.
7	Support	
8	Accept with concern	While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E.g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts. Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority peoples that have a different set of financial opportunities or capabilities then those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels.
9,10, 12-14	Support	

15	Support with concerns	In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal.
16-19	Support	
20	Support with concerns	In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)

Implementation Guidelines

#	Level of support	Explanation
A-E	Support	
F	Accept with concern	In designing a New gTLD process, one of the original design goals had been to design a predictable and timely process that did not include the involvement of the Board of Directors except for very rare and exceptional cases and perhaps in the due diligence check of a final approval. My concern is that the use of Board in step (iii) may make them a regular part of many of the application procedure and may overload both the Board and the process. If every dispute can fall through to Board consideration in the process sieve, then the incentive to resolve the dispute earlier will be lessened.
G-M	Support	
N	Support with concerns	I strongly support the idea of financial assistance programs and fee reduction for less developed communities. I am concerned that not providing pricing that enables applications from less developed countries and communities may serve to increase the divide between the haves and the haves nots in the Internet and may lead to a foreign 'land grab' of choice TLD names, especially IDN TLD names in a new form of resource colonialism because only those with well developed funding capability will be able to participate in the process as currently planned.
O	Support	
		While I essentially agree with the policy recommendation and its implementation guideline, its social justice and fairness depends heavily on the implementation issues. While the implementation details are not yet settled, I have serious concerns about the published draft plans of the ICANN staff in this regard. The current proposal involves using fees to prevent vexatious or unreasonable objections. In my personal opinion this would be a cause of social injustice in the application of the policy as it would prejudice the objection policy in

P	Support with concerns	favor of the rich. I also believe that an objection policy based on financial means would allow for well endowed entities to object to any term they found objectionable, hence enabling them to be as vexatious as they wish to be. In order for an objection system to work properly, it must be fair and it must allow for any applicant to understand the basis on which they might have to answer an objection. If the policy and implementation are clear about objections only being considered when they can be shown to cause irreparable harm to a community then it may be possible to build a just process. In addition to the necessity for there to be strict filters on which potential objections are actually processed for further review by an objections review process, it is essential that an external and impartial professional review panel have a clear basis for judging any objections. I do not believe that the ability to pay for a review will provide a reasonable criteria, nor do I believe that financial barriers are an adequate filter for stopping vexatious or unreasonable objections though they are a sufficient barrier for the poor. I believe that ICANN should investigate other methods for balancing the need to allow even the poorest to raise an issue of irreparable harm while filtering out unreasonable disputes. I believe, as recommend in the Reserved Names Working group report, that the ALAC and GAC may be an important part of the solution. IG (P) currently includes support for treating ALAC and GAC as established institutions in regard to raising objections to TLD concerns. I believe this is an important part of the policy recommendation and should be retained in the implementation. I believe that it should be poss ble for the ALAC or GAC, through some internal procedure that they define, to take up the cause of the individual complainant and to request a review by the external expert review panel. Some have argued that this is unacceptable because it operationalizes these Advisory Committees. I believe we do have precedence for such an operational role for volunteers within ICANN and that it is in keeping with their respective roles and responsibilities as representatives of the user community and of the international community of nations. I strongly recommend that such a solution be included in the Implementation of the New gTLD process.
Q	Support	

Annex C – NCUC Minority Statement: Recommendation 20 and Implementation Guidelines F, H & P

STATEMENT OF DISSENT ON RECOMMENDATION #20 &

IMPLEMENTATION GUIDELINES F, H, & P IN THE

GNSO NEW GTLD COMMITTEE'S FINAL REPORT

FROM THE

NON-COMMERCIAL USERS CONSTITUENCY (NCUC)

RE: Domain Name Objection and Rejection Process

25 July 2007

Text of Recommendation #20:

"An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted."

Text of Implementation Guideline F:

If there is contention for strings, applicants may:

i) resolve contention between them within a pre-established timeframe

ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;

iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

Text of Implementation Guideline H:

External dispute providers will give decisions on complaints.

Text of Implementation Guideline P:

The following process, definitions, and guidelines refer to Recommendation 20.

Process

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

a) substantial

In determining substantial the panel will assess the following: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.

b) significant portion:

In determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

c) community

Community should be interpreted broadly and will include for example an economic sector, a cultural community, or a linguistic community. It may also be a closely related community which believes it is impacted.

d) explicitly targeting

Explicitly targeting means there is a description of the intended use of the TLD in the application.

e) implicitly targeting

Implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

f) established institution

An institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer then 5 years. Exceptional circumstance include but are not limited to reorganisation, merger, or an inherently younger community. The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) formal existence

Formal existence may be demonstrated by: appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organisation or similar.

h) detriment

<< A >> Evidence of detriment to the community or to users more widely must be provided.

<< B >> [A likelihood of detriment to the community or to users more widely must be provided.]

Recommendation #20

The Non-Commercial Users Constituency (NCUC) Dissenting Statement on Recommendation #20 of the New GTLD Committee's Final Report[81] should be read in combination with Implementation Guidelines F, H & P, which detail the implementation of Recommendation #20. This statement should also be read in conjunction with its statement[82] of 13 June 2007 on the committee's draft report.

NCUC cannot support the committee's proposal for ICANN to establish a broad objection and rejection process for domain names that empowers ICANN and its "experts" to adjudicate the legal rights of domain name applicants (and objectors). The proposal would also empower ICANN and its "experts" to invent entirely new rights to domain names that do not exist in law and that will compete with existing legal rights to domains.

However "good-intentioned", the proposal would inevitably set up a system that decides legal rights based on subjective beliefs of "expert panels" and the amount of insider lobbying. The proposal would give "established institutions" veto power over applications for domain names to the detriment of innovators and start-ups. The proposal is further flawed because it makes no allowances for generic words to which no community claims exclusive "ownership" of. Instead, it wants to assign rights to use language based on subjective standards and will over-regulate to the detriment of competition, innovation, and free expression.

There is no limitation on the type of objections that can be raised to kill a domain name, no requirement that actual harm be shown to deny an application, and no recourse for the wrongful denial of legal rights by ICANN and its experts under this proposal. An applicant must be able to appeal decisions of ICANN and its experts to courts, who have more competence and authority to decide the applicant's legal rights. Legal due process requires maintaining a right to appeal these decisions to real courts.

The proposal is hopelessly flawed and will result in the improper rejection of many legitimate domain names. The reasons permitted to object to a domain are infinite in number. Anyone may make an objection; and an application will automatically be rejected upon a very low threshold of "detriment" or an even lower standard of "a likelihood of detriment" to anyone. Not a difficult bar to meet.

If ICANN attempted to put this policy proposal into practice it would intertwine itself in general policy debates, cultural clashes, business feuds, religious wars, and national politics, among a few of the disputes ICANN would have to rule on through this domain name policy.

The proposal operates under false assumptions of "communities" that can be defined, and that parties can be rightfully appointed representatives of "the community" by ICANN. The proposal gives preference to "established institutions" for domain names, and leaves applicants' without the backing of "established institutions" with little right to a top-level domain. The proposal operates to the detriment of small-scale start-ups and innovators who are clever enough to come up with an idea for a domain first, but lack the insider-connections and financial resources necessary to convince an ICANN panel of their worthiness.

It will be excessively expensive to apply for either a controversial or a popular domain name, so only well-financed "established institutions" will have both the standing and financial wherewithal to be awarded a top-level domain. The proposal privileges who is awarded a top-level domain, and thus discourages diversity of thought and the free flow of information by making it more difficult to obtain information on controversial ideas or from innovative new-

comers.

Implementation Guideline F

NCUC does not agree with the part of Implementation Guideline F that empowers ICANN identified "communities" to support or oppose applications. Why should all "communities" agree before a domain name can be issued? How to decide who speaks for a "community"?

NCUC also notes that ICANN's Board of Directors would make the final decisions on applications and thus the legal rights of applicants under proposed IG-F. ICANN Board Members are not democratically elected, accountable to the public in any meaningful way, or trained in the adjudication of legal rights. Final decisions regarding legal rights should come from legitimate law-making processes, such as courts.

"Expert panels" or corporate officers are not obligated to respect an applicant's free expression rights and there is no recourse for a decision by the panel or ICANN for rights wrongfully denied. None of the "expert" panelists are democratically elected, nor accountable to the public for their decisions. Yet they will take decisions on the boundaries between free expression and trademark rights in domain names; and "experts" will decide what ideas are too controversial to be permitted in a domain name under this process.

Implementation Guideline H

Implementation Guideline H recommends a system to adjudicate legal rights that exists entirely outside of legitimate democratic law-making processes. The process sets up a system of unaccountable "private law" where "experts" are free to pick and choose favored laws, such as trademark rights, and ignore disfavored laws, such as free expression guarantees.

IG-H operates under the false premise that external dispute providers are authorized to adjudicate the legal rights of domain name applicants and objectors. It further presumes that such expert panels will be qualified to adjudicate the legal rights of applicants and others. But undertaking the creation of an entirely new international dispute resolution process for the adjudication of legal rights and the creation of new rights is not something that can be delegated to a team of experts. Existing international law that takes into account conflict of laws, choice of laws, jurisdiction, standing, and due process must be part of any legitimate process; and the applicant's legal rights including freedom of expression rights must be respected in the process.

Implementation Guideline P

"The devil is in the details" of Implementation Guideline P as it describes in greater detail the proposed adversarial dispute process to adjudicate legal rights to top-level domain names in Recommendation #20. IG-P mandates the rejection of an application if there is "substantial opposition" to it according to ICANN's expert panel. But "substantial" is defined in such as way so as to actually mean "insubstantial" and as a result many legitimate domain names would be rejected by such an extremely low standard for killing an application.

Under IG-P, opposition against and support for an application must be made by an "established institution" for it to count as "significant", again favoring major industry players and mainstream cultural institutions over cultural diversity, innovative individuals, small niche, and medium-sized Internet businesses.

IG-P states that "community" should be interpreted broadly, which will allow for the maximum number of objections to a domain name to count against an application. It includes examples of "the economic sector, cultural community or linguistic community" as those who have a right to complain about an application. It also includes any "related community which believes it is impacted." So anyone who claims to represent a community and believes to be impacted by a domain name can file a complaint and have standing to object to another's application.

There is no requirement that the objection be based on legal rights or the operational capacity of the applicant. There is no requirement that the objection be reasonable or the belief about impact to be reasonable. There is no requirement that the harm be actual or verifiable. The standard for "community" is entirely subjective and based on the personal beliefs of the objector.

The definition of "implicitly targeting" further confirms this subjective standard by inviting objections where "the objector makes the assumption of targeting" and also where "the objector believes there may be confusion by users". Such a subjective process will inevitably result in the rejection of many legitimate domain names.

Picking such a subjective standard conflicts with Principle A in the Final Report that states domain names must be introduced in a "predictable way", and also with Recommendation 1 that states "All applicants for a new gTLD registry should be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." The subjectivity and unpredictability invited into the process by Recommendation #20 turn Principle A and Recommendation 1 from the same report upside down.

Besides the inherent subjectivity, the standard for killing applications is remarkably low. An application need not be intended to serve a particular community for "community-based" objections to kill the application under the proposal. Anyone who believed that he or she was part of the targeted community or who believes others face "detriment" have standing to object to a domain name, and the objection weighs in favor of "significant opposition". This standard is even lower than the "reasonable person" standard, which would at least require that the belief be "reasonable" for it to count against an applicant. The proposed standard for rejecting domains is so low it even permits unreasonable beliefs about a domain name to weigh against an applicant.

If a domain name does cause confusion, existing trademark law and unfair competition law have dealt with it for years and already balanced intellectual property rights against free expression rights in domain names. There is neither reason nor authority for ICANN processes to overtake the adjudication of legal rights and invite unreasonable and illegitimate objections to domain names.

IG-P falsely assumes that the number of years in operation is indicative of one's right to use language. It privileges entities over 5 years old with objection rights that will effectively veto innovative start-ups who cannot afford the dispute resolution process and will be forced to abandon their application to the incumbents.

IG-P sets the threshold for harm that must be shown to kill an application for a domain name remarkably low. Indeed harm need not be actual or verified for an application to be killed based on "substantial opposition" from a single objector.

Whether the committee selects the unbounded definition for "detriment" that includes a "likelihood of detriment" or the narrower definition of "evidence of detriment" as the standard for killing an application for a domain name is largely irrelevant. The difference is akin to re-arranging the deck chairs on the Titanic. ICANN will become bogged down with the approval of domain names either way, although it is worth noting that "l kelihood of detriment" is a very long way from "substantial harm" and an easy standard to meet, so will result in many more domain names being rejected.

The definitions and guidelines detailed in IG-P invite a lobby-fest between competing businesses, instill the "heckler's veto" into domain name policy, privilege incumbents, price out of the market non-commercial applicants, and give third-parties who have no legal rights to domain names the power to block applications for those domains. A better standard for killing an application for non-technical reasons would be for a domain name to be shown to be illegal in the applicant's jurisdiction before it can rejected.

In conclusion, the committee's recommendation for domain name objection and rejection processes are far too broad and unwieldy to be put into practice. They would stifle freedom of expression, innovation, cultural diversity, and market competition. Rather than follow existing law, the proposal would set up an illegitimate process that usurps jurisdiction to adjudicate peoples' legal rights (and create new rights) in a process designed to favor incumbents. The adoption of this "free-for-all" objection and rejection process will further call into question ICANN's legitimacy to govern and its ability to serve the global public interest that respects the rights of all citizens.

NCUC respectfully submits that ICANN will best serve the global public interest by resisting the temptation to stray from its technical mandate and meddle in international lawmaking as proposed by Rec. #20 and IG-F, IG-H, and IG-P of the New GTLD Committee Final Report.

REFERENCE MATERIAL -- GLOSSARY[83]

TERM	ACRONYM & EXPLANATION
A-label	The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible (ACE) form of an IDNA string; for example "xn--11b5bs1di".
ASCII Compatible Encoding	ACE ACE is a system for encoding Unicode so each character can be transmitted using only the letters a-z, 0-9 and hyphens. Refer also to http://www.ietf.org/rfc/rfc3467.txt?number=3467
American Standard Code for Information Exchange	ASCII ASCII is a common numerical code for computers and other devices that work with text. Computers can only understand numbers, so an ASCII code is the numerical representation of a character such as 'a' or '@'. See above referenced RFC for more information.
Advanced Research Projects Agency	ARPA http://www.darpa.mil/body/arpa_darpa.html
Commercial & Business Users Constituency	CBUC http://www.bizconst.org/
Consensus Policy	A defined term in all ICANN registry contracts usually found in Article 3 (Covenants). See, for example, http://www.icann.org/tlds/agreements/biz/registry-agmt-08dec06.htm
Country Code Names	

Supporting Organization	ccNSO http://ccnso.icann.org/
Country Code Top Level Domain	ccTLD Two letter domains, such as .uk (United Kingdom), .de (Germany) and .jp (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and ccTLD registries limit use of the ccTLD to citizens of the corresponding country. Some ICANN-accredited registrars provide registration services in the ccTLDs in addition to registering names in .biz, .com, .info, .name, .net and .org, however, ICANN does not specifically accredit registrars to provide ccTLD registration services. For more information regarding registering names in ccTLDs, including a complete database of designated ccTLDs and managers, please refer to http://www.iana.org/cctld/cctld.htm.
Domain Names	The term **domain name** has multiple related meanings: A name that identifies a computer or computers on the internet. These names appear as a component of a Web site's URL, e.g. www.wikipedia.org. This type of domain name is also called a hostname. The product that Domain name registrars provide to their customers. These names are often called **registered domain names**. Names used for other purposes in the Domain Name System (DNS), for example the special name which follows the @ sign in an email address, or the Top-level domains like .com, or the names used by the Session Initiation Protocol (VoIP), or DomainKeys. http://en.wikipedia.org/wiki/Domain_names
Domain Name System	The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address - just like a telephone number - which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.

Generic Top Level Domain	gTLD Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored TLDs (uTLDs), as described in more detail below. In the 1980s, seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org) were created. Domain names may be registered in three of these (.com, .net, and .org) without restriction; the other four have limited purposes. In 2001 & 2002 four new unsponsored TLDs (.biz, .info, .name, and .pro) were introduced. The other three new TLDs (.aero, .coop, and .museum) were sponsored. Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation respons bilities over many matters concerning the TLD.
Governmental Advisory Committee	GAC http://gac.icann.org/web/index.shtml
Intellectual Property Constituency	IPC http://www.ipconstituency.org/
Internet Service & Connection Providers Constituency	ISPCP
Internationalized Domain Names	IDNs IDNs are domain names represented by local language characters. These domain names may contain characters with diacritical marks (required by many European languages) or characters from non-Latin scripts like Arabic or Chinese.
Internationalized Domain Names in Application	IDNA IDNA is a protocol that makes it possible for applications to handle domain names with non-ASCII characters. IDNA converts domain names with non-ASCII characters to ASCII labels that the DNS can accurately understand. These standards are developed within the IETF (http://www.ietf.org)
Internationalized Domain	IDN A Label

Names – Labels	The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible ACE) form of an IDN A string. For example "xn-1lq90i". IDN U Label The U-label is what should be displayed to the user and is the representation of the IDN in Unicode. For example "北京" ("Beijing" in Chinese). LDH Label The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org"
Internationalized Domain Names Working Group	IDN-WG http://forum.icann.org/lists/gnso-idn-wg/
Letter Digit Hyphen	LDH The hostname convention used by domain names before internationalization. This meant that domain names could only practically contain the letters a-z, digits 0-9 and the hyphen "-". The term "LDH code points" refers to this subset. With the introduction of IDNs this rule is no longer relevant for all domain names. The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an IDN; for example "icann" in the domain name "icann.org".
Nominating Committee	NomCom http://nomcom.icann.org/
Non-Commercial Users Constituency	NCUC http://www.ncdnhc.org/
Policy Development Process	PDP See http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA
Protecting the Rights of Others Working Group	PRO-WG See the mailing list archive at http://forum.icann.org/lists/gnso-pro-wg/
Punycode	Punycode is the ASCII-compatible encoding algorithm descr bed in Internet standard [RFC3492]. This is the method that will encode IDNs into sequences of ASCII

	characters in order for the Domain Name System (DNS) to understand and manage the names. The intention is that domain name registrants and users will never see this encoded form of a domain name. The sole purpose is for the DNS to be able to resolve for example a web-address containing local characters.
Registrar	Domain names ending with .aero, .biz, .com, .coop, .info, .museum, .name, .net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. A listing of these companies appears in the Accredited Registrar Directory. The registrar asks registrants to provide various contact and technical information that makes up the domain name registration. The registrar keeps records of the contact information and submits the technical information to a central directory known as the "registry."
Registrar Constituency	RC http://www.icann-registrars.org/
Registry	A registry is the authoritative, master database of all domain names registered in each Top Level Domain. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from top-level domains anywhere in the world. Internet users don't interact directly with the registry operator. Users can register names in TLDs including .biz, .com, .info, .net, .name, .org by using an ICANN-Accredited Registrar.
Registry Constituency	RyC http://www.gtldregistries.org/
Request for Comment A full list of all Requests for Comment http://www.rfc-editor.org/rfcxx00.html Specific references used in this report are shown in the next column. This document uses language, for example, "should", "must" and "may", consistent with RFC2119.	RFC ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt ftp://ftp.rfc-editor.org/in-notes/rfc2119.txt ftp://ftp.rfc-editor.org/in-notes/rfc2606.txt

Reserved Names Working Group	RN-WG See the mailing list archive at http://forum.icann.org/lists/gnso-rn-wg/
Root server	A **root nameserver** is a DNS server that answers requests for the root namespace domain, and redirects requests for a particular top-level domain to that TLD's nameservers. Although any local implementation of DNS can implement its own private root nameservers, the term "root nameserver" is generally used to describe the thirteen well-known root nameservers that implement the root namespace domain for the Internet's official global implementation of the Domain Name System. All domain names on the Internet can be regarded as ending in a full stop character e.g. "en.wikipedia.org.". This final dot is generally implied rather than explicit, as modern DNS software does not actually require that the final dot be included when attempting to translate a domain name to an IP address. The empty string after the final dot is called the root domain, and all other domains (i.e. .com, .org, .net, etc.) are contained within the root domain. http://en.wikipedia.org/wiki/Root_server
Sponsored Top Level Domain	sTLD A Sponsor is an organization to which some policy making is delegated from ICANN. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is respons ble for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.
U-label	The U-label is what should be displayed to the user and is the representation of the Internationalized Domain Name (IDN) in Unicode.
Unicode Consortium	A not-for-profit organization found to develop, extend and promote use of the Unicode standard. See http://www.unicode.org
Unicode	Unicode is a commonly used single encoding scheme that

	provides a unique number for each character across a wide variety of languages and scripts. The Unicode standard contains tables that list the code points for each local character identified. These tables continue to expand as more characters are digitalized.

Continue to Final Report: Part B

[1] http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#I
[2] The ICANN "community" is a complex matrix of intersecting organizations and which are represented graphically here. http://www.icann.org/structure/
[3] The *Final Report* is Step 9 in the GNSO's policy development process which is set out in full at http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA.
[4] Found here http://gnso.icann.org/issues/new-gtlds/.
[5] The ICANN Staff *Discussion Points* documents can be found at http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf and http://gnso.icann.org/drafts/PDP-Dec05-StaffMemo-19-jun-07.pdf
[6] Authored in 1987 by Paul Mockapetris and found at http://www.ietf.org/rfc/rfc1034
[7] Authored in October 1984 by Jon Postel and J Reynolds and found at http://www.ietf.org/rfc/rfc920
[8] Found at http://www.oecd.org/dataoecd/15/37/38336539.pdf
[9] From Verisign's June 2007 *Domain Name Industry Brief*.
[10] The full list is available here http://www.icann.org/registrars/accredited-list.html
[11] Report found at http://www.icann.org/dnso/wgc-report-21mar00.htm
[12] Found at http://www.icann.org/announcements/announcement-31aug04.htm
[13] http://www.registrarstats.com/Public/ZoneFileSurvey.aspx
[14] Verisign produce a regular report on the domain name industry. http://www.verisign.com/Resources/Naming_Services_Resources/Domain_Name_...
[15] The announcement is here http://icann.org/announcements/announcement-03jan06.htm and the results are here http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm
[16] Found here http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm
[17] http://gnso.icann.org/issues/new-gtlds//
[18] For example, see the GA List discussion thread found at http://gnso.icann.org/mailing-lists/archives/ga/msg03337.html & earlier discussion on IANA lists http://www.iana.org/comments/26sep1998-02oct1998/msg00016.html. The 13 June 2002 paper regarding a taxonomy for non-ASCII TLDs is also illuminating http://www.icann.org/committees/idn/registry-selection-paper-13jun02.htm
[19] Found here http://gac.icann.org/web/home/gTLD_principles.pdf
[20] A list of the working materials of the new TLDs Committee can be found at http://gnso.icann.org/issues/new-gtlds/.
[21] The Outcomes Report for the IDN-WG is found http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm. A full set of resources which the WG is using is found at http://gnso.icann.org/issues/idn-tlds/.
[22] The Final Report of the RN-WG is found at http://gnso.icann.org/drafts/rn-wg-fr19mar07.pdf
[23] The Final Report of the PRO-WG is found at http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf
[24] The root server system is explained here http://en.wikipedia.org/wiki/Rootserver
[25] Ms Doria supports all of the Principles but expressed concern about Principle B by saying "...While I strongly support the introduction of IDN TLDS, I am concerned that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of IDN TLDs. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers" and Principle D "...While I favor the

establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability."
[26] Note the updated recommendation text sent to the gtld-council list after the 7 June meeting. http://forum.icann.org/lists/gtld-council/msg00520.html
[27] Reserved word limitations will be included in the base contract that will be available to applicants prior to the start of the application round.
[28] http://www.icann.org/general/idn-guidelines-22feb06.htm
[29] The Implementation Team sought advice from a number of auction specialists and examined other industries in which auctions were used to make clear and binding decisions. Further expert advice will be used in developing the implementation of the application process to ensure the fairest and most appropriate method of resolving contention for strings.
[30] Detailed work is being undertaken, lead by the Corporate Affairs Department, on establishing a translation framework for ICANN documentation. This element of the Implementation Guidelines may be addressed separately.
[31] http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf
[32] Consistent with ICANN's commitments to accountability and transparency found at http://www.icann.org/announcements/announcement-26jan07b.htm
[33] Found at http://www.icann.org/dnso/wgc-report-21mar00.htm
[34] The announcement is here http://icann.org/announcements/announcement-03jan06.htm and the results are here http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm
[35] Found here http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm
[36] Found here http://forum.icann.org/lists/gtld-council/
[37] Archived at http://forum.icann.org/lists/gtld-council/
[38] Business Constituency http://forum.icann.org/lists/gtld-council/msg00501.html, Intellectual Property Constituency http://forum.icann.org/lists/gtld-council/msg00514.html, Internet Service Providers http://forum.icann.org/lists/gtld-council/msg00500.html, NCUC http://forum.icann.org/lists/gtld-council/msg00530.html, Registry Constituency http://forum.icann.org/lists/gtld-council/msg00494.html
[39] "My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria.

In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologues, orthographic neighbourhood, transliteration and other technically defined attr butes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on.

By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.

As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages."
[40] http://data.iana.org/TLD/tlds-alpha-by-domain.txt
[41] See section 4A -- http://www.icann.org/udrp/udrp-policy-24oct99.htm.
[42] In addition to the expertise within the Committee, the NCUC provided, as part of its Constituency Impact Statement expert outside advice from Professor Christine Haight Farley which said, in part, "...A determination about whether use of a mark by another is "confusingly similar" is simply a first step in the analysis of infringement. As the committee correctly notes, account will be taken of visual, phonetic and conceptual similarity. But this determination does not end the analysis. Delta Dental and Delta Airlines are confusingly similar, but are not l ke to

cause confusion, and therefore do not infringe. ... In trademark law, where there is confusing similarity and the mark is used on similar goods or services, a likelihood of confusion will usually be found. European trademark law recognizes this point perhaps more readily that U.S. trademark law. As a result, sometimes "confusingly similar" is used as shorthand for "likelihood of confusion". However, these concepts must remain distinct in domain name policy where there is no opportunity to consider how the mark is being used."

[43] In addition, advice was sought from experts within WIPO who continue to provide guidance on this and other elements of dispute resolution procedures.

[44] Kristina Rosette provided the reference to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* which is found online at http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm

"...*Article 16 Rights Conferred* 1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use...."

[45] http://www.ohchr.org/english/bodies/hrc/comments.htm

[46] http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf

[47] Charles Sha'ban provided a range of examples from Arabic speaking countries. For example, in Jordan, Article 7 Trademarks eligible for registration are 1- A trademark shall be registered if it is distinctive, as to words, letters, numbers, figures, colors, or other signs or any combination thereof and visually perceptible 2- For the purposes of this Article, "distinctive" shall mean applied in a manner which secures distinguishing the goods of the proprietor of the trademark from those of other persons. Article 8 Marks which may not be registered as trademarks. The following may not be registered as trademarks: 10- A mark identical with one belonging to a different proprietor which is already entered in the register in respect of the same goods or class of goods for which the mark is intended to be registered, or so closely resembling such trademark to the extent that it may lead to deceiving third parties.

12- The trademark which is identical or similar to, or constitutes a translation of, a well-known trademark for use on similar or identical goods to those for which that one is well-known for and whose use would cause confusion with the well-known mark, or for use of different goods in such a way as to prejudice the interests of the owner of the well-known mark and leads to believing that there is a connection between its owner and those goods as well as the marks which are similar or identical to the honorary badges, flags, and other insignia as well as the names and abbreviations relating to international or regional organizations or those that offend our Arab and Islamic age-old values.

In Oman for example, Article 2 of the Sultan Decree No. 38/2000 states:

"The following shall not be considered as trademarks and shall not be registered as such: If the mark is identical, similar to a degree which causes confusion, or a translation of a trademark or a commercial name known in the Sultanate of Oman with respect to identical or similar goods or services belonging to another business, or if it is known and registered in the Sultanate of Oman on goods and service which are neither identical nor similar to those for which the mark is sought to be registered provided that the usage of the mark on those goods or services in this last case will suggest a connection between those goods or services and the owner of the known trademark and such use will cause damage to the interests of the owner of the known trademark."

Although the laws In Egypt do not have specific provisions regarding confusion they stress in

great detail the importance of distinctiveness of a trade mark.

Article 63 in the IP Law of Egypt No.82 for the year 2002 states:

"A trademark is any sign distinguishing goods, whether products or services, and include is particular names represented in a distinctive manner, signatures, words, letters, numerals, design, symbols, signposts, stamps, seal, drawings, engravings, a combination of distinctly formed colors and any other combination of these elements if used, or meant to be used, to distinguish the precedents of a particular industry, agriculture, forest or mining venture or any goods, or to indicate the origin of products or goods or their quality, category, guarantee, preparation process, or to indicate the provision of any service. In all cases, a trademark shall be a sign that is recognizable by sight."

[48] Found at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.ht with 171 contracting parties.

[49] Further information can be found at the US Patent and Trademark Office's website http://www.uspto.gov/

[50] Found at http://www.icann.org/registrars/ra-agreement-17may01.htm#3

[51] Found at http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm.

[52] The 2003 correspondence between ICANN's then General Counsel and the then GAC Chairman is also useful http://www.icann.org/correspondence/touton-letter-to-tarmizi-10feb03.htm.

[53] "My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice. I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system."

[54] For example, David Maher, Jon Bing, Steve Metalitz, Philip Sheppard and Michael Palage.

[55] Reserved Word has a specific meaning in the ICANN context and includes, for example, the reserved word provisions in ICANN's existing registry contracts. See http://www.icann.org/registries/agreements.htm.

[56] "Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to IDNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration."

[57] Found online at http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm and in full in Part B of the *Report*.

[58] The Committee are aware that the terminology used here for the purposes of policy recommendations requires further refinement and may be at odds with similar terminology developed in other context. The terminology may be imprecise in other contexts than the general discussion about reserved words found here.

[59] The subgroup was encouraged by the ccNSO not to consider removing the restriction on two-letter names at the top level. IANA has based its allocation of two-letter names at the top level on the ISO 3166 list. There is a risk of collisions between any interim allocations, and ISO 3166 assignments which may be desired in the future.

[60] The existing gTLD registry agreements provide for a method of potential release of two-character LDH names at the second level. In addition, two character LDH strings at the second level may be released through the process for new registry services, which process involves analysis of any technical or security concerns and provides opportunity for public input. Technical issues related to the release of two-letter and/or number strings have been addressed by the RSTEP Report on GNR's proposed registry service. The GAC has previously noted the WIPO II Report statement that "If ISO 3166 alpha-2 country code elements are to be registered as domain names in the gTLDs, it is recommended that this be done in a manner that minimises the potential for confusion with the ccTLDs."

[61] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).
[62] Internet Draft IDNAbis Issues: http://www.ietf.org/internet-drafts/draft-klensin-idnabis-issues-01.txt (J. Klensin), Section 3.1.1.1
[63] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).
[64] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).
[65] With its recommendation, the sub-group takes into consideration that justification for potential user confusion (i.e., the minority view) as a result of removing the contractual condition to reserve gTLD strings for new TLDs may surface during one or more public comment periods.
[66] Note that this recommendation is a continuation of the recommendation in the original RN-WG report, modified to synchronize with the additional work done in the 30-day extension period.
[67] Ms Doria said "...My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order. This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all poss ble religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is proh bited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality."
[68] http://www.icann.org/tlds/agreements/net/appendix7.html
[69] 'While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E.g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts.

Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority peoples that have a different set of financial opportunities or capabilities then those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels."
[70] "In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)".
[71] "In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from

the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal."
[72] Consensus Policies has a particular meaning within the ICANN environment. Refer to http://www.icann.org/general/consensus-policies.htm for the full list of ICANN's Consensus Policies.
[73] http://www.icann.org/general/bylaws.htm#AnnexA
[74] http://www.icann.org/registries/agreements.htm
[75] The full list of reports is found in the Reference section at the end of the document.
[76] http://www.icann.org/announcements/announcement-4-07mar07.htm
[77] Found at http://www.icann.org/registrars/ra-agreement-17may01.htm
[78] Found at http://www.icann.org/registrars/accreditation.htm.
[79] Text of Recommendation #6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."
[80] Ms Doria took over from former GNSO Council Chairman (and GNSO new TLDs Committee Chairman) Dr Bruce Tonkin on 7 June 2007. Ms Doria's term runs until 31 January 2008.
[81] Available at: http://forum.icann.org/lists/gtld-council/pdfOQqgaRNrXf.pdf
[82] Available at: http://ipjustice.org/wp/2007/06/13/ncuc-newgtld-stmt-june2007/
[83] This glossary has been developed over the course of the policy development process. Refer here to ICANN's glossary of terms http://www.icann.org/general/glossary.htm for further information.

EX. RE-5

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Help

Thanks to Steve Conte

- Thanks to Sponsors
- Thanks to Local Hosts, Staff, Scribes, Interpreters, Event Teams, and Others

Approval of Minutes

Resolved (2008.06.26.01), the minutes of the Board Meeting of 29 May 2008 are approved. <http://www.icann.org/minutes/prelim-report-29may08.htm>

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GNSO Recommendations on New gTLDs

Whereas, the GNSO initiated a policy development process on the introduction of New gTLDs in December 2005. <http://gnso.icann.org/issues/new-gtlds/>

Whereas, the GNSO Committee on the Introduction of New gTLDs addressed a range of difficult technical, operational, legal, economic, and policy questions, and facilitated widespread participation and public comment throughout the process.

Whereas, the GNSO successfully completed its policy development process on the Introduction of New gTLDs and on 7 September 2007, and achieved a Supermajority vote on its 19 policy recommendations. <http://gnso.icann.org/meetings/minutes-gnso-06sep07.shtml>

Whereas, the Board instructed staff to review the GNSO recommendations and determine whether they were capable of implementation.

Whereas, staff has engaged international technical, operational and legal expertise to provide counsel on details to support the implementation of the Policy recommendations and as a result, ICANN cross-functional teams have developed implementation details in support of the GNSO's policy recommendations, and have concluded that the recommendations are capable of implementation.

Whereas, staff has provided regular updates to the community and the Board on the implementation plan. <http://icann.org/topics/new-gtld-program.htm>

Whereas, consultation with the DNS technical community has led to the conclusion that there is not currently any evidence to support establishing a

limit to how many TLDs can be inserted in the root based on technical stability concerns. <http://www.icann.org/topics/dns-stability-draft-paper-06feb08.pdf>

Whereas, the Board recognizes that the process will need to be resilient to unforeseen circumstances.

Whereas, the Board has listened to the concerns about the recommendations that have been raised by the community, and will continue to take into account the advice of ICANN's supporting organizations and advisory committees in the implementation plan.

Resolved (2008.06.26.02), based on both the support of the community for New gTLDs and the advice of staff that the introduction of new gTLDs is capable of implementation, the Board adopts the GNSO policy recommendations for the introduction of new gTLDs <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

Resolved (2008.06.26.03), the Board directs staff to continue to further develop and complete its detailed implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the board and community to approve before the new gTLD introduction process is launched.

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IDNC / IDN Fast-track

Whereas, the ICANN Board recognizes that the "IDNC Working Group" developed, after extensive community comment, a final report on feasible methods for timely (fast-track) introduction of a limited number of IDN ccTLDs associated with ISO 3166-1 two-letter codes while an overall, long-term IDN ccTLD policy is under development by the ccNSO.

Whereas, the IDNC Working Group has concluded its work and has submitted recommendations for the selection and delegation of "fast-track" IDN ccTLDs and, pursuant to its charter, has taken into account and was guided by consideration of the requirements to:

- Preserve the security and stability of the DNS;
- Comply with the IDNA protocols;
- Take input and advice from the technical community with respect to the implementation of IDNs; and
- Build on and maintain the current practices for the delegation of ccTLDs,

which include the current IANA practices.

Whereas, the IDNC Working Group's high-level recommendations require implementation planning.

Whereas, ICANN is looking closely at interaction with the final IDN ccTLD PDP process and potential risks, and intends to implement IDN ccTLDs using a procedure that will be resilient to unforeseen circumstances.

Whereas, staff will consider the full range of implementation issues related to the introduction of IDN ccTLDs associated with the ISO 3166-1 list, including means of promoting adherence to technical standards and mechanisms to cover the costs associated with IDN ccTLDs.

Whereas, the Board intends that the timing of the process for the introduction of IDN ccTLDs should be aligned with the process for the introduction of New gTLDs.

Resolved (2008.06.26.04), the Board thanks the members of the IDNC WG for completing their chartered tasks in a timely manner.

Resolved (2008.06.26.05), the Board directs staff to: (1) post the IDNC WG final report for public comments; (2) commence work on implementation issues in consultation with relevant stakeholders; and (3) submit a detailed implementation report including a list of any outstanding issues to the Board in advance of the ICANN Cairo meeting in November 2008.

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GNSO Recommendation on Domain Tasting

Whereas, ICANN community stakeholders are increasingly concerned about domain tasting, which is the practice of using the add grace period (AGP) to register domain names in bulk in order to test their profitability.

Whereas, on 17 April 2008, the GNSO Council approved, by a Supermajority vote, a motion to prohibit any gTLD operator that has implemented an AGP from offering a refund for any domain name deleted during the AGP that exceeds 10% of its net new registrations in that month, or fifty domain names, whichever is greater. <http://gnso.icann.org/meetings/minutes-gnso-17apr08.shtml>

Whereas, on 25 April 2008, the GNSO Council forwarded its formal "Report to the ICANN Board - Recommendation for Domain Tasting" <http://gnso.icann.org/issues/domain-tasting/domain-tasting-board-report-

gnso-council-25apr08.pdf>, which outlines the full text of the motion and the full context and procedural history of this proceeding.

Whereas, the Board is also considering the Proposed FY 09 Operating Plan and Budget <http://www.icann.org/financials/fiscal-30jun09.htm>, which includes (at the encouragement of the GNSO Council) a proposal similar to the GNSO policy recommendation to expand the applicability of the ICANN transaction fee in order to limit domain tasting.

Resolved (2008.06.26.06), the Board adopts the GNSO policy recommendation on domain tasting, and directs staff to implement the policy following appropriate comment and notice periods on the implementation documents.

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Approval of Operating Plan and Budget for Fiscal Year 2008-2009

Whereas, ICANN approved an update to the Strategic Plan in December 2007. < http://www.icann.org/strategic-plan/>

Whereas, the Initial Operating Plan and Budget Framework for fiscal year 2009 was presented at the New Delhi ICANN meeting and was posted in February 2008 for community consultation. <http://www.icann.org/announcements/announcement-2-04feb08.htm>

Whereas, community consultations were held to discuss and obtain feedback on the Initial Framework.

Whereas, the draft FY09 Operating Plan and Budget was posted for public comment in accordance with the Bylaws on 17 May 2008 based upon the Initial Framework, community consultation, and consultations with the Board Finance Committee. A slightly revised version was posted on 23 May 2008. <http://www.icann.org/financials/fiscal-30jun09.htm>

Whereas, ICANN has actively solicited community feedback and consultation with ICANN's constituencies. <http://forum.icann.org/lists/op-budget-fy2009/>

Whereas, the ICANN Board Finance Committee has discussed, and guided staff on, the FY09 Operating Plan and Budget at each of its regularly scheduled monthly meetings.

Whereas, the final FY09 Operating Plan and Budget was posted on 26 June 2008. <http://www.icann.org/en/financials/proposed-opplan-budget-v3-fy09-

25jun08-en.pdf>

Whereas, the ICANN Board Finance Committee met in Paris on 22 June 2008 to discuss the FY09 Operating Plan and Budget, and recommended that the Board adopt the FY09 Operating Plan and Budget.

Whereas, the President has advised that the FY09 Operating Plan and Budget reflects the work of staff and community to identify the plan of activities, the expected revenue, and resources necessary to be spent in fiscal year ending 30 June 2009.

Whereas, continuing consultation on the budget has been conducted at ICANN's meeting in Paris, at constituency meetings, and during the public forum.

Resolved (2008.06.26.07), the Board adopts the Fiscal Year 2008-2009 Operating Plan and Budget. <http://www.icann.org/en/financials/proposed-opplan-budget-v3-fy09-25jun08-en.pdf>

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Update on Draft Amendments to the Registrar Accreditation Agreement

(For discussion only.)

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Approval of PIR Request to Implement DNSSEC in .ORG

Whereas, Public Interest Registry has submitted a proposal to implement DNS Security Extensions (DNSSEC) in .ORG. <http://icann.org/registries/rsep/pir-request-03apr08.pdf>

Whereas, staff has evaluated the .ORG DNSSEC proposal as a new registry service via the Registry Services Evaluation Policy <http://icann.org/registries/rsep/>, and the proposal included a requested amendment to Section 3.1(c)(i) of the .ORG Registry Agreement <http://icann.org/tlds/agreements/org/proposed-org-amendment-23apr08.pdf> which was posted for public comment along with the PIR proposal.

Whereas, the evaluation under the threshold test of the Registry Services Evaluation Policy <http://icann.org/registries/rsep/rsep.html> found a likelihood of security and stability issues associated with the proposed implementation. The RSTEP Review Team considered the proposal and found that there was a

risk of a meaningful adverse effect on security and stability, which could be effectively mitigated by policies, decisions and actions to which PIR has expressly committed in its proposal or could be reasonably required to commit. <http://icann.org/registries/rsep/rstep-report-pir-dnssec-04jun08.pdf>

Whereas, the Chair of the SSAC has advised that RSTEP's thorough investigation of every issue that has been raised concerning the security and stability effects of DNSSEC deployment concludes that effective measures to deal with all of them can be taken by PIR, and that this conclusion after exhaustive review greatly increases the confidence with which DNSSEC deployment in .ORG can be undertaken.

Whereas, PIR intends to implement DNSSEC only after extended testing and consultation.

Resolved (2008.06.26.08), that PIR's proposal to implement DNSSEC in .ORG is approved, with the understanding that PIR will continue to cooperate and consult with ICANN on details of the implementation. The President and the General Counsel are authorized to enter the associated amendment to the .ORG Registry Agreement, and to take other actions as appropriate to enable the deployment of DNSSEC in .ORG.

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ICANN Board of Directors' Code of Conduct

Whereas, the members of ICANN's Board of Directors are committed to maintaining a high standard of ethical conduct.

Whereas, the Board Governance Committee has developed a Code of Conduct to provide the Board with guiding principles for conducting themselves in an ethical manner.

Resolved (2008.06.26.09), the Board directs staff to post the newly proposed ICANN Board of Directors' Code of Conduct for public comment, for consideration by the Board as soon as feasible. [Reference to PDF will be inserted when posted.]

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Ratification of Selection of Consultant to Conduct Independent Review of the Board

Whereas, the Board Governance Committee has recommended that Boston

Consulting Group be selected as the consultant to perform the independent review of the ICANN Board.

Whereas, the BGC's recommendation to retain BCG was approved by the Executive Committee during its meeting on 12 June 2008.

Resolved (2008.06.26.10), the Board ratifies the Executive Committee's approval of the Board Governance Committee's recommendation to select Boston Consulting Group as the consultant to perform the independent review of the ICANN Board.

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Appointment of Independent Review Working Groups

Whereas, the Board Governance Committee has recommended that several working groups should be formed to coordinate pending independent reviews of ICANN structures.

Resolved (2008.06.26.11), the Board establishes the following independent review working groups:

- ICANN Board Independent Review Working Group: Amadeu Abril i Abril, Roberto Gaetano (Chair), Steve Goldstein, Thomas Narten, Rajasekhar Ramaraj, Rita Rodin, and Jean Jacques Subrenat.
- DNS Root Server System Advisory Committee (RSSAC) Independent Review Working Group: Harald Alvestrand (Chair), Steve Crocker and Bruce Tonkin.
- Security and Stability Advisory Committee (SSAC) Independent Review Working Group: Robert Blokzijl, Dennis Jennings (Chair), Reinhard Scholl and Suzanne Woolf.

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Update on Independent Reviews of ICANN Structures

(For discussion only.)

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Board Committee Assignment Revisions

Whereas, the Board Governance Committee has recommended that the

membership of several Board should be revised, and that all other committees should remain unchanged until the 2008 Annual Meeting.

Resolved (2008.06.26.12), the membership of the Audit, Finance, and Reconsideration committees are revised as follows:

- Audit Committee: Raimundo Beca, Demi Getschko, Dennis Jennings, Njeri Rionge and Rita Rodin (Chair).
- Finance Committee: Raimundo Beca, Peter Dengate Thrush, Steve Goldstein, Dennis Jennings, Rajasekhar Ramaraj (Chair), and Bruce Tonkin (as observer).
- Reconsideration Committee: Susan Crawford (Chair), Demi Getschko, Dennis Jennings, Rita Rodin, and Jean-Jacques Subrenat.

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Approval of BGC Recommendations on GNSO Improvements

Whereas, Article IV, Section 4 of ICANN's Bylaws calls for periodic reviews of the performance and operation of ICANN's structures by an entity or entities independent of the organization under review.

Whereas, the Board created the "Board Governance Committee GNSO Review Working Group" (Working Group) to consider the independent review of the GNSO and other relevant input, and recommend to the Board Governance Committee a comprehensive proposal to improve the effectiveness of the GNSO, including its policy activities, structure, operations and communications.

Whereas, the Working Group engaged in extensive public consultation and discussions, considered all input, and developed a final report <http://www.icann.org/topics/gnso-improvements/gnso-improvements-report-03feb08.pdf> containing a comprehensive and exhaustive list of proposed recommendations on GNSO improvements.

Whereas, the Board Governance Committee determined that the GNSO Improvements working group had fulfilled its charter and forwarded the final report to the Board for consideration.

Whereas, a public comment forum was held open for 60 days to receive, consider and summarize <http://forum.icann.org/lists/gnso-improvements-report-2008/msg00033.html> public comments on the final report.

Whereas, the GNSO Council and Staff have worked diligently over the past few months to develop a top-level plan for approaching the implementation of the improvement recommendations, as requested by the Board at its New Delhi meeting.

Whereas, ICANN has a continuing need for a strong structure for developing policies that reflect to the extent possible a consensus of all stakeholders in the community including ICANN's contracted parties.

Resolved (2008.06.26.13), the Board endorses the recommendations of the Board Governance Committee's GNSO Review Working Group, other than on GNSO Council restructuring, and requests that the GNSO convene a small working group on Council restructuring including one representative from the current NomCom appointees, one member from each constituency and one member from each liaison-appointing advisory committee (if that advisory committee so desires), and that this group should reach consensus and submit a consensus recommendation on Council restructuring by no later than 25 July 2008 for consideration by the ICANN Board as soon as possible, but no later than the Board's meeting in August 2008.

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Receipt of Report of President's Strategy Committee Consultation

Whereas, the Chairman of the Board requested that the President's Strategy Committee undertake a process on how to strengthen and complete the ICANN multi-stakeholder model.

Whereas, the PSC has developed three papers that outline key areas and possible responses to address them: "Transition Action Plan," "Improving Institutional Confidence in ICANN," and "FAQ." <http://icann.org/en/announcements/announcement-16jun08-en.htm >

Whereas, these documents and the proposals contained in them have been discussed at ICANN's meeting in Paris.

Whereas, a dedicated webpage has been launched to provide the community with information, including regular updates <http://icann.org/jpa/iic/>.

Resolved (2008.06.26.14), the Board thanks the President's Strategy Committee for its work to date, and instructs ICANN staff to undertake the public consultation recommended in the action plan, and strongly encourages the entire ICANN community to participate in the continuing consultations on

the future of ICANN by reviewing and submitting comments to the PSC by 31 July 2008.

Selection of Mexico City for March 2009 ICANN Meeting

Whereas, ICANN intends to hold its first meeting for calendar year 2009 in the Latin America region;

Whereas, the Mexican Internet Association (AMIPCI) has agreed to host the meeting;

Resolved (2008.06.26.15), the Board accepts the AMIPCI proposal to host ICANN's 34th global meeting in Mexico City, in March 2009.

Review of Paris Meeting Structure

(For discussion only.)

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Board Response to Discussions Arising from Paris Meeting

(For discussion only.)

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ICANN At-Large Summit Proposal

Whereas, at the ICANN meeting in New Delhi in February 2008, the Board resolved to direct staff to work with the ALAC to finalise a proposal to fund an ICANN At-Large Summit, for consideration as part of the 2008-2009 operating plan and budget process. <http://www.icann.org/minutes/resolutions-15feb08.htm>

Whereas, potential funding for such a summit has been identified in the FY09 budget. <http://www.icann.org/financials/fiscal-30jun09.htm>

Whereas, a proposal for the Summit was completed and submitted shortly before the ICANN Meeting in Paris.

Resolved (2008.06.26.16), the Board approves the proposal to hold an ICANN At-Large Summit as a one-time special event, and requests that the ALAC work with ICANN Staff to implement the Summit in a manner that achieves efficiency, including considering the Mexico meeting as the venue.

Resolved (2008.06.26.17), with the maturation of At-Large and the proposal for the At-Large Summit's objectives set out, the Board expects the ALAC to look to more self-funding for At-Large travel in the fiscal year 2010 plan, consistent with the travel policies of other constituencies.

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Other Business

(TBD)

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Thanks to Steve Conte

Whereas, Steve Conte has served as an employee of ICANN for over five years.

Whereas, Steve has served ICANN in a number of roles, currently as ICANN's Chief Security Officer, but also as a vital support to the Board and its work at meetings.

Whereas, Steve has given notice to ICANN that he has accepted a new position with the Internet Society (ISOC), and that his employment with ICANN will conclude at the end of this meeting.

Whereas, Steve is of gentle nature, possessed of endless patience and fierce integrity, a love of music, and great dedication to the Internet and those who nurture it.

Whereas, the ICANN Board wishes to recognize Steve for his service to ICANN and the global Internet community. In particular, Steve has tirelessly and with good nature supported the past 19 ICANN meetings and his extraordinary efforts have been most appreciated.

Resolved (2008.06.26.18), the ICANN Board formally thanks Steve Conte for his service to ICANN, and expresses its good wishes to Steve for his work with ISOC and all his future endeavors.

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Thanks to Sponsors

The Board extends its thanks to all sponsors of this meeting:

L'Association Française pour le Nommage Internet en Coopération (AFNIC), France Télécom, Groupe Jutheau Husson, Stichting Internet Domeinregistratie Nederland (SIDN), Association Marocaine des Professionnels des Telecommunications (MATI), Afilias Limited, Deutsches Network Information Center (DENIC), The European Registry of Domain Names (EURid), European Domain Name Registration (EuroDNS), INDOM, Toit de la Grande Arche Parvis de la Défense, Musee de L'informatique, NeuStar, Inc., Public Interest Registry, VeriSign, Inc., AusRegistry, Fundació puntCAT, Council of European National Top Level Domain Registries (CENTR), China Internet Network Information Center (CNNIC), Institut National de Recherche en Informatique et en Automatique (INRIA), InterNetX, Key-Systems GmbH, Directi Internet Solutions Pvt. Ltd. d/b/a PublicDomainRegistry.com, Nask, Nominet UK, The Internet Infrastructure Foundation (.SE), Registry ASP, Amen, DotAsia Organisation Ltd., Domaine FR, Golog, Iron Mountain Intellectual Property Management, Inc., Nameaction, Inc., NIC.AT Internet Verwaltungs und Betriebsgesellschaft m.b.H, UNINETT Norid A/S, IIT – CNR (Registro del ccTLD.it), Renater, Domaine.info, and ICANNWiki.

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Thanks to Local Hosts, Staff, Scribes, Interpreters, Event Teams, and Others

The Board wishes to extend its thanks to the local host organizers, AGIFEM, its President Daniel Dardailler, Vice-President Pierre Bonis and CEO Sebastien Bachollet, as well as Board Members from Afnic, Amen, Domaine.fr, Eurodns, Indom, Internet Society France, Internet fr, Namebay, Renater, and W3C.

The Board would also like to thank Eric Besson, the Minister for Forward Planning, Assessment of Public Policies and Development of the Digital Economy for his participation in the Welcome Ceremony and the Welcome Cocktail.

The Board thanks the Au Toit de la Grande Arche , its president, Francis Bouvier, and Directeur, Philippe Nieuwbourg, and Bertrand Delanoë, Maire de Paris, and Jean-Louis Missika, adjoint au Maire de Paris for their hospitality at the social events at the ICANN Paris meeting.

The Board expresses its appreciation to the scribes Laura Brewer, Teri Darrenougue, Jennifer Schuck, and Charles Motter and to the entire ICANN staff for their efforts in facilitating the smooth operation of the meeting. ICANN would particularly like to acknowledge the many efforts of Michael Evans for his assistance in organizing the past eighteen public board meetings and

many other smaller events for the ICANN community.

The Board also wishes to express its appreciation to VeriLan Events Services, Inc. for technical support, Auvitec and Prosn for audio/visual support, Calliope Interpreters France for interpretation, and France Telecom for bandwith. Additional thanks are given to the Le Meridien Montparnasse for this fine facility, and to the event facilities and support.

The Board also wishes to thank all those who worked to introduce a Business Access Agenda for the first time at this meeting, Ayesha Hassan of the International Chamber of Commerce, Marilyn Cade, and ICANN Staff.

The members of the Board wish to especially thank their fellow Board Member Jean-Jacques Subrenat for his assistance in making the arrangements for this meeting in Paris, France.

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EX. RE-6

gTLD Applicant Guidebook

Version 2012-06-04

4 June 2012

Preamble

New gTLD Program Background

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at http://gnso.icann.org/issues/new-gtlds.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to http://www.icann.org/en/topics/new-gtld-program.htm.

EX. RE-7

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this "Agreement") is entered into as of _____ (the "Effective Date") between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN"), and _____, a _____ ("Registry Operator").

ARTICLE 1.

DELEGATION AND OPERATION OF TOP–LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.1 Domain and Designation. The Top-Level Domain to which this Agreement applies is ____ (the "TLD"). Upon the Effective Date and until the earlier of the expiration of the Term (as defined in Section 4.1) or the termination of this Agreement pursuant to Article 4, ICANN designates Registry Operator as the registry operator for the TLD, subject to the requirements and necessary approvals for delegation of the TLD and entry into the root-zone.

1.2 Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.

1.3 Representations and Warranties.

(a) Registry Operator represents and warrants to ICANN as follows:

(i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

(ii) Registry Operator is duly organized, validly existing and in good standing under the laws of the jurisdiction set forth in the preamble hereto, and Registry Operator has all requisite power and authority and has obtained all necessary approvals to enter into and duly execute and deliver this Agreement; and

(iii) Registry Operator has delivered to ICANN a duly executed instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the "Continued Operations Instrument"), and such instrument is a binding

obligation of the parties thereto, enforceable against the parties thereto in accordance with its terms.

(b) ICANN represents and warrants to Registry Operator that ICANN is a nonprofit public benefit corporation duly organized, validly existing and in good standing under the laws of the State of California, United States of America. ICANN has all requisite power and authority and has obtained all necessary corporate approvals to enter into and duly execute and deliver this Agreement.

ARTICLE 2.

COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

2.1 Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2.1 in the Specification 6 attached hereto ("Specification 6") and such other Registry Services set forth on Exhibit A (collectively, the "Approved Services"). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a material modification to an Approved Service (each, an "Additional Service"), Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws") applicable to Consensus Policies (the "RSEP"). Registry Operator may offer Additional Services only with the written approval of ICANN, and, upon any such approval, such Additional Services shall be deemed Registry Services under this Agreement. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

2.2 Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with the ICANN Bylaws, provided such future Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth in Specification 1 attached hereto ("Specification 1").

2.3 Data Escrow. Registry Operator shall comply with the registry data escrow procedures set forth in Specification 2 attached hereto ("Specification 2") within fourteen (14) calendar days after delegation.

2.4 Monthly Reporting. Within twenty (20) calendar days following the end of each calendar month, commencing with the first calendar month in which the TLD is delegated in the root zone, Registry Operator shall deliver to ICANN reports in the format

set forth in Specification 3 attached hereto ("Specification 3"); provided, however, that if the TLD is delegated in the root zone after the fifteenth (15th) calendar day of the calendar month, Registry Operator may defer the delivery of the reports for such first calendar month and instead deliver to ICANN such month's reports no later than the time that Registry Operator is required to deliver the reports for the immediately following calendar month. Registry Operator must include in the Per-Registrar Transactions Report any domain name created during pre-delegation testing that has not been deleted as of the time of delegation (notably but not limited to domains registered by Registrar IDs 9995 and/or 9996).

2.5 Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with Specification 4 attached hereto ("Specification 4").

2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the requirements set forth in Specification 5 attached hereto ("Specification 5"). Registry Operator may at any time establish or modify policies concerning Registry Operator's ability to reserve (i.e., withhold from registration or allocate to Registry Operator, but not register to third parties, delegate, use, activate in the DNS or otherwise make available) or block additional character strings within the TLD at its discretion. Except as specified in Specification 5, if Registry Operator is the registrant for any domain names in the registry TLD, such registrations must be through an ICANN accredited registrar, and will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-level transaction fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

2.7 Registry Interoperability and Continuity. Registry Operator shall comply with the Registry Interoperability and Continuity Specifications as set forth in Specification 6 attached hereto ("Specification 6").

2.8 Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, the processes and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth Specification 7 attached hereto ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.

2.9 Registrars.

(a) All domain name registrations in the TLD must be registered through an ICANN accredited registrar; provided, that Registry Operator need not use a registrar if it registers names in its own name in order to withhold such names from delegation or use in accordance with Section 2.6. Subject to the requirements of Specification 11, Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD (the "Registry-Registrar Agreement"). Registry Operator may amend the Registry-Registrar Agreement from time to time; provided, however, that any material revisions thereto must be approved by ICANN before any such revisions become effective and binding on any registrar. Registry Operator will provide ICANN and all registrars authorized to register names in the TLD at least fifteen (15) calendar days written notice of any revisions to the Registry-Registrar Agreement before any such revisions become effective and binding on any registrar. During such period, ICANN will determine whether such proposed revisions are immaterial, potentially material or material in nature. If ICANN has not provided Registry Operator with notice of its determination within such fifteen (15) calendar-day period, ICANN shall be deemed to have determined that such proposed revisions are immaterial in nature. If ICANN determines, or is deemed to have determined under this Section 2.9(a), that such revisions are immaterial, then Registry Operator may adopt and implement such revisions. If ICANN determines such revisions are either material or potentially material, ICANN will thereafter follow its procedure regarding review and approval of changes to Registry-Registrar Agreements at <http://www.icann.org/en/resources/registries/rra-amendment-procedure>, and such revisions may not be adopted and implemented until approved by ICANN. Notwithstanding the foregoing provisions of this Section 2.9(a), any change to the Registry-Registrar Agreement that relates exclusively to the fee charged by Registry Operator to register domain names in the TLD will not be subject to the notice and approval process specified in this Section 2.9(a), but will be subject to the requirements in Section 2.10 below.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will treat such contract or related documents that are appropriately marked as confidential (as required by Section 7.15) as Confidential Information of Registry Operator in accordance with Section 7.15 (except that ICANN may disclose such contract and related documents to relevant competition authorities). ICANN reserves the right, but not the obligation, to refer any such contract,

related documents, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, related documents, transaction or other arrangement might raise significant competition issues under applicable law. If feasible and appropriate under the circumstances, ICANN will give Registry Operator advance notice prior to making any such referral to a competition authority.

(c) For the purposes of this Agreement: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, or in combination with one or more other persons or entities, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

2.10 Pricing for Registry Services.

(a) With respect to initial domain name registrations, Registry Operator shall provide each ICANN accredited registrar that has executed the Registry-Registrar Agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited duration that is clearly and conspicuously disclosed to the registrar when offered) of no less than thirty (30) calendar days. Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one (1) to ten (10) years at the discretion of the registrar, but no greater than ten (10) years.

(b) With respect to renewal of domain name registrations, Registry Operator shall provide each ICANN accredited registrar that has executed the Registry-Registrar Agreement for the TLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying, Qualified Marketing Programs or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing sentence, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to (A) for the period beginning on the Effective Date and ending twelve (12) months following the Effective Date, the initial price charged for registrations in the TLD, or (B) for subsequent periods, a price for which Registry Operator provided a notice pursuant to the first sentence of this Section 2.10(b) within the twelve (12) month period preceding the effective date of the proposed price increase; and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current

price (i.e., the price in place prior to any noticed increase) for periods of one (1) to ten (10) years at the discretion of the registrar, but no greater than ten (10) years.

(c) In addition, Registry Operator must have uniform pricing for renewals of domain name registrations ("Renewal Pricing"). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals in place at the time of such renewal, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs in place at the time of renewal. The foregoing requirements of this Section 2.10(c) shall not apply for (i) purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to higher Renewal Pricing at the time of the initial registration of the domain name following clear and conspicuous disclosure of such Renewal Pricing to such registrant, and (ii) discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing practices imposed by Registry Operator without the written consent of the applicable registrant at the time of the initial registration of the domain and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a "Qualified Marketing Program" is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed one hundred eighty (180) calendar days (with consecutive substantially similar programs aggregated for purposes of determining the number of calendar days of the program), (ii) all ICANN accredited registrars are provided the same opportunity to qualify for such discounted Renewal Pricing; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations. Nothing in this Section 2.10(c) shall limit Registry Operator's obligations pursuant to Section 2.10(b).

(d) Registry Operator shall provide public query-based DNS lookup service for the TLD (that is, operate the Registry TLD zone servers) at its sole expense.

2.11 Contractual and Operational Compliance Audits.

(a) ICANN may from time to time (not to exceed twice per calendar year) conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN will (a) give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN, and (b) use commercially reasonable efforts to conduct such audit during regular business hours and in such a manner as to not unreasonably disrupt the operations of Registry Operator. As part of such audit and upon request by ICANN, Registry Operator shall timely

provide all responsive documents, data and any other information reasonably necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than ten (10) calendar days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its representations and warranties contained in Article 1 of this Agreement and its covenants contained in Article 2 of this Agreement. ICANN will treat any information obtained in connection with such audits that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of Registry Operator in accordance with Section 7.15.

(b) Any audit conducted pursuant to Section 2.11(a) will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, or (B) has subcontracted the provision of Registry Services to an ICANN accredited registrar or registrar reseller or any of their respective Affiliates, and, in either case of (A) or (B) above, the audit relates to Registry Operator's compliance with Section 2.14, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the portion of the audit related to Registry Operator's compliance with Section 2.14, or (ii) the audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% in a given quarter to ICANN's detriment, in which case Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with the entirety of such audit. In either such case of (i) or (ii) above, such reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

(c) Notwithstanding Section 2.11(a), if Registry Operator is found not to be in compliance with its representations and warranties contained in Article 1 of this Agreement or its covenants contained in Article 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

(d) Registry Operator will give ICANN immediate notice of Registry Operator's knowledge of the commencement of any of the proceedings referenced in Section 4.3(d) or the occurrence of any of the matters specified in Section 4.3(f).

2.12 Continued Operations Instrument. Registry Operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth in Specification 8 attached hereto ("Specification 8").

2.13 Emergency Transition. Registry Operator agrees that, in the event that any of the emergency thresholds for registry functions set forth in Section 6 of Specification 10 is reached, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at <http://www.icann.org/en/resources/registries/transition-processes>) (as the same may be amended from time to time, the "Registry Transition Process") until such

time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process, provided that Registry Operator pays all reasonable costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD, which costs shall be documented in reasonable detail in records that shall be made available to Registry Operator. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument.

2.14 Registry Code of Conduct. In connection with the operation of the registry for the TLD, Registry Operator shall comply with the Registry Code of Conduct as set forth in Specification 9 attached hereto ("Specification 9").

2.15 Cooperation with Economic Studies. If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data related to the operation of the TLD reasonably necessary for the purposes of such study requested by ICANN or its designee, provided, that Registry Operator may withhold (a) any internal analyses or evaluations prepared by Registry Operator with respect to such data and (b) any data to the extent that the delivery of such data would be in violation of applicable law. Any data delivered to ICANN or its designee pursuant to this Section 2.15 that is appropriately marked as confidential (as required by Section 7.15) shall be treated as Confidential Information of Registry Operator in accordance with Section 7.15, provided that, if ICANN aggregates and makes anonymous such data, ICANN or its designee may disclose such data to any third party. Following completion of an economic study for which Registry Operator has provided data, ICANN will destroy all data provided by Registry Operator that has not been aggregated and made anonymous.

2.16 Registry Performance Specifications. Registry Performance Specifications for operation of the TLD will be as set forth in Specification 10 attached hereto ("Specification 10"). Registry Operator shall comply with such Performance Specifications and, for a period of at least one (1) year, shall keep technical and operational records sufficient to evidence compliance with such specifications for each calendar year during the Term.

2.17 Additional Public Interest Commitments. Registry Operator shall comply with the public interest commitments set forth in Specification 11 attached hereto ("Specification 11").

2.18 Personal Data. Registry Operator shall (i) notify each ICANN-accredited registrar that is a party to the Registry-Registrar Agreement for the TLD of the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to Registry Operator by such registrar is collected and used under this Agreement or otherwise and the intended recipients (or categories of recipients) of such Personal Data, and (ii) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data. Registry Operator shall take reasonable steps to protect Personal Data collected from such registrar from loss, misuse, unauthorized disclosure, alteration or destruction. Registry Operator shall not use or authorize the use of Personal Data in a way that is incompatible with the notice provided to registrars.

2.19 [Note: For Community-Based TLDs Only] Obligations of Registry Operator to TLD Community. Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration policies, and shall enforce such registration policies. Registry Operator agrees to implement and be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at http://www.icann.org/en/resources/registries/rrdrp with respect to disputes arising pursuant to this Section 2.19. Registry Operator shall implement and comply with the community registration policies set forth on Specification 12 attached hereto.]

ARTICLE 3.

COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

3.1 Open and Transparent. Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

3.2 Equitable Treatment. ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

3.3 TLD Nameservers. ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by

Registry Operator (in a format and with required technical elements specified by ICANN at http://www.iana.org/domains/root/ will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications.

3.4 Root-zone Information Publication. ICANN's publication of root-zone contact information for the TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at http://www.iana.org/domains/root/.

3.5 Authoritative Root Database. To the extent that ICANN is authorized to set policy with regard to an authoritative root server system (the "Authoritative Root Server System"), ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction.

ARTICLE 4.

TERM AND TERMINATION

4.1 Term. The term of this Agreement will be ten (10) years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

4.2 Renewal.

(a) This Agreement will be renewed for successive periods of ten (10) years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

(i) Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or breach of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach, and such breach has not been cured within thirty (30) calendar days of such notice, (A) an arbitrator or court of competent jurisdiction has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (B) Registry Operator has failed to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction; or

(ii) During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) or a court of competent jurisdiction on at least three (3) separate occasions to have been in (A) fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or (B) breach of its payment obligations under Article 6 of this Agreement.

(b) Upon the occurrence of the events set forth in Section 4.2(a) (i) or (ii), the Agreement shall terminate at the expiration of the then-current Term.

4.3 Termination by ICANN.

(a) ICANN may, upon notice to Registry Operator, terminate this Agreement if: (i) Registry Operator fails to cure (A) any fundamental and material breach of Registry Operator's representations and warranties set forth in Article 1 or covenants set forth in Article 2, or (B) any breach of Registry Operator's payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court of competent jurisdiction has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in breach of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction.

(b) ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

(c) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator fails to cure a material breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date, (ii) an arbitrator or court of competent jurisdiction has finally determined that Registry Operator is in material breach of such covenant, and (iii) Registry Operator fails to cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction.

(d) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within sixty (60) calendar days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any material property of Registry Operator that, if levied, would reasonably be expected to materially and adversely affect Registry Operator's ability to operate the registry for the TLD, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not dismissed within sixty (60) calendar days of their commencement (if such proceedings are instituted by Registry Operator or its Affiliates) or one hundred and eighty (180) calendar days of their commencement (if such proceedings are instituted by a third party against Registry Operator), or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section 101, et seq., or a foreign equivalent or liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

(e) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to a determination by any PDDRP panel or RRDRP panel under Section 2 of Specification 7 or a determination by any PICDRP panel under Section 2, Section 3 or any other applicable Section of Specification 11, subject to Registry Operator's right to challenge such termination as set forth in the applicable procedure described therein.

(f) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer who is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing.

(g) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement as specified in Section 7.5.

(h) [*Applicable to intergovernmental organizations or governmental entities only.*] ICANN may terminate this Agreement pursuant to Section 7.16.

4.4 Termination by Registry Operator.

(a) Registry Operator may terminate this Agreement upon notice to ICANN if (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court of competent jurisdiction has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court of competent jurisdiction.

(b) Registry Operator may terminate this Agreement for any reason upon one hundred eighty (180) calendar day advance notice to ICANN.

4.5 Transition of Registry upon Termination of Agreement. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD in accordance with this Section 4.5 with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; provided, however, that (i) ICANN will take into consideration any intellectual property rights of Registry Operator (as communicated to ICANN by Registry Operator) in determining whether to transition operation of the TLD to a successor registry operator and (ii) if Registry Operator demonstrates to ICANN's reasonable satisfaction that (A) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator or its Affiliates for their exclusive use, (B) 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 (C) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed). For the avoidance of doubt, the foregoing sentence shall not prohibit ICANN from delegating the TLD pursuant to a future application process for the delegation of top-level domains, subject to any processes and objection procedures instituted by ICANN in connection with such application process intended to protect the rights of third parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument for the maintenance and operation of the TLD, regardless of the reason for termination or expiration of this Agreement.

[*Alternative* ***Section 4.5 Transition of Registry upon Termination of Agreement*** *text for intergovernmental organizations or governmental entities or other special circumstances*:

"**Transition of Registry upon Termination of Agreement**. Upon expiration of the Term pursuant to Section 4.1 or Section 4.2 or any termination of this Agreement pursuant to Section 4.3 or Section 4.4, in connection with ICANN's designation of a successor registry operator for the TLD, Registry Operator and ICANN agree to consult each other and work cooperatively to facilitate and implement the transition of the TLD in accordance with this Section 4.5. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process. In the event ICANN determines to transition operation of the TLD to a successor registry operator, upon Registry Operator's consent (which shall not be unreasonably withheld, conditioned or delayed), Registry Operator shall provide ICANN or such successor registry operator for the TLD with any data regarding operations of the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator in addition to data escrowed in accordance with Section 2.3 hereof. In the event that Registry Operator does not consent to provide such data, any registry data related to the TLD shall be returned to Registry Operator, unless otherwise agreed upon by the parties. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event of a transition of the TLD pursuant to this Section 4.5. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument, regardless of the reason for termination or expiration of this Agreement."]

4.6 Effect of Termination. Upon any expiration of the Term or termination of this Agreement, the obligations and rights of the parties hereto shall cease, provided that such expiration or termination of this Agreement shall not relieve the parties of any obligation or breach of this Agreement accruing prior to such expiration or termination, including, without limitation, all accrued payment obligations arising under Article 6. In addition, Article 5, Article 7, Section 2.12, Section 4.5, and this Section 4.6 shall survive the expiration or termination of this Agreement. For the avoidance of doubt, the rights of Registry Operator to operate the registry for the TLD shall immediately cease upon any expiration of the Term or termination of this Agreement.

ARTICLE 5.

DISPUTE RESOLUTION

5.1 Mediation. In the event of any dispute arising under or in connection with this Agreement, before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator must attempt to resolve the dispute through mediation in accordance with the following terms and conditions:

(a) A party shall submit a dispute to mediation by written notice to the other party. The mediation shall be conducted by a single mediator selected by the parties. If the parties cannot agree on a mediator within fifteen (15) calendar days of delivery of written notice pursuant to this Section 5.1, the parties will promptly select a mutually acceptable mediation provider entity, which entity shall, as soon as practicable following such entity's selection, designate a mediator, who is a licensed attorney with general knowledge of contract law, has no ongoing business relationship with either party and, to the extent necessary to mediate the particular dispute, general knowledge of the domain name system. Any mediator must confirm in writing that he or she is not, and will not become during the term of the mediation, an employee, partner, executive officer, director, or security holder of ICANN or Registry Operator. If such confirmation is not provided by the appointed mediator, then a replacement mediator shall be appointed pursuant to this Section 5.1(a).

(b) The mediator shall conduct the mediation in accordance with the rules and procedures that he or she determines following consultation with the parties. The parties shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute. The mediation shall be treated as a settlement discussion and shall therefore be confidential and may not be used against either party in any later proceeding relating to the dispute, including any arbitration pursuant to Section 5.2. The mediator may not testify for either party in any later proceeding relating to the dispute.

(c) Each party shall bear its own costs in the mediation. The parties shall share equally the fees and expenses of the mediator. Each party shall treat information received from the other party pursuant to the mediation that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15.

(d) If the parties have engaged in good faith participation in the mediation but have not resolved the dispute for any reason, either party or the mediator may terminate the mediation at any time and the dispute can then proceed to arbitration pursuant to Section 5.2 below. If the parties have not resolved the dispute for any reason by the date that is ninety (90) calendar days following the date of the notice delivered pursuant to Section 5.1(a), the mediation shall automatically terminate (unless extended by agreement of the parties) and the dispute can then proceed to arbitration pursuant to Section 5.2 below.

5.2 Arbitration. Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce (the "ICC"). The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, (ii) the parties agree in writing to a greater number of arbitrators, or (iii) the dispute arises under Section 7.6 or

7.7. In the case of clauses (i), (ii) or (iii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party nominating one arbitrator for confirmation by the ICC and the two selected arbitrators nominating the third arbitrator for confirmation by the ICC. For an arbitration in front of a sole arbitrator, Registry Operator and ICANN may, by mutual agreement, nominate the sole arbitrator for confirmation by the ICC. If the parties fail to nominate a sole arbitrator or, in the case of an arbitration in front of three arbitrators, either party fails to nominate an arbitrator, in each case within thirty (30) calendar days from the date when a party's request for arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat of the Court of the ICC, the arbitrator(s) shall be appointed by the ICC. If any nominated arbitrator is not confirmed by the ICC, the party or persons that appointed such arbitrator shall promptly nominate a replacement arbitrator for confirmation by the ICC. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

[Alternative **Section 5.2 Arbitration** text for intergovernmental organizations or governmental entities or other special circumstances:

"**Arbitration**. Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce (the "ICC"). The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, (ii) the parties agree in writing to a greater number of arbitrators, or (iii) the dispute arises under Section 7.6 or 7.7. In the case of clauses (i), (ii) or (iii) in the preceding sentence, the arbitration will be in front of three arbitrators with

each party nominating one arbitrator for confirmation by the ICC and the two selected arbitrators nominating the third arbitrator for confirmation by the ICC. For an arbitration in front of a sole arbitrator, Registry Operator and ICANN may, by mutual agreement, nominate the sole arbitrator for confirmation by the ICC. If the parties fail to nominate a sole arbitrator or, in the case of an arbitration in front of three arbitrators, either party fails to nominate an arbitrator, in each case within thirty (30) calendar days from the date when a party's request for arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat of the Court of the ICC, the arbitrator(s) shall be appointed by the ICC. If any nominated arbitrator is not confirmed by the ICC, the party or persons that appointed such arbitrator shall promptly nominate a replacement arbitrator for confirmation by the ICC. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction."]

5.3 Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement will not exceed an amount equal to the Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for breaches of this Agreement will be limited to an amount equal to the fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2, except with respect to Registry Operator's indemnification obligations pursuant to Section 7.1 and Section 7.2. In no event shall either party be liable for special, punitive, exemplary or consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2. Except as otherwise provided in this Agreement, neither party

makes any warranty, express or implied, with respect to the services rendered by itself, its servants or agents, or the results obtained from their work, including, without limitation, any implied warranty of merchantability, non-infringement or fitness for a particular purpose.

5.4 Specific Performance. Registry Operator and ICANN agree that irreparable damage could occur if any of the provisions of this Agreement was not performed in accordance with its specific terms. Accordingly, the parties agree that they each shall be entitled to seek from the arbitrator or court of competent jurisdiction specific performance of the terms of this Agreement (in addition to any other remedy to which each party is entitled).

ARTICLE 6.

FEES

6.1 Registry-Level Fees.

(a) Registry Operator shall pay ICANN a registry-level fee equal to (i) the registry fixed fee of US$6,250 per calendar quarter and (ii) the registry-level transaction fee (collectively, the "Registry-Level Fees"). The registry-level transaction fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25; provided, however that the registry-level transaction fee shall not apply until and unless more than 50,000 Transactions have occurred in the TLD during any calendar quarter or any consecutive four calendar quarter period in the aggregate (the "Transaction Threshold") and shall apply to each Transaction that occurred during each quarter in which the Transaction Threshold has been met, but shall not apply to each quarter in which the Transaction Threshold has not been met. Registry Operator's obligation to pay the quarterly registry-level fixed fee will begin on the date on which the TLD is delegated in the DNS to Registry Operator. The first quarterly payment of the registry-level fixed fee will be prorated based on the number of calendar days between the delegation date and the end of the calendar quarter in which the delegation date falls.

(b) Subject to Section 6.1(a), Registry Operator shall pay the Registry-Level Fees on a quarterly basis to an account designated by ICANN within thirty (30) calendar days following the date of the invoice provided by ICANN.

6.2 Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at http://www.icann.org/en/registries/rsep/. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within fourteen (14) calendar days of receipt of a copy of the RSTEP invoice from ICANN,

unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

6.3 Variable Registry-Level Fee.

(a) If the ICANN accredited registrars (accounting, in the aggregate, for payment of two-thirds of all registrar-level fees (or such portion of ICANN accredited registrars necessary to approve variable accreditation fees under the then-current registrar accreditation agreement), do not approve, pursuant to the terms of their registrar accreditation agreements with ICANN, the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a variable registry-level fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year (the "Variable Registry-Level Fee"). The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars that are party to a Registry-Registrar Agreement with Registry Operator (which agreement may specifically provide for the reimbursement of Variable Registry-Level Fees paid by Registry Operator pursuant to this Section 6.3); provided, that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve, pursuant to the terms of their registrar accreditation agreements with ICANN, the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b) The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US$0.25 per domain name registration (including renewals associated with transfers from one ICANN accredited registrar to another) per year.

6.4 Pass Through Fees. Registry Operator shall pay to ICANN (i) a one-time fee equal to US$5,000 for access to and use of the Trademark Clearinghouse as described in Specification 7 (the "RPM Access Fee") and (ii) US$0.25 per Sunrise Registration and Claims Registration (as such terms are used in Trademark Clearinghouse RPMs incorporated herein pursuant to Specification 7) (the "RPM Registration Fee"). The RPM Access Fee will be invoiced as of the Effective Date of this Agreement, and Registry Operator shall pay such fee to an account specified by ICANN within thirty (30) calendar days following the date of the invoice. ICANN will invoice Registry Operator quarterly for the RPM Registration Fee, which shall be due in accordance with the invoicing and payment procedure specified in Section 6.1.

6.5 Adjustments to Fees. Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the expiration of each year thereafter during the Term, the then-current fees set forth in Section 6.1 and Section 6.3 may be adjusted, at ICANN's discretion, by a percentage equal to the percentage change, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such adjustment. Any fee adjustment under this Section 6.5 shall be effective as of the first day of the first calendar quarter following at least thirty (30) days after ICANN's delivery to Registry Operator of such fee adjustment notice.

6.6 Additional Fee on Late Payments. For any payments thirty (30) calendar days or more overdue under this Agreement, Registry Operator shall pay an additional fee on late payments at the rate of 1.5% per month or, if less, the maximum rate permitted by applicable law.

6.7 Fee Reduction Waiver. In ICANN's sole discretion, ICANN may reduce the amount of registry fees payable hereunder by Registry Operator for any period of time ("Fee Reduction Waiver"). Any such Fee Reduction Waiver may, as determined by ICANN in its sole discretion, be (a) limited in duration and (b) conditioned upon Registry Operator's acceptance of the terms and conditions set forth in such waiver. A Fee Reduction Waiver shall not be effective unless executed in writing by ICANN as contemplated by Section 7.6(i). ICANN will provide notice of any Fee Reduction Waiver to Registry Operator in accordance with Section 7.9.

ARTICLE 7.

MISCELLANEOUS

7.1 Indemnification of ICANN.

(a) Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose: (i) due to the actions or omissions of ICANN, its subcontractors, panelists or evaluators specifically related to and occurring during the registry TLD application process (other than actions or omissions requested by or for the benefit of Registry Operator), or (ii) due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court of competent jurisdiction or arbitrator.

[Alternative **Section 7.1(a)** text for intergovernmental organizations or governmental entities:

"Registry Operator shall use its best efforts to cooperate with ICANN in order to ensure that ICANN does not incur any costs associated with claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services, provided that Registry Operator shall not be obligated to provide such cooperation to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any of its obligations contained in this Agreement or any willful misconduct by ICANN. This Section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court of competent jurisdiction or arbitrator."]

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator's aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN's total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof are

engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator's liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [***Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.***]

7.2 Indemnification Procedures. If any third-party claim is commenced that is indemnified under Section 7.1 above, ICANN shall provide notice thereof to Registry Operator as promptly as practicable. Registry Operator shall be entitled, if it so elects, in a notice promptly delivered to ICANN, to immediately take control of the defense and investigation of such claim and to employ and engage attorneys reasonably acceptable to ICANN to handle and defend the same, at Registry Operator's sole cost and expense, provided that in all events ICANN will be entitled to control at its sole cost and expense the litigation of issues concerning the validity or interpretation of ICANN's policies, Bylaws or conduct. ICANN shall cooperate, at Registry Operator's cost and expense, in all reasonable respects with Registry Operator and its attorneys in the investigation, trial, and defense of such claim and any appeal arising therefrom, and may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom. No settlement of a claim that involves a remedy affecting ICANN other than the payment of money in an amount that is fully indemnified by Registry Operator will be entered into without the consent of ICANN. If Registry Operator does not assume full control over the defense of a claim subject to such defense in accordance with this Section 7.2, ICANN will have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Registry Operator and Registry Operator shall cooperate in such defense. [***Note: This Section 7.2 is inapplicable to intergovernmental organizations or governmental entities***.]

7.3 Defined Terms. For purposes of this Agreement, unless such definitions are amended pursuant to a Consensus Policy at a future date, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

(a) For the purposes of this Agreement, an effect on "Security" shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

(b) For purposes of this Agreement, an effect on "Stability" shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the

relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

7.4 No Offset. All payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN.

7.5 Change of Control; Assignment and Subcontracting. Except as set forth in this Section 7.5, neither party may assign any of its rights and obligations under this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any subcontracting arrangement that relates to any Critical Function (as identified in Section 6 of Specification 10) for the TLD (a "Material Subcontracting Arrangement") shall be deemed an assignment.

(a) Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any assignment or Material Subcontracting Arrangement, and any agreement to assign or subcontract any portion of the operations of the TLD (whether or not a Material Subcontracting Arrangement) must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements. Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of control of Registry Operator.

(b) Within thirty (30) calendar days of either such notification pursuant to Section 7.5(a), ICANN may request additional information from Registry Operator establishing (i) compliance with this Agreement and (ii) that the party acquiring such control or entering into such assignment or Material Subcontracting Arrangement (in any case, the "Contracting Party") and the ultimate parent entity of the Contracting Party meets the ICANN-adopted specification or policy on registry operator criteria then in effect (including with respect to financial resources and operational and technical capabilities), in which case Registry Operator must supply the requested information within fifteen (15) calendar days.

(c) Registry Operator agrees that ICANN's consent to any assignment, change of control or Material Subcontracting Arrangement will also be subject to background checks on any proposed Contracting Party (and such Contracting Party's Affiliates).

(d) If ICANN fails to expressly provide or withhold its consent to any assignment, direct or indirect change of control of Registry Operator or any Material Subcontracting Arrangement within thirty (30) calendar days of ICANN's receipt of notice of such transaction (or, if ICANN has requested additional information from Registry Operator as set forth above, thirty (30) calendar days of the receipt of all requested written information regarding such transaction) from Registry Operator, ICANN shall be deemed to have consented to such transaction.

(e) In connection with any such assignment, change of control or Material Subcontracting Arrangement, Registry Operator shall comply with the Registry Transition Process.

(f) Notwithstanding the foregoing, (i) any consummated change of control shall not be voidable by ICANN; provided, however, that, if ICANN reasonably determines to withhold its consent to such transaction, ICANN may terminate this Agreement pursuant to Section 4.3(g), (ii) ICANN may assign this Agreement without the consent of Registry Operator upon approval of the ICANN Board of Directors in conjunction with a reorganization, reconstitution or re-incorporation of ICANN upon such assignee's express assumption of the terms and conditions of this Agreement, (iii) Registry Operator may assign this Agreement without the consent of ICANN directly to an Affiliated Assignee, as that term is defined herein below, upon such Affiliated Assignee's express written assumption of the terms and conditions of this Agreement, and (iv) ICANN shall be deemed to have consented to any assignment, Material Subcontracting Arrangement or change of control transaction in which the Contracting Party is an existing operator of a generic top-level domain pursuant to a registry agreement between such Contracting Party and ICANN (provided that such Contracting Party is then in compliance with the terms and conditions of such registry agreement in all material respects), unless ICANN provides to Registry Operator a written objection to such transaction within ten (10) calendar days of ICANN's receipt of notice of such transaction pursuant to this Section 7.5. Notwithstanding Section 7.5(a), in the event an assignment is made pursuant to clauses (ii) or (iii) of this Section 7.5(f), the assigning party will provide the other party with prompt notice following any such assignment. For the purposes of this Section 7.5(f), (A) "Affiliated Assignee" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (B) "control" (including the terms "controlled by" and "under common control with") shall have the same meaning specified in Section 2.9(c) of this Agreement.

7.6 Amendments and Waivers.

(a) If the ICANN Board of Directors determines that an amendment to this Agreement (including to the Specifications referred to herein) and all other registry agreements between ICANN and the Applicable Registry Operators (the "Applicable Registry Agreements") is desirable (each, a "Special Amendment"), ICANN may adopt a Special Amendment pursuant to the requirements of and process set forth in this Section 7.6; provided that a Special Amendment may not be a Restricted Amendment.

(b) Prior to submitting a Special Amendment for Registry Operator Approval, ICANN shall first consult in good faith with the Working Group regarding the form and substance of such Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the "Posting Period") and providing notice of such proposed amendment to the Applicable Registry Operators in accordance with Section 7.9. ICANN will consider the public comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).

(c) If, within one hundred eighty (180) calendar days following the expiration of the Posting Period (the "Approval Period"), the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment, but must address the subject matter of the Special Amendment posted for public comment, as modified to reflect and/or address input from the Working Group and public comments), ICANN shall provide notice of, and submit, such Special Amendment for approval or disapproval by the Applicable Registry Operators. If, during the sixty (60) calendar day period following the date ICANN provides such notice to the Applicable Registry Operators, such Special Amendment receives Registry Operator Approval, such Special Amendment shall be deemed approved (an "Approved Amendment") by the Applicable Registry Operators, and shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice of the approval of such Approved Amendment to Registry Operator (the "Amendment Effective Date"). In the event that a Special Amendment does not receive Registry Operator Approval, the Special Amendment shall be deemed not approved by the Applicable Registry Operators (a "Rejected Amendment"). A Rejected Amendment will have no effect on the terms and conditions of this Agreement, except as set forth below.

