ICSID CASE NO. ARB/20/7

IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

VERCARA LLC (FORMERLY SECURITY SERVICES LLC, FORMERLY NEUSTAR, INC.)

CLAIMANT

AND

REPUBLIC OF COLOMBIA

RESPONDENT

RESPONDENT'S REPLY ON SECURITY FOR COSTS AND COMMENTS RELATING TO APPLICABLE LAW ON JURISDICTION

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26 May 2023

1. INTRODUCTION

1. More than nine months after having disclosed for the first time (albeit in a misleading manner) the intended change of claimant from Neustar to Security Services/Vercara, Claimant has for the first time attempted to provide written explanations and documents regarding this change in its Response on Security for Costs. It is however deplorable that Claimant waited until *after* the Hearing and Respondents' Application for Security for Costs (which was prompted by the overall secrecy maintained by Claimant) to submit these documents, which even comprise a witness statement.

2. On the basis of these new documents, Claimant now argues that Respondent's request for security for costs is unfounded and that it was entitled to unilaterally substitute Security Services/Vercara to Neustar as claimant.

3. This is however incorrect, and in spite of its improper procedural behaviour, Claimant's response does nothing to disprove the necessity for security for costs, instead confirming the doubts arising out of Claimant's approach to the proceedings.

4. Claimant also sought to use its Response on Security for Costs to finally answer Respondent's objection to the intended change of name. Nevertheless, Claimant falls far short of establishing the legitimacy of Security Services/Vercara as claimant (or to prove that the Tribunal no longer has jurisdiction over Neustar): there is no evidence that the transfer is valid and effective under Delaware law, and no legal support for Claimant's theory that under international law, it could unilaterally assign the arbitration agreement containing Colombia's consent to a new party midway the proceedings. As Respondent had already explained in previous submissions, Claimant failed to seek, let alone obtain Respondent's consent to the requested change. This approach has consequences, with the Tribunal lacking jurisdiction over this intended new claimant Security Services/Vercara.

2. CLAIMANT IMPROPERLY INTRODUCED NEW EVIDENCE AT A LATE STAGE IN THE PROCEEDINGS

5. As already noted in Respondent's emails dated 15 and 16 May 2023, Claimant filed, for the first time in these proceedings, a witness statement with its Response on Security for Costs of 10 May 2023 as well as no less than nineteen new exhibits . These include *inter alia*:

- A witness statement by Ms Megan Rodkin, Associate General Counsel for Golden Gate Capital since March 2020, describing the ownership structure of Neustar and Security Services/Vercara (i) as of the date of the RFA (23 December 2021), (ii) immediately before the spin-out (30 November 2021) and (iii) immediately after the spin-out (2 December 2021);

- The unredacted copy of the UPA and the email between counsel whereby Claimant had accepted to disclose this document to Respondent's counsel team (a disclosure that Respondent had expressly acknowledged in its Rejoinder, contrary to Claimant's insinuations),[1] as well as a bill of sale concluded among *inter alia* Security Services and Neustar;[2]

- SEC filings of TransUnion before and after the sale of Neustar;[3]

- Extracts of webpages and press releases from Golden Gate Capital, TransUnion, Security Services/Vercara, Law 360, the Delaware Division of Corporations and even the Hogan Lovells website;[4]

- The 2021 and 2022 consolidated financial statements of Aerial Blocker Corp. and subsidiaries,[5] as well as a 2023 bank statement and a 2022 account statement of Security Services.[6]

6. Under the notion of "too-little-too-late", these exhibits and the witness statement were filed on 10 May 2023, that is one year and five months after the 1 December 2021 spin-out, ten months after Claimant filed its last written submission (the Reply) on 29 July 2022, and even one month and a half after the conclusion of the Hearing on 29 March 2023. Notwithstanding, Claimant proceeded to file them without receiving leave from the Tribunal to do so, as explicitly required under Sections 16.3 and 17.2 of Procedural Order No. 1.[7] Pursuant to these provisions, Claimant should have

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1 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version) **[C-0140]**; Email from Steptoe & Johnson LLP to HoganLovells (28 October 2022) **[C-0148]**; as noted in Respondent's Rejoinder (*see* footnote 34), "*Claimant also disclosed an unredacted version of the UPA to Respondent's internal and external counsel team. However, as anticipated in Respondent's Application of 5 September 2022, this unredacted version of the UPA does not shed light on the mechanisms whereby the purported transfer of the 'MinTIC Claim' would have occurred prior to the execution of the UPA on 1 December 2021*."

2 Assignment and Assumption and Bill of Sale dated 1 December 2021, Section 5 **[C-0143]**.

3 U.S. Securities and Exchange Commission, TransUnion, Form 8-K (11 September 2021) **[C-0141]**; U.S. Securities and Exchange Commission, TransUnion, Form 8-K (1 December 2021) **[C-0144]**.

4 Golden Gate Capital, Website Extracts **[C-0142]**; TransUnion, "TransUnion and Neustar Announce Transaction Close" (1 December 2021) **[C-0145]**; HoganLovells, "Carve outs, Divestments and Spin-Offs – How to Sell Businesses and Assets" (10 February 2022) **[C-0146]**; HoganLovells, "Carve-outs, Spin-offs, and Split-offs" **[C-0147]**; Alice Palmer, "Anatomy of a Brand Transformation: Our Journey to Vercara" (3 April 2023) **[C-0149]**; Delaware Division of Corporations, Annual Report Statistics (2021) **[C-0153]**; Caroline Simson, "Colombia Can't Get $19M Glencore Award Axed" (24 September 2021), LAW 360 **[C-0154]**.

5 Aerial Blocker Corp. and Subsidiaries, Consolidated Financial Statements December 31, 2022 and 2021, and Year Ended December 31, 2022, Audited by Pricewaterhouse Coopers LLP (29 April 2023) **[C-0150]**; Bank Statement of Security Services, LLC (as of 3 January 2023) **[C-0151]**.

6 Investment Statement of Security Services, LLC (as of 31 December 2022) **[C-0152]**. Claimant also produced four Delaware law authorities in response to the Tribunal's request: *Hawkins v. Daniel*, 273 A.3d 792 (Del. Ch. 4 April 2022) (Laster, V.C.) **[C-0155]**, *In re Emerging Communications, Inc. Shareholders Litigation*, WL 1305746 (Del. Ch. 4 June 2004) (Jacobs, J.) **[C-0156]**, 10 Del. C. § 3701 **[C-0157]**, *Humanigen, Inc. v. Savant Neglected Diseases*, LLC, 238 A.3d 194 (2020) **[C-0158]**.

7 Procedural Order No. 1, Section 16.3: "*Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, without prior written permission of the Tribunal. The Tribunal shall consider whether special circumstances exist based on a reasoned written request followed by observations from the other Party. 16.3.1. Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request. 16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such a document.*"; Section 17.2: "*Neither Party shall be permitted to submit any*

requested leave to submit new documents prior to doing so, and without annexing such documents. Further, Claimant was required to explain why there were "*special circumstances*" warranting the submission of this new evidence and Respondent should then have been granted an opportunity to comment. Obviously, all of these procedures are set out in the Procedural Order to avoid improper surprise and prejudice to either party, which is the impact of this new evidence. Respondent was given no opportunity to address any of this new documentation at the Hearing and even more egregious, was unable to cross examine this late stage witness during the Hearing, in which Claimant chose not to present a single witness.

7. Claimant, however, blatantly ignored these procedural requirements and unilaterally filed these new factual exhibits and the witness statement without any authority or leave. By doing so, Claimant deprived Respondent of the opportunity to comment on the introduction of this large amount of new documents at this late stage of the proceedings *before* these were actually sent to the Tribunal. For this reason alone (and irrespective of whether this belated new evidence is included on the record), Claimant's procedural behaviour is improper and should not be condoned.

