

International Center of Dispute Resolution

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Dot Registry, LLC,)
)
 Claimant,)
) ICDR Case Number
 vs.) 01-14-0001-5004
)
 The Internet Corporation)
 for Assigned Names and)
 Numbers,)
)
 Respondent.)
 -----x

HEARING

WASHINGTON, D.C.

TUESDAY, MARCH 29, 2016

11:00 a.m.

Reported by: Laurie Bangart Donovan

Job NO.: 16074

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1 (Appearances continued)

2 ALSO PRESENT:

3 Amy Stathos, ICANN

4 Elizabeth Le, ICANN

5 Alexandre Alonso

6 Alyson Akoka

7 Michael Daly

8 Desiree Boxberger

9 Tess Pattison-Wade

10 Shaul Jolles

11 Nathaniel Morales

12 PANEL MEMBERS:

13 M. Scott Donahey, Chairman

14 Mark Kantor

15 The Honorable Charles N. Brower

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1 P R O C E E D I N G S

2 MR. DONAHEY: This is an
3 International Center of Dispute Resolution
4 matter. It's number 01-14-001-5004. It's
5 being stenographically transcribed, and for
6 that purpose I'm going to run down some
7 matters in advance for the record.

8 It's March 29, 2016. We are here
9 in a matter of independent review process for
10 the Internet Corporation for Assigned Names
11 and Numbers, better known as ICANN, and as
12 provided in their bylaws, by Article IV,
13 Section 3, we have three panelists. I see
14 Mr. Mark Kantor there on the right, and I see
15 The Honorable Charles N. Brower there on the
16 left.

17 And we are here pursuant to the
18 parties' agreement, and we're proceeding
19 under Procedural Order Number 12, and
20 Procedural Order Number 12 provides a number
21 of things in paragraph 2.

22 There is to be no live testimony or
23 no additional evidence presented today.
24 Paragraph 3 of the Order sets out the time
25 allotment, and I won't go through that in

1 detail, but that's also there. As I said,
2 the transcript is going to be provided
3 pursuant to paragraph 4, and in paragraph 8,
4 the panelists have the opportunity to request
5 post-hearing submissions should they decide
6 that that might be helpful.

7 I would like to just call to the
8 attention of the counsel paragraph 7 of that
9 procedural order, which provides that the
10 parties address the burden of proof as to
11 each subject to be addressed, including the
12 three areas of focus set forth in the ICANN
13 bylaws, Article IV, Section 3, Paragraph 4.

14 And in that regard, I would note
15 that at least the following are sources or
16 potential sources of the law on the burden of
17 proof that we should apply in this case,
18 prior to panel determinations under the
19 investigative process.

20 Relevant provisions of
21 international law and international
22 convention, California law, the articles of
23 incorporation, bylaws, and the articles of
24 incorporation and bylaws, we're referring to
25 those of ICANN, which is a not-for-profit

1 California corporation organized under the
2 laws of the state of California,
3 supplementary procedures for the ICANN IRP
4 process, which are provided by the
5 International Center for Dispute Resolutions,
6 and finally, the International Center of
7 Dispute Resolution International Arbitration
8 Rules.

9 I would hope that someone there is
10 making a record, and I would ask that someone
11 there make a record of all parties that are
12 present for purposes of the transcript of the
13 proceeding, and I won't take the time to do
14 that at this time, and we will do the same
15 here. My name is Scott Donahey, as I said
16 earlier.

17 Are there any questions before we
18 proceed?

19 Okay. In this matter then,
20 Claimant has up to two and a half hours being
21 divided between its opening and closing
22 presentations, as Claimant should decide to
23 do, and we have received -- thank you very
24 much -- your very detailed presentations, at
25 least in printed form, and understand that

1 you are going to elaborate on those at this
2 point.

3 And Counsel, is that Mr. Ali I see
4 in the background there?

5 MR. ALI: It is indeed Mr. Ali.
6 Good morning, Mr. President.

7 MR. DONAHEY: Good morning, sir.
8 Would you like to proceed then?

9 MR. ALI: Yes, I would. Thank you
10 very much.

11 Well, good morning, Mr. President
12 again. Good morning, members of the panel.
13 Good morning, Mr. LeVee, Ms. Zernik, and
14 colleagues.

15 If you would permit me three
16 perhaps informal observations, the first is
17 that I note that Mr. LeVee is sitting in the
18 middle of the screen, and I take it that
19 Mr. LeVee has not taken over presiding over
20 this panel.

21 The second is I --

22 MR. DONAHEY: I assure you your
23 assumption is correct.

24 MR. ALI: The second is I must
25 congratulate you on your additionally

1 distinguished look, Mr. President. I have
2 not seen you since you added to your visage.
3 Really becoming.

4 The third observation I'll make, if
5 you'll permit me a slight moment of personal
6 remembrance, in this proceeding I am defining
7 my own presence according to the three
8 members of the panel who have seen me at
9 different stages of weight loss.

10 Mr. Brower knew me when I was
11 40 pounds lighter, Mr. Donahey got to know me
12 when I was 20 pounds lighter, and I think
13 Mr. Kantor when I was perhaps 15 pounds
14 lighter. So hopefully as we progress through
15 this case and others, I will not continue to
16 expand in size, and you will remember me in
17 other incarnations as well as this one.

18 With that said, allow me to delve
19 into what is very serious substance.

20 Why are we here? We're here
21 because our client, Dot Registry, was
22 wronged. Our client spent millions of
23 dollars in developing a concept, in
24 developing a software, in developing
25 relationships, investing goodwill, in

1 reaching out to secretaries of state and the
2 National Association of Secretaries of State,
3 in order to implement a system that will
4 ultimately benefit the public at large.

5 And in so doing, in choosing to be
6 a community priority applicant, our client
7 deliberately decided that it would forego
8 additional profit in order to be given the
9 priority status that it believes it deserves
10 and that we believe it deserves, and we will
11 show you further today, as we have done in
12 our papers, as to why the criteria applied by
13 the Economist Intelligence Unit, which I
14 shall refer to as the EIU, and ICANN staff
15 were misapplied.

16 Now, of course, Mr. LeVee is going
17 to say that this is a, this is not supposed
18 to be an appeals process, this is not
19 supposed to be a substantive review of the
20 underlying determinations that were made by
21 EIU and the staff, but I submit to you that
22 Mr. LeVee is wrong. We will demonstrate to
23 you why it is that ICANN is wrong on this
24 particular point.

25 It is the misapplication of the

1 guidelines, the Applicant Guidebook, which is
2 ICANN policy, that is at stake in this
3 proceeding. It is the improper conduct of
4 the review process to be undertaken by the
5 Board Governance Committee that is also an
6 issue, and indeed what is also an issue is a
7 completely flawed process for review of
8 community priority applications that was
9 implemented by ICANN from the very get-go.

10 Now, that particular point, that
11 last point is one that I'd ask that you keep
12 in the background as we proceed through my
13 presentation.

14 Now, I will, Mr. President, members
15 of the panel, with your permission, devote
16 about an hour and a half to the opening and
17 keep an hour for rebuttal, and I'll be
18 sharing part of my opening with Ms. Tess
19 Pattison-Wade. Ms. Pattison-Wade has
20 submitted a statement which she will be
21 making some submissions to you on the basis
22 of the application of the criteria by the EIU
23 and ICANN staff.

24 Now, I should also mention that
25 there is an additional slide that we sent to

1 Ms. Zernik which I asked her to print out.
2 This is a slide which I hope will reduce ten
3 of what is in the PowerPoint, and perhaps you
4 could view those, Mr. Donahey. In fact,
5 there's another one as well, I apologize, and
6 that is nothing more than a re-creation of a
7 slide that is already in your packet,
8 slightly better formatted for easier review.

9 So what I'd like to do is to start
10 out with this particular slide to frame the
11 discussion, to get right into the substance
12 here. What this shows you is effectively the
13 review process and subsequent accountability,
14 and the one I'm looking at says "Staff/EIU,
15 BGC and IRP Panel." It's the first -- it's
16 the document that was just provided. Yes,
17 thank you.

18 Now, what happens in this process?
19 You have a Community Priority Evaluation that
20 is conducted by the Economist Intelligence
21 Unit together with ICANN staff. Those
22 applications are submitted, and in this case
23 our clients submitted four applications. One
24 of them, Dot Corp, is not at issue in these
25 proceedings. That application has been

1 suspended and still sits with ICANN.

2 The other three are Dot Inc, Dot
3 LLC and Dot LLP. Those applications are
4 submitted in a standard form, together with a
5 fee of \$185,000 each.

6 And what is it that an applicant
7 expects? An applicant expects to be treated
8 fairly, to be given a fair shake. The
9 applicant pays additional monies to have the
10 application reviewed by the Economist
11 Intelligence Unit, if it elects what is known
12 as CPE, and the applicant expects that
13 experts will review this application, each
14 application. They will treat that
15 application with care, they will treat that
16 application with rigor, and they will treat
17 that application ultimately fairly.

18 None of that happened here.

19 Now, the application Guidebook
20 which contains -- which reflects ICANN
21 policy, as Mr. LeVee will tell you and as you
22 will see reflected in our slides -- and I'm
23 simply going to point out to you where you
24 can find certain supporting commentary in our
25 slides to go along with the remarks that I'm

1 making. You will see at slides 7, 8 and 9,
2 as well as slide 10, discussion of the rigor
3 with which the Applicant Guidebook was
4 prepared. The Applicant Guidebook in its
5 module form contains the Community Priority
6 Evaluation criteria.

7 Now, Mr. President, members of the
8 panel, there are some very important dates
9 that I'd like you to keep in mind here.
10 September 2011, the Applicant Guidebook
11 Version 3 was in effect. March 2012,
12 applications were filed by Dot Registry.
13 July 2012, Applicant Guidebook Version 4 was
14 issued. Applicant Guidebook Version 4 did
15 not, as I understand it for present purposes,
16 differ materially from Applicant Guidebook
17 Version 3.

18 Two years after Applicant Guidebook
19 Version 3 was issued, the EIU issued
20 so-called CPE Guidelines, which subjectively
21 interpret Applicant Guidebook Module 4, which
22 contains the CPE Guidelines. So we have this
23 incredibly careful process, a process through
24 which a variety of -- there's a variety of
25 community input. There are drafts that are

1 issued. There are comments that are
2 solicited.