(d) If the ICANN Board of Directors reasonably determines that a Rejected Amendment falls within the subject matter categories set forth in Section 1.2 of Specification 1, the ICANN Board of Directors may adopt a resolution (the date such resolution is adopted is referred to herein as the "Resolution Adoption Date") requesting an Issue Report (as such term is defined in ICANN's Bylaws) by the Generic Names Supporting Organization (the "GNSO") regarding the substance of such Rejected Amendment. The policy development process undertaken by the GNSO pursuant to such requested Issue Report is referred to herein as a "PDP." If such PDP results in a Final Report supported by a GNSO Supermajority (as defined in ICANN's Bylaws) that either (i) recommends adoption of the Rejected Amendment as Consensus Policy or (ii) recommends against adoption of the Rejected Amendment as Consensus Policy, and, in the case of (i) above, the Board adopts such Consensus Policy, Registry Operator shall comply with its obligations pursuant to Section 2.2 of this Agreement. In either case, ICANN will abandon the Rejected Amendment and it will have no effect on the terms and conditions of this Agreement. Notwithstanding the foregoing provisions of this Section 7.6(d), the ICANN Board of Directors shall not be required to initiate a PDP with respect to a Rejected Amendment if, at any time in the twelve (12) month period preceding the submission of such Rejected

Amendment for Registry Operator Approval pursuant to Section 7.6(c), the subject matter of such Rejected Amendment was the subject of a concluded or otherwise abandoned or terminated PDP that did not result in a GNSO Supermajority recommendation.

(e) If (a) a Rejected Amendment does not fall within the subject matter categories set forth in Section 1.2 of Specification 1, (b) the subject matter of a Rejected Amendment was, at any time in the twelve (12) month period preceding the submission of such Rejected Amendment for Registry Operator Approval pursuant to Section 7.6(c), the subject of a concluded or otherwise abandoned or terminated PDP that did not result in a GNSO Supermajority recommendation, or (c) a PDP does not result in a Final Report supported by a GNSO Supermajority that either (A) recommends adoption of the Rejected Amendment as Consensus Policy or (B) recommends against adoption of the Rejected Amendment as Consensus Policy (or such PDP has otherwise been abandoned or terminated for any reason), then, in any such case, such Rejected Amendment may still be adopted and become effective in the manner described below. In order for the Rejected Amendment to be adopted, the following requirements must be satisfied:

(i) the subject matter of the Rejected Amendment must be within the scope of ICANN's mission and consistent with a balanced application of its core values (as described in ICANN's Bylaws);

(ii) the Rejected Amendment must be justified by a Substantial and Compelling Reason in the Public Interest, must be likely to promote such interest, taking into account competing public and private interests that are likely to be affected by the Rejected Amendment, and must be narrowly tailored and no broader than reasonably necessary to address such Substantial and Compelling Reason in the Public Interest;

(iii) to the extent the Rejected Amendment prohibits or requires conduct or activities, imposes material costs on the Applicable Registry Operators, and/or materially reduces public access to domain name services, the Rejected Amendment must be the least restrictive means reasonably available to address the Substantial and Compelling Reason in the Public Interest;

(iv) the ICANN Board of Directors must submit the Rejected Amendment, along with a written explanation of the reasoning related to its determination that the Rejected Amendment meets the requirements set out in subclauses (i) through (iii) above, for public comment for a period of no less than thirty (30) calendar days; and

(v) following such public comment period, the ICANN Board of Directors must (a) engage in consultation (or direct ICANN management to engage in consultation) with the Working Group, subject matter experts, members of the GNSO, relevant advisory committees and other interested stakeholders with respect to such Rejected Amendment for a period of no

less than sixty (60) calendar days; and (b) following such consultation, reapprove the Rejected Amendment (which may be in a form different than submitted for Registry Operator Approval, but must address the subject matter of the Rejected Amendment, as modified to reflect and/or address input from the Working Group and public comments) by the affirmative vote of at least two-thirds of the members of the ICANN Board of Directors eligible to vote on such matter, taking into account any ICANN policy affecting such eligibility, including ICANN's Conflict of Interest Policy (a "Board Amendment").

Such Board Amendment shall, subject to Section 7.6(f), be deemed an Approved Amendment, and shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice of the approval of such Board Amendment to Registry Operator (which effective date shall be deemed the Amendment Effective Date hereunder). Notwithstanding the foregoing, a Board Amendment may not amend the registry fees charged by ICANN hereunder, or amend this Section 7.6.

(f) Notwithstanding the provisions of Section 7.6(e), a Board Amendment shall not be deemed an Approved Amendment if, during the thirty (30) calendar day period following the approval by the ICANN Board of Directors of the Board Amendment, the Working Group, on the behalf of the Applicable Registry Operators, submits to the ICANN Board of Directors an alternative to the Board Amendment (an "Alternative Amendment") that meets the following requirements:

(i) sets forth the precise text proposed by the Working Group to amend this Agreement in lieu of the Board Amendment;

(ii) addresses the Substantial and Compelling Reason in the Public Interest identified by the ICANN Board of Directors as the justification for the Board Amendment; and

(iii) compared to the Board Amendment is: (a) more narrowly tailored to address such Substantial and Compelling Reason in the Public Interest, and (b) to the extent the Alternative Amendment prohibits or requires conduct or activities, imposes material costs on Affected Registry Operators, or materially reduces access to domain name services, is a less restrictive means to address the Substantial and Compelling Reason in the Public Interest.

Any proposed amendment that does not meet the requirements of subclauses (i) through (iii) in the immediately preceding sentence shall not be considered an Alternative Amendment hereunder and therefore shall not supersede or delay the effectiveness of the Board Amendment. If, following the submission of the Alternative Amendment to the ICANN Board of Directors, the Alternative Amendment receives Registry Operator Approval, the Alternative Amendment shall supersede the Board Amendment and shall be

deemed an Approved Amendment hereunder (and shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice of the approval of such Alternative Amendment to Registry Operator, which effective date shall deemed the Amendment Effective Date hereunder), unless, within a period of sixty (60) calendar days following the date that the Working Group notifies the ICANN Board of Directors of Registry Operator Approval of such Alternative Amendment (during which time ICANN shall engage with the Working Group with respect to the Alternative Amendment), the ICANN Board of Directors by the affirmative vote of at least two-thirds of the members of the ICANN Board of Directors eligible to vote on such matter, taking into account any ICANN policy affecting such eligibility, including ICANN's Conflict of Interest Policy, rejects the Alternative Amendment. If (A) the Alternative Amendment does not receive Registry Operator Approval within thirty (30) calendar days of submission of such Alternative Amendment to the Applicable Registry Operators (and the Working Group shall notify ICANN of the date of such submission), or (B) the ICANN Board of Directors rejects the Alternative Amendment by such two-thirds vote, the Board Amendment (and not the Alternative Amendment) shall be effective and deemed an amendment to this Agreement on the date that is sixty (60) calendar days following the date ICANN provided notice to Registry Operator (which effective date shall deemed the Amendment Effective Date hereunder). If the ICANN Board of Directors rejects an Alternative Amendment, the board shall publish a written rationale setting forth its analysis of the criteria set forth in Sections 7.6(f)(i) through 7.6(f)(iii). The ability of the ICANN Board of Directors to reject an Alternative Amendment hereunder does not relieve the Board of the obligation to ensure that any Board Amendment meets the criteria set forth in Section 7.6(e)(i) through 7.6(e)(v).

(g) In the event that Registry Operator believes an Approved Amendment does not meet the substantive requirements set out in this Section 7.6 or has been adopted in contravention of any of the procedural provisions of this Section 7.6, Registry Operator may challenge the adoption of such Special Amendment pursuant to the dispute resolution provisions set forth in Article 5, except that such arbitration shall be conducted by a three-person arbitration panel. Any such challenge must be brought within sixty (60) calendar days following the date ICANN provided notice to Registry Operator of the Approved Amendment, and ICANN may consolidate all challenges brought by registry operators (including Registry Operator) into a single proceeding. The Approved Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process.

(h) Registry Operator may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an "Exemption Request") during the thirty (30) calendar day period following the date ICANN provided notice to Registry Operator of such Approved Amendment. Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with

the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN's receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement; provided, that any conditions, alternatives or variations of the Approved Amendment required by ICANN shall be effective and, to the extent applicable, will amend this Agreement as of the Amendment Effective Date. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial), provided that Registry Operator may, within thirty (30) calendar days following receipt of ICANN's determination, appeal ICANN's decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(j), agreed to by ICANN following mediation pursuant to Section 5.1 or through an arbitration decision pursuant to Section 5.2 shall exempt Registry Operator from any Approved Amendment, and no Exemption Request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

(i) Except as set forth in this Section 7.6, Section 7.7 and as otherwise set forth in this Agreement and the Specifications hereto, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 or Section 7.7 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided. For the avoidance of doubt, nothing in this Sections 7.6 or 7.7 shall be deemed to limit Registry Operator's obligation to comply with Section 2.2.

(j) For purposes of this Section 7.6, the following terms shall have the following meanings:

(i) "Applicable Registry Operators" means, collectively, the registry operators of top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.

(ii) "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable, at the prevailing exchange rate published the prior day in the U.S. Edition of the Wall Street Journal for the date such calculation is made by ICANN) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For the avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.

(iii) "Restricted Amendment" means the following: (A) an amendment of Specification 1, (B) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (C) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2.1 of Specification 6, or (D) an amendment to the length of the Term.

(iv) "Substantial and Compelling Reason in the Public Interest" means a reason that is justified by an important, specific, and articulated public interest goal that is within ICANN's mission and consistent with a balanced application of ICANN's core values as defined in ICANN's Bylaws.

(v) "Working Group" means representatives of the Applicable Registry Operators and other members of the community that the Registry Stakeholders Group appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(i)).

(k) Notwithstanding anything in this Section 7.6 to the contrary, (i) if Registry Operator provides evidence to ICANN's reasonable satisfaction that the Approved Amendment would materially increase the cost of providing Registry Services, then ICANN will allow up to one-hundred eighty (180) calendar days for Approved Amendment to become effective with respect to Registry Operator, and (ii) no Approved Amendment adopted pursuant to Section 7.6 shall become effective with respect to Registry Operator if Registry Operator provides ICANN with an irrevocable notice of termination pursuant to Section 4.4(b).

7.7 Negotiation Process.

(a) If either the Chief Executive Officer of ICANN ("CEO") or the Chairperson of the Registry Stakeholder Group ("Chair") desires to discuss any revision(s) to this Agreement, the CEO or Chair, as applicable, shall provide written notice to the other person, which shall set forth in reasonable detail the proposed revisions to this Agreement (a "Negotiation Notice"). Notwithstanding the foregoing, neither the CEO nor the Chair may (i) propose revisions to this Agreement that modify any Consensus Policy then existing, (ii) propose revisions to this Agreement pursuant to this Section 7.7 on or before June 30, 2014, or (iii) propose revisions or submit a Negotiation Notice more than once during any twelve (12) month period beginning on July 1, 2014.

(b) Following receipt of the Negotiation Notice by either the CEO or the Chair, ICANN and the Working Group (as defined in Section 7.6) shall consult in good faith negotiations regarding the form and substance of the proposed revisions to this Agreement, which shall be in the form of a proposed amendment to this Agreement (the "Proposed Revisions"), for a period of at least ninety (90) calendar days (unless a resolution is earlier reached) and attempt to reach a mutually acceptable agreement relating to the Proposed Revisions (the "Discussion Period").

(c) If, following the conclusion of the Discussion Period, an agreement is reached on the Proposed Revisions, ICANN shall post the mutually agreed Proposed Revisions on its website for public comment for no less than thirty (30) calendar days (the "Posting Period") and provide notice of such revisions to all Applicable Registry Operators in accordance with Section 7.9. ICANN and the Working Group will consider the public comments submitted on the Proposed Revisions during the Posting Period (including comments submitted by the Applicable Registry Operators). Following the conclusion of the Posting Period, the Proposed Revisions shall be submitted for Registry Operator Approval (as defined in Section 7.6) and approval by the ICANN Board of Directors. If such approvals are obtained, the Proposed Revisions shall be deemed an Approved Amendment (as defined in Section 7.6) by the Applicable Registry Operators and ICANN, and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator.

(d) If, following the conclusion of the Discussion Period, an agreement is not reached between ICANN and the Working Group on the Proposed Revisions, either the CEO or the Chair may provide the other person written notice (the "Mediation Notice") requiring each party to attempt to resolve the disagreements related to the Proposed Revisions through impartial, facilitative (non-evaluative) mediation in accordance with the terms and conditions set forth below. In the event that a Mediation Notice is provided, ICANN and the Working Group shall, within fifteen (15) calendar days thereof, simultaneously post the text of their desired version of the Proposed Revisions and a position paper with respect thereto on ICANN's website.

(i) The mediation shall be conducted by a single mediator selected by the parties. If the parties cannot agree on a mediator within fifteen (15)

calendar days following receipt by the CEO or Chair, as applicable, of the Mediation Notice, the parties will promptly select a mutually acceptable mediation provider entity, which entity shall, as soon as practicable following such entity's selection, designate a mediator, who is a licensed attorney with general knowledge of contract law, who has no ongoing business relationship with either party and, to the extent necessary to mediate the particular dispute, general knowledge of the domain name system. Any mediator must confirm in writing that he or she is not, and will not become during the term of the mediation, an employee, partner, executive officer, director, or security holder of ICANN or an Applicable Registry Operator. If such confirmation is not provided by the appointed mediator, then a replacement mediator shall be appointed pursuant to this Section 7.7(d)(i).

(ii) The mediator shall conduct the mediation in accordance with the rules and procedures for facilitative mediation that he or she determines following consultation with the parties. The parties shall discuss the dispute in good faith and attempt, with the mediator's assistance, to reach an amicable resolution of the dispute.

(iii) Each party shall bear its own costs in the mediation. The parties shall share equally the fees and expenses of the mediator.

(iv) If an agreement is reached during the mediation, ICANN shall post the mutually agreed Proposed Revisions on its website for the Posting Period and provide notice to all Applicable Registry Operators in accordance with Section 7.9. ICANN and the Working Group will consider the public comments submitted on the agreed Proposed Revisions during the Posting Period (including comments submitted by the Applicable Registry Operators). Following the conclusion of the Posting Period, the Proposed Revisions shall be submitted for Registry Operator Approval and approval by the ICANN Board of Directors. If such approvals are obtained, the Proposed Revisions shall be deemed an Approved Amendment (as defined in Section 7.6) by the Applicable Registry Operators and ICANN, and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator.

(v) If the parties have not resolved the dispute for any reason by the date that is ninety (90) calendar days following receipt by the CEO or Chair, as applicable, of the Mediation Notice, the mediation shall automatically terminate (unless extended by agreement of the parties). The mediator shall deliver to the parties a definition of the issues that could be considered in future arbitration, if invoked. Those issues are subject to the limitations set forth in Section 7.7(e)(ii) below.

(e) If, following mediation, ICANN and the Working Group have not reached an agreement on the Proposed Revisions, either the CEO or the Chair may provide

the other person written notice (an "Arbitration Notice") requiring ICANN and the Applicable Registry Operators to resolve the dispute through binding arbitration in accordance with the arbitration provisions of Section 5.2, subject to the requirements and limitations of this Section 7.7(e).

(i) If an Arbitration Notice is sent, the mediator's definition of issues, along with the Proposed Revisions (be those from ICANN, the Working Group or both) shall be posted for public comment on ICANN's website for a period of no less than thirty (30) calendar days. ICANN and the Working Group will consider the public comments submitted on the Proposed Revisions during the Posting Period (including comments submitted by the Applicable Registry Operators), and information regarding such comments and consideration shall be provided to a three (3) person arbitrator panel. Each party may modify its Proposed Revisions before and after the Posting Period. The arbitration proceeding may not commence prior to the closing of such public comment period, and ICANN may consolidate all challenges brought by registry operators (including Registry Operator) into a single proceeding. Except as set forth in this Section 7.7, the arbitration shall be conducted pursuant to Section 5.2.

(ii) No dispute regarding the Proposed Revisions may be submitted for arbitration to the extent the subject matter of the Proposed Revisions (i) relates to Consensus Policy, (ii) falls within the subject matter categories set forth in Section 1.2 of Specification 1, or (iii) seeks to amend any of the following provisions or Specifications of this Agreement: Articles 1, 3 and 6; Sections 2.1, 2.2, 2.5, 2.7, 2.9, 2.10, 2.16, 2.17, 2.19, 4.1, 4.2, 7.3, 7.6, 7.7, 7.8, 7.10, 7.11, 7.12, 7.13, 7.14, 7.16; Section 2.8 and Specification 7 (but only to the extent such Proposed Revisions seek to implement an RPM not contemplated by Sections 2.8 and Specification 7); Exhibit A; and Specifications 1, 4, 6, 10 and 11.

(iii) The mediator will brief the arbitrator panel regarding ICANN and the Working Group's respective proposals relating to the Proposed Revisions.

(iv) No amendment to this Agreement relating to the Proposed Revisions may be submitted for arbitration by either the Working Group or ICANN, unless, in the case of the Working Group, the proposed amendment has received Registry Operator Approval and, in the case of ICANN, the proposed amendment has been approved by the ICANN Board of Directors.

(v) In order for the arbitrator panel to approve either ICANN or the Working Group's proposed amendment relating to the Proposed Revisions, the arbitrator panel must conclude that such proposed amendment is consistent with a balanced application of ICANN's core values (as described in ICANN's Bylaws) and reasonable in light of the balancing of

the costs and benefits to the business interests of the Applicable Registry Operators and ICANN (as applicable), and the public benefit sought to be achieved by the Proposed Revisions as set forth in such amendment. If the arbitrator panel concludes that either ICANN or the Working Group's proposed amendment relating to the Proposed Revisions meets the foregoing standard, such amendment shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator and deemed an Approved Amendment hereunder.

(f) With respect to an Approved Amendment relating to an amendment proposed by ICANN, Registry may apply in writing to ICANN for an exemption from such amendment pursuant to the provisions of Section 7.6.

(g) Notwithstanding anything in this Section 7.7 to the contrary, (a) if Registry Operator provides evidence to ICANN's reasonable satisfaction that the Approved Amendment would materially increase the cost of providing Registry Services, then ICANN will allow up to one-hundred eighty (180) calendar days for the Approved Amendment to become effective with respect to Registry Operator, and (b) no Approved Amendment adopted pursuant to Section 7.7 shall become effective with respect to Registry Operator if Registry Operator provides ICANN with an irrevocable notice of termination pursuant to Section 4.4(b).

7.8 No Third-Party Beneficiaries. This Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.

7.9 General Notices. Except for notices pursuant to Sections 7.6 and 7.7, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this Agreement. All notices under Sections 7.6 and 7.7 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Other than notices under Sections 7.6 or 7.7, any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within three (3) calendar days. Any notice required by Sections 7.6 or 7.7 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

If to ICANN, addressed to:
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA
Telephone: +1-310-301-5800
Facsimile: +1-310-823-8649
Attention: President and CEO

With a Required Copy to: General Counsel
Email: (As specified from time to time.)

If to Registry Operator, addressed to:
[_____]
[_____]
[_____]

Telephone:
With a Required Copy to:
Email: (As specified from time to time.)

7.10 Entire Agreement. This Agreement (including those specifications and documents incorporated by reference to URL locations which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.

7.11 English Language Controls. Notwithstanding any translated version of this Agreement and/or specifications that may be provided to Registry Operator, the English language version of this Agreement and all referenced specifications are the official versions that bind the parties hereto. In the event of any conflict or discrepancy between any translated version of this Agreement and the English language version, the English language version controls. Notices, designations, determinations, and specifications made under this Agreement shall be in the English language.

7.12 Ownership Rights. Nothing contained in this Agreement shall be construed as (a) establishing or granting to Registry Operator any property ownership rights or interests of Registry Operator in the TLD or the letters, words, symbols or other characters making up the TLD string, or (b) affecting any existing intellectual property or ownership rights of Registry Operator.

7.13 Severability; Conflicts with Laws. This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good

faith to modify this Agreement so as to effect the original intent of the parties as closely as possible. ICANN and the Working Group will mutually cooperate to develop an ICANN procedure for ICANN's review and consideration of alleged conflicts between applicable laws and non-WHOIS related provisions of this Agreement. Until such procedure is developed and implemented by ICANN, ICANN will review and consider alleged conflicts between applicable laws and non-WHOIS related provisions of this Agreement in a manner similar to ICANN's Procedure For Handling WHOIS Conflicts with Privacy Law.

7.14 Court Orders. ICANN will respect any order from a court of competent jurisdiction, including any orders from any jurisdiction where the consent or non-objection of the government was a requirement for the delegation of the TLD. Notwithstanding any other provision of this Agreement, ICANN's implementation of any such order will not be a breach of this Agreement

7.15 Confidentiality

(a) Subject to Section 7.15(c), during the Term and for a period of three (3) years thereafter, each party shall, and shall cause its and its Affiliates' officers, directors, employees and agents to, keep confidential and not publish or otherwise disclose to any third party, directly or indirectly, any information that is, and the disclosing party has marked as, or has otherwise designated in writing to the receiving party as, "confidential trade secret," "confidential commercial information" or "confidential financial information" (collectively, "Confidential Information"), except to the extent such disclosure is permitted by the terms of this Agreement.

(b) The confidentiality obligations under Section 7.15(a) shall not apply to any Confidential Information that (i) is or hereafter becomes part of the public domain by public use, publication, general knowledge or the like through no fault of the receiving party in breach of this Agreement, (ii) can be demonstrated by documentation or other competent proof to have been in the receiving party's possession prior to disclosure by the disclosing party without any obligation of confidentiality with respect to such information, (iii) is subsequently received by the receiving party from a third party who is not bound by any obligation of confidentiality with respect to such information, (iv) has been published by a third party or otherwise enters the public domain through no fault of the receiving party, or (v) can be demonstrated by documentation or other competent evidence to have been independently developed by or for the receiving party without reference to the disclosing party's Confidential Information.

(c) Each party shall have the right to disclose Confidential Information to the extent that such disclosure is (i) made in response to a valid order of a court of competent jurisdiction or, if in the reasonable opinion of the receiving party's legal counsel, such disclosure is otherwise required by applicable law; provided, however, that the receiving party shall first have given notice to the disclosing party and given the disclosing party a reasonable opportunity to quash such order or to obtain a protective order or confidential treatment order requiring that the Confidential Information that is the subject of such order or other applicable law be held in confidence by such court or other third

party recipient, unless the receiving party is not permitted to provide such notice under such order or applicable law, or (ii) made by the receiving party or any of its Affiliates to its or their attorneys, auditors, advisors, consultants, contractors or other third parties for use by such person or entity as may be necessary or useful in connection with the performance of the activities under this Agreement, provided that such third party is bound by confidentiality obligations at least as stringent as those set forth herein, either by written agreement or through professional responsibility standards.

[*Note: The following section is applicable to intergovernmental organizations or governmental entities only.*]

7.16 Special Provision Relating to Intergovernmental Organizations or Governmental Entities.

(a) ICANN acknowledges that Registry Operator is an entity subject to public international law, including international treaties applicable to Registry Operator (such public international law and treaties, collectively hereinafter the "Applicable Laws"). Nothing in this Agreement and its related specifications shall be construed or interpreted to require Registry Operator to violate Applicable Laws or prevent compliance therewith. The Parties agree that Registry Operator's compliance with Applicable Laws shall not constitute a breach of this Agreement.

(b) In the event Registry Operator reasonably determines that any provision of this Agreement and its related specifications, or any decisions or policies of ICANN referred to in this Agreement, including but not limited to Temporary Policies and Consensus Policies (such provisions, specifications and policies, collectively hereinafter, "ICANN Requirements"), may conflict with or violate Applicable Law (hereinafter, a "Potential Conflict"), Registry Operator shall provide detailed notice (a "Notice") of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy. In the event Registry Operator determines that there is Potential Conflict between a proposed Applicable Law and any ICANN Requirement, Registry Operator shall provide detailed Notice of such Potential Conflict to ICANN as early as possible and, in the case of a Potential Conflict with a proposed Consensus Policy, no later than the end of any public comment period on such proposed Consensus Policy.

(c) As soon as practicable following such review, the parties shall attempt to resolve the Potential Conflict by mediation pursuant to the procedures set forth in Section 5.1. In addition, Registry Operator shall use its best efforts to eliminate or minimize any impact arising from such Potential Conflict between Applicable Laws and any ICANN Requirement. If, following such mediation, Registry Operator determines that the Potential Conflict constitutes an actual conflict between any ICANN Requirement, on the one hand, and Applicable Laws, on the other hand, then ICANN shall waive compliance with such ICANN Requirement (provided that the parties shall negotiate in good faith on a continuous basis thereafter to mitigate or eliminate the effects of such noncompliance on ICANN), unless ICANN reasonably and objectively determines that the failure of Registry

Operator to comply with such ICANN Requirement would constitute a threat to the Security and Stability of Registry Services, the Internet or the DNS (hereinafter, an "ICANN Determination"). Following receipt of notice by Registry Operator of such ICANN Determination, Registry Operator shall be afforded a period of ninety (90) calendar days to resolve such conflict with an Applicable Law. If the conflict with an Applicable Law is not resolved to ICANN's complete satisfaction during such period, Registry Operator shall have the option to submit, within ten (10) calendar days thereafter, the matter to binding arbitration as defined in subsection (d) below. If during such period, Registry Operator does not submit the matter to arbitration pursuant to subsection (d) below, ICANN may, upon notice to Registry Operator, terminate this Agreement with immediate effect.

(d) If Registry Operator disagrees with an ICANN Determination, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2, except that the sole issue presented to the arbitrator for determination will be whether or not ICANN reasonably and objectively reached the ICANN Determination. For the purposes of such arbitration, ICANN shall present evidence to the arbitrator supporting the ICANN Determination. If the arbitrator determines that ICANN did not reasonably and objectively reach the ICANN Determination, then ICANN shall waive Registry Operator's compliance with the subject ICANN Requirement. If the arbitrators or pre-arbitral referee, as applicable, determine that ICANN did reasonably and objectively reach the ICANN Determination, then, upon notice to Registry Operator, ICANN may terminate this Agreement with immediate effect.

(e) Registry Operator hereby represents and warrants that, to the best of its knowledge as of the date of execution of this Agreement, no existing ICANN Requirement conflicts with or violates any Applicable Law.

(f) Notwithstanding any other provision of this Section 7.16, following an ICANN Determination and prior to a finding by an arbitrator pursuant to Section 7.16(d) above, ICANN may, subject to prior consultations with Registry Operator, take such reasonable technical measures as it deems necessary to ensure the Security and Stability of Registry Services, the Internet and the DNS. These reasonable technical measures shall be taken by ICANN on an interim basis, until the earlier of the date of conclusion of the arbitration procedure referred to in Section 7.16(d) above or the date of complete resolution of the conflict with an Applicable Law. In case Registry Operator disagrees with such technical measures taken by ICANN, Registry Operator may submit the matter to binding arbitration pursuant to the provisions of Section 5.2 above, during which process ICANN may continue to take such technical measures. In the event that ICANN takes such measures, Registry Operator shall pay all costs incurred by ICANN as a result of taking such measures. In addition, in the event that ICANN takes such measures, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

* * * * *

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

By: _____
[_____]
President and CEO
Date:

[Registry Operator]

By: _____
[_____]
[_____]
Date:

EXHIBIT A

Approved Services

The ICANN gTLD Applicant Guidebook (located at http://newgtlds.icann.org/en/applicants/agb) and the RSEP specify processes for consideration of proposed registry services. Registry Operator may provide any service that is required by the terms of this Agreement. In addition, the following services (if any) are specifically identified as having been approved by ICANN prior to the effective date of the Agreement, and Registry Operator may provide such services:

1. DNS Service – TLD Zone Contents

Notwithstanding anything else in this Agreement, as indicated in section 2.2.3.3 of the gTLD Applicant Guidebook, permissible contents for the TLD's DNS service are:

1.1. For the "Internet" (IN) Class:

1.1.1. Apex SOA record

1.1.2. Apex NS records and in-bailiwick glue for the TLD's DNS servers

1.1.3. NS records and in-bailiwick glue for DNS servers of registered names in the TLD

1.1.4. DS records for registered names in the TLD

1.1.5. Records associated with signing the TLD zone (e.g., RRSIG, DNSKEY, NSEC, NSEC3PARAM and NSEC3)

1.1.6. Apex TXT record for zone versioning purposes

1.1.7. Apex TYPE65534 record for automatic dnssec signing signaling

1.2. For the "Chaos" (CH) Class:

1.2.1. TXT records for server version/identification (e.g., TXT records for "version.bind.", "id.server.", "authors.bind" and/or "hostname.bind.")

(Note: The above language effectively does not allow, among other things, the inclusion of DNS resource records that would enable a dotless domain name (e.g., apex A, AAAA, MX records) in the TLD zone.)

If Registry Operator wishes to place any DNS resource record type or class into its TLD DNS service (other than those listed in Sections 1.1 or 1.2 above), it must describe in detail its proposal and submit a Registry Services Evaluation Process (RSEP) request. This will be

evaluated per RSEP to determine whether the service would create a risk of a meaningful adverse impact on security or stability of the DNS. Registry Operator recognizes and acknowledges that a service based on the use of less-common DNS resource records and/or classes in the TLD zone, even if approved, might not work as intended for all users due to lack of software support.

SPECIFICATION 1

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

1. **Consensus Policies**.

1.1. "***Consensus Policies***" are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this Specification. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.

1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:

1.2.1 issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");

1.2.2 functional and performance specifications for the provision of Registry Services;

1.2.3 Security and Stability of the registry database for the TLD;

1.2.4 registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;

1.2.5 resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or

1.2.6 restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.

1.3. Such categories of issues referred to in Section 1.2 of this Specification shall include, without limitation:

1.3.1 principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);

1.3.2 prohibitions on warehousing of or speculation in domain names by registries or registrars;

1.3.3 reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and

1.3.4 maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

1.4. In addition to the other limitations on Consensus Policies, they shall not:

1.4.1 prescribe or limit the price of Registry Services;

1.4.2 modify the terms or conditions for the renewal or termination of the Registry Agreement;

1.4.3 modify the limitations on Temporary Policies (defined below) or Consensus Policies;

1.4.4 modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or

1.4.5 modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.

2. **Temporary Policies**. Registry Operator shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registry Services or the DNS ("***Temporary Policies***").

2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.

2.1.1 ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why

the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.

2.1.2 If the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one (1) year period expires or, if during such one (1) year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.

3. **Notice and Conflicts**. Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Polices or Temporary Policy shall control, but only with respect to subject matter in conflict.

SPECIFICATION 2

DATA ESCROW REQUIREMENTS

Registry Operator will engage an independent entity to act as data escrow agent ("***Escrow Agent***") for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

PART A – TECHNICAL SPECIFICATIONS

1. **Deposits**. There will be two types of Deposits: Full and Differential. For both types, the universe of Registry objects to be considered for data escrow are those objects necessary in order to offer all of the approved Registry Services.

    1.1. "**Full Deposit**" will consist of data that reflects the state of the registry as of 00:00:00 UTC (Coordinated Universal Time) on the day that such Full Deposit is submitted to Escrow Agent.

    1.2. "**Differential Deposit**" means data that reflects all transactions that were not reflected in the last previous Full or Differential Deposit, as the case may be. Each Differential Deposit will contain all database transactions since the previous Deposit was completed as of 00:00:00 UTC of each day, but Sunday. Differential Deposits must include complete Escrow Records as specified below that were not included or changed since the most recent full or Differential Deposit (i.e., all additions, modifications or removals of data).

2. **Schedule for Deposits**. Registry Operator will submit a set of escrow files on a daily basis as follows:

    2.1. Each Sunday, a Full Deposit must be submitted to the Escrow Agent by 23:59 UTC.

    2.2. The other six (6) days of the week, a Full Deposit or the corresponding Differential Deposit must be submitted to Escrow Agent by 23:59 UTC.

3. **Escrow Format Specification**.

    3.1. **Deposit's Format**. Registry objects, such as domains, contacts, name servers, registrars, etc. will be compiled into a file constructed as described in draft-arias-noguchi-registry-data-escrow, see Part A, Section 9, reference 1 of this Specification and draft-arias-noguchi-dnrd-objects-mapping, see Part A, Section 9, reference 2 of this Specification (collectively, the "DNDE Specification"). The DNDE Specification describes some elements as

optional; Registry Operator will include those elements in the Deposits if they are available. If not already an RFC, Registry Operator will use the most recent draft version of the DNDE Specification available at the Effective Date. Registry Operator may at its election use newer versions of the DNDE Specification after the Effective Date. Once the DNDE Specification is published as an RFC, Registry Operator will implement that version of the DNDE Specification, no later than one hundred eighty (180) calendar days after. UTF-8 character encoding will be used.

3.2. **Extensions**. If a Registry Operator offers additional Registry Services that require submission of additional data, not included above, additional "extension schemas" shall be defined in a case by case basis to represent that data. These "extension schemas" will be specified as described in Part A, Section 9, reference 2 of this Specification. Data related to the "extensions schemas" will be included in the deposit file described in Part A, Section 3.1 of this Specification. ICANN and the respective Registry Operator shall work together to agree on such new objects' data escrow specifications.

4. **Processing of Deposit files**. The use of compression is recommended in order to reduce electronic data transfer times, and storage capacity requirements. Data encryption will be used to ensure the privacy of registry escrow data. Files processed for compression and encryption will be in the binary OpenPGP format as per OpenPGP Message Format - RFC 4880, see Part A, Section 9, reference 3 of this Specification. Acceptable algorithms for Public-key cryptography, Symmetric-key cryptography, Hash and Compression are those enumerated in RFC 4880, not marked as deprecated in OpenPGP IANA Registry, see Part A, Section 9, reference 4 of this Specification, that are also royalty-free. The process to follow for the data file in original text format is:

(1) The XML file of the deposit as described in Part A, Section 9, reference 1 of this Specification must be named as the containing file as specified in Section 5 but with the extension xml.

(2) The data file(s) are aggregated in a tarball file named the same as (1) but with extension tar.

(3) A compressed and encrypted OpenPGP Message is created using the tarball file as sole input. The suggested algorithm for compression is ZIP as per RFC 4880. The compressed data will be encrypted using the escrow agent's public key. The suggested algorithms for Public-key encryption are Elgamal and RSA as per RFC 4880. The suggested algorithms for Symmetric-key encryption are TripleDES, AES128 and CAST5 as per RFC 4880.

(4) The file may be split as necessary if, once compressed and encrypted, it is larger than the file size limit agreed with the escrow agent. Every part of a

split file, or the whole file if not split, will be called a processed file in this section.

(5) A digital signature file will be generated for every processed file using the Registry Operator's private key. The digital signature file will be in binary OpenPGP format as per RFC 4880 Section 9, reference 3, and will not be compressed or encrypted. The suggested algorithms for Digital signatures are DSA and RSA as per RFC 4880. The suggested algorithm for Hashes in Digital signatures is SHA256.

(6) The processed files and digital signature files will then be transferred to the Escrow Agent through secure electronic mechanisms, such as, SFTP, SCP, HTTPS file upload, etc. as agreed between the Escrow Agent and the Registry Operator. Non-electronic delivery through a physical medium such as CD-ROMs, DVD-ROMs, or USB storage devices may be used if authorized by ICANN.

(7) The Escrow Agent will then validate every (processed) transferred data file using the procedure described in Part A, Section 8 of this Specification.

5. **File Naming Conventions**. Files will be named according to the following convention: {gTLD}_{YYYY-MM-DD}_{type}_S{#}_R{rev}.{ext} where:

5.1. {gTLD} is replaced with the gTLD name; in case of an IDN-TLD, the ASCII-compatible form (A-Label) must be used;

5.2. {YYYY-MM-DD} is replaced by the date corresponding to the time used as a timeline watermark for the transactions; i.e. for the Full Deposit corresponding to 2009-08-02T00:00Z, the string to be used would be "2009-08-02";

5.3. {type} is replaced by:

(1) "full", if the data represents a Full Deposit;

(2) "diff", if the data represents a Differential Deposit;

(3) "thin", if the data represents a Bulk Registration Data Access file, as specified in Section 3 of Specification 4;

(4) "thick-{gurid}", if the data represent Thick Registration Data from a specific registrar, as defined in Section 3.2 of Specification 4. The {gurid} element must be replaced with the IANA Registrar ID associated with the data.

5.4. {#} is replaced by the position of the file in a series of files, beginning with "1"; in case of a lone file, this must be replaced by "1".

5.5. {rev} is replaced by the number of revision (or resend) of the file beginning with "0":

5.6. {ext} is replaced by "sig" if it is a digital signature file of the quasi-homonymous file. Otherwise it is replaced by "ryde".

6. **Distribution of Public Keys**. Each of Registry Operator and Escrow Agent will distribute its public key to the other party (Registry Operator or Escrow Agent, as the case may be) via email to an email address to be specified. Each party will confirm receipt of the other party's public key with a reply email, and the distributing party will subsequently reconfirm the authenticity of the key transmitted via offline methods, like in person meeting, telephone, etc. In this way, public key transmission is authenticated to a user able to send and receive mail via a mail server operated by the distributing party. Escrow Agent, Registry Operator and ICANN will exchange public keys by the same procedure.

7. **Notification of Deposits**. Along with the delivery of each Deposit, Registry Operator will deliver to Escrow Agent and to ICANN (using the API described in draft-lozano-icann-registry-interfaces, see Part A, Section 9, reference 5 of this Specification (the "Interface Specification")) a written statement from Registry Operator (which may be by authenticated e-mail) that includes a copy of the report generated upon creation of the Deposit and states that the Deposit has been inspected by Registry Operator and is complete and accurate. The preparation and submission of this statement must be performed by the Registry Operator or its designee, provided that such designee may not be the Escrow Agent or any of Escrow Agent's Affiliates. Registry Operator will include the Deposit's "id" and "resend" attributes in its statement. The attributes are explained in Part A, Section 9, reference 1 of this Specification.

   If not already an RFC, Registry Operator will use the most recent draft version of the Interface Specification at the Effective Date. Registry Operator may at its election use newer versions of the Interface Specification after the Effective Date. Once the Interface Specification is published as an RFC, Registry Operator will implement that version of the Interface Specification, no later than one hundred eighty (180) calendar days after such publishing.

8. **Verification Procedure**.

   (1) The signature file of each processed file is validated.

   (2) If processed files are pieces of a bigger file, the latter is put together.

   (3) Each file obtained in the previous step is then decrypted and uncompressed.

   (4) Each data file contained in the previous step is then validated against the format defined in Part A, Section 9, reference 1 of this Specification.

(5) The data escrow agent extended verification process, as defined below in reference 2 of Part A of this Specification 2, as well as any other data escrow verification process contained in such reference.

If any discrepancy is found in any of the steps, the Deposit will be considered incomplete.

9. **References**.

(1) Domain Name Data Escrow Specification (work in progress), http://tools.ietf.org/html/draft-arias-noguchi-registry-data-escrow

(2) Domain Name Registration Data (DNRD) Objects Mapping, http://tools.ietf.org/html/draft-arias-noguchi-dnrd-objects-mapping

(3) OpenPGP Message Format, http://www.rfc-editor.org/rfc/rfc4880.txt

(4) OpenPGP parameters, http://www.iana.org/assignments/pgp-parameters/pgp-parameters.xhtml

(5) ICANN interfaces for registries and data escrow agents, http://tools.ietf.org/html/draft-lozano-icann-registry-interfaces

PART B – LEGAL REQUIREMENTS

1. **Escrow Agent**. Prior to entering into an escrow agreement, the Registry Operator must provide notice to ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendments thereto. In addition, prior to entering into an escrow agreement, Registry Operator must obtain the consent of ICANN to (a) use the specified Escrow Agent, and (b) enter into the form of escrow agreement provided. ICANN must be expressly designated as a third-party beneficiary of the escrow agreement. ICANN reserves the right to withhold its consent to any Escrow Agent, escrow agreement, or any amendment thereto, all in its sole discretion.

2. **Fees**. Registry Operator must pay, or have paid on its behalf, fees to the Escrow Agent directly. If Registry Operator fails to pay any fee by the due date(s), the Escrow Agent will give ICANN written notice of such non-payment and ICANN may pay the past-due fee(s) within fifteen (15) calendar days after receipt of the written notice from Escrow Agent. Upon payment of the past-due fees by ICANN, ICANN shall have a claim for such amount against Registry Operator, which Registry Operator shall be required to submit to ICANN together with the next fee payment due under the Registry Agreement.

3. **Ownership**. Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed to ICANN or to a party designated in writing by ICANN on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis, for any use related to the operation, maintenance or transition of the TLD.

4. **Integrity and Confidentiality**. Escrow Agent will be required to (i) hold and maintain the Deposits in a secure, locked, and environmentally safe facility, which is accessible only to authorized representatives of Escrow Agent, (ii) protect the integrity and confidentiality of the Deposits using commercially reasonable measures and (iii) keep and safeguard each Deposit for one (1) year. ICANN and Registry Operator will be provided the right to inspect Escrow Agent's applicable records upon reasonable prior notice and during normal business hours. Registry Operator and ICANN will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 from time to time.

   If Escrow Agent receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposits, Escrow Agent will promptly notify the Registry Operator and ICANN unless prohibited by law. After notifying the Registry Operator and ICANN, Escrow Agent shall allow

sufficient time for Registry Operator or ICANN to challenge any such order, which shall be the responsibility of Registry Operator or ICANN; provided, however, that Escrow Agent does not waive its rights to present its position with respect to any such order. Escrow Agent will cooperate with the Registry Operator or ICANN to support efforts to quash or limit any subpoena, at such party's expense. Any party requesting additional assistance shall pay Escrow Agent's standard charges or as quoted upon submission of a detailed request.

5. **Copies**. Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement.

6. **Release of Deposits**. Escrow Agent will make available for electronic download (unless otherwise requested) to ICANN or its designee, within twenty-four (24) hours, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:

   6.1. the Registry Agreement has expired without renewal, or been terminated; or

   6.2. ICANN has not received a notification as described in Part B, Sections 7.1 and 7.2 of this Specification from Escrow Agent within five (5) calendar days after the Deposit's scheduled delivery date; (a) ICANN gave notice to Escrow Agent and Registry Operator of that failure; and (b) ICANN has not, within seven (7) calendar days after such notice, received the notification from Escrow Agent; or

   6.3. ICANN has received notification as described in Part B, Sections 7.1 and 7.2 of this Specification from Escrow Agent of failed verification of the latest escrow deposit for a specific date or a notification of a missing deposit, and the notification is for a deposit that should have been made on Sunday (i.e., a Full Deposit); (a) ICANN gave notice to Registry Operator of that receipt; and (b) ICANN has not, within seven (7) calendar days after such notice, received notification as described in Part B, Sections 7.1 and 7.2 of this Specification from Escrow Agent of verification of a remediated version of such Full Deposit; or

   6.4. ICANN has received five notifications from Escrow Agent within the last thirty (30) calendar days notifying ICANN of either missing or failed escrow deposits that should have been made Monday through Saturday (i.e., a Differential Deposit), and (x) ICANN provided notice to Registry Operator of the receipt of such notifications; and (y) ICANN has not, within seven (7) calendar days after delivery of such notice to Registry Operator, received notification from Escrow Agent of verification of a remediated version of such Differential Deposit; or

6.5. Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or

6.6. Registry Operator has experienced a failure of critical registry functions and ICANN has asserted its rights pursuant to Section 2.13 of the Agreement; or

6.7. a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN; or

6.8. pursuant to Contractual and Operational Compliance Audits as specified under Section 2.11 of the Agreement.

Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon expiration or termination of the Registry Agreement or the Escrow Agreement.

7. **Verification of Deposits**.

7.1. Within twenty-four (24) hours after receiving each Deposit or corrected Deposit, Escrow Agent must verify the format and completeness of each Deposit and deliver to ICANN a notification generated for each Deposit. Reports will be delivered electronically using the API described in draft-lozano-icann-registry-interfaces, see Part A, Section 9, reference 5 of this Specification.

7.2. If Escrow Agent discovers that any Deposit fails the verification procedures or if Escrow Agent does not receive any scheduled Deposit, Escrow Agent must notify Registry Operator either by email, fax or phone and ICANN (using the API described in draft-lozano-icann-registry-interfaces, see Part A, Section 9, reference 5 of this Specification) of such nonconformity or non-receipt within twenty-four (24) hours after receiving the non-conformant Deposit or the deadline for such Deposit, as applicable. Upon notification of such verification or delivery failure, Registry Operator must begin developing modifications, updates, corrections, and other fixes of the Deposit necessary for the Deposit to be delivered and pass the verification procedures and deliver such fixes to Escrow Agent as promptly as possible.

8. **Amendments**. Escrow Agent and Registry Operator shall amend the terms of the Escrow Agreement to conform to this Specification 2 within ten (10) calendar days of any amendment or modification to this Specification 2. In the event of a conflict between this Specification 2 and the Escrow Agreement, this Specification 2 shall control.

9. **Indemnity**. Escrow Agent shall indemnify and hold harmless Registry Operator and ICANN, and each of their respective directors, officers, agents, employees, members, and stockholders ("Indemnitees") absolutely and forever from and against any and all claims, actions, damages, suits, liabilities, obligations, costs, fees, charges, and any other expenses whatsoever, including reasonable attorneys' fees and costs, that may be asserted by a third party against any Indemnitee in connection with the misrepresentation, negligence or misconduct of Escrow Agent, its directors, officers, agents, employees and contractors.

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

Registry Operator shall provide one set of monthly reports per gTLD, using the API described in draft-lozano-icann-registry-interfaces, see Specification 2, Part A, Section 9, reference 5, with the following content.

ICANN may request in the future that the reports be delivered by other means and using other formats. ICANN will use reasonable commercial efforts to preserve the confidentiality of the information reported until three (3) months after the end of the month to which the reports relate. Unless set forth in this Specification 3, any reference to a specific time refers to Coordinated Universal Time (UTC). Monthly reports shall consist of data that reflects the state of the registry at the end of the month (UTC).

1. **Per-Registrar Transactions Report**. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-transactions-yyyymm.csv", where "gTLD" is the gTLD name; in case of an IDN-TLD, the A-label shall be used; "yyyymm" is the year and month being reported. The file shall contain the following fields per registrar:

Field #	Field name	Description
01	registrar-name	Registrar's full corporate name as registered with IANA
02	iana-id	For cases where the registry operator acts as registrar (i.e., without the use of an ICANN accredited registrar) either 9998 or 9999 should be used depending on registration type (as described in Specification 5), otherwise the sponsoring Registrar IANA id should be used as specified in http://www.iana.org/assignments/registrar-ids
03	total-domains	total domain names under sponsorship in any EPP status but pendingCreate that have not been purged
04	total-nameservers	total name servers (either host objects or name server hosts as domain name attributes) associated with domain names registered for the TLD in any EPP status but pendingCreate that have not been purged
05	net-adds-1-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of one (1) year (and not deleted within the add grace period). A transaction must be reported

		in the month the add grace period ends.
06	net-adds-2-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of two(2) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
07	net-adds-3-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of three (3) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
08	net-adds-4-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of four (4) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
09	net-adds-5-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of five (5) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
10	net-adds-6-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of six (6) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
11	net-adds-7-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of seven (7) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
12	net-adds-8-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of eight (8) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
13	net-adds-9-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial term of nine (9) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
14	net-adds-10-yr	number of domains successfully registered (i.e., not in EPP pendingCreate status) with an initial

		term of ten (10) years (and not deleted within the add grace period). A transaction must be reported in the month the add grace period ends.
15	net-renews-1-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of one (1) year (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
16	net-renews-2-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of two (2) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
17	net-renews-3-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of three (3) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
18	net-renews-4-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of four (4) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
19	net-renews-5-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of five (5) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
20	net-renews-6-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of six (6) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew

		grace period ends.
21	net-renews-7-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of seven (7) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
22	net-renews-8-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of eight (8) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
23	net-renews-9-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of nine (9) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
24	net-renews-10-yr	number of domains successfully renewed (i.e., not in EPP pendingRenew status) either automatically or by command with a new renewal period of ten (10) years (and not deleted within the renew or auto-renew grace period). A transaction must be reported in the month the renew or auto-renew grace period ends.
25	transfer-gaining-successful	number of domain transfers initiated by this registrar that were successfully completed (either explicitly or automatically approved) and not deleted within the transfer grace period. A transaction must be reported in the month the transfer grace period ends.
26	transfer-gaining-nacked	number of domain transfers initiated by this registrar that were rejected (e.g., EPP transfer op="reject") by the other registrar
27	transfer-losing-successful	number of domain transfers initiated by another registrar that were successfully completed (either explicitly or automatically approved)
28	transfer-losing-nacked	number of domain transfers initiated by another registrar that this registrar rejected (e.g., EPP

		transfer op="reject")
29	transfer-disputed-won	number of transfer disputes in which this registrar prevailed (reported in the month where the determination happened)
30	transfer-disputed-lost	number of transfer disputes this registrar lost (reported in the month where the determination happened)
31	transfer-disputed-nodecision	number of transfer disputes involving this registrar with a split or no decision (reported in the month where the determination happened)
32	deleted-domains-grace	domains deleted within the add grace period (does not include names deleted while in EPP pendingCreate status). A deletion must be reported in the month the name is purged.
33	deleted-domains-nograce	domains deleted outside the add grace period (does not include names deleted while in EPP pendingCreate status). A deletion must be reported in the month the name is purged.
34	restored-domains	domain names restored during reporting period
35	restored-noreport	total number of restored names for which a restore report is required by the registry, but the registrar failed to submit it
36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-domains	total number of names affected by granted AGP (add grace period) exemption requests
39	attempted-adds	number of attempted (both successful and failed) domain name create commands

The first line shall include the field names exactly as described in the table above as a "header line" as described in section 2 of RFC 4180. The last line of each report shall include totals for each column across all registrars; the first field of this line shall read "Totals" while the second field shall be left empty in that line. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

2. **Registry Functions Activity Report**. This report shall be compiled in a comma separated-value formatted file as specified in RFC 4180. The file shall be named "gTLD-activity-yyyymm.csv", where "gTLD" is the gTLD name; in case of an

IDN-TLD, the A-label shall be used; “yyyymm” is the year and month being reported. The file shall contain the following fields:

Field #	Field Name	Description
01	operational-registrars	number of operational registrars in the production system at the end of the reporting period
02	zfa-passwords	number of active zone file access passwords at the end of the reporting period; "CZDS" may be used instead of the number of active zone file access passwords, if the Centralized Zone Data Service (CZDS) is used to provide the zone file to the end user
03	whois-43-queries	number of WHOIS (port-43) queries responded during the reporting period
04	web-whois-queries	number of Web-based Whois queries responded during the reporting period, not including searchable Whois
05	searchable-whois-queries	number of searchable Whois queries responded during the reporting period, if offered
06	dns-udp-queries-received	number of DNS queries received over UDP transport during the reporting period
07	dns-udp-queries-responded	number of DNS queries received over UDP transport that were responded during the reporting period
08	dns-tcp-queries-received	number of DNS queries received over TCP transport during the reporting period
09	dns-tcp-queries-responded	number of DNS queries received over TCP transport that were responded during the reporting period
10	srs-dom-check	number of SRS (EPP and any other interface) domain name “check” requests responded during the reporting period
11	srs-dom-create	number of SRS (EPP and any other interface) domain name “create” requests responded during the reporting period
12	srs-dom-delete	number of SRS (EPP and any other interface) domain name “delete” requests responded during the reporting period
13	srs-dom-info	number of SRS (EPP and any other interface) domain name “info” requests responded during

Field #	Field Name	Description
		the reporting period
14	srs-dom-renew	number of SRS (EPP and any other interface) domain name "renew" requests responded during the reporting period
15	srs-dom-rgp-restore-report	number of SRS (EPP and any other interface) domain name RGP "restore" requests delivering a restore report responded during the reporting period
16	srs-dom-rgp-restore-request	number of SRS (EPP and any other interface) domain name RGP "restore" requests responded during the reporting period
17	srs-dom-transfer-approve	number of SRS (EPP and any other interface) domain name "transfer" requests to approve transfers responded during the reporting period
18	srs-dom-transfer-cancel	number of SRS (EPP and any other interface) domain name "transfer" requests to cancel transfers responded during the reporting period
19	srs-dom-transfer-query	number of SRS (EPP and any other interface) domain name "transfer" requests to query about a transfer responded during the reporting period
20	srs-dom-transfer-reject	number of SRS (EPP and any other interface) domain name "transfer" requests to reject transfers responded during the reporting period
21	srs-dom-transfer-request	number of SRS (EPP and any other interface) domain name "transfer" requests to request transfers responded during the reporting period
22	srs-dom-update	number of SRS (EPP and any other interface) domain name "update" requests (not including RGP restore requests) responded during the reporting period
23	srs-host-check	number of SRS (EPP and any other interface) host "check" requests responded during the reporting period
24	srs-host-create	number of SRS (EPP and any other interface) host "create" requests responded during the

Field #	Field Name	Description
		reporting period
25	srs-host-delete	number of SRS (EPP and any other interface) host “delete” requests responded during the reporting period
26	srs-host-info	number of SRS (EPP and any other interface) host “info” requests responded during the reporting period
27	srs-host-update	number of SRS (EPP and any other interface) host “update” requests responded during the reporting period
28	srs-cont-check	number of SRS (EPP and any other interface) contact “check” requests responded during the reporting period
29	srs-cont-create	number of SRS (EPP and any other interface) contact “create” requests responded during the reporting period
30	srs-cont-delete	number of SRS (EPP and any other interface) contact “delete” requests responded during the reporting period
31	srs-cont-info	number of SRS (EPP and any other interface) contact “info” requests responded during the reporting period
32	srs-cont-transfer-approve	number of SRS (EPP and any other interface) contact “transfer” requests to approve transfers responded during the reporting period
33	srs-cont-transfer-cancel	number of SRS (EPP and any other interface) contact “transfer” requests to cancel transfers responded during the reporting period
34	srs-cont-transfer-query	number of SRS (EPP and any other interface) contact “transfer” requests to query about a transfer responded during the reporting period
35	srs-cont-transfer-reject	number of SRS (EPP and any other interface) contact “transfer” requests to reject transfers responded during the reporting period
36	srs-cont-transfer-request	number of SRS (EPP and any other interface) contact “transfer” requests to request transfers responded during the reporting period
37	srs-cont-update	number of SRS (EPP and any other interface) contact “update” requests responded during the reporting period

The first line shall include the field names exactly as described in the table above as a "header line" as described in section 2 of RFC 4180. No other lines besides the ones described above shall be included. Line breaks shall be <U+000D, U+000A> as described in RFC 4180.

For gTLDs that are part of a single-instance Shared Registry System, the Registry Functions Activity Report may include the total contact or host transactions for all the gTLDs in the system.

SPECIFICATION 4

REGISTRATION DATA PUBLICATION SERVICES

1. **Registration Data Directory Services**. Until ICANN requires a different protocol, Registry Operator will operate a WHOIS service available via port 43 in accordance with RFC 3912, and a web-based Directory Service at <whois.nic.TLD> providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

   Registry Operator shall implement a new standard supporting access to domain name registration data (SAC 051) no later than one hundred thirty-five (135) days after it is requested by ICANN if: 1) the IETF produces a standard (i.e., it is published, at least, as a Proposed Standard RFC as specified in RFC 2026); and 2) its implementation is commercially reasonable in the context of the overall operation of the registry.

   1.1. The format of responses shall follow a semi-free text format outline below, followed by a blank line and a legal disclaimer specifying the rights of Registry Operator, and of the user querying the database.

   1.2. Each data object shall be represented as a set of key/value pairs, with lines beginning with keys, followed by a colon and a space as delimiters, followed by the value.

   1.3. For fields where more than one value exists, multiple key/value pairs with the same key shall be allowed (for example to list multiple name servers). The first key/value pair after a blank line should be considered the start of a new record, and should be considered as identifying that record, and is used to group data, such as hostnames and IP addresses, or a domain name and registrant information, together.

   1.4. The fields specified below set forth the minimum output requirements. Registry Operator may output data fields in addition to those specified below, subject to approval by ICANN, which approval shall not be unreasonably withheld.

   1.5. **Domain Name Data:**

      1.5.1 **Query format:** whois EXAMPLE.TLD

      1.5.2 **Response format:**

      Domain Name: EXAMPLE.TLD
      Domain ID: D1234567-TLD

WHOIS Server: whois.example.tld
Referral URL: http://www.example.tld
Updated Date: 2009-05-29T20:13:00Z
Creation Date: 2000-10-08T00:45:00Z
Registry Expiry Date: 2010-10-08T00:44:59Z
Sponsoring Registrar: EXAMPLE REGISTRAR LLC
Sponsoring Registrar IANA ID: 5555555
Domain Status: clientDeleteProhibited
Domain Status: clientRenewProhibited
Domain Status: clientTransferProhibited
Domain Status: serverUpdateProhibited
Registrant ID: 5372808-ERL
Registrant Name: EXAMPLE REGISTRANT
Registrant Organization: EXAMPLE ORGANIZATION
Registrant Street: 123 EXAMPLE STREET
Registrant City: ANYTOWN
Registrant State/Province: AP
Registrant Postal Code: A1A1A1
Registrant Country: EX
Registrant Phone: +1.5555551212
Registrant Phone Ext: 1234
Registrant Fax: +1.5555551213
Registrant Fax Ext: 4321
Registrant Email: EMAIL@EXAMPLE.TLD
Admin ID: 5372809-ERL
Admin Name: EXAMPLE REGISTRANT ADMINISTRATIVE
Admin Organization: EXAMPLE REGISTRANT ORGANIZATION
Admin Street: 123 EXAMPLE STREET
Admin City: ANYTOWN
Admin State/Province: AP
Admin Postal Code: A1A1A1
Admin Country: EX
Admin Phone: +1.5555551212
Admin Phone Ext: 1234
Admin Fax: +1.5555551213
Admin Fax Ext:
Admin Email: EMAIL@EXAMPLE.TLD
Tech ID: 5372811-ERL
Tech Name: EXAMPLE REGISTRAR TECHNICAL
Tech Organization: EXAMPLE REGISTRAR LLC
Tech Street: 123 EXAMPLE STREET
Tech City: ANYTOWN
Tech State/Province: AP
Tech Postal Code: A1A1A1
Tech Country: EX
Tech Phone: +1.1235551234

Tech Phone Ext: 1234
Tech Fax: +1.5555551213
Tech Fax Ext: 93
Tech Email: EMAIL@EXAMPLE.TLD
Name Server: NS01.EXAMPLEREGISTRAR.TLD
Name Server: NS02.EXAMPLEREGISTRAR.TLD
DNSSEC: signedDelegation
DNSSEC: unsigned
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.6. **Registrar Data:**

1.6.1 **Query format**: whois "registrar Example Registrar, Inc."

1.6.2 **Response format**:

Registrar Name: Example Registrar, Inc.
Street: 1234 Admiralty Way
City: Marina del Rey
State/Province: CA
Postal Code: 90292
Country: US
Phone Number: +1.3105551212
Fax Number: +1.3105551213
Email: registrar@example.tld
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www.example-registrar.tld
Admin Contact: Joe Registrar
Phone Number: +1.3105551213
Fax Number: +1.3105551213
Email: joeregistrar@example-registrar.tld
Admin Contact: Jane Registrar
Phone Number: +1.3105551214
Fax Number: +1.3105551213
Email: janeregistrar@example-registrar.tld
Technical Contact: John Geek
Phone Number: +1.3105551215
Fax Number: +1.3105551216
Email: johngeek@example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.7. **Nameserver Data:**

1.7.1 **Query format**: whois "nameserver (nameserver name)", or whois "nameserver (IP Address)." For example: whois "nameserver NS1.EXAMPLE.TLD".

1.7.2 **Response format:**

Server Name: NS1.EXAMPLE.TLD
IP Address: 192.0.2.123
IP Address: 2001:0DB8::1
Registrar: Example Registrar, Inc.
WHOIS Server: whois.example-registrar.tld
Referral URL: http://www.example-registrar.tld
>>> Last update of WHOIS database: 2009-05-29T20:15:00Z <<<

1.8. The format of the following data fields: domain status, individual and organizational names, address, street, city, state/province, postal code, country, telephone and fax numbers (the extension will be provided as a separate field as shown above), email addresses, date and times should conform to the mappings specified in EPP RFCs 5730-5734 so that the display of this information (or values return in WHOIS responses) can be uniformly processed and understood.

1.9. In order to be compatible with ICANN's common interface for WHOIS (InterNIC), WHOIS output shall be in the format outline above.

1.10. **Searchability**. Offering searchability capabilities on the Directory Services is optional but if offered by the Registry Operator it shall comply with the specification described in this section.

1.10.1 Registry Operator will offer searchability on the web-based Directory Service.

1.10.2 Registry Operator will offer partial match capabilities, at least, on the following fields: domain name, contacts and registrant's name, and contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.).

1.10.3 Registry Operator will offer exact-match capabilities, at least, on the following fields: Registrar ID, name server name, and name server's IP address (only applies to IP addresses stored by the registry, i.e., glue records).

1.10.4 Registry Operator will offer Boolean search capabilities supporting, at least, the following logical operators to join a set of search criteria: AND, OR, NOT.

1.10.5 Search results will include domain names matching the search criteria.

1.10.6 Registry Operator will: 1) implement appropriate measures to avoid abuse of this feature (e.g., permitting access only to legitimate

authorized users); and 2) ensure the feature is in compliance with any applicable privacy laws or policies.

1.11. Registry Operator shall provide a link on the primary website for the TLD (i.e., the website provided to ICANN for publishing on the ICANN website) to a web page designated by ICANN containing WHOIS policy and educational materials.

2. **Zone File Access**

2.1. **Third-Party Access**

2.1.1 **Zone File Access Agreement**. Registry Operator will enter into an agreement with any Internet user, which will allow such user to access an Internet host server or servers designated by Registry Operator and download zone file data. The agreement will be standardized, facilitated and administered by a Centralized Zone Data Access Provider, which may be ICANN or an ICANN designee (the "CZDA Provider"). Registry Operator (optionally through the CZDA Provider) will provide access to zone file data per Section 2.1.3 of this Specification and do so using the file format described in Section 2.1.4 of this Specification. Notwithstanding the foregoing, (a) the CZDA Provider may reject the request for access of any user that does not satisfy the credentialing requirements in Section 2.1.2 below; (b) Registry Operator may reject the request for access of any user that does not provide correct or legitimate credentials under Section 2.1.2 below or where Registry Operator reasonably believes will violate the terms of Section 2.1.5. below; and, (c) Registry Operator may revoke access of any user if Registry Operator has evidence to support that the user has violated the terms of Section 2.1.5 below.

2.1.2 **Credentialing Requirements**. Registry Operator, through the facilitation of the CZDA Provider, will request each user to provide it with information sufficient to correctly identify and locate the user. Such user information will include, without limitation, company name, contact name, address, telephone number, facsimile number, email address and IP address.

2.1.3 **Grant of Access**. Each Registry Operator (optionally through the CZDA Provider) will provide the Zone File SFTP (or other Registry supported) service for an ICANN-specified and managed URL (specifically, <TLD>.zda.icann.org where <TLD> is the TLD for which the registry is responsible) for the user to access the Registry's zone data archives. Registry Operator will grant the user a non-exclusive, nontransferable, limited right to access Registry Operator's (optionally CZDA Provider's) Zone File hosting server, and to transfer

a copy of the top-level domain zone files, and any associated cryptographic checksum files no more than once per 24 hour period using SFTP, or other data transport and access protocols that may be prescribed by ICANN. For every zone file access server, the zone files are in the top-level directory called <zone>.zone.gz, with <zone>.zone.gz.md5 and <zone>.zone.gz.sig to verify downloads. If the Registry Operator (or the CZDA Provider) also provides historical data, it will use the naming pattern <zone>-yyyymmdd.zone.gz, etc.

2.1.4 **File Format Standard**. Registry Operator (optionally through the CZDA Provider) will provide zone files using a subformat of the standard Master File format as originally defined in RFC 1035, Section 5, including all the records present in the actual zone used in the public DNS. Sub-format is as follows:

1. Each record must include all fields in one line as: <domain-name> <TTL> <class> <type> <RDATA>.

2. Class and Type must use the standard mnemonics and must be in lower case.

3. TTL must be present as a decimal integer.

4. Use of \X and \DDD inside domain names is allowed.

5. All domain names must be in lower case.

6. Must use exactly one tab as separator of fields inside a record.

7. All domain names must be fully qualified.

8. No $ORIGIN directives.

9. No use of "@" to denote current origin.

10. No use of "blank domain names" at the beginning of a record to continue the use of the domain name in the previous record.

11. No $INCLUDE directives.

12. No $TTL directives.

13. No use of parentheses, e.g., to continue the list of fields in a record across a line boundary.

14. No use of comments.

15. No blank lines.

16. The SOA record should be present at the top and (duplicated at) the end of the zone file.

17. With the exception of the SOA record, all the records in a file must be in alphabetical order.

18. One zone per file. If a TLD divides its DNS data into multiple zones, each zone goes into a separate file named as above, with all the files combined using tar into a file called <tld>.zone.tar.

2.1.5 **Use of Data by User**. Registry Operator will permit user to use the zone file for lawful purposes; provided that (a) user takes all reasonable steps to protect against unauthorized access to, use of, and disclosure of the data, and (b) under no circumstances will Registry Operator be required or permitted to allow user to use the data to (i) allow, enable or otherwise support any marketing activities to entities other than the user's existing customers, regardless of the medium used (such media include but are not limited to transmission by e-mail, telephone, facsimile, postal mail, SMS, and wireless alerts of mass unsolicited, commercial advertising or solicitations to entities), (ii) enable high volume, automated, electronic processes that send queries or data to the systems of Registry Operator or any ICANN-accredited registrar, or (iii) interrupt, disrupt or interfere in the normal business operations of any registrant.

2.1.6 **Term of Use**. Registry Operator, through CZDA Provider, will provide each user with access to the zone file for a period of not less than three (3) months. Registry Operator will allow users to renew their Grant of Access.

2.1.7 **No Fee for Access**. Registry Operator will provide, and CZDA Provider will facilitate, access to the zone file to user at no cost.

2.2. **Co-operation**

2.2.1 **Assistance**. Registry Operator will co-operate and provide reasonable assistance to ICANN and the CZDA Provider to facilitate and maintain the efficient access of zone file data by permitted users as contemplated under this Schedule.

2.3. **ICANN Access**. Registry Operator shall provide bulk access to the zone files for the TLD to ICANN or its designee on a continuous basis in the manner ICANN may reasonably specify from time to time. Access will be provided at least daily. Zone files will include SRS data committed as close as possible to 00:00:00 UTC.

2.4. **Emergency Operator Access**. Registry Operator shall provide bulk access to the zone files for the TLD to the Emergency Operators designated by ICANN on a continuous basis in the manner ICANN may reasonably specify from time to time.

3. **Bulk Registration Data Access to ICANN**

3.1. **Periodic Access to Thin Registration Data**. In order to verify and ensure the operational stability of Registry Services as well as to facilitate compliance checks on accredited registrars, Registry Operator will provide ICANN on a weekly basis (the day to be designated by ICANN) with up-to-date Registration Data as specified below. Data will include data committed as of 00:00:00 UTC on the day previous to the one designated for retrieval by ICANN.

3.1.1 **Contents**. Registry Operator will provide, at least, the following data for all registered domain names: domain name, domain name repository object id (roid), Registrar ID (IANA ID), statuses, last updated date, creation date, expiration date, and name server names. For sponsoring registrars, at least, it will provide: registrar name, registrar id (IANA ID), hostname of registrar Whois server, and URL of registrar.

3.1.2 **Format**. The data will be provided in the format specified in Specification 2 for Data Escrow (including encryption, signing, etc.) but including only the fields mentioned in the previous section, i.e., the file will only contain Domain and Registrar objects with the fields mentioned above. Registry Operator has the option to provide a full deposit file instead as specified in Specification 2.

3.1.3 **Access**. Registry Operator will have the file(s) ready for download as of 00:00:00 UTC on the day designated for retrieval by ICANN. The file(s) will be made available for download by SFTP, though ICANN may request other means in the future.

3.2. **Exceptional Access to Thick Registration Data**. In case of a registrar failure, deaccreditation, court order, etc. that prompts the temporary or definitive transfer of its domain names to another registrar, at the request of ICANN, Registry Operator will provide ICANN with up-to-date data for the domain names of the losing registrar. The data will be provided in the format specified in Specification 2 for Data Escrow. The file will only contain data related to the domain names of the losing registrar. Registry Operator will provide the data as soon as commercially practicable, but in no event later than five (5) calendar days following ICANN's request. Unless otherwise agreed by Registry Operator and ICANN, the file will be made available for

download by ICANN in the same manner as the data specified in Section 3.1 of this Specification.

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES

Except to the extent that ICANN otherwise expressly authorizes in writing, and subject to the terms and conditions of this Specification, Registry Operator shall reserve the following labels from initial (i.e., other than renewal) registration within the TLD. If using self-allocation, the Registry Operator must show the registration in the RDDS. In the case of IDN names (as indicated below), IDN variants will be identified according to the registry operator IDN registration policy, where applicable.

1. **Example.** The ASCII label "EXAMPLE" shall be withheld from registration or allocated to Registry Operator at the second level and at all other levels within the TLD at which Registry Operator offers registrations (such second level and all other levels are collectively referred to herein as, "All Levels"). Such label may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, such withheld or allocated label shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such name without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

2. **Two-character labels**. All two-character ASCII labels shall be withheld from registration or allocated to Registry Operator at the second level within the TLD. Such labels may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator, provided that such two-character label strings may be released to the extent that Registry Operator reaches agreement with the related government and country-code manager of the string as specified in the ISO 3166-1 alpha-2 standard. The Registry Operator may also propose the release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes, subject to approval by ICANN. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such labels that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

3. **Reservations for Registry Operations**.

    3.1. The following ASCII labels must be withheld from registration or allocated to Registry Operator at All Levels for use in connection with the operation of the registry for the TLD: WWW, RDDS and WHOIS. The following ASCII label must be allocated to Registry Operator upon delegation into the root zone at All Levels for use in connection with the operation of the registry for the TLD: NIC. Registry Operator may activate WWW, RDDS and WHOIS in the DNS,

but must activate NIC in the DNS, as necessary for the operation of the TLD (in accordance with the provisions of Exhibit A, the ASCII label NIC must be provisioned in the DNS as a zone cut using NS resource records). None of WWW, RDDS, WHOIS or NIC may be released or registered to any person (other than Registry Operator) or third party. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD all such withheld or allocated names shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement. Such domains shall be identified by Registrar ID 9999.

3.1.1 If Exhibit A to the Agreement specifically provides that Registry Operator may offer registration of IDNs, Registry Operator may also activate a language-specific translation or transliteration of the term "NIC" or an abbreviation for the translation of the term "Network Information Center" in the DNS in accordance with Registry Operator's IDN Tables and IDN Registration Rules. Such translation, transliteration or abbreviation may be reserved by Registry Operator and used in addition to the label NIC to provide any required registry functions. For the avoidance of doubt, Registry Operator is required to activate the ASCII label NIC pursuant to Section 3.1 of this Specification 3.

3.2. Registry Operator may activate in the DNS at All Levels up to one hundred (100) names (plus their IDN variants, where applicable) necessary for the operation or the promotion of the TLD. Registry Operator must act as the Registered Name Holder of such names as that term is defined in the then-current ICANN Registrar Accreditation Agreement (RAA). These activations will be considered Transactions for purposes of Section 6.1 of the Agreement. Registry Operator must either (i) register such names through an ICANN accredited registrar; or (ii) self-allocate such names and with respect to those names submit to and be responsible to ICANN for compliance with ICANN Consensus Policies and the obligations set forth in Subsections 3.7.7.1 through 3.7.7.12 of the then-current RAA (or any other replacement clause setting out the terms of the registration agreement between a registrar and a registered name holder). If Registry Operator chooses option (ii) above, it shall identify these transactions using Registrar ID 9998. At Registry Operator's discretion and in compliance with all other terms of this Agreement, including the RPMs set forth in Specification 7, such names may be released for registration to another person or entity.

3.3. Registry Operator may withhold from registration or allocate to Registry Operator names (including their IDN variants, where applicable) at All Levels in accordance with Section 2.6 of the Agreement. Such names may not be activated in the DNS, but may be released for registration to Registry

Operator or another person or entity at Registry Operator's discretion, subject to compliance with all the terms of this Agreement, including applicable RPMs set forth in Specification 7. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Upon ICANN's request, Registry Operator shall provide a listing of all names withheld or allocated to Registry Operator pursuant to Section 2.6 of the Agreement. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

3.4. Effective upon the conclusion of the No-Activation Period specified in Section 6.1 of Specification 6, Registry Operator shall allocate the domain name "icann-sla-monitoring.<tld>" to the ICANN testing registrar (as such registrar is described in Section 8.2 of Specification 10). If such domain name is not available for registration in the TLD or is otherwise inconsistent with the registration policies of the TLD, Registry Operator may allocate a different domain name to the ICANN testing registrar in consultation with ICANN. The allocation of any such alternative domain name will be communicated to ICANN following such consultation. The allocation of the domain name "icann-sla-monitoring.<tld>" to the ICANN testing registrar will not (i) be considered a Transaction for purposes of Section 6.1 of the Agreement, (ii) count towards the one hundred domain names available to Registry Operator under Section 3.2 of this Specification 5, or (iii) adversely affect Registry Operator's qualification as a .BRAND TLD pursuant to Specification 13 (.BRAND TLD Provisions) hereto (as applicable).

4. **Country and Territory Names**. The country and territory names (including their IDN variants, where applicable) contained in the following internationally recognized lists shall be withheld from registration or allocated to Registry Operator at All Levels:

4.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union <http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm>;

4.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

4.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;

provided, that the reservation of specific country and territory names (including their IDN variants according to the registry operator IDN registration policy, where applicable) may be released to the extent that Registry Operator reaches agreement with the applicable government(s). Registry Operator must not activate such names in the DNS; provided, that Registry Operator may propose the release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

5. **International Olympic Committee; International Red Cross and Red Crescent Movement**. As instructed from time to time by ICANN, the names (including their IDN variants, where applicable) relating to the International Olympic Committee, International Red Cross and Red Crescent Movement listed at http://www.icann.org/en/resources/registries/reserved shall be withheld from registration or allocated to Registry Operator at the second level within the TLD. Additional International Olympic Committee, International Red Cross and Red Crescent Movement names (including their IDN variants) may be added to the list upon ten (10) calendar days notice from ICANN to Registry Operator. Such names may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

6. **Intergovernmental Organizations**. As instructed from time to time by ICANN, Registry Operator will implement the protections mechanism determined by the ICANN Board of Directors relating to the protection of identifiers for Intergovernmental Organizations. A list of reserved names for this Section 6 is available at http://www.icann.org/en/resources/registries/reserved. Additional names (including their IDN variants) may be added to the list upon ten (10) calendar days notice from ICANN to Registry Operator. Any such protected identifiers for Intergovernmental Organizations may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such protected identifiers shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use

of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.

SPECIFICATION 6

REGISTRY INTEROPERABILITY AND CONTINUITY SPECIFICATIONS

1. **Standards Compliance**

1.1. **DNS**. Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF), including all successor standards, modifications or additions thereto relating to the DNS and name server operations including without limitation RFCs 1034, 1035, 1123, 1982, 2181, 2182, 3226, 3596, 3597, 4343, 5966 and 6891. DNS labels may only include hyphens in the third and fourth position if they represent valid IDNs (as specified above) in their ASCII encoding (e.g., "xn--ndk061n").

1.2. **EPP**. Registry Operator shall comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to the provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 5910, 5730, 5731, 5732 (if using host objects), 5733 and 5734. If Registry Operator implements Registry Grace Period (RGP), it will comply with RFC 3915 and its successors. If Registry Operator requires the use of functionality outside the base EPP RFCs, Registry Operator must document EPP extensions in Internet-Draft format following the guidelines described in RFC 3735. Registry Operator will provide and update the relevant documentation of all the EPP Objects and Extensions supported to ICANN prior to deployment.

1.3. **DNSSEC**. Registry Operator shall sign its TLD zone files implementing Domain Name System Security Extensions ("DNSSEC"). For the absence of doubt, Registry Operator shall sign the zone file of <TLD> and zone files used for in-bailiwick glue for the TLD's DNS servers. During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and their successors, and follow the best practices described in RFC 6781 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the DNSSEC Practice Statements (DPS) describing critical security controls and procedures for key material storage, access and usage for its own keys and secure acceptance of registrants' public-key material. Registry Operator shall publish its DPS following the format described in RFC 6841. DNSSEC validation must be active and use the IANA DNS Root Key Signing Key set (available at https://www.iana.org/dnssec/files) as a trust anchor for Registry Operator's Registry Services making use of data obtained via DNS responses.

1.4. **IDN**. If the Registry Operator offers Internationalized Domain Names ("IDNs"), it shall comply with RFCs 5890, 5891, 5892, 5893 and their successors. Registry Operator shall comply with the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>, as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices.

1.5. **IPv6**. Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry's name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow "DNS IPv6 Transport Operational Guidelines" as described in BCP 91 and the recommendations and considerations described in RFC 4472. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g., Whois (RFC 3912), Web based Whois. Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six (6) months after receiving the first request in writing from a gTLD accredited Registrar willing to operate with the SRS over IPv6.

1.6. **IANA Rootzone Database**. In order to ensure that authoritative information about the TLD remains publicly available, Registry Operator shall submit a change request to the IANA functions operator updating any outdated or inaccurate DNS or WHOIS records of the TLD. Registry Operator shall use commercially reasonable efforts to submit any such change request no later than seven (7) calendar days after the date any such DNS or WHOIS records becomes outdated or inaccurate. Registry Operator must submit all change requests in accordance with the procedures set forth at <http://www.iana.org/domains/root>.

1.7. **Network Ingress Filtering**. Registry Operator shall implement network ingress filtering checks for its Registry Services as described in BCP 38 and BCP 84, which ICANN will also implement.

2. **Registry Services**

2.1. **Registry Services**. "Registry Services" are, for purposes of the Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other

products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

2.2. **Wildcard Prohibition**. For domain names which are either not registered, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFCs 1034 and 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a "Name Error" response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

3. **Registry Continuity**

3.1. **High Availability**. Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme where applicable) to ensure continued operation in the case of technical failure (widespread or local), or an extraordinary occurrence or circumstance beyond the control of the Registry Operator. Registry Operator's emergency operations department shall be available at all times to respond to extraordinary occurrences.

3.2. **Extraordinary Event**. Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within twenty-four (24) hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of forty-eight (48) hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

3.3. **Business Continuity**. Registry Operator shall maintain a business continuity plan, which will provide for the maintenance of Registry Services in the event of an extraordinary event beyond the control of the Registry Operator or business failure of Registry Operator, and may include the designation of a Registry Services continuity provider. If such plan includes the designation of a Registry Services continuity provider, Registry Operator shall provide

the name and contact information for such Registry Services continuity provider to ICANN. In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated Registry Services continuity provider, if one exists. Registry Operator shall conduct Registry Services Continuity testing at least once per year.

4. **Abuse Mitigation**

4.1. **Abuse Contact**. Registry Operator shall provide to ICANN and publish on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquiries related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

4.2. **Malicious Use of Orphan Glue Records**. Registry Operator shall take action to remove orphan glue records (as defined at http://www.icann.org/en/committees/security/sac048.pdf) when provided with evidence in written form that such records are present in connection with malicious conduct.

5. **Supported Initial and Renewal Registration Periods**

5.1. **Initial Registration Periods**. Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, initial registrations of registered names may not exceed ten (10) years.

5.2. **Renewal Periods**. Renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.

6. **Name Collision Occurrence Management**

6.1. **No-Activation Period.** Registry Operator shall not activate any names in the DNS zone for the Registry TLD (except for "NIC") until at least 120 calendar days after the effective date of this agreement. Registry Operator may allocate names (subject to subsection 6.2 below) during this period only if Registry Operator causes registrants to be clearly informed of the inability to activate names until the No-Activation Period ends.

6.2. **Name Collision Occurrence Assessment**

6.2.1 Registry Operator shall not activate any names in the DNS zone for the Registry TLD except in compliance with a Name Collision Occurrence Assessment provided by ICANN regarding the Registry TLD. Registry

Operator will either (A) implement the mitigation measures described in its Name Collision Occurrence Assessment before activating any second-level domain name, or (B) block those second-level domain names for which the mitigation measures as described in the Name Collision Occurrence Assessment have not been implemented and proceed with activating names that are not listed in the Assessment.

6.2.2 Notwithstanding subsection 6.2.1, Registry Operator may proceed with activation of names in the DNS zone without implementation of the measures set forth in Section 6.2.1 only if (A) ICANN determines that the Registry TLD is eligible for this alternative path to activation of names; and (B) Registry Operator blocks all second-level domain names identified by ICANN and set forth at <http://newgtlds.icann.org/en/announcements-and-media/announcement-2-17nov13-en> as such list may be modified by ICANN from time to time. Registry Operator may activate names pursuant to this subsection and later activate names pursuant to subsection 6.2.1.

6.2.3 The sets of names subject to mitigation or blocking pursuant to Sections 6.2.1 and 6.2.2 will be based on ICANN analysis of DNS information including "Day in the Life of the Internet" data maintained by the DNS Operations, Analysis, and Research Center (DNS-OARC) <https://www.dns-oarc.net/oarc/data/ditl>.

6.2.4 Registry Operator may participate in the development by the ICANN community of a process for determining whether and how these blocked names may be released.

6.2.5 If ICANN determines that the TLD is ineligible for the alternative path to activation of names, ICANN may elect not to delegate the TLD pending completion of the final Name Collision Occurrence Assessment for the TLD, and Registry Operator's completion of all required mitigation measures. Registry Operator understands that the mitigation measures required by ICANN as a condition to activation of names in the DNS zone for the TLD may include, without limitation, mitigation measures such as those described in Section 3.2 of the New gTLD Name Collision Occurrence Management Plan approved by the ICANN Board New gTLD Program Committee (NGPC) on 7 October 2013 as found at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-07oct13-en.pdf>.

6.3. **Name Collision Report Handling**

6.3.1 During the first two years after delegation of the TLD, Registry Operator's emergency operations department shall be available to

receive reports, relayed by ICANN, alleging demonstrably severe harm from collisions with overlapping use of the names outside of the authoritative DNS.

6.3.2 Registry Operator shall develop an internal process for handling in an expedited manner reports received pursuant to subsection 6.3.1 under which Registry Operator may, to the extent necessary and appropriate, remove a recently activated name from the TLD zone for a period of up to two years in order to allow the affected party to make changes to its systems.

SPECIFICATION 7

MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Rights Protection Mechanisms**. Registry Operator shall implement and adhere to the rights protection mechanisms ("RPMs") specified in this Specification. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party's legal rights. Registry Operator will include all RPMs required by this Specification 7 and any additional RPMs developed and implemented by Registry Operator in the Registry-Registrar Agreement entered into by ICANN-accredited registrars authorized to register names in the TLD. Registry Operator shall implement in accordance with requirements set forth therein each of the mandatory RPMs set forth in the Trademark Clearinghouse as of the date hereof, as posted at http://www.icann.org/en/resources/registries/tmch-requirements (the "Trademark Clearinghouse Requirements"), which may be revised in immaterial respects by ICANN from time to time. Registry Operator shall not mandate that any owner of applicable intellectual property rights use any other trademark information aggregation, notification, or validation service in addition to or instead of the ICANN-designated Trademark Clearinghouse. If there is a conflict between the terms and conditions of this Agreement and the Trademark Clearinghouse Requirements, the terms and conditions of this Agreement shall control. Registry Operator must enter into a binding and enforceable Registry-Registrar Agreement with at least one ICANN accredited registrar authorizing such registrar(s) to register domain names in the TLD as follows:

   a. if Registry Operator conducts a Qualified Launch Program or is authorized by ICANN to conduct an Approved Launch Program (as those terms are defined in the Trademark Clearinghouse Requirements), Registry Operator must enter into a binding and enforceable Registry-Registrar Agreement with at least one ICANN accredited registrar prior to allocating any domain names pursuant to such Qualified Launch Program or Approved Launch Program, as applicable;

   b. if Registry Operator does not conduct a Qualified Launch Program or is not authorized by ICANN to conduct an Approved Launch Program, Registry Operator must enter into a binding and enforceable Registry-Registrar Agreement with at least one ICANN accredited registrar at least thirty (30) calendar days prior to the expiration date of the Sunrise Period (as defined in the Trademark Clearinghouse Requirements) for the TLD; or

   c. if this Agreement contains a Specification 13, Registry Operator must enter into a binding and enforceable Registry-Registrar Agreement with at least one ICANN accredited registrar prior to the Claims Commencement Date (as defined in Specification 13).

Nothing in this Specification 7 shall limit or waive any other obligations or requirements of this Agreement applicable to Registry Operator, including Section 2.9(a) and Specification 9.

2. **Dispute Resolution Mechanisms**. Registry Operator will comply with the following dispute resolution mechanisms as they may be revised from time to time:

   a. the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Registration Restriction Dispute Resolution Procedure (RRDRP) adopted by ICANN (posted at http://www.icann.org/en/resources/registries/pddrp and http://www.icann.org/en/resources/registries/rrdrp, respectively). Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PDDRP or RRDRP panel and to be bound by any such determination; and

   b. the Uniform Rapid Suspension system ("URS") adopted by ICANN (posted at http://www.icann.org/en/resources/registries/urs), including the implementation of determinations issued by URS examiners.