8. Perhaps cognizant of its failure to abide by Procedural Order No. 1 and in order to try to justify *post-hoc* the introduction of this new evidence, Claimant vaguely asserts in its Response on Security for Costs and its email of 16 May 2023 that such evidence is either responsive to Respondent's Application for Security for Costs or that in some instances, the documents produced were previously "*hyperlinked in the Claimant's letters of 15 September and 3 October 2022.*"[8] This is however highly misleading. As can be seen from the list of this new evidence included at paragraph 5 *supra*., several of these documents bear no relation to Respondent's Application for Security for Costs but are instead primarily relied upon by Claimant in relation to the change of claimant issue and, in some instances, these documents were not even previously referenced by Claimant at any stage. This is particularly the case of the unredacted UPA, the bill of sale, and the witness statement by Ms Rodkin.[9]

9. It is notable that Claimant simply dispensed with providing any justification or rationale for the filing of Ms Rodkin's witness statement at this late stage. This is because this witness statement is in no way responsive to Respondent's Application for Security for Costs and could well have been filed earlier in the proceedings. Indeed, as explained above this witness statement is solely aimed at establishing the ownership structure of Neustar and Security Services at the time of (i) submitting the RFA and (ii) carrying out the spin-out, to the exclusion of any other topic (such as the financial standing of Security Services/Vercara). As can be seen from the very introduction to Claimant's

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testimony that has not been filed with the written submissions, without prior written consent of the Tribunal. The Tribunal shall consider whether special circumstances exist based on a reasoned written request followed by observations from the other Party (following the procedure outlined in §16.3)."

8 Response on Security for Costs, para. 63.

9 *See* Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version) **[C-0140]**; Assignment and Assumption and Bill of Sale dated 1 December 2021, Section 5 **[C-0143]**.

Response on Security for Costs, Claimant does not use these statements to support its response on the security for costs issue, but rather to address Respondent's objection to the intended change of name (even though, as explained in Section 4.2 below, these statements are irrelevant for purposes of assessing whether the Tribunal has jurisdiction over Security Services/Vercara):

> *As to the Respondent's objection to jurisdiction relating to the Spin Out, the essential facts are that Neustar assigned to its subsidiary Neustar Security Services (now Vercara) all of its 'rights, obligations and liabilities' with respect to the claims in this arbitration, and then transferred ownership of that subsidiary to an affiliate under the same ultimate ownership as Neustar. In this way,* ***the claim remained under that same ultimate ownership*** *despite the subsequent sale of Neustar to TransUnion.* ***Neustar, Neustar Security Services/Vercara, and its parent companies up to Golden Gate are all American****, such that there has been no change in nationality. As will be seen, the assignment was valid under both Delaware law and under international law.*[10]

10. Yet, the issue of Claimant's intended change of claimant has been before this Tribunal for several months now, starting with Claimant's notification of 29 July 2022 and Respondent's subsequent application of 3 September 2022 (and could have well been raised before this date if Claimant had disclosed the purported transfer of the claim when the spin out was completed on 1 December 2021 and not on 29 July 2022).[11] Claimant had ample opportunity to request leave to respond to Respondent's objection to the intended change of Claimant *before* the Hearing. Claimant chose not to do so.

11. Coincidentally, Claimant now considers fit to file a witness statement purporting to address Respondent's objection one month and a half after the conclusion of the Hearing. Claimant's gamesmanship is evident and unacceptable. Claimant was well aware that filing the witness statement after the Hearing would avoid cross-examination by Respondent. Such right is enshrined in the ICSID Rules, with Rule 35(1) providing that "*[w]itnesses and experts shall be examined before the Tribunal by the parties under the control of its President*",[12] and reiterated in Procedural Order No. 1.[13] These provisions are further reflective of arbitral practice, with the IBA Rules on the Taking of Evidence confirming that "*[e]ach witness shall […] appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal.*"[14] In circumstances where a witness fails to appear at a Hearing, scholars consider that its testimony should be given "*little or no weight*".[15]

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[10] Response on Security for Costs, para. 10 (emphasis added).

[11] Respondent's Application on the Change of Claimant of 3 September 2022.

[12] ICSID Arbitration Rule 35(1): "*Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.*"

[13] Procedural Order No. 1, Section 18.1: "*A Party may be called upon by the opposing Party to produce at the hearing for cross-examination any witness or expert whose written testimony has been advanced with the Pleadings*."

[14] IBA Rules on the Taking of Evidence, Article 8.1 **[RL-140]**.

[15] Chester Brown and Patrick Still, 'The Status of the Testimony of the Non- Appearing Witness in International Arbitration', in Meg Kinnear and Campbell McLachlan (eds), *ICSID Review – Foreign Investment Law Journal*, 2020, Volume 35

12. As explained above, Claimant has simply failed altogether to explain why there are "*special circumstances*" present that would warrant the submission of Ms Rodkin's witness statement outside the agreed timeframes and failed to follow the procedure outlined by the Tribunal in Procedural Order No. 1. This is because there are no such special circumstances in this case: Claimant could well have submitted this witness statement earlier in the procedure, thereby permitting Respondent to question Ms Rodkin at the Hearing, but it did not, instead strategically seeking to delay the submission of this witness statement to thwart Respondent's ability to respond.

13. This strategy should not be given credence, and Respondent therefore respectfully submits that:

- As a matter of principle, the Tribunal should strike out Ms Rodkin's witness statement from the record. At the very least, the Tribunal should not accord any evidentiary weight to this witness statement filed at this very late stage.

- While for the sake of the efficient administration of the proceedings, Respondent does not object to the inclusion on the record of the new exhibits, Claimant's procedural behaviour (which disregarded Section 16.3 of Procedural Order No. 1) should be taken into account by the Tribunal in reaching its decision on both security for costs and the allocation of costs.

3. BRIEF OBSERVATIONS ON CLAIMANT'S RESPONSE ON SECURITY FOR COSTS

14. Claimant's Response fails to account for the fact that it was its very conduct of secrecy with regard to the transfer of its claim that required Respondent to apply for security for costs. Moreover, in spite of its reliance on new documents filed at the eleventh hour, Claimant is not able to disprove that security for costs is necessary and warranted on the facts of the case.

15. In particular, Claimant's misrepresentation of the applicable legal standard (**3.1**) and late disclosure (**3.2**) are insufficient to disprove the need for security for costs. Further, the Tribunal does have authority to order *both* Security Services/Vercara *and* Neustar to post security for costs pending its decision on Respondent's preliminary objections (**3.3**).

3.1 Claimant misrepresents the legal standard controlling the Application

16. The Parties appear to agree on the fact that ICSID tribunals have the power to order security for costs as a form of provisional measure under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (in their 2006 version).[16]

17. It is also widely established that, in the context of applications for provisional measures, ICSID tribunals will conduct a two-step inquiry, consisting of (i) identifying whether there is a right to be preserved, and (ii) if so, whether the circumstances require that the provisional measures be

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Issue 2, pp. 369 -397 **[RL-204]**, citing extensive jurisprudence on the issue, including *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 70 **[CL-032]**.

