

ICANN

**Moderator: Brenda Brewer
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10:00 am CT**

Leon Sanchez: Thank you very much. Welcome, everyone, to our fifth meeting on the legal sub team for the Cross Community Working Group on Enhancing ICANN's Accountability on March 18, 2015. This call is being recorded and transcribed of course. And there will be small edits to both the recording and transcription for confidentiality reasons in those places where the names of the law firms are mentioned. And the rest of the call of course will be (unintelligible) and will be recorded.

I see we only - we're only missing Robin Gross but I think we can go ahead and start the call. The suggested agenda as previously circulated, was to - or is to review the legal scoping document in order to verify we have incorporated the lessons learned from our call with (unintelligible) (unintelligible) that would be (unintelligible) scoping and coordination with both law firms.

I saw an email yesterday from Samantha Eisner with some concerns which I think that some have been addressed already in our last call but I think it would be useful for us just to iron out some details that were posed on that email as well so I think that would answer this second point of the agenda.

And then I would like to call for coordination between the members of the sub team so we can all take notes or we can decide the work of taking notes in our Istanbul meeting with regards to those points that of course have to do with the legal advice we're seeking. I see Theresa Swinehart has also joined us. Welcome, Theresa.

Well, the roll call is of course those who are present on the Adobe Connect room and if there's anyone on the phone bridge that is not through the Adobe Connect room please state your name at this stage so we can record your participation in this call. Okay I see no one - or I hear no one - no one else besides those who are already present in the AC room.

And I'd like to go through - well we're missing Robin and Robin was supposed to incorporate the lessons learned to the scoping document so I think we might wait for her to come into the room and we can just keep the second point of the agenda for which I'd like to ask Sam Eisner to voice her concerns posed in the email sent to the list yesterday. So, Sam, would you be so kind to please take the floor...

Samantha Eisner: Sure.

Leon Sanchez: ...and raise your concerns?

Samantha Eisner: Thanks, Leon. This is Sam Eisner. I'm sorry I wasn't able to join the call on Monday and I did see the decision afterwards that the group would like to retain both [firm] and [firm] for the legal work.

[Sensitive information about deliberations]

Now that we are at the point where we've talked to [firm] another thing that we had discussed last week was that it might make sense to provide [firm] with an opportunity to respond to the specific questions that were raised regarding their abilities to meet the California law aspect.

And particularly now that we're in a situation where the group is recommending to move forward with two law firms, I think that's even more important to explore. We need to understand the exact roles that we expect different counsels to undertake. We need to understand if the perceived lack of experience or perceived whole in experience at [firm] is real.

There are costs in getting one firm up to speed. [Information about firm]. But there also are specific accountability related issues. We need to make sure that we have reason to have two separate firms. It could well be that even after discussion with [firm] about the specific questions that we still need - the CCWG still believes that it needs to have two separate firms.

But it will be a lot clearer what the difference in the roles of those two firms will be and how they can be expected to work together. We need to make sure that we if we get into a two firm situation we have the lines drawn very clearly because the separate risks of having two firms is having two firms doing duplicate work. And that's also a place where ICANN has a responsibility to make sure that we are not using the community funds in that way.

So my - when I reached out to [firm] yesterday before the CCWG call and that was for the purpose of informing them that this group would like to form some sort of dual representation, make sure that that was something that [firm] would even be interested in entertaining if they were to move forward with working with the CCWG, which they confirmed that it was.

[Sensitive information about deliberation]

So, I mean, clearly if we move forward with our retention of firm, we'd share the scoping document with them in any event, but I think it would behoove us to get that to them sooner rather than later so we can have a quick conversation with them to make sure that we understand the scope of responsibilities for each of the groups and then that way we can figure out what the engagement looks like too because having the two firms engaged in how they will be directed to work together will be an important part of any engagement letter or letters that we have enter into.

Leon Sanchez: Thanks, Sam. You're right, many of the points that you've raised are common to the participants of this group. [Sensitive information about deliberations]

I mean, I think that both law firms were very impressive. And I think that we have to go with either law firm in the case we should have to choose with only one.

But the feeling in the room I felt that was that we'd rather go on the California corporate side with [firm] because we felt that they had wider experience than that from [firm] (unintelligible) the number of attorneys are - well as stated on the call, the number of attorneys with expertise on California nonprofit law in [firm] is just amazing (unintelligible) [Sensitive information about deliberations]

I'd like to hand over the floor to the queue that's forming for reactions and comments on this. I see Greg Shatan's hand is up. So please, Greg, take the floor.