3 And if you look at our slides, you
4 in fact, have other panelists or other panels
5 that have recognized how carefully the
6 Guidebook and the criteria were developed,
7 including the most recent Despegar panel. In
8 fact, the Guidelines were developed, as the
9 Despegar panel says, "after years of rigorous
10 policy development and implementation that
11 included extensive review and analysis by
12 ICANN as well as many others." Those were the
13 rules of the game that our client followed
14 when they presented their applications.
15 Those are the criteria.

16 Two years later, on 27 September
17 2013, the EIU issues CPE Guidelines
18 subjectively interpreting what was contained
19 in the AGB, and in fact, those CPE Guidelines
20 were not subject to public comment, were not
21 subject to any of the ICANN policy
22 development processes.

23 And those Guidelines not only
24 expound upon and distort the base criteria,
25 the criteria that was developed through the

1 policy development process that ICANN is
2 bound to implement, but in their actual
3 implementation, even with respect to their
4 own interpreted guidelines, the EIU
5 misapplied them, and we will demonstrate that
6 to you and believe we have done so in our
7 papers, together with our expert reports.

8 Now, staff and EIU -- and the
9 reason I'm referring to staff and EIU
10 together, because it is staff, it is ICANN
11 staff and the EIU that participated hand in
12 glove in conducting these CPEs, and how do we
13 know that? From ICANN's own documents from
14 its document production.

15 Now, ICANN will tell you that the
16 EIU is supposed to be completely independent,
17 that the EIU acts independently, but if you
18 look at the production in this case -- and I
19 would, in fact, specifically point you to
20 slide 23 and slide 51 of our packet where you
21 will see what it is that -- sorry -- slide 22
22 and slide 23.

23 Slide 22, this is ICANN in one of
24 its pleadings in the Despegar case. It is
25 neither the role of the BGC or this IRP panel

1 to second-guess the substantive
2 determinations of independent third-party
3 evaluators. So what they were telling that
4 panel is that the EIU is supposed to act
5 independently.

6 Well, if you turn to the next
7 slide, what you see there and what we also
8 demonstrated to you in our pleadings is the
9 number of communications that took place
10 between ICANN staff and the EIU during the
11 course of this supposedly independent
12 evaluation of the applications by the EIU.

13 And if you read the exhibits, as
14 I'm sure you have, and you read the emails
15 that have gone back and forth, you will see
16 the degree of substantive communication that
17 took place between EIU and ICANN staff, so
18 much so, so much so -- and I would point you
19 to slide 51. ICANN staff dictated to the EIU
20 language that should be included in the CPE
21 evaluation reports, asking them to bolster
22 their reports with research supposedly
23 conducted.

24 Now, the problem is -- and I'm
25 going to keep coming back to this over and

1 over again -- I have nobody here from EIU who
2 I can ask about any of this. I have nobody
3 here from ICANN staff that I can ask about
4 any of this. I have nobody here from the
5 board who I can ask about any of this, and
6 why is this significant?

7 EIU and ICANN staff are subject;
8 they are bound in their review of these
9 applications by the Applicant Guidebook, by
10 the bylaws and by the articles of
11 incorporation. And the articles of
12 incorporation, as President Donahey pointed
13 out, made reference to international law and
14 California law.

15 Now, Mr. LeVee will tell you that,
16 in fact, the EIU is in no way bound by
17 anything other than its contract with ICANN.
18 Well, I don't believe that is correct. In
19 fact, it isn't correct, and why isn't it
20 correct? Because the EIU and staff's actions
21 are subject -- and Mr. LeVee will agree with
22 this -- to the Board Governance Committee's
23 review in a reconsideration request.

24 And what is it that the Board
25 Governance Committee does? The Board

1 Governance Committee evaluates whether one or
2 more staff actions or inactions contradict
3 established ICANN policies, and remember, the
4 AGB is a reflection of ICANN policy.

5 Now, what are those ICANN policies?
6 Well, let me just pause there for a second.

7 So if the BGC's purpose or one of
8 its purposes is to evaluate whether one or
9 more staff actions or inactions contradicted
10 established ICANN policies, it only follows
11 that staff at EIU, who work hand in glove in
12 evaluating these applications, are bound by
13 the articles of incorporation, bylaws and the
14 AGB that reflect ICANN policies.

15 And one of the policies that the
16 BGC is supposed to consider, what is it the
17 BGC is looking at in undertaking its function
18 to evaluate staff and EIU action or inaction
19 to see if there's a contradiction of
20 established ICANN policies.

21 Number one, procedural fairness.
22 Bylaws, Article I, section 2-8. The Board
23 Governance Committee is there. One of its
24 functions is to evaluate whether decisions
25 were made by applying documented policies,

1 documented policy, i.e., the AGB. Did they
2 make decisions by applying documented
3 policies neutrally and objectively, with
4 integrity and fairness?

5 Neutrally, objectively, with
6 integrity and fairness, the board is supposed
7 to sit there and determine whether or not
8 staff inaction or action contradicts the
9 application of documented policies, neutrally
10 and objectively, with integrity and fairness.
11 That's one of the things that they're
12 supposed to do, or several things all wrapped
13 into one.

14 What else is the Board Governance
15 Committee supposed to do? Bylaws Article II,
16 Section 3 provides, "ICANN shall not apply
17 its standards, policies, procedures or
18 practices" -- policies, again, policies or
19 standards. "ICANN shall not apply its
20 standards, policies, procedures or practices
21 inequitably or single out any particular
22 party for disparate treatment, unless
23 justified by substantial and reasonable
24 cause, such as the promotion of effective
25 competition."

1 The Board Governance Committee is
2 supposed to look at that policy. The Board
3 Governance Committee's duty is to determine
4 whether the staff and EIU conducted
5 themselves in a manner that violates that
6 standard.

7 And the Board Governance Committee
8 is also supposed to act in accordance with
9 the rules of transparency that are reflected
10 in Article III, Section 1. "ICANN and its
11 constituent bodies shall operate to the
12 maximum extent feasible" -- to the maximum
13 extent feasible -- "in an open and
14 transparent manner and consistent with
15 procedures designed to ensure fairness."

16 This is not stuff that I am making
17 up. This is in the bylaws. The bylaws
18 provide what a reconsideration request is
19 supposed to do, and in this particular
20 instance, it is for the board to determine
21 whether staff, together with EIU -- because
22 there's no doubt that they were not acting
23 independently of each other -- that the
24 staff, whether their action or inaction
25 contradicted established ICANN policy.

1 So, so far we are in the realm of
2 the EIU and staff applying criteria that is
3 set out in the AGB, the document that was
4 developed through the community process of
5 policy making in ICANN.

6 Now, of course, they have these
7 guidelines, but those guidelines, unless
8 Mr. LeVee can show you, we don't have to show
9 you, Mr. LeVee has to show you that those
10 guidelines are not an expansion upon or a
11 modification of or a deviation from the rules
12 that were developed by the policy development
13 process that ICANN is bound to follow.

14 Okay. So we're in this world of
15 the application of these criteria by the EIU
16 and staff. When an application is accepted
17 by ICANN staff, based on a recommendation
18 from the EIU, what happens to that
19 application? It goes directly into
20 contracting. So nobody can tell any of us
21 that this review that is conducted by, by the
22 EIU and ICANN staff is not of immense
23 significance. It goes directly to
24 contracting. Go pick up your millions of
25 dollars. Do not pass go. You go straight to

1 contracting.

2 So it is of immense significance.
3 It doesn't go to the Board, to the Board
4 Governance Committee for any kind of
5 secondary review. It, in fact, doesn't even
6 go to what is called the New gTLD Program
7 Committee, the NGPC, to determine whether the
8 EIU or staff got it right. It goes directly
9 to contracting. Immense power put into the
10 hands of ICANN staff and the EIU.

11 Now, what is it that the EIU will
12 tell you is its role in this entire process?
13 They're supposed to be acting independently,
14 according to Mr. LeVee and Despegar. They're
15 supposed to be experts, but all they do is
16 make some recommendations. The ultimate
17 decision is taken by ICANN staff.

18 And oh, yes, if an application is
19 rejected, or rather it is not accepted, and
20 it isn't reversed through any kind of
21 accountability process, it goes into an
22 auction process.

23 So what is going to happen here?
24 Dot Registry's applications for these strings
25 will go into a pool with other applicants who

1 are not bound by any sort of restrictions
2 associated with Dot Inc, Dot LLP and Dot LLC.
3 None whatsoever. Google, one of the
4 applicants, and Dot Registry, another of the
5 applicants, will compete in an auction, an
6 auction administered by ICANN, and what
7 happens to the proceeds of those auctions?
8 Millions and millions of dollars go into the
9 coffers of ICANN.

10 I'm not making this stuff up.

11 Now, at this particular point we
12 are with staff and EIU applying the criteria.
13 Staff makes the decision, staff denies the
14 applications, and now it goes to the BGC. As
15 I explained to you, the BGC is supposed to
16 determine whether there are any violations in
17 what staff did with reference to the policies
18 that ICANN and staff and EIU are bound by.
19 And what is it that the board is supposed to
20 do in its analysis of whether or not staff --
21 whether or not one or more staff action or
22 inaction contradicted established ICANN
23 policies?

24 Well, it may ask ICANN staff for
25 its views on the matter, which comments shall

1 be made publicly available. Well, there are
2 no publicly available comments here, at least
3 none that were provided to us. So clearly
4 the BGC didn't ask ICANN staff for its view
5 on the matter, because if it did, we would
6 have those views. Plainly, it didn't.

7 Second thing they can do. The BGC
8 may request additional information or
9 clarifications from the requester and elect
10 to conduct a meeting. Well, they didn't do
11 that either. They didn't ask Dot Registry
12 for any other information. Well, we're going
13 to take a look at what they could have done
14 and how easy it would have been, but they
15 didn't.

16 They could also request -- the
17 third thing that they could do. They may
18 also request information relevant to the
19 request from third parties. Well, did they
20 do that? No. The Board Governance Committee
21 did not request any information from third
22 parties. Who could they have requested
23 information from? Perhaps the Delaware
24 secretary of state? You'd think that perhaps
25 the Delaware secretary of state would be an

1 interested third party. Well, ICANN may take
2 issue with that.

3 So how about NASS, the National
4 Association of Secretaries of State,
5 requesting any information from NASS? Now,
6 let's report here for a second that NASS
7 joined in the reconsideration request. They
8 signed the reconsideration request. How
9 difficult would it have been for the Board
10 Governance Committee to ask NASS for
11 information relevant to the application of
12 the criteria?