[16] *See* Response on Security for Costs, paras. 66-68.

ordered for the right to be preserved (which includes an assessment of necessity, timeliness/urgency, and proportionality).[17]

18. In its Response on Security for Costs, Claimant attempts to downplay the importance of identifying exceptional circumstances, merging this requirement into an alleged requirement to show that "*provisional measures in the form of security for costs is necessary, giving rise to exceptional circumstances*". Similarly, it submits that requirements of urgency and proportionality should be given equal weight to the requirement of exceptional circumstances in the context of security for costs applications.[18]

19. This is however incorrect: as explained in Respondent's Application for Security for Costs, previous ICSID tribunals have put particular emphasis on the identification of "*exceptional circumstances*", and it is in this context that they have also considered necessity, timeliness/urgency and proportionality. This is apparent, for instance, from the reasoning of the *Dirk Herzig* tribunal:

> *Having confirmed its authority, the Tribunal turns to the question of whether Turkmenistan does meet its three obligations under ICSID Arbitration Rule 39(1) to "specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures".*
>
> *First, the Tribunal is satisfied that Turkmenistan has specified the right to be preserved, namely the right to an enforceable order for costs should it ultimately prevail and be awarded costs. Second, Turkmenistan has specified the measures it requests, namely security for costs in the amount of US$ 3 million, to be deposited into an escrow account or provided as an unconditional and irrevocable bank guarantee within 14 days of the Tribunal's order, plus its costs in respect of its Request for Security for Costs.*
>
> ***The third – to prove "circumstances that require such measures" – is the core challenge**. As noted above, the Tribunal finds that Turkmenistan bears the burden to demonstrate exceptional circumstances justifying the provisional measures sought.[19]*

20. Respondent's position is further confirmed by the 2022 ICSID Arbitration Rules, which have enshrined the authority of ICSID tribunals to order security for costs. While these are not directly applicable to this application, it is interesting to note that this provision directs the Tribunal to take into account "*all relevant circumstances*" in assessing a request for security for costs, including "*(a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties.*"[20]

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17 *See* Application for Security for Costs, paras. 33-36, 40.

18 Response on Security for Costs, paras. 70-71.

19 *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, paras. 50-53 **[RL-201]**.

20 2022 ICSID Arbitration Rules, Rule 53(3).

21. Claimant's attempts to misrepresent and heighten the standard required for a security for costs order should therefore be disregarded.

3.2 **Claimant's late disclosure is insufficient to disprove the need for security for costs**

22. In its Application for Security for Costs, Respondent established that it had a right to be preserved (its right to reimbursement should it be awarded costs) and that the circumstances required this right to be protected, with the requested security for costs also being timely and proportional. In an attempt to escape an adverse order, Claimant alleges that Respondent has no such right to be protected.[21] Claimant points to its new factual exhibits to argue that, in any event, Respondent's Application does not meet the requirements of exceptional circumstances, necessity and urgency.[22] These contentions are however insufficient to disprove the need for security for costs.

23. *First*, while Claimant acknowledges that procedural rights may be subject to provisional measures under Article 47 of the ICSID Convention, it contends that Respondent has no such right to be preserved because the costs of arbitration are "*no longer prospective*" and claims that Respondent is in fact attempting to "*reduce its collection risk*".[23] Interestingly, Claimant has however been unable to point to any single decision in which the tribunal would have considered that a State's right to claim reimbursement of the costs it has and continues to incur is not a protected right under Article 47 of the ICSID Convention.

24. This is because previous tribunals have unanimously held that the right to have an enforceable award of costs against a claimant is a right which can be protected under Article 47 of the ICSID Convention, irrespective of the stage at which the request is made.[24] In the words of the *RSM v Saint Lucia* tribunal, "*[t]he right to seek reimbursement of one's costs in case of a favorable award constitutes a procedural right in that sense. Hence there has to be an effective mechanism for protecting this right in order to render it meaningful.*"[25] Similarly, in the present case Respondent is continuing to incur costs in mounting its defence, and its application therefore correctly identifies the right to be preserved, i.e. its "*right to an enforceable order for costs should it ultimately prevail and be awarded costs*" (as observed by the *Dirk Herzig* tribunal).[26]

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21 Response on Security for Costs, paras. 73-79.

22 Response on Security for Costs, paras. 80 *et seq.*

23 Response on Security for Costs, paras. 77-79.

24 While Claimant seeks to rely on *Eskosol* for this proposition (*see* Response on Security for Costs, para. 78), it bears noting that the Tribunal's remarks in that case were made *obiter*: *see Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, para. 36 **[RL-194]**: "*In this case, the Tribunal need not resolve this interesting question now, because even if in principle the "right" Italy asserts is one that would be deserving of protection in exceptional circumstances, Italy has not demonstrated that such circumstances exist.*"

25 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, para. 66 **[CL-141]**.

26 *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, para. 53 **[RL-201]**.

25. *Second*, Claimant alleges that Respondent has failed to prove exceptional circumstances on the basis of newly-introduced exhibits regarding Security Services/Vercara's financial situation,[27] to which Respondent did not have access at the time of making its Application despite previous requests to Claimant.

26. In this respect, Claimant's representations in its Response on Security for Costs that it had offered to provide financial statements to Respondent at the Hearing, which would allegedly have eliminated the need for such an application, are entirely misleading and baseless for two reasons:

- Prior to the Hearing, and including in the context of Respondent's Application regarding the change of name of 3 September 2022, Respondent had repeatedly requested Claimant to provide information on the alleged transfer of the claim and the identity of the intended new Claimant, Security Services, only for Claimant to refuse any disclosure. As explained in Respondent's Application for Security for Costs, Claimant had for instance initially indicated that Kevin Hughes would be available to answer questions on these topics at the Hearing, but failed to put him forward for questioning at the Hearing.[28]

- During the Hearing, and as per the Tribunal's instructions,[29] Respondent requested Claimant to provide additional financial information at the end of Day 1.[30] Claimant left Respondent's email unanswered, and instead elected to raise the issue before the Tribunal at the outset of Day 2. In the context of these subsequent discussions, Claimant then represented that "*the demand was made at 9pm last night and we said we would provide financial statements*" despite not having made any such offer.[31] As Counsel for Respondent clarified immediately in response to this representation by Claimant:

  MR GOUIFFES: […] you remember the circumstances in which [this] change has been announced or introduced into this arbitration at the end of July and after the document process, you will remember that. We actually have asked to this Tribunal, to the other side and then to the Tribunal, documents in relation

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27 Aerial Blocker Corp. and Subsidiaries, Consolidated Financial Statements December 31, 2022 and 2021, and Year Ended December 31, 2022, Audited by Pricewaterhouse Coopers LLP (29 April 2023) **[C-0150]**; Bank Statement of Security Services, LLC (as of 3 January 2023) **[C-0151]**; Investment Statement of Security Services, LLC (as of 31 December 2022) **[C-0152]**.

28 Claimant's allegation that "*the Respondent did not seek to question Mr Hughes or directly address him, despite making accusations about his place of employment based on an outdated LinkedIn profile*" (*see* Response on Security for Costs, para. 57) is blatantly unfounded: Respondent did raise questions regarding Mr Hughes at the Hearing and signalled on several occasions that it wished to be able to ask questions to Mr Hughes. Claimant did not follow up on these questions: Claimant's allegation that it would have been for Respondent to "*directly address*" Mr Hughes without him being included in the procedure as a witness or without his (or Claimant's counsel) indication that he was willing to answer the questions raised by Respondent is simply at odds with any proper procedural approach.

29 Transcript, Day 1 [Lew], 203:22-204:8.

30 Transcript, Day 2 [T. Baldwin], 292-293 (reading out an email sent by Respondent's counsel team to Claimant's counsel team): "[F]*ollowing on the hearing today and as per the Chairman's indications, we have further reviewed exhibit C-135." "We can confirm that this 5-page press release dated 1 December 2021 is in no way sufficient to answer our doubts regarding Security Services LLC's legitimacy as a claimant in this arbitration, or its ability and willingness to satisfy a potential adverse costs award. […] Against this background,* ***we urgently request that you provide clarifications*** *tomorrow […] at the start of the hearing* ***regarding Security Services LLC and its ability to cover any potential adverse cost award (including financial documentation),*** *failing which we will have no option but to revert to the Tribunal with all appropriate applications*." (emphasis added).

