IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DNC PARKS & RESORTS AT YOSEMITE, INC.,	)	
Plaintiff,	)	
v.	)	No. 15-1034C
	)	Hon. Patricia E. Campbell-Smith, C.J.
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

JOINT PRELIMINARY STATUS REPORT

Plaintiff, DNC Parks & Resorts at Yosemite, Inc. ("DNCY"), and Defendant, the United States, submit this Joint Preliminary Status Report pursuant to Section III of Appendix A of the Rules of the United States Court of Federal Claims ("RCFC").

Paragraph 4(a): Does the court have jurisdiction over the action?

Plaintiff states that the Court has jurisdiction over this action pursuant to 28 U.S.C. § 1491(a). Plaintiff respectfully refers the Court to Plaintiff's response to Defendant's position, which begins on page 4 below.

Defendant states that, although it has identified no reason to question the Court's general jurisdiction over this case at this time, there is uncertainty as to whether this Court possesses jurisdiction to consider the invalidity and ownership of DNCY's alleged Yosemite-related trademark registrations.

The validity of DNCY's alleged trademark registrations as of March 1, 2016, is a significant issue in this case because it affects the potential value of the trademarks as of February 29, 2016, the last day of DNCY's contract and the valuation date for any alleged property that might be required to be purchased from DNCY. DNCY argued to the United States, prior to the termination of its contract, that DNCY's alleged Yosemite-related trademarks had a value of $44 million. But, as Defendant has repeatedly asserted, DNCY's valuation is grossly inflated, in part, because DNCY's valuation methodology presumed a valid, perpetual life to *its* Yosemite-related trademarks. If DNCY's alleged Yosemite-related trademarks, however, became invalid with the termination of its concession contract, that fact of an impending invalidity to DNCY's alleged trademarks certainly affected the value of DNCY's alleged trademarks before the termination of its concession contract.[1] Put another way, DNCY, through this litigation, is attempting to monetize a property right (an unending trademark in the names of United States-owned property) it never possessed.

Defendant preferred to bring its invalidity challenges to DNCY's trademark registrations in the Trademark Trial and Appeal Board (TTAB), an administrative tribunal with clear jurisdiction to hear such challenges and significant experience in doing so. *See* 15 U.S.C. §§ 1064, 1067. On February 26, 2016, the NPS asserted its invalidity challenges in a petition to cancel seven of DNCY's trademark registrations before the TTAB. That proceeding, however, was suspended by the tribunal on May 18, 2016, without apparent consideration of the jurisdictional questions raised by the NPS. NPS petitioned the Director of the USPTO to reconsider the TTAB's decision to suspend proceedings. The USPTO, however, denied the petition to reconsider on August 5, 2016.

[1] As Defendant argued before the TTAB, there are at least three reasons that DNCY's alleged Yosemite-related trademarks are currently invalid: (1) the trademarks create a false association between DNCY and the National Park Service (NPS); (2) DNCY has abandoned the trademark registrations; and (3) DNCY's registration of YOSEMITE NATIONAL PARK dilutes the NPS's trademark for "Yosemite National Park." *See* Consolidated Petition to Cancel, National Park Service v. DNC Parks & Resorts at Yosemite, Inc. (Feb. 26, 2016, TTAB) (TTABVUE Docket No. 1).

Based upon the apparent reasoning of the TTAB, the Court may have the power to order the cancellation of asserted registrations defensively pursuant to Section 1119 of Title 15. That provision allows a court to "determine the right to registration [and] order the cancelation of registrations, in whole or in part" in "any action involving a registered mark." 15 U.S.C. § 1119. The applicability of this provision, however, has never been considered or addressed by this Court, the Federal Circuit, and any of their respective predecessors.

Plaintiff responds that the Court indisputably possesses jurisdiction over this action, as each of DNCY's three claims is "founded … upon [an] express or implied contract with the United States," and seeks a judgment of money damages caused by those breaches. 28 U.S.C. § 1491(a). Defendant inaccurately contends that the fact that the breaches of contract in this case involve trademarks raises "significant uncertainty" about this Court's jurisdiction to decide "the invalidity and ownership of DNCY's alleged Yosemite-related trademark registrations." To begin with, the Court can resolve this case without addressing any of Defendant's supposed "invalidity and ownership" issues. DNCY's claim with respect to the trademarks is that Defendant breached its contractual obligation to require the next Yosemite concessioner to purchase for fair value the trademarks that DNCY owned and used *before* its Yosemite concession contract expired on February 29, 2016. To resolve this claim, the only "invalidity or ownership" issue that the Court needs to address is whether DNCY owned valid trademarks *before* its Yosemite concession contract expired. But there is no such issue, because Defendant *does not dispute* that DNCY owned (and held valid registrations in) the relevant trademarks while DNCY was performing that contract and until that contract expired on February 29, 2016. *See* Ans. to Am. Compl. ¶ 103 (admitting that Aramark must buy "certain trademarks" owned by DNCY); *see generally* Defendant's TTAB Petition. Instead, Defendant's attempt to raise "invalidity and ownership" issues pertain to the period *after DNCY's concession contract expired.*[2] Those issues, therefore, are irrelevant to DNCY's claims.