Greg Shatan: Thanks, Leon. It's Greg Shatan. I think I would be a little - I was little more concerned than you with the answers we got from [firm] with regard to California nonprofit law.

[Sensitive information about deliberations]

And that just seemed like a - kind of a big flub to me. I do agree that we should give them, you know, a chance to explore this issue more deeply and also a chance to read and respond more specifically to the scoping document. I don't want to count [firm] out as having, you know, appropriate California public benefit and California nonprofit generally experience.

[Sensitive information about deliberations]

And I've run into a few nonprofits, you know, in my time typically as a pro bono matter. So I could talk intelligently for five or 10 minutes about New York nonprofit law but I am by no means a guru and I don't think he is either.

[Sensitive information about deliberations]

And in any case I think we need to - we need to press this point because we are making a significant decision. And if [firm] can meet our needs in this area the fact that [firm] may have more depth is not all that interesting to me. But if [firm] is just not going to have the real fluency and depth of experience and knowledge about working with all of the options that are available to a California public benefit corporation then we have a real problem.

I just, I think we've scoped the problem but I can't say that we have definitively, you know, close the book on whether there is a problem or not. Thanks.

Leon Sanchez: Thanks, Greg. I see David's hand is up. Please, David, take the floor.

David McAuley: Thank you, Leon. And thanks, Greg. I share much of what Greg just said. I just to recap a little bit, in the last call just so Sam understands too, in the last call I think we were all quite impressed with [firm]. I certainly was. [Sensitive information about deliberations]

And I think everyone in the group felt the reverse, [Sensitive information about deliberations] And I had no real issue with that.

I do think that it's getting probable that whoever we choose will not be able to be in Istanbul. That may not be all that much of a problem if they can visit the archives afterwards.

I would like to say, however, that I agree with Sam's point about clear lines. I attended - I agree with Greg that the answer from [firm] on California nonprofit was not the greatest but I still came away from that call quite impressed with [firm] and that's why I voted for them taking the lead or but I wouldn't object if it was otherwise.

And so I just think they're both good. [Sensitive information about deliberations] Hopefully we will do that quickly. And thank you, Leon, that's all I have to say right now.

Leon Sanchez: Thank you very much, David. I see Sam Eisner hand is up; please, Sam. Sam are you on mute?

Samantha Eisner: Yes, sorry. I had trouble coming off mute. So it's, again, I'm coming from a place where I - I'm not trying to advocate for one firm or the other. It really is just, you know, I can see clear reasons why someone who - when membership

organizations were raised at the end of the call would turn to a mutual benefit situation, you know, particularly not with having the scoping document in front of them.

I - particularly because we are in a place where we're talking about having two firms we really need to understand why were having two firms, and to make sure that we're not running based on assumptions from untested hypotheses. And so that's - that is the heart of the question.

I mean, I get that the answer may have been unsatisfactory, but if we think that there is - if we think that they may have the depth we need to look at that or otherwise have a way to justify very clearly quiet we're using two. And I'm not sure that we have that justification right now.

Leon Sanchez: Thank you very much, Sam. I see Ed Morris hand is up. Please, Ed, you have the floor.

Edward Morris: Thanks, Leon. And, Sam, one of the things - since you weren't there you may want to know is that [firm] admitted that they were going to need some outside help [sensitive information about deliberations]

[Sensitive information about deliberations]

And quite frankly I had never considered it. I've done a little bit more research using (West Law) and it is something that we may want to incorporate. Yet, because they have the depth in California law I was very impressed that they were able to take into account California law, what we're looking for but also the internal processes.

So when we say that we just want them for California law I'm not sure that's accurate. I sort of like some of their corporate governance presentation as well.

Leon Sanchez: Thanks, Ed. Well, I was typing on the chat regarding having [firm] not being provided the scoping document. That's true, they didn't have the scoping document in hand. But as far as I recall, and please someone else correct me if I'm wrong, we didn't discuss the scoping document with [firm], we just discussed the document that - the agenda document that was also discussed with [firm].