13 Criteria applied by the EIU and
14 ICANN staff. Now, I don't know who ICANN
15 staff are. I imagine they are some
16 reasonably competent people, but who are
17 these people who are at the EIU?

18 Well, I must say I was quite
19 surprised when I looked at the qualifications
20 of these individuals at the EIU who are
21 undertaking this incredibly consequential
22 review and making this incredibly
23 consequential decision, a decision that can
24 impact millions and millions of dollars of
25 value and a decision here that impacts very

1 serious public policy considerations.

2 You don't have to take my word for
3 the severity or the seriousness of the public
4 policy considerations. You need only look at
5 the language included in the interim decision
6 in these very proceedings in which the
7 emergency arbitrator recognized the
8 incredibly important public policy
9 considerations.

10 Well, we have decisions taken, at
11 least so far as what we know, by a EIU Contact Information Redacted

12 EIU Contact Information Redacted a policy researcher, journalist,
13 with a bachelor's in liberal arts; EIU Contact Information Redacted

14 an economist with a master's in
15 economics; EIU Contact Information Redacted , a
16 researcher, master's in international
17 political economy; EIU Contact Information Redacted , a
18 researcher, master's in international
19 relations; EIU Contact Information Redacted visual data
20 journalist, a bachelor's in modern languages.

21 Not a single one of them with any
22 qualifications whatsoever in US corporate law
23 or law at all. I'm not saying that they're
24 probably not very intelligent people, but I
25 don't know what their qualifications are,

1 because I cannot test them in front of you.

2 And why can't I test them in front
3 of you? Because of the system that ICANN has
4 created for its accountability and review of
5 its own actions. It's a system which
6 effectively strikes me as one in which you
7 flip a coin, but do you have a 50/50 chance?
8 No. It's heads I win, tails you lose.

9 And the only way -- according to
10 Mr. LeVee -- an applicant can win is if that
11 coin drops and stands on its edge. Sorry.
12 That is not what accountability is all about.
13 Recalling that ICANN operates today under
14 contract from the United States government.
15 Now, that's all under discussion as authority
16 transfers to ICANN, but ICANN operates under
17 authority from the United States government,
18 and the United States government, as far as I
19 recall, still believes in due process.

20 And that's where you come in,
21 because we have gone from the application of
22 standards to the exercise of discretion, the
23 EIU's application of standards together with
24 ICANN staff, to the exercise of discretion by
25 the Board Governance Committee, and we go

1 from application of standards and exercise of
2 discretion into the realm of evidence.

3 We go into your realm, an
4 adversarial process subject to evidentiary
5 rules, not ex aequo et bono, not pleading by
6 volume, but rules, and what are those rules?
7 What is it that you're supposed to do?

8 Well, you're going to hear a lot
9 from Mr. LeVee about the so-called "focus
10 questions," but at this point it's pretty
11 much well settled that the various questions
12 that are identified in the supplemental rules
13 that apply to IRPs, and the -- and that are
14 also reflected in the bylaws, are nothing
15 more than that. They are focus questions.
16 They are certain questions that you should
17 address in your evaluation, but that is not
18 your remit.

19 Your remit is very clearly set out
20 in the bylaws. You are to compare contested
21 actions and inaction of the board to the
22 articles of incorporation and bylaws, and
23 what I hope I've done by now is to
24 demonstrate to you how all of this flows
25 back.

1 You have staff at EIU applying
2 policy, the articles of incorporation, the
3 bylaws, the BGC that is supposed to act
4 according to the bylaws and the articles of
5 incorporation, and your job is to determine
6 whether contested actions or inaction of the
7 board, how they compare to the articles of
8 incorporation and the bylaws.

9 And in evaluating your remit, I
10 cannot impress upon you the following
11 point enough -- the following point upon you
12 enough. This is our only shot. We don't get
13 to go anywhere else because of the litigation
14 waiver that ICANN requires of all applicants,
15 a very broad litigation waiver, one that says
16 "Applicant agrees not to challenge in court
17 or in any other judicial forum any final
18 decision made by ICANN with respect to the
19 application, and irrevocably waives any right
20 to sue or proceed in court or any other
21 judicial fora on the base of any other legal
22 claim against ICANN and ICANN-affiliated
23 parties," which includes the EIU, and
24 Mr. LeVee will not dispute that, with respect
25 to the application.

1 So we have no place else to go.
2 This is the final stop with respect to
3 accountability, and that we ask you keep in
4 mind when you think about the standard of
5 proof, the allocation of the burden of proof,
6 and how this process has worked to date.

7 A complete imbalance of
8 information, a system that requires the
9 petitioner to prove a negative, and when that
10 petitioner comes before the only independent
11 review that it will get, a system in which
12 ICANN tells you there shall be no witnesses,
13 there shall be no live hearing, you only get
14 25 pages. What sort of due process is that?

15 Now, even ICANN and other panels
16 have recognized that EIU and the BGC are not
17 adjudicatory bodies. They're administrative
18 bodies. They exercise discretion, but you,
19 members of the panel, are an adjudicatory
20 body.

21 And so we, we walk from the world
22 of discretion into the world of evidence.
23 And in fact, how do we know that other than
24 simple logic, good sense, and what the tummy
25 test should tell you? Don't be technicians

1 about it. Let's take a look at two documents
2 which ICANN cannot deny or interpret in any
3 particular way.

4 The first one of these documents,
5 the ICDR rules, Article 20 addressing the
6 conduct of proceedings. "The tribunal" --
7 the panel -- "shall determine the
8 admissibility, relevance, materiality and
9 weight of the evidence." That hasn't been
10 modified in any particular way by the
11 supplemental rules. There is no evidentiary
12 process that is permitted at the Board
13 Governance Committee reconsideration request
14 stage.

15 It is only the Board that has the
16 responsibility to gather the evidence and
17 should gather the evidence. Certainly it
18 should conduct a certain amount of due
19 diligence with respect to such valuable
20 rights that are in issue, but here in this
21 adversarial process, we are dealing with
22 evidence.

23 And if -- and I refer now to
24 Article 26, 3. "If a party duly invited to
25 produce evidence or take any other steps in

1 the proceeding fails to do so within the time
2 limit established by the tribunal, without
3 showing sufficient cause for such failure,
4 the tribunal may make the award on the
5 evidence before it."

6 So the rules by which you are bound
7 and that give you direction in the exercise
8 of your jurisdiction address evidence.

9 All right. So let's also take a
10 look at the supplemental rules. The
11 supplemental rules, Article IV, provide:
12 "All evidence, including witness statements,
13 must be submitted in writing in advance."

14 Well, you have a witness statement from
15 Mr. Shaul Jolles. You have a witness
16 statement from Ms. Tess Pattison-Wade. You
17 have a witness statement from the secretary
18 of state of Delaware, and for all of us here
19 who are American lawyers and, in fact, those
20 who aren't American lawyers, understand the
21 importance of Delaware. The secretary of
22 state of Delaware and the president of the
23 National Association of Secretaries of State
24 have put in witness statements. They have
25 put in witness evidence, witness evidence,

1 witness statements specifically contemplated
2 by the supplemental rules.

3 What does ICANN say? ICANN says
4 no, we don't need to cross-examine them, we
5 won't cross-examine them, we refuse to
6 cross-examine them, because our rules say you
7 shouldn't -- that there is no provision for
8 cross-examination in any hearing. Well, in
9 fact, Mr. LeVee and I have participated in a
10 hearing in which the panel cross-examined the
11 witnesses and then allowed counsel to ask
12 further questions.

13 The point here being that witness
14 statements are specifically contemplated by
15 the rules. When they are submitted, they are
16 not idle pieces of paper. They are the fact
17 testimony, in some case melded together with
18 expert views of individuals which you must
19 give full weight.

20 It would be highly inappropriate
21 for you to not take into consideration, give
22 full weight to that evidence when ICANN tells
23 you that witness testimony can be put in,
24 but, ah, it doesn't have to be subject to
25 cross-examination, and ICANN chooses not to

1 put in any rebuttal witness testimony of any
2 sort. I don't know if that troubles you.
3 That sure troubles me.

4 Now, if you go to Article V of the
5 supplemental rules, and I quote, "The parties
6 may submit expert evidence in writing, and
7 there shall be one right of reply to that
8 expert evidence." Again, we're living in the
9 world of evidence.

10 Well, you have an extensive expert
11 report from Mr. Flynn. ICANN's supplemental
12 rules provide that ICANN has a right of
13 reply. Did ICANN reply? No, it didn't. All
14 you have, instead, are submissions by
15 Mr. LeVee. That's not evidence.

16 Mr. LeVee questions the
17 qualifications of Mr. Flynn to have issued
18 his report. Well, you know what? Why isn't
19 Mr. Flynn here being cross-examined by
20 Mr. LeVee, who is a trial lawyer with an
21 incredible amount of expertise? And I have
22 seen him examine several witnesses before.
23 In fact, why hasn't Mr. LeVee even put in a
24 rebuttal expert report?

25 So all the evidence is on one side

1 of the ledger, all the submission, without
2 any support, on the other side. It's pretty
3 obvious which side is which, so I won't
4 insult your intelligence with a conclusion to
5 that.

6 Right. So again, I would ask you
7 to give significant consideration to this
8 process that I've outlined and what the
9 implications are of this system that ICANN
10 has created.

11 Now, Mr. President, you highlighted
12 the importance of the burden of proof. In a
13 process of this nature where there is such
14 significant imbalance, we don't simply look
15 at the rule that he who submits or she who
16 submits must prove *actori incumbit probatio*.

17 In this particular instance, it is
18 ICANN that has to demonstrate that what it
19 did was correct. Because of the way in which
20 these rules are framed and because of the way
21 in which the system plays itself out, it must
22 be ICANN that has to demonstrate by a
23 preponderance of the evidence that the
24 decisions taken by the Board Governance
25 Committee and the actions of staff and the

1 EIU are consistent with the articles of
2 incorporation, bylaws and the Applicant
3 Guidebook.

4 It has to be that way because of
5 the system of accountability that they
6 created and because of the very wording of
7 the standards and how they've been laid out,
8 which I've just done for you in some detail.

9 Now, some will say that's
10 counter-intuitive to the typical rules where
11 the Claimant has to prove, but if we do look
12 at it in the traditional way, the Claimant
13 has to present a prima facia case. We've
14 done more than that. And the respondent has
15 to present countervailing evidence. That's
16 what these rules say. Did they do that? Not
17 at all. Not a shred of evidence to rebut
18 anything that I have said so far.