31 Transcript, Day 2 [Baldwin], 403:25-404:21.

> *to financial information, et cetera, and we have received absolutely nothing. So we were told today or yesterday we [would] get something. At the moment there is nothing on record.*[32]

- Following this procedural discussion, Claimant was careful not to follow-up on its alleged offer to provide financial information to Respondent (or to actually disclose the financial documents) at any further stage of the Hearing nor after the Hearing, in keeping with its usual approach of representing it will provide information (or make persons available for questioning) to later renege on such commitments.

27. Against this background, Claimant's insistence in its Response on Security for Costs on its alleged offer to provide financial information (and Respondent's alleged refusal or failure to follow through) is disingenuous.

28. In any event, these financial documents are insufficient to disprove the necessity for security for costs. Indeed, as explained in Respondent's Application, the exceptional circumstances in the present case arise not only from Claimant's failure to prove that the new intended claimant Security Services/Vercara has any substantial assets or business operations. Instead, they first and foremost arise from of Neustar and Security Services/Vercara's procedural behaviour and unclear dealings regarding the claim, which considered jointly cast doubt over their approach to these proceedings and their willingness to comply with an adverse award on costs.[33] As explained above, a party's (un)willingness to comply with an adverse award on costs and general conduct in the arbitration are key factors previous tribunals have considered when assessing security for costs applications.[34] Indeed, these two factors have been specifically included in the 2022 ICSID Rules (separately from that party's "*ability to comply with an adverse decision on costs*").[35]

29. As a reminder, there are compelling circumstances casting doubt over Security Services/Vercara's approach to these proceedings and their willingness to comply with an adverse decision on costs including *inter alia* (i) Claimant's late disclosure of the spin-out more than seven months after its completion (with Respondent requesting documents from *Neustar* during the document production phase of 18 March-10 June 2022 to which Claimant may not have had access anymore at that time); (ii) Claimant's subsequent refusal to provide further information on the transfer, including in

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[32] Transcript, Day 2 [Gouiffès], 404:22-405:7.

[33] *See* Application for Security for Costs, paras. 41-51.

[34] *See RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, para. 81 **[CL-141]**: "*The Tribunal concludes from Claimant's conduct in the Annulment Proceeding and the Treaty proceeding that it was **unwilling** or unable to pay the requested advances and, in the Treaty Proceeding, the opposing party's share of advances as awarded by the tribunal. Hence, absent a material change of circumstances, the Tribunal is satisfied that also in this proceeding, there is a material risk that Claimant would not reimburse Respondent for its incurred costs, be it due to Claimant's unwillingness or its inability to comply with its payment obligations.*" *See also*, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, para. 121 **[RL-203]** (referring to "*abuse or serious misconduct*" as factors that can support a request for security, and referring to *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, para. 45 **[CL-140]**).

[35] 2022 ICSID Arbitration Rules, Rule 53(3).

response to Respondent's Application of 3 September 2022; and (iii) Claimant's behaviour at the Hearing, with its refusal to make Mr Hughes available for questioning or to provide any further information regarding the transfer.

30. Claimant's eleventh-hour introduction of additional documents purporting to establish the validity of the transfer of the claim is thus insufficient to dispel the doubts this behaviour has casted over Claimant's approach to the proceedings and willingness to comply with an adverse award, and it bears noting that Claimant has not addressed this point in its Response .

31. Further, Claimant's procedural approach ever since its delayed and improper disclosure of the spin-out transaction on 29 July 2022, including in particular its refusal to disclose any further information on the spin-out, left Respondent with no option but to file its Application for Security for Costs. Claimant should therefore at the very least bear the full costs associated with this application.

32. *Third*, with respect to the requirement of urgency, Claimant's contention that such criterion is necessarily examined by Tribunals assessing security for costs applications is entirely unfounded: in the four cases in which security for costs was ordered, the tribunals did not consider the element of urgency, or only did so in passing.[36] Indeed, the *Dirk Herzig* tribunal went as far as to note that "[i]*nsofar as the element of urgency is concerned*", it was *"not persuaded that Turkmenistan must prove an urgent need for the provisional measure of security for costs*".[37] While Claimant correctly cites these findings, it fails to offer any convincing rebuttal.

33. In any event, Claimant's reliance on *Bay View* to argue that Respondent's application does not meet the urgency requirement is inapposite: as can be seen from the *Bay View* decision, the requirement considered by the tribunal in that case was one of *timeliness* of the application, not *urgency*:

> *The Commentary on Article 4 of the CIA Guideline cited by the Claimants provides*

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[36] *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, para. 67 **[RL-201]**; *Eugene Kazmin v. Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6 (Decision on the Respondent's Application for Security for Costs),13 April 2020, paras. 29-30 **[RL-198]** (an examination of the decision reveals that the Tribunal rather focused on whether the application was timely, concluding that the "*Tribunal disagrees with the Claimant that the filing of the application was late or disproves urgency.*"); *Luis García Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, Procedural Order No. 8, 20 June 2018, paras. 238-241 **[CL-142]** (with the Tribunal acknowledging that briefings on security for costs had taken more than a year and finding that the requirement of urgency was met since "*it effectively is necessary to protect Venezuela's right as soon as possible*"); *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, paras. 85-87 **[CL-141]** (even though the tribunal included a heading 'urgency', an examination of the relevant excerpts of the decision reveals that the tribunal did not carry out any detailed analysis of the urgency and concluded that the "*described circumstances constitute sufficient grounds and exceptional circumstances as required by ICSID jurisprudence for ordering Claimant to provide security for costs.*").

[37] *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, para. 67 **[RL-201]**.

> *Applications for security for costs should be made promptly, that is,* ***as soon as the risk or facts giving rise to the application are known or ought to have been known****. […]*[38]

34. As explained in the Application for Security for Costs, the exceptional circumstances relied upon by Respondent include not only the fact that it is following Claimant's partial disclosure of 29 July 2022 that the issue of the change of claimant started to emerge, but also Claimant's subsequent procedural behaviour which culminated with its refusal to provide additional information at the Hearing. Therefore, Respondent's application, submitted three weeks after the close of the Hearing was timely and meets any applicable requirement of urgency.

35. *Finally*, Claimant's assertion that security for costs would be disproportionate in the circumstances of the dispute because "*Respondent has not demonstrated that the Claimant would be unable or unwilling to pay costs if ultimately awarded*" is unfounded:[39] as seen immediately above, Claimant's past and continued procedural behaviour casts serious doubts over its willingness to comply with any potential adverse award of costs. Similarly, Claimant's insistence on the fact that Respondent's requested security of USD 3.5 million is substantial and burdensome simply ignores Respondent's alternative proposal that this security be posted as a bank guarantee. In this respect, Claimant alleges that a bank guarantee "*would most likely still come at significant cost*",[40] but has not provided any substantiation of such allegation nor alleged that this would somehow thwart its ability to maintain its involvement in the present proceedings. Far from showing disproportion, Claimant's Response on Security for Costs in fact confirms that the requested security would not create any undue burden on Claimant.

36. It therefore follows that in spite of Claimant's late disclosure, security for costs is still warranted on the facts of this case and should be awarded by the Tribunal.[41]

3.3 The Tribunal has power to order both Security Services/Vercara and Neustar to post security for costs pending its decision

37. Finally, while Claimant accepted that the Tribunal has authority to order security for costs against Security Services/Vercara, it submitted that (i) Respondent's request to this effect constitutes consent to having Security Services/Vercara appear as Claimant and that (ii) the Tribunal cannot order security for costs against Neustar, Inc. as it no longer has jurisdiction over this entity.[42] Both propositions are however incorrect.

