ECLIPSE.ORG FOUNDATION, INC.

MINUTES OF A MEETING
OF
THE BOARD OF DIRECTORS

(MARCH 26, 2019)

A Meeting of the Board of Directors (the *"Board"*) of Eclipse.org Foundation, Inc., a Delaware corporation (the *"Corporation"*), was held as a regularly scheduled face-to-face meeting held in Boston, MA.

Present at the meeting were the following Directors:

Present	Director	Organization
N	Dani Megert	Elected Committer Representative
N	David Blevins	Tomitribe
Y	Ed Merks	Elected Committer Representative
Y	Etienne Juliot	OBEO
Y	Jim Wright	Oracle
Y	Mike DeNicola	Fujitsu
Y	Matthias Sohn	SAP SE
Y	Deborah Bryant	Red Hat
Y	Pradeep Balachandran	IBM
N	Ron Doyle	CA Technologies
N	Sebastien Girard	CEA List
Y	Steffen Evers	Bosch
N	Torkild Ulvøy Resheim	Elected Sustaining Representative
Y	Tracy Miranda	Elected Sustaining Representative

Present at the invitation of the Board was Mike Milinkovich, Executive Director, and Paul White, Secretary of Eclipse.org Foundation, Inc., as well as Farah Papaioannou of EdgeWorx, who was recently elected as the Sustaining Representative and will join the Board on April 1. Also, Scott Peterson from Red Hat was present as an observer for part of the meeting, as noted below in the minutes.

GENERAL BUSINESS

Minutes

Mike Milinkovich introduced a discussion of the full and abridged minutes of the February 20, 2019 Board Meeting, attached as Appendix A. With Deborah Bryant, Etienne Juliot, and Matthias Sohn abstaining, the Board passed the following resolution:

>   RESOLVED, the Board approves the draft full and abridged minutes of the February 20, 2019 Board Meeting as circulated.

Anti-Trust Policy

Mike Milinkovich reminded the Board of its obligations under the Foundation's anti-trust policies.

Board Election Results

Mike Milinkovich informed the Board that the EMO recently held elections for the Board seats to be filled on an annual basis, the related materials for which is attached as Appendix B. Mike noted that Torkild Ulvøy Resheim, Gunnar Wagenknecht, and Farah Papaioannou were elected as Sustaining representatives, and that Dani Megert, Chris Aniszczyk, and Ed Merks were elected as Committer representatives.

Mike thanked Tracy Miranda for her service to the Board as an elected Sustaining representative over the past two years.

Oracle - New Board Representative

Mike welcomed Jim Wright as Oracle's new representative to the Board. Mike explained that Jim was replacing Dennis Leung as Oracle's representative, and thanked Dennis for his long and valuable service to the Board and to Eclipse.

Modifications to Strategic Membership Fees

Mike Milinkovich introduced a discussion of altering the annual membership fees paid by Strategic members, the related materials for which is attached as Appendix C. Mike explained that, unlike all other fees associated with membership, the fees paid by Strategic members is based on a computation that relies on the explicit revenues of the member. Mike highlighted that this is cumbersome to document, thus making the onboarding process more difficult, and also it requires the Foundation to confirm the member's revenues each year. Mike explained that the proposed changes would have no impact on any existing Strategic member. The Board discussed the merits of adopting the simplified fee structure, and to also further simplifying the fee structure for Strategic Consumer members. Mike agreed to further alter the draft fee schedule and to bring it to the Board at a later meeting for approval.