Defendant seems to contend that the validity of DNCY's trademark registrations *after* DNCY's contract expired will somehow be important in the determination of the "fair value" of the trademarks *before* the contract expired. This argument, however, ignores the fact that Defendant's breach is the only reason why DNCY, rather than the current concessioner, has continued to hold those registrations after the contract expired. Defendant's notion that it can reap the benefit of any reduction in value caused by its breach finds no support in the law. To the contrary, contracts are to be enforced so as to put the non-breaching party in the position it would have been had the contract been performed. *LaSalle Talman Bank v. United States*, 317 F.3d 1363 (Fed. Cir. 2003); *see also* Restatement (Second) of Contracts § 347. Had Defendant not breached its contract with DNCY, the new concessioner would have acquired the marks from DNCY for their fair value *before* the contract expired. Thus, the "invalidity and ownership" issues raised by Defendant – the validity of DNCY's registrations *after* March 1, 2016 – are also irrelevant to the "fair value" issue presented in this case.

Even if Defendant were correct that the Court may need to consider issues of trademark law in resolving this case, it is well-established that this Court possesses the authority to decide incidental legal issues that arise in the course of deciding a claim within its Tucker Act

[2] Each of NPS's legal theories in its petition to the TTAB for cancellation of DNCY's trademark registrations--false association, abandonment and dilution -- rests entirely and exclusively on the fact that after March 1, 2016, DNCY was no longer the concessioner at Yosemite National Park. In the petition, NPS asserts that since DNCY is no longer the Yosemite concessioner "as of March 1, 2016," the registered marks at issue falsely suggest a connection with the National Park Service "as of March 1, 2016." TTAB Petition at ¶¶40-47. NPS also claims that, since its term as concessioner expired, DNCY has abandoned the Contested Marks "as of March 1, 2016." TTAB Petition, at ¶¶48-53. Finally, NPS contends, incongruously with the abandonment argument, that DNCY's alleged continued use of the "Yosemite National Park" trademark dilutes NPS's alleged famous unregistered trademark in that name "because of the association that arises from the similarity between DNCY's mark and NPS's mark". TTAB Petition at ¶¶54-63.

jurisdiction, despite those issues being outside the Court's jurisdiction if asserted as standalone claims. *See*, *e.g., Holley v. United* States, 124 F.3d 1462, 1466 (Fed. Cir. 1997); *Am. Renovation & Constr. Co. v. United States,* 65 Fed. Cl. 254, 260 (2005). Thus, where this Court's Tucker Act jurisdiction is properly invoked, the Court will decide subsidiary state law issues, *e.g., Trek Leasing, Inc. v. United States,* 62 Fed. Cl. 673, 678 (2004), constitutional issues, *Holley,* 124 F.3d at 1466, and disputes over the interpretation and application of other Federal statutes and regulations, *e.g., Wheeler v. United States*, 3 Cl. Ct. 186, 688 (1983) ("this court may properly interpret and apply statutes and review regulations incident to and as a necessary part of awarding money damages."). Indeed, this Court "has also historically taken jurisdiction to decide a dispute between private parties if the resolution of that dispute bears on a monetary claim against the government." *Am. Renovation & Constr. Co. v. United States*, 65 Fed. Cl. 254, 260 (2005) (citations omitted). *Id.*, 65 Fed. Cl. at 261 (where the asserted cause of action is within this Court's Tucker Act jurisdiction to decide contract actions against the government, precedent "unambiguously supports" the Court having the authority to "determin[e] the ownership of the public right that is at stake in this case.")

Defendant cites no authority to support its notion that this Court is somehow precluded from addressing and resolving any genuine issues that are raised during this case regarding the ownership of the property at issue, including the trademarks. To the contrary, this Court frequently decides the ownership of property, including intellectual property, as necessary to resolve the properly pleaded case before it. *See Trek Leasing*, 62 Fed. Cl. at 678.

To the extent this response to Defendant's contention does not resolve any concerns the Court may have on this issue, Plaintiff respectfully requests the opportunity to brief the issue if and when the issue becomes ripe for decision in the course of this case.

Paragraph 4(b): Should the case be consolidated with any other case and, if so, why?

The parties agree that this case should not be consolidated with any other case.