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38 *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent's Request for Security for Costs, 28 September 2020, para. 40 **[CL-144]**.

39 Response on Security for Costs, para. 109.

40 Response on Security for Costs, para. 111.

41 Claimant's argument that in any event, the amount of the ordered security should be limited to future costs (*see* Response on Security for Costs, paras. 106, 116-118) is entirely unfounded: such a limitation would be particularly inappropriate in the present circumstances where the facts on the basis of which the Application started to emerge *in the course* of the proceedings and not at their outset.

42 Response on Security for Costs, paras. 183-184.

38. *First*, as explained in detail at Section 4.3 *infra.*, at no point did Respondent consent to the alleged "*substitution*" of claimant, and it is apparent from the wording of the Application for Security for Costs that such application is made pending the Tribunal's decision on whether Security Services/Vercara is a legitimate claimant in the present proceedings.

39. *Second*, Claimant argued that the Tribunal no longer has jurisdiction over Neustar because Vercara would have assumed all rights, obligations and liabilities with respect to the claim.[43] This is however incorrect, because (as explained at Section 4.1 immediately below) Claimant still failed to establish that the transfer/assignment was valid and/or effective under Delaware law. In any event, as explained at Section 4.2 further below, irrespective of whether the assignment ultimately took place under Delaware law, such assignment could not lead to a valid substitution of the claimant party (and the discontinuance of Neustar's involvement in the case) in the absence of Respondent's consent.

40. It therefore follows that the Tribunal has authority to request *both* Neustar and Security Services/Vercara to post security for costs pending its decision on Respondent's preliminary objections.

4. COMMENTS ON THE LAW APPLICABLE TO THE TRANSFER OF THE CLAIM

41. Far from only addressing the issue of the law applicable to the alleged transfer of the claim in its Response on Security for Costs, Claimant elected to provide, for the first time, a full written response to Respondent's preliminary objection. In spite of this, Claimant still failed to explain the mechanism whereby the claim was effectively assigned under Delaware law (or the legal consequences of such assignment under Delaware law) (**4.1**). In any event, Claimant equally failed to establish that it could unilaterally substitute the claimant party by another midway the proceedings under controlling international law (**4.2**). Lastly, Respondent never consented to the intended change of name, contrary to Claimant's indications (**4.3**).

4.1 There is no proof that the transfer was effective and valid under Delaware law

42. In spite of the clear indications of the Tribunal, Claimant still failed to establish that the claim was effectively and/or validly transferred under Delaware law.

43. *First*, there is no proof that the alleged assignment was effective. As explained above, together with its Response on Security for Costs Claimant has produced an unredacted copy of the UPA,[44] as well as a bill of sale concluded among *inter alia* Security Services and Neustar (the "**Bill of Sale**").[45] Claimant argues that it is by way of these two agreements, both governed by Delaware

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[43] Response on Security for Costs, para. 184.

[44] Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version) **[C-0140].**

[45] Assignment and Assumption and Bill of Sale dated 1 December 2021 **[C-0143]**.

law,[46] that "*Neustar assigned all of its 'rights, obligations and liabilities' with respect to the present arbitration to Neustar Security Services.*"[47] However, a detailed look at these agreements suffices to note that they remain extremely general regarding the terms of the assignment:

- The Bill of Sale is an 8-page agreement which does not specifically mention the present proceedings nor the assignment of the claim. In its Response, Claimant is therefore forced to rely on a convoluted interpretation of which assets held by Neustar were "*primarily related to the Business*" of Security Services in order to argue that the Parties intended for the ICSID claim to be transferred through this instrument.[48]

- The UPA does mention the ICSID claim as one of the "*Transferred Security Assets*" and "*Security Liabilities*" to be assumed by "*a member of the Company Group*".[49] As already noted in Respondent's previous submissions, this document (even in its unredacted version) is however insufficient to confirm:

    - Whether Neustar, Inc. effectively transferred the ICSID claim: while the UPA mentions that prior to its conclusion, a "*reorganization*" of the business would have been completed as part of which Neustar caused Transferred Security Assets and Security Liabilities to be transferred,[50] the UPA is not the instrument whereby such prior reorganization was carried out.[51] Claimant now alleges that this document is the Bill of Sale, but as seen immediately above this document fails entirely to mention the ICSID claim and simply mentions the transfer of assets related to the business to be retained by Security Services/Vercara.

    - To which exact entity the claim was transferred to: the UPA simply provides that Transferred Security Assets and Security Liabilities will be assumed by "*a member*

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46 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Section 7.8 **[C-0140]**; Assignment and Assumption and Bill of Sale dated 1 December 2021, Section 5 **[C-0143]**.

47 Response on Security for Costs, para. 23.

48 Assignment and Assumption and Bill of Sale dated 1 December 2021, **[C-0143]**; *See* Response on Security for Costs, para. 22.

49 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Recitals, Section 1.1 **[C-0140]**.

50 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Section 2.1 **[C-0140]**: "*Prior to the consummation of the Transaction, Neustar has caused […] the Transferred Security Assets to be transferred and assigned to a member of the Company Group, […] and, (iv) the Security Liabilities to be assumed by a member of the Company Group, in each case, in all material respects and substantially in accordance with Exhibit A (the foregoing clauses (i) to (iv) are collectively referred to as the 'Reorganization').*"

51 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Recitals, Sections 1.1, 2.1, 2.3, 5.10 **[C-0140]**: the UPA specifies that prior to the closing of the transaction, a "*reorganization*" of the business had been completed pursuant to which Neustar caused any "*Transferred Security Assets*" and "*Security Liabilities*" (including the ICSID claim) to be assumed by "*a member of the Company Group*", defined as Security Services LLC or one of its subsidiaries.

> *of the Company Group*" of Security Services LLC (i.e. not necessarily Security Services LLC itself).[52]

44. In fact, the undisclosed version of the UPA that Claimant has now elected to produce confirms that at the time of concluding this agreement, Neustar and Security Services/Vercara had potentially not even proceeded to assign the claim. This is because at Section 5.10 of this agreement, Security Services/Vercara saw fit to provide for an entire procedure in case "*the MiNTIC Claim cannot be, or is not, assigned to the Business*".[53]

45. Against this background, Claimant's reliance on the alleged fact that Delaware law permits the assignment of claims is irrelevant, with Claimant failing to establish that the assignment was effective.

46. *Second*, and in any event, Claimant also failed to establish that the assignment of the ICSID claim was permissible and valid under Delaware law. The very legal authorities produced by Claimant confirm that Delaware law imposes several limitations on the types of claims that can be assigned and (where the claim is assignable) conditions for the assignment to be valid, which Claimant carefully refrains from elaborating upon.

47. In particular, Delaware law imposes limits and conditions the assignability of claims (notably under the doctrines of maintenance and champerty). In the words of the Delaware Superior Court:

> *Delaware continues to recognize a policy against sale of a lawsuit. At the same time, Delaware generally favors the free exchange of property. These two policies stand in tension, because superficially they appear to call into question whether a property buyer obtains the right to prosecute property torts preceding the purchase. The resolution of this apparent tension is that* ***Delaware permits conveyance of a lawsuit so long as the transferor possesses and conveys a complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation' and not just the litigation itself****.*[54]

48. For instance, Delaware courts have previously considered that for the doctrine of champerty to be inapplicable, it is necessary that the "*transferee already has a legal or equitable claim on the rights that predates and is outside of the transfer.*"[55] By way of example, Delaware courts have held "*transfer of litigation rights to a creditor's creditor is void for champerty*", because such creditor has

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52 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Recitals, Section 1.1 **[C-0140]**.