<u>Updates to Eclipse.org Terms of Use</u>

Mike Milinkovich introduced the topic of proposed updates to the Eclipse.org Terms of Use. Mike explained this topic has been discussed at previous Board meetings, and the proposed revisions have been reviewed by the IP Advisory Committee. The Board unanimously passed the following resolution:

> RESOLVED, that the Board unanimously approves the following text be included in those Eclipse.org Terms of Use.
>
> *To the extent you submit or otherwise make available to an Eclipse Foundation Specification Project (as that term is defined by the Intellectual Property Policy) any ideas, concepts, methods or other information, you agree that you will not assert, based on such submissions, any intellectual property rights that are essential to any implementation of the submission, against the Eclipse Foundation, its contributors, or its licensees, with respect to any implementation of such Specification (as that term is defined by the Eclipse Foundation Specification Process). To further clarify, such submissions include, but are not limited to, submissions made to any public communications channel such as an email list, forum, or bug report.*

<u>Jakarta EE Working Group Update</u>

Mike Milinkovich provided to the Board a summary of the activities of the Foundation's Jakarta EE group, the related material for which is attached in Appendix D. Mike explained Eclipse Glassfish 5.1 had been released in late January, and the working group is now engaged in planning for the release of Jakarta EE 8, and in the early stages of planning for Jakarta EE 9. Mike explained it is expected that Eclipse Glassfish 5.2 will be released and will be Jakarta EE 8 compliant. Mike noted that the future of Eclipse Glassfish beyond version 5.2 is uncertain due to resource constraints. .

<u>Eclipse IoT Working Group Update</u>

Mike Milinkovich provided to the Board a summary of the activities of the Foundation's Eclipse IoT working group, the related material for which is attached in Appendix E. Mike noted the working group recently introduced a Strategic level of membership, and that Bosch, Eurotech, and Red Hat were all initial Strategic members. Mike explained these members were now paying an annual membership fee and that an IoT working group marketing committee had been established.

<u>Membership Update</u>

Mike Milinkovich updated the Board on the current status of the Membership and the new members that have joined the Foundation since the last face-to-face Board meeting, the related

material for which is attached in Appendix F.

Projects Update

Mike Milinkovich provided to the Board a summary of the Foundation's projects, the related material for which is attached in Appendix G.

Conferences Update

Mike Milinkovich reviewed the Foundation's conferences strategy.

Attendance of Red Hat Counsel

Deborah Bryant had asked the Board the day before the Board meeting whether Red Hat's counsel would be permitted to join as an observer when the Board was reviewing the status of all outstanding Jakarta EE-related legal agreements. Jim Wright asked whether having counsel attend would impact confidentiality of the Board, to which Mike responded he did not believe it would. Mike explained whether to permit counsel to attend was a matter for the Board to decide, and explained there have been times in the past where counsel has been permitted to join. The Board unanimously agreed to permit Red Hat counsel to attend as an observer.

Update on Move of Foundation's Ottawa Office

Mike Milinkovich updated the Board on the planned move of the Foundation's Ottawa office to its new location on May 6, 2019, the related materials for which is attached in Appendix I. The Board unanimously passed the following resolutions:

> RESOLVED, the Eclipse Foundation's operating address is 2934 Baseline Road, Suite 202, Ottawa, ON K2H 1B2 effective May 6, 2019.

> RESOLVED, the Eclipse Foundation's principal office is c/o Proskauer Rose LLP, 1585 Broadway, New York, NY 10036-8299.

> RESOLVED, that the Executive Director of the Corporation is hereby authorized and empowered, for and on behalf of the Corporation, to execute and deliver such documents, papers or instruments and to do or cause to be done any and all such other acts and things as he may deem necessary, appropriate or desirable in connection with updating the Foundation's operating address, and the taking of any such action shall be conclusive evidence of the approval thereof by this Board of Directors.

Brand Perception Survey

Mike Milinkovich updated the Board on the recent brand perception survey completed by the Foundation, the related materials for which is attached in Appendix J.

Working Group Strategy

Mike Milinkovich updated the Board on the Foundation's working group strategy. Mike noted that as part of this evolving strategy, it is expected the Eclipse Industry Working Group process will be updated in the near future.