I mean, chances are that [firm] have the chance to go through the questions of the scoping document and of course their idea of what we were looking for. So I think that we are really time constrained. I don't think one more call with [firm] would hurt us, if for the sake of having the best decision made by this group. Maybe that's - that call would help us make a more accurate decision on whether we want to go with both law firms or [firm] has what it takes to take over without needing to engage with the two law firms.

So, I mean, that would need to happen really fast since our Istanbul meeting is just three days away, four days away. And I think that if you could help us comment Sam or Greg, set up this call with [firm] as soon as possible. And I apologize to everyone on this group for having things so rushed and so last-minute but I think that you will agree with me that we need to have this call with [firm] and provide them with the scoping document so they can have a look at it.

And maybe we'll find that they do have the experience that we need and that we are looking for in [firm]. I see Ed's comment that a few of us are leaving for Istanbul on Friday. Yes, that's why this call might need to happen maybe

later today if you're available or tomorrow so I'd like to check on whether maybe Sam or Greg could help us to this call, I don't know, any thoughts?

I see Sam has offered to help. That might lead to another point that I wanted to iron out in this call and that is the coordination between the legal sub team and whichever legal firm we choose to engage with, or if we choose to engage with both law firms, the coordination between the legal sub team and the law firms.

Robin raise the point that it didn't seem quite right to have ICANN staff coordinating the communications between the law firms and the legal sub team. So in order to avoid having any kind of noise or suspicions (unintelligible) legal sub teams I would like to call for volunteers at this point in order to coordinate the communications with the law firm or law firms that we will engage with in time.

So if there is anyone that wants to go forward and volunteer for this task I think this would be a good time to do that. Okay I see Greg is happy to volunteer. I don't know if Ed's hand is a new hand or an old hand. Okay I see that's an old hand so he is not volunteering for that. And David has also volunteered to help Greg.

So I think that I would of course be volunteering for this task as well. So three of us I think will do. So I would like now to ask for agreement on the group on whether you agree on having Greg, David and myself being the coordinators of the communications between the law firms and legal sub teams. So if you could please signal with a green tick, that would be helpful.

Okay, I see (unintelligible) agrees, Greg agrees, David agrees, Ed agrees, (unintelligible) agrees. And well of course myself agree. So that's our

agreement. Please, staff, I'd like you to (point) in the notes for the call that Greg, David McAuley and myself will be those coordinating communications with the law firms. And I see David expects that Robin maybe want to be added later, of course that is an open option if she wants to jump in she is very welcome to do so.

So okay so next step would be to have this call set up so that's an action item for both Greg and Sam. And our last point in the agenda, since we haven't had the chance to have Robin today, and I see that the last version of the document was updated just seven days ago so I assume that no updates were performed between our call with [firm] and today, I'd like to call for coordination for us to take notes with regards to legal issues on our meeting in Istanbul.

I think that so far the agenda is divided in sessions of one and a half, two hours at the most. And I think that what would be useful is just to - file we are looking at the issues with the larger group try to concentrate on detecting those areas in which the legal advice would prove to be useful and of course try to take those notes to then later convert them to questions that would be posed to the lawyers that we engage with.

So I don't know if is there anyone that wouldn't like to be participating in this exercise? Otherwise if there is no objection I would kindly ask you to all take notes in this sense. So if there's anyone that is not able board doesn't want to be tasked with this exercise please raise your hand or signal with a red cross if you're not able to join us in this exercise.

Okay I see David is attending remotely so he'll do a few steps to stay alert and take notes on the legal issues. That's perfectly right, thank you, David. I see Athina has no problem. And I see no one else opposing to this exercise.

Okay so we have our team of volunteers for taking notes in Istanbul. Thank you very much. And, well, now I'd like to call for any other business or concerns that I might be missing in this call. I'm really sorry that we couldn't go through the document update.

We all know the last version of the document which seems to be an excellent work so far. And well of course I will reach out to Robin (unintelligible) that is an action item for me, staff, I will reach out to Robin to ask on whether we can be of any help for her to update the document with the lessons learned with [firm].

So is there any other business that we should be taking care of in this call please raise your hand if you have any other business. I see David says no other business. Greg, (unintelligible), Athina, Sam, Theresa, any other business? Okay I think not.

Well then this is a short call. We'll be ending early. I think Sam is typing so I'll just wait for her to end typing. Okay so no other business. So I thank you all for your time. And this meeting is now adjourned. Thanks, everyone.

END