SPECIFICATION 8

CONTINUED OPERATIONS INSTRUMENT

1. The Continued Operations Instrument shall (a) provide for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section 6 of Specification 10 to this Agreement for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6^{th}) anniversary of the Effective Date, and (b) be in the form of either (i) an irrevocable standby letter of credit, or (ii) an irrevocable cash escrow deposit, each meeting the requirements set forth in item 50(b) of Attachment to Module 2 – Evaluation Questions and Criteria – of the gTLD Applicant Guidebook, as published and supplemented by ICANN prior to the date hereof (which is hereby incorporated by reference into this Specification 8). Registry Operator shall use its best efforts to take all actions necessary or advisable to maintain in effect the Continued Operations Instrument for a period of six (6) years from the Effective Date, and to maintain ICANN as a third party beneficiary thereof. If Registry Operator elects to obtain an irrevocable standby letter of credit but the term required above is unobtainable, Registry Operator may obtain a letter of credit with a one-year term and an "evergreen provision," providing for annual extensions, without amendment, for an indefinite number of additional periods until the issuing bank informs ICANN of its final expiration or until ICANN releases the letter of credit as evidenced in writing, if the letter of credit otherwise meets the requirements set forth in item 50(b) of Attachment to Module 2 – Evaluation Questions and Criteria – of the gTLD Applicant Guidebook, as published and supplemented by ICANN prior to the date hereof; provided, however, that if the issuing bank informs ICANN of the expiration of such letter of credit prior to the sixth (6th) anniversary of the Effective Date, such letter of credit must provide that ICANN is entitled to draw the funds secured by the letter of credit prior to such expiration. The letter of credit must require the issuing bank to give ICANN at least thirty (30) calendar days' notice of any such expiration or non-renewal. If the letter of credit expires or is terminated at any time prior to the sixth (6th) anniversary of the Effective Date, Registry Operator will be required to obtain a replacement Continued Operations Instrument. ICANN may draw the funds under the original letter of credit, if the replacement Continued Operations Instrument is not in place prior to the expiration of the original letter of credit. Registry Operator shall provide to ICANN copies of all final documents relating to the Continued Operations Instrument and shall keep ICANN reasonably informed of material developments relating to the Continued Operations Instrument. Registry Operator shall not agree to, or permit, any amendment of, or waiver under, the Continued Operations Instrument or other documentation relating thereto without the prior written consent of ICANN (such consent not to be unreasonably withheld).

2. If, notwithstanding the use of best efforts by Registry Operator to satisfy its obligations under the preceding paragraph, the Continued Operations Instrument expires or is terminated by another party thereto, in whole or in part, for any reason, prior to the sixth anniversary of the Effective Date, Registry Operator shall promptly (i) notify ICANN of such expiration or termination and the reasons therefor and (ii) arrange for an alternative instrument that provides for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section 6 of Specification 10 to this Agreement for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period of one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date (an "Alternative Instrument"). Any such Alternative Instrument shall be on terms no less favorable to ICANN than the Continued Operations Instrument and shall otherwise be in form and substance reasonably acceptable to ICANN.

3. Notwithstanding anything to the contrary contained in this Specification 8, at any time, Registry Operator may replace the Continued Operations Instrument with an Alternative Instrument that (i) provides for sufficient financial resources to ensure the continued operation of the critical registry functions related to the TLD set forth in Section 6 of Specification 10 to this Agreement for a period of three (3) years following any termination of this Agreement on or prior to the fifth anniversary of the Effective Date or for a period one (1) year following any termination of this Agreement after the fifth anniversary of the Effective Date but prior to or on the sixth (6) anniversary of the Effective Date, and (ii) contains terms no less favorable to ICANN than the Continued Operations Instrument and is otherwise in form and substance reasonably acceptable to ICANN. In the event Registry Operator replaces the Continued Operations Instrument either pursuant to paragraph 2 or this paragraph 3, the terms of this Specification 8 shall no longer apply with respect to the original Continuing Operations Instrument, but shall thereafter apply with respect to such Alternative Instrument(s), and such instrument shall thereafter be considered the Continued Operations Instrument for purposes of this Agreement.

SPECIFICATION 9

REGISTRY OPERATOR CODE OF CONDUCT

1. In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:

    a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;

    b. register domain names in its own right, except for names registered through an ICANN accredited registrar; provided, however, that Registry Operator may (a) reserve names from registration pursuant to Section 2.6 of the Agreement and (b) may withhold from registration or allocate to Registry Operator up to one hundred (100) names pursuant to Section 3.2 of Specification 5;

    c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running"); or

    d. allow any Affiliated registrar to disclose Personal Data about registrants to Registry Operator or any Registry Related Party, except as reasonably necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions.

2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will, or will cause such Registry Related Party to, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.

3. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar-reseller services, Registry Operator will conduct internal reviews at least once per calendar year to ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to

Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification; provided, however, ICANN shall not disclose Confidential Information contained in such results except in accordance with Section 7.15 of the Agreement.

4. Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.

5. Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.

6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) 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, (ii) 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 (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

SPECIFICATION 10

REGISTRY PERFORMANCE SPECIFICATIONS

1. **Definitions**

1.1. **DNS**. Refers to the Domain Name System as specified in RFCs 1034, 1035, and related RFCs.

1.2. **DNSSEC proper resolution**. There is a valid DNSSEC chain of trust from the root trust anchor to a particular domain name, e.g., a TLD, a domain name registered under a TLD, etc.

1.3. **EPP**. Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.

1.4. **IP address**. Refers to IPv4 or IPv6 addresses without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is used.

1.5. **Probes**. Network hosts used to perform (DNS, EPP, etc.) tests (see below) that are located at various global locations.

1.6. **RDDS**. Registration Data Directory Services refers to the collective of WHOIS and Web-based WHOIS services as defined in Specification 4 of this Agreement.

1.7. **RTT**. Round-Trip Time or RTT refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the request will be considered unanswered.

1.8. **SLR**. Service Level Requirement is the level of service expected for a certain parameter being measured in a Service Level Agreement (SLA).

2. **Service Level Agreement Matrix**

	Parameter	SLR (monthly basis)
DNS	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	≤ 432 min of downtime (≈ 99%)
	TCP DNS resolution RTT	≤ 1500 ms, for at least 95% of the queries
	UDP DNS resolution RTT	≤ 500 ms, for at least 95% of the queries
	DNS update time	≤ 60 min, for at least 95% of the probes
RDDS	RDDS availability	≤ 864 min of downtime (≈ 98%)

	RDDS query RTT	≤ 2000 ms, for at least 95% of the queries
	RDDS update time	≤ 60 min, for at least 95% of the probes
EPP	EPP service availability	≤ 864 min of downtime (≈ 98%)
	EPP session-command RTT	≤ 4000 ms, for at least 90% of the commands
	EPP query-command RTT	≤ 2000 ms, for at least 90% of the commands
	EPP transform-command RTT	≤ 4000 ms, for at least 90% of the commands

Registry Operator is encouraged to do maintenance for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar periods of unavailable or slow service; any downtime, be it for maintenance or due to system failures, will be noted simply as downtime and counted for SLA purposes.

3. **DNS**

3.1. **DNS service availability**. Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g., a TLD), to answer DNS queries from DNS probes. For the service to be considered available at a particular moment, at least, two of the delegated name servers registered in the DNS must have successful results from "**DNS tests**" to each of their public-DNS registered "**IP addresses**" to which the name server resolves. If 51% or more of the DNS testing probes see the service as unavailable during a given time, the DNS service will be considered unavailable.

3.2. **DNS name server availability**. Refers to the ability of a public-DNS registered "**IP address**" of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered "**IP address**" of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined/unanswered results from "**DNS tests**" to a name server "**IP address**" during a given time, the name server "**IP address**" will be considered unavailable.

3.3. **UDP DNS resolution RTT**. Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

3.4. **TCP DNS resolution RTT**. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5 times greater than the time specified in the relevant **SLR**, the **RTT** will be considered undefined.

3.5. **DNS resolution RTT**. Refers to either "**UDP DNS resolution RTT**" or "**TCP DNS resolution RTT**".

3.6. **DNS update time**. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, until the name servers of the parent domain name answer "**DNS queries**" with data consistent with the change made. This only applies for changes to DNS information.

3.7. **DNS test**. Means one non-recursive DNS query sent to a particular "**IP address**" (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. A query with a "**DNS resolution RTT**" 5 times higher than the corresponding SLR, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the "**DNS resolution RTT**" or, undefined/unanswered.

3.8. **Measuring DNS parameters**. Every minute, every DNS probe will make an UDP or TCP "**DNS test**" to each of the public-DNS registered "**IP addresses**" of the name servers of the domain name being monitored. If a "**DNS test**" result is undefined/unanswered, the tested IP will be considered unavailable from that probe until it is time to make a new test.

3.9. **Collating the results from DNS probes**. The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

3.10. **Distribution of UDP and TCP queries**. DNS probes will send UDP or TCP "**DNS test**" approximating the distribution of these queries.

3.11. **Placement of DNS probes**. Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

4. **RDDS**

4.1. **RDDS availability**. Refers to the ability of all the RDDS services for the TLD, to respond to queries from an Internet user with appropriate data from the relevant Registry System. If 51% or more of the RDDS testing probes see any of the RDDS services as unavailable during a given time, the RDDS will be considered unavailable.

4.2. **WHOIS query RTT**. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.3. **Web-based-WHOIS query RTT**. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

4.4. **RDDS query RTT**. Refers to the collective of "**WHOIS query RTT**" and "**Web-based- WHOIS query RTT**".

4.5. **RDDS update time**. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, host or contact, up until the servers of the RDDS services reflect the changes made.

4.6. **RDDS test**. Means one query sent to a particular "**IP address**" of one of the servers of one of the RDDS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5 times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDDS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.

4.7. **Measuring RDDS parameters**. Every 5 minutes, RDDS probes will select one IP address from all the public-DNS registered "**IP addresses**" of the servers for each RDDS service of the TLD being monitored and make an "**RDDS test**" to each one. If an "**RDDS test**" result is undefined/unanswered, the corresponding RDDS service will be considered as unavailable from that probe until it is time to make a new test.

4.8. **Collating the results from RDDS probes**. The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

4.9. **Placement of RDDS probes**. Probes for measuring RDDS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

5. **EPP**

5.1. **EPP service availability**. Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with "**EPP command RTT**" 5 times higher than the corresponding SLR will be considered as unanswered. If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

5.2. **EPP session-command RTT**. Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.1 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.3. **EPP query-command RTT**. Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

5.4. **EPP transform-command RTT**. Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start or close of either the EPP or the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5 times or more the corresponding SLR, the **RTT** will be considered undefined.

5.5. **EPP command RTT**. Refers to "**EPP session-command RTT**", "**EPP query-command RTT**" or "**EPP transform-command RTT**".

5.6. **EPP test**. Means one EPP command sent to a particular "**IP address**" for one of the EPP servers. Query and transform commands, with the exception of "create", shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the "**EPP command RTT**" or undefined/unanswered.

5.7. **Measuring EPP parameters**. Every 5 minutes, EPP probes will select one "**IP address**" of the EPP servers of the TLD being monitored and make an "**EPP test**"; every time they should alternate between the 3 different types of commands and between the commands inside each category. If an "**EPP test**" result is undefined/unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test.

5.8. **Collating the results from EPP probes**. The minimum number of active testing probes to consider a measurement valid is 5 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

5.9. **Placement of EPP probes**. Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

6. Emergency Thresholds

The following matrix presents the emergency thresholds that, if reached by any of the services mentioned above for a TLD, would cause the emergency transition of the Registry for the TLD as specified in Section 2.13 of this Agreement.

Critical Function	Emergency Threshold
DNS Service	4-hour total downtime / week
DNSSEC proper resolution	4-hour total downtime / week
EPP	24-hour total downtime / week
RDDS	24-hour total downtime / week
Data Escrow	Reaching any of the criteria for the release of deposits described in Specification 2, Part B, Section 6.2 through Section 6.6.

7. Emergency Escalation

Escalation is strictly for purposes of notifying and investigating possible or potential issues in relation to monitored services. The initiation of any escalation and the subsequent cooperative investigations do not in themselves imply that a monitored service has failed its performance requirements.

Escalations shall be carried out between ICANN and Registry Operators, Registrars and Registry Operator, and Registrars and ICANN. Registry Operators and ICANN must provide said emergency operations departments. Current contacts must be maintained between

ICANN and Registry Operators and published to Registrars, where relevant to their role in escalations, prior to any processing of an Emergency Escalation by all related parties, and kept current at all times.

7.1. **Emergency Escalation initiated by ICANN**

Upon reaching 10% of the Emergency thresholds as described in Section 6 of this Specification, ICANN's emergency operations will initiate an Emergency Escalation with the relevant Registry Operator. An Emergency Escalation consists of the following minimum elements: electronic (i.e., email or SMS) and/or voice contact notification to the Registry Operator's emergency operations department with detailed information concerning the issue being escalated, including evidence of monitoring failures, cooperative trouble-shooting of the monitoring failure between ICANN staff and the Registry Operator, and the commitment to begin the process of rectifying issues with either the monitoring service or the service being monitoring.

7.2. **Emergency Escalation initiated by Registrars**

Registry Operator will maintain an emergency operations department prepared to handle emergency requests from registrars. In the event that a registrar is unable to conduct EPP transactions with the registry for the TLD because of a fault with the Registry Service and is unable to either contact (through ICANN mandated methods of communication) the Registry Operator, or the Registry Operator is unable or unwilling to address the fault, the registrar may initiate an emergency escalation to the emergency operations department of ICANN. ICANN then may initiate an emergency escalation with the Registry Operator as explained above.

7.3. **Notifications of Outages and Maintenance**

In the event that a Registry Operator plans maintenance, it will provide notice to the ICANN emergency operations department, at least, twenty-four (24) hours ahead of that maintenance. ICANN's emergency operations department will note planned maintenance times, and suspend Emergency Escalation services for the monitored services during the expected maintenance outage period.

If Registry Operator declares an outage, as per its contractual obligations with ICANN, on services under a service level agreement and performance requirements, it will notify the ICANN emergency operations department. During that declared outage, ICANN's emergency operations department will note and suspend emergency escalation services for the monitored services involved.

8. **Covenants of Performance Measurement**

8.1. **No interference**. Registry Operator shall not interfere with measurement **Probes**, including any form of preferential treatment of the requests for the monitored services. Registry Operator shall respond to the measurement

tests described in this Specification as it would to any other request from an Internet user (for DNS and RDDS) or registrar (for EPP).

8.2. **ICANN testing registrar**. Registry Operator agrees that ICANN will have a testing registrar used for purposes of measuring the **SLR**s described above. Registry Operator agrees to not provide any differentiated treatment for the testing registrar other than no billing of the transactions. ICANN shall not use the registrar for registering domain names (or other registry objects) for itself or others, except for the purposes of verifying contractual compliance with the conditions described in this Agreement. Registry Operator shall identify these transactions using Registrar ID 9997.

SPECIFICATION 11

PUBLIC INTEREST COMMITMENTS

1. Registry Operator will use only ICANN accredited registrars that are party to the Registrar Accreditation Agreement approved by the ICANN Board of Directors on 27 June 2013 in registering domain names. A list of such registrars shall be maintained by ICANN on ICANN's website.

2. Registry Operator will operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the following sections of Registry Operator's application to ICANN for the TLD, which commitments, statements of intent and business plans are hereby incorporated by reference into this Agreement. Registry Operator's obligations pursuant to this paragraph shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN (posted at http://www.icann.org/en/resources/registries/picdrp), which may be revised in immaterial respects by ICANN from time to time (the "PICDRP"). Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PICDRP panel and to be bound by any such determination

   [Registry Operator to insert specific application sections here, if applicable]

3. Registry Operator agrees to perform the following specific public interest commitments, which commitments shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN (posted at http://www.icann.org/en/resources/registries/picdrp), which may be revised in immaterial respects by ICANN from time to time (the "PICDRP"). Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PICDRP panel and to be bound by any such determination.

   a. Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive

practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

b. Registry Operator will periodically conduct a technical analysis to assess whether domains in the TLD are being used to perpetrate security threats, such as pharming, phishing, malware, and botnets. Registry Operator will maintain statistical reports on the number of security threats identified and the actions taken as a result of the periodic security checks. Registry Operator will maintain these reports for the term of the Agreement unless a shorter period is required by law or approved by ICANN, and will provide them to ICANN upon request.

c. Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.

d. Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" (as defined in Section 2.9(c) of the Registry Agreement). "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others.

SPECIFICATION 12

COMMUNITY REGISTRATION POLICIES

Registry Operator shall implement and comply with all community registration policies described below and/or attached to this Specification 12.

[Insert registration policies]

EX. RE-8

26 July 2019

Mr. Zak Muscovitch
General Counsel
Internet Commerce Association (ICA)

RE: ICA Letter – Renewal of .org Registry Agreement

Dear Mr. Muscovitch,

Thank you for your letter of 3 July 2019 regarding the renewal of the .org Registry Agreement.

I want to assure you that the decision to renew the .org registry agreement utilizing the Base gTLD Registry Agreement (Base RA) form was taken with care and deep consideration by both the ICANN organization and the ICANN Board.

The Base RA was developed to support the new generic top-level domains (gTLDs) being created through the 2012 New gTLD Program. It was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment and aligns with the underlying Generic Names Supporting Organization's (GNSO's) policy recommendations for new gTLDs. Established in 2013, the Base RA now applies to over 1,200 gTLDs. The ICANN org has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements. The Base RA provides additional safeguards and security and stability requirements compared to legacy agreements. Since 2014, several legacy gTLDs have renewed their agreements adopting the Base RA: cat, .jobs, .mobi, .pro, .tel, .travel, and most recently, .asia, .biz, .info, and .org.

While the Base RA does not contain price control provisions, it does contain requirements designed to protect registrants from a price perspective. These include requirements to provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals.

Additionally, these registry operators must enable registrants to renew for as many as 10 years prior to a price change taking effect. Moreover, the Base RA requires the registry operator to offer uniform pricing for renewals unless the registrant opts-in to premium pricing at the time of registration, thus preventing discriminatory pricing. Utilizing the Base RA as proposed, without additional price control provisions for .biz, .info, and .org, is consistent with the gTLDs launched via the new gTLD program and will further reduce ICANN org's role in domain pricing. ICANN's primary mission is to ensure the stable and secure operation of the DNS and other unique identifiers.

ICANN's core values, as enumerated in the Bylaws approved by the ICANN community, instruct ICANN to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.

The Uniform Rapid Suspension (URS) system, a rights protection dispute resolution mechanism, was developed and adopted into the Base RA through a process involving extensive community input including review by the GNSO Council. While there is policy development in progress regarding rights protection mechanisms, there is currently no policy requiring or prohibiting registries from adopting URS. Further, it has been affirmed by the Board that ICANN org should not stop its work because a topic is or might be the subject of policy development discussions.

During the course of renewal negotiations with the respective registry operators for .biz, .info and .org, the ICANN org provided a briefing and held a discussion with the ICANN Board at the Board's workshop in Los Angeles (25-28 January 2019). The org presented the history of the price controls in various gTLD contracts, how the concepts of price control and price protection were considered by the community during the development of the Base gTLD Registry Agreement for the New gTLD Program, and rationale for why ICANN org recommended adopting the Base RA rather than maintaining the price controls.

After consultation with the Board at the Los Angeles workshop, and with the Board's support, ICANN's President and CEO decided to continue with the plan to complete the renewal negotiations utilizing the Base RA. After the negotiations were completed with each registry operator in February/March 2019, each agreement was posted for public comment. The ICANN org team did review and consider all 3,200+ comments received. Staff shared the summary and analysis of the public comments with the ICANN Board prior to posting the summary analysis. In addition, briefing papers were provided to the Board in advance of its workshop in June 2019 in Marrakech. The briefing papers summarized the key issues raised in the public comment process and correspondence (removal of price controls and inclusion of URS), and outlined the rationale for the recommendation to renew the agreements as proposed.

Following the discussion with the ICANN Board in Marrakech, and consistent with the Board's support, ICANN President and CEO made the decision to continue with renewal agreements as proposed, using the Base gTLD Registry Agreement. These agreements were effective on 30 June 2019.

As outlined, these decisions were taken by the ICANN organization after the appropriate consideration and oversight by the ICANN Board.

I hope that you find this information helpful.

Best regards,

Cyrus K. Namazi
Senior Vice-President
Global Domains Division

EX. RE-9

NEW GTLD TIMELINES

As of 14 October 2016

New gTLD Program Timeline

New gTLD Program Process Calendar

	Monday	Tuesday	Wednesday	Thursday	Friday
Contention Resolution			CPE Invitations Auction		
Contracting				CIR Notifications RAs Sent / Executed	
Specification 13 / Code of Conduct Exemption		Requests Published for 30 Day Comment		Spec13 or CoC Exemptions Sent / Executed	
Post Contracting	PDT Testing Begins	PDT Appointment Confirmed Delegation PoC Requested, if needed		PDT Results Released IANA (Delegation) Token Issued	PDT Invites Sent
Application Status					Application Statuses Updated*

*Withdrawal statuses are updated within 48 business hours of receiving the withdrawal request.
Disclaimer: Variances from this schedule do occur from time to time depending on circumstances.

EX. RE-10

Centralized Zone Data Service (CZDS)
Comments & Feedback
Current Application Status
Delegated Strings
Contention Set Status
Evaluation Panels
gTLD Correspondence
Objection & Dispute Resolution
Post-Delegation Dispute Resolution Procedures (PDDRP)
Program Statistics →
Timelines
TLD Startup Information - Sunrise and Claims Periods
Trademark Clearinghouse (TMCH)
Uniform Rapid Suspension System

RELATED LINKS
About the Program

PROGRAM STATISTICS

Current Statistics *(Updated monthly)*

Application Statistics: Overview (as of 29 February 2020)	
Total Applications Submitted	***1930***
Completed New gTLD Program (gTLD Delegated** - introduced into Internet)	1235
Applications Withdrawn	642
Applications that Will Not Proceed/Not Approved	41
Currently Proceeding through New gTLD Program*	12

Contention Resolution	
Total Contention Sets	234
Resolved Contention Sets	231
Contention Sets Resolved via ICANN Auction	16
Unresolved Contention Sets	3
Applications Pending Contention Resolution	3

Contracting	

New gTLD Application Quick Facts

Overview of New gTLD Applications

Executed Registry Agreements (completed contracting)	1253
Registry Agreements with Specification 13	494
Registry Agreements with Code of Conduct Exemption	80
In Contracting	5

Pre-Delegation Testing (PDT)	
Passed PDT	1247

****Breakdown: Delegation Statistics**	
Delegated gTLDs (Introduced into Internet)	1235
Select Subcategories of Delegated gTLDs (NOTE: gTLDs may fall into more than one subcategory)	
Community	53
Geographic	53
Internationalized Domain Names (IDNs)	95

gTLD Startup Statistics (as of 2 March 2020)	
Sunrise	
Completed	585
In Progress	1
Not Started	0
Claims	
Completed	697
In Progress	224
Not Started	2

Please note: Registry Agreement and Delegated gTLD totals are not adjusted for TLDs that subsequently terminated their Registry Agreements and/or were removed from the root zone. In addition, Specification 13 and Code of Conduct Exemption totals are not adjusted if subsequently removed.

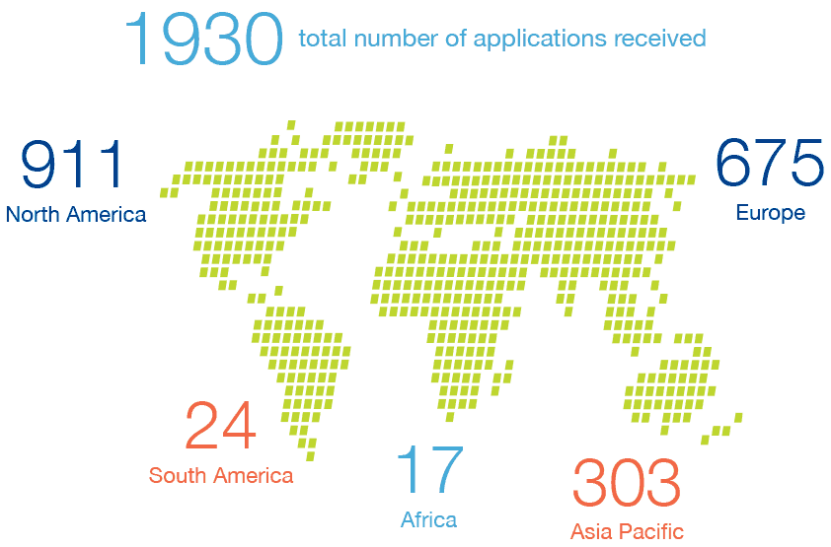
Get a status update on an individual application »

New gTLD Application Submission Statistics

The statistics in this section were calculated based on applications received by the 29 March 2012 deadline.

Application Breakdown by: Region | Type | String Similarity

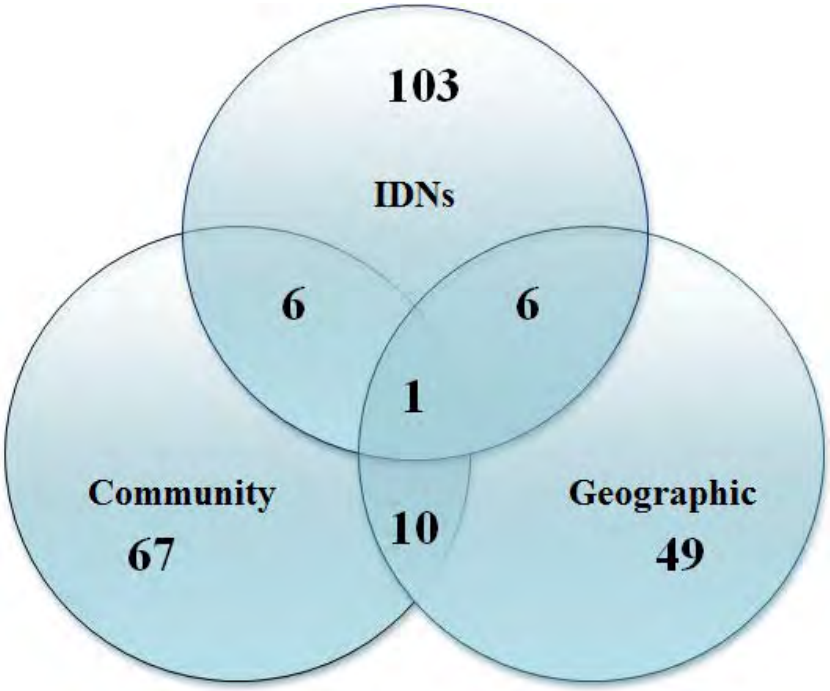
Application Breakdown by Region
Statistics as of 13 June 2012



Application Breakdown by Type
Statistics as of 13 June 2012

Application Totals

- Community: 84
- Geographic: 66
- Internationalized Domain Names: 116
  - Total Scripts Represented: 12
- Other: 1846



Application Breakdown by String Similarity
Statistics as of 26 February 2013

Approximate Number of Unique Applied-for Strings: 1,400

- Contention Sets
  - Exact Match: 230
    (two or more applications for a string with same characters)
  - Confusingly Similar: 2
    - .hotels & .hoteis
    - .unicorn & .unicom
- Applications in a Contention Set: 751

EX. RE-11

Centralized Zone Data Service (CZDS)
Comments & Feedback
Current Application Status
Delegated Strings →
Contention Set Status
Evaluation Panels
gTLD Correspondence
Objection & Dispute Resolution
Post-Delegation Dispute Resolution Procedures (PDDRP)
Program Statistics
Timelines
TLD Startup Information - Sunrise and Claims Periods
Trademark Clearinghouse (TMCH)
Uniform Rapid Suspension System

DELEGATED STRINGS

Overview

The expansion of generic Top-Level Domains (e.g. .COM, .ORG, .NET) in the Domain Name System is underway. Over 1,300 new names or "strings" could become available in the next few years.

After completing the New gTLD Program, a new gTLD becomes part of the Internet when it is delegated. This means it is introduced into the Internet's authoritative database, known as the Root Zone.

Delegation is occurring on a rolling basis, and as information becomes available, we are publishing here. **Please note, however, that this page is *not* being updated in real-time.**

Get information about New gTLD applications »

Delegated Strings

DATE	STRING
20 September 2019	CPA
9 August 2019	GAY
17 July 2018	INC
7 June 2018	CHARITY
22 February 2018	LLC
24 January 2018	xn--otu796d (招聘, "recruitment", /zhaopin/)
10 January 2018	SPORT
10 July 2017	MERCKMSD
29 June 2017	SEARCH
29 June 2017	PHD
29 June 2017	MAP
28 June 2017	GROCERY
10 June 2017	xn--mgbaakc7dvf (إتصالات "Etisalat", /itissalat/)
1 June 2017	ETISALAT
23 May 2017	ARAB

23 May 2017	xn--ngbrx (عرب, "Arab", /arab/)
7 April 2017	RUGBY
7 April 2017	HOTELS
15 February 2017	AFRICA
21 December 2016	FUN
20 December 2016	PHONE
20 December 2016	MOBILE
20 December 2016	DATA
9 December 2016	HOSPITAL
2 December 2016	HAIR
1 December 2016	xn--80aqecdr1a (католик, "Catholic", /katolik/)
1 December 2016	xn--mgbi4ecexp (كاثوليك"Catholic", /katholik/)
1 December 2016	xn--tiq49xqyj (天主教, "Catholic", /tianzhujiao/)
1 December 2016	CATHOLIC
29 November 2016	BOSTON
24 November 2016	RMIT
15 November 2016	RELIANCE
15 November 2016	JIO
15 November 2016	RIL
12 November 2016	MOTO
12 November 2016	CRUISE
11 November 2016	BOX
10 November 2016	FOOD
8 November 2016	FREE
4 November 2016	AOL
30 October 2016	NEWHOLLAND
30 October 2016	BASEBALL
30 October 2016	CASEIH
30 October 2016	CASE
30 October 2016	IVECO
24 October 2016	VOLVO

19 October 2016	BASKETBALL
12 October 2016	RADIO
30 September 2016	DVR
30 September 2016	xn--gk3at1e (通販, "online shopping", /tsuhan/)
27 September 2016	OBSERVER
26 September 2016	WOW
20 September 2016	ROGERS
20 September 2016	FIDO
14 September 2016	MONSTER
28 August 2016	ECO
28 August 2016	VANGUARD
25 August 2016	DIY
18 August 2016	SAMSCLUB
18 August 2016	WALMART
18 August 2016	NAB
18 August 2016	GEORGE
18 August 2016	UBANK
17 August 2016	AUSPOST
16 August 2016	xn--3oq18vl8pn36a (大众汽车, "Volkswagen", /dazhong qiche/)
16 August 2016	AIGO
16 August 2016	HDFC
14 August 2016	HBO
14 August 2016	ASDA
10 August 2016	HOT
10 August 2016	PAY
10 August 2016	HUGHES
10 August 2016	DISH
10 August 2016	CAPITALONE
10 August 2016	SLING
10 August 2016	SECURE
8 August 2016	AMEX

8 August 2016	OPEN
8 August 2016	AMERICANEXPRESS
4 August 2016	LOFT
4 August 2016	LANCIA
4 August 2016	DODGE
4 August 2016	CBS
4 August 2016	GAP
4 August 2016	QVC
4 August 2016	MASERATI
4 August 2016	OLDNAVY
4 August 2016	BANANAREPUBLIC
4 August 2016	SHOWTIME
4 August 2016	BLOCKBUSTER
4 August 2016	CALVINKLEIN
4 August 2016	FIDELITY
4 August 2016	TARGET
4 August 2016	ABARTH
4 August 2016	ATHLETA
4 August 2016	LATINO
2 August 2016	NBA
2 August 2016	FIAT
2 August 2016	MOPAR
2 August 2016	JUNIPER
2 August 2016	FERRARI
2 August 2016	ALFAROMEO
2 August 2016	BOFA
31 July 2016	LILLY
31 July 2016	MCKINSEY
31 July 2016	AFAMILYCOMPANY
29 July 2016	LADBROKES
28 July 2016	UCONNECT

28 July 2016	ABC
28 July 2016	HYATT
28 July 2016	INTEL
28 July 2016	GLADE
28 July 2016	PRU
28 July 2016	JEEP
28 July 2016	SRT
28 July 2016	VISA
28 July 2016	BANAMEX
28 July 2016	PRUDENTIAL
28 July 2016	PRAMERICA
28 July 2016	CHRYSLER
28 July 2016	DISCOVER
28 July 2016	CITI
26 July 2016	AMERICANFAMILY
26 July 2016	HONEYWELL
23 July 2016	DUNS
23 July 2016	MSD
23 July 2016	BOOKING
23 July 2016	AMFAM
23 July 2016	ESURANCE
23 July 2016	CITADEL
21 July 2016	DUCK
21 July 2016	RAID
21 July 2016	SWIFTCOVER
21 July 2016	SCJOHNSON
21 July 2016	IEEE
21 July 2016	OFF
21 July 2016	DOCTOR
21 July 2016	RIGHTATHOME
20 July 2016	TIAA

19 July 2016	LPL
19 July 2016	LPLFINANCIAL
19 July 2016	BESTBUY
15 July 2016	BBT
15 July 2016	PANASONIC
15 July 2016	BEAUTY
15 July 2016	LUNDBECK
15 July 2016	TJX
15 July 2016	SMART
15 July 2016	FUJIXEROX
15 July 2016	HOMESENSE
15 July 2016	STAPLES
15 July 2016	MARSHALLS
15 July 2016	LANCOME
15 July 2016	TKMAXX
15 July 2016	HOMEGOODS
15 July 2016	PFIZER
15 July 2016	VIVO
15 July 2016	WINNERS
15 July 2016	ONYOURSIDE
15 July 2016	TJMAXX
15 July 2016	NATIONWIDE
14 July 2016	GOODHANDS
14 July 2016	ALLSTATE
14 July 2016	LEFRAK
12 July 2016	MACYS
12 July 2016	MINT
12 July 2016	INTUIT
9 July 2016	SES
9 July 2016	NIKE
7 July 2016	XFINITY

7 July 2016	MITSUBISHI
7 July 2016	COMCAST
7 July 2016	GODADDY
7 July 2016	FUJITSU
6 July 2016	MIT
2 July 2016	SHANGRILA
2 July 2016	ZIPPO
2 July 2016	xn--5su34j936bgsg (香格里拉, "Shangri-La", /xianggelila/)
2 July 2016	CBRE
1 July 2016	IKANO
1 July 2016	PNC
25 June 2016	FARMERS
25 June 2016	FEDEX
23 June 2016	POLITIE
23 June 2016	ART
23 June 2016	NFL
23 June 2016	WOODSIDE
23 June 2016	TRAVELCHANNEL
23 June 2016	HGTV
23 June 2016	FRONTDOOR
23 June 2016	FOODNETWORK
23 June 2016	COOKINGCHANNEL
22 June 2016	ORIENTEXPRESS
21 June 2016	ANZ
21 June 2016	ITV
21 June 2016	BLANCO
21 June 2016	SHOPPING
21 June 2016	ABLE
16 June 2016	CAM
16 June 2016	LEGO
10 June 2016	ALSTOM

10 June 2016	DUNLOP
10 June 2016	AIRBUS
10 June 2016	GOODYEAR
10 June 2016	KOSHER
10 June 2016	DUPONT
10 June 2016	ERICSSON
7 June 2016	SAVE
7 June 2016	PRIME
7 June 2016	DEAL
7 June 2016	EPOST
7 June 2016	NOW
7 June 2016	CHINTAI
7 June 2016	FIRE
7 June 2016	KINDLE
7 June 2016	SILK
7 June 2016	IMDB
7 June 2016	AUDIBLE
7 June 2016	TDK
2 June 2016	DHL
2 June 2016	HISAMITSU
2 June 2016	GAMES
2 June 2016	PIONEER
2 June 2016	ZAPPOS
31 May 2016	UPS
28 May 2016	MATTEL
28 May 2016	NETFLIX
27 May 2016	OTT
27 May 2016	LOCKER
27 May 2016	DTV
27 May 2016	OLLO
25 May 2016	MLB

23 May 2016	REALESTATE
23 May 2016	SHOP
20 May 2016	AETNA
18 May 2016	DOT
18 May 2016	BLOG
16 May 2016	xn--w4rs40l (嘉里, "Kerry", /jia li/)
13 May 2016	GUARDIAN
12 May 2016	HKT
11 May 2016	RICHARDLI
11 May 2016	PCCW
11 May 2016	DDS
11 May 2016	NOWTV
11 May 2016	METLIFE
11 May 2016	xn--fzys8d69uvgm (電訊盈科, "PCCW", /dianxun yingke/)
10 May 2016	FLIR
6 May 2016	OLAYANGROUP
3 May 2016	xn--mgba7c0bbn0a (عليان"Olayan", /al-alian/)
3 May 2016	LIPSY
3 May 2016	OLAYAN
3 May 2016	NEXTDIRECT
3 May 2016	WARMAN
3 May 2016	NEXT
20 April 2016	MLS
20 April 2016	PROGRESSIVE
17 April 2016	FTR
17 April 2016	xn--5tzm5g (网站, "website", /wangzhan/)
16 April 2016	STATEBANK
16 April 2016	SBI
16 April 2016	AGAKHAN
16 April 2016	ISMAILI
16 April 2016	AKDN

16 April 2016	IMAMAT
13 April 2016	TEVA
8 April 2016	JNJ
8 April 2016	BABY
6 April 2016	VIG
6 April 2016	xn--9krt00a (微博, "Weibo", /weibo/)
6 April 2016	WEIBO
6 April 2016	ABUDHABI
6 April 2016	xn--mgbca7dzdo (ابوظبي"Abu Dhabi", /abu thabi/)
6 April 2016	ABBVIE
6 April 2016	NORTHWESTERNMUTUAL
4 April 2016	KPMG
4 April 2016	MUTUAL
30 March 2016	JCP
30 March 2016	YUN
30 March 2016	SHOUJI
30 March 2016	NISSAY
30 March 2016	SINA
30 March 2016	XIHUAN
30 March 2016	ANQUAN
25 March 2016	TALK
25 March 2016	AWS
25 March 2016	YOU
25 March 2016	xn--fct429k (家電, "consumer electronics", /kaden/)
25 March 2016	EXTRASPACE
24 March 2016	ALLY
24 March 2016	BAREFOOT
22 March 2016	GALLO
22 March 2016	SHAW
18 March 2016	STREAM
9 March 2016	LOCUS

9 March 2016	GMBH
9 March 2016	AVIANCA
9 March 2016	BCG
9 March 2016	TOTAL
5 March 2016	KERRYPROPERTIES
5 March 2016	KERRYLOGISTICS
5 March 2016	KUOKGROUP
5 March 2016	xn--w4r85el8fhu5dnra (嘉里大酒店, "Kerry Hotels", /jia li da jiudian/)
5 March 2016	KERRYHOTELS
2 March 2016	VUELOS
2 March 2016	PASSAGENS
27 February 2016	JPMORGAN
27 February 2016	CHASE
25 February 2016	TELECITY
25 February 2016	TUNES
24 February 2016	SONG
22 February 2016	STORE
22 February 2016	xn--jvr189m (食品, "food", /shokuhin/)
22 February 2016	VIKING
21 February 2016	xn--bck1b9a5dre4c (ファッション, "fashion", /fasshon/)
19 February 2016	xn--rovu88b (書籍, "book", /shoseki/)
19 February 2016	SPOT
19 February 2016	xn--1ck2e1b (セール, "sale", /seru/)
19 February 2016	xn--cck2b3b (ストア, "store", /sutoa/)
19 February 2016	xn--gckr3f0f (クラウド, "cloud", /kuraudo/)
19 February 2016	COUPON
13 February 2016	YAHOO
13 February 2016	TVS
13 February 2016	FLICKR
11 February 2016	GALLUP
11 February 2016	HDFCBANK

11 February 2016	PWC
11 February 2016	WOLTERSKLUWER
11 February 2016	NATURA
6 February 2016	FRONTIER
6 February 2016	QUEST
6 February 2016	xn--8y0a063a (联通, "Unicom", /liantong/)
4 February 2016	UNICOM
29 January 2016	DELOITTE
28 January 2016	WEATHERCHANNEL
28 January 2016	NIKON
26 January 2016	LANXESS
26 January 2016	HELSINKI
26 January 2016	HEALTH
26 January 2016	ADAC
21 January 2016	EDEKA
21 January 2016	TAOBAO
21 January 2016	TMALL
21 January 2016	TIFFANY
19 January 2016	LIFEINSURANCE
16 January 2016	xn--g2xx48c (购物, "shopping", /gouwu/)
16 January 2016	ALIPAY
16 January 2016	ALIBABA
16 January 2016	SOFTBANK
15 January 2016	COMPARE
15 January 2016	SKIN
15 January 2016	ISELECT
15 January 2016	MAKEUP
15 January 2016	SELECT
12 January 2016	WEATHER
11 January 2016	TUBE
9 January 2016	FRESENIUS

9 January 2016	VOLKSWAGEN
7 January 2016	DUBAI
5 January 2016	BAIDU
31 December 2015	PROMO
28 December 2015	LIVING
28 December 2015	CLINIQUE
24 December 2015	LAMER
24 December 2015	SAFETY
24 December 2015	ORIGINS
24 December 2015	FOX
24 December 2015	SCHAEFFLER
24 December 2015	STATEFARM
24 December 2015	DEALER
24 December 2015	BOSCH
24 December 2015	REXROTH
23 December 2015	MOBILY
23 December 2015	xn--mgbb9fbpob (موبايلي, "Mobily", /mobayli/)
22 December 2015	STAR
22 December 2015	PID
22 December 2015	CONTACT
22 December 2015	WEBER
21 December 2015	ANALYTICS
18 December 2015	JMP
18 December 2015	xn--jlq61u9w7b (诺基亚, "Nokia", /nuojiya/)
18 December 2015	SAS
18 December 2015	FORD
18 December 2015	STORAGE
18 December 2015	LINCOLN
15 December 2015	KFH
15 December 2015	WANGGOU
15 December 2015	SHELL

15 December 2015	xn--pbt977c (珠宝, "jewelry", /zhubao/)
15 December 2015	xn--kpu716f (手表, "watches", /shoubiao/)
15 December 2015	KPN
15 December 2015	xn--ngbe9e0a (بيتك‎"home", /baytak/)
15 December 2015	TRAVELERSINSURANCE
14 December 2015	WATCHES
14 December 2015	xn--eckvdtc9d (ポイント, "point", /pointo/)
14 December 2015	TUSHU
11 December 2015	TRV
11 December 2015	REDUMBRELLA
7 December 2015	xn--mgbt3dhd (همراه , "comrade", /hamra/)
7 December 2015	PARS
5 December 2015	ZERO
5 December 2015	SMILE
5 December 2015	BOT
5 December 2015	JOY
5 December 2015	BUY
5 December 2015	GOT
5 December 2015	FAST
5 December 2015	JOT
5 December 2015	PIN
5 December 2015	READ
5 December 2015	CIRCLE
5 December 2015	BOOK
5 December 2015	SAFE
5 December 2015	CALL
5 December 2015	ROOM
5 December 2015	LIKE
5 December 2015	AUTHOR
5 December 2015	TRAVELERS
5 December 2015	NOWRUZ

5 December 2015	FIRESTONE
5 December 2015	TCI
5 December 2015	SHARP
5 December 2015	SALON
5 December 2015	SHIA
3 December 2015	INSURANCE
3 December 2015	NORTON
3 December 2015	MED
3 December 2015	SYMANTEC
1 December 2015	SFR
25 November 2015	BOEHRINGER
25 November 2015	BOSTIK
25 November 2015	LAMBORGHINI
25 November 2015	BUGATTI
25 November 2015	AUDI
25 November 2015	VIP
25 November 2015	VERISIGN
18 November 2015	BROADWAY
16 November 2015	COMSEC
13 November 2015	GRAINGER
13 November 2015	TAB
13 November 2015	FAIRWINDS
10 November 2015	CITYEATS
10 November 2015	LIFESTYLE
10 November 2015	CREDITUNION
10 November 2015	VANA
7 November 2015	PLAYSTATION
7 November 2015	FERRERO
7 November 2015	ROCHER
3 November 2015	APPLE
3 November 2015	AARP

3 November 2015	BEATS
29 October 2015	PING
29 October 2015	MEO
29 October 2015	SAPO
29 October 2015	SBS
27 October 2015	GUCCI
27 October 2015	LANDROVER
27 October 2015	JAGUAR
27 October 2015	RWE
27 October 2015	ZARA
23 October 2015	MUTUELLE
20 October 2015	ARTE
15 October 2015	ARAMCO
15 October 2015	xn--mgba3a3ejt (إرامكو, “Aramco”, /aramko/)
14 October 2015	DELL
9 October 2015	CIPRIANI
9 October 2015	KINDER
7 October 2015	YAMAXUN
7 October 2015	MOI
7 October 2015	VIRGIN
7 October 2015	MTR
2 October 2015	CLUBMED
26 September 2015	BOM
26 September 2015	STOCKHOLM
26 September 2015	KIA
26 September 2015	FINAL
26 September 2015	SEVEN
26 September 2015	HYUNDAI
23 September 2015	OBI
23 September 2015	LTD
22 September 2015	BMS

17 September 2015	SECURITY
16 September 2015	LINDE
13 September 2015	STADA
13 September 2015	THEATRE
13 September 2015	PROTECTION
9 September 2015	CAR
1 September 2015	CSC
29 August 2015	AMICA
29 August 2015	STC
28 August 2015	VIVA
28 August 2015	STCGROUP
28 August 2015	AAA
28 August 2015	GEA
27 August 2015	ACO
24 August 2015	xn--efvy88h (新闻, "news", /xinwen/)
19 August 2015	MOM
11 August 2015	FAMILY
11 August 2015	SEEK
8 August 2015	FAGE
8 August 2015	CEB
8 August 2015	GROUP
6 August 2015	GIVING
5 August 2015	XPERIA
5 August 2015	BOOTS
5 August 2015	CHANEL
5 August 2015	WINE
5 August 2015	VIN
30 July 2015	LIXIL
29 July 2015	xn--tckwe (コム, "com", /komu/)
28 July 2015	xn--fhbei (كوم "com", /kom/)
28 July 2015	xn--c2br7g (नेट, "net", /neta/)

28 July 2015	xn--9dbq2a (קום)
28 July 2015	xn--11b4c3d (कॉम, "com", /koma/)
28 July 2015	xn--3pxu8k (点看, "dot com", /dian kan/)
28 July 2015	xn--t60b56a (닷넷, "dot net", /datnet/)
28 July 2015	xn--j1aef (ком, "com", /kom/)
28 July 2015	xn--pssy2u (大拿, "dot net", /da na/)
28 July 2015	xn--42c2d9a (คอม, "com", /khxm/)
28 July 2015	xn--mk1bu44c (닷컴, "dot com", /datkeom/)
26 July 2015	IPIRANGA
26 July 2015	LEXUS
26 July 2015	PET
26 July 2015	MAN
26 July 2015	TOYOTA
24 July 2015	SANOFI
24 July 2015	TATAMOTORS
24 July 2015	SRL
24 July 2015	BET
22 July 2015	ICE
22 July 2015	ITAU
15 July 2015	NOKIA
15 July 2015	LANCASTER
11 July 2015	UBS
11 July 2015	ISTANBUL
11 July 2015	DELTA
11 July 2015	IST
10 July 2015	HSBC
09 July 2015	IINET
09 July 2015	ORANGE
09 July 2015	BENTLEY
08 July 2015	GAME
08 July 2015	JPRS

08 July 2015	BCN
08 July 2015	STUDIO
08 July 2015	BARCELONA
08 July 2015	AIRTEL
08 July 2015	LIVE
02 July 2015	APP
02 July 2015	SAKURA
01 July 2015	REALTY
01 July 2015	FORUM
26 June 2015	HOTELES
26 June 2015	TELEFONICA
26 June 2015	BNL
26 June 2015	CLOUD
26 June 2015	BRADESCO
26 June 2015	MOVISTAR
26 June 2015	OMEGA
26 June 2015	SWATCH
26 June 2015	LAW
23 June 2015	SKYPE
23 June 2015	SCOR
23 June 2015	OFFICE
22 June 2015	STARHUB
22 June 2015	VISTA
22 June 2015	COMMBANK
22 June 2015	VISTAPRINT
22 June 2015	RICOH
22 June 2015	NETBANK
22 June 2015	CBA
20 June 2015	GENTING
20 June 2015	DRIVE
20 June 2015	PLAY

20 June 2015	AEG
19 June 2015	CROWN
19 June 2015	STATOIL
14 June 2015	BHARTI
11 June 2015	LASALLE
10 June 2015	JLC
10 June 2015	MICROSOFT
10 June 2015	HOTMAIL
10 June 2015	WINDOWS
10 June 2015	BING
06 June 2015	AZURE
04 June 2015	HOMEDEPOT
04 June 2015	XBOX
03 June 2015	SNCF
02 June 2015	BIBLE
30 May 2015	SKI
30 May 2015	xn--imr513n (餐厅, "restaurant", /canting/)
27 May 2015	WALTER
27 May 2015	SANDVIK
27 May 2015	SANDVIKCOROMANT
27 May 2015	BBVA
22 May 2015	MBA
22 May 2015	JLL
22 May 2015	FYI
22 May 2015	THD
20 May 2015	MEN
16 May 2015	LUPIN
16 May 2015	CORSICA
15 May 2015	CISCO
14 May 2015	EARTH
13 May 2015	SOCCER

13 May 2015	COUPONS
13 May 2015	ICBC
12 May 2015	BROTHER
09 May 2015	ACCENTURE
09 May 2015	PHILIPS
09 May 2015	xn--fjq720a (娱乐, "entertainment", /yule/)
09 May 2015	NEC
07 May 2015	TAXI
07 May 2015	xn--estv75g (工行, "ICBC", /gonghang/)
07 May 2015	HOCKEY
07 May 2015	RUN
06 May 2015	THEATER
02 May 2015	AIG
02 May 2015	ICU
02 May 2015	LOL
02 May 2015	LIAISON
02 May 2015	CFA
02 May 2015	NADEX
02 May 2015	CARS
02 May 2015	AUTO
01 May 2015	TORAY
01 May 2015	HITACHI
01 May 2015	BRIDGESTONE
01 May 2015	SENER
30 April 2015	RENT
30 April 2015	HONDA
29 April 2015	SWISS
29 April 2015	DOG
29 April 2015	BROKER
25 April 2015	ABB
18 April 2015	SEX

18 April 2015	SEAT
17 April 2015	WEIR
16 April 2015	JEWELRY
16 April 2015	XEROX
16 April 2015	SHOW
16 April 2015	TEAM
16 April 2015	SONY
7 April 2015	xn--kcrx77d1x4a (飞利浦, "Philips", /feilipu/)
5 April 2015	EXPRESS
5 April 2015	BAUHAUS
5 April 2015	CAFE
3 April 2015	CYOU
3 April 2015	RACING
2 April 2015	xn--nyqy26a (健康, "healthy", /jiankang/)
2 April 2015	SCHOLARSHIPS
2 April 2015	LOVE
31 March 2015	xn--30rr7y (慈善, "charity", /cishan/)
31 March 2015	MMA
28 March 2015	AFL
28 March 2015	REDSTONE
27 March 2015	xn--9et52u (时尚, "vogue", /shishang/)
27 March 2015	BOND
26 March 2015	SAP
26 March 2015	KOMATSU
25 March 2015	DOHA
25 March 2015	MTN
25 March 2015	REVIEW
25 March 2015	WIN
25 March 2015	PANERAI
25 March 2015	DOWNLOAD
25 March 2015	MOVIE

25 March 2015	FAITH
25 March 2015	TICKETS
25 March 2015	ACCOUNTANT
25 March 2015	LOAN
25 March 2015	DATE
24 March 2015	TOURS
24 March 2015	ADS
24 March 2015	PLUS
24 March 2015	FILM
24 March 2015	GOLD
24 March 2015	GOLF
24 March 2015	GUGE
21 March 2015	BBC
21 March 2015	TECH
21 March 2015	NEWS
18 March 2015	xn--vuq861b (信息, "information", /xinxi/)
16 March 2015	PAGE
16 March 2015	PIAGET
16 March 2015	SITE
16 March 2015	FAN
16 March 2015	ONLINE
13 March 2015	CFD
13 March 2015	TRADING
13 March 2015	SPREADBETTING
12 March 2015	ERNI
12 March 2015	MARKETS
12 March 2015	FOREX
7 March 2015	XIN
7 March 2015	PICTET
7 March 2015	ABBOTT
4 March 2015	NISSAN

4 March 2015	INFINITI
4 March 2015	DATSUN
4 March 2015	MTPC
3 March 2015	ORACLE
3 March 2015	GOO
3 March 2015	LECLERC
3 March 2015	JAVA
3 March 2015	EPSON
3 March 2015	MAIF
3 March 2015	xn--mxtq1m (政府, "government", /zhengfu/)
25 February 2015	SUCKS
25 February 2015	STUDY
25 February 2015	BOATS
25 February 2015	COURSES
19 February 2015	CASINO
19 February 2015	FANS
19 February 2015	FOOTBALL
19 February 2015	GOLDPOINT
19 February 2015	SCHOOL
19 February 2015	YODOBASHI
13 February 2015	CBN
13 February 2015	GDN
10 February 2015	APARTMENTS
10 February 2015	SAXO
10 February 2015	NICO
4 February 2015	TENNIS
4 February 2015	BINGO
4 February 2015	CANON
4 February 2015	STYLE
4 February 2015	TOSHIBA
4 February 2015	CHAT

3 February 2015	NTT
28 January 2015	KYOTO
24 January 2015	DCLK
24 January 2015	xn--b4w605ferd (淡马锡, "Temasek", /danmaxi/)
24 January 2015	IFM
24 January 2015	GOOG
24 January 2015	TEMASEK
24 January 2015	HANGOUT
24 January 2015	BARCLAYS
24 January 2015	DESIGN
24 January 2015	DABUR
24 January 2015	HERMES
24 January 2015	BARCLAYCARD
23 January 2015	JCB
22 January 2015	ONE
14 January 2015	LOTTE
14 January 2015	MARRIOTT
09 January 2015	FIT
09 January 2015	LAT
09 January 2015	KDDI
09 January 2015	BANK
30 December 2014	SHRIRAM
25 December 2014	ZUERICH
25 December 2014	FLOWERS
25 December 2014	GGEE
25 December 2014	SALE
25 December 2014	AMSTERDAM
25 December 2014	VIDEO
18 December 2014	DOCS
18 December 2014	TIRES
18 December 2014	DEV

13 December 2014	SCHWARZ
13 December 2014	IWC
13 December 2014	OSAKA
13 December 2014	SEW
13 December 2014	GARDEN
13 December 2014	LIDL
13 December 2014	DOOSAN
12 December 2014	SKY
11 December 2014	CARTIER
10 December 2014	SAMSUNG
06 December 2014	xn--czrs0t (商店, "shop", /shangdian/)
06 December 2014	ADULT
06 December 2014	PORN
06 December 2014	TRUST
06 December 2014	EUROVISION
06 December 2014	FASHION
02 December 2014	LATROBE
02 December 2014	IRISH
02 December 2014	xn--hxt814e (网店, "webstore", /wang dian/)
02 December 2014	AQUARELLE
26 November 2014	MEMORIAL
26 November 2014	LEGAL
26 November 2014	MONEY
26 November 2014	COACH
26 November 2014	EVERBANK
20 November 2014	xn--flw351e (谷歌, "Google", /guge/)
20 November 2014	MADRID
20 November 2014	FIRMDALE
20 November 2014	xn--qcka1pmc (グーグル, "Google", /guguru/)
19 November 2014	MORMON
19 November 2014	LDS

17 November 2014	PARTY
17 November 2014	xn--45q11c (八卦, "gossip", /bagua/)
17 November 2014	CRICKET
15 November 2014	SCIENCE
12 November 2014	REIT
12 November 2014	ANDROID
5 November 2014	SYDNEY
5 November 2014	BLOOMBERG
1 November 2014	ENERGY
1 November 2014	DELIVERY
23 October 2014	TAIPEI
22 October 2014	EMERCK
15 October 2014	FLSMIDTH
15 October 2014	BAND
15 October 2014	YOGA
15 October 2014	CRS
15 October 2014	ABOGADO
15 October 2014	RIP
15 October 2014	WEDDING
15 October 2014	POKER
4 October 2014	ALSACE
1 October 2014	ALLFINANZ
1 October 2014	IBM
1 October 2014	FORSALE
27 September 2014	vermögensberatung (xn--vermgensberatung-pwb) – German for "financial advice"
27 September 2014	vermögensberater (xn--vermgensberater-ctb) – German for "financial advisor"
27 September 2014	pyc (xn--p1acf) – Russian for "Russian"
27 September 2014	TUI
27 September 2014	DVAG
27 September 2014	POHL

23 September 2014	WORK
23 September 2014	CASA
23 September 2014	BUDAPEST
19 September 2014	WORLD
15 September 2014	GOOGLE
15 September 2014	FLY
15 September 2014	NEXUS
15 September 2014	CHANNEL
15 September 2014	PROF
15 September 2014	GLE
15 September 2014	ZIP
15 September 2014	CAL
15 September 2014	CHROME
10 September 2014	WME
5 September 2014	PHARMACY
5 September 2014	GMX
30 August 2014	BOO
30 August 2014	DAD
30 August 2014	DAY
30 August 2014	FRL
30 August 2014	ING
30 August 2014	NEW
30 August 2014	MOV
30 August 2014	RSVP
30 August 2014	EAT
30 August 2014	MEME
29 August 2014	YOUTUBE
29 August 2014	HERE
29 August 2014	PROD
29 August 2014	ESQ
27 August 2014	IMMO

27 August 2014	PIZZA
27 August 2014	GMAIL
27 August 2014	GBIZ
27 August 2014	OTSUKA
22 August 2014	BUSINESS
22 August 2014	企业 (xn--vhquv) – chinese for "enterprise"
22 August 2014	NETWORK
16 August 2014	CLICK
16 August 2014	DIET
16 August 2014	HOW
16 August 2014	OOO
16 August 2014	UOL
16 August 2014	HELP
16 August 2014	HOSTING
16 August 2014	PROPERTY
16 August 2014	LTDA
16 August 2014	CERN
14 August 2014	CARAVAN
14 August 2014	SCA
14 August 2014	广东 (xn--xhq521b) – Chinese province of "Guangdong"
14 August 2014	佛山 (xn--1qqw23a) – Chinese city of "Foshan"
14 August 2014	BNPPARIBAS
8 August 2014	RESTAURANT
8 August 2014	CYMRU
8 August 2014	SARL
8 August 2014	GIFTS
7 August 2014	WALES
7 August 2014	TATAR
3 August 2014	TOP
30 July 2014	HEALTHCARE
30 July 2014	REALTOR

28 July 2014	WILLIAMHILL
28 July 2014	ONG
18 July 2014	PRAXI
18 July 2014	YANDEX
18 July 2014	AUCTION
18 July 2014	WHOSWHO
18 July 2014	KRD
18 July 2014	NGO
18 July 2014	NRA
18 July 2014	SPIEGEL
18 July 2014	LACAIXA
18 July 2014	LGBT
13 July 2014	GENT
11 July 2014	NRW
11 July 2014	SCB
10 July 2014	DEALS
10 July 2014	MELBOURNE
10 July 2014	CITY
3 July 2014	SCHMIDT
3 July 2014	CUISINELLA
3 July 2014	CANCERRESEARCH
2 July 2014	DIRECT
2 July 2014	PLACE
2 July 2014	SUZUKI
26 June 2014	ACTIVE
24 June 2014	MINI
21 June 2014	BMW
19 June 2014	OVH
19 June 2014	CAPETOWN
19 June 2014	PHYSIO
19 June 2014	LOTTO

19 June 2014	DURBAN
19 June 2014	GREEN
19 June 2014	JOBURG
18 June 2014	VLAANDEREN
18 June 2014	BRUSSELS
18 June 2014	SURF
17 June 2014	手机 (xn--kput3i) – Chinese for "cell phone"
17 June 2014	BZH
13 June 2014	SCOT
13 June 2014	ORGANIC
6 June 2014	GLOBAL
4 June 2014	ENGINEER
4 June 2014	NHK
4 June 2014	HAMBURG
4 June 2014	REHAB
4 June 2014	TIROL
4 June 2014	REPUBLICAN
4 June 2014	GIVES
4 June 2014	NAVY
4 June 2014	ARMY
2 June 2014	BIO
31 May 2014	LAWYER
31 May 2014	VET
31 May 2014	MORTGAGE
31 May 2014	SOFTWARE
31 May 2014	HOST
31 May 2014	MARKET
31 May 2014	DENTIST
31 May 2014	HIV
31 May 2014	ATTORNEY
31 May 2014	PRESS

30 May 2014	DEGREE
30 May 2014	SPACE
30 May 2014	WEBSITE
28 May 2014	موقع(xn--4gbrim) – Arabic for "site"
22 May 2014	YACHTS
22 May 2014	RIO
22 May 2014	HOMES
22 May 2014	AUTOS
22 May 2014	VERSICHERUNG
22 May 2014	REISE
22 May 2014	MOTORCYCLES
22 May 2014	商标 (xn--czr694b) – Chinese for "trademark"
15 May 2014	GUIDE
15 May 2014	AUDIO
15 May 2014	HIPHOP
15 May 2014	LOANS
15 May 2014	CHURCH
15 May 2014	LIFE
15 May 2014	BEER
15 May 2014	JUEGOS
15 May 2014	LUXE
7 May 2014	CREDIT
7 May 2014	ACCOUNTANTS
7 May 2014	DIGITAL
7 May 2014	CLAIMS
3 May 2014	GMO
3 May 2014	GLOBO
3 May 2014	BAYERN
30 April 2014	AIRFORCE
29 April 2014	CREDITCARD
29 April 2014	INSURE

29 April 2014	FINANCE
29 April 2014	WTC
29 April 2014	CITIC
24 April 2014	москва (xn--80adxhks) – Russian for "Moscow/ moskva"
24 April 2014	MOSCOW
23 April 2014	LIMITED
23 April 2014	FAIL
23 April 2014	EXCHANGE
23 April 2014	TAX
23 April 2014	WTF
23 April 2014	FUND
23 April 2014	SURGERY
23 April 2014	INVESTMENTS
23 April 2014	FINANCIAL
23 April 2014	GRATIS
23 April 2014	FURNITURE
23 April 2014	DENTAL
23 April 2014	CARE
23 April 2014	CASH
23 April 2014	DISCOUNT
23 April 2014	BLACKFRIDAY
23 April 2014	CLINIC
23 April 2014	FITNESS
19 April 2014	SCHULE
19 April 2014	FOO
19 April 2014	SOY
19 April 2014	PARIS
19 April 2014	FROGANS
16 April 2014	QUEBEC
11 April 2014	PICTURES
11 April 2014	UNIVERSITY

11 April 2014	GAL
11 April 2014	ASSOCIATES
11 April 2014	REISEN
11 April 2014	MEDIA
11 April 2014	CAREER
11 April 2014	TOWN
11 April 2014	TOYS
11 April 2014	LEASE
11 April 2014	SERVICES
11 April 2014	ENGINEERING
11 April 2014	GRIPE
11 April 2014	EUS
11 April 2014	CAPITAL
10 April 2014	DESI
10 April 2014	FEEDBACK
10 April 2014	COLLEGE
10 April 2014	ROCKS
10 April 2014	网址 (xn--ses554g) – Chinese for "network address"
4 April 2014	GOP
3 April 2014	RYUKYU
3 April 2014	YOKOHAMA
2 April 2014	REST
2 April 2014	SAARLAND
1 April 2014	CONSULTING
31 March 2014	VODKA
31 March 2014	HAUS
31 March 2014	COOKING
31 March 2014	MOE
31 March 2014	RODEO
31 March 2014	COUNTRY
31 March 2014	商城(xn--czru2d) – Chinese for "mall"

31 March 2014	HORSE
31 March 2014	FISHING
31 March 2014	VEGAS
31 March 2014	MIAMI
31 March 2014	ARCHI
27 March 2014	BLACK
27 March 2014	REN
27 March 2014	MEET
25 March 2014	SOHU
22 March 2014	LONDON
20 March 2014	NYC
19 March 2014	COLOGNE
19 March 2014	AXA
19 March 2014	WEBCAM
19 March 2014	TRADE
15 March 2014	JETZT
12 March 2014	世界 (xn--rhqv96g) – Chinese for "world/shijie"
11 March 2014	DNP
11 March 2014	INK
9 March 2014	机构 (xn--nqv7f) – Chinese for "agencies/institutions"
9 March 2014	संगठन (xn--i1b6b1a6a2e) – Hindi for "organization/sangathana"
9 March 2014	组织机构 (xn--nqv7fs00ema) – Chinese for "organization"
5 March 2014	opr (xn--c1avg) – Russian for "organization/org"
5 March 2014	KOELN
2 March 2014	BID
2 March 2014	OKINAWA
2 March 2014	VOTE
2 March 2014	VOTO
27 February 2014	BAR
27 February 2014	KRED
27 February 2014	BEST

26 February 2014	CHRISTMAS
26 February 2014	PUB
26 February 2014	дети (xn--d1acj3b) – Russian for "kids/deti"
26 February 2014	ACTOR
25 February 2014	SUPPLIES
21 February 2014	FISH
21 February 2014	삼성 (xn—cg4bki) – Korean for "Samsung/Samseong"
21 February 2014	VACATIONS
21 February 2014	INDUSTRIES
21 February 2014	SUPPLY
19 February 2014	XYZ
19 February 2014	WIKI
19 February 2014	NEUSTAR
18 February 2014	بازار(xn--mgbab2bd) – Arabic for "bazaar/bazar"
16 February 2014	MANGO
12 February 2014	QPON
11 February 2014	CARDS
11 February 2014	FOUNDATION
11 February 2014	REVIEWS
11 February 2014	FUTBOL
11 February 2014	VISION
11 February 2014	CONDOS
11 February 2014	VILLAS
11 February 2014	PARTS
11 February 2014	PRODUCTIONS
11 February 2014	MAISON
5 February 2014	移动 (xn--6frz82g) – Chinese for "mobile"
5 February 2014	BLUE
4 February 2014	FLIGHTS
4 February 2014	CLEANING
4 February 2014	REPORT

4 February 2014	EVENTS
4 February 2014	CRUISES
4 February 2014	RENTALS
4 February 2014	PARTNERS
4 February 2014	PROPERTIES
4 February 2014	CATERING
4 February 2014	EXPOSED
29 January 2014	VOTING
29 January 2014	TOKYO
29 January 2014	NAGOYA
27 January 2014	DATING
27 January 2014	COMMUNITY
23 January 2014	BOUTIQUE
23 January 2014	BARGAINS
23 January 2014	TIENDA
23 January 2014	WORKS
23 January 2014	WED
23 January 2014	EXPERT
23 January 2014	WATCH
23 January 2014	KIM
23 January 2014	COOL
23 January 2014	TOOLS
18 January 2014	CLUB
18 January 2014	BUILD
18 January 2014	PICS
18 January 2014	PINK
18 January 2014	LUXURY
18 January 2014	PHOTO
18 January 2014	GIFT
18 January 2014	网络 (xn--io0a7i) – Chinese for "network"
18 January 2014	公司 (xn--55qx5d) – Chinese for "company"

18 January 2014	MONASH
18 January 2014	RICH
18 January 2014	RED
18 January 2014	SHIKSHA
18 January 2014	中信 (xn--fiq64b) – Chinese for "CITIC"
18 January 2014	LINK
18 January 2014	GUITARS
14 January 2014	ZONE
14 January 2014	CHEAP
14 January 2014	MARKETING
14 January 2014	DEMOCRAT
14 January 2014	SOCIAL
14 January 2014	AGENCY
14 January 2014	MODA
14 January 2014	DANCE
8 January 2014	BERLIN
3 January 2014	集团 (xn--3bst00m) – Chinese for "group"
3 January 2014	我爱你 (xn--6qq986b3xl) – Chinese for "I love you"
3 January 2014	中文网 (xn--fiq228c5hs) – Chinese for "Chinese network"
3 January 2014	WANG
3 January 2014	KIWI
3 January 2014	WIEN
2 January 2014	EMAIL
2 January 2014	IMMOBILIEN
2 January 2014	在线 (xn--3ds443g) – Chinese for "online"
28 December 2013	INSTITUTE
28 December 2013	CEO
28 December 2013	SOLAR
28 December 2013	FARM
28 December 2013	EDUCATION
28 December 2013	GLASS

28 December 2013	ONL
28 December 2013	INTERNATIONAL
28 December 2013	CODES
28 December 2013	TRAINING
28 December 2013	HOUSE
28 December 2013	KAUFEN
28 December 2013	NINJA
28 December 2013	REPAIR
28 December 2013	BUILDERS
28 December 2013	COFFEE
28 December 2013	FLORIST
28 December 2013	HOLIDAY
28 December 2013	SOLUTIONS
18 December 2013	BUZZ
18 December 2013	SUPPORT
17 December 2013	RECIPES
17 December 2013	COMPUTER
17 December 2013	ACADEMY
17 December 2013	CAREERS
17 December 2013	CAB
17 December 2013	公益 (xn--55qw42g) – Chinese for "charity"
17 December 2013	政务 (xn--zfr164b) – Chinese for "government"
17 December 2013	SYSTEMS
17 December 2013	DOMAINS
17 December 2013	VIAJES
17 December 2013	COMPANY
17 December 2013	CAMP
17 December 2013	LIMO
17 December 2013	MANAGEMENT
17 December 2013	PHOTOS
17 December 2013	SHOES

17 December 2013	CENTER
10 December 2013	RUHR
30 November 2013	MENU
30 November 2013	UNO
23 November 2013	みんな (xn--q9jyb4c) - Japanese for "everyone"
19 November 2013	DIAMONDS
19 November 2013	TIPS
19 November 2013	PHOTOGRAPHY
19 November 2013	DIRECTORY
19 November 2013	ENTERPRISES
19 November 2013	KITCHEN
19 November 2013	TODAY
14 November 2013	PLUMBING
14 November 2013	GRAPHICS
14 November 2013	CONTRACTORS
14 November 2013	GALLERY
14 November 2013	SEXY
14 November 2013	CONSTRUCTION
14 November 2013	TATTOO
14 November 2013	TECHNOLOGY
14 November 2013	ESTATE
14 November 2013	LAND
14 November 2013	BIKE
06 November 2013	VENTURES
06 November 2013	CAMERA
06 November 2013	CLOTHING
06 November 2013	LIGHTING
06 November 2013	SINGLES
06 November 2013	VOYAGE
06 November 2013	GURU
06 November 2013	HOLDINGS

06 November 2013	EQUIPMENT
23 October 2013	شبكة(xn--ngbc5azd) – Arabic for "web/network"
23 October 2013	онлайн (xn--80asehdb) – Russian for "online"
23 October 2013	сайт (xn--80aswg) – Russian for "site"
23 October 2013	游戏(xn--unup4y) – Chinese for "game(s)"

EX. RE-12

Proposed Renewal of .org Registry Agreement

Open Date
18 Mar 2019 23:59 UTC

Close Date
29 Apr 2019 23:59 UTC

Staff Report Due
3 Jun 2019 23:59 UTC

Comments Closed

Report of Public Comments

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Originating Organization

Global Domains Division

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Russ Weinstein
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Contents

Brief Overview

Purpose: The purpose of this public comment proceeding is to obtain community input on the proposed .org renewal agreement (herein referred to as ".org renewal agreement"). This renewal proposal is the result of discussions between ICANN and Public Interest Registry, a Pennsylvania non-profit corporation – the Registry Operator for the .org top-level domain (TLD).

Current Status: The current .org Registry Agreement (herein referred to as "current .org agreement") will expire on 30 June 2019. Section 4.2 of the current .org agreement provides that it shall be renewed upon the expiration of the initial term set forth in Section 4.1.

Next Steps: Following review of the public comments received, ICANN will prepare and publish a summary and analysis of the comments received. The report will be available for the ICANN Board in its consideration of the proposed .org renewal agreement.

Report of Public Comments

Section I: Description and Explanation

The .org renewal agreement is based on the base generic top level domain (gTLD) Registry Agreement updated on 31 July 2017 (herein referred to as "base registry agreement"). However, in order to account for the specific nature of the .org TLD, relevant provisions in the current .org agreement have been carried over to the .org renewal agreement.

As a result, the .org renewal agreement is substantially similar to the terms of the base registry agreement. Listed below are summaries of both a) provisions in the renewal agreement that are materially different from the current .org agreement, and b) material differences between the .org renewal agreement and the base registry agreement.

a. **Provisions in the proposed .org renewal agreement that are materially different from the current .org agreement:**
   - **Approved Services (Exhibit A):** Consistent with all new gTLDs and other "legacy" TLD registry agreement renewals, Exhibit A has been modified to include the following additional or modified approved services: Anti-Abuse, Searchable Whois, Internationalized Domain Names (IDNs), .org Single and Two-Character Phased Allocation Program, Bulk Transfer After Partial Portfolio Acquisition (BTAPPA), Registry Lock, and an implementation period of 270 calendar days to transition all systems to the requirements of the .org renewal agreement, which is consistent with other legacy TLD registry agreement renewals.

   - **Protection of Legal Rights of Third Parties and Minimum Requirements for Rights Protection Mechanisms (Section 2.8 and Specification 7 of the .org renewal agreement):** To better conform with the base registry agreement, the .org renewal agreement will be subject to the Rights Protection Mechanisms (RPMs) set forth in section 2 of Specification 7, including the Uniform Rapid Suspension (URS) system, the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP), and the Registration Restrictions Dispute Resolution Procedure (RRDRP). Public Interest Registry is also authorized to develop additional rights protection mechanisms. Section 2.8 of the .org renewal agreement also does not contemplate processes and procedures for launch of the TLD as is consistent with

other legacy TLD registry agreement renewals.

- **Public Interest Commitments (Section 2.17 and Specification 11 of the .org renewal agreement):** The Registry Operator has adopted the public interest commitments and applicability of the Public Interest Commitment Dispute Resolution Process (PICDRP) comparable to new gTLD operators (with the exception of Specification 11 Section 2, which refers to the initial application for the gTLD).

- **Pricing for Domain Name Registrations and Registry Services (Section 2.10 of the .org renewal agreement):** In alignment with the base registry agreement, the price cap provisions in the current .org agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .org renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement

- **Fees to be paid to ICANN org (Section 6.1 of the .org renewal agreement):** The .org renewal agreement has been modified to match the fee provisions in the base registry agreement. Accordingly, the registry fixed fee of $6,250 per calendar quarter is proposed for the .org TLD beginning on the .org renewal agreement effective date. The registry-level transaction fee remains at $0.25 for each annual increment of an initial or renewal domain name registration.

- **Misc. Provisions:** Various other provisions have been modified, at the request of the Registry Operator and after bilateral negotiations with Registry Operator, to align with terms previously included in the current .org agreement.

b. Material differences between the proposed renewal agreement for .org and the base gTLD Registry Agreement:

Registry Interoperability and Continuity (Section 2.7 and Specification 6 of the base registry agreement): Section 6 of Specification 6 of the base gTLD registry agreement (Name Collision Occurrence Management) will not apply to the .org TLD as it has been in operation since 1985. This is consistent with other legacy TLD registry agreement renewals.

- **Emergency Transition (Section 2.13 and 2.14 of the .org renewal agreement) and Continued Operations Instrument (Section 2.12 and Specification 8 of the base registry agreement):** In alignment with the base registry agreement, the .org renewal agreement will continue to incorporate the registrant protection provision allowing ICANN to designate an emergency interim registry operator if emergency thresholds for registry functions are reached. However, the Continued Operations Instrument requirement will not apply to the .org TLD as it has been in continuous operation since 1985. As a result, Section 4.3(c) of the base registry agreement (Termination by ICANN) is not applicable to the .org TLD and, therefore, is of no force or effect. This is consistent with other legacy TLDs who have adopted the Emergency Transition provisions.

- **Pass Through Fees related to the Trademark Clearinghouse (Section 6.4 of the base registry agreement):** This requirement will not apply to the .org TLD as it has been in continuous operation since 1985. As a result, Section 6.4 of the base registry agreement is not applicable to the .org TLD and, therefore, is of no force of effect. This is consistent with other legacy TLD registry agreement renewals.

- **Schedule of Reserved Names (Specification 5 of the base registry agreement)**: The .org renewal agreement amends Section 2 of Specification 5 (Two-Character ASCII Labels) allowing the Registry Operator to allocate two-character labels that were reserved in prior registry agreements. The allocation of two-character labels is subject to the Registration Policy and Post Registrations Complaint Investigation provisions in Appendix A of the Authorization for Release of Letter/Letter Two-Character ASCII Labels at The Second Level issued to all new gTLD registry operators on 13 December 2016.

Additionally, the provision on the Registry Operator's use of up to 100 names for the operation and promotion of the TLD (Section 3.2) and the provisions on activation of names relating to International Olympic Committee, International Red Cross and Red Crescent Movement (Section 5) and names relating to Intergovernmental Organizations Section 6) are of no force or effect in the .org renewal agreement.

- **Misc. Provisions:** Various other provisions have been modified to remove references to the initial delegation of the TLD, entry into the root zone, statements made in the registry TLD application, and launch of the TLD, as they are not applicable to a legacy TLD.

Posted for public comment are both clean and "redline" versions of the .org renewal agreement, and the Addendum to the .org renewal agreement that is proposed to be executed by the parties as follows:

- Proposed .org renewal agreement
- Redline showing changes compared to the base registry agreement
- Proposed addendum to the .org renewal agreement

Contractual Compliance Review: As part of the renewal process, ICANN conducted a contractual compliance review of the current .org agreement. Public Interest Registry was found to be in compliance with its contractual requirements for the operation of the .org TLD.

Section II: Background

ICANN and Public Interest Registry, a Pennsylvania non-profit corporation, entered into a TLD Registry Agreement on 2 December 2002 for continued operation of the .org top level domain, which was subsequently renewed on 8 December 2006 and 22 August 2013.

In addition to the .org renewal agreement, the registry agreements of several "legacy" gTLDs, namely, .tel, .mobi, .jobs, .travel, .cat and .pro have been renewed based on the base registry agreement as a result of bilateral negotiations between ICANN and the applicable registry operators. These renewed agreements can be viewed at: https://www.icann.org/resources/pages/registries/registries-

agreements-en.

Section III: Relevant Resources

- Current .org Registry Agreement and Appendices
- Approved base New gTLD Registry Agreement (as updated on 31 July 2017)

Section IV: Additional Information

Section V: Reports

- Report

Get Started
Learning
Participate
Groups
Board
President's Corner
Staff
Careers
Public Responsibility

Locations
Global Support
Report Security Issues
PGP Keys
Certificate Authority
Registry Liaison
Specific Reviews
Organizational Reviews
Complaints Office
Request a Speaker
For Journalists

& Transparency
Accountability Mechanisms
Independent Review Process
Request for Reconsideration
Ombudsman
Empowered Community

Documents
Agreements
Specific Reviews
Annual Report
Financials
Document Disclosure
Planning
Accountability Indicators
RFPs
Litigation
Correspondence

Dispute Resolution
Domain Name Dispute Resolution
Name Collision
Registrar Problems
WHOIS

Data Privacy Practices
Privacy Policy
Terms of Service
Cookies Policy

 Privacy Policy Terms of Service Cookies Policy

EX. RE-13

Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2

This substantive evaluation of Request for Reconsideration ("RFR") 19-2 by the ICANN Ombudsman is required under the Paragraph 4.2(l) of the current ICANN Bylaws ("Bylaws" (as amended July 22, 2017)).

Under ICANN Bylaws 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

> Section 4.2. RECONSIDERATION…
>
> (c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that the Requestor 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.

Unpacking the above language, did an action (or inaction in other words an action that could have been taken which was not taken) contradict or violate ICANN's Mission or established policy (including the Bylaws and relevant California laws[1])? Or, was an action taken (or not taken) without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the Board Accountability Mechanism Committee ("BAMC") and the ICANN Board of Directors a "substantive evaluation" of a Request for Reconsideration, the Ombudsman must look at the substance of what is being requested in the Request, and of course at the actions (or inaction) for which the Requestor seeks Reconsideration.

[1] While laws of a state or country are not mentioned explicitly in Bylaws Section 4.2, the Mission of a California public benefit corporation includes implicitly abiding by the relevant laws: here those are the applicable corporate laws pertinent to the governance of the corporation. If an action or inaction clearly is in violation of California law, it is improper. Similarly, the word "Commitments" suggests the commitment ICANN makes to be law abiding, especially of the laws of the State wherein and whereby it was formed, where it is headquartered, and where much of its operation takes place.

Request for Reconsideration 19-2 was filed by Namecheap, Inc. ("Requestor") on July 12th, 2019, seeking reconsideration of ICANN organization's renewal of the Registry Agreements with Public Interest Registry ("PIR") and Afilias Limited ("Afilias") for the .org and .info top-level domains (TLDs), respectively (collectively, the .org/.info renewed Registry Agreements are "Renewal Registry Agreements"), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .org and .info. The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."

The Renewal Registry Agreements (RA) (and their Addenda) that are at the heart of this Reconsideration Request can be found here: https://www.icann.org/resources/agreement/org-2019-06-30-en and https://www.icann.org/resources/agreement/info-2019-06-30-en.

The history of these RAs (which is detailed on the public comments pages) may be helpful to explain why and how these negotiations came about. [https://www.icann.org/public-comments/org-renewal-2019-03-18-en and https://www.icann.org/public-comments/info-renewal-2019-03-18-en)]

The Registries for these two historic and significant Top-Level Domains (TLDs) are Public Interest Registry (PIR) (for .org) and Afilias (for .info), (the former is a Pennsylvania non-profit corporation and the latter is a Pennsylvania corporation both are the "Registry Operators"). ICANN and the Registry Operators each bilaterally negotiated Registry Agreement renewals with ICANN org. ICANN and the Registry Operators "agreed to implement the incorporation of unique legacy-related terms of .org (and .info) through an 'Addendum' to the Registry Agreement." [https://www.icann.org/resources/agreement/org-2019-06-30-en]

The initial Registry Agreements for .org and .info were due to expire on June 30th, 2019. In anticipation of that nearing expiration date, ICANN and PIR, and ICANN and Afilias, bilaterally negotiated renewals of their respective Registry Agreements. The proposed renewals were based on ICANN's current Base gTLD Registry Agreement.

The Addendum allowed the Registry Operator to renew with "unique terms" included via the Addendum. The reasons ICANN and the Registry Operators were willing to renew with unique terms may have to do with the historical nature of these TLDs, their size, and the fact that in the case of .org, a vast number of non-profits and public interest entities are registered thereunder (ICANN itself is icann.org). The .org TLD is currently the third largest TLD, with at present more than 10 million registrants, and .info is the fourth largest (with ~4.65 million registrants as of May 2019).[2]

[2] The TLDs .com and .net are the two largest according to the latest statistics on Statista. [https://www.statista.com/statistics/262947/domain-numbers-of-the-ten-largest-top-level-domains/]

It's no understatement to note that regarding the history of Internet domains, putting all TLDs in context over the past 30 odd years, the three TLDs .org, .info, and .biz, (plus .com and .net), comprise the most important, most recognized, and just *most* period.

Viewed separately or together, these TLDs are *the most significant* TLDs; thus, it is not surprising that ICANN would take time and care to treat them differently in terms of their renewals, and be willing to renew them on unique terms. The removal of price controls brings these renewals in line with the current Base gTLD Registry Agreements, creating potential conformity for all (or almost all) TLD agreement terms going forward.

When bilateral renewal negotiations were finished, ICANN org posted the proposed, bilaterally negotiated renewal of the unique .org Registry Agreements for public comment (from March 18th, 2019 through April 29th, 2019).

According to the Staff Report of Public Comment Proceeding ("Staff Report") which was posted on June 3rd, 2019, ICANN received 3,200+ submissions during the public comment period for .org alone. (The Staff Report is available at https://www.icann.org/public-comments/org-renewal-2019-03-18-en).

The Staff Report notes this number of comments is comparable to a prior .org Registry Agreement renewal comment period in 2006, where over 2,000 comments were received. All of the present comments were submitted through an ICANN org public comment portal requiring human interaction; yet many of these comments seem clearly to be computer generated that is to say, they may be "comments" in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing. A brief search on the Internet identified one source of recurring comments to be: https://www.internetcommerce.org/comment-org/ (Web page accessed Sept. 7th, 2019).

As far as comments go for ICANN, 3200+ appears to be quite a sizeable number. But, seeing as how the public comments can be filled out and submitted electronically, it is not unexpected that many of the comments are, in actuality, more akin to spam.

After the public comment period closed, ICANN Staff prepared the Staff Report, which was circulated to the ICANN Board, and then subsequently made available to the public at the beginning of June 2019. All Board Directors could access all of the public comments, as could *anyone* (they live online here: https://www.icann.org/public-comments/org-renewal-2019-03-18-en). Given the significance of these Legacy TLDs, the Board was briefed about the negotiations in January 2019; subsequently (in June of 2019) the Board was briefed about the public comments and the decision taken by ICANN Staff and the President and CEO ("CEO") to go ahead with the renewals under the published terms.

Following consultation with the Board, ICANN published correspondence affirming that renewal of TLDs by the CEO and Staff continues to be a proper delegation of authority by the Board to the CEO and Staff.
[https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf]

What may not be understood by the Community is that ICANN's Board delegated such authority to negotiate and renew Registry Agreements to the CEO and Staff long ago, utilizing the executive authority resident in the Chief Executive and its powers:

> **Section 15.4. PRESIDENT**
>
> The President shall be the Chief Executive Officer (CEO) of ICANN 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 Director, and shall have all the same rights and privileges of any Director. 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.

They call these powers "Executive" for a reason: the Staff and the officers under the CEO *execute* agreements, operations, etc. Indeed, the Board's delegation of authority to negotiate and enter into contracts is consistent with the Bylaws and the state laws of California, under and by which ICANN is formed as a corporation, as noted in Footnote 1 above (owing to Bylaws Section 4.2 inclusion of ICANN's "Mission" and "Commitments").

The most relevant Bylaw, however, is probably Bylaws Section 2.1:

> Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1).

The Board of Directors has specifically directed the CEO and Staff to negotiate and execute agreements especially Registry Agreements. This authority is periodically reaffirmed, as appears to have happened in June 2019. Indeed, *executing* Registry Agreements (and their renewals) are, to an extent, the *raison d'être* and life's blood of ICANN; it makes total sense that the Board gave and keeps giving this authority and power to the CEO and his Staff.

The Bylaws specifically authorize the CEO's power to enter into and execute contracts (including, of course, Registry Agreements). Per the Bylaws, Section 21.1:

> **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, and such authority may be general or confined to specific instances.

Following the ICANN 65 Marrakech Policy Meeting in June 2019, the Registry Operators for the .org, .info and .biz TLDs executed their bilaterally negotiated Renewal Registry

Agreements with ICANN (on June 30th, 2019). The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff, and all the included and proposed terms were bilaterally negotiated by Staff with the respective Registry Operators.

After investigation, it seems apparent to me that the CEO and Staff acted within the scope of the powers given them by the Board. The Board retained oversight, the Board was briefed on the negotiations for the renewals of the Registry Agreements for the Legacy TLDs, and the Board was well aware of the public comments related thereto. The Board could have directed the CEO and Staff *not* to renew under these terms had it thought that warranted. It decided not to do so.