2018 Audited Financial Statements

Mike Milinkovich provided to the Board a summary of the 2018 audited financial statements of the Foundation, the related material for which is attached in Appendix L. The Board unanimously passed the following resolution:

RESOLVED, the Board approves the 2018 audited financial results as presented.

Operational Update

Mike Milinkovich provided to the Board an update on the operations of the Foundation. Mike reminded the Board that more than half of Eclipse's membership renewals occurs in the first quarter of the year, and the Foundation is on track with respect to the budgeted level of retention.

Status review of all outstanding Jakarta EE-related legal agreements

Mike Milinkovich pointed to the memos he distributed to the Board that provided an update on the current state of negotiations with Oracle regarding the agreements required to move forward with Jakarta EE.

In particular, Mike outlined that after 18+ months of negotiations, there are still four agreements under negotiation, including the Jakarta EE Working Group Participation Agreement (WGPA), the Eclipse Foundation Member Committer and Contributor Agreement (MCCA), the Jakarta EE Trademark License Agreement (TMLA), and Jakarta EE Specification Copyright License Agreement (SCLA). Mike pointed out that the WGPA and MCCA are standard bilateral agreements that other members have executed; the TMLA and SCLA are bilateral agreements specific to Oracle's donation of Java EE to the Foundation. Mike summarized the TMLA is essentially a license to use and extend the javax namespace under the auspices of the Eclipse Foundation Specification Process, and a the SCLA is conditional copyright license granting rights to the Java EE specifications.

Mike cited that negotiations have been very difficult and extremely time consuming, that significant funds have been spent by the Foundation on legal counsel in support of the negotiations, and that significant unresolved issues which are fundamental to Jakarta EE's success still remain.

With respect to the current state of negotiations, Mike said that while many issues are still outstanding, two are of primary concern, and both having to do with the TMLA. These are the issue of restrictions related to bundling with Java Platform, Standard Edition (Java SE), and the issue of restrictions related to use of the Jakarta-compatible trademark. Mike pointed to the

explanations given in his memo for details.

Mike explained one option facing the Foundation is to simply give up on the negotiations, and declare that after 18+ months, the relationship with Oracle relating to Jakarta EE is dysfunctional and therefore it is not possible to reach agreement. He explained that, in the worst case, this would mean Jakarta EE would be terminated.

The Board discussed the possibility of failure of these negotiations. In particular, Ed Merks raised whether such a declaration would have a potential negative impact on the Foundation's reputation. Deborah Bryant reminded the Board members that the health of the Foundation is their primary responsibility.

The Board also discussed the issues related to the terms being contemplated as last proposed by Oracle. In particular, Steffen Evers noted the Foundation cannot make compromises in ways that would damage or constrain the Foundation in material ways going forward. In relation specifically to the difficulty of the negotiations, he noted that simply walking away needs to be a legitimate option for the Foundation, and while the consequences may be difficult, it must be the path chosen rather than making concessions that are materially constraining or damaging. Matthias Sohn agreed with Steffen's assessment. Ed Merks commented the scope of Oracle's proposed terms as noted by Mike went well beyond Jakarta EE and the donation of Java EE, and felt this was inappropriate and unacceptable.

The Board discussed the specific topic of the proposed terms introducing constraints to projects beyond Eclipse Glassfish and the other EE4J projects, which are the projects directly related to the Oracle Java EE donation. Mike drew upon the example shared by Dani Megert in his email to the Board that highlighted the potential negative impact of Oracle's proposed terms on the Eclipse Compiler for Java (ecj). Mike noted that while the compiler has been shipped with the Eclipse IDE since 2001, under a literal interpretation of Oracle's proposed language it would no longer be possible to do so. Since ecj is such an integral feature of the Eclipse IDE for Java, this would be tantamount of discontinuing distribution of the IDE.