Paragraph 4(c): Should trial of liability and damages be bifurcated and, if so, why?

Plaintiff states that the trial of liability and damages should not be bifurcated. Plaintiff respectfully refers the Court to Plaintiff's response to Defendant's position, which begins on page 8 below.

Defendant states that, generally, the proceedings in this Court should be bifurcated so that, through summary judgment motions, the Court (assuming it has jurisdiction) addresses, first, the validity of DNCY's alleged Yosemite-related trademarks and second, liability. If the Court resolves liability in favor of the United States, there would not be a need to proceed with the expert discovery concerning damages. Certainly, the validity of DNCY's Yosemite-related trademarks is a factor in the valuation of DNCY's trademarks, and DNCY's demand for a grossly exaggerated valuation of its alleged trademarks (along with DNCY's demand for payments for alleged "fixed capitalized assets" for which it is not entitled to compensation) form the bases for the United States' prior material breach affirmative defense.

In addition, if DNCY's asserted trademark registrations were canceled during the liability phase, it will undoubtedly have a significant impact on the value of DNCY's trademarks – especially given that the methodology DNCY has invoked to value its trademarks utilizes an assumption that DNCY has the right to future "trademark royalties" based upon the future cash flows at the various hotels and recreational areas long after the conclusion of its Yosemite Concession Contract. A determination that DNCY, with the conclusion of its concession contract, has no right to the trademarks, and would thus never have had a right to the trademarks at the conclusion of its contract should have a significant effect upon DNCY's methodology for valuing the trademarks. Thus, the resolution of the parties' dispute concerning the validity of DNCY's Yosemite-related trademark registrations before proceeding to any expert discovery concerning the valuation of these trademarks would provide the most efficient cause of action.

Should the Court deny the United States' summary judgment motion with respect to liability, then expert discovery concerning the valuation of DNCY's alleged trademarks should proceed. At the conclusion of expert discovery with respect to damages, the parties should be given an opportunity to file summary judgment motions with respect to damages.

If this case is not resolved through summary judgment motions, either with respect to liability or damages, then trial should proceed to address both liability and damages.

Plaintiff responds that Defendant's proposed plan is inefficient and will result in needless expense and delay. To begin with, the plan is unworkable because what Defendant calls the "liability" issues are inextricably intertwined with what it calls the "damages" issues. As Defendant's comments above indicate, Defendant's primary defense to liability in this case is premised on its (completely unsupported) assertion that DNCY's valuation of the trademarks is "grossly exaggerated." In other words, Defendant wishes to contend it is not liable because Plaintiff's damages are overstated. Even assuming the validity of the legal theory underlying Defendant' affirmative defense (which is highly questionable), the Court will be unable to determine liability without addressing the damages issues. Therefore, it makes no sense to adopt a plan in which the Court attempts to resolve liability without expert testimony on the value of the trademarks, i.e. damages.

Additionally, following Defendant's plan to put off expert discovery on damages until after the Court has ruled on Defendant's liability defenses would severely prejudice Plaintiff. As Defendant knows, Plaintiff intends to offer expert testimony on the valuation of the trademarks in order to counter whatever evidence Defendant may present to support its assertion that DNCY "grossly exaggerated" their value. Under Defendants' plan, however, Defendant would be precluded from doing so because no expert discovery on the valuation issues would be permitted until after the Court had already ruled on liability.

Further, as discussed in the response to 4(a) above, the issue of the trademarks' post-March 1, 2016 validity is not relevant to the breach of contract issues before the Court, which concern the value and ownership of the marks before that date. As such, there is no reason to litigate "validity" issues first, as Defendant proposes. To the extent Defendant wishes to contend that "validity" issues affect the trademarks' valuation, those issues should be addressed together, not separately as Defendant proposes.

Finally, Defendant's plan would needlessly delay the Court's resolution of the principal issue in this case, which is the fair value of the property that Defendant was contractually obligated to require Aramark to buy from Plaintiff. Disagreement over the value of the property at issue (trademarks and capital improvements) is the driving factor that has resulted in this lawsuit and that has prevented an amicable resolution. The government has judicially admitted that DNCY's intangible property is among the "other property" referenced in Section 13 of the contract (although it does contest whether the capital improvements are compensable under the contract). *See* Ans. to Am. Compl. ¶ 136. While Defendant has certainly been creative in positing theories as to why the Court should delay addressing the valuation issues that are the nub of the dispute here, those theories are distractions and Defendant should not be permitted to use them to drive up the time and expense necessary to resolve this case.

The Court should decline to adopt Defendant's "bifurcation" plan and instead direct that all issues in this case are to be litigated simultaneously.