19 We'll, of course, hear from
20 Mr. LeVee in just a moment, and you'll be
21 able to evaluate whether what I'm saying is
22 correct.

23 So what I think we should do now,
24 I'm going to take a 15- to 20-minute pause,
25 because I think it's important for you to

1 understand how these criteria that the EIU
2 and staff were to apply were misapplied.

3 At the end of the day, you do not
4 need to get into all the details, or at least
5 we don't need to get into all the details in
6 this particular hearing conducting another
7 CPE analysis together, because you have it in
8 our evidence, you have it in Ms. Tess
9 Pattison-Wade's statement, and you have it in
10 Mike Flynn's expert report, completely
11 un rebutted.

12 I'd like her to do a short
13 presentation on the misapplication of these
14 criteria, because it will be relevant to what
15 I have to say about what the Board Governance
16 Committee could have done and didn't do, as
17 well as for the disparate treatment to which
18 the applications were treated.

19 So Mr. President, with your
20 permission, I'll turn over to
21 Ms. Pattison-Wade, and then I'll be back with
22 you shortly.

23 (Discussion was held off the
24 record.)

25 MS. PATTISON-WADE: Good morning.

1 First I want to say thank you. I appreciate
2 the time to speak with all of you today. My
3 name is Tess Pattison-Wade. I'm the
4 executive director of Dot Registry, and I'm
5 also the author of the applications that
6 we're discussing here today.

7 For the sake of time, I will only
8 be addressing the content of the INC
9 application and the scoring that we received
10 in relation to that particular application,
11 though it's important to remember that these
12 concepts are universally applicable across
13 all three of our applications, and we did
14 receive identical content and commentary from
15 the EIU in all of those cases.

16 When I began writing and submitting
17 the applications, I was working from Version
18 3 of the Applicant Guidebook which was
19 published in September of 2011. In Module 1
20 of that publication, it tells us that "any
21 applicant has the ability to designate their
22 application as community-based, generic,
23 top-level domain if it is intended to be
24 operated for the benefit of a clearly
25 delineated community."

1 Module 1 then goes on to tell us to
2 consider four key points in answering
3 questions 18 and 20 of the application. The
4 first is that it asks the applicant to
5 demonstrate an ongoing relationship with a
6 clearly delineated community; that the gTLD
7 that we have applied for strongly and
8 specifically relates to the community named
9 in our application; that we have proposed
10 dedicated content and use policies which are
11 supportive of the community-based nature of
12 our application, and includes specific
13 security verification mechanisms; and finally
14 that we provide, in writing, endorsements
15 from at least one community institution which
16 is supportive of the concept and the
17 community that we have provided.

18 It is these four concepts that form
19 the basis for the Community Priority
20 Evaluation criterion, as further described in
21 Module 4 of the AGB.

22 Module 4 also reminds us that
23 community in ICANN's eyes is very different
24 than the concept of community that you or I
25 might think of, where traditionally we think

1 of the word "fellowship," potentially the
2 neighborhood we live in or the church that we
3 belong to, in ICANN's world, "community"
4 applies more to the concept of cohesion, and
5 they tell us to focus less on commonality of
6 interest and more on what the community
7 makeup is and how it relates.

8 Specifically, they tell us that
9 communities are able to be made up of legal
10 entities, an alliance of groups, a federation
11 of organizations --

12 MR. DONAHEY: Can you wait just one
13 second, ma'am? Mr. LeVee has an objection he
14 wants to state.

15 MR. LEVEE: So the rules of this
16 proceeding to which Mr. Ali referred and
17 which Mr. Donahey repeated in his opening do
18 not permit the witnesses to testify.

19 If Ms. Pattison-Wade is making an
20 argument about something in the legal
21 papers -- I don't know whether she's a
22 lawyer, I don't care whether she is, and then
23 I would not object. If the purpose of her
24 segment here is to stand up and tell us what
25 she did and why she thinks the EIU was wrong,

1 all of that is in her witness statement, and
2 I object to her repeating it now, because
3 it's outside the bounds of the rules.

4 MR. ALI: Well, it isn't uncommon
5 for counsel to also be a witness and to make
6 submissions, and for the fact testimony, too,
7 at the same time being accepted into
8 evidence.

9 ICANN chose not to cross-examine
10 any of our witnesses, and I'm simply asking
11 Ms. Pattison-Wade to set the background to
12 what happened with the application and the
13 criteria.

14 If ICANN accepts her testimony,
15 then we'll go no further with any further
16 explanation. This is really for the panel's
17 benefit. This is complicated stuff, and a
18 quick summary of what it is that's reflected
19 in the witness statement may well be
20 beneficial to the panel, but I leave myself
21 with the good hands of Mr. President.

22 MR. LEVEE: If I may respond,
23 Ms. Pattison-Wade's witness statement, which
24 is 23 pages long, goes into considerable
25 detail as to her views as to why the EIU got

1 it wrong, ICANN responded to that in its
2 responsive papers, and of course, I intend to
3 address that issue in some detail during my
4 remarks, assuming I don't lose my voice from
5 my cold.

6 I do object to have a witness stand
7 up and relate her experience about why she
8 thinks the EIU got it wrong. It's expressly
9 prohibited by the Procedural Order that
10 Mr. Donahey read from this morning.

11 MR. DONAHEY: We have
12 Ms. Pattison-Wade's witness statement, and if
13 she's just going to report on what she
14 previously said, I don't think we need
15 anything further.

16 MR. ALI: That's fine,
17 Mr. President. As Mr. LeVee pointed out, she
18 submitted a 23-page witness statement
19 describing the rationale behind what it is
20 that was included in the applications.

21 MR. DONAHEY: And I assure you,
22 Mr. Ali, that the panel will review that
23 statement carefully.

24 MR. ALI: Okay, Mr. President. I'm
25 going to take from that that you have

1 reviewed it already and that you are
2 reviewing it again.

3 MR. DONAHEY: We will do so and we
4 have done so.

5 MR. ALI: Okay. Just a point of
6 clarification there, and -- all right.

7 Well, let's just then continue,
8 since I take it that the panel understands
9 the basis for the applications and what was
10 put in, and you will see in our written
11 submissions a fair amount of detail regarding
12 the misapplication of the criteria.

13 Now, what do we mean by the
14 misapplication of the criteria? We have the
15 AGB criteria, going back again to what I said
16 right at the beginning; we have the CPE
17 non-reviewed guidelines that were not
18 developed through any policy development
19 process of ICANN that were then issued; and
20 then the EIU, in its own -- in its actual
21 decisions that it issued, added further
22 requirements to the criteria that it applied,
23 and certainly applied criteria to Dot
24 Registry's applications that it did not apply
25 to any of the others.

1 And frankly, if the same standards
2 that were applied to Dot Registry were
3 applied to the other applicants, those
4 applicants should also -- those applications
5 should also have been denied, the obvious
6 being that if those applications, such as Dot
7 Osaka, Dot Hotel, Dot Radio, Dot Eco, and Dot
8 Spa, were accepted, then the three
9 applications that have been put in and that
10 are in issue before you should also have been
11 accepted, applying the same standards.

12 Now, ICANN will tell you that the
13 EIU does not have any type of quality control
14 mechanism. ICANN will tell you that there is
15 no consistency check that is to be conducted
16 by the EIU at all, but recall that the EIU is
17 making a recommendation, recall the role that
18 the EIU has told you in the witness statement
19 of EIU Contact Information Redacted, who is -- this is the only
20 witness statement that we have here.

21 EIU Contact Information Redacted tells you, "The EIU
22 made it clear to ICANN that its public
23 involvement in the application due process
24 should be limited. While performing its
25 contracted functions, the EIU would operate

1 largely in the background, and ICANN would be
2 solely responsible for all legal matters
3 pertaining to the application process."

4 So you have the EIU, which, by the
5 way, EIU Contact Information Redacted statement also makes it
6 very clear that the EIU and ICANN staff
7 engaged in "a long and iterative process in
8 the finalization of these applications."
9 Those are his words, "a long and iterative
10 process."

11 So the EIU makes this
12 recommendation. Should it be ICANN staff
13 that's somehow checking for consistency with
14 the policies, the guidelines, and doing
15 quality check? You'd think yes, at least at
16 one level, and if by some chance, after that
17 quality check and consistency check, the
18 application is nonetheless in the rejected
19 basket, who else should do it?

20 The Board Governance Committee
21 should do it. And why? Because it is
22 incumbent upon the Board Governance Committee
23 to ensure that ICANN shall not apply its
24 standards, policies, procedures or practices
25 inequitably or single out any particular

1 party for disparate treatment. It is
2 incumbent upon the ICANN Board Governance
3 Committee to ensure that decisions were made
4 by applying documented policies neutrally and
5 objectively, with integrity and fairness.

6 That's what they're supposed to do.
7 So perhaps a consistency check and a quality
8 check should be done at that point, and if
9 it's not done at that point, who does it?
10 You must do it, members of the panel. And
11 why? Because this is our only shot at
12 independent review and to hold ICANN
13 accountable.

14 So what is it that the Board
15 Governance Committee actually does? They
16 issue a decision of 23 pages, double-spaced,
17 with respect to the complaints that were
18 raised, and of course, they limit themselves
19 very narrowly in terms of how they define
20 what complaints are being raised by the
21 applicant. And somewhere around page 7, we
22 actually get into the substantive evaluation,
23 or some substantive analysis. The first six
24 pages are nothing more than procedural
25 background. Nothing more.

1 And then ICANN says, or the Board
2 says, "ICANN has previously determined that
3 the reconsideration process can properly be
4 invoked by challenges to determinations
5 rendered by panels formed by third-party
6 service providers such as the EIU, where it
7 can be stated that a panel failed to follow
8 the established policies or procedures in
9 reaching its determination, or that staff
10 failed to follow its policies or procedures
11 in accepting that determination."

12 I actually use a different word
13 than "determination." Staff accepts the
14 recommendation.

15 Okay. So that's what they're --
16 that's what ICANN's Board recognizes, and at
17 this point you will be told by Mr. LeVee, in
18 response to what I've just said, well, it's
19 not a substantive review of the decisions of
20 the ICANN staff. Well, how on earth can you
21 decide whether or not policies, those
22 reflected in the AGB, have been properly
23 applied or not without doing a substantive
24 review of what was done?