The Board also discussed the impact the length of negotiations has had. In particular, Mike DeNicola expressed that the delay in completing the negotiations and advancing the Jakarta EE technology is intolerable. He reminded the Board Java EE had become very slow to innovate over the past number of years. He further explained the Java EE community was frustrated with Oracle's pace of innovation and the challenges with the JCP process, and believed there was significant goodwill gained when it was announced that Java EE was moving to Eclipse. He stated the 18+ month delay is causing the community to no longer care. He also noted Oracle's proposal to change the namespace would also cause the TCK to be broken, further alienating the community. Jim Wright highlighted for the Board that Oracle has spent significant time and resources in bringing the donation of Java EE to Eclipse, and that Oracle is committed to the success of Jakarta EE.

The Board discussed the potential impact of Oracle's current proposed terms to the Foundation's not-for-profit status. In particular, Pradeep Balachandran drew attention to the risk to the

Foundation's tax status as a 501(c)(6) cited in Mike Milinkovich's memo to the Board, which is a risk he feels the Board should not take.

The Board discussed the vendor neutrality aspects of the negotiations. In particular, Jim Wright stated he believed, like the other Board members who spoke, that the Foundation does indeed have an obligation to vendor neutrality. Jim explained Oracle's position is that Eclipse's compliance with the Java compatibility and licensing regimen is vendor neutral, just as it would be to adhere to the standard setting regimes in other ecosystems were Eclipse to participate in those ecosystems where testing or other compatibility standards are required. He further stated that in his opinion Eclipse's failure to comply with this Java licensing regimen would be inconsistent with vendor neutrality as it would be harmful to Oracle, quoting Mike's letter to the board of March 20 that it would be problematic for the Foundation "if we were to allow ourselves to be used by one member to attack another member's business," and that for Eclipse to become the source of a noncompliant Java implementation would clearly be exactly that.

Jim stated that while the Foundation is free in theory to decide to take the IP risks associated with distributing code that disregards the existing standards regimen in any space, be it Java or some other regimen, he believes doing so would subject both the Foundation and end users to both failures of compatibility and also infringement risks and is inconsistent with how the Foundation is expected to behave.

Mike Milinkovich responded that Eclipse has no intent of violating anyone's IP rights, and disagreed with Jim's assertion that Eclipse's current or proposed practices of relying upon the freedoms provided by open source licenses are not vendor neutral. Mike further stated he disagreed with Jim's assertions that should Eclipse not agree with Oracle's bundling requirements that would be violating vendor neutrality. He emphasized that Oracle is essentially demanding that Eclipse agree to what amounts to a perpetual license obligation to use only technologies made available by Oracle or its licensees, and that would fail the test of vendor neutrality. Mike explained he has confirmed this position with Eclipse's counsel.

Jim Wright asserted runtimes can be created from the arbitrary combinations of open source which are constructed from various implementations, and to the extent those pieces of technology are not tested and licensed via the industry regimen, they carry IP risks as well as failing to adhere to compatibility standards. In the case of Java, Jim stated Eclipse and its users would not benefit from the Java Specification Participation Agreement (JSPA) attendant to the Java Community Process, and he believes it's consistent with the purpose of the Foundation to operate in compliance with standards in an ecosystem in which software adheres to such a regime.

Mike explained that Oracle's proposal demands that Eclipse restrict all of its projects that use the javax namespace to ship using only certified Java SE versions, and that the Foundation does not believe this to be vendor neutral. Mike asserted that one could replace "Java SE compliant" with "Oracle and its licensees" in the text of the proposal, and that the advice of Eclipse's counsel is that, in addition to being detrimental to Eclipse's reputation and restrictive to its projects, this would put at risk the Foundation's tax exempt status.