The Board were well aware of the public comments, had been briefed on them by the CEO and Staff, and had been provided with the Staff Report summarizing them; they chose to let Staff go ahead and renew on the terms agreed to with the Registry Operators, and the renewal Registry Agreements were duly and timely executed. Nothing about this seems to me, based on my investigation and understanding of the relevant rules, laws and Bylaws, to be any kind of violation or dereliction of CEO and Staff's normal executive obligations and duties, or of the Mission, Core Values, or Commitments of ICANN.

Ultimately, my substantive evaluation of this Request is that the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws). I have more to say about all this in the "companion" Substantive Evaluation of Reconsideration Request 19-3 (see Annex 1), which relates to other terms of these same renewal Registry Agreements (and which I have submitted per the Bylaws on the same day as I submitted this Evaluation: September 7th, 2019).

What Requestor set forth and requests in Request for Reconsideration 19-2 does not merit a recommendation by me to the BAMC or the Board to take the action Requestor requests, or to take any action at all.

EX. RE-14

1. PIR's Application for Indirect Change of Control, 14 November 2019

14 November 2019

VIA FEDEX AND ICANN NAMING SERVICES PORTAL

Internet Corporation for Assigned Names and Numbers
12025 E. Waterfront Drive, Suite 300
Los Angeles, CA 90094 2536
registrylegalnotices@icann.org

Re: Public Interest Registry – Notice of Indirect Change of Control and Entity Conversion

ICANN:

Public Interest Registry ("PIR") hereby provides ICANN with thirty (30) calendar days advance notice of its planned indirect change of control, described below, pursuant to Section 7.5 of each of the Registry Agreements between PIR and ICANN – a list of which is enclosed.

On 11 November 2019, PIR entered into an equity purchase agreement whereby Ethos Capital, LLC ("Ethos Capital"), acting through its affiliate Purpose Domains Direct, LLC, will, subject to the satisfaction of closing conditions, acquire 100% of the equity interests of PIR (the "Transaction"). A chart showing the current and post Transaction structure of PIR is attached. PIR anticipates the closing of the Transaction to occur as soon as possible after the earlier of: (x) receipt of ICANN's consent to the Transaction or (y) the end of the required notice period under the Registry Agreements.

As part of and immediately before the consummation of the Transaction, PIR will undergo a statutory conversion and name change from Public Interest Registry to Public Interest Registry, LLC. The management and operations of PIR will remain unchanged throughout the process.

Ethos Capital is committed to furthering PIR's mission and values that have long distinguished it from other registries, including its deep commitment to community support and activities, high ethical standards, leadership in anti-abuse activities, and quality domain registrations. Ethos Capital also intends to create a PIR Stewardship Council, on which it will invite prominent and respected community members to serve, dedicated to upholding PIR's core founding values and providing continued support through a variety of community programs.

I trust we have provided all pertinent information, but please feel free to reach out if you have any questions or require additional information regarding this indirect change of control.

Sincerely,

PUBLIC INTEREST REGISTRY

Brian Cimbolic
Vice President, General Counsel

cc: John Jeffrey john.jeffrey@icann.org
Cyrus Namazi cyrus.namazi@icann.org
Jon Nevett Contact Information Redacted

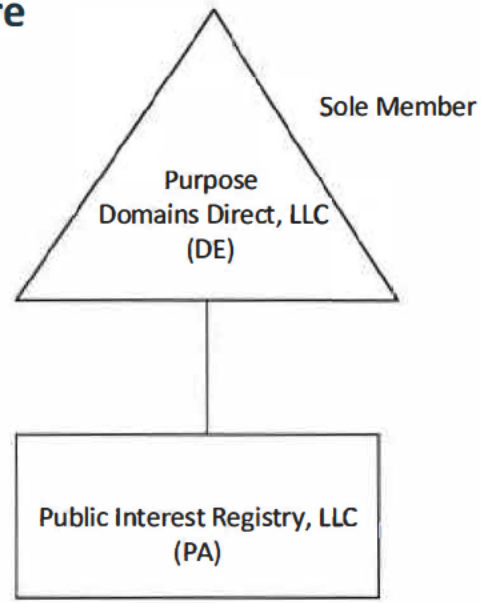
ICANN Registry Agreements with Public Interest Registry

1. Registry Agreement, dated June 30, 2019, between ICANN and PIR, pursuant to which PIR operates .org.
2. Registry Agreement, dated March 6, 2014, by and between ICANN and PIR, as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .ngo.
3. Registry Agreement, dated March 6, 2014, by and between ICANN and PIR, as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .ong.
4. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by Amendment No. 1, effective as of August 14, 2014, and further amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn--c1avg (Cyrillic script).
5. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by Amendment No. 1, effective as of April 20, 2014, and further amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn--i1b6b1a6a2e (Devanagari script).
6. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn--nqv7f (Chinese 2-character script).
7. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn-nqv7fs00ema (Chinese 4-character script).

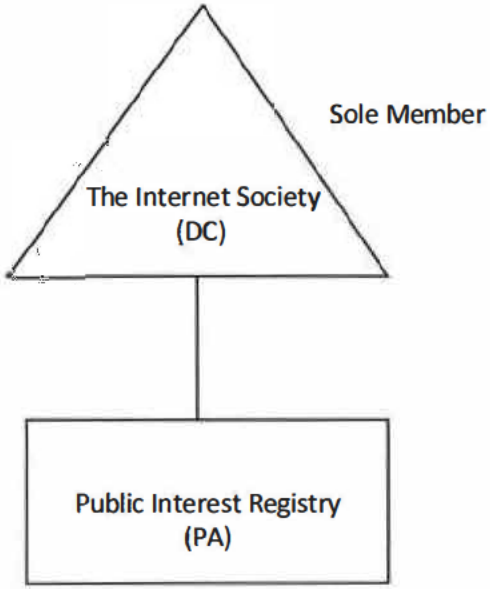
Ownership Structure

Attached

Planned PIR Ownership Structure



Previous PIR Ownership Structure



PIR Indirect Change of Control Information

The following information was submitted to ICANN on 14 November 2019 via the Naming Services Portal regarding the planned indirect change of control Public Interest Registry will undergo.

TLDs

1. .org
2. .ngo
3. .ong
4. .xn--c1avg
5. .xn--i1b6b1a6a2e
6. .xn--nqv7f
7. .xn-nqv7fs00ema

DUMs

1. .org 10M
2. .ngo 3,800
3. .ong - 3,800
4. .xn c1avg 1,100
5. .xn--nqv7f 235
6. .xn--i1b6b1a6a2e – 78
7. .xn-nqv7fs00ema – N/A

Overview of Name Change and Conversion:

Public Interest Registry will undergo a legal conversion to Public Interest Registry, LLC, under Pennsylvania law - its place of domicile. This type of legal conversion is not an assignment. The converted entity is the same entity as it was before the conversion, just a different legal type.

As stated in the Pennsylvania Consolidated Statutes (15 Pa.C.S.A. § 356):

> **§ 356. Effect of conversion**
> **(a) General rule.--** When a conversion becomes effective, all of the following apply:
> (1) The *converted association* is:
> (i) Organized under and subject to the organic law of the converted association.
> (ii) *The same association without interruption as the converting association.*
> (iii) Deemed to have commenced its existence on the date the converting association commenced its existence in the jurisdiction in which the converting association was first created, incorporated, formed or otherwise came into existence, except for purposes of determining how the converted association is taxed.

Upon conversion, the entity will be known as Public Interest Registry, LLC. We understand ICANN will want to paper the updated name, and trust that simple one-page document between the parties that acknowledges the name change should be sufficient to update the Registry Agreements.

Overview of Indirect Change of Control:

This transaction does not involve the assignment of assets, or a merger/consolidation, by a Registry Operator. Public Interest Registry will remain the Registry Operator under its Registry Agreements. Public Interest Registry, LLC, will undergo an indirect change of control at its member level, whereby Purpose Domains Direct, LLC, will acquire 100% of the equity interests in Public Interest Registry, LLC, from The Internet Society – the previous sole member of Public Interest Registry. A chart showing the previous and planned structure is included.

The directors of Purpose Domains Direct, LLC, are [redacted], [redacted], and [redacted]. The sole member of Purpose Domains Direct, LLC is Purpose Domains Holdings, LLC.

Entity Information for Purpose Domains Direct, LLC:

1. Legal form of the entity – LLC
2. The specific national or other jurisdiction under which the entity was formed - Delaware
3. Attach evidence of the assignee's establishment as the entity described above. – DE Certificate of Formation included.
4. If the assignee entity is publicly traded, provide the exchange and symbol. – N/A
5. If the assignee entity is a subsidiary, provide the parent company. – Ethos Capital, LLC is the controlling entity.
6. DE 7670477
7. Address and Contact Information: [redacted]

Control Information for Purpose Domains Direct, LLC:

1. Directors:

[redacted]

[redacted]

[redacted]

[redacted]

The Directors each attest that none of the events listed in online application for change of control have occurred or are applicable.

2. Shareholder: sole member of Purpose Domains Direct, LLC is Purpose Domains Holdings, LLC.

Authorized Signatory:

Jonathon Nevett
CEO
[redacted]

[redacted]

[redacted]

There are no updates to the PIR / ICANN points of contact associated with this indirect change of control.

Change to Public Registry Contact Information:

Update Registry Operator name to Public Interest Registry, LLC. No other changes.

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF FORMATION OF "PURPOSE DOMAINS DIRECT, LLC", FILED IN THIS OFFICE ON THE TWENTY-FOURTH DAY OF OCTOBER, A.D. 2019, AT 1:45 O`CLOCK P.M.

Jeffrey W. Bullock, Secretary of State

7670477 8100
SR# 20197717118

Authentication: 203860406
Date: 10-24-19

You may verify this certificate online at corp.delaware.gov/authver.shtml

State of Delaware
Secretary of State
Division of Corporations
Delivered 01:45 PM 10/24/2019
FILED 01:45 PM 10/24/2019
SR 20197717118 - File Number 7670477

CERTIFICATE OF FORMATION
OF
PURPOSE DOMAINS DIRECT, LLC

This Certificate of Formation is duly executed and filed by the undersigned, an authorized person, to form a limited liability company under the Delaware Limited Liability Company Act (6 *Del. C.* § 18-101, *et seq.*) (the "Act").

I. The name of the limited liability company is "Purpose Domains Direct, LLC".

II. The address of the limited liability company's registered office in the State of Delaware is Corporation Service Company, 251 Little Falls Drive, Wilmington, County of New Castle, Delaware 19808. The name of the limited liability company's registered agent for service of process in the State of Delaware at such address is Corporation Service Company.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Formation of Purpose Domains Direct, LLC as of the 24th day of October, 2019.

By: /s/ Todd Boudreau
Todd Boudreau
Authorized Person

2. ICANN Request for Additional Information, 9 December 2019

We have completed an initial review of the submitted information and have a request for additional information. Pursuant to the .org Registry Agreement, responses should be provided within 15 days of the receipt of this request but please let us know if that creates a difficulty for you. Once all additional information is provided, ICANN has up to 30 days to review the materials.

COVER LETTER

1. This document states that "… before the consummation of the Transaction, PIR will undergo a statutory conversion and name change from Public Interest Registry to Public Interest Registry, LLC". If the conversion and entity name is changed before the change of control, then a Registry Operator name change must first be processed so that all submitted information for the change of control is consistent with the new name.

1.1. We note that you stated, "we understand ICANN will want to paper the updated name, and trust that simple one-page document between the parties that acknowledges the name change should be sufficient to update the Registry Agreements." We have asked several clarifying questions below about the process by which PIR will be changing its legal form and legal name. Once provided, we will be able to provide direction about how to best process a name change request.

PROPOSED OWNERSHIP STRUCTURE AND INDIVIDUALS

Several entities are named in the submission. For the avoidance of doubt, please provide the following:

2. Two comprehensive corporate organizational charts:

2.1. The first chart should reflect the current ownership (or membership) structure. The chart should indicate the percentage of ownership each entity or individual has within the others listed on the chart.

2.2. The second chart should document the proposed post-transaction ownership structure. It must illustrate the relationship between all entities or individuals that will have any indirect or direct ownership/control over the registry operator as well as all affiliates (as defined in the Registry Agreement) of said entities. The chart should include the percentage of ownership each will have after the proposed transaction closes. Please ensure that this includes Ethos Capital, LLC and any entities controlling Ethos Capital (as "control" is defined in the Registry Agreement).

3. For each entity listed in the proposed post-transaction organization chart, please provide the full legal name, principal place of business, directors and officers, shareholders and percentage of ownership they each have. For each individual listed, please provide their position/title, full names, date of birth, country of birth and current country of residence.
4. For all entities and affiliates listed in the proposed post-transaction organization chart, provide proof of establishment.
5. Although the submitted documentation states that "none of the events listed in the online application for change of control have occurred or are applicable", a response for each specific question was not provided. Please provide a response for each of the following

questions related to the background for the proposed shareholders, entities or directors and officers named in number two above and indicate whether any of them:

5.1. Within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these.

5.2. Within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others.

5.3. Within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities.

5.4. Within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative.

5.5. Has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes.

5.6. Has ever been convicted of any crime involving the use of a weapon, force, or the threat of force.

5.7. Has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities.

5.8. Has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

5.9. Has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols).

5.10 Has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above).

5.11 Has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above).

5.12 Is the subject of a disqualification imposed by ICANN and in effect at the time of this application.

6. Cross-ownership information was not provided. Please disclose any cross-ownership interests in registrars and/or registrar resellers, that may exist for any of the entities named in the responses to number one and number two, (collectively, the "Cross-ownership Parties") above, specifically:

6.1. Is there any ownership interest the Cross-ownership Parties hold in any registrar or reseller of registered names?

6.2. Is there any ownership interest that a registrar or reseller of registered names holds in the Cross-ownership Parties?

6.3. Are there any relationships under common control with, control or controlled by any registrar or reseller of registered names?

6.4. If any of the above are Yes please explain. If referencing a registrar, please include an IANA ID.

Note: ICANN retains the right to refer any identified relationships to a competition authority prior to change of control of the Registry Operator if it is determined that any such cross-ownership interests could raise competition issues.

TRANSACTION DOCUMENTS AND INFORMATION

7. Please answer the following questions and provide any relevant documentation, if any: Was PIR aware at any time during the negotiations and finalization of the renewal of the .org Registry Agreement (effective 30 June 2019) that ISOC was engaged in discussions for or planning the sale of PIR or its assets? To the best of your knowledge, was ISOC engaged in discussions for or planning the sale of PIR or its assets at the time of the renewal of the .org Registry Agreement?
8. Please provide a copy of the Equity Purchase Agreement, dated November 11, 2019, pursuant to which Ethos Capital is indirectly acquiring 100% of the equity interests of PIR, together with all ancillary agreements necessary to determine the effect of the proposed transaction.
9. Please provide a schedule detailing the allocation/distribution of the purchase price among interested parties, including owners, members and consultants. Please include information on how the transaction will be funded and how that will affect the financial state of PIR and its ability to operate a secure and stable registry and fund the initiatives recently announced to support the .org community going forward (for example, will PIR incur debt obligations in connection with the transaction).
10. Please provide copies of all filings made by PIR with the Pennsylvania Secretary of State to effect its conversion to an LLC.
11. Please provide a copy of the notice to the Pennsylvania Attorney General regarding the proposed sale to Ethos Capital, LLC, including all additional documents and information provided to the Pennsylvania Attorney General in connection with its review of the proposed sale.
12. Please provide the proposed organizational documents to be implemented for PIR post-closing.
13. Please provide relevant financial information (e.g. audited financial statements) and organizational documents of the post-transaction beneficial owner of PIR, confirming that PIR will maintain sufficient financial resources to fund operations, including financial statements of the ultimate parent entity of PIR following the consummation of the transaction.
14. Please provide a list of ongoing transaction-related litigation involving the transaction parties or their related entities.
15. Please provide a list of all entities or individuals that have a financial, beneficial or controlling interest in the transaction.
16. Please provide a list of all former directors, officers or employees of ICANN that you are aware of that are or have been involved in, have advised on or otherwise have an interest in the transaction.

17. Please provide a list of all current directors, officers or employees of ICANN, if any, that are or have been involved in, have advised on or otherwise have an interest in the transaction.

FINANCIAL QUESTIONS

18. Please provide the financial information requested in Exhibit A. Please consider the term "assignee" to refer to Public Interest Registry LLC.

TECHNICAL OPERATIONS

19. Please identify the current provider for each of the critical functions of the registry (as defined in Spec 10 of the Registry Agreement) and state whether there will be a change to the provider for each of the critical functions as a result of the proposed transaction.

THE .ORG COMMUNITY

20. In order to support PIR's recent public statements about programs or initiatives to promote/protect the .org community, please provide any controls or representations in the transaction documents (or otherwise) in relation to protecting the .org community.

21. Please provide information on how PIR and the proposed new controlling entities of PIR address the original criteria evaluated in the designation of ISOC/PIR as the operator of .org. Please include reference to any controls or representations in the transaction documents (or otherwise) regarding these criteria. Please confirm whether any funds from the Verisign endowment remain available for use.

EVALUATION FEES

22. Please acknowledge that any fees associated with evaluation of this Assignment or Change of Control request must be paid before the request can be approved.

COMMUNITY INQUIRIES

23. We note the heavy interest of many members of the .org community and ask that you consider responding to the community questions attached as Exhibit B.

ATTESTATION OF FULL AND TRUTHFUL DISCLOSURE

24. We note that PIR attested to several conditions in the submission. However, we noticed that you did not attest to the following: "I attest that the requested change only affects the ownership or shareholder(s) of Registry Operator and the Registry Operator does not change." Please provide an explanation for this omission.
25. Please include an attestation of full and truthful disclosure in the same manner as provided in the initial submission with respect to the additional information provided pursuant to this request.

EXHIBIT A

Provide responses to each of the questions below with attachments.

1. Financial Statements: provide
audited or independently certified financial statements for the most recently completed fiscal year for the assignee, and
audited or unaudited financial statements for the most recently ended interim financial period for the assignee for which this information may be released.

For newly-formed assignee, or where financial statements are not audited, provide:
the latest available unaudited financial statements; and
an explanation as to why audited or independently certified financial statements are not available.

At a minimum, the financial statements should be provided for the legal entity listed as the assignee.

Financial statements are used in the analysis of projections and costs. A complete answer should include:
balance sheet;
income statement;
statement of shareholders equity/partner capital;
cash flow statement, and
notes to the financial statements including the accounting standard used to prepare the statements.

2. Projections Template: provide financial projections for costs and funding using Template 1, Most Likely Scenario available at http://newgtlds icann org/en/applicants/agb/fin-proj-template-28dec11-en.xls. Note, if certain services are outsourced, reflect this in the relevant cost section of the template. The template is intended to provide commonality among gTLD applications and thereby facilitate the evaluation process.

A complete answer is expected to be no more than 10 pages in addition to the template.

3.(a)Costs and capital expenditures: in conjunction with the financial projections template, describe and explain:
the expected operating costs and capital expenditures of setting up and operating the proposed registry;
any functions to be outsourced, as indicated in the cost section of the template, and the reasons for outsourcing;
any significant variances between years in any category of expected costs; and
a description of the basis / key assumptions including rationale for the costs provided in the projections

template. This may include an executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made.

As described in the Applicant Guidebook, the information provided will be considered in light of the entire application and the evaluation criteria. Therefore, this answer should agree with the information provided in Template 1 to:
1) maintain registry operations,
2) provide registry services described above, and
3) satisfy the technical requirements described in the Demonstration of Technical & Operational Capability section. Costs should include both fixed and variable costs.

Answers must demonstrate a conservative estimate of costs based on actual examples of previous or existing registry operations with similar approach and projections for growth and costs or equivalent. Attach reference material for such examples.

A complete answer is expected to be no more than 10 pages.

3.(b) Describe anticipated ranges in projected costs. Describe factors that affect those ranges.

A complete answer is expected to be no more than 10 pages.

4.(a) Funding and Revenue: Funding can be derived from several sources (e.g., existing capital or proceeds/revenue from operation of the proposed registry).

Describe:
I. How existing funds will provide resources for both:
a) start-up of operations, and
b) ongoing operations;

II. the revenue model including projections for transaction volumes and price (if the assignee does not intend to rely on registration revenue in order to cover the costs of the registry's operation, it must clarify how the funding for the operation will be developed and maintained in a stable and sustainable manner);

III. outside sources of funding (the assignee must, where applicable, provide evidence of the commitment by the party committing the funds). Secured vs unsecured funding should be clearly identified, including associated sources of funding (i.e., different types of funding, level and type of security/collateral, and key items) for
each type of funding;

IV. Any significant variances between years in any category of funding and revenue; and

V. A description of the basis / key assumptions including rationale for the funding and revenue provided in the projections template. This may include an executive summary or summary

outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made; and

VI. Assurances that funding and revenue projections cited in this application are consistent with other public and private claims made to promote the business and generate support. Answers must demonstrate:

- A conservative estimate of funding and revenue; and
- Ongoing operations that are not dependent on projected revenue.

A complete answer is expected to be no more than 10 pages.

4.(b) Describe anticipated ranges in projected funding and revenue. Describe factors that affect those ranges.

A complete answer is expected to be no more than 10 pages

5.(a) Contingency Planning: describe your contingency planning:
Identify any projected barriers/risks to implementation of the business approach described in the application and how they affect cost, funding, revenue, or timeline in your planning;
Identify the impact of any particular regulation, law or policy that might impact the Registry Services offering; and
Describe the measures to mitigate the key risks as described in this question. A complete answer should include, for each contingency, a clear description of the impact to projected revenue, funding, and costs for the 3-year period presented in Template 1 (Most Likely Scenario).
Answers must demonstrate that action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur.

A complete answer is expected to be no more than10 pages.

5.(b) Describe your contingency planning where funding sources are so significantly reduced that material deviations from the implementation model are required. In particular, describe:
how on-going technical requirements will be met; and
what alternative funding can be reasonably raised at a later time. Provide an explanation if you do not believe there is any chance of reduced funding. Complete the financial projections Template 2, Worst Case Scenario available at http://newgtlds.icann.org/en/applicants/agb/fin-proj-template-28dec11-en.xls)

A complete answer is expected to be no more than 10 pages, in addition to the template.

5.(c) Describe your contingency planning where activity volumes so significantly exceed the high projections that material deviation from the implementation model are required. In particular, how will on-going technical requirements be met?

A complete answer is expected to be no more than 10 pages.

6.(a) Provide a cost estimate for funding critical registry functions on an annual basis, and a rationale for these cost estimates commensurate with the technical, operational, and financial approach described in the application.

The critical functions of a registry which must be supported even if a registry's business and/or funding fails are:
(1) DNS resolution for registered domain names
Assignee should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.

(2) Operation of the Shared Registration System
Assignee should consider ranges of volume of daily EPP transactions (e.g., 0-200K, 200K-2M, 2M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.

(3) Provision of Whois service
Assignee should consider ranges of volume of daily Whois queries (e.g., 0-100K, 100k-1M, 1M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics for both web-based and port-43 services.

(4) Registry data escrow deposits
Assignee should consider administration, retention, and transfer fees as well as daily deposit (e.g., full or incremental) handling. Costs may vary depending on the size of the files in escrow (i.e., the size of the registry database).

(5) Maintenance of a properly signed zone in accordance with DNSSEC requirements.
Assignee should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.

List the estimated annual cost for each of these functions (specify currency used). A complete answer is expected to be no more than 10 pages.

EXHIBIT B

1. Are the stewardship measures proposed for the new PIR sufficient to protect the interests of the dot org community? What is missing?
2. What level of scope, authority and independence will the proposed Stewardship Council possess? Will dot org stakeholders have opportunities to weigh in on the selection of the Council and development of its bylaws and its relationship to PIR and Ethos?
3. What assurances can the dot org community have that Ethos and PIR will keep their promises regarding price increases? Will there be any remedy if these promises are not kept?
4. What mechanisms does PIR currently have in place to implement measures to protect free speech and other rights of domain holders under its revised contract, and will those mechanisms change in any way with the transfer of ownership and control? In particular, how will PIR handle requests from government actors?
5. When is the planned incorporation of PIR as a B corp? Are there any repercussions for Ethos and/or PIR if this incorporation does not take place?
6. What guarantees are in place to retain the unique character of the dot org as a home for non-commercial organizations, one of the important stewardship promises made by PIR when it was granted the registry?
7. Did ISOC receive multiple bids for PIR? If yes, what criteria in addition to price were used to review the bids? Were the ICANN criteria originally applied to dot org bidders in 2002 considered? If no, would ISOC consider other bids should the current proposal be rejected?
8. How long has Ethos committed to stay invested in PIR? Are there measures in place to ensure continued commitment to the answers above in the event of a resale?
9. What changes to ICANN's agreement with PIR should be made to ensure that dot org is maintained in a manner that serves the public interest, and that ICANN has recourse to act swiftly if it is not?

3. PIR Response to ICANN's Request for Additional Information, 20 December 2019

PIR's response to ICANN's request for additional information included the following information (along with other confidential information not published here).

- **PIR's planned statutory conversion and name change.**

  - The planned statutory conversion and associated name change of PIR will occur substantially simultaneously with closing of the Transaction. PIR has provided drafts for ICANN's prior review of the documentation regarding the statutory conversion and associated name change to be filed at closing. PIR also will promptly provide ICANN with finalized copies of such documents upon their submission to the Commonwealth of Pennsylvania.
  - We understand ICANN's published instructions to be that, if a name change occurs in conjunction with an indirect change of control, both the name change and the indirect change of control should be handled through the single indirect change of control process.[3]
  - As a matter of law, "Public Interest Registry, a Pennsylvania nonprofit corporation" will be the same entity as "Public Interest Registry, LLC." There will not be a "new" entity or "assignee" involved in this indirect change of control. The conversion will be effectuated pursuant to Subchapter E of Part I, Chapter 3, of Title 15 Pa.C.S.A. As a matter of law, Public Interest Registry, LLC, will be "the same association without interruption" as Public Interest Registry.[4] All property of Public Interest Registry will continue to be vested in Public Interest Registry, LLC "without reversion or impairment, and the conversion shall not constitute a transfer of any of that property."[5]
  - All debts, obligations and other liabilities of Public Interest Registry will continue as debts, obligations and other liabilities of Public Interest Registry LLC as a matter of law.[6] Any requests regarding the financials of Public Interest Registry, LLC are necessarily the same as requests for the financials of PIR.
  - PIR is providing financial information to fully demonstrate that the continued security of registry operations will not be in jeopardy by this Transaction in the spirit of full transparency. If anything, the infusion of outside resources only acts to strengthen PIR's position in the competitive marketplace.
  - PIR is a mature registry with known costs and base of revenue, rather than an applicant for a yet-to-be-launched gTLD without a proven track record. Many of the questions in Exhibit A are taken from the New gTLD Applicant Guidebook, some referencing "applicant" and the Applicant Guidebook. As such, many of the requests set forth in ICANN's Exhibit A do not apply to a fully functioning, legacy gTLD registry operator (e.g. startup operations, anticipated costs, projections, etc.). PIR trusts the financial information and other documentation

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[3] "If the change is the result of a direct or indirect change of control of the registry operator, the assigning registry operator needs to utilize the appropriate Assignment process." https://www icann org/en/system/files/files/registry-operator-name-change-25sep17-en.pdf

[4] 15 Pa.C.S.A. 356(a)(1).

[5] 15 Pa.C.S.A. 356(a)(2).

[6] 15 Pa.C.S.A. 356(a)(3).

provided herein is sufficient to demonstrate its financial ability to continue to provide secure registry services.

- **Background of the proposed shareholders, entities or directors and officers of acquiror.**

- The ownership chart provided by PIR in its application for indirect change of control illustrates the current membership structure of PIR and the post-Transaction ownership structure. As indicated in the chart, The Internet Society is currently the sole member of PIR (i.e. 100% control).
- PIR and Purpose Domains Direct, LLC, the post-transaction direct parent of PIR, will each establish a Board of Managers with five seats (each, the "Board"). The Board will include the CEO of PIR (currently Jon Nevett), two seats selected by Ethos Capital, and two seats selected by one or more minority equity holders.[7] The Board will act by majority vote (i.e. Ethos Capital together with the PIR CEO can control the management and affairs of PIR). None of the minority investors will have any special rights or preferences other than standard minority investor approval rights and preferences.
- The management team of PIR will remain in place and continue to operate the business of PIR in a manner consistent with past practices in furtherance of the .ORG community.
- The investors in this Transaction do not include any ICANN registry operators or registrars, nor is ABRY Partners an investor.
- The Internet Society ("ISOC") has created a newly formed supporting organization, Connected Giving Foundation, a non-profit Pennsylvania entity ("CGF"), for which it serves as its sole member. CGF is expected to be a Section 501(c)(3) public charity. Prior to, but in tandem with the closing of the Transaction, CGF will become a member of PIR and upon the conversion of PIR to PIR LLC, ISOC will no longer be a member of PIR LLC, and CGF will be the sole member of PIR LLC. Immediately thereafter, CGF will then sell its 100% membership in PIR to Purpose Domains Direct, LLC. CGF's purpose is to ensure the ongoing financial stability of ISOC, whose mission is to support and promote the development of the Internet around the world – an Internet that is open, globally- connected, secure and trustworthy and that is a resource to enrich people's lives, and a force for good in society. With the funds generated by the Transaction and paid to CGF, ISOC will be well positioned to continue its charitable mission by investing in programs that build and support the communities that make the Internet work, advance the development and application of Internet infrastructure, technologies, and open standards, and advocate for policy that is consistent with its vision for the Internet.
- None of the entities or individuals listed herein have, within the past ten years, been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these.

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7 The contemplated Board has expanded from 3 to 5 seats from the original Notice filed to ICANN.

- None of the entities or individuals listed herein have, within the past ten years, been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others.
- None of the entities or individuals listed herein have, within the past ten years, been convicted of any willful tax-related fraud or willful evasion of tax liabilities.
- None of the entities or individuals listed herein have, within the past ten years, been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative.
- None of the entities or individuals listed herein have ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes.
- None of the entities or individuals listed herein have ever been convicted of any crime involving the use of a weapon, force, or the threat of force.
- None of the entities or individuals listed herein have ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities. None of the entities or individuals listed herein have ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
- None of the entities or individuals listed herein have ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols).
- None of the entities or individuals listed herein have been convicted of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above).
- None of the entities or individuals listed herein have, entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above.
- None of the entities or individuals listed herein to their respective knowledge are the subject of a disqualification imposed by ICANN and in effect at the time of this application.

- **PIR's knowledge during the negotiations and finalization of the renewal of the .org Registry Agreement (effective 30 June 2019) that ISOC was engaged in discussions for or planning the sale of PIR or its assets.**

- No, PIR was not aware that ISOC was engaged in discussions regarding the potential sale of PIR or its assets at the time of the negotiation and finalization of the renewal of the .ORG Registry Agreement. The negotiations over the .ORG Registry Agreement were handled by PIR without ISOC involvement and ended in February

2019, with the final version of the ultimately signed agreement being posted for public comment on March 18, 2019. In July 2019, ISOC first informed PIR that ISOC had previously received offers for the purchase of PIR or its assets and had determined that such offers were not in the interests of ISOC or PIR. PIR was not made aware of those discussions at the time they occurred. In September 2019, ISOC informed PIR that ISOC had received an offer for PIR that ISOC was contemplating entertaining. PIR was not involved in any process ISOC may have run with regards to the potential sale of the .ORG registry prior to September 2019,

- **Transaction funding and its affect if any on the financial state of PIR and its ability to operate a secure and stable registry.**

- The purchase price as publicly announced is $1.135 billion, and will be financed through a combination of cash from equity partners and a $360 million term loan facility entered into by lenders to Purpose Domains Direct, LLC, the borrower and post-transaction direct parent of PIR. These lenders are established U.S. financial institutions, each of which has in excess of $50 billion in assets under management and none of which is affiliated with Ethos Capital. The final purchase price, taking into account standard adjustments and the payment of Transaction-related fees and expenses, all as set forth in the Equity Purchase Agreement, will be paid to CGF, the seller of the membership interests in PIR. ISOC is the sole member of CGF and will use the funds in furtherance its mission to support an open, globally-connected, secure, and trustworthy Internet.
- PIR has sufficient operational cash flow to service the loan incurred by Purpose Domains Direct, LLC, to pay taxes, and to continue to operate a secure and stable registry and fund its recently announced initiatives to support the .ORG community. As you may know, PIR has contributed tens of millions of dollars annually to ISOC (contributions it will no longer be making to ISOC after the Transaction) in amounts more than twice that which will be required to service the debt obligations.
- PIR anticipates that the shift in tax status from a non-profit entity to a for-profit entity will not adversely impact PIR's finances or its ability to provide registry services.

- **Financial Information demonstrating that PIR will maintain sufficient financial resources to fund operations:**

- PIR is providing its most recent audited financial statement for 2018, along with its IRS Form 990.[8] This information more than demonstrates that PIR has sufficient financial resources to fund operations post-Transaction. Given PIR's longevity and its known and solid financial performance over the past 16 years in operating the .ORG registry, information regarding an equity investor does not seem pertinent. PIR does not rely on its current equity owner for funding, and given its base of consistent revenue generation, will similarly not require funding post-Transaction. As demonstrated through the Form 990 (and each of PIR's previously Form 990s, all of

[8] https://thenew.org/org-people/about-pir/resources/990-annual-report/

which are publicly available), PIR's revenue more than sustains its operations, a fact which will not change following the Transaction.

- We note that the registry operator is not changing in this indirect change of control per ICANN's requirements.[9] PIR remains the registry operator and has the proven financial wherewithal to ensure the registry remains secure, reliable, and stable. Further, as illustrated in the documents provided herein, PIR is under no burdensome financial restrictions that would hinder its financial ability to continue to securely operate its registries. The amounts PIR currently contributes to ISOC will more than cover any debt obligations and taxes, and leave a substantial amount to invest in the growth of .ORG.

- **Any on-going litigation.**

- To PIR's knowledge, there are no ongoing transaction-related litigation matters involving the transaction.

- **Former directors, officers or employees of ICANN that are or have been involved in, have advised on or otherwise have an interest in the transaction.**

- Nora Abusitta-Ouri currently serves as the Chief Purpose Officer of Ethos Capital. Allen Grogan and Fadi Chehade are acting as advisors to Ethos Capital. Each of them is a former ICANN officer, and Fadi Chehade is a former ICANN Board member as well.

- Joe Abley is the current CTO of PIR, and former Director of DNS Operations at ICANN. Suzanne Woolf is a Senior Director at PIR and is a former ICANN Board member.

- **Current directors, officers or employees of ICANN, if any, that are or have been involved in, have advised on or otherwise have an interest in the transaction.**

- None.

- **Critical registry functions of the registry.**

- There will be no change to any of the critical functions of the registry. Afilias will continue to serve as PIR's back-end registry service provider and DNS provider for all of its TLDs. Iron Mountain will continue to act as PIR's escrow agent.

- **Programs or initiatives to promote/protect the .org community. ISOC/PIR's response to community interest.**

[9] https://www.icann.org/en/system/files/files/change-of-control-guide-13dec17-en.pdf

- PIR and Ethos Capital hosted a webinar on December 19, 2019 to discuss safeguards and controls that will be implemented for the .ORG Community upon consummation of the Transaction, including a PIR Stewardship Council, a commitment to anchor PIR in a Public Benefit LLC, and a commitment on domain registration pricing codified in a Certificate of Formation. A copy of the slides from that webinar are provided, and the recording can be accessed here: https://www.pscp.tv/w/1zqKVElpoXWxB
- More information on Ethos' commitment to protecting the .ORG community can be found here: https://www keypointsabout org/blog/strengthening-org-for-the-future

- **Criteria of evaluation used by ISOC; availability of Verisign endowment.**

- PIR was informed by ISOC that it did not exclusively apply the 2002 ICANN assessment criteria for new gTLD applications, because several conditions in the registry environment have changed since then, and many of the criteria do not in fact apply to a fully functioning registry operator. PIR believes, and has been informed that ISOC also believes, that applicable criteria from 2002 are met by the proposed Transaction in the following ways:

  • Ethos Capital is well-positioned to preserve a stable, well-functioning .ORG registry. ISOC believes Ethos Capital plans to invest in PIR as evidenced by the fact they are paying a significant premium for PIR in order to be able to do so. Ethos Capital has announced that they plan to make no short-term changes to PIR's registry management, and have committed to maintaining existing relationships and agreements.

  • PIR's ability to comply with ICANN-developed policies remains unchanged.

  • Ethos Capital's involvement will increase competition for registration services, because Ethos Capital is another company joining the marketplace with the intent to offer enhanced services to the market. Ethos Capital intends to offer the market high- quality, competitive registry services with an attractive customer value proposition, as PIR has throughout its history.

  • The Transaction represents a commitment to differentiation of the .ORG TLD, and other TLDs that PIR operates, from the rest of the TLD marketplace. That appears to us to be the value in which Ethos Capital wishes to invest.

  • Over the years, PIR has adopted mechanisms for promoting their registries operation in a manner that is responsive to the needs, concerns, and views of the relevant Internet user community, such as the PIR Advisory Council. Those mechanisms were part of what Ethos Capital seemed to desire in PIR, and they have announced investment in such mechanisms.

- There was no requirement in the 2002 process that the .ORG Registry Operator be a non-profit itself.

- No funds remain available for use from the Verisign endowment.

- **Cross-ownership interests in registrars and/or registrar resellers.**

- This transaction will not trigger any cross-ownership for purposes of Section 2.9(b) of the Registry Agreement, i.e., PIR will not as a result of this transaction become an Affiliate or reseller of any ICANN accredited registrar.

Summary

PIR, ISOC, and Ethos Capital would like to take this opportunity to assure the .ORG community that there are no agreements in place pursuant to which we anticipate control being granted to any other entity or individual, and there are no springing rights that would be triggered by any future event that would make any minority investor a majority investor.

We commit to maintaining as much transparency as one might reasonably expect, consistent with the principles set forth in ICANN's DIDP.

EX. RE-15

Los Angeles Headquarters
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USA
+1 310 301 5800
+1 310 823 8649

9 December 2019

Andrew Sullivan
President and CEO, ISOC
Email: Contact Information Redacted

Jon Nevett
CEO, PIR
Email: Contact Information Redacted

Subject: Transparency

Dear Andrew and Jon:

We are writing regarding Public Interest Registry's (PIR) 14 November 2019 notification relating to the proposed acquisition of PIR (the "Request"). As we are sending PIR a detailed request for additional information today, we wanted to encourage you to answer these questions fully and as transparently as possible.

As you are well aware, transparency is a cornerstone of ICANN and how ICANN acts to protect the public interest while performing its role. In light of the level of interest in the recently announced acquisition of PIR, both within the ICANN community and more generally, we continue to believe that it is critical that your Request, and the questions and answers in follow up to the Request, and any other related materials, be made public.

While PIR has previously declined our request to publish the Request, we urge you to reconsider. We also think there would be great value for us to publish the questions that you are asked and your answers to those questions. We will of course provide you with the opportunity to redact portions of the documents that you believe contain personally identifiable information before posting and renew that offer here.

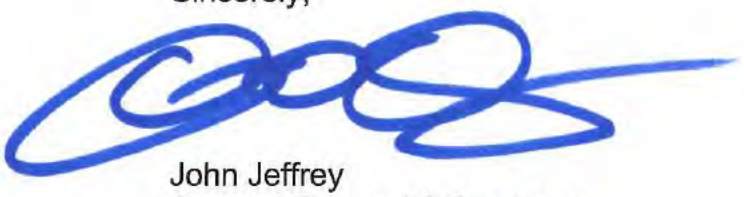
As you, Andrew, ISOC's CEO stated publicly during a webcast meeting in which you participated on 5 December 2019, you are uncomfortable with the lack of transparency. Many of us watching the communications on this transaction are also uncomfortable.

In sum, we again reiterate our belief that it is imperative that you commit to completing this process in an open and transparent manner, starting with publishing the Request

and related material, and allowing us to publish our questions to you, and your full responses.

We look forward to hearing from you on this matter, as soon as possible. Please let us know if you would like to discuss.

Sincerely,



John Jeffrey
General Counsel & Secretary

cc: Brian Cimbolic, VP, General Counsel, PIR
Email: Contact Information Redacted

EX. RE-16

Public Engagement

PIR PUBLIC ENGAGEMENT PROCESS ON PIC AND STEWARDSHIP COUNCIL

Purpose: Public Interest Registry (PIR) is soliciting .ORG Community engagement and feedback regarding its proposed safeguards for the Community; specifically, the legally binding commitments contained in the Public Interest Commitments ("PIC"), the .ORG Stewardship Council and anchoring PIR in a Public Benefit LLC framework.

Background: On Friday, February 21, Ethos voluntarily proposed adopting a legally binding addition to PIR's Registry Agreement in the form of a PIC following the closing of the proposed sale of PIR to address concerns voiced by some in the .ORG Community. The PIC would enforce price limits, establish binding safeguards protecting free expression and use of personal data, create a Stewardship Council and a Community Enablement Fund and require annual reports assessing PIR's compliance with the PIC and the ways it serves .ORG registrants.

As part of our continued outreach, we would like to hear from the Community about the specific provisions of the Public Interest

Commitment and proposed Stewardship Council Charter, which is the body that will have binding veto power on policies related to free expression and use of registrant and user data.

Public Engagement Process: To that end, we are soliciting public engagement on both documents. This public engagement period will be open from Tuesday, March 3 and will close on Friday, March 13, 2020 at 12pET (1600 UTC). After this engagement period, PIR will provide a summary of input received shortly after the close of this public engagement period as well as all of the underlying submissions received.

In addition to the full texts of the PIC and Stewardship Council Charter, you can find the full suite of FAQs provided over the last few months at keypointsabout.org.

---

* INDICATES REQUIRED FIELDS

Name *

First Name

Last Name

Organization:
(optional)

Email *

1. In response to concerns expressed by some .ORG registrants and

community members, Ethos has voluntary proposed to add an amendment to PIR's .ORG Registry Agreement with ICANN in the form of a PIC (Public Interest Commitment) following the closing of the proposed sale of PIR. Do you think that such a contractual amendment enforceable by ICANN and third parties is the appropriate mechanism to address stakeholder concerns? If yes, why? If no, why not? *

2. The PIC includes a provision related to maintaining the affordability of .ORG domain names. Do you think a 10% annual price cap will ensure predictability? If yes, why? If no, why not? *

3. The PIC includes a provision to create a .ORG Stewardship Council. The majority of TLDs do not have formal mechanisms or processes for registrants and stakeholders to provide input to registries about the policies of a TLD, such as the .ORG anti-abuse policy. Do you think .ORG needs such a mechanism? If yes, why? If no, why not? If yes, does a stewardship council meet that need, why or why not? *

4. The PIC includes a provision to create a Community Enablement Fund to support activities that benefit .ORG registrants. Do you support the creation of such a fund? If yes, why? If no, why not? The .ORG Stewardship Council will provide recommendations and advice on how to allocate the fund. Do you support this role for the Council? If yes, why? If no, why not? *

5. The PIC includes a provision that will require PIR to publish an annual compliance report with the PIC commitments and the ways in which PIR pursued activities that benefit .ORG registrants. Do you think annual reports are useful tools for assessing compliance? If yes, why? If no, why not? Do you think annual reports help with transparency? If yes, why? If no, why not? *

6. In addition to the PIC, Ethos has publicly posted the charter of the .ORG Stewardship Council. Do you support the charter as currently drafted? If yes, why? If no, why not? If no, what changes would you want to see in the charter. *

7. It has been proposed that PIR be part of a Public Benefit LLC framework, which would allow the board to consider social, economic and environmental considerations without violating its fiduciary duty to act. Do you support PIR reorganizing within a Public Benefit LLC framework as opposed to a for-profit entity. If yes, why? If no, why not? *

8. Do you have any additional input or feedback on either the PIC or the .ORG Stewardship Council? If so, please provide it below. *

PIR is collecting information via this webform to conduct a transparent engagement comment process. PIR will publish a report of all input received associating the poster's name and/or organization with their feedback but will not publicize email addresses. PIR will only use the information submitted for this public engagement process. *

☐ I consent to my name and organization (if applicable) to be published with my comments.

Submit

KEYPOINTSABOUT.ORG

EX. RE-17

How Our Public Interest Commitment Ensures a Bright Future for .ORG

By **Nora Abusitta-Ouri**

Feb 28, 2020 6:53 AM PST | Comments: 0 | Views: 2,944 Comment | Print

The discussion about the future of the .ORG domain registry has been partly rooted in stewardship. Who will guide the Public Interest Registry (PIR) so it continues to serve the .ORG community? For those of us at Ethos Capital, the company acquiring PIR, this has been a central focus.

We understand that owning PIR makes us stewards of an essential part of the fabric of the Internet. The .ORG domain is bigger than the 10 million domain names registered. It is both a symbol of many non-profit organizations on the Internet and a means by which millions of organizations operate, communicate, fundraise, and provide services to those in need. For that reason, stewardship of .ORG is paramount.

Recognizing that the community valued enforceable assurances, Ethos has taken a powerful additional step: we've voluntarily proposed to add a Public Interest Commitment amendment, or a "PIC," to the ICANN Registry Agreement. This will formalize our commitments, making them legally binding and enforceable by ICANN and also by members of the community through the Public Interest Commitments Dispute Resolution Procedure, or "PICDRP." Public Interest Commitments were introduced in the ICANN community in 2013 as new domain names were created. Ethos listened to the .ORG community's request for strong enforceability measures to ensure that we would be held accountable to our promises — and we took action.

With this Public Interest Commitment, Ethos undertakes an explicit contractual obligation to limit price increases to no more than 10% per year on average, and we are committed to maintaining prices within this framework for 8 years from the start of the current Registry Agreement. One of the key questions raised about the sale was whether Ethos, as a private company, would dramatically increase prices. We had made numerous prior announcements articulating this commitment, but the PIC makes this ironclad and legally binding. The .ORG community will be able to judge us by our track record, and our performance will demonstrate to everyone that claims put forward by some of wild and indiscriminate price increases will prove to be unfounded.

But stewardship of .ORG goes beyond prices. The PIC will also dictate how PIR looks at .ORG's future and the decisions it makes that could affect the overall .ORG community. Ethos and PIR have always believed the community needed to have a strong voice in shaping .ORG's future. For this reason, the .ORG Stewardship Council will have a specific oversight mandate on PIR's policies regarding freedom of expression and the protection of customer information.

In addition to describing the role of the .ORG Stewardship Council within the PIC, Ethos also publicly released the .ORG Stewardship Council Charter outlining concrete principles and protocols that will govern the administration and operation of the Council. This includes overseeing a Community Enablement Fund — which is expected to receive a minimum of $10 million over the remaining life of the current Registry Agreement — which will finance existing and new initiatives serving the .ORG community, including the .ORG Impact Awards and other meaningful educational and outreach programs. Having a Council of this nature will be important in shaping .ORG's future for years to come.

It's fair for anyone who is passionate about .ORG to weigh what all this means. How are .ORG's prospects for its future different than they were prior to news of the sale? Let's take stock:

The .ORG community will now have a contractual guarantee that limits price increases. A new independent .ORG Stewardship Council, composed of representatives and leaders from the community, will play an instrumental role in ensuring that the needs of all .ORG registrants and users remain central to PIR. As part of the PIC, PIR will also be required to release an annual report that assesses compliance with the PIC commitments. And additional funding will be invested in philanthropic initiatives to benefit non-profit organizations and the overall community.

That last point is worth underscoring. Up until now, the revenue from .ORG domain name sales went to the Internet Society to fund a myriad of initiatives. With the sale, the Internet Society will have an endowment to continue powering the organization's mission of an Internet that is open, globally-connected, trustworthy and secure. But moving forward, profits from .ORG can now go to the benefit of non-profits and .ORG users.

What does .ORG need additional investment for? We can expand .ORG's presence in new markets, which takes time and capital, because broadening the .ORG community benefits everyone. And Ethos will invest in helping identify the products and services that can further build the online presence of mission-driven organizations around the world. This can enable development of new products and services to strengthen and grow the .ORG brand, enabling .ORG registrants to do what they do best; feed, shelter, heal, educate and inspire all of us.

The commitments that Ethos and PIR are making towards strengthening .ORG will have a positive impact on the millions of non-profit, mission-driven and other organizations and individuals who rely on it to benefit the public. They will provide certainty to .ORG users about price, future operations, and the security and stability of a critical piece of the Internet infrastructure. Broadly, they will strengthen .ORG for the future.

Ethos and PIR will continue to listen to the community before, during and after the sale. We're glad we had the opportunity to provide more clarity on these initiatives through the community discussion we held yesterday, and look forward to our upcoming community events including a more thorough discussion around the PIC being held next Tuesday, March 3. More information about this event can be found here. By combining good stewardship with private investment, .ORG will thrive.

By Nora Abusitta-Ouri, Chief Purpose Officer at Ethos Capital

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EX. RE-18

JONES DAY

555 CALIFORNIA STREET, 26TH FLOOR • SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE: +1.415.626.3939 • FACSIMILE: +1.415.875.5700

DIRECT NUMBER: (415) 875-5850
JRABKIN@JONESDAY.COM

January 31, 2020

VIA EMAIL

Sandra I. Barrientos
Deputy Attorney General
State of California
Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Re: In the Investigation of the Proposed Sale of PIR to Ethos Capital
Matter ID: LA2020500139

Dear Sandra:

I write in response to your January 23, 2020 letter to the Board of Directors of ICANN. As we discussed in our January 28, 2020 meeting and January 29, 2020 telephone call, information responsive to some of your January 23 requests is publicly available on ICANN's website. To facilitate your review, I write to provide link citations to identify that information.

Please note that while some of these documents are self-explanatory, others may require further information or explanation. We are happy to provide additional information in due course. Likewise, while we have endeavored to give you a broad overview of responsive, publicly available information, there may be additional public information responsive to your requests. To the extent we identify such materials, we will supplement this list of links in a future letter.

Request	Citation to Responsive Materials
1. All Registry Agreements entered into by ICANN and PIR (and/or Internet Society (ISOC)), including any amendments, extensions, or other documents regarding the agreements	https://www.icann.org/resources/agreement/org-archive-1999-11-10-en https://www.icann.org/resources/agreement/org-2019-06-30-en

Request	Citation to Responsive Materials
2. Any and all Notices of Indirect Change [of] Control and Entity Conversion from PIR and/or ISOC to ICANN	https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf
3. All correspondence, including emails, between PIR and/or ISOC and ICANN regarding the proposed acquisition of PIR by Ethos Capital	https://www.icann.org/en/system/files/correspondence/marby-to-sullivan-14nov19-en.pdf https://www.icann.org/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf https://www.icann.org/en/system/files/correspondence/sullivan-to-marby-16nov19-en.pdf https://www.icann.org/en/system/files/correspondence/marby-to-sullivan-18nov19-en.pdf https://www.icann.org/en/system/files/correspondence/sullivan-to-marby-19nov19-en.pdf https://www.icann.org/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf https://www.icann.org/en/system/files/correspondence/namazi-to-nevett-17jan20-en.pdf https://www.icann.org/en/system/files/files/icann-to-pir-17jan20-en.pdf https://www.icann.org/en/system/files/correspondence/sullivan-et-al-to-marby-et-al-22jan20-en.pdf https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-30jan20-en.pdf

Request	Citation to Responsive Materials
4. All correspondence, including email correspondence, between ICANN and Ethos Capital regarding the proposed acquisition of PIR by Ethos Capital	https://www.icann.org/en/system/files/correspondence/sullivan-et-al-to-marby-et-al-22jan20-en.pdf
5. PIR's unredacted response to ICANN's request for additional information regarding the acquisition of PIR by Ethos Capital	https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf[1]

[1] The redacted version of PIR's response to ICANN's request for additional information regarding the acquisition of PIR by Ethos Capital is available at this link. ICANN intends to produce the nonpublic version of this document following its compliance with its contractual obligations to PIR.

Request	Citation to Responsive Materials
12. Minutes of the proceedings of corporate members, board of directors, board committees, and any board resolutions regarding PIR and/or ISOC. This request includes any information provided to board members by ICANN	https://www.icann.org/resources/board-material/prelim-report-2002-10-14-en https://www.icann.org/resources/board-material/prelim-report-2003-08-19-en https://www.icann.org/resources/board-material/prelim-report-2004-02-18-en https://www.icann.org/resources/board-material/resolutions-2004-06-29-en https://www.icann.org/resources/board-material/minutes-2006-11-22-en https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113176 https://www.icann.org/resources/board-material/resolutions-2013-08-22-en#2.c https://www.icann.org/resources/board-material/resolutions-2014-09-09-en#3.a *See also* https://www.icann.org/resources/pages/documents-2014-03-24-en
23. Did ICANN approve a removal of the price cap for registration fees for .org domains?	*See* https://www.icann.org/resources/agreement/org-2019-06-30-en
31. In addition to PIR, who else has ICANN contracted with to provide registration services for .org domains? Identify the time periods for all agreements and the reason these were terminated.	*See* https://www.icann.org/resources/agreement/org-archive-1999-11-10-en

Request	Citation to Responsive Materials
32. In removing the price cap for .org domains, did ICANN provide any restrictions and/or limitations as to any fee increases to register .org domains?	*See* https://www.icann.org/resources/agreement/org-2019-06-30-en
34. Provide the names and contact information of all of ICANN's members of its Board of Directors, including all non-voting members	https://www.icann.org/resources/pages/board-of-directors
35. Your conflict of interest policy	https://www.icann.org/resources/pages/governance/coi-en

Please feel free to contact me with any questions or concerns at jrabkin@jonesday.com or (415) 875-5850.

Very truly yours,

/s/ Jeffrey Rabkin

Jeffrey Rabkin

EX. RE-19

UNCITRAL | UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments as adopted in 2006

UNITED NATIONS

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:

UNCITRAL secretariat, Vienna International Centre,
P.O. Box 500, 1400 Vienna, Austria

Telephone: (+43-1) 26060-4060
Telefax: (+43-1) 26060-5813
Internet: http//www.uncitral.org
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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006

UNITED NATIONS
Vienna, 2008

Contents

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)*(d)*, the requirements in paragraphs (1)*(a)* and *(b)* of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)*(a)*, is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

EX. RELA-1

632 F.3d 1127
United States Court of Appeals,
Ninth Circuit.

ALLIANCE FOR THE WILD ROCKIES; Native Ecosystems Council, Plaintiffs–Appellants,
v.
Jane L. COTTRELL, in her official capacity as acting Regional Forester; United States Forest Service, an agency of the United States Department of Agriculture, Defendants–Appellees.

No. 09–35756.
|
Argued and Submitted Feb. 2, 2010.
|
Filed Jan. 25, 2011.

Synopsis

Background: Environmental advocacy group brought suit against United States Forest Service, seeking to enjoin logging project and timber sales. The United States District Court for the District of Montana, Donald W. Molloy, J., denied plaintiff's motion for preliminary injunction. Plaintiff appealed.

Holdings: The Court of Appeals, W. Fletcher, Circuit Judge, held that:

serious questions going to merits and hardship balance that tips sharply toward plaintiff can support issuance of preliminary injunction;

there was likelihood of irreparable harm;

there were at least serious questions on the merits;

balance of hardships tipped sharply in plaintiff's favor; and

public interest favored preliminary injunction.

Reversed and remanded.

Mosman, District Judge, sitting by designation, filed concurring opinion.

Opinion, 613 F.3d 960, amended and superseded.

Opinion, 622 F.3d 1045, withdrawn and superseded on denial of rehearing en banc.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

***1128** Matthew Kellogg Bishop; Western Environmental Law Center, Helena, MT, Susan Jane McKibben Brown, Western Environmental Law Center, Portland, OR, for the appellants.

John Emad Arbab, U.S. Department of Justice, Washington, D.C., Mark Steger Smith, Office of the U.S. Attorney, Billings, MT, for the appellee.

Appeal from the United States District Court for the District of Montana, Donald W. Molloy,

District Judge, Presiding. D.C. No. 9:09–cv–00107–DWM.

Before: WILLIAM A. FLETCHER and JOHNNIE B. RAWLINSON, Circuit Judges, and MICHAEL W. MOSMAN,* District Judge.

* The Honorable Michael W. Mosman, United States District Judge for the District of Oregon, sitting by designation.

Opinion by Judge WILLIAM A. FLETCHER; Concurrence by Judge MOSMAN.

ORDER

This Court's opinion, filed September 22, 2010, and published at 622 F.3d 1045 (9th Circuit 2010), is withdrawn and replaced by the attached opinion and concurrence.

With this filing, the panel has voted unanimously to deny Appellees' petition for rehearing. Judge W. Fletcher and Judge Rawlinson have voted to deny the petition for rehearing en banc, and Judge Mosman so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35. The Appellees' petition for rehearing and petition for rehearing en banc are **DENIED.**

No further petitions for rehearing will be entertained.

W. FLETCHER, Circuit Judge:

OPINION

Alliance for the Wild Rockies ("AWR") appeals the district court's denial of its motion for a preliminary injunction. AWR seeks to enjoin a timber salvage sale proposed by the United States Forest Service. Citing *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), the district court held that AWR had not shown the requisite likelihood of irreparable injury and success on the merits. After hearing oral argument, we issued an order reversing the district court and directing it to issue the preliminary injunction. *Alliance for* ***1129** *Wild Rockies v. Cottrell,* 385 Fed.Appx. 683 (9th Cir.2010). In this opinion, we now set forth the reasons for our reversal, and we take this opportunity to clarify an aspect of the post-*Winter* standard for a preliminary injunction.

I. Background

In August and September of 2007, the Rat Creek Wildfire burned about 27,000 acres in the Beaverhead–Deerlodge National Forest in Montana. On July 1, 2009, almost two years later, the Chief Forester of the Forest Service made an Emergency Situation Determination for the Rat Creek Salvage Project ("the Project"). The Emergency Situation Determination permitted the immediate commencement of the Project's logging without any of the delays that

might have resulted from the Forest Service's administrative appeals process.

The Project permits salvage logging of trees on approximately 1,652 of the 27,000 acres that were burned. The logging will take place (and to some degree has already taken place) on thirty-five units of land ranging from 3 to 320 acres in size. The Forest Service describes the purpose of the Project as follows:

> ... to recover and utilize timber from trees that are dead or dying as a result of the Rat Creek Wildfire or forest insects and disease and reforest the harvested units with healthy trees appropriate for the site. The trees would supply wood to the forest products industry.

A further purpose is to cut trees infested with dwarf mistletoe to prevent transmission to new trees.

Trees to be cut are those from 4 to 15 inches in diameter at breast height ("dbh") that have died or are likely to die as a direct result of fire or insect attack. The Forest Service has provided species-specific guidelines for determining likelihood of mortality. For example, Douglas-fir trees from 4 to 15 inches dbh are to be logged if less than 40% of the pre-fire live crown remains. Other conifers are to be logged if less than 80% of the pre-fire live crown remains. The severity of insect attacks is to be determined by examining trees for signs such as pitch tubes or boring dust.

Trees that survived the fire but are infected with dwarf mistletoe are to be cut, regardless of size, unless doing so would reduce the number of live trees below the Forest Service's wildlife habitat standard. Uninfested live trees, including those with a dbh larger than 15 inches, are to be cut only if required by safety concerns.

The Project requires construction of 7 miles of temporary roads and reconditioning of about 3 miles of existing roads. After completion of the Project, the temporary roads will be obliterated, and the existing roads will be returned to their current uses, if any.

In April 2009, the Forest Service released an Environmental Assessment ("EA") of the Project for public comment.

On June 15, 2009, the Acting Forest Supervisor for the Beaverhead–Deerlodge National Forest wrote to the Regional Forester requesting that the Chief Forester make an Emergency Situation Determination ("ESD") in connection with the Rat Creek Project. The ESD request stated that the emergency resulted from "rapid deterioration and decay of trees proposed for salvage harvest," noting that "[t]rees that have died or are dying from secondary fire effects are rapidly losing their value and merchantable volume." The request stated that immediate commencement of logging would "prevent substantial economic loss to the Federal Government." The sites to be logged are typically accessible to loggers for only four to five months out of the year due to

heavy snowfalls. ***1130** The request stated that the logging needed to commence immediately so that it could be completed before winter arrived.

The request stated further:

> An objective for recovering the value of the fire-killed trees is to respond to local, regional, and national needs for commercial timber products. Local economies in Southwest Montana have developed with natural resource utilization as the foundation. This economic structure continues today and is becoming stressed and increasingly unstable due to higher energy prices, and reduced supply of timber from National Forest System lands. As markets decline and harvest activities on private lands decrease, the timber industry in Montana increasingly depends on National Forest System timber supply as an essential element to keep their mills operational.

On June 22, 2009, the Regional Forester forwarded the request for an ESD to the Chief Forester, noting that a "delay in implementation of activities included in the request would result in substantial loss of economic value to the Federal Government." On July 1, 2009, the Chief Forester granted the request for an ESD. She wrote:

> [A] delay to implementing the project until after any administrative appeals have been reviewed and answered will result in a substantial loss of economic value to the government. Such a delay would push the award of timber sale contracts for the hazard tree and other salvage back to late October 2009, with winter access limitations delaying most operations until summer of 2010. By that time further deterioration of the affected trees will have resulted in a projected loss of receipts to the government of as much as $16,000 and significantly increased the likelihood of receiving no bids. An absence of bids would push the potential loss to the government to $70,000 and eliminate an opportunity to accomplish Douglas-fir planting and dwarf mistletoe control objectives.
>
> In evaluating whether an emergency situation exists with this project, I also took note of the importance this project has to the local economy of southwest Montana. I understand the wood products yielded by this project will be a critical contributor to helping keep local mills operational.

On July 22, 2009, the Forest Service issued the final Environmental Assessment ("EA") and a Decision Notice and Finding of No Significant Impact ("DN/FONSI"). The Forest Service concluded that the Project would not have a significant effect on the quality of the human environment and that an Environmental Impact Statement ("EIS") was therefore not required. The Forest Service then initiated a

bidding process for the Project. On July 30, 2009, Barry Smith Logging was declared the highest bidder.

Plaintiff AWR filed suit in federal district court alleging violations of the Appeals Reform Act ("ARA"), the National Forest Management Act ("NFMA"), and the National Environmental Protection Act ("NEPA"). In a brief order entered on August 14, 2009, the district court denied AWR's request for a preliminary injunction. After quoting *Winter,* the court wrote, "After reviewing the parties' filings, the Court is convinced Plaintiffs do not show a likelihood of success on the merits, nor that irreparable injury is likely in the absence of an injunction. This determination prevents the issuance of a preliminary injunction at this stage of the proceedings." The court did not describe or analyze the merits of AWR's claims and did not describe or analyze the harm alleged ***1131** by AWR. The court denied AWR's motion for a stay and injunction pending appeal to this court.

Barry Smith Logging began work on the Project on August 21, 2009. The parties indicated at oral argument that approximately 49% of the planned logging was completed before winter conditions halted operations.

AWR timely appealed the district court's denial of its request for a preliminary injunction. Because a significant amount of the Project remains to be completed, this appeal is not moot.

II. Standard of Review

We review a district court's denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair,* 537 F.3d 981, 986 (9th Cir.2008) (en banc). An abuse of discretion will be found if the district court based its decision "on an erroneous legal standard or clearly erroneous finding of fact." *Id.* "We review conclusions of law de novo and findings of fact for clear error." *Id.* at 986–87. We will not reverse the district court where it "got the law right," even if we "would have arrived at a different result," so long as the district court did not clearly err in its factual determinations. *Id.* at 987 (internal citations omitted).

III. Discussion

A. "Sliding Scale" and "Serious Questions" after *Winter*

In *Winter,* the Supreme Court disagreed with one aspect of this circuit's approach to preliminary injunctions. We had held that the "possibility" of irreparable harm was sufficient, in some circumstances, to justify a preliminary injunction. *Winter* explicitly rejected that approach. *Winter,* 129 S.Ct. at 375–76. Under *Winter,* plaintiffs must establish that irreparable harm is *likely,* not just possible, in order to obtain a preliminary injunction. *Id.* The Court wrote, "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. "A preliminary

injunction is an extraordinary remedy never awarded as of right." *Id.* at 376.

The majority opinion in *Winter* did not, however, explicitly discuss the continuing validity of the "sliding scale" approach to preliminary injunctions employed by this circuit and others. Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits. *See, e.g., Clear Channel Outdoor, Inc. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir.2003). This circuit has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." *Id.* That test was described in this circuit as one alternative on a continuum. *See, e.g., Lands Council,* 537 F.3d at 987. The test at issue here has often been referred to as the "serious questions" test. We will so refer to it as well.

The parties in this case have devoted substantial portions of their argument to the question of the continuing validity of the "serious questions" approach to preliminary injunctions after *Winter.* For the reasons that follow, we hold that the "serious ***1132** questions" approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.

Justice Ginsburg explicitly noted in her dissent in *Winter* that the "Court has never rejected [the sliding scale] formulation, and I do not believe it does so today." *Winter,* 129 S.Ct. at 392 (Ginsburg, J., dissenting). Justice Ginsburg emphasized the importance of the sliding scale approach, writing "[f]lexibility is the hallmark of equity jurisdiction." *Id.* at 391. As Justice Ginsburg noted, the majority opinion in *Winter* did not disapprove the sliding scale approach. Indeed, some of its language suggests that the approach survives. For example, the Court implied that balancing is appropriate when it indicated that "particular regard" should be paid to "the public consequences in employing the extraordinary remedy of injunction." *Winter,* 129 S.Ct. at 376–77.

Our circuit has not yet directly discussed in a published opinion the post-*Winter* viability of the sliding scale approach. In our first post-*Winter* opinion, we recited the *Winter* four-part test and then wrote, "To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir.2009). We discussed the holding of *Winter* that a preliminary injunction requires a showing of likely irreparable injury, but we did not discuss whether some version of the sliding scale test survived. *Id.*; *see also Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1127 (9th Cir.2009) ("In *Winter,* the Supreme Court definitively refuted our 'possibility of irreparable injury' standard...."); *McDermott v. Ampersand Publ'g, LLC,* 593 F.3d 950, 957 (9th Cir.2010) (ultimately

applying a more stringent standard in light of First Amendment interests). In *National Meat Association v. Brown,* 599 F.3d 1093, 1097 n. 3 (9th Cir.2010), we wrote, "The district court applied our pre-*Winter* 'sliding scale' approach, which required only a 'possibility of irreparable injury' if plaintiff is likely to succeed on the merits." We then held that, although such an error might warrant remand, it was unnecessary in that case because all elements of the *Winter* test had been met. *Id.*

In *Johnson v. Couturier,* 572 F.3d 1067, 1084 (9th Cir.2009), the district court had applied the "serious questions" test and held that "there are serious questions on the merits and the balance of hardships tips sharply in favor of plaintiff." The defendant objected that the district court had failed to "consider the element of irreparable harm." *Id.* We noted that the district court's approach was "questionable post-*Winter*[ ]," *id.,* but affirmed because the record supported a finding of a "likelihood of irreparable harm," *id.* at 1085.

Our other post-*Winter* published opinions are largely unilluminating on the question now before us. Some address wholly separate aspects of *Winter. See, e.g., Sierra Forest Legacy v. Rey,* 577 F.3d 1015, 1022–23 (9th Cir.2009) (emphasizing that *Winter* requires consideration of narrow injunctive relief). Others simply recite the *Winter* test without elaboration. *See, e.g., S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior,* 588 F.3d 718, 721 (9th Cir.2009); *Klein v. City of San Clemente,* 584 F.3d 1196, 1199–1200 (9th Cir.2009).

Three other circuits have directly confronted the question whether some version of a sliding scale test has survived *Winter.* They have split. The Fourth Circuit has ***1133** held that the sliding scale approach is now invalid. *Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 575 F.3d 342, 347 (4th Cir.2009) (holding that the circuit's prior test, which permitted "flexible interplay" among the elements, "may no longer be applied" after *Winter*), *vacated on other grounds,* —— U.S. ——, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). The Seventh and Second Circuits have held to the contrary.

The Seventh Circuit was the first to hold that the sliding scale test survives *Winter,* and that a weaker claim on the merits can still justify a preliminary injunction depending on the amount of "net harm" that could be prevented by the injunction. Citing *Winter,* Judge Easterbrook wrote:

> Irreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the "balance of equities" favors the plaintiff). How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be

> while still supporting some preliminary relief.

Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir.2009) (internal citations omitted).

The Second Circuit decision came down after the Supreme Court had decided two post-*Winter* cases, *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008), and *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). Prior to *Winter*, the Second Circuit had employed a "serious questions" sliding scale test:

> For the last five decades, this circuit has required a party seeking a preliminary injunction to show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly toward the party requesting the preliminary relief. The "serious questions" standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction. Because the moving party must not only show that there are "serious questions" going to the merits, but must additionally establish that "the balance of hardships tips *decidedly* " in its favor, its overall burden is no lighter than the one it bears under the "likelihood of success" standard.

Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir.2010) (emphasis in original; internal quotations omitted).

Judge Walker explained why the Second Circuit's "serious questions" test survived *Winter:*

> The value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation.
>
> ....
>
> The Supreme Court's recent opinions ... have not undermined its approval of the more flexible approach.... None of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict "likelihood" [of success] requirement in cases that warrant it.
>
> ....
>
> ***1134** If the Supreme Court had meant for *Munaf*, *Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself.... We have found no command from the Supreme Court that would foreclose the application of our established "serious questions" standard as a means of assessing a movant's likelihood of success on the

> merits.... Thus, we hold that our venerable standard for assessing a movant's probability of success on the merits remains valid....

Id. at 35–38.

Dicta in two other circuits suggests that they will follow the Seventh and Second Circuits in preserving the flexibility of the sliding scale approach. The Tenth Circuit has a "modified test," similar to the "serious questions" test, under which "a movant need only show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.' " *RoDa Drilling Co. v. Siegal,* 552 F.3d 1203, 1208–09 n. 3 (10th Cir.2009) (quoting *Walmer v. U.S. Dep't of Def.,* 52 F.3d 851, 854 (10th Cir.1995)). Since *Winter,* the Tenth Circuit has mentioned its "modified test" but indicated that it was not applicable to the case before the court. *Id.* The D.C. Circuit has touched upon this issue, noting that *Winter* "does not squarely discuss whether the four factors are to be balanced on a sliding scale." *Davis v. Pension Benefit Guar. Corp.,* 571 F.3d 1288, 1292 (D.C.Cir.2009).

District courts in our circuit have grappled with the question of the sliding scale approach's validity after *Winter.* District Judge Alsup's analysis bears repeating:

> *Winter* concerned the end of the sliding scale where the weaker factor involves injury, not the end of the scale where the weaker factor involves the merits (but the injury is clear and the equities tip in favor of relief). *Winter* can, however, be construed to hold that the moving party must *always* show a probability of success on the merits (as well as a probability of injury).
>
> ....
>
> It would be most unfortunate if the Supreme Court or the Ninth Circuit had eliminated the longstanding discretion of a district judge to preserve the *status quo* with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least "serious questions" going to the merits are raised....
>
> Can it possibly be that the Supreme Court and Ninth Circuit have taken away the ability of district judges to preserve the *status quo* pending at least some discovery and further hearing on the merits in such cases? This would be such a dramatic reversal in the law that it should be very clearly indicated by appellate courts before a district court concludes that it has no such power.

Save Strawberry Canyon v. Dep't of Energy, No. C 08–03494 WHA, 2009 WL 1098888, at *1–3 (N.D.Cal. Apr.22, 2009) (citing three other district court cases in the Ninth Circuit with similar holdings).

For the reasons identified by our sister circuits and our district courts, we join the Seventh and the Second Circuits in concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter.* In this circuit, the test has been formulated as follows:

> A preliminary injunction is appropriate when a plaintiff demonstrates ... ***1135** that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor.

Lands Council, 537 F.3d at 987 (internal quotations and modification omitted). Of course, plaintiffs must also satisfy the other *Winter* factors. To the extent prior cases applying the "serious questions" test have held that a preliminary injunction may issue where the plaintiff shows only that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor, without satisfying the other two prongs, they are superseded by *Winter,* which requires the plaintiff to make a showing on all four prongs. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (en banc). But the "serious questions" approach survives *Winter* when applied as part of the four-element *Winter* test. That is, "serious questions going to the merits" and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

B. Preliminary Injunction

Because it did not apply the "serious questions" test, the district court made an error of law in denying the preliminary injunction sought by AWR. We conclude that AWR has shown that there is a likelihood of irreparable harm; that there are at least serious questions on the merits concerning the validity of the Forest Service's Emergency Situation Determination; that the balance of hardships tips sharply in its favor; and that the public interest favors a preliminary injunction.

1. Likelihood of Irreparable Harm

Winter tells us that plaintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction. AWR's members use the Beaverhead–Deerlodge National Forest, including the areas subject to logging under the Project, for work and recreational purposes, such as hunting, fishing, hiking, horseback riding, and cross-country skiing. AWR asserts that its members' interests will be irreparably harmed by the Rat Creek Project. In particular, AWR asserts that the Project will harm its members' ability to "view, experience, and utilize" the areas in their undisturbed state.

The Forest Service responds that the Project areas represent only six percent of the acreage damaged by fire. It argues that because AWR members can "view, experience, and utilize" other areas of the forest, including other fire-damaged areas that are not part of the Project, they are not harmed by logging in the Project.

This argument proves too much. Its logical extension is that a plaintiff can never suffer

irreparable injury resulting from environmental harm in a forest area as long as there are other areas of the forest that are not harmed. The Project will prevent the use and enjoyment by AWR members of 1,652 acres of the forest. This is hardly a de minimus injury.

"[T]he Supreme Court has instructed us that '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable.' " *Lands Council,* 537 F.3d at 1004. Of course, this does not mean that "any potential environmental injury" warrants an injunction. *Id.* But actual and irreparable injury, such as AWR articulates here, satisfies the "likelihood of irreparable injury" requirement articulated in *Winter.*

2. Likelihood of Success on the Merits

AWR's strongest argument on the merits is that the Forest Service has violated ***1136** the Appeals Reform Act ("ARA") and its implementing regulations by granting the Emergency Situation Designation ("ESD"). Regulations promulgated under the ARA provide that most Forest Service decisions are appealable through an administrative process. *See* 36 C.F.R. § 215.1 *et seq.;* Forest Service Decisionmaking and Appeals Reform Act, Pub.L. No. 102–381, Title III, § 322, 106 Stat. 1374, 1419–21 (1992). The administrative appeals process would ordinarily be available for the Project at issue in this case. 36 C.F.R. § 215.11(a) (including as appealable decisions those for "projects and activities implementing land and resource management plans ... documented in a Record of Decision (ROD) or Decision Notice (DN)"). If the Forest Service decision had been appealed administratively, there would have been an opportunity for members of the public, including plaintiffs, to object to the Project on various grounds. Implementation would then have been delayed until at least "the 15th business day following the date of appeal disposition." 36 C.F.R. § 215.9(b).

The regulations provide an exception to the appeals process when the Forest Service makes an ESD. An ESD allows work to begin on a project as soon as notice of the otherwise appealable project decision is appropriately published. 36 C.F.R. § 215.10(c). The regulations define an Emergency Situation as "[a] situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed." 36 C.F.R. § 215.2.

In granting the ESD for this Project, the Chief Forester considered three factors: (1) the loss of receipts to the government due to delayed commencement of the Project; (2) the potential loss of an "opportunity to accomplish Douglas-fir planting and dwarf mistletoe control objectives"; and (3) the "importance this project has to the local economy of southwest Montana." We hold that, at a minimum, there are "serious questions" on the merits whether these three factors are sufficient to justify the ESD. We consider in

turn the three factors upon which the Chief Forester relied.

First, the potential loss of receipts to the government resulting from the delay inherent in the appeals process was not great. The Chief Forester wrote that a delay of the commencement of the project until the summer of 2010 would result in a "projected loss of receipts to the government of as much as $16,000." The Chief Forester wrote, in addition, that if the commencement of the project were delayed until 2010, this would "significantly increase[ ] the likelihood of receiving no bids." "An absence of bids would push the potential loss to the government to $70,000." With all due respect to the budgetary concerns of the Forest Service, a loss of anticipated revenues to the government of "as much as $16,000," or even a "potential loss" of $70,000 in the event of no bids, is likely not a "substantial loss ... to the Federal Government."

Even if $70,000 might, in some contexts, constitute a "substantial loss," that figure here is highly speculative. The Chief Forester indicated that a one-year delay would "significantly increase[ ] the likelihood of receiving no bids," but we cannot know precisely what that statement means. We do know that with a 2009 commencement date, multiple bids were submitted almost immediately, and one was accepted. The ***1137** likelihood of not receiving a bid in 2009 appears to have been essentially zero. An increase from a likelihood of essentially 0% to a likelihood of 10% would be a significant increase in likelihood. But a 10% risk of receiving no bids results in a risk-adjusted loss of 10% of $70,000, or $7,000. A risk-adjusted loss of $7,000 is not significant.

[**13**] Second, the loss of the opportunity to "accomplish Douglas-fir planting and dwarf mistletoe objectives" would be an actual loss only if there were no successful bid on the Project. That is, the Chief Forester concluded that if there were a bid on the Project, the monetary loss to the government would be "as much as $16,000." But in that event, there would be no loss of opportunity to plant Douglas firs or to control dwarf mistletoe, for those objectives would be accomplished by means of the logging contract. Only if there were no bids on the contract would the opportunity be lost. For the reasons just discussed, the possibility of no bids appears to us to be highly speculative. In addition, the Forest Service did not even attempt to quantify the extent of its mistletoe abatement objectives that would be achieved through this Project. It is unclear from the record whether the acres selected are particularly infested with mistletoe and therefore the Project is essential to the Forest Service's goals, or if mistletoe abatement on these acres is simply a serendipitous byproduct of the Project.

Third, the Chief Forester took into account the importance of the Project to the local economy of southwest Montana. As discussed below, this factor is relevant to the public interest element of the preliminary injunction analysis. But the impact of a project on a local economy is not one of the factors the Chief Forester was permitted to consider in deciding whether to issue an ESD. Under Forest Service regulations, she was permitted to consider "hazards threatening human health and safety

or natural resources" and any "substantial loss of economic value to the Federal Government." 36 C.F.R. § 215.2. Neither the regulation, nor the ARA, permits consideration of the local economy in making an ESD determination. Thus, in relying on the third factor, the Chief Forester "relied on factors Congress did not intend [her] to consider." *Lands Council,* 537 F.3d at 987.

Finally, we note that the Forest Service has not been able to make clear to us, either in its briefing or at oral argument, why it waited so long to request an ESD. The Rat Creek fire occurred in August and September of 2007. The ESD was requested, and then issued, almost two years later. The delay in requesting an ESD obviously undermines the Chief Forester's determination in July 2009 that there was an Emergency Situation that justified the elimination of otherwise available administrative appeals.

We therefore conclude that AWR has, at a minimum, raised "serious questions" on the merits of its claim regarding the validity of the Chief Forester's Emergency Situation Determination.

3. Balance of Hardships

We conclude that the balance of hardships between the parties tips sharply in favor of AWR. When the question was before the district court, logging was contemplated on 1,652 acres of land in the Beaverhead–Deerlodge National Forest. Once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost.

In addition, AWR was harmed by its inability to participate in the administrative appeals process, and that harm is ***1138** perpetuated by the Project's approval. The administrative appeals process would have allowed AWR to challenge the Project under both NFMA and NEPA, and to seek changes in the Project before final approval by the Forest Service. Such administrative appeals sometimes result in significant changes to proposed projects.

The hardship to the Forest Service, set against the hardship to AWR, is an estimated potential foregone revenue of "as much as $16,000," and a much more speculative loss of up to $70,000. These foregone revenues are so small that they cannot provide a significant counterweight to the harm caused to AWR. In addition, as noted above, the Forest Service's opportunity to mitigate mistletoe infestation and to replant Douglas firs is tied to whether the Project occurs or not. Because we conclude that the risk that the project will not occur at all is speculative, those lost opportunities similarly cannot outweigh the harm to AWR.

The balance of the hardships here tips sharply enough in favor of AWR that a preliminary injunction is warranted in light of the serious questions raised as to the merits of its ARA claim. That decision, however, does not end our analysis, as the preliminary injunction must also be in the public interest.

4. Public Interest

In this case, we must consider competing public interests. On the side of issuing the injunction, we recognize the well-established "public interest in preserving nature and avoiding irreparable environmental injury." *Lands Council,* 537 F.3d at 1005. This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs "comports with the public interest." *S. Fork Band Council,* 588 F.3d at 728. While that public interest is most often noted in the context of NEPA cases, we see no reason why it does not apply equally to violations of the ARA. In the ARA, Congress specifically identified the process through which it wanted the Forest Service to make project decisions such as this one. It comports with the public interest for the Forest Service to comply faithfully with those procedures and to use the exceptional emergency procedures sparingly and only in compliance with its own implementing regulations.

We will not grant a preliminary injunction, however, unless those public interests outweigh other public interests that cut in favor of *not* issuing the injunction. *See Lands Council,* 537 F.3d at 1005 ("Consistent with *Amoco Production Company,* we have held that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim."). "The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Cal. Pharmacists Ass'n v. Maxwell–Jolly,* 596 F.3d 1098, 1114–15 (9th Cir.2010) (internal quotations omitted).

The public interests that might be injured by a preliminary injunction here, however, do not outweigh the public interests that will be served. The primary public interest asserted by the Forest Service is that the Project will aid the struggling local economy and prevent job loss. The effect on the health of the local economy is a proper consideration in the public interest analysis. The Forest Service asserts that the Project would directly create ***1139** 18 to 26 temporary jobs and would have indirect beneficial effects on other aspects of the local economy. The record before us reflects that the jobs in question, and, for the most part, the indirect effects, will begin and end with work on the Project which is now expected to be completed in 2010.

On these facts, we conclude that issuing the injunction is in the public interest.

Conclusion

We conclude that the district court erred in denying AWR's request for a preliminary injunction. AWR has established a likelihood of irreparable injury if the Project continues. AWR has also established serious questions, at the very least, on the merits of its claim under the ARA. Because AWR has done so with respect to its claim under the ARA, we do not reach its claims under NFMA and NEPA. The balance of hardships between the parties tips sharply in favor of AWR. Finally, the public interest favors a preliminary injunction.

We therefore **REVERSE** and **REMAND** for further proceedings consistent with this opinion.

MOSMAN, District Judge, concurring:

Today's holding that the "serious questions" test remains valid post-*Winter* is an important one for district courts tasked with evaluating requests for preliminary injunctions. The task is often a delicate and difficult balancing act, with complex factual scenarios teed up on an expedited basis, and supported only by limited discovery. A sliding scale approach, including the "serious questions" test, preserves the flexibility that is so essential to handling preliminary injunctions, and that is the hallmark of relief in equity. *See Winter,* 129 S.Ct. at 391 (Ginsburg, J., dissenting); *see also Miller v. French,* 530 U.S. 327, 361, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (Breyer, J., dissenting) ("[I]n certain circumstances justice requires the flexibility necessary to treat different cases differently—the rationale that underlies equity itself."); *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.") (quoting *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)); *Holmberg v. Armbrecht,* 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946) ("Equity eschews mechanical rules; it depends on flexibility.").

While the Supreme Court cabined that flexibility with regard to the likelihood of harm, there are good reasons to treat the likelihood of success differently. As between the two, a district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of success. In fact, it is not unusual for the parties to be in rough agreement about what will follow a denial of injunctive relief. In this case, for example, the parties agree that more than 1,600 acres would be logged in the absence of an injunction. While they disagree about the implications of the logging—such as the extent of environmental impact or the value of natural recovery—the mere fact of logging is undisputed.

But predicting the likelihood of success is another matter entirely. As mentioned, the whole question of the merits comes before the court on an accelerated schedule. The parties are often mostly guessing about important factual points that go, for example, to whether a statute has been violated, whether a noncompetition agreement is even valid, or whether a patent is ***1140** enforceable. The arguments that flow from the facts, while not exactly half-baked, do not have the clarity and development that will come later at summary judgment or trial. In this setting, it can seem almost inimical to good judging to hazard a prediction about which side is likely to succeed. There are, of course, obvious cases. But in many, perhaps most, cases the *better* question to ask is whether there are serious questions going to the merits. That question has a legitimate answer. Whether plaintiffs are likely to prevail often does not.

All Citations

632 F.3d 1127, 72 ERC 1711, 11 Cal. Daily Op. Serv. 1098, 2011 Daily Journal D.A.R. 1363

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EX. RELA-2

International Centre for Settlement of Investment Disputes

Burlington Resources Inc. and others
CLAIMANTS

v.

Republic of Ecuador

and

Empresa Estatal Petróleos del Ecuador (PetroEcuador)
RESPONDENTS

ICSID Case No. ARB/08/5

PROCEDURAL ORDER No. 1
on Burlington Oriente's Request for Provisional Measures

Rendered by an Arbitral Tribunal composed of:
Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Marco Tulio Montañés-Rumayor

Date: June 29, 2009

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I. FACTUAL AND PROCEDURAL BACKGROUND

A. Subject matter of this Order

1. The present order deals with a request for provisional measures, by which Burling[illegible] Burlington Oriente[illegible], to the exclusion of the other Claimants in this arbitration) seeks the following relief from the Arbitral Tribunal:

   (i) that Ecuador and PetroEcuador and/or their agencies or entities refrain from demanding payment of amounts allegedly due under Law No. 2006-42 and commencing any action or adopting any resolution or decision that may directly or indirectly lead to the forced or coerced payment of any amount relating to Law No. 2006-42;

   (ii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from making or implementing any measure, decision or resolution which directly or indirectly affects the legal situation of or is intended to terminate the Block 7 and 21 PSCs; and

   (iii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from engaging in any other conduct that aggravates the dispute between the parties and/or alters the status quo, including commencing any action or adopting any resolution or decision that directly or indirectly affects the legal or physical integrity of Burlington [illegible]"

B. Origin of the dispute

2. The present dispute originates from two production sharing contracts ([illegible]PSCs[illegible]) for the exploration and exploitation of oil fileds in the Amazon Region. The first contract relates to Block 7. It was concluded on 23 March 2000 between Kerr McGee Ecuador Energy Corporation, Preussag Energie GMBH, Sociedad Internacional Petrolera S.A., Compañía Latinoamericana Petrolera Numero Dos S.A., on the one hand and the [illegible] Petró[illegible], on the other hand [illegible] 79/Y). The second contract relates to Block 21. It was concluded on 20 March 1999 between Oryx Ecuador Energy Company, Santa Fe Minerales del Ecuador S.A., Sociedad Internacional Petrolera S.A. and Compañía

Latinoamericana Petrolera S.A., on the one hand, and Ecuador by the intermediary of PetroEcuador, on the other hand ÀÐAÃX.HK?GÃ%$Ã79/Y). Burlington Resources Oriente 4EIEA@ÃX QNECPKJÃ6 NAJPAYÃalleges that it now holds a 42.5% interest in the Block 7 PSC and a 46.25% interest in the Block 21 PSC, an allegation that remained unchallenged. Perenco 1?Q=@KNAEIEA@ÃX7ANAJ?KY is the operator of Blocks 7 and 21.