53 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Section 5.10 **[C-0140]**.

54 *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194, 203–04 (Del. Super. 2020) (quoting *Drake v. Nw. Nat. Gas Co.*, 165 A.2d 452, 454 (Del. Ch. 1960)) **[C-0158]**.

55 *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194, 203–04 (Del. Super. 2020) (quoting *Hall v. State*, 655 A.2d 827, Del. Super. Ct. 1994) **[C-0158]**.

no interest predating the assignment.[56] In the present case, there is no proof that Security Services/Vercara had any interest in the ICSID claim *prior* to the assignment.

49. By the same token, the Bill of Sale and UPA produced by Claimant (and its convoluted interpretation thereof) do not allow to confirm that Neustar and Security Services/Vercara met the requirements for the assignment to be valid, even under the Delaware law applicable to these instruments: as seen above, the Bill of Sale does not even mention the claim as one of the transferred assets.

50. However, even if the assignment was valid and effective under Delaware law, and as Respondent further explains below, Claimant fails to explain how it could possibly have any effect under the controlling international law (i.e. the TPA and the ICSID Convention) and result in the unilateral substitution of the claimant party to the arbitration agreement on which the present proceedings are based.

4.2 Claimant could not validly substitute another claimant midway the proceedings

51. In its Response to Security for Costs, Claimant devotes substantial developments to arguing that "*international law permits assignment of claims*",[57] concluding on this basis that it was validly entitled to substitute the claimant midway the proceedings. However, a detailed examination of Claimant's Response reveals that the authorities it cites do not support its conclusion that Security Services/Vercara validly substituted Neustar as Claimant in the present proceedings.

52. Preliminarily, Claimant represents that Respondent would have argued that there is a "*general prohibition on the assignment of claims under international law.*"[58] This is however a misrepresentation of Respondent's position: in the Rejoinder, Respondent submitted that it was "*highly questionable whether the transfer itself of the claim was permissible*" and that there are limits to the assignability of such claims.[59] In the words of Prof. Crawford, an authority on which Respondent already relied in the Rejoinder:

> *Although it is said that that assignment does not affect the claim if the principle of continuity is observed, great care is required:* ***BIT claims are essentially claims intuitu personae under international law, and this imposes limits to their assignability.***[60]

53. In any event, Claimant's insistence on this point is nothing but a red-herring: irrespective of whether the assignment of international claims is permissible or not as a general principle, the question at issue here is whether Claimant was entitled to substitute the original party to the arbitration agreement formed with Colombia by another entity without seeking Respondent's consent, and

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56 *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194, 203–04 (Del. Super. 2020) (quoting *Street Search Partners, L.P. v. Ricon Int'l, L.L.C.*, 2006 WL 1313859, Del. Super. Ct. 2006) **[C-0158]**.

57 Response on Security for Costs, Section II.B.

58 Response on Security for Costs, para. 127.

59 Rejoinder, fn. 47.

60 J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th ed. (2012), p. 704 **[RL-120]** (emphasis added).

even though the original entity remained in existence. Yet, none of the authorities submitted by Claimant tackle this issue or are apposite:

- In the first four cases relied upon by Claimant, the assignation of the claim at issue had taken place well before the initiation of the proceedings:

    - In *African Holding*, contrary to Claimant's misrepresentation there was no *ongoing claim* but rather *receivables* (in French: "*créance*") under a concession contract with the DRC, which had been assigned by SAFRICAS to another US company (African Holding) **one year before** the ICSID proceedings had been commenced. At the time SAFRICAS's receivables were transferred to African Holding, no arbitration proceedings were pending and therefore, there was no arbitration agreement in place (with consent of SAFRICAS or African Holding to arbitrate not having been expressed).[61] What is more, African Holding had expressly notified the assignment to the respondent State immediately after it took place, a step which the Tribunal took into account towards its decision, holding that the assignment of the receivables was therefore "*opposable*" to the respondent (which had in fact *not* objected to the assignation but expressly accepted it).[62]

    - In *Renee Rose Levy*, the initial investor (Mr Levy) similarly did not assign an *ongoing claim* but its *investment* (along with a *potential claim*) to his daughter, **five years before** Ms Levy commenced arbitration.[63] Claimant is in fact forced to acknowledge that "*the assignment was of shares*", although it included "*an assignment of the rights to arbitrate and the claim itself.*"[64] This is misleading, as at the time of assignment there was no *claim* pending but only a potential claim. In any event, it is undisputed that when the transfer occurred, there was no concluded agreement to arbitrate (and consent had not crystallized).

    - In *Pantechniki*, the initial investor (Sarantopoulos) was *absorbed* by the claimant Pantechniki through a merger **five years before** the initiation of ICSID proceedings.[65] It is therefore undisputed that the transfer occurred *before* the claimant accepted the State's standing offer to arbitrate and *before* an arbitration agreement was formed. Further, the Tribunal expressly noted that the claimant

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61 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility, 29 July 2008, para. 57 **[CL-164]**.

62 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility, 29 July 2008, para. 73 **[CL-164]**.

63 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, paras. 5, 112, 118 **[RL-164]**.

64 Response on Security for Costs, para. 141.

65 *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 6 **[RL-131]**.

was the "*corporate successor*" of the former investor and that the respondent State had not objected to the new company's standing.[66]

- In *LESI & Astaldi*, one of the initial investors (Dipenta) was also *absorbed* by one of the claimants (Astaldi) through a merger, **six years before** the initiation of ICSID proceedings.[67] Similarly to the *Pantechniki* case, the transfer had therefore occurred at a time when the claimant investor had not yet accepted the respondent State's offer to arbitrate, and *before* an arbitration agreement was formed. In reaching its decision, the Tribunal took into account that under the municipal law applicable to the merger (Italian law), Astaldi was the universal successor of the merged company, and that (ii) Dipenta no longer had any legal existence (in contrast to Neustar in the present case).[68]

- In the two other cases relied upon by Claimant, the transfer of the claim had taken place following a merger/liquidation, with the original claimant ceasing to exist and the new claimant being the universal successor of the initial claimant:

  - In *Quasar*, as Claimant acknowledges, the transfer of the claim from the initial claimant (Rovime) to the new one (ALOS 34) took place following the liquidation of the initial claimant and the distribution of some of the liquidated assets (including the claim) to its former shareholder ALOS 34. The transfer and associated consequences under applicable municipal bankruptcy law (Spanish law) were expressly confirmed before the arbitral tribunal by the liquidator of the initial claimant.[69] The Tribunal therefore expressly noted that there was a "*universal succession*" between Rovime and ALOS 34 before going on to accept the replacement.[70]

  - Finally, in *Vivendi II* the tribunal faced a resubmitted case (following the annulment of *Vivendi I*). In between the two cases, one of the initial claimants (*Compagnie Générale de l'Eau*) had been merged into another company, Vivendi Universal. In this context, the question before the tribunal was whether it was bound by the *Vivendi I* tribunal's findings on certain jurisdictional questions by operation the doctrine of *res judicata:*[71] the tribunal's inquiry was simply whether the identity

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66 *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 30 **[RL-131]**.

67 *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision, 12 July 2006, para. 18 **[CL-008]**.

68 *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision, 12 July 2006, paras. 92-94 **[CL-008]**.

69 *Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012 paras.35-37 **[RL-205]**.

70 *Quasar de Valors SICAV S.A. and Others v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012 para. 40 **[RL-205]**.