The Board discussed the fact the agreements as proposed by Oracle have an impact beyond the scope of the Jakarta EE initiative. In particular, Mike Milinkovich explained that what is being asked by Oracle goes further than originally expected when Oracle announced it was donating Java EE. Deborah Bryant concurred with this assertion, noting Eclipse's processes and policies are long established and well understood, and that it is generally accepted that Eclipse provides a vendor neutral platform for collaboration. She further asserted that it was reasonable for the Board and the Foundation's members to have assumed the process of completing the contributions to Eclipse would have been done quickly and with terms consistent with how Eclipse traditionally accepts such contributions. Etienne Juliot expressed he found it strange and inappropriate to have a donation of Java EE have a significant impact on other Eclipse projects.

The Board discussed Eclipse's current position in the negotiations. In particular, Mike Milinkovich explained to the Board that one option proposed by Eclipse but rejected by Oracle was to agree to never ship Eclipse Glassfish bundled with any runtime, thus avoiding Oracle's stated concerns. Mike stated that, while it would be a first for Eclipse to introduce such a constraint on a project, he felt it was a reasonable compromise as Eclipse Glassfish was donated by Oracle. Mike further explained to the Board that, while it is a fact Eclipse has never shipped a runtime in its 15+ year history, to enshrine a restriction that impacts projects that are outside the scope of the donation by Oracle of Java EE is unacceptable.

To bring the topic to a conclusion, the Board discussed potential guiding principles for Mike to use in negotiations with Oracle. Many on the Board reiterated Mike should avoid introducing restrictions to projects outside the scope of Glassfish. Many also expressed grave concerns that the community will have lost interest if an agreement is not reached quickly, and thus urged Mike to bring the negotiations to a close as quickly as possible, one way or the other. In support of this position, Mike DeNicola cited the feedback received from the recent DevNexus conference in Atlanta, where members heard first hand from developers that they are frustrated with no progress on Jakarta.

The Board explored what outcomes might come out of concluding the negotiations, regardless of whether they are successful, but decided this was not appropriate at this time.

The Board unanimously passed the following two resolutions:

> RESOLVED, that the Executive Director of the Corporation is hereby authorized and empowered, for and on behalf of the Corporation, to retain such advisors, to execute and deliver such documents, papers or instruments and to do or cause to be done any and all such other acts and things as he may deem necessary, appropriate or desirable in connection with the transition of Java EE to the Eclipse Foundation, including updating existing processes, entering new bilateral agreements with Oracle, establishing new community processes for specifications, and the taking of any such action shall be conclusive evidence of the approval thereof by this Board of Directors. Further, the Executive Director is hereby authorized and empowered to decide that it is not possible to close in a timely manner bilateral

agreements with Oracle that, in his opinion, are beneficial to the Foundation, and to decide to terminate such negotiations. The Executive Director will update the Board on material updates to such documents, agreements, and processes.

RESOLVED, the Executive Director is instructed to update the Board on the status of negotiations of bilateral agreements with Oracle at the April 17, 2019 Board meeting.

Shipping a Runtime

The Board returned to the topic of shipping a runtime with a select number of Eclipse projects. Specifically, there were two resolutions put forward prior to the Board meeting for consideration by the Board. They are:

DRAFT RESOLUTION # 1: That the Board approves the distribution by Eclipse Foundation projects of open source licensed Java SE TCK certified binaries and related source code, recognizing that such binaries may contain GPLv2 and GPLv2+CE-licensed materials as well as other previously approved open source licenses.

DRAFT RESOLUTION # 2: That the Board approves the distribution of GPLv2+CE-licensed runtime binaries by Eclipse Foundation projects.
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Mike Milinkovich explained the Board had discussed this on a number of occasions over the past year, starting at last June's Board meeting, and then again at the October meeting. He also explained there were two different resolutions that were put forward, which are noted below.

Pradeep Balachandran spoke of the desire to be able to include a runtime when shipping the Ecilpse IDE, especially for users who would not otherwise have Java installed on their machines.

Mike Milinkovich reminded the Board a policy already passed by the Board years ago that allows for GPLv2+Classpath Exception (GPL+CE) –licensed projects, subject to a super-majority approval of the Board.