3. Both PSCs contain tax stabilization clauses, a choice of Ecuadorian law, and an ICSID arbitration clause.

4. According to its Article 6(2), the Block 7 PSC will expire on 16 August 2010. By contrast, pursuant to Articles 6(2)(5) and 6(3) of the Block 21 PSC, the period of exploitation for such PSC is twenty (20) years from the date of authorization of PetroEcuador, *i.e.* allegedly until 2021, being specified that by letter of 24 December 2008 (Exhibit C49) the Ministry of Energy and Mines invited Perenco to appoint a negotiating team for the A=NHÃPANIEJ=KPEKBÃ HK?G%$Ã79/Ã À=OÃ?KJBENIA@Ã>UÃPDAÃ5 EEOPNUÃAPPANÃKBÃ 26 January 2009 WExhibit E3).

5. Burlington Oriente and Perenco formed a Consortium, which is responsible for the tax obligations derived from the PSCs.

6. On 19 April 2006, Ecuador enacted Law No. 2006-42 ÀL=SÃ&%Y), which amended the Hydrocarbons Law of Ecuador as follows:

> X[c]ontracting companies having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference** ;V<.Y(Exhibit C7, Article 2; emphasis added)

7. Decrees Nos. 1583 (29 June 2006) and 1672 (13 July 2006) spelled out the method of calculation of such 50% participation. From the record, it appears that the X*reference price*Y (that is X*the monthly average selling*

price in force at the date of subscription of the agreement expressed at constant rates for the month of payment") is USD 25 per barrel for Block 7 (Transcript, p.163) and USD 15 per barrel for Block 21 (Exhibit C41). In other words, if "*the actual monthly average selling price for the FOB sale of Ecuadorian crude oil*" amounted for instance to USD 40, Ecuador's participation would be 50% of USD 15, *i.e.* USD 7.5, for Block 7 and 50% of USD 25, *i.e.* USD 12.5, for Block 21.

8. On 18 October 2007, Ecuador published Decree No. 662 ÀX0?NAÃ '%Y, from here, any reference to Law 42 includes Decree 662 unless otherwise specified), which amended Decree No. 1672 and increased the participation on "*extraordinary revenues*" pursuant to Law 42 from 50 percent to 99 percent. Using the same example as in the preceding paragraph, Ecuador[s participation would be 99% of USD 15, *i.e.* USD 14.85, for Block 7 and 99% of USD 25, *i.e.* 24.75, for Block 21 crude.

9. From the enactment of Law 42 until June 2008, *i.e.* during eighteen months after the adoption of Law 42 and eight months after Decree 662, the Consortium made the payments due under these texts to the State ÀDANAEU+KBÃPDAÃ TLNAOOKEJÃX4=SÃ&%Ã=UI AJPOY will include payments under Decree 662, unless otherwise specified). Specifically, by June 2008, the Consortium alleges that it "*had made Law No. 2006-42 payments for Block 7 and 21 to Ecuador in excess of US$396.5 million*" (Request for provisional measures, para.25).

10. Thereafter, the Consortium ceased to make such payments to the Respondent. Instead, it deposited the monies owed under Law 42 (and Decree 662) in an alleged total amount of USD 327.4 million (USD 171.7 million for Block 7 and USD 155.7 million for Block 21) into two segregated accounts, over which it keeps control.

11. 2KHHKESCÃPDÃ@?EOEKKBÃQ NEJCPKÃ6NEAPAÃPKÃAF?PÃ?Q=@8NQÃNKKO=HÃ to amend the Block 7 and 21 PSCs, Ecuador allegedly threatened to seize assets of the Consortium in order to collect unpaid amounts relating to Law 42 and to terminate the Block 7 and Block 21 PSCs. Notices were

served by PetroEcuador on Perenco (Exhibit C55), in order to collect monies in the amount of USD 327,467,447.00 million (for the entire Consortium).

12. On 19 February 2009, Ecuador and PetroEcuador (through the Executory Tribunal of PetroEcuador) instituted so-called *coactiva* proceedings to enforce the payment of USD 327,467,447.00, corresponding to the /KJO KNRQI [OĀ=HAC A@dUĀQJL=E@=Ā KQJPOunder Law 42.

13. On 25 February 2009, PetroEcuador proceeded to serve its third notice of the *coactiva* process on Perenco, which filed an action before the Civil Judge of Pichincha against any further actions that could be taken within the *coactiva* process[1].

14. On 3 March 2009, the *coactiva* administrative tribunal ordered the immediate seizure of all Block 7 and 21 crude production and cargos produced by Perenco**,** which decision was confirmed by the Civil Judge of Pichincha on 9 March 2009 (Exhibit C60).

15. At the hearing, Burlington Oriente =OOANĀAD=PĀPDĀX;?K=?P=ĀRQ@CA< *elected to treat it* [the debt for payments under Law 42] *as if it was res judicata, and then went ahead, seized the assets, and auctioned off – and auctioned them off for payment*"YĀTranscript, pp.27-8). The Respondents did not rebut such statement. They had actually stated in a letter of 3 5 =N?DĀ%##*ĀPD=ĀX*steps have been, or will imminently be, taken by the 'coactivas judge' to seize certain assets in satisfaction of the debts claimed in C-55 to Burlington Oriente's Request for Provisional Measures*Y. Although no amounts were specified, there is no dispute that Ecuador has seized certain quantities of oil produced by Burlington. By contrast, it has not been shown that other assets such as production equipment have been seized.

1 It is unclear whether Perenco alone, or the whole Consortium (as stated by the Respondent, see para.40 of the Rejoinder) filed an action before the Ecuadorian courts.

C. Request for arbitration

16. On 21 April 2008, Burlington Resources Inc., Burlington Oriente, Burlington Resources Andean Limited and Burlington Resources Ecuador Limited filed a Request for arbitration with ICSID. They asked for the following relief:

> X(a) DECLARE that Ecuador has breached:
>
> (i) Article III of the Treaty [between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment] by unlawfully expropriating and/or taking measures tantamount to expropriation with respect
>
> (ii) -NPE?
> Ecuador on a basis no less favorable than that accorded nationals; by failing to accord
> equitable treatment, full protection and security and treatment no less than that required by international law; by implementing
> investments; and
>
> (iii) Each of the PSCs;
>
> (b) ORDER Ecuador: (i) to pay damages to Burlington for its breaches of the Treaty in an amout to be determined at a later stage in these proceedings, including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages for the breach of the Treaty; and/or (ii) to specific performance of its obligations under the PSCs and pay damages for its breaches of the PSCs in an amount to be determined at a later stage in the proceedings, including interest at such a rate as the Tribunal considers just and appropriate until the complete payment of all damages for breach of the PSCs.
>
> (c) AWARD such other relief as the Tribunal considers appropriate; and
>
> (d) ORDER Ecuador to pay all of the costs and expenses of this arbitration,
> any experts appointed by the Tribunal, the fees and expenses of the
> :NE>QJ

D. Procedural history

17. On 20 February 2009, Burlington Oriente filed a Request for provisional measures (the X8AMQAO).PY

18. The Request was accompanied by a number of exhibits, including a witness statement from Mr. Alex Martinez. It included a request for a temporary restraining order with immediate effect.

19. On 23 February 2009, the First Respondent (Ecuador) filed a response to the Claimant[s request for a temporary restraining order. It in particular undertook X*to serve prior notice on the Tribunal, granting enough time for the Tribunal to act as necessary, before it takes any measure that seeks to enforce the debts claimed in exhibit C-55 to the request for Provisional Measures".* On the basis of this undertaking, the Tribunal considered that it could dispense with reviewing whether a temporary order with immediate effect was justified pending determination of the application for provisional measures.

20. Burlington Oriente renewed its request for a temporary restraining order on 25 February 2009 alleging that the third *coactiva* notice had been given and that three days thereafter the Respondents could start seizing assets. The First Respondent replied on 26 February 2009 and reiterated its undertaking.

21. On 27 February 2009, the Arbitral Tribunal again resolved that there was no need to rule on Burlington Orientez request in view of Ecuador's repeated assurances.

22. On 3 March 2009, Burlington Oriente again repeated its request for a temporary restraining order, owing to the alleged imminence of the seizures of Burlington 6 NEAJAPO assets pursuant to two orders issued by the *coactiva* tribunal on 3 March 2009.

23. On 4 March 2009, the First Respondent filed a preliminary reply to . QNHECPKJÃ6 NEAJPA[OÃRequest for provisional measures (the X7NHEIE=NUÃ 8ALHUY).

24. On 6 March 2009, in light of the information received three days earlier, the Arbitral Tribunal recommended X*that the Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties*

and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first. In issuing such recommendation, the Arbitral Tribunal considered that the requirements of urgency and of necessity were met. It in particular considered that Burlington's [illegible] effectively protected by way of provisional measures was sufficient to demonstrate necessity in the circumstances.

25. [illegible] provisional measures (the "[illegible]"), together with a Request for [illegible] of 6 March 2009, on 17 March 2009. On 25 March 2009, the Claimant filed a Reply to the First [illegible] recommendation on 25 March 2009. The Arbitral Tribunal denied the First [illegible] request for reconsideration on 3 April 2009 on the ground that no changed circumstances called for reconsideration and that the hearing on provisional measures was to take place shortly thereafter.

26. [illegible] for provisional measures on 27 March 2009 (the "[illegible]") and the [illegible] provisional measures on 6 April 2009 (the "[illegible]").

27. The hearing on provisional measures took place on 17 April 2009 in Washington, D.C. It was attended by the following persons:

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Professor Brigitte Stern, Arbitrator
Professor Francisco Orrego Vicuña, Arbitrator

ICSID Secretariat

Mr. Marco T. Montañés-Rumayor, Secretary of the Tribunal

Representing the Claimants

Ms. Aditi Dravid, ConocoPhilips Company

Mr. Alex Martínez, Burlington Resources Oriente Limited

Mr. Alexander Yanos, Freshfields Bruckhaus Deringer US LLP

Ms. Noiana Marigo, Freshfields Bruckhaus Deringer US LLP

Mr. Viren Mascarenhas, Freshfields Bruckhaus Deringer US LLP

Mr. Javier Robalino-Orellana, Pérez Bustamante & Ponce Abogados Cía Ltda.

Representing First Respondent Republic of Ecuador

Mr. Alvaro Galindo Cardona, Director de Patrocinio Internacional Procuraduría General del Estado

Mr. Juan Francisco Martínez, Procuraduría General del Estado

Mr. Felipe Aguilar, Procuraduría General del Estado

Mr. Eduardo Silva Romero, Dechert LLP

Mr. George K. Foster, Dechert LLP

Mr. José Manuel García Represa, Dechert LLP

Representing Second Respondent PetroEcuador

Dr. José Murillo Venegas, Empresa Estatal Petróleos del Ecuador

Dr. Wilson Narváez, Empresa Estatal Petróleos del Ecuador

At the hearing, the Tribunal heard the Parties' oral arguments as well as the testimony of Mr. Martinez. A transcript was made in English and Spanish and distributed to the Parties.

II. PARTIES' POSITIONS

A. Claimant's position

28. The Claimant argues that the test to be applied to provisional measures is twofold: urgency and necessity PKĀ IO=NAĀOEJBB?=JFĀD=NI ĀIKĀ=Ā 7=NRJOĀ rights.

29. It understands the first requirement of urgency in a broad fashion that includes situations in which protection cannot wait until the award. In the

present case, it submits that urgency arises out of the Respondents[plan to enforce all amounts due under Law 42.

30. With respect to necessity, the Claimant stresses that the distinction between X[illegible]harm does not entail consequences in the present case. According to the Claimant, irreparable harm is not required under the ICSID Convention or international law, and a broad meaning has been given to the phrase by a number of international tribunals (*Paushok v. Mongolia*, *City Oriente v. Ecuador*, *Saipem v. Bangladesh*). It further submits that ICSID arbitral tribunals have interpreted X*necessity*Y for provisional measures not so much as a need to prevent X*irreparable*Y harm but as a need to spare X*significant harm*Y. According to the Claimant, ICSID tribunals have also given careful consideration to the proportionality of the measures when considering if they are necessary.

31. The Claimant argues that necessity exists here in three respects:

(i) Provisional measures are necessary to preserve the Claimant's rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules pursuant to which X;V<Ā*once the parties have consented to ICSID arbitration, they cannot resort to other forums in respect to the subject matter of the dispute before the ICSID Tribunal*"Y(Response, para.32). The Claimant contends that through the *coactiva* proceedings, the Respondents seek provisional relief against it in contravention to the said rights.

(ii) [illegible] independent right to specific performance of the Block 7 and 21 PSCs. The right to specific performance exists under Ecuadorian law, as provided by Article 1505 of the Ecuadorian Civil Code and confirmed by the Supreme Court of Ecuador in the case of *Tecco v. IEOS*. The Claimant also argues [illegible] specific performance would not survive termination of the PSCs and that it is a property right that deserves protection to prevent its dissipation or destruction. The Claimant substantially argues that the [illegible]measures will irreversibly [illegible] actual right to seek specific performance of the PSCs by effectively terminating them.

(iii) Provisional [illegible] self-standing rights to the preservation of the *status quo*, non-

> aggravation of the dispute, and preservation of the award. These rights are in danger of being irreparably harmed by the actions of the Respondents. In particular, according to the Claimant, the enforcement of Law 42 would alter the *status quo* and aggravate the dispute, as well as frustrate the effectiveness of the award, particularly of an award of specific performance.

32. The Claimant adds that its request for provisional measures not only responds to the necessity criterion, but also fulfills the proportionality requirement. : DAUĀLKEĒPĀKQĀPD=PĀX[s]*ince Ecuador has not enforced Law No. 2006-42 since June 2008, when the* Consortium *began depositing it into a segregated account, no additional burden would be imposed upon Ecuador if the Tribunal authorized the Consortium or Burlington Oriente to continue paying such amounts into a segregated account or into an official escrow account*"Y(Request, para.74).

33. The Arbitral Tribunal further notes the statement made by Mr. Alex Martinez, a member of the Board of Directors for Burlington Oriente and Latin America Partnership Operations and Peru Opportunity Manager for ConocoPhillips Corporation, according to whom X;Ē<*Ecuador indeed seizes the production assets of the Perenco-Burlington Oriente Consortium and/or the oil produced by the consortium, Burlington Oriente will be forced to exit Blocks 7 and 21 as it will be forced in this context to spend money to produce oil for the sole benefit of PetroEcuador*YÀWitness Statement of Alex Martinez, para.10).

B. Respondents' position

34. In its Preliminary Reply, Reply and Rejoinder, the First Respondent (Ecuador) set out its arguments against the Claimant[s Request. The Second Respondent (PetroEcuador) stated in its letters of 31 March, 2 =J@'Ā- LNĒHĀ##* ĀPD=PĒĀKLLKOA@ĀPDAĀ HĒI=JPZs Request and agreed with the position of the Republic of Ecuador, as expressed in the submissions just referred to. Therefore, the Arbitral Tribunal will thereafter refer to the position expressed in the First 8AOLKJ@AP[Osubmissions as that of both Respondents (on the admissibility of PetroEcuador's opposition to the Request, see para.43).

35. The Respondents state at the outset of their submissions that the Claimant's acts against the enforcement of a valid Ecuadorian law constitute an interference with the sovereignty of Ecuador. They further contend that a presumption of validity exist in favor of legislative measures adopted by a State, that any loss might be compensated by an award of damages and interest, and that the Claimant admits that it could meet its obligations to pay the disputed amounts, since it stated to have set aside the relevant amounts in U.S. accounts. The Respondents also state that the Claimant's Request is neither urgent nor necessary.

36. The Respondents stress that the applicable test for granting provisional measures is the existence of an urgent need to avoid irreparable prejudice, in accordance with ICJ practice. In particular, they stress that no ICSID tribunal has ever rejected the criterion of "*irreparable*" harm to the benefit of "*significant*" harm. They further state [illegible] reliance on *Paushok v. Mongolia* and *City Oriente v. Ecuador* is misplaced, as in the latter case, irreparable harm was met on the facts and, in the former, the arbitral tribunal recognized that it went against the weight of authorities.

37. Furthermore, the Respondents understand urgency as follows: "*action prejudicial to the rights of Burlington Oriente is likely to be taken before the Tribunal can finally decide on the merits of the dispute submitted to it*" (Preliminary Reply, para. 8). The Respondents also state that "*Burlington Oriente's reliance on a so-called 'proportionality test' confuses the issue*" (Preliminary Reply, para.52).

38. The Respondents do not see the need for protection against the termination of the PSCs as urgent, since Ecuador confirmed on 23 February 2009 to the Arbitral Tribunal that none of the Respondents had taken steps to this effect.

39. The Respondents further opposed the Claimant's arguments asserting that Burlington Oriente has not identified any substantive right requiring preservation through provisional measures:

(i) The *coactiva* process @KAOÃJKPÃPDA=PAJÃPDAÃH=EI=JPQ[rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules. Such process is an administrative not a judicial proceeding. Consequently, it does not involve the determination of any of the matters at issue in this arbitration. The only judicial proceedings before the Ecuadorian courts (namely the proceedings in front of the Civil Court of Pichincha) were initiated by the Claimants, and not by any of the Respondents.

(ii) Burlington Oriente has no right to specific performance of the PSCs, let alone one that would be irreparably harmed absent provisional relief. It has not established that Ecuador actually intended to terminate the PSCs. To the contrary, the government X***expressly disavowed*** *any such intention*"Y(Rejoinder, para.21, with emphasis). Even if Ecuador had such intent, Burlington Oriente would still have no right to specific performance under international law. As for Ecuadorian law, it does not recognize a right to specific performance when the subject matter of the obligation is contrary to the law, which would be the case here because the enforcement of the PSCs would breach Law 42. Moreover, there is no more basis for a tribunal to restrain a sovereign State from terminating a contract than to order a State to reinstate a contract after termination.

(iii) The preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the effectiveness of the award are not free standing rights in international law, independent from contractual or treaty rights. The preservation of the *status quo* is one of the purposes to be served by preserving rights under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules by way of provisional measures. Even if it had a right to the preservation of the *status quo*, Burlington Oriente is the one who altered this *status quo* by ceasing to pay the amounts due to Ecuador. Finally, there is no risk that the enforcement of Law 42 aggravates the dispute or renders any future award ineffective, since the dispute can easily be resolved through a monetary award.

40. The Respondents further argue that the Claimant[OÃallegations about a PDA=PÃPKÃPDAÃLDUCP=HÃJ@ÃA=HÃPACNEJÃKBÃ CNEBCPKJ[OÃALMCAJP=PERDÃEÃ unparticularised and should therefore be rejected.

III. DISCUSSION

41. The Tribunal will first deal with some preliminary matters (A). Thereafter, it will address the standards applicable to provisional measures in general (B), before reviewing each such standards, *i.e*. the existence of right (C),

urgency (D), and necessity or the need to avoid harm (E). It will finally deal with the issue of the escrow account (F) before setting forth its decision (IV).

A. PRELIMINARY MATTERS

42. The Arbitral Tribunal will first deal with a few procedural issues which arose during the hearing of 17 April and in the course of previous written exchanges, namely the timeliness of PetroEcuador's opposition to the Request; . QNHLCPKJÃ6 NEAPA[OÃQOAÃKBÃ=JÃ=HHACA@ÃOP=PAI AJPÃby President Correa; and the request for relief regarding the alleged threat to the legal and physical integrity of the Claimant's representatives.

43. Burlington Oriente argues PD=PÃ7 APK1?Q=@KNOÃendorsement of 1?Q=@KN[Ã position on 31 March 2009 (confirmed on 1 and 6 April 2009 and repeated at the hearing, Transcript, p.9) was untimely and should thus not be considered. PetroEcuador attended the hearing without presenting oral argument of its own in accordance with the Tribunal's understanding set out in the latter's letter of 8 April 2009. Since PetroEcuador made no written or oral submissions of its own, but for its adhesion to Ecuador's case, the fact that such adhesion did not respect the briefing schedule did not affect the Claimant's due process rights. The Tribunal would thus find it excessively formalistic to disregard PetroEcuador's endorsement of the 2EOPÃ8ØLKJ@AJP$ position.

44. As a second preliminary matter, the Respondents object to Burlington Oriente[s reliance at the hearing on a statement by President Correa in 2008 (Transcript, p.21). Since evidence of such a statement was not in the record then, the Arbitral Tribunal will not consider it for purpose of this decision.

45. As a third preliminary matter, the Respondents submit that Burlington 6NEAPA[OÃMQAOPBKÃNAHEAÃbased on the threat to the legal and physical integrity of its representatives has been abandoned (Transcript, pp.90-91). The Arbitral Tribunal indeed notes that Burlington Oriente has not opposed such submission at the hearing. Be this as it may, the allegation of threats

is in any event unsubstantiated Hence, the Tribunal will not further entertain it.[2]

46. As a final observation within these preliminary matters, the Tribunal notes that this order is made on the basis of its understanding of the record as it stands now. Nothing herein shall preempt any later finding of fact or conclusion of law.

B. APPLICABLE STANDARDS

1. Legal framework

47. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal.

48. Article 47 of the ICSID Convention provides that

> X[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the specific rights of either party.Y

49. Rule 39 of the ICSID Arbitration Rules reads as follows:

> (1) XAt any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

[2] *See,* for a similar approach, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para.) *+ĀXĀ&ĀDANĀKN@O!ĀĒH=JPOĀ=ĀHĀGEJCĀĀLĀKĀEĀK=HĀ A=QNĀ in order to avoid a behaviour, which they are not even sure to be intended. This is not the purpose of a provisional measure. Provisional measures are not deemed to protect against any potential and hypothetical harm susceptible to result from uncertain measures, they are deemed to protect the requesting party from an imminent harm.Y

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

;V<Y

It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is prima facie basis for jurisdiction.

50. The provisional measures were requested by Burlington Oriente, *i.e.* one of the so-?=HHA@Ā *Burlington subsidiaries* Y (Request for Arbitration, para.1). TDAĀX *Burlington subsidiaries* YĀ APD=EĀ QNHCPKĀ 6NEJPA!Ā . QNHEJCPKJĀ Resources Ecuador Limited and Burlington Resources Andean Limited) seek compensation for the 8AOLKJ@AJPOĀ>NA=?DĀKBĀPDAĀPSCs (Request for Arbitration, para.3). AOĀ=NA=CĀ QNHECPKJ[ĀQ>CE@HEAĀ=NAĀ?KJ?ANJA@ĀPDAĀ Claimants assert that ICSID has jurisdiction on the basis of the arbitration clauses embodied in Section 20.3 of the Block 7 PSC and Section 20.2.19 of the Block 21 PSC:

> XBy the express language of the PSCs for Blocks 7, 21 and 23, the parties consented to ICSID jurisdiction from the moment the ICSID Convention was ratified by Ecuador. Ecuador ratified the ICSID Convention on February 7, 2001. Thus, since February 7, 2001, all parties to the PSCs for Blocks 7, 21 and 23 have consented to ICSID arbitration to resolve the dispute set forth herein.Y (Request for Arbitration, para.131).

Hence, the Tribunal considers that it has *prima facie* jurisdiction for purposes of rendering this order.

2. Requirements for provisional measures

51. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties differ on the nature of such harm. The Claimant argues that significant harm is sufficient, while the Respondents insist on

irreparable harm. The Parties further disagree on the type and existence of the rights to be protected. The Tribunal will now review the different requirements for provisional measures just set out and the Parties' divergent positions in this respect.

C. EXISTENCE OF RIGHTS

52. Burlington Oriente asserts that three types of rights need protection by way of provisional measures, namely the right to exclusive recourse to ICSID under Article 26 of the ICSID Convention (1); the rights to the preservation of the *status quo*, the non-aggravation of the dispute and the effectivity of the arbitral award (2); and the right to specific performance of the PSCs (3).

53. At the outset, one notes the Parties' concurrent view that the Tribunal must examine the existence of rights under a *prima facie* standard (Transcript, p.169, 179-80, 199). It cannot require actual proof, but must be satisfied that the rights exist *prima facie*.

1. Right to exclusivity under Article 26 ICSID Convention

54. In the first place, Burlington Oriente substantially argues that provisional measures are necessary to preserve the exclusivity of ICSID proceedings under Article 26 of the ICSID Convention, which in essential part provides that *"*[c]*onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."*

55. The Claimant submits that matters at issue in the present case are being adjudicated in the *coactiva* process. The Respondents reply that the *coactiva* proceeding is an administrative not a judicial process, that it carries no *res judicata*, and does not preempt the determination of the dispute by this Tribunal.

56. In the Tribunal's view, two questions arise here. First, does a right to the exclusive jurisdiction of ICSID exist as a right that can be protected through provisional measures? If the answer is positive, the second question that arises is whether that right is at risk under the circumstances if no provisional measures are granted.

57. The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures, or in the words of the *Tokios Tokelés v. Ukraine* tribunal:

> "Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative."[3]

58. The existence of such a right being accepted, is the continuation of the *coactiva* process susceptible of putting this right at risk? There is conflicting argumentation on record about the true legal nature and the subject matter of the *coactiva* process (Transcript, pp. 26-7, 49-63, 116-30). The Tribunal is thus unable to come to a conclusion on this issue in the context of this Order. Hence, for purposes of the present limited review, it cannot but hold that Burlington Oriente has not established a *prima facie* case of breach of Article 26 of the ICSID Convention.

2. Right to the preservation of the *status quo* and non-aggravation of the dispute

59. Second, Burlington Oriente asserts rights to the preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the award. The Respondents object that these are neither rights under Article 47 of the ICSID Convention nor free standing rights under international law and that the Claimant can only seek measures that protect the substantive rights in dispute.

60. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or

[3] *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Order No. 3 of 18 January 2005, para. 7, citation omitted.

substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

61. The Tribunal will now review the right to the preservation of the *status quo* and the non-aggravation of the dispute. Such right focuses on the situation at the time of the measures. By contrast, the right to the protection of the effectivity of the award looks into the future. As such, under the circumstances of this case, it is closely linked with the right to specific performance. The discussion on such latter right, to which the Tribunal refers later in this Order, thus equally disposes of the issue of the protection of the award.

62. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established since the case of the *Electricity Company of Sofia and Bulgaria*[4]. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need "*to preserve the status quo between the parties pending* [the] *final decision on the merits*" and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention "*is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award*"[5].

63. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*[6] and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged "*the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do*

[4] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, para. 103, ICJ Reports 2001, p.466.

[5] 1 ICSID Reports 99.

[6] *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, "The First "World Bank" Arbitration (Holiday Inns v. Morocco) "Some Legal Problems", BYIL, 1980.

anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult[7].

64. The principle was re-affirmed in *Plama v. Bulgaria*[8] (although with a somewhat more limited approach), *Occidental v. Ecuador*[9], and *City Oriente v. Ecuador*[10].

65. There is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute. At present, both PSCs are in force and, subject to the controversy about the Law 42 payments, appear to be perfomed in accordance with their terms. If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.

66. In making this finding, the Tribunal QJ@ANOPEQÃ?Q=@K arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.

67. The Tribunal is =HOKÃ EJ@HKBPDÃ8AOLKJ@AP argument that Burlington Oriente is the one who altered the *status quo* by ceasing to pay the amounts due to Ecuador. It cannot, however, follow this argument. Indeed, the *status quo* at issue, the one that needs protection Wprovided the other requirements are met Wconsists in the continuation of the cooperation between the Parties in the framework of the PSCs.

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[7] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p.412.

[8] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/04), Order of 6 September 2005, para.40.

[9] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para.96.

[10] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on provisional measures of 19 November 2007, para.55.

68. In conclusion, the Tribunal holds that Burlington Oriente has shown the existence of a right to preservation of the *status quo* and the non-aggravation of the dispute.

3. Right to specific performance (and to the preservation of the effectivity of the award)

69. Third, the Claimant asserts a right to specific performance of the PSCs and to the protection of the effectivity of an award that may sanction such right. It is disputed whether specific performance is admissible under Ecuadorian and international law.

70. With respect to international law, Article 35 of the ILC Articles on State responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate[11]. Whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. In the instant case, the PSCs are in force which makes it unnecessary to consider that view. As far as Ecuadorian law is concerned, it appears to provide for the remedy of specific performance pursuant to Article 1505 of the Civil Code.

71. Accordingly, at first sight at least, a right to specific performance appears to exist. Some other factual and legal elements seem to support the possibility of specific performance: (i) Burlington Oriente's claim for specific performance is a contract, not a treaty claim; (ii) the PSCs are still being perfomed, and (iii) they contain a choice of Ecuadorian law and a tax stabilization clause. Thus, at least *prima facie*, a right to specific performance could exist in the present situation. Under the circumstances, the same can be said of the right to the protection of the effectivity of a possible future award.

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[11] See also e.g. *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para.400: [illegible] used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially [illegible]

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D. URGENCY

72. The Parties agree that there is urgency when it is impossible to wait until the award because actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute. They disagree, however, on whether the present facts meet the urgency requirement. The Respondents in particular submit that the threat of termination of the PSCs does not create an urgent situation as Ecuador has confirmed to the Tribunal on 23 February 2009 that the Respondents had taken no steps to this effect.

73. The Arbitral Tribunal agrees that the criterion of urgency is satisfied when, as Schreuer puts it, X*a question cannot await the outcome of the award on the merits*Y[12]. This is in line with ICJ practice[13]. The same definition has also been given in *Biwater Gauff v. Tanzania*:

> Xn the Arbitral TNE>QJ=H[ØRE.S!ĀDAĀ@ACMAĀKBZQCAJ?UZŠDE?DĀEOĀMQENA@Ā depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.Y[14]

74. The Tribunal shares the Respondents' opinion that no urgency arises from the alleged threat of termination of the PSCs. The urgency lies elsewhere and is closely linked to the non-aggravation of the dispute discussed in the preceding section, to which the Tribunal refers. Indeed, when the

[12] Christoph SCHREUER, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751 (para.17).

[13] In the words of the ICJ, X[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, para.23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, para.22 *; Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, para.32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists", Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Order of 15 October 2008, para.129.

[14] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para.76.

measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition[15].

E. NECESSITY OR NEED TO AVOID HARM

75. The Parties concur that the measures must be necessary or in other words that they must be required to avoid harm or prejudice being inflicted upon the applicant. They differ, however, on the required intensity of the harm: X*irreparable*Y, *i.e*. not compensable by money, for the Respondents, as opposed to X*significant*Yfor the Claimant.

76. The Respondents substantially argue that the harm invoked by Burlington Oriente cannot be deemed X*irreparable*Ybecause (i) no production assets were seized and (ii) such harm can easily be made good by a monetary award. They rely in particular on *Occidental Petroleum and other v. Ecuador* to argue that X*a mere increase in damages is not a justification for provisional measures*Y(Rejoinder, para.55).

77. The Claimant does not dispute that no production assets were seized, but insists that its operational capacity is severely threatened by the seizures, that the imposition of the Law 42 payments led to a loss on investment in 2008 and prevented a sale of the latter (Testimony of Mr. Martinez, Transcript, pp.117-118 and 114). It also argues that it may have no other ?DKEAĀRD=JĀRKĀS=HĀS=UYfrom its investment.

78. :D AĀSKNĀDĀXJA?AOEBYĀKNĀXD=NIYdo not appear in the relevant ICSID provisions. Necessity is nonetheless an indispensable requirement for provisional measures. It is generally assessed by balancing the degree of harm the applicant would suffer but for the measure.

79. The Respondents are right in pointing out that a number of investment tribunals have required irreparable harm in the sense of harm not compensable by monetary damages. The *Occidental* tribunal found that there was no irreparable harm since the CH=E=JPO[harm, if any, could be

[15] Of the same opinion, in particular, City Oriente, Decision on Provisional Measures, para.69.

compensated by a monetary award[16]. In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages[17], but did not discuss the matter further. Similarly, the tribunal in *Metaclad v. Mexico* denied the request and underlined that the measures must be required to protect the applicant's rights from X*an injury that cannot be made good by subsequent payment of damages*Y[18].

80. By contrast, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought was damages, while *City Oriente* was seeking contract performance[19]. In its decision not to revoke the measures, the tribunal stressed that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 X*require that provisional measures be ordered only as means to prevent irreparable harm*Y[20]. In the UNCITRAL investment case of *Paushok v. Mongolia*, the tribunal distinguished *Plama*, *Occidental* and *City Oriente* and concluded that X*irreparable harm*Y in international law has a X*flexible meaning*Y. It also referred to Article 17A of the UNCITRAL Model Law which only requires that X*harm not adequately reparable by an award of damages is likely to result if the measures are not ordered*Y[21].

81. However defined, the harm to be considered does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of both parties. Specifically, it stated that X*provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State*Y.[22] In the same spirit, the *City Oriente* tribunal stressed the need to weigh the interests at stake against each other. Referring to

[16] Occidental, para.92.
[17] Plama, para.46.
[18] *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information regarding ICSID Case ARB(AF)/97/1, para.8.
[19] City Oriente, Decision on Revocation, para.86.
[20] Ibid., para.70.
[21] Paushok, paras.62, 68-69.
[22] Occidental, para.93.

Article 17A(1) of the UNCITRAL Model Law, it emphasized the balance of interests that needs to be struck as follows:

> XIt is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.Y[23]

82. In the circumstances of the present case, this Tribunal finds it appropriate to follow those cases that adopt the standard of X*harm not adequately reparable by an award of damages*Y to use the words of the UNCITRAL Model Law. It will also weigh the interests of both sides in assessing necessity.

83. Unlike *Occidental*, this case is not one of only X*more damages*Y caused by the passage of time[24]. It is a case of avoidance of a different damage. The risk here is the destruction of an ongoing investment and of its revenue-producing potential which benefits both the investor and the State. Indeed, if the investor must continue to finance operation expenses while making losses, from a business point of view it is likely that it will reduce its investment and maintenance costs to a minimum and thus its output and the shared revenues. There is also an obvious economic risk that it will cease operating altogether. While profit sharing may be legitimate, expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice. Contrary to the Respondents' assertion pursuant to which the protection would be CN=JPA@ĀC=EOPĀDAĀEJRAOPKN[OĀKSJĀ=?PĀKBĀXwaIGEJCĀS=UY, the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.

84. In reaching this conclusion, the Tribunal has paid due attention to the Respondents[argument that the effect of the seizures was economically neutral for the Claimant. Every time oil is seized for a given amount, past due Law 42 debts are extinguished, which would allow the Claimant to withdraw the equivalent amount from the segregated account. Although

[23] City Oriente, Decision on Revocation, para.72.
[24] Occidental, para.99.

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the Claimant replies that it will not touch the monies on the segregated account, the objection is mathematically speaking correct. Yet, it misses the point. Indeed, the risk of further deterioration of the relationship possibly ending with the destruction of the investment would still exist. This is especially, but not exclusively so if the investor is liable to settle both the alleged past due Law 42 payments and the newly accruing ones (Transcript, p.195). The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.

85. This last observation shows that provisional measures are in the interest of both sides if they are adequately structured, a matter discussed in the next section.

F. ESCROW ACCOUNT

86. As an alternative to its main request for relief, Burlington Oriente confirmed at the hearing that it could envisage an escrow account X*where all the funds that are the subject of this dispute could be held pending its resolution*Y (Transcript, pp.23-24, esp. lines 16-18). The Arbitral Tribunal JKFAOÃ PDAÃ8 AQLKJ@AJPQ argument that such account would be X*unmanageable and inadequate*Y(Transcript, p.211, line 12), since it would exclusively cover the Parties in this arbitration, notwithstanding the joint liability of the Consortium and also because an offshore escrow account would be X*nimical to Ecuador's sovereignty*Y(Transcript, p.212, lines 4-5).

87. The Arbitral Tribunal is of the view that the establishment of an escrow account would provide =Ã>=H=JA@ÃOKHGBRJÃEAHJÃKLNAONRAÃ=?DÃ7=NPUOÃ rights. The Republic of Ecuador would have the certainty that the amounts allegedly owing would be paid and could later be collected if held to be due. The investor would benefit from the cessation of the *coactiva* process, and although paying significant amounts into the escrow account, would have the assurance that such amounts could later be recovered if held not to be due. Moreover, in reliance on such assurances, one would

reasonably expect both Parties to continue the performance of the PSCs under their terms.

88. The terms and conditions of the escrow account, and other practicalities call for a number of specifications:

(i) The escrow account shall contain all future and past payments due under Law 42 and Decree 662. Past payments shall include all payments owed by the Claimant and payed into their segregated account. It appears that past payments (in the amount of USD 327.4 million) were made by the Consortium into two segregated U.S. accounts (one for each of the members of the Consortium, see Request, para.25). Therefore, even if the Consortium were jointly liable for its debts as the Respondents allege, the Claimant will be able to separate the payments owed by it from the payments owed by Perenco.

(ii) The amounts deposited on the escrow account shall only be released in accordance with a final award, or a settlement agreement duly entered into by the Parties, or with other specific instructions issued by this Tribunal.

(iii) The escrow agent shall be an internationally recognized financial institution. For reasons of neutrality, it shall not be an Ecuadorian, North American or Bermuda institution.

(iv) Interest earned on the escrow account should be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal.

(v) The costs incurred by the escrow account shall be borne equally by both Parties but can be made part of the claim for compensation by each Party.

IV. ORDER

On this basis, the Arbitral Tribunal makes the following order:

1. The Parties shall confer and make their best efforts to agree on the opening of an escrow account at an internationally recognized financial institution incorporated outside of Ecuador, the United States of America and Bermuda;

2. Burlington Oriente shall pay into the escrow account all future and past payments allegedly due under Law 42 and Decree 662, including all payments made by the Claimants into their segregated account;

3. The funds in the escrow account shall only be released in accordance with a final award or a settlement agreement duly entered into by the Parties or with other specific instructions from this Tribunal;

4. The costs of the escrow account shall be borne equally by both Parties and can be made part of the claim for compensation by each Party;

5. The interest accrued on the escrow account shall be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal;

6. If the Parties cannot agree on the opening of an escrow account within 60 days from notification of this Order, they shall report to the Arbitral Tribunal setting forth the status of their negotiations and the content of and reasons for their disagreements after which the Arbitral Tribunal will rule on the outstanding issues;

7. The Respondents shall discontinue the proceedings pending against the Claimant under the *coactiva* process and shall not initiate new *coactiva* actions;

8. The Parties shall refrain from any conduct that may lead to an aggravation of the dispute until the Award or the reconsideration of this order. In particular, Burlington Oriente shall refrain from making good on its threat to abandon the project and Ecuador shall refrain from any action that may induce Burlington Oriente to do so;

9. The Order issued by this Tribunal on 6 March 2009 is terminated;

10. Costs are reserved for a later decision or award.

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

Professor Francisco Orrego Vicuña
Arbitrator

Professor Brigitte Stern
Arbitrator

EX. RELA-3

844 F.2d 668
United States Court of Appeals,
Ninth Circuit.

CARIBBEAN MARINE SERVICES COMPANY, INC., a California Corporation; Carlos A. Garcia, Plaintiffs–Appellees,
v.
Malcolm BALDRIGE, Secretary of Commerce of the United States; Anthony Calio, Administrator, National Oceanic and Atmospheric Administration; William Evans, Assistant Administrator for Fisheries, National Marine Fisheries Services; E.C. Fullerton, Southwest Regional Director, National Marine Fisheries Service, Defendants–Appellants.
CAROLINE M. CORP., INC.; Jose R. Rebelo; Francisco M. Nunes, Plaintiffs–Appellees,
v.
Malcolm BALDRIGE, Secretary of Commerce of the United States; Anthony J. Calio, Administrator, National Oceanic and Atmospheric Administration; William Evans, Assistant Administrator for Fisheries Service; E.C. Fullerton, Southwest Regional Director, National Marine Fisheries Service, Defendants–Appellants.

Nos. 87–57845, 87–5821.

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Argued and Submitted Dec. 9, 1987.

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Decided April 14, 1988.

Synopsis

Owners and crew members of commercial tuna boats moved for preliminary injunction prohibiting government from placing female observers on board boats to enforce Marine Mammal Protection Act. The United States District Court for the Southern District of California, William B. Enright, J., granted preliminary injunction, and government appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) owners' allegations were insufficient to establish imminent threat of irreparable economic injury; (2) failure to identify possible harm to government was reversible error; and (3) failure to consider government's and public's interest in ensuring equal employment opportunities for women was reversible error.

Reversed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

***669** F. Henry Habicht, II, Asst. Atty. Gen., Washington, D.C., Peter K. Nunez, U.S. Atty., Karen M. Shichman, Asst. U.S. Atty., San Diego, Cal., Eileen Sobeck, Peter R. Steenland, Jr., and Alice Thurston, Dept. ***670** of Justice, Washington, D.C., for defendants-appellants.

Charles W. Froehlich, Jr., Peterson, Thelan & Price, Keith Zakarin, Lillick, McHose & Charles, San Diego, Cal., for plaintiffs-appellees.

Schulman and Schulman by Elizabeth Schulman, Thomas H. (Speedy) Rice, San Diego, Cal., for amicus curiae, American Civil Liberties Foundation of Southern California, San Diego Chapter.

Appeal from the United States District Court for the Southern District of California.

Before WALLACE, NORRIS and THOMPSON, Circuit Judges.

Opinion

WALLACE, Circuit Judge:

The Secretary of Commerce, the Administrator of the National Oceanic and Atmospheric Administration, the Assistant Administrator for Fisheries, National Fisheries Service, and the Southwest Regional Director of the National Marine Fisheries Service (government) appeal two preliminary injunctions prohibiting them from placing female observers on board commercial tuna boats owned and operated by Caribbean Marine Service Co. and Caroline M. Corp. (the owners). We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), and we reverse.

I

The owners and certain crew members (crew) fish for yellow fin tuna using purse seine nets. To locate the tuna, they scan the water looking for porpoises, which for unknown reasons often swim with the tuna. Nets are set around the porpoises, and the tuna swimming beneath them are captured when the net is closed or "pursed" around them. During this procedure, many porpoises may be caught in the nets and drowned. In 1970 and 1971, for example, more than 600,000 porpoises were killed in the course of such operations. *See Balelo v. Baldrige,* 724 F.2d 753, 756 (9th Cir.) (en banc) (*Balelo*), *cert. denied,* 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984).

In 1972, Congress enacted the Marine Mammal Protection Act (Act), 16 U.S.C. §§ 1361–1406. One of the declared goals of the Act is to reduce the number of incidental kills and injuries to marine mammals permitted in the course of commercial fishing operations. *Id.* § 1371(a)(2). In furtherance of this goal, section 1372 of the Act prohibits the killing or "taking" of any marine mammal except in accordance with permits issued by the Secretary of Commerce (Secretary). *Id.* § 1372. Section 1373 directs the Secretary to prescribe regulations regarding permitted takings of marine mammals and authorizes the Secretary to set quotas restricting the number of porpoises that may be taken pursuant to such permits each year. *Id.* § 1373.

Pursuant to section 1373, the Secretary promulgated regulations requiring permit holders to allow an employee of the National Oceanic and Atmospheric Administration (Administration) to accompany fishing vessels "for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions." 50 C.F.R. § 216.24(f)(1) (1986). In *Balelo,* this court, sitting en banc, held that the Secretary did not exceed the scope of his authority in promulgating this regulation and

that the placement of observers aboard the vessels did not constitute an unreasonable warrantless search within the meaning of the fourth amendment. 724 F.2d at 755.

The Administrator's new policy of hiring female, as well as male, observers to accompany selected fishing vessels on their voyages prompted the present litigation. Before 1986, the Administration did not hire women to fill positions as porpoise observers aboard fishing vessels. A number of female applicants complained of discrimination, and the Chief of the Administration's Civil Rights Division conducted an administrative inquiry into the complaints. He concluded that the practice of denying women employment on the tuna vessels ***671** solely because of their sex violated Title VII of the Civil Rights Act of 1964. Pursuant to his recommendation, the Administration began recruiting female as well as male applicants for the tuna boat observer program. Four women were recruited for the observer position in 1986 and were assigned to their first voyages in January of 1987.

In November of 1986, the Administration notified the tuna fleet that women were being trained as observers and that the female observers could be placed aboard the vessels in the near future. The letter sent to each owner stated that no alterations of the vessels or special accommodations would be required, but that any adjustments that could be made to achieve compatibility between male crew members and female observers were encouraged.

The owners were notified in December 1986 and January 1987 that a female observer would be assigned to accompany their vessels, the M/V Mariner and the M/V Apure, on their next voyages. In two separate actions, the owners and crew filed these actions for declaratory and injunctive relief. In each action, the owners and crew alleged that the Administrator's directive requiring the presence of female observers threatened a violation of the crew members' constitutional privacy rights and a violation of regulations requiring the observer to carry out his duties so as to minimize interference with fishing operations, 50 C.F.R. § 216.24(f)(2) (1986). The owners and crew sought and obtained temporary restraining orders prohibiting the government from implementing its new directive. The owners and crew then moved for preliminary injunctive relief. They supplemented their motions with various declarations describing the living and working conditions on the vessels. We now summarize these declarations.

A fishing voyage may last three months or longer, depending upon fishing conditions. During this period, the crew members work together on the deck of the boat, eat and drink together in the small galley, and are otherwise forced to interact with one another in their bunkrooms, in the passageways, and in the common showers and toilets.

The crew members allegedly enjoy little or no privacy with respect to intimate bodily functions. They share small, dormitory-style bunkrooms and common toilets and showers. Because the bunkrooms are cramped, the crew members usually undress in the common area of the bunkroom, rather than behind curtains in their bunks. Moreover, because the common toilets and showers lack partitions or

curtains, they usually bathe and perform other bodily functions in view of their cabinmates. Though single and double cabins equipped with private bathrooms exist on the vessels, these are assigned to officers. Porpoise observers usually bunk with the crews and share their bathroom facilities; thus, these observers may both observe and be observed by the crew members while undressing or performing bodily functions.

In addition, the crew members allegedly expose their bodies to the view of other members of the boat's complement while working on deck. Declarations submitted by the owners and crew state that crew members sometimes remove their clothes on deck, urinate over the side of the deck, shower on deck, and use unenclosed toilets on the deck. The porpoise observer, while conducting observation duties on deck, may have occasion to view these activities as well.

Finally, the declarations state that the West Coast tuna fishing industry has suffered severe financial losses in the past few years. The declarations contend that the presence of a female observer could destroy morale and distract the crew, thus affecting the crew's efficiency and decreasing the vessel's profits. The declarations also express the owners' concern that the crew members, some of whom are allegedly crude men with little formal education, may harass or sexually assault a female observer. Such tortious conduct could subject the owners to uninsurable liability, and further endanger their profits. To support this allegation, the owners referred to an incident which occurred aboard a foreign ***672** vessel involving an assault by a Korean officer upon an American female who served as a foreign fishing observer. Finally, the owners claimed that officers would have to devote time to protecting the female observer from the crew, thus distracting them from their primary duty of locating and catching tuna.

The owners and crew argued that these declarations were sufficient to call into question the constitutionality of the Administration's order requiring that the owners permit female observers to accompany their vessels on extended fishing voyages. Due to the captains' practice of assigning government observers to bunk in the dormitory bunkrooms and the crew members' habit of undressing, showering, and relieving themselves on deck, the crew members allegedly would be forced to expose their naked bodies to the view of the observer both above and below the deck. They contended further that even if this indignity could be avoided, the female observer's very presence in common areas of the vessel, such as the dining area, would unconstitutionally infringe the crew members' alleged right to privacy in these areas.

The owners also contended that declarations stating that the presence of a female would create conflicts that would disrupt fishing operations raised a serious legal question regarding the legality of assigning females as observers under 50 C.F.R. § 216.24(f)(2) (1986). This regulation requires that the duties of the observer be performed in a manner that minimizes interference with fishing operations. The owners contended that this regulation should be interpreted to require the government to refrain from placing female observers on board vessels because the mere presence of a

woman on the ship would distract the crew and affect its efficiency.

The government responded to these averments by submitting declarations challenging the owners' and crew's assertion that an invasion of the crew members' privacy interests was unavoidable and that the female observer would disrupt fishing operations. With respect to the crew members' privacy claim, the government submitted declarations pointing out that Administration regulations do not require that observers be placed in shared bunkrooms, that private quarters on tuna vessels may remain vacant throughout a fishing voyage, and that both male and female observers had been assigned private accommodations on boats in the past. Declarations from both male and female observers stated that crew members were always partially dressed while performing their duties, and that they had never observed crew members taking showers on deck.

With respect to the owners' claim that the presence of a female would disrupt fishing operations and provoke jealousy and fights, the government submitted the declaration of Wendy Townsend, a female Administration observer, who completed a 48–day voyage aboard a tuna seiner, which, like the owners' vessels, is subject to the Administration's directive. She stated that though the vessel's navigator vacated his quarters for the observer's use, he expressed no resentment at her presence and that they established a comfortable working rapport. Townsend also stated that she established amicable relations with the crew members, that no harassment or other disturbing incidents took place during her voyage, and that the crew members succeeded in capturing a hold-full of fish during the voyage.

The government also challenged the owners' prediction that the presence of a female observer would subject the owners to ruinous liability for the tortious conduct of their employees. It relied on Townsend's statement that she experienced no problems with the crew members. The government also submitted the declaration of Janet Wall, a foreign fisheries observer since 1978, who stated that approximately one-third, or about 150, of the observers serving on foreign vessels each year are women, and that in the past ten years there had been only six instances of physical or verbal abuse of female observers on these vessels. Finally, the government contended that the owners and officers, rather than the government, were responsible as a matter of law for the conduct of their ***673** crews, and that the owners could not be heard to complain of financial injuries which might result from the tortious conduct of their own employees.

The district court granted the motions of the owners and crew for preliminary injunctions in each case. The district court found that the parties raised serious privacy questions, and a serious question concerning the legality of placing women on the vessels under 50 C.F.R. § 216.24(f)(2) (1986). The district court determined that the balance of hardships tipped sharply in favor of the owners and crew. The court decided that the injunction would merely preserve the status quo, and this was important considering "the fact that the tuna industry is not as viable as it once was." In addition, the court concluded that maintenance of the

status quo allowing only male observers "will not adversely effect the purpose of the [Act], namely the preservation of porpoise."

II

When reviewing an order issuing a preliminary injunction, an appellate court must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard. *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir.1982) (*Sports Form*). An injunction may also be set aside if the district court misapprehended the law in its preliminary assessment of the merits, or premised its conclusions on clearly erroneous findings of fact. *Id.* Absent one of these errors, the district court's decision will not be reversed merely because the appellate court would have arrived at a different result if it had initially applied the law to the facts of the case. *Id.*

Because our review of the district court's decision is generally limited to whether the district court abused its discretion, our disposition of an appeal from a preliminary injunction ordinarily will not dispose of the merits of the litigation. *Id.* at 753. "Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits." *Id.*

In some cases, such appeals unnecessarily delay the litigation and waste judicial resources. *Id.* In this case, for example, the government moved to stay discovery in the underlying litigation pending our disposition of this appeal. To the extent that a desire to get an early glimpse of our view of the merits of the underlying legal issues in this litigation motivated this tactic, it was both misconceived and wasteful. A preliminary injunction is, as its name implies, preliminary to the trial—not to an appeal. We believe that this case could have proceeded to trial, or to the summary judgment stage, in less time than it took the parties to submit these cases for appeal. Had the parties pursued this course, they would have achieved a prompt resolution of the merits. But the parties did not pursue this course; therefore, we are conducting our review on the basis of a limited record. On the basis of this limited record and the status of the litigation, we may do no more than determine whether the district court abused its discretion in determining that serious legal questions were raised and that the balance of hardships tipped sharply in favor of the owners and crew. Our resolution of these issues will not determine the merits of the underlying legal issues presented in this litigation, and will only temporarily affect the rights of the parties. *Id.* When the district court renders its judgment on the merits of these cases, the losing party may again appeal. *Id.* Thus, rather than delay all proceedings during the pendency of an appeal from an order granting a preliminary injunction, the parties should have sought a rapid resolution of the legal issues presented in this case by moving for summary judgment or proceeding to a trial. Unfortunately, the parties did not take seriously our strong suggestion in *Sports Form*.

III

We now consider the question whether the district court abused its discretion ***674** in granting the preliminary injunction in this action. Identifying the proper test that should be applied by the district court is not always easy. Our cases have emphasized, however, that when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief. Thus, under the "traditional test" typically used in cases involving the public interest, the district court should consider (1) the likelihood that the moving party will prevail on the merits, (2) whether the balance of irreparable harm favors the plaintiff, and (3) whether the public interest favors the moving party. *Northern Alaska Environmental Center v. Hodel,* 803 F.2d 466, 471 (9th Cir.1986). We have allowed the district court some latitude in assessing the first two factors as it fashions appropriate relief. In some cases, we have stated that a plaintiff may meet its burden by demonstrating a combination of probable success on the merits and a possibility of irreparable injury. *E.g., Los Angeles Memorial Coliseum Commission v. National Football League,* 634 F.2d 1197, 1201 (9th Cir.1980) (*L.A. Coliseum*). At other times, we have stated that where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise "serious questions" on the merits. *Id.* at 1201, 1203 & n. 9. This latter formulation is known as the "alternative test." Under either test, however, the district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected. *See id.* at 1200; *see also American Motorcyclist Association v. Watt,* 714 F.2d 962, 967 (9th Cir.1983) (*AMA*).

In the case before us, the district court did not find that the owners and crew were likely to prevail on the merits. Instead, it only considered the seriousness of the questions raised and the balance of the hardships between the parties. After examining the moving papers, the court concluded that the owners and crew raised serious questions on the merits and that the balance of hardships tipped sharply in their favor. The government urges us to find that the district court erred in each of these determinations. However, we need not reach the question whether the owners and crew raised serious questions on the merits before the district court. Our review of the legal questions, as important as they are, will need to await a trial on the merits of this case and any subsequent appeal. We may properly dispose of the appeal before us by considering whether the district court properly evaluated and weighed the relevant harms in this case.

A.

In his Memorandum Decision, the district judge cited four findings in support of his conclusion that the balance of harm tipped sharply in favor of the owners and crew: (1) the preliminary injunction would do no more than "preserve the status quo"; (2) the tuna industry "has been plagued with financial problems";

(3) the female observer would "disturb the domestic aspect of the tuna seiner"; and (4) the declarations submitted by the owners and crew "speculate that accommodation of a female federal observer may be costly."

These findings do not support the district court's conclusion that the balance of harm tipped decidedly in favor of the owners and crew. First, and perhaps most important, the owners and crew did not demonstrate, and the district court did not find, that the alleged harms will be irreparable. At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm. *L.A. Coliseum,* 634 F.2d at 1202–03. Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. *Goldie's Bookstore, Inc. v. Superior Court,* 739 F.2d 466, 472 (9th Cir.1984). A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief. *L.A. Coliseum,* 634 F.2d at 1201.

***675** The district court did not require a showing that the harms alleged by the owners and crew were imminent or likely. For example, the district court did not require them to demonstrate that the economic losses they alleged would result from a female observer's presence were likely to occur. Instead, the court merely stated that "the declarations submitted by the [owners] *speculate* that accommodation of a female observer *may be costly* " (emphasis added). Nor do the materials that the owners submitted demonstrate an imminent threat of economic harm. The owners offered no evidence that female porpoise observers would interfere with fishing operations on their vessels. Instead, the owners simply stated that their employees would respond negatively to a female observer and that this subjective response might cost the owners money. The owners also feared that their employees would assault or harass the observer and thereby subject them to an increased risk of liability. Neither of these allegations suffices to establish an imminent threat of economic injury.

The only evidence submitted to substantiate the owner's prediction that they would incur increased liability for intentional torts were materials describing an assault on an American female foreign fisheries observer by a Korean officer on a Korean ship. The possibility that a female observer aboard one of the owners' vessels would suffer a similar attack at the hands of the owners' employees and thus subject the owners to liability is too remote and speculative to constitute an irreparable injury meriting preliminary injunctive relief.

In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, 233 (9th Cir.) (*South Lake Tahoe*), *cert. denied,* 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980), we held that council members' fears that enforcing regulations would expose them to civil liability did not give them standing to challenge the regulations. *Id.* at 238–39. We held that because "multiple contingencies" must occur before the alleged injury occurred, the threat of civil liability was only *potential.* We concluded that because there was "no immediate threat of suit nor reason to believe suit [was] inevitable," the injury the council members alleged was too

speculative to constitute an "injury in fact" for standing purposes. *Id.* at 239. *See also O'Shea v. Littleton,* 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974) (*O'Shea*) (plaintiffs lacked standing to complain of an injury that would occur only "*if* [they] proceed[ed] to violate an unchallenged law and *if* they [were] charged, held to answer, and tried in any proceedings.").

We find the reasoning of these standing cases persuasive because the issues involved in this claim are similar. The owners claim that their increased exposure to liability constitutes economic injury. This claim appears indistinguishable from those alleged in *South Lake Tahoe* and *O'Shea*. Multiple contingencies must occur before their injuries would ripen into concrete harms. Here, as in *South Lake Tahoe,* there is no threat of suit nor reason to believe suit is inevitable. *Id.* at 239; *see also O'Shea,* 414 U.S. at 498, 94 S.Ct. at 677. In addition, we must assume that the owners and their employees will not willfully violate criminal assault laws or commit intentional torts against the observer. *O'Shea,* 414 U.S. at 497, 94 S.Ct. at 676. Because the threat of civil liability is too attenuated and conjectural to constitute a basis for their standing, *South Lake Tahoe,* 625 F.2d at 239, it follows that this injury is too speculative to constitute an irreparable harm justifying injunctive relief. *See L.A. Coliseum,* 634 F.2d at 1201 (plaintiffs must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief; they need only *allege* such injury to establish their standing).

The owners' and crew's claim that they will catch fewer fish if a woman is on board is similarly unsupported. The only materials submitted to the district court describing the impact of women on fishing operations were declarations the government filed stating that women have served successfully on numerous voyages on both foreign and American fishing vessels. Subjective apprehensions and unsupported ***676** predictions of revenue loss are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm. *See id.* at 1201–02. Moreover, there was no showing that the threat to the owners' revenues constituted an irreparable injury. No consideration was given to whether any lost revenues might be compensable in a damage award, and thus not irreparable. *Id.* at 1202. Indeed, the district court did not make any finding on whether the alleged threat to the owners' revenues would be irreparable. Therefore, the district court abused its discretion by including the economic harm the owners and crew alleged in its calculus when balancing the hardships alleged by the parties.

B.

The district court similarly failed to find a threat of immediate, irreparable harm to the privacy interests alleged by the crew. The district court did not find, for example, that the female observer would have to bunk in the crew's quarters or observe their intimate bodily activities. Instead, the district judge stated in conclusory fashion that though a "male federal observer did not disturb the domestic aspect of the tuna seiner, a female would." It is unclear from this description whether the "harm" the court found consisted

of an invasion of any constitutionally protected privacy interests or mere inconvenience to the crew members. Injunctions should not issue "to restrain an act the injurious consequences of which are merely trifling." *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982), *quoting Consolidated Canal Co. v. Mesa Canal Co.,* 177 U.S. 296, 302, 20 S.Ct. 628, 630, 44 L.Ed. 777 (1900). If the owners and crew demonstrated only a likelihood that the crew members would be inconvenienced by having to adapt to the presence of a woman, but failed to establish an imminent threat to their privacy interests, the district court abused its discretion by resorting to the extraordinary remedy of enjoining the operation of the governmental program in this case.

The government urges us to find that the owners and crew failed to demonstrate a likelihood that the presence of a female observer would implicate constitutionally protected privacy interests. It points out that the Administration does not require that the federal observer be housed with the crew members and that the crew members' privacy in their bedrooms could be ensured by the simple step of assigning the female observer to a private cabin. It argues further that the crew did not allege, much less demonstrate, that the presence of a female observer in other areas of the ship would implicate any constitutionally protected interest.

We agree with the government that mere allegations of inconvenience will not support the crew members' claim of irreparable injury to their constitutional rights. We will not, however, decide whether the owners and crew have raised serious constitutional issues in this appeal. Because we cannot determine from the district court's decision whether the district court found that a female observer would infringe any constitutionally protected privacy interests, we need not reach that issue.

C.

The district court also failed to mention the harm that the government might suffer from a preliminary injunction, and thus did not weigh that harm against any alleged privacy interests of the crew members. The district court must "identify the harms which a preliminary injunction might cause to defendants and ... weigh these against plaintiff's threatened injury." *L.A. Coliseum,* 634 F.2d at 1203.

The only indication in the district judge's opinion that he considered whether the injunction would harm the government is his statement that the injunction would do no more than preserve the status quo. This brief statement does not identify specific injuries alleged by the government or weigh those injuries against those alleged by the owners and crew. In fact, however, the government did allege that enjoining the placement of female observers on ***677** board the ships would cause specific injuries to governmental interests.

The government alleged that its ability to enforce the mandate of the Act would be hampered if it were prohibited from placing qualified members of the observer program aboard West Coast vessels. It also alleged that

its failure to employ women in the observer program could subject it to liability for a violation of Title VII of the Civil Rights Act of 1964. The district court's decision does not indicate that it considered, much less weighed, this harm against the injuries alleged by the owners and crew. This failure to identify, evaluate, and weigh the potential harm alleged by the government is reversible error. *L.A. Coliseum,* 634 F.2d at 1203.

D.

Finally, the district court failed to identify and weigh the public interests at stake in its balance of harms analysis. As stated earlier, the district court must always consider whether the public interest would be advanced or impaired by issuance of an injunction in any action in which the public interest is affected. *AMA,* 714 F.2d at 967.

The owners and crew argue that delaying either temporarily or permanently the use of women in the Act's observer program would not have any impact on the interests of the public. This argument rests on two premises: first, that the only public interest implicated by this dispute is the interest in preserving marine mammals, and second, that excluding qualified women from the observer program will not negatively affect that interest. Though the district court's analysis of the balance of harms does not indicate whether it considered or balanced the interests of the public in this case, it appears that the district court accepted the assertion of the owners and crew that excluding women from the observer program would not affect the primary purpose of the Act. The court stated that "the maintenance of the status quo by allowing exclusively male observers to accompany the plaintiffs' tuna seiners will not adversely affect the purpose of the [Act], namely the preservation of porpoise."

The argument that the injunction would have no impact on the interests of the public fails to take into account both the government's and the public's interest in ensuring equal employment opportunities for women. This interest, as well as the interest in protecting and preserving marine mammals, is clearly implicated by the issuance of the preliminary injunction in this case. *See, e.g., Kent v. Johnson,* 821 F.2d 1220, 1225 (6th Cir.1987) (operational necessity of nondiscrimination in employment is, by definition, a legitimate penological objective which must be balanced against inmates' alleged rights to privacy); *Forts v. Ward,* 621 F.2d 1210, 1215–17 (2d Cir.1980) (*Forts*) (district court must balance the Title VII rights of guards against the privacy rights of inmates even where no Title VII action has been filed). The district court acknowledged that this action "implicated" the policies underlying Title VII. However, there is no indication that the district court *weighed* the strong governmental and public interest in nondiscriminatory hiring practices by the government against the privacy interests asserted by the crew. This omission fatally undermines the district court's conclusion that the balance of hardships tips decidedly in favor of the owners and crew. *L.A. Coliseum,* 634 F.2d at 1203.

When the governmental and public interest in gender-neutral hiring is balanced against the privacy interests asserted in this case, it

is by no means apparent that the balance tips decidedly in the crew members' favor. Some courts have held that the privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex should not impair employment rights unless the threatened invasion of privacy is serious and there are no means by which both interests can be reasonably accommodated. *See, e.g., Grummett v. Rushen,* 779 F.2d 491, 495 (9th Cir.1985) (restricted observations by members of the opposite sex are not so degrading as to require intervention by a federal court); ***678** *Forts,* 621 F.2d at 1216–17 (threat to privacy must be of sufficient gravity to justify denial of equal employment opportunities); *Smith v. Fairman,* 678 F.2d 52, 54–55 (7th Cir.1982) (per curiam) (conflict between privacy interest of inmates and state's duty to refrain from discrimination in employment of guards ordinarily should be resolved by reasonable accommodations), *cert. denied,* 461 U.S. 907, 103 S.Ct. 1879, 76 L.Ed.2d 810 (1983). Therefore, we cannot automatically say, based on the record before us, that the privacy interests "decidedly" outweigh the important governmental interest in providing equal employment opportunities for its employees, especially if the threat to the privacy interests asserted can be minimized by taking reasonable steps to prevent the threatened intrusions.

In the present case, the district court's decision does not indicate that the court considered whether less drastic alternatives were available that could accommodate both the crew members' alleged privacy interests and the governmental and public interest in gender-neutral hiring. If such alternatives are available, the crew members' alleged privacy claim may be reduced to no more than a claim of inconvenience. *See Forts,* 621 F.2d at 1217 (interests in style and avoiding discomfort do not justify denial of equal employment opportunities). We therefore cannot determine from the scant record before us what, if any, effect the female observer's presence would have on the crew members' alleged right to be free from involuntary observation of their intimate activities and whether this harm decidedly outweighs the governmental and public interests threatened by the issuance of the preliminary injunction. We trust these issues will be properly developed during the trial.

IV

In conclusion, after careful review of the record and the district court's decision, we hold that the district court abused its discretion by ordering preliminary relief in this case. Under the alternate approach articulated in *L.A. Colisuem,* the moving party must first demonstrate an immediate threat of irreparable injury to itself and that the balance of hardships tips decidedly in its favor. *Id.* at 1203. The district court did not determine that the injuries alleged by the owners and crew were serious, immediate, and irreparable. Moreover, it failed to identify the harm which a preliminary injunction might cause to the government, its employees, and the public and to weigh this harm against any irreparable injuries alleged by the owners and crew. We therefore reverse the orders granting preliminary injunctions.

REVERSED.

All Citations

844 F.2d 668, 46 Fair Empl.Prac.Cas. (BNA) 1027, 46 Empl. Prac. Dec. P 37,935

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EX. RELA-4

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DEPARTMENT 53

DOTCONNECTAFRICA TRUST; Plaintiff, vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.; Defendants.	Case No.: BC607494 Hearing Date: February 3, 2017 Time: 8:30 a.m. **ORDER RE:** PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is DENIED. The court has considered, very carefully, the excellent arguments of counsel. The tentative ruling will remain the ruling on the motion.

BACKGROUND

This action involves the award and delegation of the generic top-level domain name ("gTLD")[1] ".Africa." Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet's domain name system. In 2012, ICANN launched the "New gTLD program," in which it invited interested parties to apply to be designated the operator of their chosen gTLD. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses.

In March 2012, Plaintiff DotConnectAfrica Trust ("DCA") applied to ICANN for the delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing

[1] Examples of gTLDs are .com, .gov, and .org

information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC ("ZACR") also applied to be the operator of .Africa. ZACR is a South African non-profit company which was formed to promote open standards and systems in computer hardware and software.

The competition for the .Africa gTLD came down to DCA and ZACR. In 2013, ICANN's Government Advisory Committee ("GAC") issued advice that DCA's application should not proceed due to issues with regional endorsements. ICANN rejected DCA's application based on the GAC advice, while ZACR's application continued. Thereafter, DCA challenged ICANN's decision and filed a request for review by an Independent Review Process ("IRP") Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

On July 9, 2015, the IRP Panel issued a "Final Declaration" finding in favor of DCA and concluding that ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." In July 2015, ICANN placed DCA's application back in the geographic names evaluation phase. ICANN later concluded that DCA's application was insufficient to proceed past this phase.

In January 2016, after learning that ICANN would reject its application, DCA filed suit against ICANN. ICANN then removed the case to the Central District of California. While this case was pending before the district court, DCA moved for and was granted a temporary restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the preliminary injunction order which ICANN joined. The motion for reconsideration was denied. On October 19, 2016, the district court remanded the case to this Court due to lack of jurisdiction.

Upon remand, DCA moved for the same preliminary injunction that the district court previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has been resolved. DCA initially sought this relief under its ninth cause of action for declaratory

relief. A hearing on this motion was held on December 22, 2016 and the matter was argued at length. The Court denied the motion.

DCA now moves again for the same preliminary injunction. The instant motion is substantially the same as the motion which was denied on December 22, 2016. The only meaningful difference is that DCA now moves under alternative causes of action: its second and fifth causes of action for intentional misrepresentation and unfair business practices. The motion is opposed by Defendant ICAAN and by intervenor ZACR.

EVIDENCE

ICANN's evidentiary objections are overruled.

DCA's evidentiary objections are overruled.

LEGAL STANDARD

"As its name suggests, a preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (White v. Davis (2003) 30 Cal.4th 528, 554.) "[A]n order granting or denying a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until the merits of the action can be determined." (Socialist Workers etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 890-91 (citations omitted).)

"In determining whether to issue a preliminary injunction, the trial court considers: (1) the likelihood that the moving party will prevail on the merits and (2) the interim harm to the respective parties if an injunction is granted or denied. The moving party must prevail on both factors to obtain an injunction." (Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other..." (Church of Christ in Hollywood v. Superior Court (2002) 99 Cal.App.4th 1244, 1251-52.) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous

interim decision may cause." (White, supra, 30 Cal.4th at p. 554.) The burden is on the party seeking injunctive relief to show all elements necessary to support issuance of a preliminary injunction. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

DISCUSSION

A. Interim Harm to the Parties

"To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (White, supra, 30 Cal.4th at p. 554.) "In evaluating interim harm, the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the defendant is likely to suffer if an injunction is issued." (Shoemaker, supra, 37 Cal.App.4th at 633.)

Notably, DCA has not provided any new evidence of harm that was not considered by the Court in the prior motion for preliminary injunction. DCA contends that, if .Africa is delegated to ZACR before this case is resolved, DCA's mission will be seriously frustrated, funders will likely pull their support, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶34-35.) This harm is highly speculative and fails to account for the possibility of re-delegation.

The .Africa gTLD can be re-delegated to DCA in the event DCA prevails in this litigation. This is not disputed by DCA. Instead, DCA argues, without supporting evidence, that the procedure for gTLD re-delegation is uncertain. But the evidence reflects that re-delegation is not uncommon and has occurred numerous times. (Atallah Decl. ¶13.) Indeed, ICANN has an established procedure for re-delegating a gTLD, which is set forth in a published manual. (Masilela Decl. I, Ex. I.) Accordingly, there is no potential for irreparable harm to DCA. Further, it appears that any interim harm to DCA can be remedied by monetary damages, as requested in DCA's Complaint. (See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300, 306 ("if monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction cannot be granted").)

In contrast to the speculative nature of DCA's harm, ZACR presents evidence in the form of a detailed spreadsheet prepared by its finance section demonstrating that ZACR is incurring significant financial costs with no attendant benefits as a result of the delay in delegation of the .Africa gTLD. (Masilela Decl. ¶11-12, Ex. F.)

The public interest also weighs in favor of denying the injunction because the delay in the delegation of the .Africa gTLD is depriving the people of Africa of having their own unique gTLD. (See Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 435 (courts consider "the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause").) Although the public also has an interest in having the .Africa gTLD properly awarded through a fair and transparent application process, this concern does not apply to the interim harm analysis because, in the event that DCA ultimately prevails in this action, the gTLD can be re-delegated.

The Court finds that the balance of the interim harm weighs in favor of denying the preliminary injunction.

B. Likelihood of Success on the Merits

A preliminary injunction must not issue unless it is "reasonably probable that the moving party will prevail on the merits." (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller) (1985) 170 Cal.App 3d 438, 442.) The "likelihood of success on the merits and the balance-of-harms analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary injunction." (White, supra, 30 Cal.4th at 561.) "The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor." (Id.) However, this does not mean that a trial court may grant a preliminary injunction on the basis of the likelihood-of-success factor alone when the balance of hardships dramatically favors denial of a preliminary injunction. (Id.; see also Yu v. Univ. of La Verne (2011) 196 Cal.App.4th 779,

787 (a trial court's order denying a motion for preliminary injunction should be affirmed if the trial court correctly found the moving party failed to satisfy either of the factors).)

Here, as discussed above, the balance of hardships clearly favors denial of the preliminary injunction. In any event, DCA has not made a sufficient evidentiary showing to establish that it is likely to prevail on the merits.

ICANN contends that DCA is unlikely to prevail on the merits because, among the terms and conditions that DCA acknowledged and accepted by submitting a gTLD application, was a covenant barring all lawsuits against ICANN arising out of its evaluation of new gTLD applications (the "Covenant"). The Covenant provides:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.

DCA contends that the Covenant is unenforceable because it violates Civil Code §1668, it is unconscionable, and it was procured by fraud. However, a federal district court recently rejected these same arguments and dismissed a gTLD applicant's lawsuit against ICANN on the sole ground that the Covenant bars all "claims related to ICANN's processing and consideration of a gTLD application." (Ruby Glen, LLC v. Internet Corp. 2016 WL 6966329, at *4 (C.D. Cal. Nov. 28, 2016).) The court stated: "the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to sue is not substantively unconscionable or void pursuant to California Civil Code section 1668.

Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with prejudice." (Id. at *5.)

For the reasons set forth in the Ruby Glen order, it appears that the Covenant is enforceable. If the Covenant is enforceable, DCA's claims against ICANN for fraud and unfair business practices are likely to be barred. As a result, DCA cannot establish that it is likely to succeed on the merits.

For the foregoing reasons, the Court finds that DCA has not met its burden of showing the elements necessary to support issuance of a preliminary injunction. DCA's motion for a preliminary injunction is denied.

ICANN is ordered to provide notice of this ruling.

DATED: February 3, 2017

Howard L. Halm
Judge of the Superior Court

EX. RELA-5

869 F.3d 848
United States Court of Appeals, Ninth Circuit.

DISNEY ENTERPRISES, INC.; LucasFilm Ltd. LLC; Twentieth Century Fox Film Corporation; Warner Brothers Entertainment, Inc., Plaintiffs–Counter–Defendants–Appellees,
v.
VIDANGEL, INC., Defendant–Counter–Claimant–Appellant.

No. 16-56843
|
Argued and Submitted June 8, 2017 Pasadena, California
|
Filed August 24, 2017

Synopsis

Background: Companies that owned copyrights for movies and television shows brought action against operator of online streaming service that removed objectionable content from movies and television shows, alleging copyright infringement in violation of Copyright Act and circumvention of technological measures controlling access to copyrighted works in violation of Digital Millennium Copyright Act (DMCA). The United States District Court for the Central District of California, No. 2:16–cv–04109–AB–PLA, André Birotte, Jr., J., 224 F.Supp.3d 957, granted companies' motion for preliminary injunction. Operator appealed.

Holdings: The Court of Appeals, Hurwitz, Circuit Judge, held that:

companies showed likelihood of success on merits of copyright infringement claim;

operator failed to show likelihood of success on Family Movie Act (FMA) defense;

operator failed to show likelihood of success on fair use defense;

companies showed likelihood of success on merits of claim for violation of DMCA;

companies showed likelihood of irreparable harm;

balance of equities supported preliminary injunction; and

public interest supported preliminary injunction.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, André Birotte, Jr., District Judge, Presiding, D.C. No. 2:16–cv–04109–AB–PLA

Before: Carlos T. Bea and Andrew D. Hurwitz, Circuit Judges, and Leslie E. Kobayashi, ** District Judge.

** The Honorable Leslie E. Kobayashi, United States District Judge for the District of Hawaii, sitting by designation.

OPINION

HURWITZ, Circuit Judge:

VidAngel, Inc. operates an online streaming service that removes objectionable content from movies and television shows. VidAngel purchases physical discs containing copyrighted movies and television shows, decrypts the discs to "rip" a digital copy to a computer, and then streams to its customers a filtered version of the work.

The district court found that VidAngel had likely violated both the Digital Millennium Copyright Act and the Copyright Act, and preliminarily enjoined VidAngel from circumventing the technological measures controlling access to copyrighted works on DVDs and Blu-ray discs owned by the plaintiff entertainment studios, copying those works, and streaming, transmitting, or otherwise

publicly performing or displaying them electronically. VidAngel's appeal presents two issues of first impression. The first is whether the Family Movie Act of 2005 exempts VidAngel from liability for copyright infringement. 17 U.S.C. § 110(11). The second is whether the anti-circumvention provision of the Digital Millennium Copyright Act covers the plaintiffs' technological protection measures, which control both access to and use of copyrighted works. 17 U.S.C. § 1201(a)(1). The district court resolved these issues against VidAngel. We agree and affirm the preliminary injunction.

FACTUAL BACKGROUND

I. The copyrighted works.

Disney Enterprises, LucasFilm Limited, Twentieth Century Fox Film Corporation, ***853** and Warner Brothers Entertainment ("the Studios") produce and distribute copyrighted motion pictures and television shows. The Studios distribute and license these works for public dissemination through several "distribution channels": (1) movie theaters; (2) sale or rental of physical discs in DVD or Blu-ray format; (3) sale of digital downloads through online services, such as iTunes or Amazon Video; (4) on-demand rental for short-term viewing through cable and satellite television or internet video-on-demand platforms, such as iTunes or Google Play; and (5) subscription on-demand streaming online outlets, such as Netflix, Hulu, HBO GO, and cable television.

To maximize revenue, the Studios employ "windowing," releasing their works through distribution channels at different times and prices, based on consumer demand. Typically, new releases are first distributed through digital downloads and physical discs, and are only later available for on-demand streaming. The Studios often negotiate higher licensing fees in exchange for the exclusive rights to perform their works during certain time periods. Digital distribution thus provides a large source of revenue for the Studios.

The Studios employ technological protection measures ("TPMs") to protect against unauthorized access to and copying of their works. They use Content Scramble System ("CSS") and Advanced Access Content System ("AACS"), with optional "BD+," to control access to their copyrighted content on DVDs and Blu-ray discs, respectively. These encryption-based TPMs allow consumers to use players from licensed manufacturers only to lawfully decrypt a disc's content, and then only for playback, not for copying. [1]

[1] Thus, as the licensors of CSS and AACS, amicus curiae DVD Copy Control Association, Inc. and Advanced Access Content System License Administrator, LLC, explain, "[i]ndividual consumers purchasing a DVD or Blu-ray Disc are not provided the keys or other cryptographic secrets that are necessary for playback. They must use a licensed player which, in turn, must abide by the technical specifications and security requirements imposed by [their] licenses."

II. VidAngel's streaming service.

VidAngel offers more than 2500 movies and television episodes to its consumers. It purchases multiple authorized DVDs or Blu-ray discs for each title it offers. VidAngel then assigns each disc a unique inventory barcode and stores it in a locked vault. VidAngel uses AnyDVD HD, a software program, to decrypt one disc for each title, removing the CSS, AACS, and BD+ TPMs on the disc, and then uploads the digital copy to a computer.[2] Or, to use VidAngel's terminology, the "[m]ovie is ripped from Blu–Ray to the gold master file." After decryption, VidAngel creates "intermediate" files, converting them to HTTP Live Streaming format and breaking them into segments that can be tagged for over 80 categories of inappropriate content. Once tagged, the segments are encrypted and stored in cloud servers.

[2] AnyDVD HD is sold by RedFox, a Belize-based company run by former employees of a company convicted overseas for trafficking in anti-circumvention technology and identified by the United States Trade Representative as selling software that facilitates copyright violations. AnyDVD is commercially available outside of the United States.

Customers "purchase" a specific physical disc from VidAngel's inventory for $20. The selected disc is removed from VidAngel's inventory and "ownership" is transferred to the customer's unique user ID. However, VidAngel retains possession of the physical disc "on behalf of the purchasers," with the exception of the isolated ***854** cases in which the consumer asks for the disc. To date, VidAngel has shipped only four discs to purchasers.

After purchasing a disc, a customer selects at least one type of objectionable content to be filtered out of the work.[3] VidAngel then streams the filtered work to that customer on "any VidAngel-supported device, including Roku, Apple TV, Smart TV, Amazon Fire TV, Android, Chromecast, iPad/iPhone and desktop or laptop computers." The work is streamed from the filtered segments stored in cloud servers, not from the original discs. Filtered visual segments are "skipped and never streamed to the user." If the customer desires that only audio content be filtered, VidAngel creates and streams an altered segment that mutes the audio content while leaving the visual content unchanged. VidAngel discards the filtered segments after the customer views them.

[3] VidAngel initially permitted streaming without filters. It then began requiring a filter, but soon discovered customers were selecting inapplicable filters (e.g., a *Star Wars* character for a non-*Star Wars* movie) to obtain unfiltered films. VidAngel subsequently required filtering to correspond to the specific movie being streamed, but permitted the single required filter to be simply for the opening or closing credits. After the Studios brought this action, VidAngel began requiring customers to "pick at least one additional [non-credits] filter."

After viewing the work, a customer can sell the disc "back to VidAngel for a partial

credit of the $20 purchase price," less $1 per night for standard definition purchases or $2 per night for high-definition purchases. VidAngel accordingly markets itself as a $1 streaming service. After a disc is sold back to VidAngel, the customer's access to that title is terminated.[4] Virtually all (99.6%) of VidAngel's customers sell back their titles, on average within five hours, and VidAngel's discs are "re-sold and streamed to a new customer an average of 16 times each in the first four weeks" of a title's release.

[4] VidAngel previously permitted customers to select "automatic sellback," but eliminated that feature after this suit was filed.

III. VidAngel's growth.

In July 2015, VidAngel sent letters to the Studios describing its service. The letters explained that VidAngel was in "a limited beta test of its technology" and had only 4848 users, and concluded: "If you have any questions concerning VidAngel's technology or business model, please feel free to ask. If you disagree with VidAngel's belief that its technology fully complies with the Copyright Act ... please let us know." The Studios did not respond, but began monitoring VidAngel's activities.

VidAngel opened its service to the general public in August 2015. Its marketing emphasized that it could stream popular new releases that licensed video-on-demand services like Netflix could not, for only $1. For example, when VidAngel began streaming Disney's *Star Wars: The Force Awakens*, it was available elsewhere only for purchase on DVD or as a digital download, not as a short-term rental. Similarly, VidAngel began streaming Fox's *The Martian* and *Brooklyn* while those works were exclusively licensed to HBO for on-demand streaming. Customers responded favorably.[5] And, a survey indicated that 51% of VidAngel's users would not otherwise ***855** watch their selections without filtering.

[5] For example, one customer tweeted: "Son asked for #StarWars A New Hope. Not on Netflix, Google play charges $19.99. Streamed HD on @VidAngel. $2 & hassle free!" Another gave VidAngel a 5–star rating on Facebook, explaining: "We bought Star Wars and sold it back for a total of $1 when it was like $5 to rent on Amazon. So even if you don't need content cleaned, it's a great video service."

VidAngel eventually reached over 100,000 monthly active users. When the Studios filed this suit in June 2016, VidAngel offered over 80 of the Studios' copyrighted works on its website. VidAngel was not licensed or otherwise authorized to copy, perform, or access any of these works.

PROCEDURAL BACKGROUND

The Studios' complaint alleged copyright infringement in violation of 17 U.S.C. § 106(1), (4), and circumvention of technological measures controlling access to copyrighted works in violation of the Digital Millennium Copyright Act of 1998 ("DMCA"), 17 U.S.C. § 1201(a)(1)(A). VidAngel denied the statutory violations, raising the affirmative defenses of

fair use and legal authorization by the Family Movie Act of 2005 ("FMA"), 17 U.S.C. § 110(11). The Studios moved for a preliminary injunction, and after expedited discovery, the district court granted the motion.

The district court found that the Studios had demonstrated a likelihood of success on the merits of both their DMCA and copyright infringement claims. It first found that VidAngel violated § 1201(a)(1)(A) of the DMCA by circumventing the technological measures controlling access to the Studios' works. The district court also concluded that VidAngel violated the Studios' exclusive right to reproduce their works under § 106(1) by making copies of them on a computer and third-party servers. It also held that VidAngel violated the Studios' exclusive right to publicly perform their works under § 106(4), because at most the customers "own" only the physical discs they "purchase," not the digital content streamed to them.

The district court rejected VidAngel's FMA defense, holding that "VidAngel's service does not comply with the express language of the FMA," which requires a filtered transmission to "come from an 'authorized copy' of the motion picture." § 110(11). The district court also found that VidAngel was not likely to succeed on its fair use defense, emphasizing that the "purpose and character of the use" and "effect of the use upon the potential market for or value of the copyrighted work" factors weighed in favor of the Studios. 17 U.S.C. § 107.

The district court concluded that the Studios had demonstrated a likelihood of irreparable injury from VidAngel's interference "with their basic right to control how, when and through which channels consumers can view their copyrighted works" and with their "relationships and goodwill with authorized distributors." Finally, the court found that "the balance of hardships tips sharply in [the Studios'] favor."

The court therefore preliminarily enjoined VidAngel from copying and "streaming, transmitting, or otherwise publicly performing or displaying any of Plaintiff's copyrighted works," "circumventing technological measures protecting Plaintiff's copyrighted works," or "engaging in any other activity that violates, directly or indirectly," 17 U.S.C. §§ 1201(a) or 106. VidAngel timely appealed. [6]

6 Both the district court and this court denied VidAngel's motions for a stay of the preliminary injunction. Before its motions were denied, VidAngel continued to stream the Studios' copyrighted works and added at least three additional works to its inventory. The district court held VidAngel in contempt for violating the preliminary injunction. The contempt citation is not involved in this appeal.

*856 JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction of this appeal under 28 U.S.C. § 1292(a)(1) and review the district court's entry of a preliminary injunction for abuse of discretion. *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc).

"Because our review is deferential, we will not reverse the district court where it got the law right, even if we would have arrived at a different result, so long as the district court did not clearly err in its factual determinations." *Id.* (citation omitted, alteration incorporated); *see also Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam) (asking whether the district court "identified the correct legal rule" and whether its application of that rule "was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record" (citation omitted)).

DISCUSSION

A party can obtain a preliminary injunction by showing that (1) it is "likely to succeed on the merits," (2) it is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). A preliminary injunction may also be appropriate if a movant raises "serious questions going to the merits" and the "balance of hardships ... tips sharply towards" it, as long as the second and third *Winter* factors are satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). The district court applied both of these standards.

I. Likelihood of success on the merits.

Likelihood of success on the merits "is the most important" *Winter* factor; if a movant fails to meet this "threshold inquiry," the court need not consider the other factors, *Garcia*, 786 F.3d at 740, in the absence of "serious questions going to the merits," *All. for the Wild Rockies*, 632 F.3d at 1134–35. However, "once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). Thus, if the Studios demonstrated a likelihood of success on their copyright infringement and DMCA claims, the burden shifted to VidAngel to show a likelihood of success on its FMA and fair use affirmative defenses. *Id.*

A. Copyright infringement.

To establish direct copyright infringement, the Studios must (1) "show ownership of the allegedly infringed material" and (2) "demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." *Id.* at 1159 (citation omitted). VidAngel's briefing on appeal does not contest the Studios' ownership of the copyrights, instead focusing only on the second requirement.