25 That's, in fact, what the Despegar

1 panel says. Yes. Here is what the Despegar
2 panel says. "What is of critical
3 importance" --

4 MR. DONAHEY: Is this in your slide
5 somewhere?

6 MR. ALI: The Despegar panel
7 quotation certainly is in the slides. I will
8 have a specific reference.

9 MR. DONAHEY: All right.

10 MR. ALI: The panel says, quote,
11 "What is of critical importance is the manner
12 in which the review of whether the EIU has
13 followed the correct procedure and has
14 correctly applied ICANN's policies is
15 conducted. Further" -- this is paragraph 69.
16 The previous quote was from paragraph 66.

17 The Despegar panel says, and I
18 quote, "The panel agrees that if the BGC is
19 charged with considering whether the EIU
20 correctly applied ICANN policies, which ICANN
21 accepts it is, that it needs to look into how
22 the standard was applied. It is not
23 sufficient to limit the review to the
24 question of whether mention was made or the
25 relevant policy. The BGC needs to have a

1 reasonable degree of assurance that the EIU
2 has correctly applied the policy."

3 Now, recall that the BGC's rule,
4 the bylaws give the BGC various powers that
5 it can exercise to figure out what it is that
6 the EIU did or perhaps get some information,
7 additional information with respect to these
8 valuable rights from the applicant, or
9 perhaps even communicate with interested
10 third parties, and in fact, in this
11 particular instance, a party to the actual
12 reconsideration request, i.e., the National
13 Association of Secretaries of State.

14 Okay. So when you go through
15 Mr. Flynn's report, you get chapter and verse
16 on how it is that the criteria were
17 misapplied. One of the critical points in
18 the entire analysis is whether or not the --
19 whether or not there is a community. That
20 actually courses through all of the analysis
21 that's done, and there's a fundamental
22 disagreement that the EIU has with the
23 applicant, that there is no community at all.
24 It doesn't exist.

25 Well, had the Board Governance

1 Committee deigned to do some further
2 investigation, perhaps requested some
3 information from the Delaware secretary of
4 state, to give one example, here's what they
5 might have heard.

6 "The decision" -- this is in
7 paragraph 7. "The decision to register a
8 corporation, a limited liability company or a
9 limited liability partnership reflects a
10 distinct choice about what the filing party
11 wants to do with the entity; how the
12 ownership and control of the entity was
13 structured; what protections from personal
14 liability will apply; how it wants to be
15 taxed by both the state and federal
16 government; and what it wishes to project to
17 the public."

18 "For example, a business might
19 choose to organize under Delaware law as a
20 limited liability company, because a limited
21 liability company offers it greater
22 flexibility with respect to how its ownership
23 and control is structured as compared to a
24 corporation."

25 Paragraph 8, and I quote again.

1 "Businesses choose the jurisdiction in which
2 they want to incorporate, formal organize,
3 and they make a deliberate choice to be a
4 corporation, limited liability company,
5 limited liability partnership, or another
6 type of legal entity. This means that when a
7 company holds itself out as a registered
8 limited liability company in the United
9 States, I would know that it is controlled by
10 a manager and/or its members, pursuant to the
11 underlying operating agreement that provides
12 for how profits and loss are passed through
13 to its members," et cetera.

14 He goes on to say, "From this
15 perspective" -- this is the Delaware
16 secretary of state, and if Mr. LeVee
17 disagrees with what he has to say, Mr. LeVee
18 could have cross-examined him. "This
19 criteria with respect to community was
20 misapplied by the EIU, and that decision was
21 improperly accepted by ICANN staff."

22 What does Mr. Bullock say? "From
23 this perspective, the legal form a business
24 chooses does make it part of a community."

25 Now, the EIU says a lot of research

1 was conducted. Well, I don't see that
2 research anywhere in the decision. How can I
3 figure out where they got -- how they made
4 their finding or how they reached the
5 conclusion that they ultimately did?

6 The EIU also took issue with the
7 fact that there's no representative of the
8 community. Well, the National Association of
9 Secretaries of State is the association for
10 all the secretaries of state, and if you look
11 at the witness statement of Elaine Marshall,
12 she tells you precisely what the Business
13 Services Committee of the National
14 Association of Secretaries of State does with
15 respect to these criteria for registering an
16 entity. She tells you about public policy
17 considerations underlying the interest in
18 this new gTLD process.

19 And Mr. Bullock, The Honorable
20 Jeffrey Bullock, also tells you that "There
21 is an interest on the part of not only the
22 Delaware secretary of state, as well as other
23 secretaries of state and the National
24 Association of Secretaries of State, and
25 raising the standards of all states helps

1 protect these communities, i.e., communities
2 or registered entities, and consumers from
3 other businesses unlawfully trading on their
4 name and reputation."

5 The problem here is two-fold. One,
6 the misapplication of very obvious what we'll
7 call "criteria," and the other of doing even
8 minimal due diligence that would have
9 resulted in this information coming before,
10 whether it's the EIU or the Board Governance
11 Committee.

12 Now, we talk about community, and
13 with respect to this whole issue of a
14 community, let me just give you one example,
15 because all the rest you'll find in
16 Mr. Flynn's unrebutted expert report.

17 Whereas in defining or what is an
18 acceptable community, EIU and ICANN staff
19 chose not to accept the communities of
20 incorporated entities, LLCs or LLPs, which
21 are externally verifiable with external
22 information, they did accept the following.
23 This is from the Dot Radio application, and I
24 could go to Dot Osaka, I could go to Dot Eco,
25 I could go to Dot Spa, I could go to Dot

1 Hotel, but let's just take a look at Dot
2 Radio.

3 "The radio industry is composed of
4 a huge number of very diverse radio
5 broadcasters." This is how the applicant is
6 defining its community, "a huge number of
7 very diverse radio broadcasters, public and
8 private, international and local, commercial,
9 community-oriented, general purpose, or set
10 to specific local music, big and small. All
11 licensed radio broadcasters are part of the
12 radio community, and so are the associations,
13 federations, unions."

14 "Also included are the radio
15 professionals. However, the radio industry
16 keeps evolving, and today many stations are
17 not only broadcasting in the traditional
18 sense, but also webcasting and streaming
19 their audio content via the internet. Some
20 are not broadcasters in the traditional
21 sense. Internet radio is also part of the
22 radio community, and as such will be
23 acknowledged by Dot Radio TLD, as will
24 podcasters. Finally, the community includes
25 a variety of companies providing specific

1 services or products to the radio industry."

2 This is just basically putting in
3 the word "radio" wherever you like and say,
4 okay, that's a community. Let's stick in the
5 word "hotel" someplace, and we call it
6 community. Let's call -- let's -- Osaka.
7 Anybody who self-certifies that they have
8 something to do with Osaka can belong to the
9 Osaka community, but a business that chooses
10 to register itself as a particular type of
11 entity does so because it wants to be seen
12 and evaluated and dealt with as part of a
13 particular community to which others belong,
14 like an LLC.

15 Mr. Kantor, Professor Kantor, a
16 long-standing transactional lawyer of
17 significant repute, in deals that were done
18 would want to know about the corporate
19 structure, the legal structure, the legal
20 identity of the counter-party to a deal. Are
21 you an LLC? Are you an LLP? Are you an INC?
22 Not just that particular entity, but that
23 entity and how that entity is defined by
24 other entities that form part of that
25 community.

1 It may be boring, but it certainly
2 doesn't mean that they aren't a community.
3 And the members of the community, the
4 advocates for the community as reflected in
5 the National Association of Secretaries of
6 State, and the secretary of state of the
7 jurisdiction in which the most number of
8 registrations are completed every year, tells
9 you that there is a community, and that is
10 unrebutted.

11 And the fault here is not just in
12 the substantive mistake that was made. The
13 fault lies in the misapplication of the
14 criteria and the failure to do any due
15 diligence. The fault lies, when you look at
16 the reconsideration request itself, in the
17 failure to properly acknowledge the support
18 that was given to the applications.

19 Page 9 of the reconsideration
20 request decision, the reconsideration request
21 decision says, "The requester claims that it
22 was insufficient" -- sorry. Let me step
23 back. I'll restart the quote.

24 "The reconsideration request
25 decision recognizes that the CPE panel, the

1 EIU, mistakenly identified the supporter's
2 letters as involving the requester's
3 application for Dot Inc," but the fact that
4 the CPE panel and staff made a mistake is
5 seen as being completely insignificant. Why?
6 Because the requester provides no evidence
7 demonstrating that the typographical error
8 represented a substantive misunderstanding.

9 Well, if they wanted further proof,
10 just as the bylaws provide, they could have
11 asked for such further proof. Just in the
12 same way as the EIU sent letter after letter
13 after letter to the various supporters that
14 submitted support letters for the
15 applications, five letters could have been
16 sent to figure out what was going on here in
17 terms of whether or not the typographical
18 error represented a substantive
19 misunderstanding or not, or that those
20 supporting requester's application were
21 confused by the error.

22 When you read the second paragraph
23 of one of the first grounds that the request
24 for reconsideration requests, it will become
25 evident to you that what is being said there

1 is that Dot Registry has to prove the
2 negative without being asked any information
3 or having any participation in the final
4 determination of its fate. The only place it
5 can do that is right here, right now with
6 you.

7 Let's take another one that's
8 really quite egregious in the reconsideration
9 request.

10 The BGC says, "The panel declined
11 to award the Requester two points on the
12 support element because it found that the
13 requester was not the recognized community
14 institutions(s), member organization(s), nor
15 did it have documented authority to represent
16 the community, or documented support from a
17 majority of the recognized community
18 institution(s)."

19 As I just pointed out to you, all
20 they had to do was to ask the Delaware
21 secretary of state, who voluntarily provided
22 you with a witness statement and his position
23 in this proceeding. And why wasn't it
24 significant that NASS, the National
25 Association of Secretaries of State, joined

1 in the reconsideration request? Isn't that a
2 sufficient demonstration of support by an
3 organization that represents the affected
4 communities? They didn't ask.

5 Third one. This one is quite
6 delicious, actually. If you look at page 11,
7 the BGC says that Dot Registry's complaint
8 that no research is identified in the
9 decisions is not a basis for reconsideration.
10 It's not a basis for complaining. It's not a
11 violation of any policy.

12 They say, and I quote, "The
13 requester cites to no established policy or
14 procedure," because there is none, "requiring
15 a CPE panel to disclose details regarding the
16 sources, scope, or methods of its independent
17 research. As such, the requester's argument
18 does not support reconsideration."

19 Right there, that is complete --
20 that's completely wrong. Why? Because there
21 is a fundamental principle and one that I
22 have identified for you, and it's called
23 transparency.