Paragraph 4(d): Should further proceedings in the case be deferred pending consideration of another case before this court or any other tribunal and, if so, why?

The Parties state that, in light of the TTAB's suspension of the cancellation petition, further proceedings in this Court should not be deferred at this time.

Paragraph 4(e): In cases other than tax refund actions, will a remand or suspension be sought and, if so, why and for how long?

The Parties state that there is no basis upon which a remand could be requested. At present, the Parties do not see any reason for seeking a suspension of this matter.

Paragraph 4(f): Will additional parties be joined? If so, the parties shall provide a statement describing such parties, their relationship to the case, the efforts to effect joinder, and the schedule proposed to effect joinder.

Plaintiff states that it does not intend to seek the joinder of any additional parties, and expects to oppose the joinder of Aramark in the event Defendant so moves and will, as is appropriate, set forth the grounds for its opposition at that time.

Defendant states that the concessioner that replaced DNCY at Yosemite, Yosemite Hospitality, LLC (Aramark), should be joined as a third-party defendant to this case pursuant to RCFC Rule 14(b), RCFC Rule 24, or RCFC Rule 19.

Pursuant to Rule 14(b)(1), "[t]he court, on motion or on its own, may notify any person with the legal capacity to sue or to be sued who is alleged to have an interest in the subject matter of the suit." RCFC Rule 14(b)(1). "The interest requirement of Rule 14(b)(1) is broad, and an apparent interest is sufficient for notice to issue '[e]ven in those situations where an alleged third party interest in the suit is uncertain.'" *Uusi, LLC v. United States*, 110 Fed. Cl. 604, 609 (2013) (quoting *Allied Oil & Supply, Inc. v. United States*, 60 Fed. Cl. 223, 225-26 (2004), *aff'd*, No.

2013-155, slip op. (Fed. Cir. Nov. 22, 2013) (upholding ruling in denying writ of mandamus). A*ccord 3rd Eye Surveillance LLC v. United States*, No. 15-501C, 2016 WL 1366688 at *6 (Fed. Cl. Apr. 5, 2016); *see also Del-Rio Drilling Programs, Inc. v. United States*, 17 Cl. Ct. 844, 849 (1989). "'A person against whom the United States alleges a nonfrivolous claim for indemnity is a party who 'appears' to have such an interest.'" *Uusi*, 110 Fed. Cl. at 610 (quoting *Carrier Corp. v. United States*, 209 Ct. Cl. 267, 269, 534 F.2d 250, 251 (1976) (per curiam)).

Rule 24, which permits third parties to participate in a case as third party intervenors, similarly has an "interested party" basis for the intervention and a similarly broad standard with respect to the interest requirement:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

RCFC Rule 24(a)(2). Recognizing the broad standard with respect to the interest requirement this Court has stated: "[A] party need only show an interest in the subject of the proceeding such that 'disposing of the action *may* as a practical matter impair or impede the movant's ability to protect its interest.' RCFC 24(a)(2) (emphasis added)." *3rd Eye Surveillance*, 2016 WL 1366688 at *8. *See also Klamath Irr. Dist. v. United States*, 64 Fed. Cl. 328, 330 ("courts interpreting the newer version of Rule 24(a)(2) generally have concluded that 'the requirements for intervention are to be construed in favor of intervention.'") (quoting *Am. Maritime Transp., Inc. v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989)).

Here, DNCY's allegations center around the notion that the United States has failed to force Aramark to purchase at "fair value" certain intangible assets and "fixed capital assets," what DNCY now claims to be possessory interests, from DNCY. *See, e.g.*, Amended Compl. at

¶¶ 2, 114. And the amount that DNCY seeks from the United States is the amount that DNCY alleges Aramark should have paid for these disputed classes of DNCY's assets. Given these allegations, and setting aside the fact that the United States has denied in part DNCY's allegations and has otherwise asserted an affirmative defense concerning DNCY's prior material breach of its contract with the United States, the United States contends that Aramark, as the current concessioner from whom DNCY alleges it should have been compensated, has an interest in this case, especially with respect to the alleged validity and value of DNCY's claims concerning its alleged Yosemite-related trademarks and "fixed capital assets." [3] Certainly, it has never been the United States' position that NPS would set the value of the assets to be sold by DNCY to Aramark; instead, the ultimate value of DNCY's alleged assets was meant to be determined through good faith negotiations between DNCY and any non-related successor concessioner.

Moreover, Aramark (or any future concessioner), which is currently operating the Yosemite businesses previously operated by DNCY using new trade names, may have an interest in the ultimate restoration of the historic trade names of the properties, as it acts as a steward of the United States' properties – including its trademarks – during Aramark's tenure at Yosemite.