Copyright owners have the exclusive right "to reproduce the copyrighted work in copies," or to authorize another to do so. 17 U.S.C. § 106(1). VidAngel concedes that it copies the Studios' works from discs onto a computer. VidAngel initially argued that because it lawfully purchased the discs, it can also lawfully re-sell or rent them. But, lawful owners "of a particular copy" of a copyrighted work are only entitled to "sell or otherwise dispose of the possession of that copy," not to reproduce the work. 17 U.S.C. § 109(a). The district court thus did not abuse its discretion

in ***857** concluding that VidAngel's copying infringed the Studios' exclusive reproduction right. *See MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (transferring digital files "from a permanent storage device to a computer's RAM" is "copying" under § 106); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1993) (holding that § 106 "unambiguously ... proscribes 'intermediate copying' " (citation omitted)). [7]

7 Indeed, at oral argument, VidAngel conceded that it relies entirely on the FMA and fair use as affirmative defenses to the reproduction claim.

B. Defenses to copyright infringement.

1. The Family Movie Act.

The FMA was designed to allow consumers to skip objectionable audio and video content in motion pictures without committing copyright infringement. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109–9, Title II, §§ 201, 202(a), 119 Stat. 218 (2005). The statute provides, in relevant part:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> [...]
>
> the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

17 U.S.C. § 110(11).

We have had no previous occasion to interpret the FMA, so we begin with its text. *See Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1072 (9th Cir. 2016). The statute clearly identifies two acts that "are not infringements of copyright." § 110(11). First, it authorizes "making imperceptible"—filtering—by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during performances or transmissions to private households, "from an authorized copy of the motion picture." *Id.* Second, the statute authorizes the creation or distribution of any technology that enables the filtering described in the first provision and that is designed and marketed to be used, at the direction of a member of a private household, for that filtering, if no fixed copy of the altered version of the motion picture is created by the technology. *Id.* Thus, the second act authorized by the FMA—the creation or distribution of certain technology that enables "such" filtering —necessarily requires that the filtering be "from an authorized copy of the motion picture." *Id.*

Indeed, VidAngel concedes that under the FMA, "the filtering must come 'from an authorized copy' of the movie." But, VidAngel argues that because it "*begins* its filtering process with an authorized copy"—a lawfully purchased disc—"any subsequent filtered stream" is also "from" that authorized copy.

We disagree. The FMA permits "the making imperceptible ... of limited portions of audio or video content of a motion picture, during a performance in or transmitted to [a private household], *from* an ***858** authorized copy of the motion picture." § 110(11) (emphasis added). It does not say, as VidAngel would have us read the statute, "beginning from" or "indirectly from" an authorized copy. *See id.* VidAngel "would have us read an absent word into the statute," but, "[w]ith a plain, nonabsurd meaning in view, we need not proceed in this way." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Rather, the most natural reading of the statute is that the filtered performance or transmission itself must be "from" an authorized copy of the motion picture. *See Yates v. United States*, —— U.S. ——, 135 S.Ct. 1074, 1085, 191 L.Ed.2d 64 (2015) (plurality opinion) ("The words immediately surrounding ['from' in § 110(11)] ... cabin the contextual meaning of that term."); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 148–49 (2012) (explaining that a "postpositive modifier"—that is, one "positioned after" multiple phrases or clauses, such as "from an authorized copy" here—modifies all the preceding clauses, unless a "determiner" is repeated earlier in the sentence). [8]

[8] In support of its argument that the transmission need only be the culmination of a process that begins with the possession of an authorized copy, VidAngel offers the following analogy: "Holiday cards are best described as coming from loved ones, even though the mailman serves as an intermediary. Only a hypertechnical interpretation would insist the card came from the mailman." But, VidAngel is not a mailman who simply delivers movies from the seller to the customer in their original form—it delivers digital, altered copies of the original works, not the discs. Moreover, if we adopted VidAngel's reading of "from," the card would be "from" Hallmark, the card creator, not the loved one.

The statutory context of § 110(11) supports this interpretation. *See Yates*, 135 S.Ct. at 1081–82 (noting that the interpretation of statutory language is "determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole" (citation omitted, alterations incorporated)). The FMA was enacted as part of Title II of the Family Entertainment and Copyright Act of 2005, which is entitled "exemption from infringement for skipping audio and video content in motion pictures." Pub. L. No. 109–9, § 202(a), 119 Stat. 218. It is found in a subsection of 17 U.S.C. § 110, which is entitled "Limitations on exclusive rights: Exemption of certain performances and displays." These headings indicate that the FMA exempts compliant filtered performances, rather than

the processes that make such performances possible. *See Yates*, 135 S.Ct. at 1083 (looking to statute heading to "supply cues" of Congress's intent). Indeed, the title of § 110 indicates that it is directed only at "certain performances and displays" that would otherwise infringe a copyright holder's exclusive public performance and display rights, *see* 17 U.S.C. § 106(4), (5), (6), while other limitations on exclusive rights in Title 17 are directed at the reproduction right. *Compare* § 110 *with* § 108 ("Limitations on exclusive rights: Reproduction by libraries and archives").

Moreover, the enacting statute was created "to provide for the protection of intellectual property rights." Pub. L. No. 109–9, 119 Stat. 218. Notably, the FMA concludes by noting: "Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section." § 110. VidAngel's interpretation of the statute—which permits ***859** unlawful decryption and copying prior to filtering—would not preserve "protection of intellectual property rights" or not "have any effect" on the existing copyright scheme. *See Yates*, 135 S.Ct. at 1083 (explaining that "[i]f Congress indeed meant to make" a statute "an all-encompassing" exemption, "one would have expected a clearer indication of that intent").

VidAngel argues that the FMA was crafted "to avoid turning on the technical details of any given filtering technology," citing the statutory authorization of "the creation or provision of ... other technology that enables such making imperceptible." § 110(11).[9] But, the phrase "such making imperceptible" clearly refers to the earlier description of "making imperceptible," which must be "from an authorized copy of the motion picture." § 110(11). Thus, even if VidAngel employs technology that enables filtering, the FMA exempts that service from the copyright laws only if the filtering is from an authorized copy of the motion picture. VidAngel's interpretation, which ignores "intermediate steps" as long as the initial step came from a legally purchased title and the final result involves "no fixed copy of the altered version," ignores this textual limitation.[10]

9 Because this argument was not raised below, we would be hard-pressed to find that the district court abused its discretion by failing to address it. We address it nonetheless.

10 At oral argument, VidAngel asserted that the FMA's prohibition on creating a "fixed copy of the altered version" contemplates that fixed copies of the authorized copy can be made. We disagree. The FMA states only that, when streaming from an authorized copy, "the altered version of the motion picture" created by the filtering technology cannot be fixed in a copy. § 110(11).

More importantly, VidAngel's interpretation would create a giant loophole in copyright law, sanctioning infringement so long as it filters some content and a copy of the work was lawfully purchased at some point. But,

virtually all piracy of movies originates in some way from a legitimate copy. If the mere purchase of an authorized copy alone precluded infringement liability under the FMA, the statute would severely erode the commercial value of the public performance right in the digital context, permitting, for example, unlicensed streams which filter out only a movie's credits. *See* 4 Patry on Copyright § 14:2 (2017). It is quite unlikely that Congress contemplated such a result in a statute that is expressly designed not to affect a copyright owner's § 106 rights. § 110. *See Hernandez*, 829 F.3d at 1075 (adopting an interpretation because it "is the only one that is consistent with the rest of the statutory text and that avoids creating substantial loopholes ... that otherwise would undermine the very protections the statute provides").

And, although we need not rely upon legislative history, it supports our conclusion. The FMA's sponsor, Senator Orrin Hatch, stated that the Act "should be narrowly construed" to avoid "impacting established doctrines of copyright" law and "sets forth a number of conditions to ensure that it achieves its intended effect." 151 Cong. Rec. S450–01, S501 (daily ed. Jan. 25, 2005). Thus, "an infringing performance ... or an infringing transmission ... are not rendered non-infringing by section 110(11) by virtue of the fact that limited portions of audio or video content of the motion picture being performed are made imperceptible during such performance or transmission in a manner consistent with that section." *Id.* Indeed, Senator Hatch stressed that "[a]ny suggestion that support for the exercise of viewer choice in modifying their viewing experience of copyrighted works requires violation of either the copyright in the work or of the ***860** copy protection schemes that provide protection for such work should be rejected as counter to legislative intent or technological necessity." *Id.*

Senator Hatch identified "the Clear Play model" as one intended to be protected by the FMA. *Id.* So did the House of Representatives. H.R. Rep. No. 109–33, pt. 1, at 70 (2005) (minority views); *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (ClearPlay CEO testimony). [11] ClearPlay sells a fast-forwarding device which uses video time codes to permit customers to skip specific scenes or mute specific audio; it does not make copies of the films because the time codes are "integrated" into the disc's encrypted content and players licensed to decrypt and play the content. Not surprisingly, therefore, the only other court to construe the FMA has held that ClearPlay's technology "is consistent with the statutory definition," *Huntsman v. Soderbergh*, No. Civ.A02CV01662RPMMJW, 2005 WL 1993421, at *1 (D. Colo. Aug. 17, 2005), but that a filtering technology that made digital copies from lawfully purchased discs and then filtered them, as VidAngel does, is not, *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F.Supp.2d 1236, 1238, 1240 (D. Colo. 2006).

11 Indeed, the legislative history stresses that the FMA was a response to litigation between ClearPlay and several studios. 150 Cong. Rec. H7654 (daily ed. Sept. 28, 2004) (statement of Rep. Jackson–Lee); *see also* Family

> Movie Act of 2004, H.R. Comm. on the Judiciary Rep. No. 108–670 at 41–42 (dissenting views) (opposing the FMA because it "takes sides in a private lawsuit" and "is specifically designed to legalize ClearPlay technology").

VidAngel does not stream from an authorized copy of the Studios' motion pictures; it streams from the "master file" copy it created by "ripping" the movies from discs after circumventing their TPMs. The district court therefore did not abuse its discretion in concluding that VidAngel is unlikely to succeed on the merits of its FMA defense to the Studios' copyright infringement claims.

2. Fair use.

"[T]he fair use of a copyrighted work, including such use by reproduction in copies ... is not an infringement of copyright." 17 U.S.C. § 107. In determining whether the use of a copyrighted work is fair, we consider:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. Although we must consider all of these factors "together, in light of the purposes of copyright," we are not confined to them; rather, we must conduct a "case-by-case analysis." *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 577–78, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

The district court correctly identified the four fair use factors and applied them. VidAngel concedes that the district court correctly found that the second and third factors—"the nature of the copyrighted work" and "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"—weigh against finding fair use. VidAngel claims, however, that the district court abused its discretion with respect to the first and fourth factors.

***861** In addressing the first factor, the court asks "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character ... [;] in other words, whether and to what extent the new work is 'transformative.' " *Id.* at 579, 114 S.Ct. 1164 (citations omitted, alterations incorporated); *see* § 107(1). VidAngel concedes its use is commercial, and thus "presumptively ... unfair." *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir. 2008) (citation omitted). But, it argues that its use is "profoundly transformative" because "omissions can transform a work," affirming "[r]eligious convictions and parental views."

The district court found, however, that "VidAngel's service does not add anything to Plaintiff's works. It simply omits portions that viewers find objectionable," and transmits them for the "same intrinsic entertainment value" as the originals. This factual finding was not clearly erroneous. Although removing objectionable content may permit a viewer to enjoy a film, this does not necessarily "add[ ] something new" or change the "expression, meaning, or message" of the film. *Campbell*, 510 U.S. at 579, 114 S.Ct. 1164. Nor does reproducing the films' discs in digital streaming format, because "both formats are used for entertainment purposes." *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003). *Star Wars* is still *Star Wars*, even without Princess Leia's bikini scene.

Moreover, VidAngel's service does not require removing a crucial plot element—it requires the use of only one filter, which can be an audio filter temporarily silencing a portion of a scene without removing imagery, or skipping a gratuitous scene. Indeed, the FMA sanctions only making "limited portions" of a work imperceptible. 17 U.S.C. § 110(11). The district court did not abuse its discretion in finding that VidAngel's use is not transformative. *See Kelly*, 336 F.3d at 819 ("Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.... for entertainment purposes." (footnote omitted)).

The fourth fair use factor evaluates "the extent of market harm caused by" the infringing activity and "whether unrestricted and widespread conduct of the sort engaged by the defendant ... would result in a substantially adverse impact on the potential market for the original." *Campbell*, 510 U.S. at 590, 114 S.Ct. 1164 (citation omitted, alteration incorporated); *see* § 107(4). Because the district court concluded that VidAngel's use was commercial and not transformative, it was not error to presume likely market harm. *Leadsinger*, 512 F.3d at 531.

VidAngel argues that its service actually benefits the Studios because it purchases discs and expands the audience for the copyrighted works to viewers who would not watch without filtering. But, the district court found that "VidAngel's service [is] an effective substitute for Plaintiff's unfiltered works," because surveys suggested that 49% of its customers would watch the movies without filters. This finding was not clearly erroneous. VidAngel's purchases of discs also do not excuse its infringement. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) ("Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works.") (quoting *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 352 (S.D.N.Y. 2000)). And, the market factor is less important when none of the other ***862** factors favor VidAngel. *See Leadsinger*, 512 F.3d at 532. [12]

12 VidAngel also argues that creating an "intermediate copy" for filtering is a "classic fair use." The cases it cites are inapposite, because VidAngel does not copy the Studios' works to access unprotected functional elements it cannot otherwise access. *See Sega*,

> 977 F.2d at 1520 ("Where there is good reason for studying or examining the unprotected aspects of a copyrighted computer program, disassembly for purposes of such study or examination constitutes a fair use."); *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602–07 (9th Cir. 2000) (copying necessary "for the purpose of gaining access to the unprotected elements of Sony's software" was fair use and not a "change of format").

Finally, VidAngel argues that its service is "a paradigmatic example of fair use: space-shifting." But, the case it cites states only that a portable music player that "makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive" is "consistent with the [Audio Home Recording] Act's main purpose —the facilitation of personal use." *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). The reported decisions unanimously reject the view that space-shifting is fair use under § 107. *See A&M Records*, 239 F.3d at 1019 (rejecting "space shifting" that "simultaneously involve[s] distribution of the copyrighted material to the general public"); *UMG Recordings*, 92 F.Supp.2d at 351 (rejecting "space shift" of CD files to MP3 files as "another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation"). Indeed, in declining to adopt an exemption to the DMCA for space-shifting, *see* 17 U.S.C. § 1201(a)(1)(C), the Librarian of Congress relied on the Register of Copyright's conclusion that "the law of fair use, as it stands today, does not sanction broad-based space-shifting or format-shifting." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944–01, 65960 (Oct. 28, 2015) (to be codified at 37 C.F.R. pt. 201). And, even assuming space-shifting could be fair use, VidAngel's service is not personal and non-commercial space-shifting: it makes illegal copies of pre-selected movies and then sells streams with altered content and in a different format than that in which they were bought. [13]

13 Because the Studios are likely to succeed on the merits of their reproduction claim, and VidAngel is unlikely to succeed on the merits of its affirmative defenses, we therefore need not reach the district court's alternative § 106 ground for imposing the preliminary injunction—the public performance right. *See* 17 U.S.C. § 502(a) (authorizing a court to enter a temporary injunction "on such terms as it may deem reasonable to prevent or restrain infringement of copyright"); *Perfect 10*, 508 F.3d at 1159 (holding that plaintiff must show defendant infringed "at least one exclusive right" under § 106); *see also Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003) (explaining that "for preliminary injunction purposes, [plaintiff] needed to show" only that the defendant's action "likely violates any provision of § 106," and the district court's injunction, based upon likely violations of multiple subsections of § 106, "would not be affected

by any conclusion [the appellate court] might make as to whether" defendant's actions violated a different subsection of § 106). The district court properly enjoined VidAngel from streaming, transmitting, or otherwise publicly performing or displaying any of the Studios' works, because such actions all stem from either past or future unauthorized copying. *See* 2 Nimmer on Copyright § 8.02(c) (2017) ("[S]ubject to certain ... exemptions, copyright infringement occurs whenever an unauthorized copy ... is made, even if it is used solely for the private purposes of the reproducer, or even if the other uses are licensed."); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 762–63 (7th Cir. 2012) (explaining that "copying videos ... without authorization" constitutes direct infringement and plaintiff would therefore "be entitled to an injunction," even if the defendant does not "perform" the works itself).

***863 C. Circumvention of access control measures under the Digital Millennium Copyright Act.**

The district court also did not abuse its discretion in finding that the Studios are likely to succeed on their DMCA claim. In relevant part, that statute provides that "[n]o person shall circumvent a technological measure that effectively controls access to a [copyrighted] work." 17 U.S.C. § 1201(a)(1)(A). Circumvention means "to decrypt an encrypted work ... without the authority of the copyright owner." § 1201(a)(3)(A). VidAngel concedes that CSS, AACS, and BD+ are encryption access controls, and that it "uses software to decrypt" them. But, it argues that, "like all lawful purchasers, VidAngel is *authorized* by the Studios to decrypt [the TPMs] to view the discs' content."

The argument fails. Section 1201(a)(3)(A) exempts from circumvention liability only "those whom a copyright owner authorizes to circumvent an access control measure, not those whom a copyright owner authorizes to access the work." *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 953 n.16 (9th Cir. 2011). *MDY* acknowledged a circuit split between the Second Circuit and the Federal Circuit regarding "the meaning of the phrase 'without the authority of the copyright owner,' " and chose to follow the Second Circuit's approach in *Universal City Studios, Inc. v. Corley*. *Id.* (citing 273 F.3d 429, 444 (2d Cir. 2001)). [14] *Corley* rejected the very argument VidAngel makes here: "that an individual who buys a DVD has the 'authority of the copyright owner' to view the DVD, and therefore is exempted from the DMCA pursuant to subsection 1201(a)(3)(A) when the buyer circumvents an encryption technology in order to view the DVD on a competing platform." 273 F.3d at 444. Rather, the Second Circuit explained, § 1201(a)(3)(A) "exempts from liability those who would 'decrypt' an encrypted DVD with the authority of the copyright owner, not those who would 'view' a DVD with the authority of a copyright owner." *Id.*

14 Although *MDY* and *Corley* involved claims under § 1201(a)(2) rather than § 1201(a)(1), both provisions rely on the definition of circumvention in §

1201(a)(3)(A), so the same analysis applies to claims under both provisions. *See MDY*, 629 F.3d at 953 n.16; *Corley*, 273 F.3d at 444.

Like the defendant in *Corley*, VidAngel "offered no evidence that [the Studios] have either explicitly or implicitly authorized DVD buyers to circumvent encryption technology" to access the digital contents of their discs. *Id.* Rather, lawful purchasers have permission only to view their purchased discs with a DVD or Blu-ray player licensed to decrypt the TPMs. Therefore, VidAngel's "authorization to circumvent" argument fails. [15]

15 The two Ninth Circuit cases cited by VidAngel in support of its argument interpret different phrases, "without authorization" and "exceeds authorized access," in a different statute, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. *See United States v. Nosal*, 676 F.3d 854, 856–63 (9th Cir. 2012) (en banc); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1132–35 (9th Cir. 2009).

VidAngel also argues, for the first time on appeal, that the TPMs on the Studios' discs are use controls under § 1201(b) rather than access controls under § 1201(a), and therefore it cannot be held liable for circumventing them. Unlike § 1201(a), § 1201(b) does not prohibit circumvention of technological measures. Rather, it "prohibits trafficking in technologies that circumvent technological measures ***864** that effectively protect 'a right of a copyright owner,' " meaning the "existing exclusive rights under the Copyright Act," such as reproduction. *MDY*, 629 F.3d at 944 (quoting § 1201(b)(1)). In other words, § 1201(b) governs TPMs that control use of copyrighted works, while § 1201(a) governs TPMs that control access to copyrighted works. *Id.* at 946 (explaining that DMCA "created a new anticircumvention right in § 1201(a)(2) independent of traditional copyright infringement and granted copyright owners a new weapon against copyright infringement in § 1201(b)(1)").

But, even assuming that VidAngel's argument is not waived, it fails. VidAngel contends that because the Studios object only to decryption to copy—a *use* of the copyrighted work—but permit those who buy discs to decrypt to view —a way of *accessing* the work—the TPMs are "conditional access controls [that] should be treated as use controls" governed by § 1201(b). VidAngel therefore argues that because it only circumvents use controls, but does not traffic, it does not violate the DMCA. But, the statute does not provide that a TPM cannot serve as both an access control and a use control. Its text does not suggest that a defendant could not violate both § 1201(a)(1)(A), by circumventing an access control measure, and § 106, by, for example, reproducing or publicly performing the accessed work. Indeed, this court has acknowledged that a TPM could "both (1) control[ ] access and (2) protect[ ] against copyright infringement." *MDY*, 629 F.3d at 946.

To be sure, "unlawful circumvention under § 1201(a)—descrambling a scrambled work and decrypting an encrypted work—are acts that do not necessarily infringe or facilitate infringement of a copyright." *Id.* at 945. Thus, a defendant could decrypt the TPMs on the

Studios' discs on an unlicensed DVD player, but only then "watch ... without authorization, which is not necessarily an infringement of [the Studios'] exclusive rights under § 106." *Id.* But, when a defendant decrypts the TPMs and then also reproduces that work, it is liable for both circumvention in violation of § 1201(a)(1)(A) and copyright infringement in violation of § 106(1). *See Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011) ("Thus, for example, if a movie studio encrypts a DVD so that it cannot be copied without special software or hardware, and an individual uses his own software to 'crack' the encryption and make copies without permission, the studio may pursue the copier both for simple infringement under the Copyright Act and, separately, for his circumvention of the encryption ... under the DMCA."). [16]

16 VidAngel argues that adopting this view would "deepen[ ] a controversial split with the Federal Circuit" regarding whether § 1201(a) requires an "infringement nexus." *See Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004). But this panel is bound by *MDY*. *See* 629 F.3d at 950. In any event, even assuming a nexus is required for dual access-use controls, VidAngel's circumvention was for an infringing use—to copy.

VidAngel relies heavily on the DMCA's legislative history, which states that "1201(a)(2) and (b)(1) are 'not interchangeable,' " and that circumvention of a TPM controlling access "is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book." *MDY*, 629 F.3d at 946–47 (citations omitted). VidAngel argues that it instead was given the key to a locked room and entered the room only to take a photograph of the room's contents. But, it was never given the "keys" to the discs' contents—only authorized players get those keys. VidAngel's decision to use other software to decrypt ***865** the TPMs to obtain a digital copy of the disc's movie thus is exactly like "breaking into a locked room in order to obtain a copy of a [movie]." *Id.* at 947 (citation omitted). Nothing in the legislative history suggests that VidAngel did not circumvent an access control simply because there are authorized ways to access the Studios' works. *See, e.g.*, WIPO Copyright Treaties Implementation and On-line Copyright Infringement Liability Limitation, H.R. Rep. No. 105–551, pt. 1 at 18 (1998) (presuming that a defendant "obtained authorized access to a copy of a work" before it circumvented the TPMs or circumvented "in order to make fair use of a work").

Finally, VidAngel contends that a TPM cannot serve as both an access and use control, because that would permit copyright holders to prohibit non-infringing uses of their works. It cites a Final Rule of the Library of Congress stating that "implementation of merged technological measures arguably would undermine Congress's decision to offer disparate treatment for access controls and use controls." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556–01, 64,568 (Oct. 27, 2000). But, the Rule also states that "neither the language of section 1201 nor the legislative

history addresses the possibility of access controls that also restrict use." *Id.* And, it concludes that "[it] cannot be presumed that the drafters of section 1201(a) were unaware of CSS," which existed "when the DMCA was enacted," and "it is quite possible that they anticipated that CSS would be" an access control measure despite involving "a merger of access controls and copy controls." *Id.* at 64,572 n.14.

Because VidAngel decrypts the CSS, AACS, and BD+ access controls on the Studios' discs without authorization, the district court did not abuse its discretion in finding the Studios likely to succeed on their § 1201(a)(1)(A) circumvention claim. [17]

17 VidAngel argued in its briefing that the FMA immunizes it from liability for the DMCA claim, but conceded at oral argument that it is "not arguing that the FMA is a defense to the DMCA claim." And, although it also claimed a fair use defense, VidAngel did not advance any arguments for why its violation of § 1201(a)(1)(A) is a fair use independent of those it advances for its copyright infringement. Thus, even assuming that fair use can be a defense to a § 1201(a) violation, the defense fails for the same reasons it does for the copyright infringement claim.

II. Irreparable harm.

A preliminary injunction may issue only upon a showing that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22, 129 S.Ct. 365. VidAngel contends that once the district court concluded the Studios were likely to succeed on their copyright infringement claim, it relied on a forbidden presumption of harm rather than "actual evidence." *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (per curiam). However, the district court expressly rejected any such presumption, instead extensively discussing the declaration of Tedd Cittadine, Fox Senior Vice President of Digital Distribution. Crediting this "uncontroverted evidence," the district court found that the Studios showed "VidAngel's service undermines [their] negotiating position ... and also damages goodwill with licensees," because it offers the Studios' works during negotiated "exclusivity periods" and because licensees raised concerns about "unlicensed services like VidAngel's."

VidAngel argues that these harms are "vague and speculative," but the district court did not abuse its discretion in concluding otherwise. Although Cittadine's ***866** declaration does not state that licensees have specifically complained about VidAngel, it says that licensees complain that "it is difficult to compete with" unlicensed services. The Studios also provided uncontroverted evidence that VidAngel offered *Star Wars: The Force Awakens* before it was available for legal streaming and offered *The Martian* and *Brooklyn* during HBO's exclusive streaming license.

This evidence was sufficient to establish a likelihood of irreparable harm. The district court had substantial evidence before it that VidAngel's service undermines the value of the Studios' copyrighted works, their "windowing" business model, and their goodwill and

negotiating leverage with licensees. *See, e.g.*, *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285–86 (2d Cir. 2012) (holding that "streaming copyrighted works without permission," including at times "earlier ... than scheduled by the programs' copyright holders or paying" licensees was likely to cause irreparable harm to copyright owners' "negotiating platform and business model"); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F.Supp.2d 30, 50 (D.D.C. 2013) (rejecting contention that harms to negotiation leverage with licensees were "pure speculation" and noting existence of an uncontroverted "sworn declaration from a senior executive at Fox who states that [licensees] have *already* referenced businesses like [the defendant] in seeking to negotiate lower fees"). And, although VidAngel argues that damages could be calculated based on licensing fees, the district court did not abuse its discretion in concluding that the loss of goodwill, negotiating leverage, and non-monetary terms in the Studios' licenses cannot readily be remedied with damages. *See Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) ("Evidence of loss of control over business reputation and damage to goodwill could constitute irreparable harm."); *WPIX*, 691 F.3d at 286.

VidAngel also argues that the Studios' delay in suing obviates a claim of irreparable harm. But, "courts are loath to withhold relief solely" because of delay, which "is not particularly probative in the context of ongoing, worsening injuries." *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (citation omitted). The district court found that the Studios' "delay in seeking an injunction was reasonable under the circumstances, their alleged harms are ongoing, and will likely only increase absent an injunction." This finding, based on the Studios' cautious investigation of VidAngel, their decision to sue only after VidAngel expanded from beta-testing into a real threat, and VidAngel's admission that "it intends to continue to stream [the Studios'] works and add other future releases, unless enjoined," was not an abuse of discretion.

III. Balancing the equities.

Before issuing a preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (citation omitted). VidAngel argues that the district court abused its discretion by failing to consider the harm to its "fledgling business" from an injunction. However, the district court did consider the harm to VidAngel—in both its original order and again in denying a stay—and concluded that "lost profits from an activity which has been shown likely to be infringing ... merit[ ] little equitable consideration." *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) (citation omitted). VidAngel argues that the district court erred in relying on cases that predate *Winter* and ***867** *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). But, those subsequent cases held only that the district court must balance the harms to both sides before issuing an injunction, *Winter*, 555 U.S. at 24, 129 S.Ct. 365; *eBay Inc.*, 547 U.S. at 391–93, 126 S.Ct. 1837, and do not undermine the long-settled principle that harm caused by illegal conduct does not merit significant equitable protection.

The district court might have provided greater detail in balancing the equities. But, contrary to VidAngel's assertions, the court did not conclude that the Studios were "automatically" entitled to an injunction once it found that their "copyright [was] infringed." *eBay*, 547 U.S. at 392–93, 126 S.Ct. 1837. Nor did it relegate its "entire discussion" of the required equity balancing to "one ... sentence" without analysis. *Winter*, 555 U.S. at 26, 129 S.Ct. 365. Rather, it concluded that the only harm VidAngel asserted—financial hardship from ceasing infringing activities—did not outweigh the irreparable harm likely to befall the Studios without an injunction. This was not an abuse of discretion. *See All. for the Wild Rockies*, 632 F.3d at 1138. [18]

18 Moreover, most of the evidence VidAngel cites to show damage to its business was not submitted to the district court until after the preliminary injunction was issued. *See, e.g.*, Declaration of David Quinto in Support of VidAngel, Inc.'s Opposition to Plaintiffs' *Ex Parte* Application for an Order to Show Cause at 2 ("The parties never briefed or explained ... why it is impossible for VidAngel to comply immediately with the preliminary injunction without ceasing business activities entirely."); Declaration of Neal Harmon in Support of VidAngel, Inc.'s *Ex Parte* Application to Stay Preliminary Injunction Pending Appeal Or, Alternatively, Pending Decision by the Ninth Circuit on Stay Pending Appeal at 5 (declaring that VidAngel can modify its applications by January 2017).

IV. Public interest.

Finally, the court must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (citation omitted). VidAngel argues that the preliminary injunction harms the public's interest in filtering, enshrined in the FMA. But, as the district court recognized, this argument "relies on VidAngel's characterization of its service as the only filtering service" for streaming digital content. It is undisputed that ClearPlay offers a filtering service to Google Play users, and the district court did not clearly err in finding that other companies could provide something "similar to ClearPlay's." That VidAngel believes ClearPlay's service is technically inferior to its own does not demonstrate that consumers cannot filter during the pendency of this injunction.

On the other hand, as the district court concluded, "the public has a compelling interest in protecting copyright owners' marketable rights to their work and the economic incentive to continue creating television programming" and motion pictures. *WPIX*, 691 F.3d at 287 (citing *Golan v. Holder*, 565 U.S. 302, 328, 132 S.Ct. 873, 181 L.Ed.2d 835 (2012)). The Studios own copyrights to some of the world's most popular motion pictures and television shows. In light of the public's clear interest in retaining access to these works, and the ability to do so with filters even while VidAngel's service is unavailable, we conclude that the district court did not

abuse its discretion in finding that a preliminary injunction is in the public interest. *Id.* at 288.

CONCLUSION

The judgment of the district court is **AFFIRMED.**

All Citations

869 F.3d 848, 2017 Copr.L.Dec. P 31,141, 123 U.S.P.Q.2d 1753, 45 Media L. Rep. 2241, 17 Cal. Daily Op. Serv. 8379, 2017 Daily Journal D.A.R. 8228

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EX. RELA-6

662 Fed.Appx. 550
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

IFREEDOM DIRECT CORPORATION, a Utah corporation, Plaintiff-Appellant,
v.
Peter MCCORMICK, an Individual; Veterans First Real Estate and Mortgage Company, a California corporation, Defendants-Appellees.

No. 16-55877
|
Submitted December 5, 2016 * Pasadena, California
|
Filed December 08, 2016

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appeal from the United States District Court for the Central District of California, Josephine L. Staton, District Judge, Presiding. D.C. No. 8:16-cv-00470-JLS-KES

Attorneys and Law Firms

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David A. Gauntlett, Attorney, James A. Lowe, Esquire, Gauntlett & Associates, Irvine, CA, for Defendants-Appellees

Before: PREGERSON, D.W. NELSON, and OWENS, Circuit Judges.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36–3.

iFreedom Direct Corporation (iFreedom) appeals the district court's order denying its motion for a preliminary injunction. The district court denied the preliminary injunction because iFreedom failed to show a likelihood of irreparable harm. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Reviewing for abuse of discretion, we affirm. *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013).

The district court found that iFreedom's ten-month delay in seeking a preliminary injunction undermined its claim of irreparable harm. This finding was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record."

Id. (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). One could infer from the record that iFreedom was likely to enter the California market around the time it sent Peter McCormick the cease and desist letter that complained that his use was "likely to lead to confusion among consumers and the public" and also alleged "violation[s] ***551** of state and federal ... trademark law."

Moreover, the district court did not abuse its discretion when it concluded that the evidence iFreedom submitted to show a likelihood of irreparable harm—primarily the declaration of a mortgage industry expert—was too speculative. The expert's declaration failed to show that harm is likely to occur or that traditional remedies, like monetary damages, are inadequate. *Id*. at 1250.

AFFIRMED.

All Citations

662 Fed.Appx. 550

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EX. RELA-7

18 Cal.App.5th 22
Court of Appeal, Second
District, Division 1, California.

ITV GURNEY HOLDING INC.
et al., Plaintiffs and Appellants,
v.
Scott GURNEY et al.,
Defendants and Respondents.

B281694
|
consolidated w/ B283476
|
Filed 12/5/2017

Synopsis

Background: Television production limited liability company (LLC) brought action against former chief executive officers (CEOs), who were also minority owners of company, arising out of employment agreement. The Superior Court, Los Angeles County, No. BC 643237, Susan Bryant-Deason, J., granted preliminary injunction in favor of former CEOs, reinstating them to positions of managing day-to-day operations and barring LLC from impinging on their rights as board members. LLC appealed.

The Court of Appeal, Rothschild, P.J., held that operating agreement did not confer authority on CEOs to manage day-to-day affairs of LLC even after board voted to remove CEOs pursuant to employment agreement.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

****497** APPEAL from an order of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed in part and reversed in part. (Los Angeles County Super. Ct. No. BC 643237)

Attorneys and Law Firms

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Opinion

ROTHSCHILD, P. J.

***24** Plaintiffs and appellants ITV Gurney Holding Inc. (ITV) and Gurney Productions, LLC (the Company) challenge the trial court's grant of a preliminary injunction in favor of defendants and respondents Scott Gurney and Deirdre Gurney (the Gurneys), and Little Win, LLC. The Gurneys are the minority owners of the Company and formerly served as its chief executive officers (CEO's), pursuant to an employment agreement. The Company fired the Gurneys as CEO's and removed them from managing the day-to-day operations of the Company. The Gurneys do

not challenge the Company's right to fire them as CEO's. Rather, they contend that under the operating agreement that governs the Company, they could not be removed from managing its day-to-day operations. Plaintiffs contend the operating agreement gave the Company, through its board of managers, the ultimate authority to manage the Company, and thus permitted the board to remove the Gurneys as managers of the day-to-day operations. We agree with plaintiffs and reverse the trial court's order to the extent that it reinstated the Gurneys to their positions managing the day-to-day operations of the Company. The Gurneys continue as members of the Company's board of managers, and we affirm the portion of the preliminary injunction barring the Company from impinging on their rights as board members.

FACTS AND PROCEEDINGS BELOW

The Gurneys have been producing reality-television programming since 2005. Their greatest success was the program *Duck Dynasty*.

In 2012, the Gurneys agreed to sell 61.5 percent of their production business to ITV, an affiliate of the British media company ITV plc. As part of ***25** the transaction, the parties signed two contracts relevant to this appeal: an operating agreement, which defined the structure of the Company and the terms under which the owners could buy and sell their stakes, and employment agreements, which established the terms of the Gurneys' employment as joint CEO's.

****498** The operating agreement provided for a board of managers composed of five members, three of whom were to be appointed by ITV, and two by the Gurneys' shell company, Little Win, LLC. The Gurneys themselves were designated as Little Win, LLC's representatives on the board. In most instances, the operating agreement allowed the board to decide matters by majority vote, but several situations required unanimity. In particular, unanimous approval was required for "[o]perating the Company and its [s]ubsidiaries other than as a television production company in the ordinary course of business consistent with past practice of the Gurneys, the Company's five year forecasts and the [b]udget; except that, without the approval of all [m]anagers, the Gurneys may [among other powers]: [¶] ... manage the day-to-day business and affairs of the Company."

The operating agreement also provided for specific timeframes within which ITV was entitled to buy out the Gurneys' ownership interest, and the Gurneys were entitled to sell their interest to ITV. ITV's right to "call," or purchase, the Gurneys' interest, was to run for 90 days after the Company's auditor delivered the audited financial statements for the year 2015. In addition, if "the Company terminates the employment of either Gurney with [g]ood [c]ause (as such term is defined in such Gurney's [e]mployment [a]greement with the Company) ... before the end of fiscal year 2015," ITV would be entitled to purchase the Gurneys' interest on similar terms. If ITV did not exercise its call rights, the Gurneys were entitled to "put," or sell, their stake to ITV at any time after the auditor delivered the financial statements for 2017. The operating agreement established the

price for the Gurneys' ownership interest in a put or call as a multiple of the Company's average EBITDA (earnings before interest, taxes, depreciation, and amortization) for the preceding three years.

The Gurneys also signed employment agreements to serve as co-CEO's of the Company. These agreements required the Gurneys to devote their "full business time and efforts to the performance of [their] duties for [the] Company" for the five-year period ending December 31, 2017, with annual renewals thereafter at the option of both the Gurneys and ITV. For their work, the Gurneys were each to receive $500,000 per year. A majority of the Company's board could vote to remove the Gurneys for good cause if, among other reasons, the Gurneys "willfully engage[d] in any activity that is in direct conflict with [their] duties and responsibilities" under the agreements, ***26** or "breach[ed their] fiduciary duty to the Company or any affiliated entity, including acts of self-dealing (whether or not for personal profit)." The Company was also entitled to terminate the Gurneys' employment without cause at any time after the contract had been in force for three years, that is, after 2015.

In the employment agreements, the Gurneys agreed not to "engage directly or indirectly in any activity that competes with the business activities of the Company. The business activities of the Company are defined as the development, production, promotion, and marketing of reality-based programs whether for television, internet or other broadcast, cable, electronic or digital media." The Gurneys also agreed that, while they were employed and for one year afterward, they would "not interfere with, impair, disrupt or damage [the] Company's business by soliciting, encouraging or recruiting any of [the] Company's employees or causing others to solicit or encourage any of [the] Company's employees to discontinue their employment with [the] Company."

****499** In the summer of 2016, the Gurneys learned that ITV's parent company was pressuring its United States-based subsidiaries and affiliates, including the Company, to reduce expenses. Around July 2016, the Gurneys formed a new television production company called Snake River Productions. According to the Gurneys, their intention was to produce programming other than reality shows, and to have an alternative source of employment in case ITV elected not to renew their contracts at the Company. At around the same time, the Gurneys were attempting, without success, to sell a second season of a reality program called *Sons of Winter* to a network for broadcast. The Discovery Channel had aired the first season of the program but elected not to renew it. At a September 2016 board meeting, the Gurneys informed the other board members that they had sold the rights to *Sons of Winter* for $3.6 million. When asked who the buyer was, Deirdre Gurney claimed she could not remember the company's name, but when Scott reminded her, she acknowledged that it was Snake River Productions. Neither of the Gurneys told the board that they owned Snake River Productions.

Plaintiffs allege that the purpose of Snake River Productions' purchase of *Sons of Winter* was financial manipulation. They claim that the sale of *Sons of Winter* was an attempt

by the Gurneys to increase the Company's EBITDA, and thus to increase the price at which the Gurneys would be entitled to sell their stake in the Company to ITV under the terms of the operating agreement. A witness for plaintiffs calculated that the sale of *Sons of Winter*, if considered in calculating EBITDA, would increase the potential sale price of the Gurneys' ownership interest by approximately $3.71 million. In addition, because the Gurneys and their holding company owned 38.5 percent of the Company, they would be entitled to a distribution of approximately ***27** $1.39 million of the price Snake River Productions had paid for the rights to *Sons of Winter*. Thus, by buying *Sons of Winter* for $3.6 million, the Gurneys could potentially obtain as much as $5.1 million for themselves, even if *Sons of Winter* had no value.

Around the same time, the Gurneys decided to fire two of the employees on the Company's development team with the expectation of rehiring them to work at Snake River Productions.

Approximately one week after the September board meeting, the Company's chief financial officer (CFO), who under the terms of the operating agreement was appointed by ITV, informed ITV that the Gurneys owned Snake River Productions. The CFO also told ITV about other financial irregularities he perceived in the Gurneys' management of the Company, including the payment of a $350,000 advance to the Gurneys that the CFO believed was improper.

At a board meeting in December 2016, the ITV-appointed board members—who constituted a majority of the board—voted to place the Gurneys on a paid leave of absence while the charges against them were being investigated. A few days later, the same board members voted to terminate the Gurneys' employment for cause, alleging that the Gurneys had violated their duty of loyalty to the Company by concealing the facts surrounding the sale of *Sons of Winter*, along with engaging in other misconduct. The next day, ITV and the Company filed suit against defendants and thereafter defendants filed a cross-complaint against the Company. ITV also attempted to exercise its call rights and purchase the Gurneys' share of the Company, and the Gurneys attempted to exercise their put rights and sell their share of ****500** the Company to ITV. The parties, however, did not consummate a sale because they could not agree on a price.

On February 1, 2017, the Gurneys filed a motion for a preliminary injunction, requesting that the court restrain plaintiffs from breaching the operating agreement. In particular, the Gurneys asked the court to bar ITV from exercising its call rights, and to order the Company to restore the Gurneys to the day-to-day management of the Company.

After a hearing, the trial court issued a preliminary injunction granting both requests. The trial court found that ITV was unlikely to succeed in its claim regarding its call rights because, by the time ITV elected to exercise those rights, those rights had expired. Under the terms of the operating agreement, the period in which ITV was entitled to buy out the Gurneys' shares ran 90 days from the end of the 2015 fiscal year, but ITV did not notify the Gurneys of its intent to purchase the shares

until February 2017. The injunction also ***28** required that the Company restore the Gurneys to their positions as day-to-day managers of the Company.

DISCUSSION

Plaintiffs contend that the trial court abused its discretion by granting the preliminary injunction. They argue that because the employment agreement allowed the board to terminate the Gurneys' employment with or without cause at any time, it is irrelevant for purposes of a preliminary injunction whether or not good cause supported the Gurneys' termination. Plaintiffs also argue that the operating agreement does not provide the Gurneys an independent basis for exercising day-to-day authority over the Company.

We agree with plaintiffs' position regarding the interpretation of the operating agreement and employment agreements. On this basis, we conclude that the trial court abused its discretion by granting a preliminary injunction reinstating the Gurneys to management positions. Because the interpretation of the contracts is decisive in this case, we need not and do not reach a determination of the other issues the parties have raised in their briefs, including the questions of whether the Gurneys violated their fiduciary duties or otherwise breached their contracts with the Company, and whether the trial court erred by sustaining a number of the Gurneys' objections to plaintiffs' evidence. [1]

[1] Defendants filed a motion to strike portions of plaintiffs' reply brief, and plaintiffs filed a motion to strike portions of the defendants' motion. We deny both motions.

Although we reverse the trial court's order restoring the Gurneys to day-to-day management of the Company, we leave in place the other portions of the preliminary injunction. This includes the portion of the injunction denying ITV's request to exercise its call rights to purchase the remainder of the Company, a ruling which plaintiffs have not challenged on appeal. It also includes the portion of the injunction barring the Company from violating the Gurneys' rights as members of the board of managers, including their right to vote on matters requiring unanimous board approval. Those rights belong to the Gurneys so long as they and their shell company own at least 10 percent of the Company, regardless of whether they continue to be employed as CEO's.

A. Standards of Review of a Preliminary Injunction

Pursuant to long-standing Supreme Court case law, "trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary ****501** injunction. The first is the likelihood that the plaintiff will ***29** prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69–70, 196 Cal.Rptr. 715, 672 P.2d 121.) We review a trial court's application of these factors for abuse of

discretion. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1047, 151 Cal.Rptr.3d 65.)

"Notwithstanding the applicability of the abuse of discretion standard of review, the specific determinations underlying the superior court's decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination. [Citation.] For instance, the superior court's express and implied findings of fact are accepted by appellate courts if supported by substantial evidence, and the superior court's conclusions on issues of pure law are subject to independent review." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 739, 106 Cal.Rptr.3d 318.) Because this case involves only the interpretation of contracts, which is a question of pure law, our review is de novo. (See *Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 288, 199 Cal.Rptr.3d 488.)

Injunctions may be either mandatory, in that they compel a party to take an action, or prohibitory, in that they attempt to maintain the status quo by restraining a party from taking action. (*Oiye v. Fox*, *supra*, 211 Cal.App.4th at p. 1048, 151 Cal.Rptr.3d 65.) " ' " 'A preliminary mandatory injunction is rarely granted, and is subject to stricter review on appeal.' " ' " (*Ibid.*) In this case, plaintiffs contend that the preliminary injunction was mandatory; the Gurneys contend that it was prohibitory. Because our decision in this case would be the same regardless of which standard of review applied, we need not resolve this dispute.

B. The Operating and Employment Agreements

The key question in this case is whether the Gurneys retained the right, despite their termination from employment as CEO's, to continue managing the Company's day-to-day operations. Our answer to that question is no. The operating agreement reserves to the board —by majority, and in some cases unanimous, vote—the authority to manage the Company's affairs. In context, the language in the operating agreement authorizing the Gurneys to manage the Company without the approval of the other board members serves as an accommodation to the Gurneys to exercise authority as CEO's, not as an irrevocable grant to continue managing the Company indefinitely.

1. Termination Under the Employment Agreements

Under the terms of the employment agreements, the Company was entitled to terminate the Gurneys' employment at any time for good cause. In ***30** addition, the employment agreements provided that "[t]he Company may terminate [the Gurneys'] employment without [g]ood [c]ause at any time after the third anniversary of the date of this [a]greement on [30] ... days' advance written notice." The board's decision to fire the Gurneys occurred in December 2016, almost four years after the employment agreements were signed. Consequently, we agree with plaintiffs' contention that the employment agreements provide no basis for a preliminary injunction. (In any case, the Gurneys do not so contend.) Even if the Gurneys are correct that

there was no good cause for their firing, ****502** the only difference between a termination with or without cause is whether the Gurneys would be entitled to 30 days' notice before their termination.

2. The Gurneys' Rights Under the Operating Agreement

Our conclusion regarding the employment agreements is insufficient to decide this case, however. The operating agreement includes a provision stating that, "without the approval of all [m]anagers, the Gurneys may [among other powers]: [¶] ... manage the day-to-day business and affairs of the Company consistent with past practice of the Gurneys (except as otherwise restricted in this [a]greement)." The Gurneys contend that this provision is a blanket grant of authority to control the operations of the Company, regardless of the wishes of the majority owners, regardless of whether or not the Gurneys continued to be employed under the employment agreements, and thus, apparently, regardless of whether there is cause for firing them. We disagree. The Gurneys misinterpret the language of the operating agreement itself and its connection with the Gurneys' employment agreements.

The provision regarding the management of day-to-day operations must be understood in the context of the operating agreement as a whole. (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245, 37 Cal.Rptr.3d 918 ["We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation."]; Civ. Code, § 1641.) In this case, the relevant language is found in the section describing the circumstances in which the board may make decisions by majority or unanimous vote. The operating agreement provides that "[a]ll actions by the [b]oard ... shall require the affirmative vote of a majority of the [m]anagers, except for such actions as to which a greater than majority vote may be required pursuant to the provisions of the [a]ct or this [a]greement."

The operating agreement then goes on to list a number of exceptions for which unanimous approval is required. The first of these exceptions is for any action involving "[o]perating the Company and its [s]ubsidiaries other than as ***31** a television production company in the ordinary course of business consistent with past practice of the Gurneys, the Company's five[-]year forecasts and the [b]udget." In other words, the Company may not deviate from its prior way of doing business without unanimous board approval. The same section of the operating agreement then continues: "except that, without the approval of all [m]anagers, the Gurneys may:

(i) manage the day-to-day business and affairs of the Company consistent with past practice of the Gurneys (except as otherwise restricted in this [a]greement);

(ii) hire and fire employees other than the chief financial officer;

(iii) decide which productions are sold, to whom, and upon what terms ... ;

(iv) spend up to $500,000 on development in [f]iscal [p]eriod 2014 and each [f]iscal [p]eriod forward;

(v) introduce new business streams to the Company, including merchandising and music rights;

(vi) utilize the Company's resources to maximize profits;

(vii) deploy employees of the Company in their sole discretion"; along with a few other similar functions.

Thus, in general, the board may make decisions by majority vote, with the exception that some decisions require unanimity. The Gurneys' authority over the day-to-day ****503** operations of the Company is an exception to the exception. It describes instances in which the Gurneys may operate autonomously. Within the operating agreement these exceptions serve a clear role: They relieve the Gurneys, when acting in their role as joint CEO's of the Company, from needing to seek the approval of the other board members for every decision that might represent a departure in some small way from their prior course of business. Presumably, neither the Gurneys nor the other members of the board wished to become bogged down in constant votes over minor matters.

The exceptions to the exception did not grant the Gurneys lifetime jobs as managers of the Company. If the Gurneys were removed as CEO's, these exceptions would no longer have any practical effect. At that point, the Gurneys would no longer be operating the Company, and so they would no ***32** longer need an exemption from the unanimity requirement to perform the specified job functions.

3. The Operating Agreement Interpreted in Broader Context

As we have seen, the operating agreement, even when interpreted on its own, does not grant the Gurneys authority to manage the Company's day-to-day operations indefinitely. If there could be any doubt about the Gurneys' rights under the operating agreement, it is dispelled when the operating agreement is considered in light of the employment agreements. The Gurneys signed their employment agreements on the same day that they signed the operating agreement, and the operating agreement explicitly refers to the termination provisions of the employment agreements. Thus, the section of the operating agreement describing actions that require unanimous board approval states that unanimity is required for "[f]iring any senior executive, other than the Gurneys (whose employment may be terminated in accordance with their [e]mployment [a]greements)."[2]

[2] This reference in the operating agreement to the termination of the Gurneys' employment shows that it is proper to interpret the operating agreement in light of the employment agreements in spite of the integration clause in the operating agreement.

The employment agreements described in detail the circumstances under which the Gurneys' employment could be terminated.

In addition to setting out timeframes during which the Gurneys could be terminated with or without cause, the employment agreements explained exactly what would constitute good cause. They also spelled out the procedure the board must follow, including allowing the Gurneys an opportunity to respond to the evidence against them. It would be unimaginable for ITV and the Gurneys to go to this much trouble to describe the procedures surrounding the Gurneys' termination, if they intended that the Gurneys would continue to "manage the day-to-day business and affairs of the Company," "hire and fire employees," and exercise other functions ordinarily reserved for CEO's, even after they were removed from those positions.

Furthermore, the operating agreement must be interpreted in light of common understandings in corporate law. Although the Company was established as a limited liability company rather than as a corporation, we interpret the establishment of a formal board as a choice by the Company to organize itself according to the ordinary rules of a board of directors. (See Friedman et al., Cal. Practice Guide: Corporations (The Rutter Group 2017) ¶ 2:36.18, p. 2-16.) Ordinarily, a majority shareholder who has the authority to appoint a majority ****504** of the board of directors may make decisions despite the objection of a minority shareholder. If the Gurneys' interpretation were correct, that rule would be flipped on its head, with essentially no recourse for the ***33** majority to assert its authority. Under their interpretation, the Gurneys could never be removed from managing the Company, regardless of any bad behavior on their part or the terms of their employment. Even if the Gurneys had already breached their duty of loyalty by entering into a self-dealing transaction to benefit themselves at the expense of the Company and ITV, the remaining board members would have no means of preventing the Gurneys from continuing indefinitely to operate the Company, except by dissolving the Company.

If the parties intended the operating agreement to grant the Gurneys, as minority shareholders, this much control regardless of the wishes of the majority shareholder, we would expect to find such authority granted prominently and unequivocally in the text of the document. Instead, the language that the Gurneys rely on appears as an exception to a rule requiring unanimous approval of board actions.

Our conclusion that the operating agreement does not give the Gurneys this unchecked authority does not render the Gurneys powerless. Although the Gurneys lost the right to manage the day-to-day operations of the Company when the majority of the board voted to remove them as CEO's, they retained their rights as board members. This included the ability to veto proposed actions requiring unanimous board approval.

Furthermore, as board members, the Gurneys retained the right to visit and inspect the Company's properties, books, and records, and to speak with the Company's officers regarding the Company's affairs, finances, and accounts. We perceive no error in the trial court's grant of a preliminary injunction in favor of the Gurneys with respect to these matters.

The trial court's order granting the injunction depended on its interpretation of the operating agreement as granting the Gurneys authority to manage the day-to-day affairs of the Company regardless of whether they continued to be employed as CEO's. Because the trial court erred in its interpretation of a question of law, its grant of the injunction constituted an abuse of discretion, and we must reverse.

DISPOSITION

We reverse the order granting the preliminary injunction to the extent that the injunction reinstates the Gurneys to exercise the functions described in section 5.7(a)(i)-(ix) of the operating agreement, including the day-to-day management of the Company. In all other respects, the trial court's order ***34** granting the preliminary injunction is affirmed. Appellants are awarded their costs on appeal.

JOHNSON, J.

LUI, J., concurred.

A petition for a rehearing was denied January 3, 2018, and respondents' petition for review by the Supreme Court was denied March 21, 2018, S246462.

All Citations

18 Cal.App.5th 22, 226 Cal.Rptr.3d 496, 2017 IER Cases 435,303, 17 Cal. Daily Op. Serv. 11,616, 2017 Daily Journal D.A.R. 11,545

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EX. RELA-8

43 Cal.3d 1217, 743 P.2d 889, 240 Cal.Rptr. 829, 56 USLW 2257

M. L. KING et al.,
Plaintiffs and Appellants,
v.
GEORGE MEESE, as Director, et al., Defendants and Respondents

L.A. No. 32133.
Supreme Court of California
Oct 26, 1987.

SUMMARY

In an action by individual plaintiffs seeking to restrain the enforcement of the Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), which makes it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility, the trial court denied plaintiffs' motion for a preliminary injunction, finding that the balance of hardship favored defendants, the former Director of the Department of Motor Vehicles, the Commissioner of the California Highway Patrol, the Attorney General, and the Sheriff of Los Angeles County. The trial court inferred from the enactment of the act itself that the Legislature had determined that substantial harm was being caused by uninsured drivers, especially if their victims were not themselves insured. (Superior Court of Los Angeles County, No. C565535, Norman R. Dowds, Judge.)

The Supreme Court vacated its order staying enforcement of the act, affirmed the trial court's order denying the motion for a preliminary injunction, and remanded for further proceedings. The court held the California Automobile Assigned Risk Plan (Ins. Code, § 11620 et seq.) provided the required access to insurance in a manner that comports with procedural due process. It held the plan effectively guarantees that insurance is offered and available to all eligible drivers in the state, and requires the program's rates to be set by the Insurance Commissioner after public hearings. The court further held the regulatory structure did not constitute a delegation of legislative authority to the private insurance industry, applying the longstanding rule that a statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. The court held plaintiffs were not likely to prevail on the merits, and the trial court's decision to deny the motion for a preliminary injunction should therefore be affirmed. (Opinion by Panelli, J., with Lucas, C. J., Arguelles, Kaufman, JJ., and Feinerman (Robert), J.,* concurring. ***1218** Separate concurring opinion by Broussard, J., with Mosk, J., concurring.)

* Presiding Justice, Court of Appeal, Second Appellate District, Division Five, assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1)
Injunctions § 21--Preliminary Injunctions--Appeal--Denial of Preliminary Injunction.
On review of the denial of a preliminary injunction, the trial court must be affirmed unless it abused its discretion in making its determination. In exercising its discretion, the trial court must consider two interrelated factors: the likelihood that plaintiff will prevail on the merits at trial, and the comparative harm to be suffered by plaintiff if the injunction does not issue against the harm to be suffered by defendant if it does. The more likely it is that plaintiff will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when a requested injunction maintains, rather than alters, the status quo.

[See **Cal.Jur.3d,** Injunctions, § 104; **Am.Jur.2d,** Injunctions, § 24.]

(2)
Injunctions § 21--Preliminary Injunctions--Appeal--Preliminary Injunction.
On review, a trial court's order with regard to a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiff's likelihood of success considerations would alone support the ruling. However, if the trial court relies on but one of the foregoing, the reviewing court must determine whether that reliance conclusively supports the trial court's determination regardless of the remaining considerations.

(3)
Automobiles and Highway Traffic § 4--Operators' Licenses--Regulation and Licensing of Drivers--Privilege.
The privileges conferred by a driver's license constitute an important property right, although not so fundamental a right as to trigger a strict scrutiny analysis.

(4)
Automobiles and Highway Traffic § 37--Criminal Offenses--Financial Responsibility Law--Procedural Due Process.
Under the Robins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), making it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility, the California Automobile Assigned Risk Plan (CAARP, Ins. Code, § 11620 et seq.) provides the required access to insurance in a manner that comports ***1219** with procedural due process. CAARP effectively guaranties that insurance is offered and available to all eligible drivers and requires that the program's rates are to be set by the Insurance Commissioner after public hearings. Motorists have no procedural due process right to examine and challenge the decisionmaking process of private insurers. The acts of private insurers in setting rates or denying coverage are not state acts. Only in extreme cases of pervasive state regulation coupled with a state-guaranteed monopoly are private decisions equated with state action.

(5)
Constitutional Law § 43--Distribution of Governmental Powers-- Delegation of Power--

To Private Agencies--Insurance Companies--Financial Responsibility Law.

The Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), making it an infraction for a motorist stopped for a moving violation to fail to provide proof of financial responsibility, does not constitute a delegation of legislative authority to the private insurance industry. A statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. A statute that merely permits a private seller to decide to whom to sell, and at what price, is not unconstitutional. (Disapproving *Rosner v. Peninsula Hospital Dist.* (1964) 224 Cal.App.2d 115 [36 Cal.Rptr. 332], to the extent it is inconsistent.)

COUNSEL

Armando M. Menocal III, Angela Glover Blackwell, Lois Salisbury and James R. Wheaton for Plaintiffs and Appellants.

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PANELLI, J.

In this case we are called upon to determine whether, as plaintiffs allege, the 1984 Robbins-McAlister Financial Responsibility Act (Stats. 1984, ch. 1322), when considered in relation to the relevant provisions of the Insurance Code pertaining to automobile insurance, fails to provide drivers with adequate procedural due process of law. For the reasons set forth below we hold that plaintiffs' concerns are legally without merit, and are more properly addressed to the Legislature than to the courts.

I. *Legislative Framework*

California first enacted a financial responsibility law in 1929, which, like those that followed, required all drivers to be "financially responsible" (usually by means of insurance) for any injury they caused while driving. However, enforcement of the requirement was triggered only when the driver *was at fault* in an accident causing either bodily injury, or property damage in excess of $100 (later amended to $200). Even then, there was no sanction for failing to have insurance if the driver was able to post a bond in an amount determined by the Department of Motor Vehicles (DMV) to be sufficient to meet the likely liability. Failure to either post a bond or provide proof of financial responsibility resulted in suspension of driving privileges.

In 1931, we held this law constitutional as against a substantive due process challenge, specifically that not all drivers could afford to comply with the law, and that negligent wealthy drivers could continue to drive but that not so negligent but less affluent drivers

could have their licenses suspended. (*Watson v. Department of Motor Vehicles* (1931) 212 Cal. 279 [298 P. 481].)

In 1974, the financial responsibility law was amended to require the posting of a bond or the filing of proof of financial responsibility whenever a driver *was involved* in an accident resulting in either bodily injury, or property damage exceeding $200, regardless of fault. That too was held to be constitutional in light of an uncodified statute declaring that the purpose of the law was not so much to deter negligent drivers, but rather to insure that everyone, negligent or not, was able to compensate for any harm they ***1221** caused while driving. (Stats. 1974, ch. 1409, § 1, held constitutional in *Anacker v. Sillas* (1976) 65 Cal.App.3d 416, 421-422 [135 Cal.Rptr. 537].)

In 1984, the Legislature, concerned that too many motorists still were not financially responsible, enacted the Robbins-McAlister Financial Responsibility Act (1984 Act). In addition to the requirements of prior enactments, the 1984 act allows a peace officer to request proof of financial responsibility "whenever a notice to appear is issued" for any alleged moving violation. (Veh. Code, § 16028.)[1] Failure to provide such proof is itself an infraction. (*Ibid.*) However, if it is established that the driver actually was financially responsible at the time in question notwithstanding the lack of written evidence, the citation will be dismissed. (Veh. Code, § 16028, subd. (e).) If such proof is not forthcoming, the driver is subject to a fine ranging from $100 to $240. (Veh. Code, § 16028, subd. (a).) Moreover, within 60 days of that conviction, the driver must provide proof of financial responsibility (and maintain it for three years) or the driver's license will be suspended. (Veh. Code, § 16034.)

1 Section 16028 provides in pertinent part: "(a) Every person who drives a motor vehicle required to be registered in this state upon a highway ... shall, when required by a peace officer pursuant to subdivision (c) or (d), provide evidence of financial responsibility for the vehicle. ... [¶] (c) Whenever a notice to appear is issued for any alleged violation of this code, ... the cited driver shall furnish written evidence of financial responsibility, as defined by subdivision (b), upon request of the peace officer issuing the citation. ... If the cited driver fails to provide evidence of financial responsibility at the time the notice to appear is issued, the peace officer may issue the driver a notice to appear for violation of subdivision (a). ..."
There are various forms of proof of financial responsibility, but the most common, and the one at issue here, is a certificate of insurance. The certificate must verify that the insured is covered for not less than $15,000 per person bodily injury, $30,000 per accident bodily injury, and $5,000 per accident property damage. (Veh. Code, §§ 16028, subd. (b), 16056.)

From the foregoing, it is clear that the 1984 Act significantly increased the need for insurance. Now, for the first time, failure to have written evidence of financial responsibility is itself an offense. Nonetheless, the full implications of the financial responsibility laws cannot be

understood without reference to the Insurance Code.

California is a so-called "open rate" state, that is, rates are set by insurers without prior or subsequent approval by the Insurance Commissioner (Commissioner). (Ins. Code, § 1850.) This is not to say, however, that there is absolutely no regulation of the rates. California law does require that rates not be "excessive, inadequate or unfairly discriminatory." (Ins. Code, § 1852.) No rate is excessive unless: "(1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." (*Ibid.*) Risk classifications are permissible if based on any ***1222** reasonable (i.e., actuarially sound), and not prohibited, ground. (Ins. Code, § 1852, subd. (d).) Although the term "unfairly discriminatory" is not defined in Insurance Code section 1852, section 11628 of that code prohibits discrimination by an insurer with regard to issuance of policies, or the terms of such policies, on the basis of "race, language, color, religion, national origin, ancestry, or location within the same geographic area." "Geographic area" is defined as an area "not less than 20 square miles," and is made up by combining a series of contiguous zip code zones. Under the statutory scheme, different geographic areas may be treated differently.

Although insurers need not file their rates with the Commissioner, nor obtain approval of rates, the Commissioner may on his own initiative investigate rates. (Ins. Code, § 12924.) Moreover, a person objecting to a rate or classification may file a complaint with the insurer and, if dissatisfied with the insurer's response, file a complaint with the Commissioner. (Ins. Code, § 1858.)

The Commissioner may, at his option, dismiss the complaint without investigation. (*Ibid.*) In fact, the Commissioner routinely does so if the complaint fails to come within his perceived jurisdictional powers. A common example of a routinely dismissed complaint is one alleging a refusal by an insurer to provide coverage to an applicant.[2] If the Commissioner does investigate, he may hold public hearings, issue findings, and assess penalties. The decisions of the Commissioner are subject to judicial review. (Ins. Code, § 1858.6.) Should the Commissioner make a determination that the rates are excessive or are not excessive, then the complainant, on request, is entitled to know the basis of such determination. (Ins. Code, § 1858.7.) In this regard, plaintiffs allege that only once in the last decade has the Commissioner declared a rate to be excessive.

2 The Commissioner is of the opinion that an insurer may refuse to insure based on any permissible classification. Hence, an insurer may decide not to write any policies in a geographic area without violating the Insurance Code, and so the Commissioner is without jurisdiction to enjoin the conduct. Presumably, though, the Commissioner does have authority to investigate a claim that insurers are refusing to write policies on the basis of race or any other *prohibited* classification, pursuant to Insurance Code section 11628. We also note that under Insurance Code section 657, an applicant who is denied

coverage by an insurer is entitled to a statement of reasons from the insurer as to why the application was rejected.

In California, in addition to the regular and customary sources for the purchase of insurance coverage which most are familiar with, drivers may be insured through the California Automobile Assigned Risk Plan (CAARP). (Ins. Code, § 11620 et seq.) By statute this plan is available to any driver otherwise entitled to insurance but who has been unable in good faith to obtain it within the past 60 days. (Ins. Code, § 11620; ***1223** Cal. Admin. Code, tit. 10, ch. 5, subch. 3, art. 8, § 2430.)[3] All insurers are required to participate in the program. (Ins. Code, § 11620.) CAARP offers the statutorily required minimum insurance plus optional medical and uninsured motorist coverage. (CAARP, §§ 2406-2408.)

3 All Administrative Code references are to this article, and are hereinafter denominated CAARP followed by the relevant section number.

The CAARP rates are set by the Commissioner after public hearings, and are based on a number of classifications (including geographical area). There is a rate differential of $600 between drivers with no accidents or traffic violations in the last three years and those with twelve or more "points" during that period.[4] (Prior to 1987, the differential was $200.) Under CAARP, the highest annual premium for "good drivers" (i.e., those with zero points) is for youthful drivers in the highest rated geographic areas (e.g., South Central Los Angeles). The annual premium for these drivers is $662. For adult drivers in the highest rated geographic area who have zero points, the annual premium is $516. CAARP provides that the premium can be paid in five installments provided a 25 percent deposit is made. In order to use the installment plan an additional $2 fee per installment is charged. (CAARP, § 2443.1.)

4 Points are accumulated based on accidents and vehicular offenses. For example, a first moving violation is generally assigned one point, although a serious moving violation is valued at four points. An accident causing bodily injury or over $250 in property damage is worth two points. Three years is the maximum permissible period for consideration of such an event under the CAARP penalty point system. (CAARP, § 2460.3(a).)

In most parts of the state, CAARP rates are higher than those offered by voluntary insurers. However, in certain areas, including the area in which all plaintiffs reside (South Central Los Angeles), CAARP is allegedly less expensive than non-CAARP insurance. It appears that statewide, approximately 35 percent of those with CAARP insurance are drivers with no points.

Being placed with CAARP is really a "nondecision." That is, no entity "decides" to place a driver in the program. Rather, placement in the plan results as a condition of being "unable to procure [insurance] through ordinary means." The inability to procure insurance by ordinary means is, of course, the result of determinations made by individual insurers to refuse to provide coverage to the driver in question. Hence, eligibility for

CAARP is not reviewable because there is no decision to review. ***1224**

II. *Factual and Procedural Background of this Litigation*

The individual named plaintiffs in this action are seven residents of South Central Los Angeles.[5] At the time this action was filed, they ranged in age from 19 to 73. Most were retired or unemployed, but one was employed and earning $17,000 a year. Some suffered from medical disabilities (none of which precluded driving), and some relied on driving to go to and from work or to the doctor. Some had been insured in the recent but not immediate past, while others had not been insured.

5 The eighth named plaintiff is the United Front Against Insurance Discrimination, a coalition of organizations "to fight automobile insurance discrimination against residents of Los Angeles."

Despite the above differences, all of the named plaintiffs shared some common characteristics. As previously noted, all lived in South Central Los Angeles. None of them had been involved in an accident or had a traffic violation within the last three years or since they started driving.[6] All have had difficulty finding insurers willing to issue them a policy, and none had found private insurance at premiums below those offered by CAARP. Plaintiffs felt that it was unfair to lump them with bad drivers for insurance purposes notwithstanding their clean driving records, and to be charged correspondingly higher premiums as a result. Many could not afford insurance even under the CAARP or would have difficulty paying the CAARP premiums.

6 Three years is the length of time that the DMV is generally required to retain data concerning a driver's accidents or traffic infractions. (Veh. Code, §§ 1807, 12810.5.) Most plaintiffs have been "clean" drivers for significantly longer than three years.

The action was brought on behalf of the named plaintiffs and "all others similarly situated," specifically, licensed drivers who do not have the required "insurance or proof of insurance" and "all who have been fined or lost their licenses" pursuant to Vehicle Code section 16034. The class has not been certified.

The defendants are (in their official capacities) George Meese, former Director of the DMV, James Smith, Commissioner of the California Highway Patrol, John Van De Kamp, Attorney General, and Sherman Block, Sheriff of Los Angeles County. Neither the Commissioner nor any private insurer has been named a party defendant in the action.

Plaintiffs filed their complaint on Friday September 13, 1985, and requested a temporary restraining order enjoining the operation of the 1984 ***1225** Act. The trial court refused to issue the restraining order, but set a hearing date for plaintiffs' motion for a preliminary injunction.

In support of their motion for preliminary injunction, plaintiffs submitted a number of declarations and exhibits.[7] This evidence tended to establish that the level of competition

among automobile insurers found elsewhere in the state was lacking in South Central Los Angeles. Most "mainstream" insurers were allegedly refusing to write policies in that area, or would only insure those who already had insurance. Many of the insurers who did offer insurance for the area were said to be "sub-standard," that is, they specialized in high risk customers and hence charged the highest rates. Insurance by mail was also available, but plaintiffs did not discuss this option except to note that such companies "provide no service through agents or offices for acquiring insurance, servicing policies, or handling claims."

7 In view of the remainder of our opinion, we do not address defendants' objections to the proffered evidence.

Defendants submitted no evidence in opposition to plaintiffs' motion. However, this court may (as did the trial court) infer from enactment of the 1984 Act itself that the Legislature had determined that substantial harm was being caused by uninsured drivers, especially if their victims were not themselves insured.

The trial court denied plaintiffs' motion, finding that a balance of hardships favored defendants. Plaintiffs then petitioned the Court of Appeal for supersedeas. That court denied the petition. We granted the subsequent petition to this court for review, and stayed enforcement of the 1984 Act. We also transferred the appeal, then pending before the Court of Appeal, to this court.

III. *The Questions Presented*

The scope of our task is greatly narrowed not only by the limited attack made by plaintiffs, but also by the various concessions made by defendants. First and foremost, plaintiffs have expressly and repeatedly confined themselves to two main legal theories: (1) By providing no mechanism whereby a driver can question and challenge (a) an insurer's decision not to issue a policy or (b) the rate thereof, and by effectively making the ability to drive contingent on having insurance, the state is denying drivers procedural due process of law; and (2) By effectively requiring drivers to carry insurance, by allowing insurers to decide who will or will not be able to obtain private insurance, and by failing to provide adequate guidelines to insurers in making ***1226** their decision, the Legislature has unconstitutionally delegated its authority to insurers. [8]

8 Plaintiffs do not attack the pre-1984 financial responsibility laws, nor do they contend that the 1984 Act denies them substantive due process or equal protection. Moreover, plaintiffs do not allege that the Commissioner is improperly carrying out his duties or that any insurer is failing to comply with the law. We also note that plaintiffs do not argue that private insurance rates are actually "excessive" in violation of Insurance Code section 1852. Plaintiffs assert that even if the Commissioner and various insurers had been joined as defendants, and even if we found plaintiffs' legal propositions persuasive, we would be without power to remedy the situation through a

> decree directed at the Commissioner or any insurer.

Similarly, defendants also concentrate on two major points. First, they contend that since the appeal is from a denial of a preliminary injunction we can affirm the trial court solely by balancing the equities without reaching the merits of plaintiffs' claims. Second, they argue that even if we reach the merits and find that there is a procedural due process interest involved, CAARP meets all constitutional standards, and hence the 1984 Act is constitutional. [9]

9 For their part, defendants do not strongly argue that the state has no responsibility or duty to provide access by all to insurance at rates set in a constitutionally permissible manner (i.e., neither arbitrarily nor capriciously). They do strongly maintain, however, that private insurers do not constitute an arm of the state, and their acts are not "state acts" cognizable under the Fourteenth Amendment to the United States Constitution or article I, section 7 of the California Constitution.

(1) As defendants correctly note, at this stage of the proceedings, i.e., denial of a preliminary injunction, the trial court must be affirmed unless it abused its discretion in making its determination. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69 [196 Cal.Rptr. 715, 672 P.2d 121].) In exercising its discretion, the trial court must consider "two interrelated factors," specifically, the likelihood that plaintiffs will prevail on the merits at trial, and the comparative harm to be suffered by plaintiffs if the injunction does not issue against the harm to be suffered by defendants (or in this case the people of the State of California) if it does. (*Id.* at pp. 69-70.)

Although there is no data quantifying the harm to be caused by issuing the injunction, there is no doubt that the victims of accidents caused by uninsured drivers suffer greatly, especially if these victims do not themselves have medical or uninsured motorist coverage. Against that unquantified harm, the trial court weighed the effect of the law on plaintiffs. Many members of the putative class were undoubtedly faced with fines and threatened with or actually subjected to suspension of their licenses. [10] Without ***1227** considering the merits, the trial court found that the balance of hardships favored defendants, and therefore denied the injunction.

10 We note that the statistics quoted by plaintiffs as establishing the number of citations issued under the 1984 Act prior to the trial court's hearing did not differentiate between those who could not afford or could not obtain insurance, and those who simply would not buy it even if they could afford it.

In doing so, the trial court considered the reasoning of the Michigan Supreme Court in *Shavers v. Kelly* (1978) 267 N.W.2d 72 [267 N.W.2d 72]. That case raised similar issues to those raised here, and is discussed in detail *infra*. At this point it is necessary only to point out that the Michigan court agreed with plaintiffs' legal position but stayed the effect of its decision for 18 months so that the Legislature could enact appropriate corrective

legislation. Inferentially, then, even after the plaintiffs in that case won on the merits the Michigan court must have found that a balance of hardships favored defendants.

However, the procedural posture in *Shavers* is strikingly different from that in the instant case. In *Shavers*, the law in question, a no-fault plan which effectively required all drivers to carry insurance, had been in effect, and enforced, for four and one-half years. For the Michigan court to enjoin enforcement would therefore have *changed* the status quo. In contrast, the 1984 Act had only been in effect for a short time when the trial court heard the preliminary injunction motion. Hence, in the case at bench, an injunction would have *maintained* the status quo. We therefore conclude that reference to *Shavers* is of limited value with regard to a balancing-of-hardships analysis.

We conclude that the trial court did not err insofar as it found that the balance-of-hardships analysis favored defendants. However, as previously stated, the trial court must also consider the likelihood of plaintiffs' ultimate success on the merits in determining whether to issue a preliminary injunction. Although consideration of this issue does not entail final adjudication of the ultimate rights in controversy (*Cohen* v. *Board of Supervisors* (1985) 40 Cal.3d 277, 286 [219 Cal.Rptr. 467, 707 P.2d 840]), it does affect the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo. (*Continental Banking Co. v. Katz* (1968) 68 Cal.2d 512, 528 [67 Cal.Rptr. 761, 439 P.2d 889].) We believe it is the mix of these factors that guides the trial court in its exercise of discretion.

(2) On review, a trial court's order with regard to a preliminary injunction may be affirmed if either the balance-of-hardships analysis or plaintiffs' likelihood of success considerations would alone support the ruling. (*Cohen, supra*, 40 Cal.3d at pp. 286-287.) However, if the trial court relies on but one of the foregoing, the reviewing court must determine whether that ***1228** reliance conclusively supports the trial court's determination regardless of the remaining considerations.

Although the balance of hardships favors defendants in this case, we cannot say that it tilts so sharply in their favor that it supports the trial court's order irrespective of the likelihood of plaintiffs' success on the merits, especially where, as here, the trial court's order denying the motion had the effect of altering the status quo. Normally, it would be appropriate to remand the case to the trial court for consideration of the latter question. However, plaintiffs have argued, and we agree, that there exist no contested factual questions necessary to resolve the case. In addition, the legal issues have been exhaustively briefed by the parties and numerous amici. In light of these factors and the importance of the case, we take the unusual, but practical, step of reaching and resolving the merits ourselves.

IV. *Discussion*

A. *Procedural Due Process.*

(3) It is well established in California that the privileges conferred by a driver's license constitute an important property right (*Rios v. Cozens* (1972) 7 Cal.3d 792 [103 Cal.Rptr. 299, 499 P.2d 979]; *Bell v. Burson* (1971) 402 U.S. 535 [29 L.Ed.2d 90, 91 S.Ct. 1586]), although not so fundamental a right as to trigger a strict scrutiny analysis (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70 [177 Cal.Rptr. 566, 634 P.2d 917]). It is equally clear that before any criminal sanction is imposed for failure to establish financial responsibility, such as a fine, the state must comply with a panoply of procedures. Moreover, under the 1984 Act, a license can be suspended only after such an adjudication. Hence, at one level, there is ample "due process" before any sanctions are imposed for lack of financial responsibility.

But it is plaintiffs' contention that the foregoing process comes too late. The critical moment, according to plaintiffs' theory, occurs when they attempt to obtain insurance from the private insurance market and are unable to do so. (4) Plaintiffs assert that they have a substantive right either to participate in the private insurance market or to obtain coverage from the private insurance market and it is this right which cannot be impaired without procedural protection. Plaintiffs contend they have a procedural due process right to examine and challenge the decisionmaking process of private insurers.

Plaintiffs' position finds support in *Shavers v. Kelly, supra*, 267 N.W.2d 72. In *Shavers*, the Michigan Supreme Court reviewed a legislatively enacted ***1229** no fault insurance law, which required all drivers to establish their financial responsibility in order to register or operate a motor vehicle. In most other respects, the legislative framework encompassing financial responsibility and insurance regulation was generally similar to that now in place in California.[11] Michigan also had a program similar in many respects to CAARP.

11 However, unlike California, Michigan required that all insurance rates be approved by its insurance commissioner.

The *Shavers* court began its consideration by holding that insurers were instruments of the state in carrying out Michigan's no-fault policy, and hence acts by insurers were state acts. Since drivers had a right not to be arbitrarily or capriciously denied by state actions the state-mandated insurance (at fair and equitable rates), the court held that procedural due process was required. At a minimum, that required the state to provide a meaningful way for drivers to challenge an insurer's coverage or rate-setting decision. The court also went on to consider the effect of the Michigan assigned risk program, but concluded that the program did not cure the constitutional infirmity.

Although defendants in the instant case attempt to distinguish *Shavers*, there is no reasoned way to do so. Thus, if we applied the reasoning of that case here, we would be compelled to find that plaintiffs would likely prevail on the merits. However, we are not persuaded by the reasoning in *Shavers*, and decline to follow that case in two crucial respects. First, we cannot agree that the acts of private insurers in setting rates or denying coverage are state acts. Second, because of the foregoing, we

cannot concur in the Michigan court's summary consideration and rejection of the assigned risk program as a constitutional alternative to meeting due process requirements.

We turn first to the state-action question. We have never held that a private company in a competitive industry is a state agent, or that its decisions on how to price and market its product constituted state action. To the contrary, only in extreme cases of pervasive state regulation coupled with a state-guaranteed monopoly have we equated private decisions with state action.[12] ***1230**

12 See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458 [156 Cal.Rptr. 14, 595 P.2d 592]. In *Gay Law Students*, we found that a public utility is more akin to a governmental entity than a purely private employer. As factors leading to that conclusion, we noted the following: "[B]readth and depth" of governmental regulation; a regulatory framework establishing that the state "expects" a utility to act like a governmental entity, not a private corporation; the fact that the prices charged for the utility and the standards of the facilities were determined by the state; the endowment of the utility with a number of the state's sovereign powers; the guaranteed monopoly status of the utility; the guaranteed return on investment; and the public's need to purchase the monopolistic utility's product. (*Id.* at pp. 469-472.) Insurance companies might possess only the last of the foregoing attributes: the public's need to buy the product. Without more, that does not approach the situation described in *Gay Law Students*.

There are many products and services the use of which is obligatory to the enjoyment of a state-protected property right, such as fire extinguishers for buildings, or smog control devices or mufflers for cars. The state generally should be able to rely on such products to be supplied by the marketplace, and the suppliers should not become state agents on the ground that state law has created or expanded the demand for their product or mandated its use. Rather, it is only when state law encourages the decisionmaking procedure in question, or when a statute permits that which had been prohibited by common law, that the decisions of private parties can potentially be considered state actions. (See *Garfinkle* v. *Superior Court* (1978) 21 Cal.3d 265, 278-279 [146 Cal.Rptr. 208, 578 P.2d 925] [holding that nonjudicial foreclosure is not state action despite its statutory authorization]; *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 361-362 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266] [refusing to find that the action of a bank in asserting a statutory right of setoff constituted state action].)

Even though the acts of insurers in setting rates and their decisions whether to provide coverage are not state actions, as we have already stated the state's decision to impose a fine or suspend a license is a state action. We must, therefore, consider what process is due to insure that this limited state action is not performed arbitrarily or capriciously.

Plaintiffs contend that the only way to guarantee access to insurance, at "fair and equitable" rates (although not necessarily affordable rates [13]), is to provide the procedural process they request. Defendants do not strongly challenge plaintiffs' contention that by effectively requiring drivers to carry insurance, the state may have a duty to make insurance available to drivers in a manner that is neither arbitrary nor capricious.[14] However, they argue that one way to meet that duty is through the CAARP. We agree.

13 Plaintiffs have conceded that if after a due process hearing the same rates were approved as are now in effect, they would have no remedy.

14 We did not reach this issue in *Watson, supra*, 212 Cal. 279, which concerned a substantive due process challenge to the financial responsibility laws, and plaintiffs do not quarrel with the result in that case.

We are persuaded that we must look to the CAARP in deciding whether the 1984 Act comports with procedural due process. As part of our analysis, we take note of the assessment by the *Shavers* court of Michigan's Assigned Risk program. That court identified three problems: (1) there was a "statutory presumption that the rates charged will be higher than the ***1231** rates for motorists in the open marketplace. M.C.L. § 500.3365; M.S.A. § 24.13365." (267 N.W.2d at p. 89.); (2) the rates set by the program were subject to the same procedural and substantive inadequacies as those found in the private market; and (3) there was no way to challenge placement in the program "with its presumptively higher rates." (*Ibid.*) Having recited these problems, the court summarily concluded that the program was inadequate to meet due process requirements.

We cannot dispose of CAARP as easily. In determining whether procedural due process is afforded plaintiffs, it is axiomatic that we look only to the asserted state duty and cognizable state action. (See *Garfinkle, supra*, 21 Cal.3d at pp. 281-282; *Kruger, supra*, 11 Cal.3d at pp. 366-367.)[15] Thus, if the state provides a program to satisfy its duty, and that program is procedurally adequate, then the "state action" is constitutional. Inasmuch as we have determined (contrary to the *Shavers* court) that the acts of private insurers do not constitute state actions, we need not consider CAARP in relation to private insurance. Rather, we must look to CAARP standing alone to determine whether it meets the required procedural due process standards.

15 Plaintiffs cite *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657 [163 Cal.Rptr. 831], for the proposition that private enterprises affected with a public interest must provide "fair procedures," a notion akin to due process. However, that case and the law review article upon which it relies make it clear that "fair procedures" extend only to membership decisions of work-related entities, such as unions or professional organizations. The only exception is that the doctrine has been extended to a hospital's decisions concerning a doctor's staff privileges.

(Sloss & Becker, *The Organization Affected With a Public Interest and Its Members - Justice Tobriner's Contribution to Evolving Common Law Doctrine* (1977) 29 Hastings L.J. 99.) *Applebaum* has no application to this case.

In our judgment, CAARP effectively guarantees that insurance is offered and available to all eligible drivers in the state. Further, CAARP requires the program's rates to be set by the Commissioner after public hearings. (Ins. Code, § 11620, CAARP, § 2404.) Thus, a plan is in place to meet the state's asserted duty, and the plan is, on its face, procedurally sound. The burden is therefore squarely on the plaintiffs to establish an infirmity in CAARP. In attempting to meet that burden, plaintiffs put forth five arguments (including the three mentioned in *Shavers*). We ultimately conclude that none has merit.

First, plaintiffs allege that CAARP was originally designed to be used by bad drivers. As a consequence, plaintiffs assert that CAARP rates are "presumptively" higher than those of private insurers.[16] In support, they point to ***1232** the hearsay words of an official in the Commissioner's office: if CAARP rates are lower than those of private insurers, "something is wrong."

16 We note, though, that there is certainly no "statutory presumption" in California that CAARP rates are higher than those in the voluntary market, in contrast to the described situation in Michigan.

Defendants dispute the accuracy of plaintiffs' premise, but either way it is agreed that 35 percent of those insured through CAARP are drivers with no points and hence are presumptively good drivers. Because of the number of good drivers in the program, CAARP premiums significantly differentiate between drivers with no points and others.[17] (CAARP, § 2460.3 subd. (g).) In addition, even if "something is wrong," as plaintiffs assert, their remedy is through the Commissioner, who may investigate private insurance rates to determine if they are "excessive" or revise the rates set in CAARP. Plaintiffs have made some showing that a "reasonable degree of competition does not exist in [South Central Los Angeles] with respect to the classification to which such rate is applicable." (Ins. Code, § 1852.) That is half of the necessary statutory showing required to obtain relief from the Commissioner.[18]

17 In his March 20, 1986, decision, the Commissioner explained that a recent change in the CAARP regulations was designed "to double the premium surcharges [of drivers with points] in order to place the increasing costs of liability insurance on the negligent automobile operator who has documented traffic violations. This change is also necessary to reflect inflation because these fixed surcharges haven't been changed in past years when the base rates were increased." This explanation takes into account much of plaintiffs' concern. Before these changes were adopted, base rates, paid by all CAARP insureds, increased although the dollar

differentiation between "good" and "bad" drivers remained constant. In effect, the percentage differential between such drivers decreased each time that the base rates increased. The prior $200 spread between the best and worst drivers did not fully reflect the actuarial difference in the cost of insurance between them. Hence, plaintiffs were correct in asserting that good drivers in CAARP subsidized bad drivers. That concern now has less persuasive force.

18 As plaintiffs have not filed a complaint with the Commissioner, nor joined him in the present case, we cannot determine whether the rates are actually excessive. We note, though, that such a claim was made in a complaint filed with the Commissioner by the County of Los Angeles. Plaintiffs here are, of course, also free to file a complaint. As stated previously, the Commissioner's final determination is subject to judicial review.

Second, plaintiffs claim that CAARP "stigmatizes the driver vis-a-vis future insurance opportunities." The only evidence on point is a declaration by an experienced, licensed insurance agent who serves the South Central Los Angeles community. However, that declaration does not show that, for purposes of future insurance opportunities, an insurer treats a CAARP driver any differently from a previously uninsured driver.[19] Therefore, we cannot find that CAARP results in unconstitutional state-mandated stigmatization. ***1233**

19 One plaintiff, in his declaration, states that he believes it is "unfair" for him to be placed in CAARP, where he claims he is "lumped with bad drivers," just because of where he lives. This argument was not set forth in plaintiffs' brief as evidence of "stigmatization." Moreover, as plaintiffs themselves point out, 35 percent of those insured through CAARP are good drivers. Given the differentiation in rates based on driving record, and the foregoing statistic, it cannot be said that this declaration, if true, establishes stigmatization.