24 Transparency bylaw, Article III,
25 section 1. "ICANN and its constituent body

1 shall operate to the maximum extent feasible
2 in an open and transparent manner, and
3 consistent with procedures designed to ensure
4 fairness." And let's not forget the other
5 one. "Making decisions by applying
6 documented policies neutrally, objectively,
7 and with integrity and fairness."

8 Now, mr. LeVee will say, well, the
9 EIU is not bound by any of that. It's not in
10 the contract. Aside from the fact that staff
11 worked hand in glove with the EIU and there
12 was no independence, let's take a look at
13 what the EIU's own documents say.

14 Exhibit C-16. This is the EIU's
15 own document. EIU says, page 1, and I quote,
16 "The evaluation process respects the
17 principles of fairness, transparency,
18 avoidance of potential conflicts of interest,
19 and nondiscrimination. Consistency of
20 approach: Consistency of approach in scoring
21 applications is of particular importance."

22 Now, that's the EIU telling you
23 what's important to the EIU. And funny
24 enough, that language seems to have
25 dovetailed very nicely with the various

1 policies that we've been discussing with you.

2 Is there a basis for
3 reconsideration? We submit to you yes, but
4 the burden is not on us. It's on ICANN.

5 I won't go into the rest of the
6 reconsideration request. It simply says over
7 and over again, the requester does not claim
8 that the panel has violated establishes
9 policy or procedure, but instead challenges
10 the substantive determinations of the panel
11 that that is not a basis for reconsideration.

12 Conclusory statement without any
13 analysis whatsoever. Without requesting any
14 information, without requesting any input,
15 without conducting any due diligence. Our
16 answers to the misapplication of the
17 criteria, the discriminatory application of
18 the criteria, are set out in Mike Flynn's
19 report and Ms. Tess Pattison-Wade's witness
20 statement.

21 So with that, Mr. Chairman, I don't
22 know how much time I've used up so far.

23 MR. DONAHEY: Just about a little
24 over an hour and a half.

25 MR. ALI: Okay. I will stop there

1 and reserve the rest of my time for rebuttal,
2 and if there are any questions that I can
3 answer at this juncture, I would be happy to
4 do so.

5 MR. DONAHEY: Thank you, Mr. Ali.

6 Do either of my co-panelists have
7 questions?

8 MR. KANTOR: Not at this time,
9 Mr. Chairman.

10 JUDGE BROWER: I have -- can you
11 see me now, if it makes any difference?

12 MR. DONAHEY: No, we can't see you
13 here.

14 JUDGE BROWER: Who's responsible
15 for the technology here?

16 (Discussion was held off the
17 record.)

18 MR. DONAHEY: Thank you very much.

19 JUDGE BROWER: You quoted from the
20 statement of the secretary, secretary of
21 state of Delaware who stated that ICANN, that
22 EIU or ICANN had gotten it wrong in not
23 finding it was a community. I'm just
24 wondering what value should we place on the
25 opinion of the secretary of state of Delaware

1 as to whether or not the criteria to be
2 applied for CPE have been correctly applied
3 or not.

4 MR. ALI: Very good question, Judge
5 Brower.

6 When you review the CPE criteria --
7 and remember now we're talking about the
8 policy-developed criteria contained in the
9 Applicant Guidebook, the Applicant Guidebook
10 that was issued in 2011, pursuant to which
11 Ms. Pattison-Wade completed the applications.
12 Those are developed through the mandated
13 community development, policy development
14 processes of ICANN.

15 There are separate guidelines that
16 the EIU developed for itself, which in our
17 submission are not reflective of what is in
18 the actual AGB, but even if one were not to
19 accept that particular position, taken
20 together, the criteria are very, very broad,
21 and the only way in which you can really
22 understand the criteria is through the
23 concrete application.

24 As you've seen in the five
25 applications that were accepted, what you

1 might call a most favored application
2 standard, the Delaware secretary of state is
3 one view, but a very important view.

4 You know far better than I what the
5 importance of Delaware is in terms of a
6 jurisdiction where entities are registered.
7 This is the expert view of a public official
8 who has public policy interests to take care
9 of, and this is a public official who's
10 expressing a view which might have been
11 important for the BGC or the EIU or staff,
12 had it been substantive, because you have a
13 very substantial individual or a very
14 substantial office that frankly is, in many
15 respect, akin to the Osaka Prefecture, for
16 example, expressing a view as to the
17 community and the community that is
18 administered by that individual. So I think
19 you should give it significance, perhaps, in
20 terms of the factual determination that you
21 need to make with respect to the criteria.

22 Now, looking at a particular result
23 as reflected in a report, objectively
24 speaking, one might say, okay, I agree with
25 that outcome, but I submit to you here that

1 the outcome as reflective of our community is
2 illogical, and it's not factually supportive
3 when one looks at the underlying facts.

4 JUDGE BROWER: Let me put another
5 scenario before you.

6 Suppose I'm the secretary of state
7 of Delaware or the head of the NASS, and your
8 client comes to me with his proposition of
9 the applications that have been put before
10 us. And the secretary of state says, oh,
11 wow, this is a great enforcement possibility
12 for us. If you get these domain names
13 approved by ICANN and a provision of being
14 able to use it is that one is registered with
15 the secretary of state of one of the states,
16 that's for me, wow, what a great sort of
17 enforcement surveillance mechanism, because I
18 don't have to pay anything for it. It's
19 better than anything we've been able to do,
20 because I will know anyone using the LLC or
21 LLP or INC as a domain name actually has
22 legitimate -- should have a legitimate legal
23 status.

24 So that's my motive, okay? I'll do
25 anything I can to get that done, and he says,

1 sure, I'll sign anything. I'll say they got
2 it all wrong.

3 Does that make -- would that make
4 any difference?

5 MR. ALI: I mean I wouldn't want to
6 speak for the Delaware secretar of state or
7 any other secretary of state. I think that's
8 precisely the sort of question that you could
9 have put to them if they were in front of
10 you.

11 I mean what their motivations were
12 or what their motivations are, I think it
13 would be highly inappropriate for me to try
14 and get. I would not want to offer you any
15 sort of speculation, but I would say that the
16 obverse of not having that I would say
17 surveillance power, they have that anyway if
18 you want to call it surveillance, because the
19 registration, "surveillance" sounds somewhat
20 sinister, particularly in today's environment
21 of being someone who has some background.

22 So I would simply say that the --
23 by not having this particular institution as
24 we proposed by Dot Registry, the prospects of
25 consumer fraud and abuse are absolutely

1 massive, because if somebody were to gain the
2 rights to these TLDs, or maybe it's not just
3 one company or one applicant, but three
4 different applicants, not a single one of
5 which is based in the United States, just
6 think of the prospect of a company registered
7 who knows where, representing to the world
8 that it's an INC. That would be highly
9 problematic. That would be -- that would
10 create the potential for significant consumer
11 fraud. I mean consumer fraud on the internet
12 is multibillion dollar liability. This
13 stands, if it's not done properly, to create
14 absolute havoc.

15 And so the secretary of state, in
16 his or her execution of his or her mission,
17 might well be motivated by wanting to prevent
18 further consumer fraud, but that's an
19 entirely legitimate purpose. That's really
20 my own speculation.

21 JUDGE BROWER: No, I don't argue
22 with the legitimate purpose. The question is
23 whether it is a basis of community.

24 I have one other question, which
25 is --

1 MR. ALI: Very briefly on that
2 particular point, because I think you've
3 raised a very important point.

4 You've got representatives of the
5 community saying that it's community. You
6 have to judge what's a community according to
7 what other communities have been defined, and
8 certainly this is a very definable community
9 by very objective criteria, without any
10 self-selection at all or self-certification,
11 let's say, self-certification. Osaka. I
12 spoke in Osaka once. I want to be part of
13 Dot Osaka. Do you determine that as the
14 prefecture?

15 JUDGE BROWER: You're not using Dot
16 Osaka?

17 MR. ALI: Not yet, but that's the
18 whole point.

19 So yes, there have to be definable,
20 identifiable communities, and these are
21 communities, although -- and again as
22 Ms. Pattison-Wade started to say and as is
23 reflected in the guidelines and as reflected
24 in the witness statements, it's the way in
25 which communities are being defined and

1 redefined in cyberspace.

2 We're talking about different
3 concepts, which is why the criteria were so
4 broadly defined, and then they -- so when
5 they're applied, they need to be applied with
6 reference to certain external standards, such
7 as the Delaware secretary of state or the
8 National Association of Secretaries of State
9 present by way of opinion.

10 JUDGE BROWER: I just have one
11 other question.

12 At this point you describe the BGC
13 as not being adjudicatory but instead
14 administrative and discretionary. Why? Why
15 is it not adjudicatory when it was hearing
16 applications for reconsideration?

17 MR. ALI: There was no, there was
18 no hearing. There's a --

19 JUDGE BROWER: -- receiving and
20 deciding on applications, if there is.

21 MR. ALI: Well, it's sort of
22 like -- I wouldn't call a university
23 admissions board adjudicatory. It's an
24 adversarial process. It's one in which the
25 onus is put on the Board Governance Committee

1 to conduct further investigation in order to
2 ensure that the applicant has been granted
3 due process, and the fact that it's
4 adjudicatory -- not my words, Mr. LeVee's
5 words -- words come from a submission that
6 was made in another case. I think that was
7 in Despegar again.

8 I can't find it right now, but I
9 will give you the reference where ICANN
10 itself says that this is a performance of
11 adjudicatory and administrative function --
12 sorry -- an administrative function and a
13 non-adjudicatory function. Let's find that
14 for you just so we don't lose it.

15 MR. DONAHEY: Mr. Ali, maybe we can
16 do that at a break.

17 (Discussion was held off the
18 record.)

19 MR. ATTANASIO: "The Panel
20 understands the importance of administrative
21 procedures, such as the CPE discussed below.
22 The Panel also understands that the EIU and
23 the BGC themselves are not adjudicatory but
24 administrative bodies. Nevertheless, the
25 Panel invites the board to affirm that, to

1 the extent possible, and compatible with the
2 circumstances and the objects to be achieved
3 by ICANN, transparency and administrative due
4 process should be applicable."

5 MR. ALI: This was -- the language
6 that my colleague just quoted was in the
7 context of the panel's commentary as to its
8 disappointment with the overall process that
9 ICANN has put in place for review of CPEs.