Furthermore, it is the United States' contention that, if the United States becomes obligated to pay damages to DNCY based upon this Court's valuation of DNCY's alleged Yosemite-related property, Aramark will become obligated to pay that valuation amount to

[3] To be sure, it is the United States' contention that it faces no contractual liability to DNCY in the first instance because DNCY breached its contract with the United States prior to any alleged contractual breach by the United States. *See* Def. Answer to Amended Compl. at ¶¶ 151-197. Moreover, the United States has asserted that DNCY's claims concerning its demand for payment for "fixed capital assets" or a "possessory interest" fail to state a claim because the costs claimed by DNCY are not compensable under DCNY's Concession Contract.

DNCY (or the United States if the United States first pays DNCY a Court-ordered valuation amount). In fact, Aramark has already purchased a portion of the "other property" from DNCY. Thus, with respect to some of the assets for which DNCY demands compensation, Aramark may have an obligation to the United States that is effectively analogous to that of an indemnitor. The United States understands that Aramark may dispute these contentions.

Counsel for the United States have spoken with counsel for Aramark who have advised us that Aramark consents to its joinder to this case, while reserving its ultimate rights with respect to any contractual obligations of Aramark to the United States to pay DNCY (or the United States) the fair value of DNCY's alleged Yosemite-related trademarks, fixed capital assets, or possessory interest.

In the alternative to joinder pursuant to Rules 14(b) and 24, we also contend that Aramark could be joined to this case pursuant to RCFC Rule 19(a)(1)(ii).[4]

Paragraph 4(g): Does either party intend to file a motion pursuant to RCFC 12(b), 12(c), or 56 and, if so, what is the schedule for the intended filing?

The Parties state that neither party currently intends to file a motion pursuant to RCFC 12(b) or 12(c).

[4] RCFC Rule 19(a)(1)(ii) provides that a party must be joined as a party if:

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impeded the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Plaintiff further states that it will evaluate whether a motion for summary judgment pursuant to RCFC 56 is warranted as discovery progresses. Plaintiff's proposed discovery plan below includes a deadline for filing dispositive motions.

Defendant states that it anticipates filing a motion for summary judgment with respect to liability pursuant to RCFC 56 no later than 60 days after the close of fact discovery and the conclusion of any expert discovery that might be obtained with respect to the validity of DNCY's trademarks. Furthermore, if the case is not resolved with respect to liability, defendant also intends to file a motion for partial or complete summary judgment with respect to damages no later than 60 days after the close of expert discovery with respect to damages.

Paragraph 4(h): What are the relevant factual and legal issues?

Plaintiff states that the relevant issues include:

- Whether Defendant breached its obligations under the unambiguous terms of Concession Contract No. YOSE004-93 (the "Contract"), pursuant to which Plaintiff provided concession services in Yosemite National Park ("Yosemite") by not requiring the successor concessioner ("Aramark") to purchase Plaintiff's Possessory Interest and Other Property (as defined by the terms of the Contract).

- Whether the property that Defendant is obligated by the Contract to require Aramark to compensate Plaintiff for includes certain capitalized improvements installed in Yosemite by Plaintiff at its own expense and with Defendant's approval and that Plaintiff used in its Yosemite operations and, if so, what is the fair value of that property.

- Whether the property that Defendant is obligated by the Contract to require Aramark to buy from Plaintiff includes intellectual property that Plaintiff uses in its Yosemite operations and, if so, what is the fair value of that property.

- Whether Defendant breached the implied covenant of good faith and fair dealing in the Contract by failing to cooperate with Plaintiff and by taking steps to deny Plaintiff its reasonable expectations under Section 13 of the Contract and, if so, to what extent was Plaintiff damaged by that breach.

- Whether Defendant breached an implied-in-fact contract with Plaintiff to evaluate fairly proposals for the successor concession contract in Yosemite, Contract No. CC-YOSE004-16 (the "New Contract"), in accordance with the prospectus for the new contract or was otherwise arbitrary, capricious, an abuse of discretion or not in compliance with law.

- What damages has Plaintiff suffered as a result of Defendant's alleged breaches of the Contract and implied-in-fact contract?

Defendant states that the relevant issues include:

- Whether DNCY's claims are, in part, moot because the United States informed Aramark and DNCY in December 2015, that Aramark must purchase DNCY's alleged trademarks for "fair value."

- Whether DNCY has improperly demanded compensation for alleged "fixed capitalized assets" or an alleged "possessory interest" for maintenance and other costs (*e.g.*, repainting walls, replacing carpet, flooring, and plumbing and lighting fixtures) that are not reimbursable by either the United States or Aramark under DNCY's Concession Contract or pursuant to law.