Third, plaintiffs complain that they cannot challenge CAARP rates, another concern of the *Shavers* court. This is true on an individual premium basis at the time of application. However, unlike private insurance rate-setting systems, CAARP rate criteria are set out publicly, so the application of rate classification to an individual premium is a ministerial task and easily verified by the applicant. On a larger scale, rates are set periodically by the Commissioner after public hearings.[20] Consequently, ample process is afforded with regard to CAARP rates and premiums.

20 Plaintiffs expressly concede for purposes of this suit the procedural due process adequacy of the CAARP rate-setting procedures.

Fourth, plaintiffs note that coverage under the CAARP is limited and they cannot choose their carrier. If they desire additional insurance, they must take out a separate and allegedly expensive supplemental policy with another insurer. Even if true, this additional insurance

is not required by law, and so the need to obtain it is purely self-imposed. Further, plaintiffs specify no reason, and we can discern none, why the inability to choose a particular insurer renders CAARP constitutionally infirm. This allegation therefore can have no effect on plaintiffs' constitutional challenge.

Finally, as in *Shavers*, plaintiffs complain that they cannot challenge their placement in CAARP. But as we noted earlier, there is no single decision consigning someone to that program; only individual decisions of insurers to refuse to insure, or to charge rates that the applicant finds unacceptable. Thus, plaintiffs' objection is not to CAARP as such, but to the Commissioner's failure to police the insuring decisions and rate schedules of the private insurers.

In sum, because the acts of private insurers do not constitute state actions, plaintiffs have no procedural due process right to review or challenge an insurer's decision concerning the denial of coverage or the premiums charged. Although state action is involved in the suspension of a license or the imposition of a fine for failure to establish financial responsibility, the scope of the state's alleged duty can at most extend to a duty to provide plaintiffs with the required amount of insurance at rates that are neither arbitrary nor capricious. We therefore conclude that CAARP provides the required access to insurance in a manner that comports with procedural due process.

B. *Delegation of Power.*

Plaintiffs' second argument is dealt with more easily. (5) They contend that the current regulatory structure in California constitutes a delegation ***1234** of legislative authority to the private insurance industry, which determines who can purchase insurance (and thus who must resort to CAARP) and what rates they must pay. Such a delegation, plaintiffs maintain, is invalid unless accompanied by clear standards to guide the exercise of the delegated power, and adequate safeguards to limit the exercise of discretion.

However, the great weight of California authority has found a delegation of legislative power to industrial or professional associations only where statutes gave such groups the power to initiate or enact rules that acquired the force of law. [21] Other decisionmaking authority, even if the decision had a significant impact on a person's daily life, has not constituted a delegation.

21 See e.g., *Bayside Timber Co.* v. *Board of Supervisors* (1971) 20 Cal.App.3d 1 [97 Cal.Rptr. 431] (Forest Practice Act resulted in an unconstitutional delegation-of-power because an industry committee was empowered to initiate rules that governed all lumbering in a region, preempting county regulation); *State Board* v. *Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436 [254 P.2d 29] (striking down, in part on a delegation of power theory, legislation authorizing a professional organization to set minimum prices binding upon all members of the profession); *Allen v. California Board of Barber Examiners* (1972) 25 Cal.App.3d 1014 [102 Cal.Rptr. 368, 54 A.L.R.3d 910] (same); *Wilke & Holzheiser, Inc. v.*

Dept. of Alcoholic Beverage Control (1966) 65 Cal.2d 349 [55 Cal.Rptr. 23, 420 P.2d 735], result overruled on other grounds in *Rice* v. *Alcoholic Bev. etc. Control Appeals Bd.* (1978) 21 Cal.3d 431 [146 Cal.Rptr. 585, 579 P.2d 476, 96 A.L.R.3d 613] (fair trade laws upheld against delegation-of-power challenge because prices were set by individual distillers, not by industry association, and were enforced by contract).

The exception to the rule is *Rosner v. Peninsula Hospital Dist.* (1964) 224 Cal.App.2d 115 [36 Cal.Rptr. 332]. In *Rosner*, a hospital adopted an emergency resolution requiring all staff doctors to carry malpractice insurance, and refused staff privileges to Dr. Rosner because he lacked such coverage. The Court of Appeal struck the resolution because it effectively delegated the determination of who could obtain staff privileges to the insurance industry, and it did so without providing adequate safeguards or standards. However, *Rosner* was rejected in a later Court of Appeal decision also concerning a requirement that all staff doctors carry medical malpractice insurance. (*Wilkinson* v. *Madera Community Hospital* (1983) 144 Cal.App.3d 436 [192 Cal.Rptr. 593].) The *Wilkinson* court, relying on our post-*Rosner* decision in *Wilke & Holzheiser, Inc., supra*, 65 Cal.2d 349, held that the purported delegation was really no delegation at all. Insurance companies had always been entitled to determine who they would insure. The hospital's rule in no way "authorized a private entity to do anything other than what it was already entitled to do." (144 Cal.App.3d at pp. 445-446.)

We adhere to the longstanding rule that a statute does not delegate legislative authority to a private industry unless it empowers that industry to initiate or enact rules that have legal force. A statute that merely permits ***1235** a private seller to decide to whom to sell, and at what price, is not unconstitutional. [22]

22 To the extent that *Rosner* is inconsistent with the foregoing, it is disapproved.

V. *Conclusion*

We conclude that the 1984 Act comports with all procedural due process and delegation-of-power requirements. Therefore, plaintiffs are not likely to prevail on the merits, and the trial court's decision to deny the motion for a preliminary injunction must be affirmed.

In reaching this conclusion, we are not insensitive to plaintiffs' position. There is a certain appeal to plaintiffs' complaint that those with good driving records, who could possibly afford insurance if they lived in a more affluent area, are unable to obtain insurance in the area where they actually live. As a consequence, they face relatively heavy fines and suspended licenses for a traffic infraction that would otherwise be but a minor annoyance. There is also some persuasive force to plaintiffs' concern that the lack of procedural safeguards in the area of private insurance, which might provide a guaranty that such insurance is offered at fair and equitable rates, leads to a feeling of helplessness among those unable to afford or obtain private insurance. However, their case should be made to the Legislature, not to this court. So long as the legislatively mandated system meets minimum procedural due process standards, as we found it does, we

cannot look behind the enacted framework to replace the Legislature's social judgment with our own. To do so would be an egregious violation of the separation of powers.

Our order of December 5, 1985, enjoining enforcement of the provisions of Vehicle Code sections 16028 through 16035 is vacated. The order of the trial court denying the motion for a preliminary injunction is affirmed. The case is remanded for further proceedings consistent with the foregoing opinion.

Lucas, C. J., Arguelles, J., Kaufman, J., and Feinerman (Robert), J., * concurred.

* Presiding Justice, Court of Appeal, Second Appellate District, Division Five, assigned by the Chairperson of the Judicial Council.

BROUSSARD, J.

I reluctantly concur in the judgment sustaining the trial court's ruling denying a preliminary injunction to restrain enforcement of the 1984 legislation (Veh. Code, §§ 16028-16035) providing that a driver cited for a moving violation must provide proof that he has automobile liability insurance. When we granted review, we saw this case as raising two ***1236** significant constitutional issues: (1) whether the state, having effectively made automobile liability insurance compulsory, had a duty to assure that such insurance was available to all its drivers at reasonable and nondiscriminatory rates [1]; and (2) if so, whether the state's statutory and administrative scheme fulfilled that duty. But a funny thing happened on the way to this forum. The state did not dispute its duty to assure that insurance was available to all on a fair and reasonable basis. [2] Instead, it maintained that the California Automobile Assigned Risk Plan (CAARP) fulfilled that obligation. And plaintiffs, on their part, made no attempt to show that insurance was not available under CAARP on a fair and reasonable basis, and in response to our questions disclaimed any notion that affordability was something to be considered in assessing the reasonableness of insurance rates.

1 In *Shavers* v. *Kelley* (1978) 402 Mich. 554 [267 N.W.2d. 72], the Michigan Supreme Court held that "[m]otorists are constitutionally entitled to have ... insurance made available on a fair and equitable basis."

2 Every state which has enacted compulsory automobile insurance laws (whether liability insurance or no fault insurance) has also enacted procedures for review of private insurance rates, an assigned risk program, or both. Most states go further, requiring advance approval of insurance rates by an insurance commissioner or board, but there appear to be none which do not recognize the obligation to make sure that insurance is available to those required to possess it.

Instead, it turned out that plaintiffs' attack on CAARP was based entirely on popular but mistaken notions concerning the assigned risk program. Plaintiffs assert that CAARP was

intended only for drivers with bad records,[3] when in fact it serves the broader purpose of making insurance available to anyone who, for any reason, cannot obtain private insurance at lower rates. They assume that, as persons with good driving records, they were mistakenly relegated to CAARP, and seek to challenge the decision which assigned them to that fate. In fact, there is no such decision; drivers turn to CAARP when they discover that private insurance is not available, or costs more than CAARP insurance. Finally, plaintiffs assume that their CAARP rates are unfairly high because they are calculated on the basis of a pool containing primarily drivers with bad records. But CAARP charges lower rates for drivers with good records. If the rate differential is inadequate, that issue can be raised in rate-making proceedings before the Insurance Commissioner (Commissioner) and on judicial review of those proceedings.

3 This claim, while plausible on its face, may be historically inaccurate. According to *Cal. State Auto. etc. Bureau* v. *Downey* (1950) 96 Cal.App.2d 876, 880-881 [216 P.2d 882], the impetus for the current assigned risk program was the refusal of insurance companies to insure small trucking companies regardless of their accident record.

The failure of plaintiffs' attack on CAARP dooms their request for a preliminary injunction, and requires us to affirm the ruling below. But that ***1237** outcome for the present appeal leaves a great many unanswered questions. Since this case remains subject to further proceedings in the trial court, and the matter is one of legislative and public concern, I think it appropriate to note some of those questions.

(1) ***Factual Background of this Litigation***

This case arises from the attempt of the California Legislature to solve a serious social problem - the uninsured driver - without taking into account an equally serious problem - insurance pricing practices which make automobile liability insurance prohibitively expensive for many of the urban poor. The 1984 Legislature enacted Vehicle Code sections 16028 through 16035, which provide that whenever a driver is cited for a moving violation, he must provide proof of financial responsibility upon request of the citing officer. Violators are subject to a fine of $100 to $240 and penalty. The Department of Motor Vehicles (hereafter DMV or department) is notified of the conviction, and must suspend the violator's driving privileges unless, within 60 days, he provides proof of financial responsibility. Although statutes provide alternative methods of demonstrating financial responsibility,[4] the only practical method is purchase of an insurance policy with liability coverage equal to or greater than the statutory minimum.[5]

4 The other forms of proof may be found in Vehicle Code sections 16053 (certificate of self insurance); 16054 (insurance policy or bond); 16054.2, subdivision (a) (cash deposit of $50,000 with the DMV). The certificate of self insurance can only be issued to fleet owners of more than 25 vehicles. (§ 16053, subd. (a).) The bond mentioned in section 16054,

subdivision (a) is not in fact sold by any surety in the state. It is self-evident that a person who cannot afford to pay the several hundred dollars required for minimum liability insurance is equally unable to deposit $50,000 in cash with the DMV as required by section 16054.2, subdivision (a). Accordingly, purchase of an automobile insurance liability policy is, in fact, compulsory.

5 The minimum insurance currently required is $15,000 liability coverage per person injured, $50,000 per accident, and $5,000 for property damage. (Veh. Code, § 16056, subd. (a).)

Since previous California law required proof of financial responsibility only after an accident, the new statute radically accelerated the enforcement of the financial responsibility requirements, increasing substantially the number of persons facing revocation of their licenses for noncompliance with those laws. Purchase of liability insurance became a necessity for all drivers, even those with no personal assets to protect.

But as insurance became essential, for many people it was also becoming more difficult to obtain. Private insurance companies were increasingly unwilling to sell liability coverage, at least at affordable rates, to residents of South Central Los Angeles and portions of Oakland. [6] Often a resident of ***1238** those areas with a perfect driving record could obtain private coverage, if at all, only by paying more than a resident of some other areas with a history of accidents and violations. [7] The 1984 legislation did nothing to correct this problem.

6 The individual plaintiffs in the present case all reside in South Central Los Angeles, and the evidentiary record on which they base their motion for preliminary injunction refers to that area. Statewide information on insurance rates, however, suggests that the problem of obtaining insurance at affordable rates exists in portions of Oakland, and probably in other low-income urban areas.

7 For discussion of a similar problem involving property insurance, see Note, *Property Insurance and the American Ghetto: A Study in Social Irresponsibility* (1971) 44 So. Cal.L.Rev. 218.

The individual plaintiffs here are seven residents of South Central Los Angeles. Each has submitted declarations in support of plaintiffs' motion for a preliminary injunction; these declarations, collectively, explain the circumstances which gave rise to this action. [8]

8 The declarations refer to insurance rates as of 1985; current rates are generally higher and the magnitude of the problem has, if anything, become worse. (See Dept. Ins. Auto Ins. Premium Survey (July 15, 1987).) The survey gave the example of a policy providing minimum coverage issued to a 45-year-old married couple with clean driving records. Such a policy would cost from $750 to $1,500 in South Central Los Angeles (an average of about $1,000). It would cost from

$250 to $400 in San Diego, and from $150 to $300 in Redding.

Plaintiff Benita Hill, 28 years old, states that she is unable to work because of a medical condition (lupus) and must drive to medical appointments. She has never received a traffic ticket or been in an accident. Her monthly income is $485. When she sought private insurance, companies quoted annual rates of $1,050 to $1,400, far beyond what she could afford.

Plaintiff Lorene Dilworth, age 69, has had 1 accident, but no traffic tickets. She lives with her son V. La Val Dilworth, age 19, who has a completely clean driving record. He supports them both with a job paying $6.54 per hour. The California Automobile Association presented the best offer of any private insurance company, $2,634 cash or $3,030 on an installment basis to insure the Dilworths' two cars.

Willie Henry, age 73, has had no tickets or accidents for the past 10 years. His income is under $500 per month. Most companies would not insure him because he had been driving without insurance until the present law went into effect. (One company offered coverage at $1,200.) He discovered he could obtain assigned risk coverage at $481 per year, but cannot afford it as this is equal to one month's income.[9] ***1239**

9 As of 1985, $481 was the lowest assigned risk rate available for this territory. (Current rates are higher.) It applied to males over 25, or females over 21, who do not use their car to drive to work, and have a completely clean driving record. It is possible that some other plaintiffs could have obtained assigned risk policies for $481, far less than the private rates recited in their declarations.

Lawrence Wiley is retired on an income of $996 per month. He has had no tickets in the last five years and no accidents. He was unable to get private coverage, and will be forced to purchase an assigned risk policy at $648 to $731.

The declarations of other plaintiffs recite similar facts. They demonstrate that residents of South Central Los Angeles, even those with good driving records, have considerable difficulty obtaining private insurance coverage. When such coverage is available, the price quoted is very high, much higher than prices for other parts of the state, and often far beyond the means of the applicant. Thus applicants must resort to the assigned risk program, but those rates, while less than private rates, are still prohibitive to many applicants.[10]

10 Typically, assigned risk rates are much higher than private rates. The converse situation in South Central Los Angeles arises not because assigned risk rates are low for that region - to the contrary, that territory has the highest assigned risk rates - but because the territorial differences in assigned risk rates are much less than the territorial differences in private rates.

Further evidence supports this conclusion. The ruling of the Commissioner on assigned risk rates, filed March 20, 1986, observes that "[f]or a variety of reasons, these are difficult times for some of the insurance companies

with respect to the willingness to offer basic automobile liability insurance, particularly in the urban areas. Some agent appointments are being terminated, underwriting standards have been tightened, and some premium rates have increased." Plaintiffs' counsel submitted a declaration quoting Everett Brookhard, chief of the Consumer Affairs Division of the California Department of Insurance: "The biggest problem in South Central Los Angeles is the lack of a competitive market. The distribution system for insurance sales is not there, especially for the large direct sales companies such as Allstate, State Farm and Farmers insurance companies. While a number of companies may actually quote rates for South Central Los Angeles, many fewer of them were actually doing business there, that is writing policies for South Central Los Angeles residents. They might have rates, but there are no agents authorized to write the policies, nor are the distribution or claims systems there to service the customers. Additionally, even if they published rates, they often impose so many restrictions (e.g., no prior insurance precludes application), that the insurance quoted at those rates is inaccessible. A 'high percentage' of drivers in South Central Los Angeles are uninsured."

Morris Davis, an insurance agent with offices in South Central Los Angeles, declared: "Currently, out of over 400 insurance companies doing business in California, I only know of approximately 10 who will write liability insurance policies through local agents and brokers for customers whose ***1240** vehicles are registered in south central Los Angeles. And, of these companies, virtually all are insurance companies denominated as 'sub-standard.' This means that these companies specifically write for customers who are perceived to be the greatest risk, that is, 'sub-standard' customers, and therefore these companies charge the highest rates. Customers residing in south central Los Angeles, especially in certain zip codes, are stigmatized as 'sub-standard' risks, even if they've had no moving violations and no accidents." [11]

11 Davis explained that residents can obtain insurance in only three ways, assigned risk, "substandard companies," and insurance by mail. The substandard companies charge more than assigned risk rates. Companies operating by mail "provide no service through agents or offices for acquiring insurance, servicing policies, or handling claims."

A number of exhibits verify that private insurance rates in South Central Los Angeles are two to three times as high as rates in other areas of the state, with the result that good driver rates in Los Angeles often exceed rates charged drivers with bad records in other areas.

Davis and others speak also of the reluctance of insurance companies to insure persons who were previously uninsured, a problem of particular concern since the purpose of the 1984 legislation was to compel such persons to obtain insurance. They speak also of the difficulty persons with assigned risk insurance experience in later obtaining private insurance.

(2) *Regulation of Private Automobile Liability Insurance*

Automobile liability insurance in California is provided primarily by a private, competitive, largely unregulated market. California has less regulation of insurance than any other state, and in California automobile liability insurance is less regulated than most other forms of insurance.

The principal regulatory law, the McBride-Grunsky Regulatory Act of 1947 (Ins. Code, § 1850 et seq.) enacts the minimal regulation required to exempt California insurance from federal antitrust law. It governs all forms of insurance including automobile liability insurance. The principal provision, section 1852, provides that "Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory. [¶] No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." No provision defines "unfairly discriminatory" rates. Subdivision (d) permits insurers to classify risks in accord with the probable effect on losses, utilizing "individual experience, location or dispersion of hazard, or any other reasonable considerations." ***1241**

A person objecting to a rate or classification can complain to the insurer. (Ins. Code, § 1858.) If dissatisfied with the insurer's action, he can request a hearing before the Commissioner. (*Ibid.*) If the Commissioner believes the complaint states probable cause to find a violation of section 1852, he may hold hearings (§§ 1858.1, 1858.2), render findings (§ 1858.3), and impose sanctions (§ 1858.4). [12] His decisions are subject to judicial review. (Ins. Code, § 1858.6.)

12 As summarized in *County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77, 87 [182 Cal.Rptr. 879]: "[T]he Commissioner has the power to take corrective action as he deems necessary and proper (Ins. Code, § 1858.3); he can impose a money penalty not to exceed $1,000 for each failure to comply up to a total penalty of and aggregating no more than $30,000 (Ins. Code, § 1858.3); he can issue an order specifying in what respects a violation exists and require compliance within a reasonable time thereafter (Ins. Code, § 1855.3, subds. (b) and (c)); and in addition to the other penalties provided, he may suspend or revoke, in whole or in part, the certificate of authority of an insurer with respect to the class or classes of insurance specified in such order which fails to comply within the time limited by such lawful order of the Commissioner pursuant to section 1858.3. (Ins. Code, § 1858.4.)"

Insurers do not file rates with the Commissioner, nor do rates require his approval. He is forbidden to set or fix rates. (Ins. Code, § 1850.) Rates come to his attention only when, sua sponte or in response to a complaint, the Commissioner requests such information from the insurer. The Commissioner asserts no authority over refusals to insure, and complaints charging that an insurer has unreasonably refused to insure are routinely rejected as raising an issue beyond the Commissioner's jurisdiction.

The declarations on file in this action make it clear that South Central Los Angeles is not a competitive market. Consequently the Commissioner has authority to determine whether rates charged for that area are "unfairly discriminatory" or "unreasonably high." (Ins. Code, § 1852.) Efforts to obtain such a determination, however, have failed. The Commissioner appears to assume that so long as a rate is actuarially sound it cannot be unfairly discriminatory or unreasonably high. [13]

13 Plaintiffs challenge the insurers' claim that rates in South Central Los Angeles are actuarially sound, contending that so little private insurance is now sold in that area that the insurers' accident and loss computations are not statistically reliable. Indeed, considering the disparity between private rates and assigned risk rates for that region, it is difficult to believe that both are actuarially sound. The question is one which would have to be tested by inquiry into the rates at a trial on the merits. At this stage of the litigation, however, plaintiffs have presented insufficient evidence for us to conclude that the insurers' rates lack actuarial justification.

The Commissioner's assumption that an actuarially sound rate is necessarily a fair and reasonable rate is open to challenge. One can argue that it is unfairly discriminatory to use classifications which result in charging good drivers in some areas much more than bad drivers in others parts of the ***1242** state; it could be considered unreasonable to price liability insurance at levels many cannot afford. Rates which took affordability into account, and weighted driving record more than residence, would go far to alleviate the problem caused by the financial responsibility laws. [14]

14 The fact that current territorial rates may be actuarially justified does not mean that a rate which placed less weight on residence would be unsound, or would be unfair to residents of low-risk territories. As explained by the United States Supreme Court, discussing a company requirement that women pay more into a retirement program because they live longer as a class, "when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension profits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one 'subsidy' seem less fair than the other." (*Los Angeles Dept. of Water & Power v. Manhart* (1978) 435

U.S. 702, 710, fns. omitted [55 L.Ed.2d 657, 666-667, 98 S.Ct. 1370].)

The Commissioner's practices, however, make it difficult for drivers to challenge this assumption. The Commissioner has issued no regulations, and published no decisions, stating explicitly how he or she determines whether a rate is reasonable and nondiscriminatory.[15] Plaintiffs allege that complaints are routinely dismissed without hearing. And the fate of the City of Los Angeles's suit shows that when hearings are held, the result may be a decision unsuitable for judicial review.[16] ***1243**

15 In *Shavers* v. *Kelley, supra*, 267 N.W.2d 72, the Michigan Supreme Court found state regulation of automobile insurance rates constitutionally inadequate, in part because "[t]he statutory structure against 'excessive, inadequate or unfairly discriminatory' rates is without the support of clarifying rules established by the Commissioner, with legislatively sufficient definition, and without any history of prior court interpretation." (P. 88.)

16 In 1978 the County of Los Angeles filed a complaint with the Insurance Commission, charging two insurers with 20 specified unlawful practices relating to territorial classifications. The Commissioner conducted public hearings and reached the following conclusions:

"

. . . . .

"2. That the use of territorial classification does constitute a reasonable and credible rating criterion, but that this finding should not be considered a blanket approval of the territorial classification presently used by the insurance industry. '[C]oncerns expressed by many individuals who wrote to the Commissioners or testified at the hearings to express their sincere and honest bewilderment about the fact that such costs appear to fall more heavily upon those least able to pay are clearly well deserving of further consideration by the Department to identify these perceived inequities';

"3. That the methodologies used to develop geographical rates reasonably achieve the goals intended and therefore are actuarially valid." (*County of Los Angeles v. Farmers Ins. Exchange, supra*, 132 Cal.App.3d 77, 84-85, summarizing the Commissioner's "Findings and Recommendations" filed Dec. 20, 1979.)

The county then filed suit against the insurers and the Commissioner. The trial court upheld demurrers, with leave to amend as to the Commissioner but without leave to amend as to the insurers. On appeal from the latter ruling, the Court of Appeal held that the county had failed to exhaust its administrative remedies because it had not insisted that the Commissioner render findings on the specific unlawful practices

> alleged in the original complaint. (132 Cal.App.3d 77, 87.)
>
> We have not been informed about any further developments in this suit. And despite the reservations in the Commissioner's 1979 decision, the Commissioner has done little or nothing to curb pricing polices which "fall more heavily on those least able to pay."

Apart from proceedings through the Insurance Commission, the California statutes provide a judicial remedy against discriminatory insurance practices. The Rosenthal-Robbins Auto Insurance Nondiscrimination Law (Ins. Code, § 11628 et seq.) prohibits a refusal to issue insurance on the same conditions as in other comparable cases for reasons of race, language, color, religion, national origin, ancestry, or "location within a geographic area." This last phrase is defined, however, as "a portion of this state of not less than 20 square miles defined by description in their rating manual of an insurer. ... Differentiation in rates between geographical areas shall not constitute unfair discrimination." Thus the law has been interpreted to authorize territorial rate differentials, so long as rates are uniform within 20-square-mile blocks (See *County of Los Angeles* v. *Farmers Ins. Exchange, supra*, 132 Cal.App.3d 77, 84-85.) The result of the 20-square-mile provision is that insurers can draw lines which have the practical effect of discriminating between applicants on the basis of race.

In sum, the deficiencies in California legislation and administrative regulation are apparent. The present case, however, is not a very suitable one for examining these deficiencies. Plaintiffs have not sought relief from the Commissioner, and thus may encounter questions of exhaustion of remedies. Even apart from those questions, the absence of the Commissioner as a party litigant may deny the court precise information concerning the Commissioner's policies and practices, and leave the court uncertain as to the reasons which he or she might advance in defense of those policies and practices. Finally, plaintiffs' failure to include insurance companies as defendants limits judicial inquiry into whether insurers are charging unfair or discriminatory rates in violation of Insurance Code section 1852, or following practices which violate section 11628.

(3) *The California Automobile Assigned Risk Plan*

Insurance Code section 11620, provides simply that the Commissioner "shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damages liability insurance who are in good faith entitled to but unable to procure such insurance though ordinary methods." Rates are set by the Commissioner after public hearing. Current rates are based on the driver's age, sex, use of the car, and place of ***1244** residence. Drivers with good records receive a small reduction in rates; those with bad records a somewhat larger increase in rates.

Although assigned risk rates also use territorial classifications, the impact of such classifications is much less than in private rates. Assigned risk rates for South Central Los Angeles run about 15 percent above the

average assigned risk rates. The record does not contain equally exact information about private rates, but comments in declarations and briefs suggest that the comparable figure for private rates would exceed 100 percent. It is clear that for many drivers in South Central Los Angeles, including many with clean driving records, assigned risk rates are substantially less than available private rates. [17]

17 Plaintiffs assert that a person insured under the program is often rejected or charged higher rates by private companies when he seeks additional insurance (collision or comprehensive coverage, or liability coverage above the minimum). He may also be subject to discrimination when he later tries to leave the program and obtain private coverage. The Commissioner has taken note of this discrimination, but true to the philosophy that nothing is unfair which is actuarially sound, he has ordered the insurers only to desist from discrimination if they cannot show actuarial justification.

The assigned risk program does overcome some of the objections to private insurance regulation: assigned risk rates are set by the state after public hearing, are available for public scrutiny, and subject to judicial review. It does not, however, eliminate the fundamental problems faced by residents of South Central Los Angeles. Assigned risk rates, like private rates, are established on a basis of weighing revenue against expected loss, with no consideration of affordability. [18] There appears to be no sense that driving record should be entitled to greater weight, or residence to lesser weight, than the actuarial computations would indicate. As a result, assigned risk rates remain prohibitively high for many residents of urban areas. Such rates, however, are not properly subject to review in the present case, but should be challenged at the rate determination hearing before the Commissioner, or upon judicial review of his determination. [19] ***1245**

18 In 1985 the insurers requested an increase in assigned risk rates of 60 percent. The Commissioner granted only a 20 percent increase. His opinion, however, makes no mention of affordability, but rejects the insurers' proposal because it did not take account of investment income.

19 Amicus Consumers Union did appear at the hearing to set the rates which took effect in January of 1987. It complains that while it was permitted to put on its evidence, it was not permitted to participate as a party and to cross-examine the insurers' witnesses. Consumers Union further claims that the Commissioner's decision simply stated the alternatives and adopted one of them, without considering Consumers Union's contentions - a format which impedes judicial review. The complaints sound very much like those plaintiffs raise about Commissioner action under section 1852.

(4) *Criminal and License Revocation Proceedings*

Although the present decision upholds the facial validity of the 1984 financial responsibility legislation, it does not determine whether its criminal and revocation procedures can validly be applied to individual cases. If a defendant can show that insurance was not available to him upon a fair and reasonable basis, at rates he could afford, I would think he would have an arguable defense to any criminal proceeding. In *In re Antazo* (1970) 3 Cal.3d 100 [89 Cal.Rptr. 255, 473 P.2d 999], for example, we held it unconstitutional to imprison a person because he could not afford to pay a fine. The fact that the statute on its face did not discriminate against the poor (a rich man who refused to pay the fine would also go to jail), we said, did not foreclose a constitutional attack; the practical effect of the statute as applied was to discriminate on the basis of wealth. By the same reasoning, I would question whether the state can constitutionally fine a man because he cannot afford to buy insurance, especially if the reason he cannot afford insurance is that, because of his race and poverty, he lives in a part of the state where insurance rates are far higher than in more affluent areas.

The same concern arises in license revocation proceedings. In *Rios v. Cozens* (1972) 7 Cal.3d 792 [103 Cal.Rptr. 299, 499 P.2d 979], we observed that "'[o]nce licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood.' ... [A] person deprived of the right to drive may forfeit his employment and suffer other disabilities." (P. 796, quoting *Bell v. Burson* (1971) 402 U.S. 535, 539 [29 L.Ed.2d 90, 94, 91 S.Ct. 1586].) The impact of license revocation may be far more severe than a $100 to $240 fine. Realistically, the practical effect of revocation is probably to convert a licensed uninsured driver into an unlicensed uninsured driver. But if the driver again encounters the police, he faces conviction for driving with a revoked license, and a possible jail term.

(5) *Conclusion*

When it comes to automobile liability insurance, the poor pay more or do without. Private companies have been increasingly unwilling to insure residents of certain low-income urban neighborhoods, particularly South Central Los Angeles. Residents are forced to turn to the assigned risk program, paying rates much higher than available through private insurance to persons living in other areas. Those who cannot afford such rates drive without insurance.

This serious social problem has, with enactment of Vehicle Code section 16028, become a legal problem. That statute was intended to compel previously uninsured drivers to purchase insurance by threatening the violator ***1246** with fines and suspension of his driving privileges, yet it did nothing to ensure that insurance was available. Thus the poor no longer have the option of driving without insurance; to comply with the law, they must stop driving, whatever the consequences.

The state's program for assuring the availability of insurance, however, has not kept pace with its financial responsibility laws. Certain problems are apparent: the failure to consider affordability in regulating private rates and setting assigned risk rates; the failure to consider the unfairness of charging a good driver higher rates because of the poor driving habits of his neighbors; the injustice

of geographic boundaries which discriminate against the poor; the procedural deficiencies in the Commissioner's office which make it virtually impossible for an individual to challenge the rates and terms offered him. The present case, however, is not a suitable one for resolving those issues. Plaintiffs have limited their attack to selected procedural issues, avoiding the question whether current private or CAARP rates are fair and reasonable. Nothing presented here would justify a conclusion that the 1984 financial responsibility law is facially unconstitutional. Thus on the record before us I concur with the majority that we should sustain the trial court's ruling denying a preliminary injunction.

Mosk, J., concurred. ***1247**

EX. RELA-9

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE

IN THE PROCEEDING BETWEEN

SERGEI PAUSHOK
CJSC GOLDEN EAST COMPANY
CJSC VOSTOKNEFTEGAZ COMPANY

Claimants

-AND-

THE GOVERNMENT OF MONGOLIA

Respondent

ORDER ON INTERIM MEASURES

Members of the Tribunal
The Honorable Marc Lalonde, P.C., O.C., Q.C. (President)
Professor Brigitte Stern (Arbitrator)
Dr. Horacio A. Grigera Naón (Arbitrator)

Secretary of the Tribunal
Me Lev Alexeev

For Claimants:

Mr. George M. von Mehren
Mr. Stephen P. Anway
Mr. Rostislav Pekař
Ms. Irina Golovanova
Squire, Sanders and Dempsey L.L.P.

For Respondent:

Mr. Michael D. Nolan
Mr. Edward G. Baldwin
Mr. Frédéric G. Sourgens
Milbank Tweed Hadley McCloy L.L.P.
Ms. Tainvankhuu Altangerel
Ministry of Justice and Home Affairs, Mongolia

I- BACKGROUND AND PROCEDURAL HISTORY

1. On November 30, 2007, Claimants, namely Mr. Sergei Paushok, CJSC Golden East Company ("**Golden East**") and CJSC Vostokneftegaz Company ("**Vostokneftegaz**"), issued a Notice of Arbitration against the Government of Mongolia, in accordance with Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Rules**").

2. Mr. Paushok is a national of the Russian Federation, whereas Golden East and Vostokneftegaz are both registered in the Russian Federation.

3. Claimants, directly or indirectly, own 100% of the outstanding shares of KOO Golden East-Mongolia ("**GEM**"), a gold mining company, and KOO Vostokneftegaz ("**Vostokneftegaz-Mongolia**"), an oil and gas company. Both GEM and Vostokneftegaz-Mongolia are registered and operating in Mongolia.

4. In their Notice of Arbitration, Claimants alleged that Respondent breached its obligations under the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Russian Federation and the Government of Mongolia (the "**Treaty**" or "**BIT**") by, among others, enacting and enforcing legislation known as the Windfall Profit Tax Law (the "**WPT Law**") and the 2006 Minerals Law (the "**2006 Minerals Law**").

5. Under the WPT Law, any gold sales at prices in excess of USD 500 per ounce are subject to tax at the rate of 68% on the amount exceeding USD 500 per ounce.

6. Under the 2006 Minerals Law, the maximum number of foreign nationals employed by a mining company is limited to 10% of its workforce, unless the company pays a penalty equal to ten times the minimum monthly salary for each foreign national it employs.

7. Article 6 of the Treaty allows the investor of a Contracting Party to initiate arbitration against the other Contracting Party pursuant to the UNCITRAL Rules:

> *"Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of the compensation, shall, whenever possible, be settled through negotiations.*
>
> *If a dispute cannot be settled in such manner within six months from the moment of its occurrence, it may be referred to*
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> *(a) a competent court or arbitral tribunal of the Contracting Party in which territory the investments were made;*
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> *(b) the Arbitration Institute of the Stockholm Chamber of Commerce;*
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> *(c) an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."*

8. In their Notice of Arbitration, Claimants appointed Dr. Horacio A. Grigera Naón as arbitrator.

9. On February 18, 2008, Respondent appointed Professor Brigitte Stern as arbitrator.

10. On March 12, 2008, Arbitrators Stern and Grigera Naón, further to the consultation with counsel to the Parties, appointed the Honorable Marc Lalonde as President of the Tribunal.

11. On March 14, 2008, Claimants submitted to the Tribunal a *Request for Interim Measures including a Temporary Restraining Order Prior to March 24, 2008* (the "**Request**") pursuant to Articles 15 and 26 of the UNCITRAL Rules.

12. In their Request, Claimants requested an order from the Tribunal directing Respondent during the pendency of the arbitral proceedings:

    a- To suspend enforcement of the WPT Law, the 2006 Minerals Law, and penalties for alleged late tax payments against GEM;

    b- To suspend any criminal action against Claimants or their investments and guarantee free movement in and out of Mongolia for GEM's representatives, managers and employees;

    c- To suspend any other conduct that aggravates the dispute, including, but not limited to, disparagement of Claimants or their investment in the media or unjustified refusal of permission to continue to mine gold in the same way and at the same levels as were approved in 2006 and 2007;

13. Claimants also requested the issuance of a temporary restraining order directing Respondent to refrain from the activities listed in sub-paragraphs (a), (b) and (c) pending the Tribunal's decision on interim measures.

14. The request for the issuance of a temporary restraining order was based on the alleged intention of Respondent to prosecute the enforced collection of taxes and fees disputed in this arbitration with effect on March 24, 2008.

15. Subsequent to the Request, various letters and telephone communications were exchanged between the Parties and the members of the Tribunal, including (i) a letter from Counsel for Respondent dated March 22, 2008 and opposing the issuance of a temporary restraining order and (ii) a telephone conference call between counsel for the Parties and the President of the Tribunal on March 22, 2008.

16. On March 23, 2008, the Tribunal issued the following temporary restraining order:

> *"1- Taking into account the undertaking already given, Respondent shall refrain from seizing or obtaining a lien on the assets of Claimants and shall allow Claimants to maintain their ordinary business operations;*

2- Claimants shall immediately sign an undertaking not to move assets out of Mongolia nor to take any action which would alter in any way the ownership and/or financial interests of the Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent;

3- Claimants shall, within seven days, provide Respondent with a complete list of their assets in Mongolia;

4- The issue raised by Respondent of the provision of security by Claimants shall be dealt with at the time of the consideration of the Request for Interim Measures;

5- The briefing schedule for any issue related to Claimants' interim measures application shall be decided in a separate procedural order by the Tribunal, after consultation with the Parties.

Pending its decision on interim measures, the Tribunal urges the Parties to refrain from any action which could lead to further injury and aggravation of the dispute between the Parties."

17. On April 18, 2008, an organizational meeting was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40th floor, Montreal, Québec, Canada. The purpose of this meeting was to establish the terms of reference and to discuss various procedural and logistical issues.

18. In addition to the members of the Tribunal and the Secretary thereof, the following counsel attended that meeting:

Mr. George M. von Mehren (Counsel for Claimants)
Mr. Stephen P. Anway (Counsel for Claimants)
Mr. Michael D. Nolan (Counsel for Respondent)
Mr. Edward G. Baldwin (Counsel for Respondent)

19. Further to the meeting, the contents of which, as per counsel for the Parties' agreement and request, were not transcribed, the Secretary of the Tribunal communicated to counsel for the Parties detailed minutes of the said meeting on April 29, 2008.

20. On April 30, 2008, Respondent submitted its *Opposition* to the Request, arguing that the latter should be dismissed.

21. On the basis of the minutes of the meeting referred to in paragraph 17, counsel for the Parties prepared a draft Procedural Order No. 1 and submitted same for consideration to the Tribunal on May 14, 2008.

22. On May 30, 2008, Claimants submitted their *Reply on Interim Measures*, amending their Request and limiting the relief sought to the extension of the temporary restraining order in an Order on Interim Measures.

23. On June 3, 2008, the President of the Tribunal issued Procedural Order No. 1, which dealt with all the procedural and logistical issues, save the timetable of submissions and hearing for Phase 1 (Jurisdiction/Admissibility and Liability).

24. On June 4, 2008, the President of the Tribunal issued Procedural Order No. 2, which dealt with the timetable for Phase 1.

25. On June 30, 2008, Respondent submitted its *Rejoinder* to the Request, requesting to dismiss the latter or, subsidiarly, to order Claimants to cause GEM to pay Windfall Profit Taxes into an escrow account.

26. On July 1, 2008, Claimants submitted their Statement of Claim, but this submission was not considered by the Tribunal either for the purposes of the hearing on interim measures or for the purpose of the present order on interim measures.

27. On July 2, 2008, a conference call was held between counsel for the Parties and the President of the Tribunal in order to address various organizational and procedural issues in relation to the forthcoming hearing on interim measures.

28. From the date of filing of the Request until the date of the hearing on interim measures, counsel for the Parties addressed numerous letters to the members of the Tribunal with respect to the Request as well as in relation to issues peripheral thereto.

29. On July 8, 2008, a full day hearing on interim measures was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40th floor, Montreal, Québec, Canada (the "**Hearing**").

30. In addition to the members of the Tribunal, the Secretary of the Tribunal and the Court Reporter, this Hearing was attended by:

On behalf of the Claimants:

Mr. George M. von Mehren (Counsel for Claimants)
Mr. Stephen P. Anway (Counsel for Claimants)
Mr. Rostislav Pekař (Counsel for Claimants)
Ms. Irina Golovanova (Counsel for Claimants)
Mr. Trevor Covey (Counsel for Claimants)
Mr. Sergei Paushok (CJSC Golden East Company, CJSC Vostokneftegaz Company)
Ms. Yana Ibragimova (CJSC Golden East Company)
Ms. Marina Spirina (CJSC Golden East Company)

On behalf of the Respondent:

Mr. Michael D. Nolan (Counsel for Respondent)
Mr. Edward G. Baldwin (Counsel for Respondent)
Mr. Frédéric G. Sourgens (Counsel for Respondent)
Ms. Tainvankhuu Altangerel (Ministry of Justice and Home Affairs, Mongolia)

31. At the Hearing, counsel for the Parties presented oral submissions to the Tribunal and Mr. Paushok was heard as a witness and questioned by the Tribunal. Questions from the Tribunal and Mr. Paushok's answers thereto were interpreted by Ms. Golovanova, with occasional assistance from the Secretary of the Tribunal.

32. Verbatim transcripts of the Hearing were produced in English and were concurrently available for viewing throughout the Hearing. Hard and soft copies of the transcripts were distributed to the Tribunal and Parties a few days after the Hearing.

33. Having consulted with counsel for the Parties, the Tribunal decided that post-hearing submissions were not required and took the Request under advisement.

II- GENERAL COMMENTS

1- The applicable rules

34. The Tribunal wishes to point out, first, that this case is taking place under the UNCITRAL Arbitration Rules. The powers of the Tribunal relating to interim (or provisional) measures are set in Articles 15(1), 26(1) and 26(2) of those Rules which provide as follows:

> *"Article 15(1):*
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> *Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*
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> *Article 26(1):*
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> *At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*
>
> *Article 26(2)*
>
> *Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the cost of such measures."*

35. The Parties have drawn the Tribunal's attention to a number of awards under the ICSID Convention dealing with requests for provisional measures under Article 47 of that Convention and Arbitration Rule 39 under it. Rule 39(1) in particular provides that:

> *"At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The*

request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."

36. The Tribunal notes that the wording of Article 26(1) of the UNCITRAL Rules is not the same as under the ICSID Convention; it leaves wider discretion to the Tribunal in the awarding of provisional measures (*"any interim measures it deems necessary in respect of the subject-matter of the dispute"*) than under Article 47 of the ICSID Rules (*"provisional measures for the preservation of its rights"*).

2- What is the subject-matter of the dispute

37. The subject-matter of the dispute is the validity under the Treaty of the Windfall Profit Tax and of the levying of a fee for the import of foreign workers imposed by Respondent. In their Notice of Arbitration of November 30, 2007, Claimants request declaratory relief based on Articles 3(1) and 4 of the Treaty as well as damages, interest and costs. And, in their Statement of Claim filed on June 27, 2008, Claimants request declaratory relief with regard to those two types of measures as contrary to Articles 2, 3 and 4 of the Treaty; in addition, they claim damages, interest and costs to be determined by the Tribunal.

38. The Parties have spent some considerable time arguing the issue of disputed rights in this case. These matters will be dealt with in the section of this Order dealing with imminent danger of prejudice.

3- Interim measures not to be granted lightly

39. It is not contested that interim measures are extraordinary measures not to be granted lightly, as stated in a number of arbitral awards rendered under various arbitration rules[1]. Even under the discretion granted to the Tribunal under the UNCITRAL Rules, the Tribunal still has to deem those measures urgent and necessary to avoid "irreparable" harm and not only convenient or appropriate.

4- Evidentiary Burden

40. In requests for interim measures, it is incumbent upon Claimants to demonstrate that their request is meeting the standards internationally recognized as pre-conditions for such measures[2].

41. In the present instance, Claimants submitted as principal evidence the testimony of Mr. Sergei Paushok, the Executive Director of GEM and the indirect owner of 100% of the shares of that company. Respondent argued that the Tribunal should attach no value to what it considers a self-serving statement from a party; it argues in particular that Mr. Paushok's Statement *"merely parrots Claimants' legal argument and conclusions, rather than*

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1 See for example, *Emilio Agustin Maffezini* v. *Spain*, ICSID Case No ARB/97/7, IIC 84 (1999), Procedural Order No 2, October 28, 1999.

2 *Ibid.* at ¶10. See also *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *Ecuador*, ICSID Case No ARB/06/11, IIC 305 (2007), Decision on provisional measures, August 17, 2007 at ¶90 [*Occidental Petroleum*].

adducing concrete factual material" and that, as such, it did not provide "*evidence of a specificity and concreteness that would allow Mongolia the opportunity of confrontation*"[3].

42. The Tribunal views the matter somewhat differently. The Witness Statement and the oral testimony (the latter taking place at the instigation of the Tribunal) were made in the form of a solemn declaration and it contains some elements which could be considered as statements of facts and others as legal conclusions. Respondent was given full opportunity to cross-examine Mr. Paushok on his Statement. In many cases, a statement by one of the parties may be of great importance in the analysis of the facts and it is up to the tribunal in each case to attach to such a statement the credibility and relevancy it considers appropriate. In the present instance and at this stage of the proceedings, the Tribunal sees no reason to ignore Mr. Paushok's Statement and oral testimony.

5- The specific features of this request

43. In deciding upon the present request for interim measures, the Tribunal will attach significant importance to the specific features surrounding this particular request which differentiate it from other awards referred to by the Parties. In particular, the Government of Mongolia, while not admitting to any illegality in the measures which have been enacted and which are challenged in this case, has recognized, both in 2007 and 2008, that the WPT Law was not achieving its objectives and should be replaced by a less severe taxation regime. In addition, Respondent appears to wish GEM to continue its operations in Mongolia. Evidence in that regard can be seen from the written undertaking given by the State Secretary of the Minister of Justice and Home Affairs on March 19, 2008, (confirmed at the Hearing by Ms. Taivankhuu Altangerel, of the Ministry of Justice and Home Affairs of Mongolia) that no seizure of or lien on GEM's assets would take place in connection with this dispute until a final award has been rendered in the present case.

6- Peripheral issues

44. Before the Hearing, a considerable exchange of correspondence took place between the Parties and with the Tribunal relating to a number of peripheral issues; all of them were resolved before the Hearing, except for the allegation by Respondent that, by selling gold rather than pledging it, GEM was in breach of the Temporary Restraining Order issued by the Tribunal. On the basis of the evidence submitted to it, the Tribunal has come to the conclusion that, in spite of some understandable concern on the part of Respondent, there was no breach of the TRO by Claimants. The Tribunal will deal with this specific issue for the future in this Order.

III- THE CRITERIA GUIDING THE TRIBUNAL

45. It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) prima facie jurisdiction, (2)

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[3] Mongolia's Rejoinder to Claimants' March 14, 2008 Request for Interim Measures, June 30, 2008 at ¶12.

prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality.

46. In addressing the first two criteria, the Tribunal wishes to make it clear that it does not in any way prejudge the issues of fact or law which may be raised by the Parties during the course of this case concerning the jurisdiction or competence of the Tribunal or the merits of the case.

1- Prima facie jurisdiction

47. The International Court of Justice described the interpretation to be given to this standard in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*:

> *"(O)n a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection to jurisdiction is well founded, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the court might be founded;"*[4]

48. The Tribunal is of the view that, in their Notice of Arbitration and their submissions in connection with their Request, Claimants have established such a basis upon which the jurisdiction of the Tribunal might be founded. In particular,

a- The Treaty (Article 6) provides for UNCITRAL arbitration.

b- Until proven otherwise, Mr. Paushok is considered a citizen of Russia and the other two Claimants are considered legal persons constituted in accordance with the laws of Russia.

c- GEM appears to meet the definition of investment in Article 1(b) of the Treaty and Claimants appear to be direct or indirect shareholders in GEM and to have a separate claim of their own.

d- The dispute relates to investment in Mongolia.

49. Respondent raises two arguments in support of its challenge to the jurisdiction of the Tribunal.

50. The first is to the effect that the six-month amicable dispute resolution period prescribed in Article 6 of the BIT was not abided by Claimants. Article 6 states (in part): *"If a dispute cannot be settled in such a manner within six months of its occurrence, it may be referred to"* courts or arbitral institutions specified in that Article.

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[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Provisional Measures, Order of May 10, 1984, [1984] I.C.J. Rep. 169 at ¶24.

51. Respondent argues that Claimants initiated the arbitration on November 30, 2007, a mere month after having sent their formal notice to Respondent of their intent to commence investment arbitration. For their part, Claimants argue that a letter sent to the President of Mongolia by Mr. B.A Igoshin, First Deputy Executive Director of GEM, constituted sufficient notice[5], an argument with which Respondent disagrees.

52. The Tribunal is not ruling at this stage on these arguments, as it believes that they are more matters to be considered as part of the jurisdictional and merits phase of these proceedings. The Tribunal notes however that in the *Lauder* v. *The Czech Republic* case[6], an arbitral tribunal ruled that the requirement for a six-month waiting period was not a jurisdictional provision and that other tribunals also ruled that the waiting period need not have lapsed before initiating an arbitration, if negotiation attempts were clearly futile[7].

53. Respondent's second argument relates to estoppel allegedly resulting from negotiations surrounding Respondent's agreement, in January 2007, to grant to GEM an extension for the payment of the Windfall Profit Tax. This is even more clearly a matter that should be the subject of debate at the time of the jurisdictional and merits phase of these proceedings. It is clearly a contested matter about which both written and oral evidence will be required and it would be premature to embark on such an expedition at the stage of a request for interim measures, where the Tribunal only needs to decide whether there is prima facie jurisdiction.

54. The Tribunal therefore concludes that, for the purpose of a request for interim measures, the prima facie jurisdiction of the Tribunal has been established.

2- Prima facie establishment of the case

55. At this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal[8]. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.

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5 Claimants' Reply on Interim Measures, March 30, 2008, CE-46.

6 Ad hoc - UNCITRAL Arbitration Rules, IIC 205 (2001), Final Award, September 3, 2001 at ¶187.

7 *L.E.S.I. S.p.A. et ASTALDI S.p.A.* v. *Algeria*, ICSID Case No.ARB/05/3, Decision on Jurisdiction, July 12, 2006 at ¶32; *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, August 6, 2003 at ¶187; *Ethyl Corporation* v. *Government of Canada*, NAFTA/UNCITRAL Case, Award on Jurisdiction, June 24, 1998 at ¶84.

8 *Víctor Pey Casado, Président Allende Fondation* c. *République du Chili*, ICSID Case No. ARB/98/2, ICC 185 (2001), Decision on Provisional Measures, September 25, 2001 at ¶8; *Application of the Convention on the Punishment of the Crime of Genocide*, Provisional Measures, Order of September 13, 1993, [1993] I.C.J. Rep. 325 at ¶24.

56. In the present circumstances, the Tribunal concludes that Claimants have succeeded in a prima facie establishment of the case. In so ruling, the Tribunal wishes to stress that in no way does that ruling imply that the Tribunal would reach a similar conclusion on the merits of the case, once it has received submissions and heard witnesses and experts from each side on their respective allegations.

3- Urgency

57. From the evidence submitted, it appears that the WPT Law has had a major negative impact on the gold mining industry in Mongolia. Ms. S. Oyun, the President of the Mongolian Geologists Association and a Member of the Mongolian Parliament declared in September 2007 that, subsequently to the adoption of that Law, some 93 gold mining companies discontinued their operations, most of them declaring bankruptcy[9]. This would represent a reduction by more than 50% of the previous number of firms in the industry.

58. The Government of Mongolia itself recognized the critical situation resulting from its legislation and proposed in 2007 major amendments which it did not succeed in getting enacted. And, according to information transmitted to the press service of the Mongolian Government and contained in an undated press release submitted to the Tribunal[10], the Government decided on May 7, 2008, to propose to Parliament a new law reducing very substantially the tax rates established under the WPT Law. As an explanation, the Government said that the changes were proposed *"(w)ith the purpose of easing the tax burden on the mining companies, increasing the amount of gold deliveries and consolidating all of the tax payment on sold gold and gold-related royalties in the national budget and harmonizing the royalty payments with the international standards"*[11]. The use of the expression "standards" and its interpretation by Claimants were contested by Respondent, but, even accepting Respondent's translation of the appropriate Mongolian word into English, it is clear that the Mongolian Government has realized for quite some time that its taxation regime had led its gold mining industry into a crisis.

59. The Tribunal is not called upon to rule on that overall situation but taking cognizance of it helps the Tribunal in understanding whether the condition of urgency alleged by Claimants can be met in the present case.

60. From the evidence submitted by the Parties and taking into account the very specific features of this case, it appears to the Tribunal that urgent action in the form of interim measures is justified.

61. Respondent claims that over US$41 million is currently owed by GEM, under the WPT Law. It appears from the financial statements and taxation reports submitted to the Tribunal that GEM could not proceed to the immediate payment of this total sum out of its own resources. The only alternatives would be either loans from financial institutions or a large equity infusion by shareholders. It has been established to the satisfaction of

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9 Interview published in Mongolya Segodnya on September 15, 2007, CE-54.

10 CE-30.

11 *Idem.*

the Tribunal that, in the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM. And, assuming that Respondent is right in stating that GEM's net book value assets are worth less than 50% of the amount of WPT owing and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, it would be very presumptuous for any investor to make additional equity investment in that company. The likelihood of GEM's bankruptcy in such a context therefore becomes very real.

62. The Tribunal is aware of preceding awards concluding that even the possible aggravation of a debt of a claimant did not ("generally" says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused[12]. And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion, although it might have expressed reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the UNCITRAL Rules. But those specific features point not only to the urgency of action by the Tribunal but also to the necessity of such action in the face of an imminent danger of serious prejudice.

4- Imminent danger of serious prejudice (necessity)

63. The Parties have raised a number of arguments in relation to the issue of disputed rights in this case.

64. Respondent, citing ICSID awards, contends that provisional measures are limited to situations where specific performance is requested and that such a request for specific performance could only occur when the dispute is based on a contractual relationship. Respondent further argues that when the dispute only relates to a claim for damages, as in this case, there is no place for provisional measures, as damages can always be compensated with the payment of money. Moreover, says Respondent, the only remedy available under Article 6 the BIT is monetary compensation.

65. Respondent refers in particular to the following cases. In *Occidental Petroleum*, the Tribunal says that *"provisional measures should only be granted in situations of necessity and urgency in order to protect legal rights that could, absent such measures, be definitely lost"* and in paragraph 98, it adds: *"The harm in this case is only "more damages", and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm"*[13]. Respondent also refers to the Decision on revocation of provisional measures in *City Oriente* where the Tribunal states that *"a possible aggravation of a debt does not generally warrant the ordering of provisional measures"* [14]. Respondent also relies on *Plama Consortium Limited* v. *Bulgaria* where the

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[12] *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No ARB/03/24, IIC 190 (2005), Order, September 6, 2005 at ¶46 [*Plama*]; *Occidental Petroleum, supra* note 2 at ¶99; *City Oriente Limited* v. *Ecuador*, ICSID Case No. ARB/06/21, IIC 325 (2008), Decision on Revocation of Provisional Measures, May 13, 2008 at ¶64 [*City Oriente*].

[13] *Occidental Petroleum, supra* note 2 at ¶59 and ¶98.

[14] *City Oriente, supra* note 12 at ¶64.

Tribunal says that *"(t)he Tribunal accepts Respondent's argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover is the only remedy Claimant seeks"* [15].

66. Claimants, for their part, argue that their right to interim measures is not excluded in the case of a claim for damages only and that, in any event, their request for relief is not only for damages but also for declaratory relief under the provisions of the Treaty.

67. They refer in particular to the *Behring International, Inc.* v. *Islamic Republic Iranian Air Force* case where the Iran-U.S. Claims Tribunal states that *"the concept of irreparable prejudice in international law arguably is broader than the Anglo-American concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (...), the former does not necessarily so require"* [16]. Claimants also mention *Saipem S.p.A* v. *The People's Republic of Bangladesh* where the Tribunal found that Saipem was facing a risk of irreparable damage if it had to pay the amount of a bond[17].

68. The Tribunal does not agree with Respondent that Claimants are merely requesting damages, as is clearly demonstrated by the text of their request for relief. Moreover, the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures. The Tribunal relies on the opinion of the Iran-U.S. Claims Tribunal in the *Behring* case to the effect that, in international law, the concept of "irreparable prejudice" does not necessarily require that the injury complained of be not remediable by an award of damages. To quote K.P. Berger who refers specifically to Article 26 of the UNCITRAL Rules:

> *"To preserve the legitimate rights of the requesting party, the measures must be "necessary". This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a "substantial" (but not necessarily "irreparable" as known in common law doctrine) prejudice for the requesting party."*[18]

69. The Tribunal shares that view and considers that the "irreparable harm" in international law has a flexible meaning. It is noteworthy in that respect that the UNCITRAL Model Law in its Article 17A does not require the requesting party to demonstrate irreparable harm but merely that "(h)arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".

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15 *Plama, supra* note 12 at ¶46.

16 *Behring International, Inc.* v. *Islamic Republic Iranian Air Force, Iran Aircraft Industries, and The Government of Iran*, Award No. ITM/ITL 52-382-3, June 21, 1985, 8 Iran-U.S. C.T.R. 238 at p. 276.

17 ICSID Case No. ARB/05/07, ICC 280 (2007), Decision on Jurisdiction and Recommendation of Provisional Measures , March 21, 2007 at ¶182.

18 Berger, K.P., *International Economic Arbitration*, in *Studies in Transnational Economic Law*, vol. 9, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993 at p. 336.

70. Whatever the situation under the ICSID Convention, the Tribunal does not support the contention that such measures can only be issued, under the UNCITRAL Rules, when specific performance is requested in connection with a contractual relationship. No such restriction is implied under the broad language of Article 26(1) of the UNCITRAL Rules. The specific examples mentioned in that Article, on the contrary, point to a wide discretion in the hands of the Tribunal.

71. Finally, the Tribunal does not find that the Treaty limits the rights of Claimants to requests for monetary compensation. Respondent bases its argument on Articles 4 and 6 of the Treaty.

72. Article 4 indicates indeed that, in the case of nationalization or measures tantamount to nationalization, *"the compensation shall correspond to the real value of the nationalized investments"*. It is quite understandable that, in a situation where a State has exercised its right to takeover a foreign investment under the conditions mentioned in the Treaty, financial compensation would be the proper remedy. But, that Article only applies to cases of nationalization and, even then, it does not restrict what remedy a Tribunal could order where the nationalization does not meet the conditions mentioned in Article 4. Moreover, that Article certainly does not define the remedies available under Article 3 (fair and equitable treatment provision), even though, in practice, financial compensation is the overwhelming form of remedy requested by claimants.

73. As to the relevant part of Article 6 of the Treaty cited by Respondent, it reads as follows:

> *"Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of compensation, shall, whenever possible, be settled through negotiations."*

74. While payment of compensation is specifically mentioned, it is only referred to as one of the types of disputes which may arise under the Treaty but not as the exclusive one.

75. In the Tribunal's view, the Treaty does not restrict the available remedies of investors to monetary compensation. The three types of remedies available at public international law (*restitutio in integrum*, compensation and satisfaction) remain available under the Treaty.

76. Claimants have raised another argument in support of their request for interim measures on the basis that, in this case, the Tribunal would have reasons to believe that Claimants would encounter serious difficulties in having enforced an award which would be rendered in their favor. They allege in particular the modest financial means of Respondent as well as some recent political turbulence in Mongolia. The Tribunal does not believe that such allegations are sufficient to justify the ordering of interim measures in this case. The Tribunal should not presume that Respondent will not honor its international obligations, if an award is to be eventually rendered against it and nothing in the allegations made by Claimants is of such substance as to justify a different stand.

77. After review of the evidence and the pleadings submitted to it by the Parties, the Tribunal has come to the conclusion that Claimants are facing, in this case, very substantial prejudice unless some interim measures are granted. Immediate payment of the WPT allegedly owing to Mongolia would likely lead to the insolvency and bankruptcy of GEM (Mongolia's second largest gold producer) and the complete loss of Claimants' investment in that company. In an interview published in Odriyn Sonin, on December 17, 2007, the Director of Mongolia's Tax Office, Mr. L. Zorig, is reported as saying that *"(t)he company's licenses might be suspended or cancelled altogether"* unless payment of the WPT was made. Moreover, on February 25, 2008, Respondent commenced enforcement of GEM's tax debt before the Bayangol District Court. Respondent itself subsequently recognized the critical situation of GEM by agreeing not to seize or put a lien on its assets until a final award was rendered in this case, even if payment of the WPT owing was not paid immediately.

78. While it is true that Claimants would still have a recourse in damages and that other arbitral tribunals have indicated that debt aggravation was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion. In particular, while not putting in doubt the value of the undertaking of Respondent not to seize or put a lien on GEM's assets, the Tribunal believes that it is preferable to formalize that commitment into an interim measures order.

5- Proportionality

79. Under proportionality, the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.

80. The Tribunal has just discussed the issue of the burden of immediate payment upon Claimants.

81. In its consideration of this criterion with regard to Respondent, the Tribunal does not question in any way the sovereign right of a State to enact whatever tax measures it deems appropriate at any particular time. Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to existing fiscal legislation. There is a presumption of validity in favor of legislative measures adopted by a State and the burden of the proof is upon those who challenge such measures to demonstrate their invalidity. Moreover, a government is generally entitled to demand immediate payment of taxes owing, even if there is a dispute with a taxpayer about them. Finally, the fact that a particular level of taxation would appear excessive to some taxpayers does not make it illegal *per se*, even though it may open the door to contestation, including by foreign investors under a relevant BIT.

82. However, in the present instance, the Government itself has recognized that the WPT Law was not achieving the objectives it had in mind when it was adopted in 2006. This is quite apparent in its attempts, both in 2007 and 2008, to repeal that Law and to replace it with a much more modest taxation regime; similarly with the more recent undertaking made by Respondent not to seize or put a lien upon GEM's assets until a final award has been rendered in this case.

83. Clearly, and quite understandably so, Respondent sees that it is in its own interest that its second largest gold producer should continue its operations. A sudden collapse of GEM would put Respondent in a situation where it would, most likely, be unable to realize a large share of the amount owing to it under the WPT Law and some considerable time could elapse before it could find another investor willing to restart gold production on the relevant properties, unless a new fiscal regime would have been legislated – an eventuality which, considering the 2007 experience, cannot be guaranteed.

84. If Respondent were to prevail, it would be in a position to obtain payment of the full amount owing to it, specially taking into account the security in favor of Respondent to be provided by Claimants according to directions further issued under this Order. If, on the other hand, Claimants were to prevail, Respondent would probably face a claim for lower damages than if GEM's activities had been terminated; this is not an insignificant factor, considering Respondent's tight budgetary constraints.

85. On balance, the Tribunal concludes that there is considerable advantage for both parties in the issuance of interim measures of protection.

86. However, while granting Claimants the requested protection from immediate payment of the WPT and from seizure of or liens upon GEM's assets, the Tribunal also understands Respondent's concern that, at the end of the process, it should not be "thrown the keys" of GEM with assets worth significantly less than the amount of the WPT owing. Hence, its request that, if Claimants' request for interim measures were to be accepted, an escrow account should be established where the full amount of the WPT owing would be deposited until a final award.

87. The Tribunal finds that the Respondent's concern underlying its request in that regard is legitimate but not that setting up an escrow account is the only alternative to address it.

88. If Respondent were to prevail, it would not find itself without possibility of realizing at least part of its tax claim upon GEM's assets, if that company would not be able to pay the whole sum out of its own liquidities. Respondent itself has recognized that GEM's assets currently represent close to 50% of its tax claim, Claimants arguing that those assets are worth significantly more. The present Order provides that those assets and the revenues from future production should remain in Mongolia until a final award has been rendered.

89. In those circumstances, taking into account the value of GEM's assets inside Mongolia, the restrictions in that regard imposed by the Tribunal in the present Order and that GEM's business prospects are likely to improve since it will be free from the WPT burden so long as the present Order remains in place, it does not appear necessary that the security to be provided by Claimants should cover the full value of the claimed WPT; thus, limiting it to about 50% of that amount would be sufficient. At the same time, taking into account GEM's inability to pay the full amount immediately, a schedule of monthly payments by Claimants into the escrow account would be a reasonable solution. Moreover, such payments could be reduced or increased depending on reasonable proof as to the evolution of GEM's business.

90. Article 26 of the UNCITRAL Rules does not mandate any specific type of security. An escrow account is not the exclusive measure of protection from which Respondent could benefit. Different measures with equivalent results can also be considered. The Tribunal is retaining one such measure: the provision of a bank guarantee having the same effect.

91. The Tribunal is giving Claimants the right to choose the option they prefer under the conditions mentioned below.

ON THE BASIS OF THE ABOVE, THE TRIBUNAL THEREFORE ORDERS AS FOLLOWS

Claimants' application for interim measures of protection under Article 26 of the UNCITRAL Rules is granted in accordance with the terms and subject to the conditions below:

1- Payment to Respondent of the Windfall Profit tax owing by GEM (including interest and penalties) is suspended until the Tribunal has ruled on the merits of Claimants' request for relief.

2- Taking note of the undertaking previously made by Respondent on March 19, 2008 and confirmed at the Hearing, Respondent shall refrain from seizing or obtaining a lien on the assets of GEM and other assets of Claimants in connection with the WPT owing to Respondent or from directly or indirectly taking any other action leading to the same or similar effect, except in accordance with the Tribunal's Orders, and shall allow GEM and Claimants to maintain their ordinary business operations in Mongolia.

3- Following their previous undertaking in that regard on March 26, 2008, Claimants shall not move assets out of Mongolia, nor take any action which would alter in any way the ownership and/or financial interests of Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent. Sale and pledges of gold are authorized provided the funds thus obtained are used for the ordinary business operations of GEM. Under no circumstances should such funds be used for other purposes; in particular, no transfer of funds or assets of any kind should be made outside of Mongolia (except for deposit into the escrow account under the conditions described below) or to any of the Claimants or any person, corporation or business related to them, without Respondent's agreement.

4- Claimants shall provide gradually increasing security as described below. The Tribunal may increase or decrease the security for good cause shown premised on the evolution of GEM's business. Claimants shall submit for approval by the Tribunal, within twenty days of the present Order, a detailed proposal, which will have been discussed with Respondent, concerning the implementation of one of the following measures of protection which they will have selected:

   a- An escrow account in an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal;

b- The provision of a bank guarantee to the same effect and under the same conditions from an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal.

If Respondent is not satisfied with the arrangement proposed by Claimants, the Tribunal will issue the appropriate order upon request by one of the Parties.

5- The cost of the escrow account shall be borne equally by Claimants and Respondent but can be made part of the claim for compensation by each Party.

6- Claimants shall deposit in the escrow account (if such is the option retained), on the first working day of each month following the establishment of that account, the sum of US$2 million, until a final award is rendered in the present case or until the sum in the escrow account has reached 50% of the total amount of the accrued WPT claimed by Respondent, including interest and penalties, whichever comes first. The monies deposited in the escrow account may be invested in financial instruments of high liquidity. The decision regarding the scope of the security is adopted by majority, Dr. Horacio A. Grigera Naón being of the view that tax penalties should be excluded from the determination or calculation of the security.

7- Claimants may use the income resulting from the sale of gold by GEM for deposit into the escrow account, provided that, in no circumstance, such transfer would result in a reduction of shareholders' equity in GEM below the sum of MNT 31,578,323,602.35 mentioned at line 2.3.20 of the Balance Sheet of the Financial Statements of December 31, 2007 (after inclusion in the liabilities of the company the amount of WPT payable at that time - but not actually paid - of MNT 35,241,117,584.00 mentioned at line 2.1.1.12)[19]. Each such transfer shall be preceded by an affidavit signed by Director S.V. Paushok and the Chief Accountant of GEM confirming that fact and sent to Respondent and the Tribunal.

8- If, instead of the escrow account, the bank guarantee option is retained, arrangements to the same effect shall be put into place.

9- Claimants shall, every six months, provide Respondent with a complete list of their assets in Mongolia.

10- The scope of this Order does not extend beyond the subject-matter of this dispute and does not prevent Mongolia, after due consideration in good-faith of the Tribunal's direction under paragraph 11 below, from exercising its rights against GEM or Claimants in matters unrelated to this dispute, including taxes owing in other respect than the Windfall Profit Tax.

11- The Parties shall refrain, until a final award is rendered in this case, from any action which could lead to further injury and aggravation of the dispute between the Parties.

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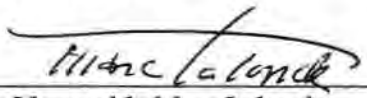
[19] CE-93.

12- The Tribunal reserves for later consideration its decision on costs arising from these proceedings.

13- The Temporary Restraining Order is terminated.

14- The Tribunal reserves the right to amend or revoke the present Order at any time during the proceedings, upon request by one of the Parties demonstrating the need for such action. In particular, failure by Claimants to timely provide or maintain the required security could lead to the immediate revocation of the present Order.

FOR THE TRIBUNAL



The Honorable Marc Lalonde,
Chairman of the Tribunal

Date: September 2, 2008

EX. RELA-10

13 F.3d 1313
United States Court of Appeals,
Ninth Circuit.

Marianne STANLEY,
Plaintiff–Appellant,
v.
UNIVERSITY OF SOUTHERN CALIFORNIA; Michael L. Garrett, Individually and His Official Capacity as Athletic Director; Does 1 Through 20, Inclusive, Defendants–Appellees.

No. 93–56185.
|
Argued and Submitted Nov. 2, 1993.
|
Decided Jan. 6, 1994.

Synopsis

Former head coach of women's basketball team at university sued university claiming, inter alia, violations of the Equal Pay Act. Following removal from state court, motion for preliminary injunction was denied by the United States District Court for the Central District of California, John G. Davies, J., and plaintiff appealed. The Court of Appeals, Alarcon, Circuit Judge, held that: (1) in requesting to be installed again as head coach after contract had expired and at pay of $28,000 a year more than received previously, coach was seeking mandatory preliminary injunction rather than prohibitory injunction, and request was subject to higher degree of scrutiny; (2) coach failed to show that she was entitled to same pay as head coach of men's team in light of differences in responsibilities, qualifications and experience; (3) relative amount of revenue generated by the two teams should be considered in determining whether responsibilities and working conditions were substantially equal; (4) there was no clear error in finding that university did not fail to renew contract in retaliation for involvement in protected activities; and (5) there was no clear error in finding that balance of hardships did not tip sharply in coach's favor.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

***1315** Robert L. Bell, Law Offices of Robert L. Bell, Washington, DC, Alvin L. Pittman, Law Offices of Alvin L. Pittman, Los Angeles, CA, for plaintiff-appellant.

J. Al Latham, Jr., Paul, Hastings, Janofsky & Walker, Los Angeles, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: ALARCON, LEAVY and KLEINFELD, Circuit Judges.

Opinion

***1316** ALARCON, Circuit Judge:

Marianne Stanley, former head coach of the women's basketball team at the University of Southern California (USC), appeals from an order denying her motion for a preliminary

injunction against USC and Michael Garrett, the athletic director for USC (collectively USC).

Coach Stanley contends that the district court abused its discretion in denying a preliminary injunction on the ground that she failed to present sufficient evidence of sex discrimination or retaliation to carry her burden of establishing a clear likelihood of success on the merits. Coach Stanley also claims that the court misapprehended the nature of the preliminary injunction relief she sought. In addition, she argues that the district court clearly erred in finding that USC would suffer significant hardship if the preliminary injunction issued. Coach Stanley further asserts that she was denied a full and fair opportunity to present testimonial evidence at the preliminary injunction hearing and to demonstrate that USC's purported justification for paying a higher salary to George Raveling, head coach of the men's basketball team at USC, was a pretext for sex discrimination and retaliation. We affirm because we conclude that the district court did not abuse its discretion in denying the motion for a preliminary injunction. We also hold that the district court did not deny Coach Stanley a full and fair opportunity to present evidence of sex discrimination, retaliation, and pretext.

I. PERTINENT FACTS

Coach Stanley signed a four-year contract with USC on July 30, 1989, to serve as the head coach of the women's basketball team. The expiration date of Coach Stanley's employment contract was June 30, 1993. Coach Stanley's employment contract provided for an annual base salary of $60,000 with a $6,000 housing allowance.

Sometime in April of 1993, Coach Stanley and Michael Garrett began negotiations on a new contract. The evidence is in dispute as to the statements made by the parties. Coach Stanley alleges in her declarations that she told Garrett that she "was entitled to be paid equally with the Head Men's Basketball Coach, George Raveling[,] and that [she] was seeking a contract equal to the one that USC had paid the Head Men's Basketball Coach" based on her outstanding record and the success of the women's basketball program at USC. She also requested a higher salary for the assistant coaches of the women's basketball team. According to Coach Stanley, Garrett verbally agreed that she should be paid what Coach Raveling was earning, but he asserted that USC did not have the money at that time. He indicated that "he would get back [to her] with an offer of a multi-year contract ... that would be satisfactory." Garrett alleges in his affidavit, filed in opposition to the issuance of the preliminary injunction, that Coach Stanley told him that "she wanted a contract that was identical to that between USC and Coach Raveling."

On April 27, 1993, Garrett sent a memorandum which set forth an offer of a three-year contract with the following terms:

> 1993–94 Raising your salary to $80,000 with a $6,000 housing allowance.
>
> 1994–95 Salary of $90,000 with a $6,000 housing allowance.

> 1995–96 Salary of $100,000 with a $6,000 housing allowance.
>
> Presently, Barbara Thaxton's base salary is $37,000 which I intend to increase to $50,000. It is not my policy to pay associate or assistant coaches housing allowances. Therefore that consideration is not addressed in this offer.

The memorandum concluded with the following words: "I believe this offer is fair, and I need you to respond within the next couple of days so we can conclude this matter. Thank you." According to Garrett, Coach Stanley said the offer was "an insult."

Coach Stanley alleged that, after receiving this offer, she informed Garrett that she "wanted a multi-year contract but his salary figures were too low." Coach Stanley also alleged that she told Garrett she "was to make the same salary as was paid to the Head Men's Basketball Coach at USC." Garrett asserted that Coach Stanley demanded a "three-year contract which would pay ***1317** her a total compensation at the annual rate of $96,000 for the first 18 months and then increase her total compensation to the same level as Raveling for the last 18 months." He rejected her counter offer.

Coach Stanley alleged that Garrett stated to her that he thought his proposal was fair and he would "not spend a lot of time negotiating a contract." According to Coach Stanley, Garrett's attitude toward her changed and he became "hostile." Garrett told her that she would not be paid the same as Coach Raveling and that she should be satisfied with being the second highest paid women's basketball coach in the PAC–10 Conference.

After this discussion, Coach Stanley retained attorney Timothy Stoner to negotiate the terms of the new contract. Coach Stanley alleged that Garrett rejected her offer "to negotiate a contract that would allow me to gradually work my way to the contract salary and benefits level that USC had provided to George Raveling." Coach Stanley alleged further that Garrett refused to "negotiate in good faith." He withdrew the multi-year contact offer he had previously made to her. Coach Stanley also alleged that Garrett told her attorney that he would offer a one-year contract at a $90,000 salary, plus a $6,000 housing allowance.

Garrett alleges that Stoner proposed a three-year contract with compensation starting at $88,000 in the first year, $97,000 in the second year, and $112,000 in the third year. According to Garrett's affidavit, Coach Stanley also made certain "unprecedented demands, such as: free room and board for her daughter who is anticipated to attend USC as an undergraduate student; radio and television shows where Stanley and the women's team would be spotlighted; and monetary payments tied to conference championships, wins in NCAA play-off games, and coach of the year honors." Garrett indicated that these "incentives" were unacceptable to USC.

On June 21, 1993, Garrett transmitted a written offer of a one-year contract to Mr. Stoner. The offer contains the following terms with reference to salary:

> In consideration of the performance of her duties and responsibilities as Head Women's Basketball Coach, USC shall pay to Stanley an annual salary of $96,000, commencing as of the effective date of this Agreement and payable in equal monthly installments. Stanley shall also be eligible to participate in all of the USC employee benefits as set forth from time to time in the USC Staff Handbook.

Coach Stanley alleges that she contacted Garrett sometime thereafter, "to remind him of the promise he and the University made to me for a multi-year contract that would fairly compensate me for my services and efforts...." Garrett told her that she had until the end of that business day to accept the one-year contract at $96,000 or USC would begin to look at other candidates for her position.

Garrett alleged that he received a telephone call from Coach Stanley on July 13, 1993, in which she "renewed her demand for the three-year contract on the economic terms previously proposed by her counsel." Garrett reiterated that a one-year contract at $96,000 was USC's final offer. Garrett told Coach Stanley that her final decision to reject or accept the offer had to be communicated to him by the end of the day. Garrett alleged that Coach Stanley did not accept the offer. The following day, Coach Stanley sent a memorandum requesting additional time to consider the offer because she was too distressed to make a decision. Garrett sent a memorandum to Coach Stanley on July 15, 1993, in which he stated, *inter alia:*

> My job as athletic director is to look out for the best interests of our women's basketball program as a whole, and that is what I have been trying to do all along. The best interests of the program are not served by indefinitely extending the discussions between you and the University, which have already dragged on for weeks. That is why I told you on Tuesday that I needed a final answer that day.
>
> Since I did not hear from you, as it now stands the University has no offers on the table. If you want to make any proposals, I am willing to listen. Meanwhile, for the protection of the program, I must, and am, ***1318** actively looking at other candidates. I am sorry that you feel distressed by this situation. As I have said, I have to do what is best for our women's basketball program.
>
> Finally, I was not aware that you were in Phoenix on official University business. Your contract with the University expired at the end of June, and I must ask you not to perform any services for the University unless and until we enter into a new contract. I will arrange for you to be compensated on a daily basis for the time you have expended thus far in July on University business....

Coach Stanley did not reply to Garrett's July 15, 1993 memorandum. Instead, on August 3, 1993, her present attorney, Robert L. Bell, sent

a letter via facsimile to USC's Acting General Counsel in which he indicated that he had been retained to represent Coach Stanley. Bell stated he desired "to discuss an amicable resolution of the legal dispute between [his] client and the University of Southern California." Bell stated that if he did not receive a reply by August 4, 1993, he would "seek recourse in court." On August 4, 1993, USC's Acting General Counsel sent a letter to Bell via facsimile in which he stated that "[w]e are not adverse to considering carefully a proposal from you for an 'informal resolution.' "

II. PROCEDURAL BACKGROUND

On August 5, 1993, Coach Stanley filed this action in the Superior Court for the County of Los Angeles. She also applied *ex parte* for a temporary restraining order (TRO) to require USC to install her as head coach of the women's basketball team.

The complaint sets forth various federal and state sex discrimination claims, including violations of the Equal Pay Act (EPA), 29 U.S.C. 206(d)(1) (1988), Title IX, 20 U.S.C. § 1681(a) (1988), the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12921 (West Supp.1993), and the California Constitution, Cal. Const. art. 1, § 8 (West 1983). The complaint also alleges common law causes of action including wrongful discharge in violation of California's public policy, breach of an implied-in-fact employment contract, intentional infliction of emotional distress, and conspiracy. As relief for this alleged conduct, Coach Stanley seeks a declaratory judgment that USC's conduct constituted sex discrimination, a permanent injunction restraining the defendants from discrimination and retaliation, an order "requiring immediate installation of [p]laintiff to the position of Head Coach of Women's Basketball at the USC," three million dollars in compensatory damages, and five million dollars in punitive damages.

On August 6, 1993, the Los Angeles Superior Court issued an oral order granting Coach Stanley's *ex parte* application for a TRO, pending a hearing on her motion for a preliminary injunction. The TRO ordered USC to pay Coach Stanley an annual salary of $96,000 for her services as head basketball coach of the women's team, and all benefits under the 1989 contract were to remain in effect. The record shows that, on June 30, 1993, the date that her four-year employment contract expired, Coach Stanley's salary was $62,000 per year with a $6,000 housing allowance.

On the same day that the TRO was issued, USC removed the action to the District Court for the Central District of California. On August 11, 1993, the district court ordered that the hearing on Coach Stanley's motion for a preliminary injunction be held on August 26, 1993, and that the TRO issued by the state court be extended and remain in effect until that date.

Coach Stanley and Garrett submitted their declarations prior to the August 26, 1993, hearing. At the hearing, Coach Stanley submitted the declaration of her physician, Dr. Elizabeth Monterio, regarding Coach Stanley's emotional state. Coach Stanley also made offers of proof as to the testimony of various witnesses. The court accepted the proffered

testimony as true for purposes of ruling on the motion for preliminary injunction. These witnesses included one of the captains of the women's basketball team, two assistant coaches, and Timothy Stoner, Coach Stanley's former counsel.

Pursuant to Coach Stanley's request, the district court reviewed Coach Raveling's employment contract *in camera*. Later that ***1319** day, the district court denied the motion for a preliminary injunction.

III. DISCUSSION

The gravamen of Coach Stanley's multiple claims against USC is her contention that she is entitled to pay equal to that provided to Coach Raveling for his services as head coach of the men's basketball team because the position of head coach of the women's team "require[s] equal skill, effort, and responsibility, and [is performed] under similar working conditions." Appellant's Opening Brief at 34. She asserts that USC discriminated against her because of her sex by rejecting her request. She also maintains that USC retaliated against her because of her request for equal pay for herself and her assistant coaches. According to Coach Stanley, USC retaliated by withdrawing the offer of a three-year contract and instead presenting her with a new offer of a one-year contract at less pay than that received by Coach Raveling.

We begin our analysis mindful of the fact that we are reviewing the denial of a *preliminary* injunction. There has been no trial in this matter. Because the hearing on the preliminary injunction occurred 21 days after the action was filed in state court, discovery had not been completed. Our prediction of the probability of success on the merits is based on the limited offer of proof that was possible under the circumstances. We obviously cannot now evaluate the persuasive impact of the evidence that the parties may bring forth at trial.

A. *Standard of Review.*

We review the denial of a motion for preliminary injunction for abuse of discretion. *Chalk v. United States Dist. Court,* 840 F.2d 701, 704 (9th Cir.1988).

> An order is reversible for legal error if the court did not apply the correct preliminary injunction standard, or if the court misapprehended the law with respect to the underlying issues in litigation. An abuse of discretion may also occur if the district court rests its conclusions on clearly erroneous findings of fact.

Id. (citations omitted).

In *Martin v. International Olympic Committee,* 740 F.2d 670 (9th Cir.1984), we described the legal standard a district court must apply in exercising its discretion:

> In this circuit, a party seeking preliminary injunctive relief must meet one of two

tests. Under the first, a court may issue a preliminary injunction if it finds that:

> (1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest.

Alternatively, a court may issue a preliminary injunction if the moving party demonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor. Under this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. There is one additional factor we must weigh. In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite,* courts should be extremely cautious about issuing a preliminary injunction.

Id. at 674–75 (internal quotations and citations omitted) (emphasis in original).

Coach Stanley argues that she did not seek a mandatory preliminary injunction. She asserts that she was "not seeking to be instated by USC, she was seeking to continue her employment with USC." Appellant's Opening Brief at 28. Coach Stanley maintains that she requested a prohibitory preliminary injunction and that the district court erred in applying the test for a mandatory preliminary injunction.

***1320** A prohibitory injunction preserves the status quo. *Johnson v. Kay,* 860 F.2d 529, 541 (2d Cir.1988). A mandatory injunction " 'goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored.' " *Anderson v. United States,* 612 F.2d 1112, 1114 (9th Cir.1979) (quoting *Martinez v. Mathews,* 544 F.2d 1233, 1243 (5th Cir.1976)). When a mandatory preliminary injunction is requested, the district court should deny such relief " 'unless the facts and law clearly favor the moving party.' " *Id.* Our first task is to determine whether Coach Stanley requested a prohibitory injunction or a mandatory injunction.

Coach Stanley's four-year contract terminated on June 30, 1993. She was informed by Garrett on July 15, 1993, that her employment contract had expired and that she should not perform any services for the university until both parties entered into a new contract. On August 6, 1993, the date this action was filed in state court, Coach Stanley was no longer a USC employee.

Accordingly, an injunction compelling USC to install Coach Stanley as the head coach of the women's basketball team and to pay her $28,000 a year more than she received when her employment contract expired would not have maintained the status quo. Instead, it would have forced USC to hire a person at a substantially higher rate of pay than she had received prior to the expiration of her employment contract on June 30, 1993.

The district court did not err in concluding that Coach Stanley was seeking a mandatory injunction, and that her request was subject to a higher degree of scrutiny because such relief is particularly disfavored under the law of this circuit. *Anderson,* 612 F.2d at 1114.

B. *There Has Been No Clear Showing of a Probability of Success on the Merits of Coach Stanley's Claim for Injunctive Relief.*

In light of our determination that Coach Stanley requested a mandatory preliminary injunction, we must consider whether the law and the facts clearly favor granting such relief. To obtain a preliminary injunction, Coach Stanley was required to demonstrate that her remedy at law was inadequate. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506–07 & n. 8, 79 S.Ct. 948, 954–55 & n. 8, 3 L.Ed.2d 988 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.") (footnote omitted).

In her motion for a preliminary injunction filed in the state court, Coach Stanley requested an order "enjoining the defendants from forcing plaintiff to enter into an unfair and sex discriminatory contract and interfering with plaintiff (sic) continued performance as head coach of women's basketball until such time as the Court may enter a final determination on the merits of this action." As described above, the state court granted a temporary restraining order installing Coach Stanley to the position of head coach of the women's basketball team, at a higher annual salary, 37 days after her four-year contract had expired. On August 6, 1993, this matter was removed to the district court, before the state court could rule on the motion for a preliminary injunction.

The district court ordered USC and Garrett to file their opposition to Coach Stanley's motion for a preliminary injunction on August 18, 1993. On August 24, 1993, Coach Stanley filed her reply. In her reply, Coach Stanley states:

> Thus, *Plaintiff,* in her motion for TRO, and in this hearing for a preliminary injunction, *is simply seeking to maintain the status quo between the parties at the firm and final salary offered by Defendants* and to restrain Defendants from wrongfully locking out Plaintiff from the performance of her duties as Head Women's Basketball Coach simply because she is engaged in protected activities, i.e., seeking equal pay and benefits as are provided to the Head Men's Basketball Coach at U.S.C.

(emphasis added).

Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion For Preliminary Injunction at 11 (emphasis added).

To the extent that Coach Stanley is seeking money damages and back pay for the loss of her job, her remedy at law is adequate. ***1321** *Cf. Anderson v. United States,* 612 F.2d at 1115 (mandatory injunction is inappropriate

where retroactive promotion and back pay are available if the employee succeeds on the merits). The district court, however, construed the motion for a preliminary injunction as including a request that future discrimination or retaliation based on the fact that she is a woman be enjoined. We do so as well for purposes of resolving the present appeal.