10 And so by nature, the Board
11 exercises its discretion, and does so in what
12 appears to be the best interests of the
13 company. Here, the only adjudication that's
14 taking place is before an independent review
15 panel of three independent panelists, so I
16 make that distinction.

17 JUDGE BROWER: Okay.

18 MR. ALI: Thank you.

19 MR. DONAHEY: Mr. Kantor, has this
20 raised any additional questions in your mind
21 that you wish to add now?

22 MR. KANTOR: Not at this time.
23 Just so you are aware, Chairman Donahey, I
24 will hold questions until after I have heard
25 presentations by both sides.

1 MR. DONAHEY: Very good. I will
2 keep that in mind. Thank you very much.

3 I just have one question, and that
4 is: Are you aware, Mr. Ali, of any panel
5 decision -- determination, I should say --
6 any panel determination or any legal decision
7 that interprets or otherwise deals with the
8 waiver provision in the Applicant Guidebook
9 Module 6, Section 6?

10 MR. ALI: I don't believe that --
11 the closest, the closest is in DCA Trust
12 versus ICANN, in fact, the case in which
13 Mr. LeVee and I locked horns and which the
14 panel, as reflected in the transcript, was
15 very concerned about the waiver provision
16 and, in fact, whether it's even enforceable,
17 but there is a -- I believe very recently a
18 TRO has been issued in a case that's been
19 brought in the California courts by DCA
20 Trust, challenging the waiver provision, but
21 I think Mr. LeVee will know more about the
22 status of that particular case, but a lot of
23 people have raised concerns about this, about
24 the enforceability of this waiver.

25 MR. DONAHEY: Thank you.

1 MR. ALI: Thank you, sir.

2 JUDGE BROWER: In Washington,
3 it's -- I was just wondering when our
4 lunchtime is going to be.

5 MR. DONAHEY: Let's see. What did
6 we have for lunchtime? Yes, we are over,
7 aren't we? I'm trying to keep -- we have
8 1:30. Is it 1:30 here?

9 JUDGE BROWER: It's ten to
10 1:00 now.

11 MR. DONAHEY: We have 1:30 as our
12 lunch break, your time. I take it your
13 stomach is bothering you?

14 JUDGE BROWER: No. I'm just
15 wondering about the next presentation,
16 whether it wishes to be interrupted or not.

17 MR. DONAHEY: You're finished with
18 your presentation, Mr. Ali?

19 JUDGE BROWER: No, for rebuttal.

20 MR. ALI: Yes, I am. I want to
21 give you one citation to your last question,
22 Mr. President.

23 Paragraphs 70 and 74 of DCA Trust
24 address the waiver provision.

25 And if I may, in terms of lunch, I

1 understand that we did not coordinate
2 sufficiently well with Jones Day over
3 ensuring that there would be lunch at this
4 side of the screen. So I believe that we
5 have tried to make some arrangements.

6 MR. SANCHETI: We have. We will be
7 getting sandwiches here shortly.

8 MR. DONAHEY: Why don't we take a
9 short break? Let's take five minutes and
10 reconvene and see where we go from here.
11 Okay? All right.

12 (Whereupon, a short recess was
13 taken.)

14 MR. LEVEE: Are we ready to go?
15 Okay.

16 MR. DONAHEY: We're going to
17 resume. Mr. LeVee said he would like to
18 resume now and go for about a half hour and
19 then take our lunch at a scheduled break.

20 Mr. LeVee.

21 MR. LEVEE: Thank you.

22 Mr. President, members of the
23 panel, thank you again this morning for
24 joining us.

25 I did for the court reporter want

1 to introduce off screen two lawyers from
2 ICANN's Office of General Counsel, Amy
3 Stathos and Elizabeth Le. They are here, but
4 they are -- in order to keep the screen
5 focused, they are sort of off to the side.

6 I'm going to be using the slides
7 that we distributed on February 27, and I'm
8 actually going to go through them
9 chronologically. I will, of course, focus as
10 much as possible on the comments that Mr. Ali
11 made this morning, and of course, to some
12 degree, the slides that Dot Registry gave to
13 you and the slides that ICANN gave to you
14 have some amount of overlap, and I'll try not
15 to dwell on the overlap.

16 I do want to emphasize that most of
17 the last 90 minutes, what you heard was
18 attention on the work of the EIU, and I do
19 intend to address that work, and I do intend
20 to address the expert report and the witness
21 statements that were provided to us.

22 But that is not the focus
23 ultimately of the panel's purpose, because
24 the singular purpose of an independent review
25 proceeding, as confirmed time and again by

1 other independent review panels, is to test
2 whether the conduct of the board of ICANN and
3 only of the board of ICANN was consistent
4 with ICANN's articles and with ICANN's
5 bylaws.

6 There is one Board action that
7 occurred in conjunction with this matter, the
8 Board Governance Committee's review of Dot
9 Registry's reconsideration request. Mr. Ali
10 wanted to pull a few pages of that. I'm
11 going to go through that as well, but that is
12 the Board action that is subject to review
13 here, and there literally is no other purpose
14 for this proceeding.

15 Clearly, the purpose of the
16 proceeding is not to determine whether the
17 EIU got it right or got it wrong, although,
18 as I will discuss during the course of my
19 remarks, most likely after lunch, the
20 criticisms of the EIU are wholly unfounded.
21 They followed the Guidebook to a T, and their
22 conclusions are fully supportable, and that
23 is what the Board Governance Committee found,
24 and therefore ICANN's Board Governance
25 Committee could not possibly have violated

1 its articles or its bylaws.

2 On my slides -- I'm going to take
3 you through some of these slides relatively
4 quickly, and I'm going to start with slide 2.
5 By way of background only, ICANN was formed
6 in 1998, and the Board approved the first set
7 of new gTLDs in the year 2000 for the purpose
8 of confirming that adding gTLDs would not
9 affect the security or the stability of the
10 internet.

11 What brings us here today is the
12 first large-scale expansion of the registry
13 system to permit what was at the time an
14 unlimited number of gTLD applications, and
15 the initial Guidebook that was approved in
16 2011, although, as Mr. Ali noted, there have
17 been subsequent revisions.

18 Most importantly, the Guidebook was
19 developed through extensive consultation with
20 the ICANN community in a bottom-up process
21 that included numerous versions, multiple
22 public comment periods.

23 A fair amount of what we heard this
24 morning from Dot Registry was that they don't
25 like aspects of the Guidebook. Mr. Ali

1 clearly doesn't like the rules that bring us
2 here today, which are contained specifically
3 in ICANN's bylaws.

4 I want to be clear. The time to
5 challenge the Guidebook, the time to
6 challenge the bylaw provisions that set forth
7 the rules for these proceedings has long
8 passed. There is a 30-day period to initiate
9 an independent review if you don't like
10 something that the ICANN board has adopted,
11 such as the Guidebook, such as a bylaw
12 modification, and Dot Registry was silent
13 throughout that period.

14 So I know they don't seem to like
15 the rules, but they are the rules that both
16 sides in all of the IRPs have agreed to abide
17 by, and so I'm not going to accept criticism
18 that I elected not to cross-examine
19 witnesses. It was not an election. It was
20 the rule which this panel adopted.

21 Page 3 of our slides, ICANN
22 received 1,930 new gTLD applications, a
23 whopping number, far greater than anybody's
24 expectation. Nobody had that number. We'll
25 leave it at that.

1 "Applications proposing a
2 community-based top-level domain" to be
3 "operated for the benefit of a clearly
4 delineated community," which is what brings
5 us here today. They "are invited to
6 participate in a Community Priority
7 Evaluation."

8 I want to be clear. The
9 requirements to prevail in a Community
10 Priority Evaluation according to the
11 Guidebook are very stringent. Qualifying for
12 a community eliminates all of the other
13 applicants who submitted applications with
14 those strings.

15 We have a total of 21 applications
16 for the three strings that bring us here
17 today, and if Dot Registry were to have
18 achieved community priority, it would have
19 eliminated all of those other applications,
20 and that's one of the reasons that the
21 Guidebook says that the rules are strict.

22 Slide 4. ICANN did outsource the
23 Community Priority Evaluations to EIU, and it
24 outsourced virtually all of the other
25 evaluations, because ICANN, with 1,930

1 applications, simply was not equipped to do
2 the sorts of technical and financial and
3 other evaluations that were necessary here.
4 ICANN staff selected the Economist
5 Intelligence Unit to assess whether
6 community-based application meets the
7 criteria set forth in the Guidebook.

8 Now, when Mr. Ali said this morning
9 that EIU then issued its own guidelines for
10 how it would evaluate the Community Priority
11 Evaluations, and that those guidelines were
12 untested, Mr. Ali's statement is wrong.
13 Those guidelines that the EIU issued were
14 issued for public comment, and following
15 public comment, they were finalized. So
16 there was input, just as ICANN always does in
17 these types of procedures.

18 Now, ICANN itself did not
19 administer any of the CPEs, but ICANN was
20 involved to the extent that it did interact
21 with the EIU to answer questions and provide
22 thoughts. I'm not at all embarrassed by the
23 number of emails that went back and forth
24 between the EIU and ICANN. I expected it,
25 and it's a good way for the EIU to make sure

1 that it's looking at the right things.

2 And so yes, there was
3 communication, and yes, ICANN did suggest
4 that the EIU look at certain things, but you
5 will not find anything, not a hint to suggest
6 that ICANN participated in the scoring that
7 the EIU applied to any of these applications.
8 There is no such evidence, because it did not
9 happen.

10 A few months ago I submitted
11 closing argument to a different panel in the
12 Dot Hotel and Dot Eco proceeding, and that
13 panel, as you know, has already issued its
14 award to ICANN. Those proceedings involved a
15 challenge to the fact that Dot Hotel and Dot
16 Eco did achieve community status, so to some
17 extent we're being whipsawed here. When EIU
18 says it's a community, those who did not
19 submit community applications complained, but
20 when the EIU says, as here, that it's not a
21 community, then the applicant complains.

22 The panel ruled in ICANN's favor,
23 and it did not undertake the sort of detailed
24 finding-by-finding analysis of EIU's work,
25 instead finding that ICANN's work did not act

1 inconsistent with its articles and bylaws, in
2 requesting reconsideration requests that were
3 filed claiming that the EIU was too --
4 interestingly, it should come as no surprise,
5 of course, that the winners in a CPE process
6 challenge the EIU as being too lenient or the
7 losers as being too strict, and as I said, I
8 will discuss the work of the EIU in some
9 detail, and I'm going to compare it to the
10 expert report that has been provided.