71 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II),* ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, paras. 71-73 **[RL-042]**.

requirement of *res judicata* was met, which in turn depended "*on whether Vivendi Universal is the successor-in-interest of CGE.*"[72] The tribunal went on to find this was the case, and therefore that the doctrine of *res judicata* applied with respect to the respondent State's jurisdictional objections.[73] Just as in *Quasar*, it is also notable that the original claimant CGE had ceased to exist in between the original proceedings and the resubmitted proceedings.[74]

54. As Respondent already explained in great detail in its previous submissions, the factual matrix of the present case is entirely different:

- The transfer did not take place *before* the initiation of the claim but in the midst of the proceedings, at a time when the arbitration agreement between the investor and the respondent State had already been crystallized;

- The assignment was not the consequence of a liquidation or merger, with the original claimant ceasing to exist and a universal corporate successor stepping in its shoes; rather, it is uncontested the original claimant Neustar remained in existence after the alleged transaction and simply sought to assign/transfer the claim to another entity, Security Services/Vercara.

55. The only previous ICSID case known to Respondent with factual similarities to the present situation is the *Wintershall* case. In this case, the proceedings had been initiated by the original claimant Wintershall Aktiengesellschaft in 2004. In November 2006, the original claimant assigned its "*rights and liabilities in and arising from the present arbitration proceedings*" to Wintershall Holding through what it termed a "*spin-off*", and notified this change to Respondent and the Tribunal seven months later on 18 May 2007.[75] On this basis, the claimant requested that the Tribunal "*acknowledge*" Wintershall Holding as claimant.[76] In the award, the tribunal observed that, as a matter of principle,[77] the substitution requested by claimant was outside the tribunal's powers and required consent of the parties:

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72 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II),* ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, para. 73 **[RL-042]**.

73 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II),* ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, paras. 73, 82-83 **[RL-042]**.

74 *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (II),* ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, para. 85 **[RL-042]**: "*CGE was renamed Vivendi S.A. in May 1998 and then merged into Vivendi Universal (keeping with it the shares of CAA), so that Vivendi Universal is the successor of CGE.*"

75 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 45 **[RL-123]**.

76 It bears noting that in that case, both parties agreed that under German law, Wintershall Holding was a "*partial universal successor*" of Wintershall. To the contrary, it is uncontested in the present case that there was no such corporate succession between Neustar and Security Services/Vercara. Yet, even against this background the Wintershall tribunal considered that the Respondent's consent was required for the substitution of the claimant.

77 Claimant also alleges that Prof. Schreuer was "*not aware of any principle under international law which would impede W.Holding from being substituted or joined to the case.*" (Response on Security for Costs, para. 150). This is highly misleading: as can be seen from the very award, Prof. Schreuer explained during cross-examination that he did not "*think this particular situation has actually arisen so far. Two cases come to mind: Vivendi and LESI, bout in both cases*

> *In the present case, an objection to the substitution of the Claimant by a new entity during the course of ICSID arbitration proceedings may be well-taken – for lack of empowerment of a Tribunal to do so,* ***absent consent****.*[78]

56. While the Tribunal went on to hold that Wintershall Holding could be *joined* to Wintershall (and not *substituted* as Claimant intends to do in the present arbitration),[79] it did so on the basis that the respondent State had *consented* to the joinder.[80] It also bears noting that in that case, the claimant explicitly offered "*the possibility that Wintershall either solely or jointly with Wintershall Holding AG would maintain a capacity as claimant in the current proceedings*" (including therefore for purposes of cost allocation),[81] This offer was reiterated to the respondent State's counsel on several occasions.[82] In contrast, Claimant explicitly submitted in the present case that the Tribunal no longer has jurisdiction over Neustar, Inc., even for purposes of cost allocation.[83]

57. In these circumstances, and irrespective of whether the assignment is effective and/or valid under Delaware law (which Claimant has failed to establish), Claimant fails to explain how this assignment in a private agreement between private parties could validly serve as basis for the *substitution* of the claimant party in the ICSID proceedings under controlling international law (the TPA and ICSID Convention), absent Respondent's consent. Similarly, Claimant fails to explain why such an alleged assignment/transfer could possibly deprive the Tribunal of jurisdiction over Neustar for purposes of cost allocation under these instruments.

58. This is because, as already explained in Respondent's Rejoinder and Application for Security for Costs, once consent has been crystallized in an arbitration agreement such arbitration agreement cannot be unilaterally modified or altered. In the words of the *Sumrain* tribunal:

> ***Once an arbitration agreement comes into existence and the parties to that agreement have been defined, the arbitral tribunal cannot modify that agreement without the consent of all the parties to that agreement****. That is a fundamental principle: a tribunal can interpret and apply an arbitration agreement, but it cannot rewrite or amend it.*[84]

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there was an absorption not a spin-off, so I believe the old companies did not continue to exist." (*see Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 52 **[RL-123]**).

78 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 59 **[RL-123]** (emphasis added).

79 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, paras. 55-60 **[RL-123]** (emphasis added).

80 Contrary to Claimant's misrepresentation, *Winterhsall* certainly does not stand for the proposition that "*the assignee can be joined to the arbitration even without the respondent's* ***absolute*** *consent.*" (emphasis added). The *Wintershall* tribunal considered that the respondent State *had* consented to the replacement, and this therefore confirms that consent of the other party is required for such a substitution/joinder to be possible.

81 *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 49 **[RL-123]**.

82 *See Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 54 **[RL-123]**.

83 *See* Response on Security for Costs, Section IV.D.

84 *Sumrain et al v. Kuwait*, ICSID Case No. ARB/19/20, Decision on the Joinder Application, 5 October 2020, para. 21 **[RL-122]** (emphasis added).

59. As the United States reiterated at the Hearing, consent of the State parties to the TPA to arbitrate (and the ICSID Convention) is not unconditional: "*the parties to the US-Colombia TPA did not provide unconditional consent to arbitration under any and all circumstances. Rather the parties have only consented to arbitrate investor-state disputes under Chapter 10, Section B, where an investor submits a "claim to arbitration under this section in accordance with this agreement.*"[85] As Respondent explained in its previous submissions,[86] such consent is also necessarily limited to a ***specific*** claimant: this is notably apparent from Article 10.18 of the TPA, which requires that the RFA be accompanied by a waiver filed by a claimant,[87] and Article 10.16(2) of the TPA which requires a Notice of Intent to be filed by a specific claimant.[88]

60. Contrary to Claimant's misrepresentation, these are certainly not "*mere formality requirements*" as Claimant seeks to suggest in its Response on Security for Costs: rather, as already explained in detail in Respondent's previous submissions, under the terms of the TPA such requirements have a jurisdictional nature. Contrary to Claimant's newfound suggestion, noncompliance with these requirements cannot therefore be remedied by Security Services/Vercara at this very late stage in the proceedings.[89]

61. Against this background, Claimant's proposition that "*[t]he arbitration agreement containing Neustar's consent to arbitration […] has been assigned to Vercara*"[90] would precisely amount to an unilateral modification of the agreement without the consent of all the parties to that agreement, i.e. both Claimant and Respondent, and in breach of the numerous conditions on the respondent State's consent enumerated by Section B of Chapter 10 of the TPA.

62. In fact, there is evidence on the record that at the time of concluding the UPA, Claimant may have shared this understanding that the formal assignment of the ICSID claim would not be permissible under either/both municipal and international law. At Section 5.10 of this instrument, Neustar and

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85 Transcript, Day 1 [Bigge], 188:15-22.

86 Rejoinder, paras. 31-32.

87 Article 10.18 of the TPA requires that the RFA has to be accompanied by the claimant's written waiver "*of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16*", this waiver being necessarily filed by a *specific* claimant.