- Whether DNCY breached its duty of good faith and fair dealing in connection with its Concession Contract (a prior material breach) by setting forth and demanding a grossly exaggerated payment for its alleged Yosemite-related trademarks and by requesting payment for a category of assets, described by DNCY as "fixed capitalized assets," or "possessory interests," which were actually largely maintenance costs for which DNCY had no rights for compensation under the contract.

- Whether the expiration of DNCY's trademark registration to the YOSEMITE design mark, and the initial rejection by the United States Patent and Trademark Office of DNCY's application to reregister that design mark affect the validity of DNCY's proposed sale of that trademark and its valuation.

- Whether DNCY's registration and alleged ownership of Yosemite-related trademarks are valid.

- Whether DNCY had properly valued its alleged Yosemite-related trademarks when it demanded a $44 million payment from Aramark for those alleged trademarks.

- Whether DNCY can properly seek payment for the theoretical "extension" of the alleged Yosemite-related trademark "brands" beyond the borders of the operations of Yosemite National Park given that the Concession Contract only provides that DNCY be compensated for property "used or held for use in connection with" DNCY's operations within Yosemite National Park.

- Whether DNCY's valuation methodology is fundamentally flawed and grossly inaccurate because it ignores the unique paradigm of a concession within a

National Park: namely, that the underlying properties are owned by the United States in a National Park where it is the unique, natural surroundings that draw visitors to the parks – and to the concessions – and not the trade name of any particular hotel, or restaurant – or the management company the tradename is alleged to represent.

- Whether DNCY's valuation methodology is fundamentally flawed and grossly inaccurate because it ignores that, to the degree that there is good will or trade facilitation present with respect to the name of a particular Government-owned property, that goodwill or trade facilitation is primarily the result of the properties themselves and their location within the National Park, both of which are owned by the United States.

- Whether DNCY's claimed value of its interest in the trademarks and intellectual property for which DNCY demanded compensation from Aramark is consistent with the actual fair value of those intangible assets.

- Whether DNCY's claims for the categories of property it refers to as "fixed capitalized assets" or "possessory interests" are supported by the language of the Contract and other documentation consistent with the time the claims were allegedly incurred.

- Whether DCNY's claimed value of the alleged "fixed capitalized assets" or "possessory interests" for which DNCY demanded compensation from Aramark is consistent with the actual fair value of those tangible or intangible assets.

- Whether the CONSOR Report, an appraisal of intellectual property and intangibles obtained by DNCY and delivered to the NPS in 2014 to substantiate certain of DNCY's claims, sets forth a grossly inflated valuation of DNCY's alleged Yosemite-related trademarks.

- Whether DNCY undertook any valuation of the Yosemite-related trademarks being used by its predecessor concessioner, the Yosemite Park & Curry Company at the time that DNCY merged with it and obtained its Concession Contract.

- Whether, through the inflated valuation of its alleged assets at Yosemite, which were to be purchased by a successor as a condition of the new concession contract, DNCY planned to effectively prevent competitors from bidding for the new Yosemite concession contract.

- The purposes behind DNCY's communications to NPS in 2014 concerning the alleged value of its trademarks and "fixed capitalized assets."

- The reasons why DNCY took steps to obtain trademark registrations for several of its alleged trademarks in 2002 and 2003 when its concession contract was, at that time, set to expire in 2008.

- Whether DNCY's petitions for Yosemite-related trademark registrations before the Patent and Trademark Office provided accurate and non-misleading information.

- Whether DNCY's Concession Contract required that a successor concessioner purchase from DNCY the Yosemite-related trademarks and "fixed capitalized assets" or possessory interests demanded by DNCY.

- Whether, as a matter of law, once a property-related item, such as paint, carpeting, or fixtures, becomes affixed to NPS realty, it becomes the property of the United States, and thus cannot be concessioner-owned property used or held for use in the concessioner's operations.

- Whether DNCY's parent and affiliated companies' course of dealing with the NPS concerning similar concession contracts executed pursuant to the 1965 Concession Act informs the terms of DNCY's Concession Contract, especially with respect to how and when the sale of "other property" to a concessioner took place.

Paragraph 4(i): What is the likelihood of settlement? Is alternative dispute resolution contemplated?

The Parties state that they have engaged in preliminary settlement discussions and have extensively discussed the possibility of non-binding mediation, but have not reached agreement on mediation at this time. The parties do not believe that settlement is likely at this time.

The Parties further state that they remain open to the possibility of mediation in this case but believe that the case should proceed at this time.

Paragraph 4(j): Do the parties anticipate proceeding to trial? Does either party, or do the parties jointly, request expedited trial scheduling and, if so, why? A request for expedited trial scheduling is generally appropriate when the parties anticipate that discovery, if any, can be completed within a 90-day period, the case can be tried within 3 days, no dispositive motion is anticipated, and a bench ruling is sought. The requested place of trial shall be stated. Before such a request is made, the parties shall confer specifically on this subject.