1. *Merits of Coach Stanley's Claim of Denial of Equal Pay for Equal Work.*

The district court concluded that Coach Stanley had failed to demonstrate that there is a likelihood that she would prevail on the merits of her claim of a denial of equal pay for equal work because she failed to present facts clearly showing that USC was guilty of sex discrimination in its negotiations for a new employment contract. The thrust of Coach Stanley's argument in this appeal is that she is entitled, as a matter of law, "to make the same salary as was paid to the Head Men's Basketball Coach at USC." Appellant's Opening Brief at 9. None of the authorities she has cited supports this theory.

In her reply brief, Coach Stanley asserts that she has "never said or argued in any of her submissions that the compensation of the men's and women's basketball coaches at USC or elsewhere must be identical." Appellant's Reply Brief at 2. Coach Stanley accuses USC of mischaracterizing her position. This argument ignores her insistence to Garrett that she was entitled to the "same salary" received by Coach Raveling. The denotation of the word "same" is "identical." Webster's Third New International Dictionary 2007.

In her reply brief, Coach Stanley asserts that she merely seeks equal pay for equal work. In *Hein v. Oregon College of Education,* 718 F.2d 910 (9th Cir.1983), we stated that to recover under the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1988), "a plaintiff must prove that an employer is paying different wages to employees of the opposite sex for equal work." *Hein,* 718 F.2d at 913. We concluded that the jobs need not be identical, but they must be "substantially equal." *Id.* (internal quotation and citation omitted).

The EPA prohibits discrimination in wages "between employees on the basis of sex ... for equal work, on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (1988). Each of these components must be substantially equal to state a claim. *Forsberg v. Pacific Northwest Bell Tel.,* 840 F.2d 1409, 1414 (9th Cir.1988).

Coach Stanley has not offered proof to contradict the evidence proffered by USC that demonstrates the differences in the responsibilities of the persons who serve as head coaches of the women's and men's basketball teams. Coach Raveling's responsibilities as head coach of the men's basketball team require substantial public relations and promotional activities to generate revenue for USC. These efforts resulted in revenue that is 90 times greater than the revenue generated by the women's basketball team. Coach Raveling was required to conduct twelve outside speaking engagements per year, to be accessible to the media for interviews, and to participate in certain activities designed

to produce donations and endorsements for the USC Athletic Department in general. Coach Stanley's position as head coach did not require her to engage in the same intense level of promotional and revenue-raising activities. This quantitative dissimilarity in responsibilities justifies a different level of pay for the head coach of the women's basketball team. *See Horner v. Mary Inst.,* 613 F.2d 706, 713–14 (8th Cir.1980) (evidence that male physical education teacher had a different job from a female physical education teacher because he was responsible for curriculum precluded finding that jobs were substantially similar; court may consider whether job requires more experience, training, and ability to determine whether jobs require substantially equal skill under EPA).

The evidence presented by USC also showed that Coach Raveling had substantially different qualifications and experience related to his public relations and revenue- ***1322** generation skills than Coach Stanley. Coach Raveling received educational training in marketing, and worked in that field for nine years. Coach Raveling has been employed by USC three years longer than Coach Stanley. He has been a college basketball coach for 31 years, while Coach Stanley has had 17 years experience as a basketball coach. Coach Raveling had served as a member of the NCAA Subcommittee on Recruiting. Coach Raveling also is the respected author of two bestselling novels. He has performed as an actor in a feature movie, and has appeared on national television to discuss recruiting of student athletes. Coach Stanley does not have the same degree of experience in these varied activities. Employers may reward professional experience and education without violating the EPA. *Soto v. Adams Elevator Equip. Co.,* 941 F.2d 543, 548 & n. 7 (7th Cir.1991).

Coach Raveling's national television appearances and motion picture presence, as well as his reputation as an author, make him a desirable public relations representative for USC. An employer may consider the marketplace value of the skills of a particular individual when determining his or her salary. *Horner,* 613 F.2d at 714. Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA. *EEOC v. Madison Community Unit Sch. Dist. No. 12,* 818 F.2d 577, 580 (7th Cir.1987).

The record also demonstrates that the USC men's basketball team generated greater attendance, more media interest, larger donations, and produced substantially more revenue than the women's basketball team.[1] As a result, USC placed greater pressure on Coach Raveling to promote his team and to win. The responsibility to produce a large amount of revenue is evidence of a substantial difference in responsibility. *See Jacobs v. College of William and Mary,* 517 F.Supp. 791, 797 (E.D.Va.1980) (duty to produce revenue demonstrates that coaching jobs are not substantially equal), *aff'd without opinion,* 661 F.2d 922 (4th Cir.), *cert. denied,* 454 U.S. 1033, 102 S.Ct. 572, 70 L.Ed.2d 477 (1981).

1 The total average attendance per women's team game during Coach Stanley's tenure was 751 as compared to 4,035 for the men's team during the same period. The average sales of season ticket passes to faculty and

staff for women's games were 13, while the average sales for men's games were 130. Alumni and other fans, on average, purchased 71 passes for women's home games as compared to over 1,200 season passes for men's home games during the same period. A season pass to the men's home games was more than double the price of a season pass to women's home games.

The same disparity exists with respect to media interest in the men's and women's basketball teams. Television and radio stations paid USC to broadcast the men's basketball games; all of the home games and many games off campus were broadcast on network or cable stations. All of the games were broadcast on commercial radio. Approximately three of the women's basketball games were broadcast on cable stations as part of a contract package that also covered several other sports.

Donations and endowments were likewise greater for the men's basketball team, totalling $66,916 during the time period of Coach Stanley's contract, as compared to $4,288 for the women's basketball team. The same was true for revenue production. While the women's basketball team produced a total revenue of $50,262 during Coach Stanley's four years, the men's team generated $4,725,784 during the same time period.

Coach Stanley did not offer evidence to rebut USC's justification for paying Coach Raveling a higher salary. Instead, she alleged that the women's team generates revenue, and that she is under a great deal of pressure to win. [2] Coach Stanley argues that *Jacobs* is distinguishable because, in that matter, the head basketball coach of the women's team was not required to produce any revenue. *Jacobs,* 517 F.Supp. at 798. Coach Stanley appears to suggest that a difference in the amount of revenue generated by the men's and women's teams should ***1323** be ignored by the court in comparing the respective coaching positions. We disagree.

2 Coach Stanley also alleged that, as head coach, she had won four national women's basketball championships, but that Coach Raveling had won none. In addition, while head coach at USC, Coach Stanley was named PAC–10 Coach–of–the–Year in 1993 and the women's basketball team played in the last three NCAA Tournaments and advanced to the NCAA Sweet Sixteen in 1993 and the NCAA Elite in 1992. She also described numerous speaking engagements in which she had participated.

We agree with the district court in *Jacobs* that revenue generation is an important factor that may be considered in justifying greater pay. We are also of the view that the relative amount of revenue generated should be considered in determining whether responsibilities and working conditions are substantially equal. The fact that the men's basketball team at USC generates 90 times the revenue than that produced by the women's team adequately demonstrates that Coach Raveling was under greater pressure to win and to promote his team

than Coach Stanley was subject to as head coach of the women's team.

Coach Stanley's reliance on *Burkey v. Marshall County Board of Education,* 513 F.Supp. 1084 (N.D.W.Va.1981), and *EEOC v. Madison Community Unit School District No. 12,* 818 F.2d 577 (7th Cir.1987) to support her claim of sex discrimination is misplaced. In *Burkey,* the women coaches were "uniformly paid one-half (½) of the salary which male coaches of *comparable or identical boys' junior high school sports were paid.*" *Burkey,* 513 F.Supp. at 1088 (emphasis added). Here, however, Coach Stanley has not shown that her responsibilities were identical.

In *Madison,* the Seventh Circuit held that the plaintiff established a prima facie EPA claim because "male and female coaches alike testified that the skill, effort, and responsibility required were the same and the working conditions [were] also the same—*not merely similar,* which is all the Act requires." *Madison,* 818 F.2d at 583 (emphasis added). In the instant matter, the uncontradicted evidence shows that Coach Raveling's responsibilities, as head coach of the men's basketball team, differed substantially from the duties imposed upon Coach Stanley.

Coach Stanley contends that the failure to allocate funds in the promotion of women's basketball team demonstrated gender discrimination. She appears to argue that USC's failure to pay her a salary equal to that of Coach Raveling was the result of USC's "failure to market and promote the women's basketball team." The only evidence Coach Stanley presented in support of this argument is that USC failed to provide the women's team with a poster containing the schedule of games, but had done so for the men's team. This single bit of evidence does not demonstrate that Coach Stanley was denied equal pay for equal work. Instead, it demonstrates, at best, a business decision to allocate USC resources to the team that generates the most revenue. [3]

3 Coach Stanley has not contended either in the district court or before this court that this evidence would support an inference that USC violated Title IX, 20 U.S.C. § 1681(a) (1988).

The district court also was "unconvinced" by Coach Stanley's claim that USC's disparate promotion of men's and women's basketball teams had "caused the enormous differences in spectator interest and revenue production." The court rejected Coach Stanley's assertion that the differences were due to societal discrimination and that this was evidence of a prima facie case under the EPA. The court reasoned that societal discrimination in preferring to witness men's sports in greater numbers cannot be attributed to USC. We agree. *Cf. Madison,* 818 F.2d at 580–82 (EPA does not prohibit wages that reflect market conditions of supply and demand, which may depress wages in jobs held mainly by women).

At this preliminary stage of these proceedings, the record does not support a finding that gender was the reason that USC paid a higher salary to Coach Raveling as head coach of the men's basketball team than it offered Coach Stanley as head coach of the women's basketball team. Garrett's affidavit supports the district court's conclusion that

the head coach position of the men's team was not substantially equal to the head coach position of the women's team. The record shows that there were significant differences between Coach Stanley's and Coach Raveling's public relations skills, credentials, experience, and qualifications; there also were substantial differences between their responsibilities and working conditions. The district court's finding that the head coach positions were not substantially equal is not a "clear error of judgment." *Martin v. International* ***1324** *Olympic Comm.,* 740 F.2d 670, 679 (9th Cir.1984).

2. *Merits of Coach Stanley's Claim of Retaliation.*

The district court also rejected Coach Stanley's claim that USC terminated her contract or failed to renew her contract in retaliation for her involvement in protected activities. Rather, the court found that her contract had expired and she refused to accept any of the renewal options that USC offered. This finding is not clearly erroneous. Although Coach Stanley contends that she accepted the multi-year contract and continued only to negotiate the terms of the compensation, the district court found this assertion to be "contrary to the weight of the evidence which clearly suggests that Ms. Stanley failed to accept USC's three-year contract because she was dissatisfied with the proposed compensation." The record supports this finding. Coach Stanley rejected the three-year contract offered by USC. She made a counter offer which USC did not accept. The disagreement on the amount of pay precipitated an impasse in the negotiations.

Coach Stanley's argument that Garrett retaliated against her because she demanded equal pay does not square with the evidence she has produced. After she demanded the same pay that Coach Raveling receives, she was offered a multi-year contract at a substantially higher salary than she had received under her original employment agreement. This offer remained open until June 7, 1993. The offer was rejected by Coach Stanley.

Contrary to Coach Stanley's contention, the offer of a one-year contract at an increase of $28,000 in total compensation does not clearly demonstrate retaliation. Rather, it tends to show that USC wanted to retain her services, at a substantial increase in salary. The fact that she was offered a one-year contract after her four-year contract expired does not demonstrate discrimination or retaliation. The record shows Coach Raveling was offered a one-year renewal contract after his initial five year contract expired. [4]

4 *Miller v. Fairchild Industries, Inc.,* 797 F.2d 727 (9th Cir.1986) is therefore distinguishable. Coach Stanley did not produce evidence that a causal connection existed between her demand for equal pay and the failure to renew her contract as did the plaintiffs in *Miller.* There, we reversed a summary judgment in favor of the employer who advanced economic layoff as a justification for the discharge of two African American females who had previously filed EEOC discrimination claims against the employer and settled. The layoffs occurred less than two months after

> they negotiated the EEOC settlement agreement and the management personnel who participated in the EEOC settlement negotiations were also responsible for their layoffs. Plaintiff's declarations established that they were the only employees laid off; the employer disputed this fact. We held that summary judgment under these circumstances was not appropriate. *Miller,* 797 F.2d at 732–33.

We express no opinion as to whether Coach Stanley ultimately will establish a prima facie case of sex discrimination or retaliation at trial. We hold only that Coach Stanley has failed to demonstrate that the law and the facts clearly favor her position. *See Anderson v. United States,* 612 F.2d 1112, 1114 (9th Cir.1979).

C. *There Has Been No Showing of a Nexus Between Hardship and the Conduct of USC.*

The district court found that Coach Stanley presented sufficient facts from which it could be inferred that she suffered emotional distress, loss of business opportunity, and injury to her reputation following the expiration of her four-year employment contract and the failure of negotiations for a new contract. The court was "persuaded that Coach Stanley [had] sustained her burden to demonstrate a threat of imminent irreparable harm if preliminary injunctive relief [was] denied."[5] Neither party challenges this finding.

5 The allegations of intentional sex discrimination, prospective loss of reputation, business opportunity, and serious emotional distress, the court reasoned, could not be remedied by money damages. There is legal support for the court's conclusion. *See, e.g., Chalk v. United States Dist. Court,* 840 F.2d 701, 709 (9th Cir.1988) (emotional distress, depression, and anxiety may constitute irreparable injury); *Garcia v. Lawn,* 805 F.2d 1400, 1405 (9th Cir.1986) (chilling effect of retaliation may be irreparable harm).

***1325** The district court also concluded, however, that Coach Stanley failed to demonstrate that the facts clearly show that USC discriminated or retaliated against her on the basis of her gender. As discussed above, Coach Stanley failed to demonstrate that the facts developed in the record and the law clearly favored the issuance of a mandatory preliminary injunction. She has failed to show that the injury she suffered was caused by the alleged wrongful conduct of USC.

D. *The District Court's Finding that the Balance of Hardships Do Not Tip Sharply in Coach Stanley's Favor is Not Clearly Erroneous.*

Coach Stanley challenges the district court's finding that the balance of hardships did not tip sharply in her favor. She argues that USC presented no evidence to demonstrate any hardship.

Although the district court found that the balance of hardships was "tipped to some degree in [Coach] Stanley's favor[,]" it found that USC would suffer some prejudice if the injunction was granted. Garrett's affidavit and supporting exhibits demonstrate that a preliminary injunction would cause USC hardship. This evidence establishes that Garrett

wanted to conclude contract negotiations before the June 30, 1993 expiration of Coach Stanley's contract because

> [t]he summer months are critical for recruiting of student athletes. In addition, it is essential that the head coach be in place by the time the students arrive for the Fall term, which at USC generally is the Monday before Labor Day. This is because the coach is responsible for providing general supervision of and counselling to the student athletes in their academic and personal lives. In addition, practices commence soon after the Fall term begins in preparation for pre-season games.

The district court drew a logical inference of hardship from this evidence. The district court reasoned that issuing the injunction would force USC into a unilateral contract which would provide Coach Stanley with a significant pay increase, but would not require any commitment by Coach Stanley to remain at USC as the head coach of women's basketball. If Coach Stanley were reinstated to the position pursuant to a preliminary injunction, her compensation would be $96,000, a sum she rejected when it was offered to her previously. Accordingly, USC would have a head coach who was dissatisfied with the terms of her employment. Her state of mind, and the impermanence of her position, would likely affect the ability of the school to recruit athletes concerned about the quality and identity of the coaching staff for the next four years. The court concluded that if USC was not permitted to seek out "a replacement of Coach Stanley prior to commencement of the Fall semester, USC will suffer a serious hardship."

The record supports the district court's finding that USC would suffer some hardship if the preliminary injunction issued. In light of the evidence of the impact on the women's basketball program if USC were forced to hire an employee, *pendente lite,* who claims the school discriminates on the basis of sex, we conclude that the district court did not clearly err in finding that the balance of hardships did not tip sharply in Coach Stanley's favor.

E. *The District Court's Finding that the Public's Interest Was Not Served by Granting the Preliminary Injunction Is Not Clearly Erroneous.*

Coach Stanley argues that the strong public interest in preventing intentional sex discrimination and discriminatory employment practices weighs in favor of granting the preliminary injunction. We agree with the district court that "[t]his argument would be quite persuasive had [Coach] Stanley come forward with some evidence that her termination was the result of sex discrimination and that she was reasonably likely to prevail on the merits of her discrimination claim."

Coach Stanley failed to present evidence that she would probably prevail on her claims of sex discrimination and retaliation.

The evidence also does not establish that the balance of hardships tipped sharply in her favor. Consequently, the district court did not err in concluding that the public's interest in preventing sex discrimination and discriminatory ***1326** employment practices did not clearly favor granting a mandatory preliminary injunction.

F. *Procedural Challenges to the Preliminary Injunction Hearing.*

Coach Stanley claims that the district court violated her right to due process by requiring her to make offers of proof rather than permitting her witnesses to testify. This contention is without merit. In this circuit, the refusal to hear oral testimony at a preliminary injunction hearing is not an abuse of discretion if the parties have a full opportunity to submit written testimony and to argue the matter. *Kenneally v. Lungren,* 967 F.2d 329, 335 (9th Cir.1992), *cert. denied,* 506 U.S. 1054, 113 S.Ct. 979, 122 L.Ed.2d 133 (1993); *International Molders' & Allied Workers' Local Union v. Nelson,* 799 F.2d 547, 555 (9th Cir.1986); *San Francisco–Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 546 & n. 6 (9th Cir.1969).

Coach Stanley had an opportunity to present additional affidavits. In addition, the district court accepted her offers of proof as conclusive proof of the matter represented.

Coach Stanley also asserts that the district court erred in resolving the preliminary injunction without providing her an opportunity to conduct discovery. We disagree. Coach Stanley requested a preliminary injunction on August 5, 1993. She did not file a request for a continuance in order to complete discovery prior to the August 26, 1993 hearing on the motion for a preliminary injunction. Thus, the opportunity to conduct discovery was not denied; Coach Stanley simply did not avail herself of it prior to the hearing. Nothing precluded her from conducting discovery prior to the hearing on the preliminary injunction. She could have moved, *ex parte,* for an order shortening time within which to conduct depositions. *See* Fed.R.Civ.P. 30(a); *see also* W. Scwarzer, A.W. Tashima, J. Wagstaffe, Federal Civil Procedure Before Trial § 11:157 (1993) (Federal Rules of Civil Procedure require a court order if plaintiff desires to take a deposition during the first 30 days after service of the summons and complaint, and "good cause [for such an order] may exist because of the urgent need for discovery in connection with an application for TRO or preliminary injunction") (internal quotations omitted).

IV. CONCLUSION

The district court did not abuse its discretion in denying a mandatory preliminary injunction. Coach Stanley did not meet her burden of demonstrating the irreducible minimum for obtaining a preliminary injunction: "that there is a fair chance of success on the merits." *Martin v. International Olympic Comm.,* 740 F.2d at 675. Because mandatory preliminary injunctions are disfavored in this circuit, we are compelled to review the record to determine whether the facts and the law clearly favor Coach Stanley. *Anderson,* 612 F.2d at 1114. The evidence offered at the hearing on the motion for a preliminary injunction demonstrated

that Coach Stanley sought pay from USC equal to Coach Raveling's income from that university, notwithstanding significant differences in job pressure, the level of responsibility, and in marketing and revenue-producing qualifications and performance. A difference in pay that takes such factors into consideration does not prove gender bias or violate the Equal Pay Act. The unfortunate impasse that occurred during the negotiations for the renewal of the employment contract of an outstanding basketball coach followed the offer of a very substantial increase in salary—not sex discrimination or retaliation. Because Coach Stanley failed to demonstrate that the law and the facts clearly favor her position, the judgment is AFFIRMED.

All Citations

13 F.3d 1313, 63 Fair Empl.Prac.Cas. (BNA) 1021, 63 Empl. Prac. Dec. P 42,757, 127 Lab.Cas. P 33,045, 88 Ed. Law Rep. 984, 1 Wage & Hour Cas.2d (BNA) 1394

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EX. RELA-11

129 S.Ct. 365
Supreme Court of the United States

Donald C. WINTER, Secretary of the Navy, et al., Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 07–1239.
|
Argued Oct. 8, 2008.
|
Decided Nov. 12, 2008.

Synopsis

Background: Environmental organizations, which were concerned that the Navy's use of mid-frequency active (MFA) sonar in training exercises would cause serious harm to various species of marine mammals present in the southern California waters, sought a preliminary injunction based on alleged violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the Coastal Zone Management Act (CZMA). The United States District Court for the Central District of California, Florence Marie Cooper, J., 530 F.Supp.2d 1110, granted motion for preliminary injunction. Navy appealed. The Court of Appeals for the Ninth Circuit, 518 F.3d 658, Betty B. Fletcher, Circuit Judge, upheld preliminary injunction imposing restrictions on the Navy's sonar training. Certiorari was granted.

The Supreme Court, Chief Justice Roberts, held that:

plaintiffs seeking preliminary relief are required to demonstrate that irreparable injury is likely in absence of injunction; abrogating *Faith Center Church Evangelistic Ministries v. Glover,* 480 F.3d 891; *Earth Island Inst. v. United States Forest Serv.,* 442 F.3d 1147, and

alleged irreparable injury to marine mammals resulting from Navy's training exercises using mid-frequency active (MFA) sonar was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors.

Reversed.

Justice Breyer, with whom Justice Stevens joined as to Part I, concurred in part and dissented in part, and filed opinion.

Justice Ginsburg, with whom Justice Souter joined, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

****366** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber &*

Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Antisubmarine warfare is one of the Navy's highest priorities. The Navy's fleet faces a significant threat from modern diesel-electric submarines, which are extremely difficult to detect and track because they can operate almost silently. The most effective tool for identifying submerged diesel-electric submarines is active sonar, which emits pulses of sound underwater and then receives the acoustic waves that echo off the target. Active sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use.

This case concerns the Navy's use of "mid-frequency active" (MFA) sonar during integrated training exercises in the waters off southern California (SOCAL). In these exercises, ships, submarines, and aircraft train together as members of a "strike group." Due to the importance of antisubmarine warfare, a strike group may not be certified for deployment until it demonstrates proficiency in the use of active sonar to detect, track, and neutralize enemy submarines.

The SOCAL waters contain at least 37 species of marine mammals. The plaintiffs—groups and individuals devoted to the protection of marine mammals and ocean habitats—assert that MFA sonar causes serious injuries to these animals. The Navy disputes that claim, noting that MFA sonar training in SOCAL waters has been conducted for 40 years without a single documented sonar-related injury to any marine mammal. Plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the training exercises violated the National Environmental Policy Act of 1969 (NEPA) and other federal laws; in particular, plaintiffs contend that the Navy should have prepared an environmental impact statement (EIS) before conducting the latest round of SOCAL exercises.

The District Court entered a preliminary injunction prohibiting the Navy from using MFA sonar during its training exercises. The Court of Appeals held that this injunction was overbroad and remanded to the District Court for a narrower remedy. The District Court then entered another preliminary injunction, imposing six restrictions on the Navy's use of sonar during its SOCAL training exercises. As relevant to this case, the injunction required the Navy to shut down MFA sonar when a marine mammal was spotted within 2,200 yards of a vessel, and to power down sonar by 6 decibels during conditions known as "surface ducting."

****367** The Navy then sought relief from the Executive Branch. The Council on Environmental Quality (CEQ) authorized the Navy to implement "alternative arrangements" to NEPA compliance in light of "emergency circumstances." The CEQ allowed the Navy to continue its training exercises under voluntary mitigation procedures that the Navy had previously adopted.

The Navy moved to vacate the District Court's preliminary injunction in light of the CEQ's actions. The District Court refused to do so, and the Court of Appeals affirmed. The Court of Appeals held that there was a serious question whether the CEQ's interpretation of the "emergency circumstances" regulation was lawful, that plaintiffs had carried their

burden of establishing a "possibility" of irreparable injury, and that the preliminary injunction was appropriate because the balance of hardships and consideration of the public interest favored the plaintiffs. The Court of Appeals emphasized that any negative impact of the injunction on the Navy's training exercises was "speculative," and determined that (1) the 2,200–yard shutdown zone was unlikely to affect naval operations, because MFA sonar systems are often shut down during training exercises; and (2) the power-down requirement during surface ducting conditions was not unreasonable, because such conditions are rare and the Navy has previously certified strike groups not trained under these conditions.

Held: The preliminary injunction is vacated to the extent challenged by the Navy. The balance of equities and the public interest—which were barely addressed by the District Court—tip strongly in favor of the Navy. The Navy's need to conduct realistic training with active sonar to respond to the threat posed by enemy submarines plainly outweighs the interests advanced by the plaintiffs. Pp. 374 – 382.

(a) The lower courts held that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm. The "possibility" standard is too lenient. This Court's frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.

Even if plaintiffs have demonstrated a likelihood of irreparable injury, such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. For the same reason, it is unnecessary to address the lower courts' holding that plaintiffs have established a likelihood of success on the merits. Pp. 374 – 377.

(b) A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences. *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. Military interests do not always trump other considerations, and the Court has not held that they do, but courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478.

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Those officers emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed ****368** by the District Court—the 2,200–yard shutdown zone and the power-down requirement during surface ducting conditions. The use of MFA sonar under realistic conditions during training exercises is clearly of the utmost importance

to the Navy and the Nation. The Court does not question the importance of plaintiffs' ecological, scientific, and recreational interests, but it concludes that the balance of equities and consideration of the overall public interest tip strongly in favor of the Navy. The determination of where the public interest lies in this case does not strike the Court as a close question. Pp. 376 – 378.

(c) The lower courts' justifications for entering the preliminary injunction are not persuasive. Pp. 377 – 381.

(1) The District Court did not give serious consideration to the balance of equities and the public interest. The Court of Appeals did consider these factors and conclude that the Navy's concerns about the preliminary injunction were "speculative." But that is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. Pp. 377 – 378.

(2) The District Court abused its discretion by requiring the Navy to shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a sonar-emitting vessel. The Court of Appeals concluded that the zone would not be overly burdensome because marine mammal sightings during training exercises are relatively rare. But regardless of the frequency of such sightings, the injunction will increase the radius of the shutdown zone from 200 to 2,200 yards, which expands its surface area by a factor of over 100. Moreover, because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. The Court of Appeals also concluded that the shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar several times during prior exercises when marine mammals were spotted well beyond the Navy's self-imposed 200–yard zone. But the court ignored undisputed evidence that these voluntary shutdowns only occurred during tactically insignificant times. Pp. 378 – 380.

(3) The District Court also abused its discretion by requiring the Navy to power down MFA sonar by 6 decibels during significant surface ducting conditions. When surface ducting occurs, active sonar becomes more useful near the surface, but less effective at greater depths. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. The Court of Appeals concluded that the power-down requirement was reasonable because surface ducting occurs relatively rarely, and the Navy has previously certified strike groups that did not train under such conditions. This reasoning is backwards. Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Pp. 380 – 381.

(4) The Navy has previously taken voluntary measures to address concerns about marine mammals, and has chosen not to challenge four other restrictions imposed by the District Court in this case. But that hardly means that other, more intrusive restrictions pose no threat to preparedness for war. The Court of Appeals

noted that the Navy could return to the District Court to seek modification of the **369 preliminary injunction if it actually resulted in an inability to train. The Navy is not required to wait until it is unable to train sufficient forces for national defense before seeking dissolution of the preliminary injunction. By then it may be too late. Pp. 380 – 381.

(d) This Court does not address the underlying merits of plaintiffs' claims, but the foregoing analysis makes clear that it would also be an abuse of discretion to enter a permanent injunction along the same lines as the preliminary injunction. Plaintiffs' ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training. There is accordingly no basis for enjoining such training pending preparation of an EIS—if one is determined to be required—when doing so is credibly alleged to pose a serious threat to national security. There are many other remedial tools available, including declaratory relief or an injunction specifically tailored to preparation of an EIS, that do not carry such dire consequences. Pp. 380 – 382.

518 F.3d 658, reversed; preliminary injunction vacated in part.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined as to Part I, *post*, pp. 382 – 387. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, pp. 387 – 393.

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Opinion

****370** Chief Justice ROBERTS delivered the opinion of the Court.

***12** "To be prepared for war is one of the most effectual means of preserving peace." 1 Messages and Papers of the Presidents 57 (J. Richardson comp. 1897). So said George Washington in his first Annual Address to Congress, 218 years ago. One of the most important ways the Navy prepares for war is through integrated training exercises at sea. These exercises include training in the use of modern sonar to detect and track enemy submarines, something the Navy has done for the past 40 years. The plaintiffs, respondents here, complained that the Navy's sonar-training program harmed marine mammals, and that the Navy should have prepared an environmental impact statement before commencing its latest round of training exercises. The Court of Appeals upheld a preliminary injunction imposing restrictions on the Navy's sonar training, even though that court acknowledged that "the record contains no evidence that marine mammals have been harmed" by the Navy's exercises. 518 F.3d 658, 696 (C.A.9 2008). The Court of Appeals was wrong, and its decision is reversed.

I

The Navy deploys its forces in "strike groups," which are groups of surface ships, submarines, and aircraft centered around either an aircraft carrier or an amphibious assault ship. App. to Pet. for Cert. 316a–317a (Pet. App.). Seamless coordination among strike-group assets is critical. Before deploying a strike group, the Navy requires extensive integrated training in analysis and prioritization of threats, execution of military missions, and maintenance of force protection. App. 110–111.

Antisubmarine warfare is currently the Pacific Fleet's top war-fighting priority. Pet.App. 270a–271a. Modern diesel-electric submarines pose a significant threat to Navy vessels because they can operate almost silently, making them extremely ***13** difficult to detect and track. Potential adversaries of the United States possess at least 300 of these submarines. App. 571.

The most effective technology for identifying submerged diesel-electric submarines within their torpedo range is active sonar, which involves emitting pulses of sound underwater and then receiving the acoustic waves that echo off the target. Pet.App. 266a–267a, 274a. Active sonar is a particularly useful tool because it provides both the bearing and the distance of target submarines; it is also sensitive enough to allow the Navy to track enemy submarines that are quieter than the surrounding marine environment.[1] This case

concerns the Navy's use of "mid-frequency active" (MFA) sonar, which transmits sound waves at frequencies between 1 kHz and 10 kHz.

[1] In contrast, passive sonar "listens" for sound waves but does not introduce sound into the water. Passive sonar is not effective for tracking diesel-electric submarines because those vessels can operate almost silently. Passive sonar also has a more limited range than active sonar, and cannot identify the exact location of an enemy submarine. Pet.App. 266a–271a.

Not surprisingly, MFA sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use. Sonar reception can be affected by countless different factors, including the time of day, water density, salinity, currents, weather conditions, and the contours of the sea floor. *Id.,* at 278a–279a. When working as part of a strike group, sonar operators must be able to coordinate with other Navy ships and planes while avoiding interference. The Navy conducts regular training exercises ****371** under realistic conditions to ensure that sonar operators are thoroughly skilled in its use in a variety of situations.

The waters off the coast of southern California (SOCAL) are an ideal location for conducting integrated training exercises, as this is the only area on the west coast that is relatively close to land, air, and sea bases, as well as amphibious ***14** landing areas. App. 141–142. At issue in this case are the Composite Training Unit Exercises and the Joint Tactical Force Exercises, in which individual naval units (ships, submarines, and aircraft) train together as members of a strike group. A strike group cannot be certified for deployment until it has successfully completed the integrated training exercises, including a demonstration of its ability to operate under simulated hostile conditions. *Id.,* at 564–565. In light of the threat posed by enemy submarines, all strike groups must demonstrate proficiency in antisubmarine warfare. Accordingly, the SOCAL exercises include extensive training in detecting, tracking, and neutralizing enemy submarines. The use of MFA sonar during these exercises is "mission-critical," given that MFA sonar is the only proven method of identifying submerged diesel-electric submarines operating on battery power. *Id.,* at 568–571.

Sharing the waters in the SOCAL operating area are at least 37 species of marine mammals, including dolphins, whales, and sea lions. The parties strongly dispute the extent to which the Navy's training activities will harm those animals or disrupt their behavioral patterns. The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal. The Navy asserts that, at most, MFA sonar may cause temporary hearing loss or brief disruptions of marine mammals' behavioral patterns.

The plaintiffs are the Natural Resources Defense Council, Inc., Jean–Michael Cousteau (an environmental enthusiast and filmmaker), and several other groups devoted to the protection of marine mammals and ocean habitats. They contend that MFA sonar can cause much more serious injuries

to marine mammals than the Navy acknowledges, including permanent hearing loss, decompression sickness, and major behavioral disruptions. According to the plaintiffs, several mass strandings of marine mammals (outside of SOCAL) ***15** have been "associated" with the use of active sonar. They argue that certain species of marine mammals—such as beaked whales—are uniquely susceptible to injury from active sonar; these injuries would not necessarily be detected by the Navy, given that beaked whales are "very deep divers" that spend little time at the surface.

II

The procedural history of this case is rather complicated. The Marine Mammal Protection Act of 1972 (MMPA), 86 Stat. 1027, generally prohibits any individual from "taking" a marine mammal, defined as harassing, hunting, capturing, or killing it. 16 U.S.C. §§ 1362(13), 1372(a). The Secretary of Defense may "exempt any action or category of actions" from the MMPA if such actions are "necessary for national defense." § 1371(f)(1). In January 2007, the Deputy Secretary of Defense—acting for the Secretary—granted the Navy a 2–year exemption from the MMPA for the training exercises at issue in this case. Pet.App. 219a–220a. The exemption was conditioned on the Navy adopting several mitigation procedures, including: (1) training lookouts and officers to watch for marine mammals; (2) requiring at least five lookouts with binoculars ****372** on each vessel to watch for anomalies on the water surface (including marine mammals); (3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises; (4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards; (5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel; (6) requiring active sonar to be operated at the "lowest practicable level"; and (7) adopting coordination and reporting procedures. *Id.,* at 222a–230a.

The National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, requires federal agencies "to the fullest extent ***16** possible" to prepare an environmental impact statement (EIS) for "every ... major Federal actio[n] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000 ed.). An agency is not required to prepare a full EIS if it determines—based on a shorter environmental assessment (EA)—that the proposed action will not have a significant impact on the environment. 40 CFR §§ 1508.9(a), 1508.13 (2007).

In February 2007, the Navy issued an EA concluding that the 14 SOCAL training exercises scheduled through January 2009 would not have a significant impact on the environment. App. 226–227. The EA divided potential injury to marine mammals into two categories: Level A harassment, defined as the potential destruction or loss of biological tissue (*i.e.,* physical injury), and Level B harassment, defined as temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding. *Id.,* at 160–161.

The Navy's computer models predicted that the SOCAL training exercises would cause only eight Level A harassments of common dolphins each year, and that even these injuries could be avoided through the Navy's voluntary mitigation measures, given that dolphins travel in large pods easily located by Navy lookouts. *Id.,* at 176–177, 183. The EA also predicted 274 Level B harassments of beaked whales per year, none of which would result in permanent injury. *Id.*, at 185–186. Beaked whales spend little time at the surface, so the precise effect of active sonar on these mammals is unclear. Erring on the side of caution, the Navy classified all projected harassments of beaked whales as Level A. *Id.,* at 186, 223. In light of its conclusion that the SOCAL training exercises would not have a significant impact on the environment, the Navy determined that it was unnecessary to prepare a full EIS. See 40 CFR § 1508.13.

Shortly after the Navy released its EA, the plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the Navy's SOCAL training exercises violated ***17** NEPA, the Endangered Species Act of 1973(ESA), and the Coastal Zone Management Act of 1972 (CZMA).[2] The District Court granted plaintiffs' motion for a preliminary injunction and prohibited the Navy from using MFA sonar during its remaining training exercises. The court held that plaintiffs had "demonstrated a probability of success" on their claims under NEPA and the CZMA. Pet.App. 207a, 215a. The court also determined that equitable relief was ****373** appropriate because, under Ninth Circuit precedent, plaintiffs had established at least a " 'possibility' " of irreparable harm to the environment. *Id.,* at 217a. Based on scientific studies, declarations from experts, and other evidence in the record, the District Court concluded that there was in fact a "near certainty" of irreparable injury to the environment, and that this injury outweighed any possible harm to the Navy. *Id.,* at 217a–218a.

2 The CZMA states that federal agencies taking actions "that affec [t] any land or water use or natural resource of the coastal zone" shall carry out these activities "in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." 16 U.S.C. § 1456(c)(1)(A).

The Navy filed an emergency appeal, and the Ninth Circuit stayed the injunction pending appeal. 502 F.3d 859, 865 (2007). After hearing oral argument, the Court of Appeals agreed with the District Court that preliminary injunctive relief was appropriate. The appellate court concluded, however, that a blanket injunction prohibiting the Navy from using MFA sonar in SOCAL was overbroad, and remanded the case to the District Court "to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises." 508 F.3d 885, 887 (2007).

On remand, the District Court entered a new preliminary injunction allowing the Navy to use MFA sonar only as long as it implemented the following mitigation measures (in addition to the measures the Navy had adopted pursuant to its MMPA exemption): (1) imposing a 12 nautical mile "exclusion ***18** zone" from

the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of "helicopter-dipping" sonar; (4) limiting the use of MFA sonar in geographic "choke points"; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water. 530 F.Supp.2d 1110, 1118–1121 (C.D.Cal.2008). The Navy filed a notice of appeal, challenging only the last two restrictions.

The Navy then sought relief from the Executive Branch. The President, pursuant to 16 U.S.C. § 1456(c)(1)(B), granted the Navy an exemption from the CZMA. Section 1456(c)(1)(B) permits such exemptions if the activity in question is "in the paramount interest of the United States." The President determined that continuation of the exercises as limited by the Navy was "essential to national security." Pet.App. 232a. He concluded that compliance with the District Court's injunction would "undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of ... strike groups." *Ibid*.

Simultaneously, the Council on Environmental Quality (CEQ) authorized the Navy to implement "alternative arrangements" to NEPA compliance in light of "emergency circumstances." See 40 CFR § 1506.11. [3] The CEQ determined that alternative arrangements were appropriate because the District Court's injunction "create[s] a significant and unreasonable risk that Strike Groups will not be ***19** able to train and be certified as fully mission capable." Pet.App. 238a. Under the alternative arrangements, the Navy would be permitted to conduct its training exercises under the mitigation procedures adopted in conjunction with the exemption ****374** from the MMPA. The CEQ also imposed additional notice, research, and reporting requirements.

3 That provision states in full: "Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review."

In light of these actions, the Navy then moved to vacate the District Court's injunction with respect to the 2,200–yard shutdown zone and the restrictions on training in surface ducting conditions. The District Court refused to do so, 527 F.Supp.2d 1216 (2008), and the Court of Appeals affirmed. The Ninth Circuit held that there was a serious question regarding whether the CEQ's interpretation of the "emergency circumstances" regulation was lawful. Specifically, the court questioned whether there was a true "emergency" in this case, given that the Navy has been on notice of its obligation to comply with NEPA from the moment it first planned the SOCAL training exercises. 518 F.3d, at 681. The Court

of Appeals concluded that the preliminary injunction was entirely predictable in light of the parties' litigation history. *Ibid*. The court also held that plaintiffs had established a likelihood of success on their claim that the Navy was required to prepare a full EIS for the SOCAL training exercises. *Id.*, at 693. The Ninth Circuit agreed with the District Court's holding that the Navy's EA—which resulted in a finding of no significant environmental impact—was "cursory, unsupported by cited evidence, or unconvincing." *Ibid.* [4]

[4] The Ninth Circuit's discussion of the plaintiffs' likelihood of success was limited to their NEPA claims. The court did not discuss claims under the CZMA or ESA.

The Court of Appeals further determined that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury. Even under the Navy's own figures, the court concluded, the training exercises would cause 564 physical injuries to marine mammals, as well as 170,000 disturbances ***20** of marine mammals' behavior. *Id*., at 696. Lastly, the Court of Appeals held that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs. The court emphasized that the negative impact on the Navy's training exercises was "speculative," since the Navy has never before operated under the procedures required by the District Court. *Id*., at 698–699. In particular, the court determined that: (1) The 2,200–yard shutdown zone imposed by the District Court was unlikely to affect the Navy's operations, because the Navy often shuts down its MFA sonar systems during the course of training exercises; and (2) the power-down requirement during significant surface ducting conditions was not unreasonable because such conditions are rare, and the Navy has previously certified strike groups that had not trained under such conditions. *Id*., at 699–702. The Ninth Circuit concluded that the District Court's preliminary injunction struck a proper balance between the competing interests at stake.

We granted certiorari, 554 U.S. 916, 128 S.Ct. 2964, 171 L.Ed.2d 883 (2008), and now reverse and vacate the injunction.

III

A

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. See *Munaf v. Geren,* 553 U.S. 674, 689 – 690, 128 S.Ct. 2207, 2218–2219, 171 L.Ed.2d 1 (2008); *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311–312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

****375** The District Court and the Ninth Circuit concluded that plaintiffs have shown a likelihood of success on the merits of their NEPA claim. The Navy strongly disputes this determination, arguing that

plaintiffs' likelihood of success is low because the CEQ reasonably concluded that "emergency ***21** circumstances" justified alternative arrangements to NEPA compliance. 40 CFR § 1506.11. Plaintiffs' briefs before this Court barely discuss the ground relied upon by the lower courts—that the plain meaning of "emergency circumstances" does not encompass a court order that was "entirely predictable" in light of the parties' litigation history. 518 F.3d, at 681. Instead, plaintiffs contend that the CEQ's actions violated the separation of powers by readjudicating a factual issue already decided by an Article III court. Moreover, they assert that the CEQ's interpretations of NEPA are not entitled to deference because the CEQ has not been given statutory authority to conduct adjudications.

The District Court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm. *Id.,* at 696–697; 530 F.Supp.2d, at 1118 (quoting *Faith Center Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 906 (C.A.9 2007); *Earth Island Inst. v. United States Forest Serv.,* 442 F.3d 1147, 1159 (C.A.9 2006)). The lower courts held that plaintiffs had met this standard because the scientific studies, declarations, and other evidence in the record established to "a near certainty" that the Navy's training exercises would cause irreparable harm to the environment. 530 F.Supp.2d, at 1118.

The Navy challenges these holdings, arguing that plaintiffs must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief. On the facts of this case, the Navy contends that plaintiffs' alleged injuries are too speculative to give rise to irreparable injury, given that ever since the Navy's training program began 40 years ago, there has been no documented case of sonar-related injury to marine mammals in SOCAL. And even if MFA sonar does cause a limited number of injuries to individual *marine mammals,* the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that ***22** would adversely affect *their* scientific, recreational, and ecological interests. For their part, plaintiffs assert that they would prevail under any formulation of the irreparable injury standard, because the District Court found that they had established a "near certainty" of irreparable harm.

We agree with the Navy that the Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Los Angeles v. Lyons,* 461 U.S. 95, 103, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 441, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *O'Shea v. Littleton,* 414 U.S. 488, 502, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); see also 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed.1995) (hereinafter Wright & Miller) (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); *id.*, at 154 – 155, 94 S.Ct. 669 ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury").

Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our ****376** characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*).

It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm. Although the court referred to the "possibility" standard, and cited Circuit precedent along the same lines, it affirmed the District Court's conclusion that plaintiffs had established a " 'near certainty' " of irreparable harm. 518 F.3d, at 696–697. At the same time, however, the nature of the District Court's conclusion is itself unclear. The District Court originally found irreparable harm from sonar-training exercises generally. But by the time of the District Court's final decision, the Navy challenged only two of six restrictions ***23** imposed by the court. See *supra,* at 373 – 374. The District Court did not reconsider the likelihood of irreparable harm in light of the four restrictions not challenged by the Navy. This failure is significant in light of the District Court's own statement that the 12 nautical mile exclusion zone from the coastline—one of the unchallenged mitigation restrictions—"would bar the use of MFA sonar in a significant portion of important marine mammal habitat." 530 F.Supp.2d, at 1119.

We also find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment. When the Government conducts an activity, "NEPA itself does not mandate particular results." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Instead, NEPA imposes only procedural requirements to "ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id.,* at 349, 109 S.Ct. 1835. Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures. Here, in contrast, the plaintiffs are seeking to enjoin —or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years. And the latest series of exercises were not approved until after the defendant took a "hard look at environmental consequences," *id.,* at 350, 109 S.Ct. 1835 (quoting *Kleppe v. Sierra Club,* 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); internal quotation marks omitted), as evidenced by the issuance of a detailed, 293–page EA.

As explained in the next section, even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief. For the same reason, we ***24** do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits.

B

A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf,* 553 U.S., at 689 – 690, 128 S.Ct., at 2218–2219. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.,* 480 U.S., at 542, 107 S.Ct. 1396. "In exercising their sound discretion, courts of equity should pay particular regard for the ****377** public consequences in employing the extraordinary remedy of injunction." *Romero–Barcelo,* 456 U.S., at 312, 102 S.Ct. 1798; see also *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In this case, the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense.

This case involves "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which are "essentially professional military judgments." *Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). We "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986). As the Court emphasized just last Term, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush,* 553 U.S. 723, 797, 128 S.Ct. 2229, 171 L.Ed.2d 41, 2008 WL 4722127 (2008).

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Admiral Gary ***25** Roughead—the Chief of Naval Operations—stated that during training exercises:

> "It is important to stress the ship crews in all dimensions of warfare simultaneously. If one of these training elements were impacted —for example, if effective sonar training were not possible—the training value of the other elements would also be degraded...." Pet.App. 342a.

Captain Martin May—the Third Fleet's Assistant Chief of Staff for Training and Readiness—emphasized that the use of MFA sonar is "mission-critical." App. 570–571. He described the ability to operate MFA sonar as a "highly perishable skill" that must be repeatedly practiced under realistic conditions. *Id.*, at 577. During training exercises, MFA sonar operators learn how to avoid sound-reducing "clutter" from ocean floor topography and environmental conditions; they also learn how to avoid interference and how to coordinate their efforts with other sonar operators in the strike group. *Id.*, at 574. Several Navy officers emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed by the District Court—the 2,200–yard shutdown zone and

the requirement that the Navy power down its sonar systems during significant surface ducting conditions. See, *e.g.,* Pet.App. 333a (powering down in presence of surface ducting "unreasonably prevent[s] realistic training"); *id.,* at 356a (shutdown zone would "result in a significant, adverse impact to realistic training"). We accept these officers' assertions that the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation.

These interests must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court. Plaintiffs have submitted declarations asserting that they take whale watching trips, observe marine mammals underwater, conduct scientific ***26** research on marine mammals, and photograph these animals in their natural habitats. Plaintiffs contend that the Navy's use of MFA sonar will injure marine ****378** mammals or alter their behavioral patterns, impairing plaintiffs' ability to study and observe the animals.

While we do not question the seriousness of these interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President —the Commander in Chief—has determined that training with active sonar is "essential to national security." *Id.*, at App. 232a.

The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.

C

1. Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion. The court's entire discussion of these factors consisted of one (albeit lengthy) sentence: "The Court is also satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur if prevented from using MFA sonar, absent the use of effective mitigation ***27** measures, during a subset of their regular activities in one part of one state for a limited period." *Id.,* at 217a–218a. As the prior Ninth Circuit panel in this case put it, in staying the District Court's original preliminary injunction, "[t]he district court did not give serious consideration to the public interest factor." 502 F.3d, at 863. The District Court's order on remand did nothing to cure this defect, but simply repeated nearly verbatim the same sentence from its previous

order. Compare 530 F.Supp.2d, at 1118, with Pet.App. 217a–218a. The subsequent Ninth Circuit panel framed its opinion as reviewing the District Court's exercise of discretion, 518 F.3d, at 697–699, but that discretion was barely exercised here.

The Court of Appeals held that the balance of equities and the public interest favored the plaintiffs, largely based on its view that the preliminary injunction would not in fact impose a significant burden on the Navy's ability to conduct its training exercises and certify its strike groups. *Id.*, at 698–699. The court deemed the Navy's concerns about the preliminary injunction "speculative" because the Navy had not operated under similar procedures before. *Ibid.* But this is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. See Wright & Miller § 2948.2, at 167 – 168 ("The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome").

2. The preliminary injunction requires the Navy to shut down its MFA sonar if a ****379** marine mammal is detected within 2,200 yards of a sonar-emitting vessel. The Ninth Circuit stated that the 2,200–yard shutdown zone would not be overly burdensome because sightings of marine mammals ***28** during training exercises are relatively rare. But regardless of the frequency of marine mammal sightings, the injunction will greatly increase the size of the shutdown zone. Pursuant to its exemption from the MMPA, the Navy agreed to reduce the power of its MFA sonar at 1,000 yards and 500 yards, and to completely turn off the system at 200 yards. Pet.App. 222a–230a. The District Court's injunction does not include a graduated power-down, instead requiring a total shutdown of MFA sonar if a marine mammal is detected within 2,200 yards of a sonar-emitting vessel. There is an exponential relationship between radius length and surface area (Area = r^2). Increasing the radius of the shutdown zone from 200 to 2,200 yards would accordingly expand the surface area of the shutdown zone by a factor of over 100 (from 125,664 square yards to 15,205,308 square yards).

The lower courts did not give sufficient weight to the views of several top Navy officers, who emphasized that because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. *Id.*, at 344a. Limiting the number of sonar shutdowns is particularly important during the Joint Tactical Force Exercises, which usually last for less than two weeks. *Ibid.* Rear Admiral John Bird explained that the 2,200–yard shutdown zone would cause operational commanders to "lose awareness of the tactical situation through the constant stopping and starting of MFA [sonar]." *Id.*, at 332a; see also *id.*, at 356a ("It may take days to get to the pivotal attack in antisubmarine warfare, but only minutes to confound the results upon which certification is based"). Even if there is a low likelihood of a marine mammal sighting, the preliminary

injunction would clearly increase the number of disruptive sonar shutdowns the Navy is forced to perform during its SOCAL training exercises.

The Court of Appeals also concluded that the 2,200–yard shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar 27 times during its eight ***29** prior training exercises in SOCAL; in several of these cases, the Navy turned off its sonar when marine mammals were spotted well beyond the Navy's self-imposed 200–yard shutdown zone. 518 F.3d, at 700, n. 65. Vice Admiral Samuel Locklear III—the Commander of the Navy's Third Fleet—stated that any shutdowns beyond the 200–yard zone were voluntary avoidance measures that likely took place at tactically insignificant times; the Ninth Circuit discounted this explanation as not supported by the record. *Ibid.* In reaching this conclusion, the Court of Appeals ignored key portions of Vice Admiral Locklear's declaration, in which he stated unequivocally that commanding officers "would not shut down sonar until legally required to do so if in contact with a submarine." Pet.App. 354a–355a. Similarly, if a commanding officer is in contact with a target submarine, "the CO will be expected to continue to use active sonar unless another ship or helicopter can gain contact or if regulatory reasons dictate otherwise." *Id.*, at 355a. The record supports the Navy's contention that its shutdowns of MFA sonar during prior training exercises only occurred during tactically insignificant times; those voluntary shutdowns do not justify the District Court's imposition of a mandatory 2,200–yard shutdown zone.

Lastly, the Ninth Circuit stated that a 2,200–yard shutdown zone was feasible because the Navy had previously adopted a 2,000–meter zone for low-frequency active ****380** (LFA) sonar. The Court of Appeals failed to give sufficient weight to the fact that LFA sonar is used for long-range detection of enemy submarines, and thus its use and shutdown involve tactical considerations quite different from those associated with MFA sonar. See App. 508 (noting that equating MFA sonar with LFA sonar "is completely misleading and is like comparing 20 degrees Fahrenheit to 20 degrees Celsius").

3. The Court of Appeals also concluded that the Navy's training exercises would not be significantly affected by the requirement that it power down MFA sonar by 6 dB during ***30** significant surface ducting conditions. Again, we think the Ninth Circuit understated the burden this requirement would impose on the Navy's ability to conduct realistic training exercises.

Surface ducting is a phenomenon in which relatively little sound energy penetrates beyond a narrow layer near the surface of the water. When surface ducting occurs, active sonar becomes more useful near the surface but less useful at greater depths. Pet.App. 299a–300a. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. *Id.,* at 333a.

The Ninth Circuit determined that the power-down requirement during surface ducting conditions was unlikely to affect certification of the Navy's strike groups because surface ducting occurs relatively rarely, and the Navy

has previously certified strike groups that did not train under such conditions. 518 F.3d, at 701–702. This reasoning is backwards. Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Rear Admiral Bird explained that the 6 dB power-down requirement makes the training less valuable because it "exposes [sonar operators] to unrealistically lower levels of mutual interference caused by multiple sonar systems operating together by the ships within the Strike Group." Pet.App. 281a (footnote and some capitalization omitted). Although a 6 dB reduction may not seem terribly significant, decibels are measured on a logarithmic scale, so a 6 dB decrease in power equates to a 75% reduction. *Id.,* at 284a–285a.

4. The District Court acknowledged that " 'the imposition of these mitigation measures will require the Navy to alter and adapt the way it conducts antisubmarine warfare training—a substantial challenge. Nevertheless, evidence presented to the Court reflects that the Navy has employed mitigation measures in the past, without sacrificing training ***31** objectives.' " 527 F.Supp.2d, at 1238. Apparently no good deed goes unpunished. The fact that the Navy has taken measures in the past to address concerns about marine mammals—or, for that matter, has elected not to challenge four additional restrictions imposed by the District Court in this case, see *supra,* at 373 – 374—hardly means that other, more intrusive restrictions pose no threat to preparedness for war.

The Court of Appeals concluded its opinion by stating that "the Navy may return to the district court to request relief on an emergency basis" if the preliminary injunction "actually result[s] in an inability to train and certify sufficient naval forces to provide for the national defense." 518 F.3d, at 703. This is cold comfort to the Navy. The Navy contends that the injunction will hinder efforts to train sonar operators under realistic conditions, ultimately leaving strike groups more vulnerable to enemy submarines. Unlike the Ninth Circuit, we do not think the Navy is required to wait until the injunction "actually result[s] in an inability to train ... sufficient naval forces for the national defense" before ****381** seeking its dissolution. By then it may be too late.

IV

As noted above, we do not address the underlying merits of plaintiffs' claims. While we have authority to proceed to such a decision at this point, see *Munaf,* 553 U.S., at 691 – 692, 128 S.Ct., at 2219 – 2220, doing so is not necessary here. In addition, reaching the merits is complicated by the fact that the lower courts addressed only one of several issues raised, and plaintiffs have largely chosen not to defend the decision below on that ground. [5]

[5] The bulk of Justice GINSBURG's dissent is devoted to the merits. For the reasons stated, we find the injunctive relief granted in this case an abuse of discretion, even if plaintiffs are correct on the underlying merits. As to the injunction, the dissent barely mentions the Navy's interests. *Post,* at 392 – 393. We find that those interests, and the

documented risks to national security, clearly outweigh the harm on the other side of the balance.

We agree with much of Justice BREYER's analysis, *post,* at 383 – 386 (opinion concurring in part and dissenting in part), but disagree with his conclusion that the modified conditions imposed by the stay order should remain in force until the Navy completes its EIS, *post,* at 386 – 387. The Court is reviewing the District Court's imposition of the preliminary injunction; once we conclude, as Justice BREYER does, *post,* at 386, that the preliminary injunction should be vacated, the stay order is no longer pertinent. A stay is a useful tool for managing the impact of injunctive relief *pending further appeal,* but once the Court resolves the merits of the appeal, the stay ceases to be relevant. See 518 F.3d 704, 706 (C.A.9 2008) ("[T]he partial stay ... shall remain in effect until final disposition by the Supreme Court"). Unexamined conditions imposed by the stay order are certainly no basis for what would be in effect the entry of a new preliminary injunction by this Court.

***32** At the same time, what we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction. An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course. *Romero–Barcelo,* 456 U.S., at 313, 102 S.Ct. 1798 ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

The factors examined above—the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. See *Amoco Production Co.,* 480 U.S., at 546, n. 12, 107 S.Ct. 1396 ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success"). Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such ***33** training in a manner credibly alleged to pose a serious threat to national security. This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal. A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy's training in the interim. See, *e.g., Steffel v. Thompson,* 415 U.S. 452, 466, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction"). In the meantime, we see no basis for jeopardizing national security, as the present injunction does. Plaintiffs confirmed at oral argument that the preliminary injunction was "the whole ball game," Tr. of Oral Arg. 33, and our analysis of the ****382** propriety of preliminary relief is applicable to any permanent injunction as well.

* * *

President Theodore Roosevelt explained that "the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed." President's Annual Message, 42 Cong. Rec. 81 (1907). We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines. The District Court abused its discretion by imposing a 2,200–yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions. The judgment of the Court of Appeals is reversed, and the preliminary injunction is vacated to the extent it has been challenged by the Navy.

It is so ordered.

***34** Justice BREYER, with whom Justice STEVENS joins as to Part I, concurring in part and dissenting in part.

As of December 2006, the United States Navy planned to engage in a series of 14 antisubmarine warfare training exercises off the southern California coast. The Natural Resources Defense Council, Inc., and others (NRDC) brought this case in Federal District Court claiming that the National Environmental Policy Act of 1969 (NEPA) requires the Navy to prepare an environmental impact statement (EIS) (assessing the impact of the exercises on marine mammals) prior to its engaging in the exercises. As the case reaches us, the District Court has found that the NRDC will likely prevail on its demand for an EIS; the Navy has agreed to prepare an EIS; the District Court has forbidden the Navy to proceed with the exercises unless it adopts six mitigating measures; and the Navy has agreed to adopt all but two of those measures.

The controversy between the parties now concerns the two measures that the Navy is unwilling to adopt. The first concerns the "shutdown zone," a circle with a ship at the center within which the Navy must try to spot marine mammals and shut down its sonar if one is found. The controverted condition would enlarge the radius of that circle from about one-tenth of a mile (200 yards) to one and one-quarter miles (2,200 yards). The second concerns special ocean conditions called "surface ducting conditions." The controverted condition would require the Navy, when it encounters any such condition, to diminish the sonar's power by 75%. The Court of Appeals affirmed the District Court order that contained these two conditions. 518 F.3d 658, 703 (C.A.9 2008).

I

We must now decide whether the District Court was legally correct in forbidding the training exercises *unless* the Navy implemented the two controverted conditions. In ***35** doing so, I assume, like the Court, that the NRDC will prevail on its demand for an EIS. (Indeed, the Navy is in the process of preparing

one.) And, I would ask whether, in imposing these conditions, the District Court properly "balance[d the] harms." See, *e.g., Amoco Production Co. v. Gambell,* 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

Respondents' (the plaintiffs) argument favoring the District Court injunction is a strong one. As Justice GINSBURG well points out, see *post,* at 389 – 390 (dissenting opinion), the very point of NEPA's insistence upon the writing of an EIS is to ****383** force an agency "carefully" to "consider ... detailed information concerning significant environmental impacts," while "giv[ing] the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.' " *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). NEPA seeks to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations. An EIS does not force them to make any particular decision, but it does lead them to take environmental considerations into account when they decide whether, or how, to act. *Id.,* at 354, 109 S.Ct. 1835. Thus, when a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place. In this case, for example, the *absence* of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring. The absence of an injunction thereby threatens to cause the very environmental harm that a full preaction EIS might have led the Navy to avoid (say, by adopting the two additional mitigation measures that the NRDC proposes). Consequently, if the exercises are to continue, conditions designed to mitigate interim environmental harm may well be appropriate.

***36** On the other hand, several features of this case lead me to conclude that the record, as now before us, lacks adequate support for an injunction imposing the two controverted requirements. *First,* the evidence of need for the two special conditions is weak or uncertain. The record does show that the exercises as the Navy originally proposed them could harm marine mammals. The District Court found (based on the Navy's study of the matter) that the exercises might cause 466 instances of Level A harm and 170,000 instances of Level B harm. App. to Pet. for Cert. 196a–197a. (The environmental assessment actually predicted 564 instances of Level A harm. See App. 223–224.) The study defines Level A injury as "any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild" through "destruction or loss of biological tissue," whether "slight to severe." *Id.,* at 160. It defines Level B harm as " 'any act that disturbs or is likely to disturb a marine mammal ... by causing disruption of natural behavioral patterns including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behaviors are abandoned or significantly altered' " and describes it as a "short term" and "temporary" "disturbance." *Id.,* at 161, 175.

The raw numbers seem large. But the parties argue about the extent to which they mean

likely harm. The Navy says the classifications and estimates err on the side of caution. (When in doubt about the amount of harm to a mammal, the study assumed the harm would qualify as Level A harassment. *Id.,* at 200.) The Navy also points out that, by definition, mammals recover from Level B injuries, often very quickly. It notes that, despite 40 years of naval exercises off the southern California coast, no injured marine mammal has ever been found. App. to Pet. for Cert. 274a–275a. (It adds that dolphins often swim alongside the ships. *Id.,* at 290a, 346a.) At the same time, plaintiffs point to instances where whales have been found stranded. They add ***37** that scientific studies have found a connection between those beachings and the Navy's use of sonar, see, *e.g.,* App. 600–602, and the ****384** Navy has acknowledged one stranding where "U.S. Navy mid-frequency sonar has been identified as the most plausible contributory source to the stranding event," *id.,* at 168.

Given the uncertainty the figures create in respect to the harm caused by the Navy's original training plans, it would seem important to have before us at least some estimate of the harm likely avoided by the Navy's decision not to contest here *four of the six mitigating conditions* that the District Court ordered. Without such evidence, it is difficult to assess the *relevant* harm—that is, the environmental harm likely caused by the Navy's exercises with the four uncontested mitigation measures (but without the two contested mitigation measures) in place.

Second, the Navy has filed multiple affidavits from Navy officials explaining in detail the seriousness of the harm that the delay associated with completion of this EIS (approximately one year) would create in respect to the Navy's ability to maintain an adequate national defense. See generally App. to Pet. for Cert. 260a–357a. Taken by themselves, those affidavits make a strong case for the proposition that insistence upon the two additional mitigating conditions would seriously interfere with necessary defense training.

The affidavits explain the importance of training in antisubmarine warfare, *id.,* at 263a; the need to use active sonar to detect enemy submarines, *id.,* at 266a–267a, App. 566; the complexity of a training exercise involving sonar, App. to Pet. for Cert. 343a; the need for realistic conditions when training exercises take place, *id.,* at 299a–300a, App. 566; the "cascading" negative "effect" that delay in one important aspect of a set of coordinated training exercises has upon the Navy's ability "to provide combat ready forces," App. to Pet. for Cert. 343a; the cost and disruption that would accompany the adoption of the two additional mitigating conditions that ***38** the NRDC seeks, *ibid.*; the Navy's resulting inability adequately to train personnel, *id.,* at 278a; the effectiveness of the mammal-protecting measures that the Navy has taken in the past, *id.,* at 285a–298a; and the reasonable likelihood that the mitigating conditions to which it has agreed will prove adequate, *id.,* at 296a.

Third, and particularly important in my view, the District Court did not explain *why* it rejected the Navy's affidavit-supported contentions. In its first opinion enjoining the use of sonar, the District Court simply stated:

> "The Court is ... satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur if prevented from using [mid-frequency active (MFA)] sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period." *Id.,* at 217a–218a.

Following remand from the Court of Appeals, the District Court simply repeated, word for word, this same statement. It said:

> "The Court is ... satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur (or the public interest would suffer) if Defendants were prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period." 530 F.Supp.2d 1110, 1118 (C.D.Cal.2008).

With respect to the imposition of the 2,200-yard shutdown zone, the District Court ****385** noted evidence of the harm that MFA sonar poses to marine mammals, and then concluded that "[t]he Court therefore is persuaded that while the 2200 yard shutdown requirement may protect marine mammals ***39** from the harshest of sonar-related consequences, it represents a minimal imposition [on] the Navy's training exercises." *Id.,* at 1119. The District Court did not there explain the basis for that conclusion. With respect to the imposition of the surface ducting condition, the District Court said nothing about the Navy's interests at all. *Id.,* at 1120–1121.

While a district court is often free simply to state its conclusion in summary fashion, in this instance neither that conclusion, nor anything else I have found in the District Court's opinion, answers the Navy's documented claims that the two extra conditions the District Court imposed will, in effect, seriously interfere with its ability to carry out necessary training exercises.

The first condition requires the Navy to reduce the power of its sonar equipment by 75% when the ship encounters a condition called "surface ducting" that occurs when the presence of layers of water of different temperature make it unusually difficult for sonar operators to determine whether a diesel submarine is hiding below. Rear Admiral John Bird, an expert in submarine warfare, made clear that the 75% power-reduction requirement was equivalent to forbidding any related training. App. to Pet. for Cert. 297a. But he says in paragraph 52 of his declaration: "Training in surface ducting conditions is critical to effective training because sonar operators need to learn how sonar transmissions are altered due to surface ducting and how submarines may take advantage of them." *Id.,* at 299a–300a. The District Court, as far as I can tell, did not even acknowledge in its opinion the Navy's asserted interest in being able to train under these conditions. 530 F.Supp.2d, at 1120–1121.

The second condition requires the Navy to expand the sonar "shutdown" area surrounding a ship (*i.e.,* turn off the sonar if a mammal is spotted in the area) from a circle with a

radius of about one-tenth of a mile to a circle with a radius of about one mile and a quarter. Both sides agree that this ***40** requirement will lead to more shutdowns. Admiral Gary Roughead, Chief of Naval Operations, states in paragraph 12 of his declaration that this expanded zone requirement "will result in increased interruptions to training exercises, ... vastly increas[ing] the risk of negating training effectiveness, preventing strike group certification, and disrupting carefully orchestrated deployment plans to meet world-wide operational commitments." App. to Pet. for Cert. 344a. Again, I can find nothing in the District Court's opinion that specifically explains why this is not so. 530 F.Supp.2d, at 1119–1120.

Fourth, the Court of Appeals sought, through its own thorough examination of the record, to supply the missing explanations. But those explanations are not sufficient. In respect to the surface ducting conditions, the Court of Appeals rejected the Navy's contentions on the ground that those conditions are "rar[e]," and the Navy has certified trainings that did not involve any encounter with those conditions. 518 F.3d, at 701–702. I am not certain, however, why the rarity of the condition supports the District Court's conclusion. Rarity argues as strongly for training when the condition is encountered as it argues for the contrary.

In respect to the expansion of the "shutdown" area, the Court of Appeals noted that (1) the Navy in earlier exercises had shut down its sonar when marine mammals were sited within about one-half a ****386** mile, (2) the Navy has used a larger shutdown area when engaged in exercises with lower frequency sonar equipment, and (3) foreign navies have used larger shutdown areas. *Id.,* at 699–701, and nn. 63, 67. But the Navy's affidavits state that (1) earlier shutdowns when marine mammals were spotted at farther distances "likely occurred during tactically insignificant times," App. to Pet. for Cert. 356a, (2) ships with low frequency sonar (unlike the sonar here at issue) have equipment that makes it easier to monitor the larger area, particularly by significantly reducing the number of monitoring personnel necessarily involved, and (3) foreign navy experience is not relevant given the ***41** potentially different military demands upon those navies, App. 508–509.

Finally, the Court of Appeals, mirroring a similar District Court suggestion in the language I have quoted, says that "the exercises in southern California are only a subset of the Navy's training activities involving active sonar." 518 F.3d, at 702. It adds that the Navy's study "shows the Navy is still able to conduct its exercises in alternative locations, in reduced number, or through simulation." *Ibid.,* n. 69. The Court of Appeals, however, also concluded that the study "provides reasonably detailed justifications for why the Southern California Operating Area is uniquely suited to these exercises, and demonstrates that the Navy would suffer a certain hardship if the considered alternatives were employed instead." *Ibid.*

Fifth, when the Court of Appeals first heard this case following the District Court's imposition of a broad, absolute injunction, it held that any injunction must be crafted so that the Navy could continue its training exercises. Noting

that the Navy had, in the past, been able to use mitigation measures to "reduce the harmful effects of its active sonar," it "vacate[d] the stay and remand[ed] this matter to the district court to narrow its injunction so as to provide mitigation conditions *under which the Navy may conduct its training exercises*." 508 F.3d 885, 887 (C.A.9 2007) (emphasis added). For the reasons just stated, neither the District Court nor the Court of Appeals has explained why we should reject the Navy's assertions that it cannot effectively conduct its training exercises under the mitigation conditions imposed by the District Court.

I would thus vacate the preliminary injunction imposed by the District Court to the extent it has been challenged by the Navy. Neither the District Court nor the Court of Appeals has adequately explained its conclusion that the balance of the equities tips in favor of plaintiffs. Nor do those parts of the record to which the parties have pointed supply the missing explanation.

***42** II

Nonetheless, as the Court of Appeals held when it first considered this case, the Navy's past use of mitigation conditions makes clear that the Navy can effectively train under *some* mitigation conditions. In the ordinary course, I would remand so the District Court could, pursuant to the Court of Appeals' direction, set forth mitigation conditions that will protect the marine wildlife while also enabling the Navy to carry out its exercises. But, at this point, the Navy has informed us that this set of exercises will be complete by January, at the latest, and an EIS will likely be complete at that point, as well. Thus, by the time the District Court would have an opportunity to impose new conditions, the case could very well be moot.

In February of this year, the Court of Appeals stayed the injunction imposed by the District Court—*but only pending this Court's resolution of the case*. The Court ****387** of Appeals concluded that "[i]n light of the short time before the Navy is to commence its next exercise, the importance of the Navy's mission to provide for the national defense and the representation by the Chief of Naval Operations that the district court's preliminary injunction in its current form will 'unacceptably risk' effective training and strike group certification and thereby interfere with his statutory responsibility ... to 'organiz[e], train[ ], and equip[ ] the Navy,' " interim relief was appropriate, and the court then modified the two mitigation conditions at issue. 518 F.3d 704, 705 (C.A.9 2008).

With respect to the 2,200-yard shutdown zone, it required the Navy to suspend its use of the sonar if a marine mammal is detected within 2,200 yards, *except* when sonar is being used at a "critical point in the exercise," in which case the amount by which the Navy must power down is proportional to the mammal's proximity to the sonar. *Id.*, at 705–706 (internal quotation marks omitted). With respect to surface ducting, the Navy is only required to shut down sonar altogether ***43** when a marine mammal is detected within 500 meters and the amount by which it is otherwise required to power down is again proportional to the mammal's proximity to

the sonar source. *Ibid.* The court believed these conditions would permit the Navy to go forward with its imminently planned exercises while at the same time minimizing the harm to marine wildlife.

In my view, the modified conditions imposed by the Court of Appeals in its February stay order reflect the best equitable conditions that can be created in the short time available before the exercises are complete and the EIS is ready. The Navy has been training under these conditions since February, so allowing them to remain in place will, in effect, maintain what has become the status quo. Therefore, I would modify the Court of Appeals' February 29, 2008, order so that the provisional conditions it contains remain in place until the Navy's completion of an acceptable EIS.

Justice GINSBURG, with whom Justice SOUTER joins, dissenting.

The central question in this action under the National Environmental Policy Act of 1969 (NEPA) was whether the Navy must prepare an environmental impact statement (EIS). The Navy does not challenge its obligation to do so, and it represents that the EIS will be complete in January 2009—one month after the instant exercises conclude. If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy's training could have proceeded without interruption. Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve. To justify its course, the Navy sought dispensation not from Congress, but from an executive council that lacks authority to countermand or revise NEPA's requirements. I would hold that, in imposing manageable measures to mitigate harm until completion of the ***44** EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.

I

In December 2006, the Navy announced its intent to prepare an EIS to address the potential environmental effects of its naval readiness activities in the Southern California (SOCAL) Range Complex. See 71 Fed.Reg. 76639 (2006). These readiness activities include expansion and intensification of naval training, as well as research, development, and testing of various systems and weapons. *Id.,* at 76639, 76640. The EIS process is underway, and the ****388** Navy represents that it will be complete in January 2009. Brief for Petitioners 11; Tr. of Oral Arg. 11.

In February 2007, seeking to commence training before completion of the EIS, the Navy prepared an environmental assessment (EA) for the 14 exercises it planned to undertake in the interim. See App. to Pet. for Cert. 235a.[1] On February 12, the Navy concluded the EA with a finding of no significant impact. App. 225–226. The same day, the Navy commenced its training exercises. *Id.,* at 227 ("The Proposed Action is hereby implemented.").

1 An EA is used "for determining whether to prepare" an EIS. *Department of Transportation v. Public Citizen,* 541 U.S. 752, 757, 124 S.Ct.

> 2204, 159 L.Ed.2d 60 (2004) (quoting 40 CFR § 1508.9(a) (2003)); see *ante,* at 371 – 372 (opinion of the Court). By definition, an EA alone does not satisfy an agency's obligation under NEPA if the effects of a proposed action require preparation of a full EIS.

On March 22, 2007, the Natural Resources Defense Council, Inc. (NRDC), filed suit in the U.S. District Court for the Central District of California, seeking declaratory and injunctive relief based on the Navy's alleged violations of NEPA and other environmental statutes. As relevant here, the District Court determined that NRDC was likely to succeed on its NEPA claim and that equitable principles warranted preliminary relief. On August 7, 2007, the court ***45** enjoined the Navy's use of mid-frequency active (MFA) sonar during the 11 remaining exercises at issue.

On August 31, the Court of Appeals for the Ninth Circuit stayed the injunction pending disposition of the Navy's appeal, and the Navy proceeded with two more exercises. In a November 13 order, the Court of Appeals vacated the stay, stating that NRDC had shown "a strong likelihood of success on the merits" and that preliminary injunctive relief was appropriate. 508 F.3d 885, 886 (2007). The Court of Appeals remanded, however, instructing the District Court to provide mitigation measures under which the Navy could conduct its remaining exercises.

On remand, the District Court received briefing from both parties. In addition, the court "toured the *USS Milius* at the naval base in San Diego, California, to improve its understanding of the Navy's sonar training procedures and the feasibility of the parties' proposed mitigation measures. Counsel for both [parties] were present." 530 F.Supp.2d 1110, 1112 (2008). On January 3, 2008, the District Court entered a modified preliminary injunction imposing six mitigation measures. The court revised the modified injunction slightly on January 10 in response to filings by the Navy, and four days later, denied the Navy's application for a stay pending appeal.

On the following day, January 15, the Council on Environmental Quality (CEQ), an advisory body within the Executive Office of the President, responded to the Navy's request for "alternative arrangements" for NEPA compliance. App. to Pet. for Cert. 233a. The "arrangements" CEQ set out purported to permit the Navy to continue its training without timely environmental review. *Id.,* at 241a–247a. The Navy accepted the arrangements on the same day. App. 228.

The Navy then filed an emergency motion in the Court of Appeals requesting immediate vacatur of the District Court's modified injunction. CEQ's action, the Navy urged, ***46** eliminated the injunction's legal foundation. In the alternative, the Navy sought a stay of two aspects of the injunction pending its appeal: the 2,200–yard mandatory shutdown zone and the power-down requirement in significant ****389** surface ducting conditions, see *ante,* at 373 – 374 (opinion of the Court). While targeting in its stay application only two of the six measures imposed by the District Court, the Navy explicitly reserved the right to challenge on appeal each of the six mitigation measures. Responding to the Navy's emergency motion, the Court of Appeals remanded the matter to

allow the District Court to determine in the first instance the effect of the intervening executive action. Pending its own consideration of the Navy's motion, the District Court stayed the injunction, and the Navy conducted its sixth exercise.

On February 4, after briefing and oral argument, the District Court denied the Navy's motion. The Navy appealed, reiterating its position that CEQ's action eliminated all justification for the injunction. The Navy also argued that vacatur of the entire injunction was required irrespective of CEQ's action, in part because the "conditions imposed, in particular the 2,200 yard mandatory shutdown zone and the six decibel (75%) power-down in significant surface ducting conditions, severely degrade the Navy's training." Brief for Appellants in No. 08–55054(CA9), p. 15. In the February 29 decision now under review, the Court of Appeals affirmed the District Court's judgment. 518 F.3d 658, 703 (2008). The Navy has continued training in the meantime and plans to complete its final exercise in December 2008.

As the procedural history indicates, the courts below determined that an EIS was required for the 14 exercises. The Navy does not challenge that decision in this Court. Instead, the Navy defends its failure to complete an EIS before launching the exercises based upon CEQ's "alternative arrangements"—arrangements the Navy sought and obtained in order to overcome the lower courts' rulings. As ***47** explained below, the Navy's actions undermined NEPA and took an extraordinary course.

II

NEPA "promotes its sweeping commitment" to environmental integrity "by focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Ibid.*

The EIS is NEPA's core requirement. *Department of Transportation v. Public Citizen,* 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). This Court has characterized the requirement as "action-forcing." *Andrus v. Sierra Club,* 442 U.S. 347, 350, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979) (internal quotation marks omitted). Environmental concerns must be "integrated into the very process of agency decisionmaking" and "interwoven into the fabric of agency planning." *Id.,* at 350–351, 99 S.Ct. 2335. In addition to discussing potential consequences, an EIS must describe potential mitigation measures and alternatives to the proposed course of action. See *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 351–352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) (citing 40 CFR §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c) (1987)). The EIS requirement "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." 490 U.S., at 349, 109 S.Ct. 1835.

"Publication of an EIS ... also serves a larger informational role." *Ibid.* It demonstrates that an agency has indeed considered environmental concerns, and ****390** "perhaps more significantly, provides a springboard for public comment." *Ibid.* At the same time, it affords other affected governmental bodies "notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Id.,* at 350, 109 S.Ct. 1835.

***48** In light of these objectives, the timing of an EIS is critical. CEQ regulations instruct agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values." 40 CFR § 1501.2 (1987). An EIS must be prepared "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." *Andrus,* 442 U.S., at 351–352, n. 3, 99 S.Ct. 2335 (quoting 43 Fed.Reg. 55995 (1478) (codified in 40 CFR § 1502.5 (1979))).

The Navy's publication of its EIS in this case, scheduled to occur *after* the 14 exercises are completed, defeats NEPA's informational and participatory purposes. The Navy's inverted timing, it bears emphasis, is the very reason why the District Court had to confront the question of mitigation measures at all. Had the Navy prepared a legally sufficient EIS before beginning the SOCAL exercises, NEPA would have functioned as its drafters intended: The EIS process and associated public input might have convinced the Navy voluntarily to adopt mitigation measures, but NEPA itself would not have impeded the Navy's exercises. See *Public Citizen,* 541 U.S., at 756, 769, n. 2, 124 S.Ct. 2204 (noting that NEPA does not mandate particular results, but rather establishes procedural requirements with a "focus on improving agency decisionmaking").

The Navy had other options. Most importantly, it could have requested assistance from Congress. The Government has sometimes obtained congressional authorization to proceed with planned activities without fulfilling NEPA's requirements. See, *e.g.,* Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub.L. 106–398, § 317, 114 Stat. 1654A–57 (exempting the military from preparing a programmatic EIS for low-level flight training); 42 U.S.C. § 10141(c) (2000 ed.) (exempting the Environmental Protection Agency from preparing an EIS for the development of criteria for handling spent nuclear fuel and high-level ***49** radioactive waste); 43 U.S.C. § 1652(d) (exempting construction of the trans-Alaska oil pipeline from further NEPA compliance).

Rather than resorting to Congress, the Navy "sought relief from the Executive Branch." *Ante,* at 373 (opinion of the Court). On January 10, 2008, the Navy asked CEQ, adviser to the President, to approve alternative arrangements for NEPA compliance pursuant to 40 CFR § 1506.11 (1987). App. to Pet. for Cert. 233a; see *ante,* at 373, n. 3. The next day, the Navy submitted supplementary material to CEQ, including the Navy's EA and after-action reports, the District Court's orders, and two analyses by the National Marine Fisheries Service (NMFS). App. to Pet. for Cert. 237a–238a. Neither the Navy nor CEQ notified

NRDC, and CEQ did not request or consider any of the materials underlying the District Court orders it addressed.

Four days later, on January 15, the Chairman of CEQ issued a letter to the Secretary of the Navy. Repeating the Navy's submissions with little independent analysis, the letter stated that the District Court's orders posed risks to the Navy's training exercises. See *id.,* at 238a ("You have explained that the training restrictions set forth in the ... injunctive orders prevent the Navy from providing Strike Groups with adequate proficiency training ****391** and create a substantial risk of precluding certification of the Strike Groups as combat ready.").

The letter continued:

> "Discussions between our staffs, your letter and supporting documents, and the classified declaration and briefings I have received, have clearly determined that the Navy cannot ensure the necessary training to certify strike groups for deployment under the terms of the injunctive orders. Based on the record supporting your request ... CEQ has concluded that the Navy must be able to conduct the [exercises] ... in a timeframe that does not provide sufficient time to complete an EIS. ***50** Therefore, emergency circumstances are present for the nine exercises and alternative arrangements for compliance with NEPA under CEQ regulation 40 C.F.R. § 1506.11 are warranted." *Id.,* at 240a.

The alternative arrangements CEQ set forth do not vindicate NEPA's objectives. The arrangements provide for "public participation measures," which require the Navy to provide notices of the alternative arrangements. *Id.,* at 241a, 242a. The notices must "seek input on the process for reviewing post-exercise assessments" and "include an offer to meet jointly with Navy representatives ... and CEQ to discuss the alternative arrangements." *Id.,* at 242a–243a. The alternative arrangements also describe the Navy's existing research and mitigation efforts. *Id.,* at 243a–247a.

CEQ's hasty decision on a one-sided record is no substitute for the District Court's considered judgment based on a two-sided record.[2] More fundamentally, even an exemplary CEQ review could not have effected the short circuit the Navy sought. CEQ lacks authority to absolve an agency of its statutory duty to prepare an EIS. NEPA established CEQ to assist and advise the President on environmental policy, 42 U.S.C. § 4342, and a 1977 Executive Order charged CEQ with issuing regulations to federal agencies for implementation of NEPA's procedural provisions, Exec. Order No. 11991, 3 CFR 123 (1977 Comp.). This Court has recognized that CEQ's regulations are entitled to "substantial deference," *Robertson,* 490 U.S., at 355, 109 S.Ct. 1835, and 40 CFR § 1506.11 indicates that CEQ may play an important consultative role in emergency circumstances, but we have never suggested that CEQ could eliminate the statute's command. If the ***51** Navy sought to avoid its NEPA obligations, its remedy lay in the Legislative Branch. The Navy's alternative course—rapid, self-serving resort to an office in the White House—is surely not what Congress had in mind when it instructed agencies to comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332.[3]

[2] The District Court may well have given too spare an explanation for the balance of hardships in issuing its injunction of August 7, 2007. The court cured any error in this regard, however, when it closely examined each mitigation measure in issuing the modified injunction of January 3, 2008. The Court of Appeals, too, conducted a detailed analysis of the record.

[3] On the same day that CEQ issued its letter, the President granted the Navy an exemption from the requirements of the Coastal Zone Management Act of 1972 (CZMA) pursuant to 16 U.S.C. § 1456(c)(1)(B) (2006 ed.). That exemption, expressly authorized by the CZMA, does not affect NRDC's NEPA claim.

III

A

Flexibility is a hallmark of equity jurisdiction. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to **392 the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (quoting *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.3, p. 195 (2d ed.1995). This Court has never rejected that formulation, and I do not believe it does so today.

Equity's flexibility is important in the NEPA context. Because an EIS is the tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm. The Court is correct that relief is not warranted "simply to prevent the possibility of some remote future injury." **52 *Ante,* at 375 (quoting Wright & Miller, *supra,* § 2948.1, at 155). "However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis." Wright & Miller, *supra,* § 2948.1, at 155–156 (footnote omitted). I agree with the District Court that NRDC made the required showing here.

B

The Navy's own EA predicted substantial and irreparable harm to marine mammals. Sonar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs. *E.g.,* App. 600–602; *id.*, at 360–362, 478–479. As the Ninth Circuit noted, the EA predicts that the Navy's "use of MFA sonar in the SOCAL exercises will result in 564 instances

of physical injury including permanent hearing loss (Level A harassment) and nearly 170,000 behavioral disturbances (Level B harassment), more than 8,000 of which would also involve temporary hearing loss." 518 F.3d, at 696; see App. 223–224. Within those totals,

> "the EA predicts 436 Level A harassments of Cuvier's beaked whales. According to [the National Oceanic and Atmospheric Administration (NOAA)], as few as 1,121 ... may exist in California, Oregon and Washington combined. Likewise, the EA predicts 1,092 Level B harassments of bottlenose dolphins, of which only 5,271 may exist in the California Coastal and Offshore stocks." 518 F.3d, at 691–692.

The majority acknowledges the lower courts' findings, *ante,* at 374, but also states that the EA predicted "only eight Level A harassments of common dolphins each year" and "274 Level B harassments of beaked whales per year, none of which would result in permanent injury," *ante,* at 372. Those numbers do not fully capture the EA's predictions.

***53** The EA classified the harassments of beaked whales as Level A, not Level B. The EA does indeed state that "modeling predicts non-injurious Level B exposures." App. 185. But, as the majority correctly notes, *ante,* at 372, the EA also states that "all beaked whale exposures are counted as Level A," App. 185. The EA counted the predicted exposures as Level A "[b]y Navy policy developed in conjunction with NMFS." *Id.,* at 200. The record reflects "the known sensitivity of these species to tactical sonar," *id.,* at 365 (NOAA letter), ****393** and as the majority acknowledges, beaked whales are difficult to study, *ante,* at 372. Further, as the Ninth Circuit noted, "the EA ... maintained that the methodology used was based on the 'best available science.' " 518 F.3d, at 669. [4]

[4] The majority reasons that the environmental harm deserves less weight because the training exercises "have been taking place in SOCAL for the last 40 years," such that "this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment." *Ante,* at 376. But the EA explains that the proposed action is not a continuation of the "status quo training." App. 128. Instead, the EA is based on the Navy's proposal to employ a "surge" training strategy, *ibid.,* in which the commander "would have the option to conduct two concurrent major range events," *id.,* at 124.

In my view, this likely harm—170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121—cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy's 14 training exercises. There is no doubt that the training exercises serve critical interests. But those interests do not authorize the Navy to violate a statutory command, especially when recourse to the Legislature remains open. "Of course, military interests do not always trump other considerations, and we have not held that they do." *Ante,* at 378.

In light of the likely, substantial harm to the environment, NRDC's almost inevitable success on the merits of its claim ***54** that NEPA required the Navy to prepare an EIS, the history of this litigation, and the public interest, I cannot agree that the mitigation measures the District Court imposed signal an abuse of discretion. Cf. *Amoco Production Co. v. Gambell,* 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").

For the reasons stated, I would affirm the judgment of the Ninth Circuit.

All Citations

555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249, 67 ERC 1225, 77 USLW 4001, 08 Cal. Daily Op. Serv. 13,990, 2008 Daily Journal D.A.R. 16,797, 21 Fla. L. Weekly Fed. S 547

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