The Board discussed the merits of the two resolutions in the context of vendor neutrality. In particular, Mike explained Eclipse's counsel felt the Draft Resolution # 1 presents risks related to vendor neutrality. Jim Wright stated that he does not consider Draft Resolution # 2 to be vendor-neutral, in the context of the earlier discussions. Jim explained that to the extent there is an existing ecosystem for compliance, this resolution would be construed as enabling the Foundation to approve distribution of a project that doesn't comport with the requirements of that ecosystem's licensing or compatibility regimen. Jim acknowledged that in this case, Oracle is the administrator of Java, and stated it believes Eclipse taking the position proposed by Draft Resolution # 2 would be damaging to the Java ecosystem.

Mike Milinkovich clarified Jim's position for the Board with a specific example. He explained

Eclipse OpenJ9 does not currently comply with Java SE licensing requirements.

Ed Merks stated he believes Draft Resolution # 1 is essentially asking Eclipse to agree to Oracle's rules for the ecosystem, and felt it would be inappropriate for the Foundation to do so.

Jim explained he believes the Foundation would be exposed by the action proposed in Draft Resolution # 2 as it is Oracle's position that IP flows necessary for downstream users only exist through the JSPA, and were Eclipse to ignore this fact would leave Eclipse and its downstream users exposed to claims of violating IP rights.

Mike explained that OpenJ9 is in fact an open source project at Eclipse, and that Eclipse promoting one of its projects that is available under the EPL is a reasonable action, and consistent with Eclipse's previous practices.

The Board then discussed the impact to the Eclipse projects of the two draft resolutions. Mike Milinkovich noted that both Eclipse Jetty and Eclipse Kura projects included code that uses GPLv2+CE-licensed code. Mike also noted that Eclipse does not ship binaries for Eclipse OpenJ9 from Eclipse infrastructure today. Jim Wright reminded the Board that a distribution of OpenJ9 as suggested would include materials under licenses that are not approved by Eclipse. He then inquired about activities that are not permitted in Eclipse projects being simultaneously conducted outside Eclipse to be incorporated back into Eclipse projects which might then ship as binaries, to which Mike responded that the Foundation has never had a rule that its projects had to build its binaries using Eclipse infrastructure. Jim then clarified his question, noting that the OpenJ9 project appears to maintain and consume several files at a separate GitHub organization rather than within the project when as far as he understood it, the Foundation Board approved rules for consumption of GPLv2+CPE approved libraries do not permit the creation of derived works of GPLv2+CPE licensed content at the Foundation. Mike responded that the Foundation has neither the resources nor the desire to explore such concerns, and that the scope of IP reviews done by Eclipse are limited to those activities related to our own infrastructure. Jim asked to confirm that a vote would be required in order to permit the creation of derived works of such material as part of an Eclipse project, and Mike responded that yes, it would.

Ed Merks explained there is a large user community that needs the Eclipse IDE to ship with a runtime, and that the Draft Resolution #2 would enable this. Jim expressed his concern that doing so would lead to non-compliant JVMs to be found in use, and expose Eclipse to potential claims of IP violations.

After extensive discussion, Draft Resolution # 1 was proposed by Jim Wright. No one seconded the motion, and so the motion died. Draft Resolution # 2 was then proposed and seconded, with all Board members except Oracle voting in favor, and Oracle voting against. As the motion required unanimity, the motion did not carry.

Closing

The Board thanked Red Hat for hosting the Board meeting and the use of its facilities.

Action Items:

Mike agreed to revise the proposal to modify the Strategic membership fees.

Mike agreed to update the Board at the April meeting on the progress made with respect to negotiating the Jakarta EE related agreements.

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There being no further business to discuss, the meeting was adjourned at 16:15.

This being a true and accurate record of the proceedings of this Meeting of the Board of Directors held on March 26, 2019, is attested to and signed by me below.

/s/ Paul White
Secretary of Meeting