The parties state that in the absence of the disposition of this case through pre-trial motions for summary judgment, the parties anticipate proceeding to trial. The parties agree that an expedited trial is not necessary. The parties propose Washington, DC, as the location for the trial.

<u>Paragraph 4(k): Are there special issues regarding electronic case management needs?</u>

Plaintiff states that the factual issues raised by this litigation are relatively narrow in scope and will not likely involve a large enough volume of electronic discovery to warrant special procedures. The parties have discussed the possibility of agreeing upon a "clawback" order and electronic document production specifications and protocols. The parties anticipate submitting these to the Court upon agreement on their terms.

Defendant states that due to the potentially large volume of discovery and multiple entities that may be involved in this case, it may seek a special procedures order from the Court that will govern electronic and other case management, discovery, and procedural issues. As noted above, the parties are discussing these issues and will submit their proposals to the Court.

<u>Paragraph 4(l): Is there other information of which the court should be aware?</u>

The parties intend to attempt to agree to a proposed protective order for submission to the Court.

Proposed Discovery Schedule

Plaintiff states that its proposed discovery schedule is as follows:

September 16, 2016	Initial disclosures pursuant to RCFC 26(a)(1)
February 28, 2017	Completion of fact discovery
April 3, 2017	Disclosure of experts
April 17, 2017	Initial expert reports
May 15, 2017	Rebuttal expert reports
June 30, 2017	Completion of expert discovery, including depositions
July 31, 2017	Last day to file dispositive motions

Plaintiff also respectfully refers the Court to Plaintiff's response to Defendant's position, which begins on page 21 below.

Defendant states that its proposed discovery schedule is as follows:

Date	**Event**
Beginning of schedule or "A"	Court issues scheduling order.
A + 30 days	If DNCY does not consent to Aramark's joinder, and if required by the Court, the United States to file motion to join Aramark to the case.
Date of Court's decision on the Joinder of Aramark to the case or "B"	Discovery period begins
45 days before B + 12 months	All discovery requests must have been served
B + 12 months	Fact discovery concludes; expert discovery period with respect to the validity of DNCY's Yosemite-related trademarks

	begins[5]
B + 12 months + 2 weeks	Parties identify experts with respect to the validity of DNCY's Yosemite-related trademarks
B + 12 months + 8 weeks	Parties issue simultaneous expert reports with respect to the validity of DNCY's Yosemite-related trademarks
B + 12 months + 20 weeks	Parties complete depositions of experts and issue rebuttal reports
B + 12 months + 28 weeks	Parties file summary judgment briefs with respect to liability and the validity of DNCY's Yosemite-related trademarks
Date of Court's decision on summary judgment motions with respect to liability and the validity of DNCY's Yosemite-related trademarks (if case is not dismissed) or "C"	
C + 4 weeks	Plaintiff identifies experts with respect to damages
C + 12 weeks	Plaintiff issues expert report with respect to damages
C + 16 weeks	Defendant identifies experts with respect to damages
C + 24 weeks	Defendant completes deposition of plaintiff's experts and issues expert reports with respect to damages
C + 32 weeks	Plaintiff completes deposition of defendant's experts
C + 40 weeks	Parties file summary judgment motions with respect to damages

[5] This schedule assumes that the current stay at the TTAB with respect to the Government's motion to cancel or transfer DNCY's Yosemite-related trademarks remains in effect. If the stay of the TTAB petition is lifted, the United States intends to renew its motion to stay proceedings in this Court pending the resolution of the Government's motion to cancel or transfer DNCY's Yosemite-related trademarks.

Date of Court's decision on summary judgment motions with respect to damages (if case not dismissed) or "D"	
D + 6 weeks	Parties file joint proposed schedule with respect to trial

Defendant further proposes the following expert discovery procedure:

<u>Defendant's Proposed Expert Discovery Procedure</u>

At the point that expert discovery proceeds, the following protocol should guide expert discovery:

i. On the date that a party identifies any expert, they shall state each witness's qualifications (e.g., curriculum vitae), list all publications authored in the previous ten years, list all other cases in which, during the previous 4 years, the witness provided testimony as an expert at trial, deposition, or in an affidavit, and a provide statement of the compensation to be paid for the study and testimony in this case.

ii. The parties shall be entitled to depose the experts after the issuance of each report, and depositions must be completed within time frames identified above, unless otherwise agreed to by the parties.