88 Article 10.16.2 of the TPA specifies that the notice of intent must include the name and address of the claimant.

89 With respect to the waiver requirement, *see Commerce Group v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 115 **[RL-027]**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, para. 61 **[RL-028]**; *Renco Group v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, para. 142 **[RL-021]**; *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 191 **[RL-095]**; *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022, para. 233 **[RL-133]**.
With respect to the notice of intent requirement, *see Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 344 **[RL-011]**; *Pac Rim v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, para. 93 **[RL-012]**; *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, 4 April 2022, para. 10 **[RL-137].**

90 Response on Security for Costs, para. 184.

Security Services/Vercara saw fit to provide for an entire procedure in case "*the MiNTIC Claim [could not] be, or [was] not, assigned to the Business*":

> ***To the extent the MINTIC Claim cannot be, or is not, assigned to the Business**, (i) the Company shall assume the control of such claim and shall pay as incurred the fees and out-of-pocket expenses of outside counsel related to such claim, (ii) Neustar shall have the right, at its own cost and expense, to participate in the pursuit of such claim, and (iii) the Company shall be permitted to settle the MINTIC Claim in its sole discretion; provided, that in the event any such settlement involves an injunction or other equitable relief against Neustar, such settlement shall require the prior written consent of Neustar (not to be unreasonably withheld, conditioned or delayed).*[91]

63. Claimant was therefore perfectly aware on or before 1 December 2021 that there was a real risk that the claim could not and/or would not be assigned to Security Services (under either Delaware or international law) and that Neustar would have to remain the party to the proceedings before ICSID. However, rather than approaching ICSID and Respondent regarding this circumstance, for instance to verify whether Respondent would agree to the substitution of claimant, Claimant elected to withhold all relevant information for more than six months and make a misleading and incomplete disclosure with its Reply on 29 July 2022.

64. Claimant's improper approach to this issue has consequences, which it cannot seek to cure through the submission of new evidence at the eleventh-hour and/or unsupported contentions that "*[t]he arbitration agreement containing Neustar's consent to arbitration has […] been assigned to Vercara.*"[92] Claimant's newfound theory that through the assignment of the claim, it 'assigned' the arbitration agreement containing consent is unavailing and unsupported by any authority: consent of the other party to this agreement, Respondent, should have been sought and obtained. This was not the case, and the consequence is that the Tribunal lacks jurisdiction over this intended new claimant Security Services/Vercara (with Respondent's request that Security Services/Vercara post security for costs being made *pending* the Tribunal's decision on jurisdiction with respect to this entity). To the contrary, the Tribunal retains jurisdiction over Neustar (at least for purposes of cost allocation).[93]

4.3 **Respondent did not consent to the intended substitution of claimant**

65. Finally, as already explained in the Application for Security for Costs,[94] Respondent never consented to the intended change notified by Claimant on 29 July 2022. Claimant's suggestions to the contrary in its Response are misleading.

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91 Unit Purchase Agreement between Neustar Inc., Aerial Blocker Corp., Aerial Security Services Intermediate, LLC, and Security Services, LLC dated 1 December 2021 (unredacted version), Section 5.10 **[C-0140]**.

92 Response on Security for Costs, para. 184.

93 And without prejudice to Respondent's other preliminary objections to the Tribunal's jurisdiction *over Neustar, Inc*, the initial claimant in this case, as set out in Respondent's previous submissions and at the Hearing.

94 Application for Security for Costs, para. 30.

66. *First*, Claimant refers to Respondent's 12 August 2022 email to ICSID, sent in response to ICSID's communication of 8 August 2022 noting that it would proceed to update the record for the proceedings following Claimant's notification of the change. Claimant characterizes this email as "*expressly agree[ing] that the title of the proceeding be changed*" and concludes that such email constitutes consent to the change of claimant because "*[i]t was not an option for the Respondent to agree to change the case title but withhold consent to the change of claimant that underlay that.*"[95]

67. The basis for this proposition is however unclear and in any event incorrect. Respondent's email, which as a reminder was sent in response to an administrative communication from ICSID regarding the record of the proceeding at a time when Respondent was still grasping the full consequences of Claimant's notification, contained a full reservation of rights:

> *While Respondent* ***reserves all of its rights*** *in relation to the corporate changes referred to in Claimant's letter of 29 July 2022, Respondent kindly requests that* ***for administrative purposes and in order to avoid any confusion to members of the public who might seek information about the case****, the proceeding be referred to as 'Security Services, LLC d/b/a Neustar Security Services (formerly Neustar, Inc.) v. Republic of Colombia."*[96]

68. It could not be clearer from the contents of this email that Respondent expressly reserved "*all of its rights*" with respect to the changes notified by Claimant, and that any update to the record of the proceeding would be "*for administrative purposes and in order to avoid any confusion to members of the public who might seek information about the case.*" Contrary to Claimant's representation, this email can therefore certainly not be construed as expressing consent to the intended change of claimant by Respondent. This is all the more so that Respondent followed up a few weeks later, on 3 September 2023, with an Application mentioning the potential jurisdictional consequences of this change (and requesting further information), and submitted a full preliminary objection to this intended change of claimant with its Rejoinder of 4 November 2022.

69. *Second*, Claimant argues that Respondent seeking an order for security against both Neustar and Security Services/Vercara equates to consent to having Security Services/Vercara replace Neustar as Claimant in the proceedings.[97] However, Respondent's Application for Security for Costs is made <u>pending</u> the Tribunal's decision on whether it has jurisdiction over Security Services/Vercara, this also being the reason why this request is directly against <u>both</u> Neustar (in respect of which the Tribunal has retained jurisdiction for purposes of cost allocation) and Security Services/Vercara (pending a decision on their involvement in this case). This is apparent from the very relief requested by Respondent, which Claimant has simply omitted:

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95 Response on Security for Costs, para. 175.

96 Email from Respondent to ICSID of 12 August 2022 (emphasis added).

97 Response on Security for Costs, paras. 178-180.

> *Respondent respectfully requests that* ***pending its decision on whether it has jurisdiction over Security Services/Vercara****, the Tribunal order* ***Neustar and Security Services/Vercara****, as a condition to the continuation of this proceeding, to post security for costs in the amount of USD 3.5 million to cover a potential award of costs in favour of the Republic of Colombia, to be deposited in an escrow account or provided as an unconditional and irrevocable bank guarantee.*[98]

70. In these circumstances, Respondent's Application for Security for Costs cannot be construed as constituting consent to the replacement of the Claimant.[99]

5. REQUEST

71. For all the above reasons, Respondent respectfully:

- Maintains its request for relief as set out in its Application for Security for Costs; and,
- Requests that the Tribunal strike out the witness statement of Ms Megan Rodkin improperly submitted by Claimant at this late stage of the proceedings.

Respectfully submitted,

26 May 2023

[Signed]

Agencia Nacional de Defensa Jurídica del Estado	**Hogan Lovells**
Ana María Ordoñez Puentes Camilo Valdivieso León	Laurent Gouiffès Daniel E. González Melissa Ordoñez Juliana De Valdenebro Garrido Lucas Aubry

[98] Application for Security for Costs, para. 63 (emphasis added).

[99] Claimant's insistence on Respondent's alleged admissions at the Hearing is similarly no more than a red-herring. As explained during Respondent's Opening Statement (Transcript, Day 1 [Gouiffès], 138:14-21), "*any award from this Tribunal has to be against Neustar Inc., and whether Security Services LLC is added or not, frankly if we understand better why not, but we are not so interested […].*"). In any event, as explained above Respondent clearly explained in its Application for Security for Costs (para. 32) that "*Respondent has not agreed that Neustar discontinue its involvement entirely in the proceedings and avoid liability for an adverse award on costs*", concluding that "[i]*nstead such an award should be rendered primarily against Neustar.*"