iii. All expert reports shall be in written form, authored and signed by the expert. All expert reports must contain: (1) a complete statement of all opinions the witness will express and the basis and reasons for them; (2) the facts or data relied upon by the witness in forming them; and (3) any exhibits that summarize or support them. On the same day that the expert reports are produced, each party shall produce copies of all materials relied upon by each expert in connection with the preparation of his or her report, including copies of relevant portions of books, except those produced by the parties in discovery or pleadings, and as to those materials relied upon and previously produced, the expert shall identify the previously-produced documents. Moreover, the expert reports must update the expert's qualifications, list of publications, list of cases in which the expert has provided trial and deposition testimony, and the statement of compensation relative to the initial disclosures described above.

iv. Parties shall provide supporting data and calculations for all quantitative material within, and all exhibits attached to, expert reports, all of which must be in native form (e.g., Excel), and shall include actual formulas used to perform any calculations (e.g., averages, sums) as well as the formula cell links and cross references linking data from one worksheet or exhibit to another worksheet or exhibit.

v. All narrative reports shall be produced in an electronic form that allows for the text to be copied electronically. For example, the parties shall not produce narrative reports in a "secure" PDF format that prevents the text in the PDF from being copied.

vi. Draft expert reports and exhibits created after the date of the commencement of this lawsuit will not be discoverable, and there shall be no requirement that the parties produce draft expert reports and exhibits of any such expert reports. The CONSOR and Dornbusch reports are specifically excluded from this protocol as they were created prior to the commencement of this litigation.

vii. All communications between attorneys and experts retained after the commencement of this litigation shall be protected and will not be subject to disclosure or discovery, except to the extent that an expert relied on information provided by attorneys in forming or supporting the expert's opinion.

Defendant further proposes the following changes in the limitations on discovery imposed under the Court's rules:

Time for Responding To Written Discovery Requests. The parties propose that responses to requests for production, requests for admission, and interrogatories shall be due within 45 days of the date of service of such requests or interrogatories. Service shall be deemed to have been made on the date of transmission if made electronically by email to counsel of record.

Depositions by Oral Examination. The limitation upon the number of depositions by oral examination set forth in RCFC 30(a)(2)(A)(i) may need to be changed from 10 depositions to another limit; the parties propose to discuss and advise the Court by motion at such time as they are able to determine whether and to what extent it appears that more than 10 depositions will be necessary.

Plaintiff responds that the discovery schedule proposed by Defendant is far too long, unduly complicated and likely unworkable in light of the issues in this litigation and the vagaries of any litigation. Defendant's proposed schedule appears designed to draw this action out as long as possible and to allow Defendant to conduct expert discovery in advance of Plaintiff. This will be inefficient, wasteful of Court resources and, as discussed in the response to 4(c) above, prejudicial to Plaintiff. Moreover, as discussed in 4(c) above, with respect to the claims concerning DNCY's trademarks, Defendant's position depends on a theory that damages and liability are inextricably connected, making it nonsensical to separate litigation of these issues. Further, Plaintiff objects to Defendant's proposed inclusion in the Scheduling Order of deadlines for separate expert discovery and summary judgment motions on the validity of DNCY's trademark registrations. The nature of Plaintiff's case is that Defendant should have required Aramark to purchase these marks by February 29, 2016 at the latest, so the status of these marks after March 1, 2016 will not have independent legal significance that would warrant a separate set of deadlines and pre-scheduled motion practice.

With respect to Defendant's proposed procedures for expert discovery, written discovery and depositions, Plaintiff notes that the parties have not discussed this, as it is not part of the required early meeting of counsel, and Plaintiff does not at this time agree to these proposed procedures. Plaintiff proposes to meet and confer with Defendant at the outset of discovery to try to reach a mutually acceptable agreement on these subjects. To the extent this response does not resolve any concerns the Court may have on this issue, Plaintiff respectfully requests the opportunity to brief the issue if and when the issue becomes ripe for decision in the course of this case.

Dated: August 18, 2016 Respectfully submitted,

/s Thomas P. McLish
Thomas P. McLish
tmclish@akingump.com
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000 (Tel)
(202) 887-4288 (Fax)

Nicolas J. Rotsko
nrotsko@phillipslytle.com
PHILLIPS LYTLE LLP
125 Main Street
Buffalo, NY 14203-2887
(716) 847-8400 (Tel)
(716) 852-6100 (Fax)

Attorneys for DNC Parks & Resorts at Yosemite, Inc.

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ Bryant G. Snee
BRYANT G. SNEE
Deputy Director

/s/ John H. Roberson
JOHN H. ROBERSON
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 353-7972
Fax: (202) 514-8640
Email: John.Roberson@usdoj.gov

Attorneys for the United States

Of Counsel:
SCOTT BOLDEN
Department of Justice