11 I want to emphasize that we are not
12 here to assess whether the EIU got it right.
13 Reasonable minds can differ on a lot of these
14 things, although I will argue to you in a
15 moment that reasonable minds could not differ
16 as to whether these applications actually
17 deserve community treatment.

18 We're here to assess the conduct of
19 the ICANN board and specifically the Board
20 Governance Committee. I think the answer is
21 clear that the Board Governance Committee did
22 its job, did its job well, and in full
23 conformance with the articles and the bylaws.

24 Page 5 of my slides. "In
25 developing the Guidebook, the ICANN community

1 determined not to include an appellate
2 mechanism for expert determinations . . .
3 conducted pursuant to the Guidebook." As I
4 noted, those determinations are financial,
5 technical, they're string similarity reviews
6 and so forth.

7 Dot Registry did not object that
8 the Guidebook did not create an appellate
9 mechanism, and really that's what's happening
10 today. This is an appeal of the EIU. In a
11 moment I'm going to tell you that all of the
12 panels that uniformly rejected the notion
13 that they should or could be sitting in these
14 proceedings as an appellate review, but the
15 Board -- the whole purpose was that the Board
16 didn't want to create an appellate review
17 process, because it would be -- because of
18 the literally hundreds and hundreds and
19 hundreds of evaluations that were to be done
20 under the Guidebook, the notion that the
21 Board would be the appellate review avenue
22 for all of those determinations literally
23 would have overwhelmed the ability of the
24 Board to function. Given 1,930 applications,
25 the Board's decision in this respect clearly

1 was very wise.

2 "The Board retained the right,"
3 under the Guidebook, "but clearly not the
4 obligation, to review any aspect of a gTLD
5 application, including a CPE determination,"
6 but nothing in the bylaws or in the articles
7 requires the Board to sit as a court of
8 review.

9 Slide 6. As we know, Dot Registry
10 submitted these community applications, and
11 there were a total of 21 applications for
12 LLC, LLP and for INC. Mr. Ali said the Dot
13 Registry spent millions of dollars. I have
14 no basis to know whether it did or didn't,
15 but Dot Registry knew from the Guidebook that
16 it faced the risk that it would not achieve
17 community priority status, and it knew that
18 the Guidebook set forth rules that were
19 intended to be stringent.

20 And so the fact that Dot Registry
21 spent money should not cause us to have
22 sympathy that they didn't win. Everybody
23 spent money on their applications, and there
24 are some winners and there are some losers.

25 The point is that the EIU

1 determined that Dot Registry should not
2 essentially be able to trump the 18 other
3 applications because it determined that these
4 were not communities.

5 And I want to emphasize that the
6 decision by the EIU wasn't close. It's not
7 as if -- out of the 16 total points that were
8 required, with 14 necessary to achieve
9 community priority status, it's not as if
10 they got 11 or 12 or 13. They got five.
11 They were off by nine points, and so we were
12 surprised to receive independent review
13 notifications on this, because EIU scoring
14 was very fair and not a close call.

15 Slide 7. We've really already
16 covered this, but following an adverse
17 determination, an applicant has a right to
18 seek reconsideration with the Board
19 Governance Committee, and several IRP
20 decisions have determined that that
21 reconsideration process is, quote, "of
22 limited scope," quoting the Merck IRP.

23 "The Board Governance Committee
24 focuses on whether the policies and
25 procedures set forth in the bylaws and

1 Guidebook book were followed and whether the
2 dispute resolution provider followed its own
3 policies and procedures." The EIU did that,
4 and I will confirm that in a few minutes.

5 Slide 8. "The BGC does not address
6 the substance." That really here is the
7 gist. Mr. Ali has suggested to you that what
8 the EIU did was misinterpret the actual
9 Guidebook. He didn't identify what the
10 misinterpretations were. I'm going to take
11 you through some of the alleged
12 misinterpretations that Mr. Flynn reports in
13 his expert report, and there are no
14 misinterpretations.

15 The EIU in its reports -- and I'm
16 going to take you through one of them in a
17 few minutes -- lays out from the Guidebook
18 what the test is, and then the EIU tells you
19 how it decided as a result of the tests set
20 forth in the Guidebook. There is nothing
21 made up. There are no new rules. There's no
22 new policies. It's straight out of the
23 Guidebook.

24 As noted in the Merck decision,
25 "The reconsideration process is of limited

1 scope," and given that there is no appeals
2 process in the Guidebook, "it is not open to
3 the Panel to create one."

4 As we know, in slide 9, Dot
5 Registry filed three reconsideration
6 requests, and the Board denied each of them,
7 so let me go to slide 10.

8 The independent review process
9 which brings us here today is "another
10 accountability mechanism" that is contained
11 in the bylaws.

12 In response to your question,
13 Mr. President, as to the enforceability of
14 the waiver, I will tell you that there have
15 been two lawsuits filed against ^{(ICANN)*}. There
16 was a lawsuit filed a couple of months ago by
17 an entity called Commercial Connection, and
18 the court denied a temporary restraining
19 order, finding that the waiver was valid. In
20 the DCA matter and the IRP, the panel did ask
21 for briefing on enforceability, and the panel
22 made a few comments, but ultimately never
23 issued any sort of adjudication.

24 MR. DONAHEY: The panel being --
25 I'm sorry.

1 MR. LEVEE: The IRP panel did not
2 adjudicate its views as to whether the waiver
3 was enforceable, and Mr. Ali then terminated
4 his relationship with [DCA]* .

5 Subsequently DCA retained a new
6 firm, and they have filed a lawsuit in Los
7 Angeles, and there is a motion for
8 preliminary injunction that they have filed
9 which is on for hearing on April 4, and of
10 course, one of the critical issues is whether
11 it may --

12 MR. DONAHEY: Was there a TRO
13 issued in that case?

14 MR. LEVEE: There was a TRO issued
15 pursuant to which ICANN was not to proceed
16 with the delegation of Dot (inarticulate
17 word) pending the outcome of the motion for
18 preliminary injunction. We did not brief the
19 waiver in conjunction with the TRO. I think
20 we mentioned it, but under the rules of the
21 court, the parties are given 24 hours to
22 respond to TRO applications, and my clients
23 were in Morocco at the time. So we all but
24 stipulated to the TRO.

25 The bylaws set forth the purpose of

1 an independent review proceeding, which, as I
2 mentioned, is simply to compare actions of
3 the Board through the articles and the bylaws
4 to see if the Board acted consistent with the
5 articles and the bylaws. Independent review
6 proceedings are not to address whether you
7 think the staff did something right or wrong.
8 It's not subject to review in this
9 proceeding.

10 Now, again, I understand that Dot
11 Registry doesn't like the rules and doesn't
12 like that the independent review proceeding
13 is intended to be -- although this appears to
14 be an exception -- very expedited, very much
15 done via email, and very much trying to get
16 to an economical and appropriate result.

17 The point was that ICANN knew that
18 it might have many IRPs. It didn't want live
19 hearings, it didn't want live witnesses, it
20 didn't want extended proceedings. The bylaws
21 had to change following the earlier
22 proceeding where Mr. Ali and I spent an
23 entire week cross-examining multiple
24 witnesses.

25 ICANN and Mr. Ali's client both had

1 to pay millions of dollars to adjudicate a
2 single issue. ICANN changed the bylaws so
3 that we streamlined the process. It's the
4 process. Complaints about the process are
5 time-barred. It's how it works.

6 I understand that the applicants
7 don't like it sometimes, but I would tell you
8 that many of the other applicants have loved
9 it, and some of the applicants don't even
10 want a closing argument, because in the Dot
11 Merck matter, the panel said would you like
12 to have closing argument, and I said, well,
13 if Merck wants oral argument, I'm happy to do
14 it, let's do it by phone, which is how we've
15 done most of them, and the Merck people said,
16 you know what? We said what we needed to say
17 in the papers. We'll let the panel decide.
18 We're perfectly happy with that. Of course,
19 the outcome was in ICANN's favor, but the
20 point is we're trying to get these things to
21 move quickly, with the least amount of cost
22 possible.

23 Slide 11. Standard of Review. You
24 asked about it at the beginning. I'm going
25 to discuss it in these slides.

1 The bylaws contain the specific
2 provision in Article IV, Section 3, Paragraph
3 4, which asks the panel to focus on these
4 three items on slide 11. Mr. Ali says these
5 are not the three only items, and I agree.
6 The bylaws don't say these are the only
7 things that a panel can consider.

8 But then Mr. Ali said this morning,
9 that he had not said in any of his papers,
10 that ICANN bears the burden of demonstrating
11 that we got it right. Not a single IRP panel
12 has so ruled. Dot Registry clearly bears the
13 burden. It's the claimant. It bears the
14 burden of demonstrating that the conduct of
15 the ICANN board did not meet the standard,
16 which is one of the reasons why the parties
17 had to submit all of their evidence in
18 advance. Don't take my word for it. Take
19 the word of the various panels that have
20 ruled.

21 Slide 12, Booking.com, I'm not
22 going to read this entire quotation, but it
23 says, picking up at about the fourth line,
24 "It is not for the Panel to opine on whether
25 the Board could have acted differently . . .

1 Our role is to assess whether the Board's
2 action was consistent with the applicable
3 rules found in the articles, bylaws and
4 Guidebook." It's not to appraise the
5 policies or procedures, "but merely to apply
6 them to the facts."

7 Then Merck, slide 13, "The process
8 is a bespoke process, precisely
9 circumscribed; the Panel's mandatory focus in
10 assessing objected-to Board actions are the
11 three elements" contained in the article I
12 just noted. "The Panel may not substitute
13 its own view of the merits," which is the
14 same thing that the Vistaprint panel has
15 said.

16 So slide 14. To summarize Dot
17 Registry's arguments -- now, I will tell you
18 in all candor that I was going off the slides
19 that were presented, and so -- I'm sorry --
20 off the briefs that were done. I didn't have
21 Dot Registry's slides. So a few of my slides
22 that we're about to get to are irrelevant in
23 the face that Dot Registry didn't include
24 those issues either in its slides or in
25 Mr. Ali's argument this morning.

1 The gist -- Mr. Ali does argue that
2 the Board Governance Committee improperly
3 denied its reconsideration requests, but the
4 primary challenge is that the EIU got it
5 wrong. And in the papers, Dot Registry had
6 raised a challenge to the Board's acceptance
7 of GAC advice regarding the safeguards
8 associated with these strings. Mr. Ali did
9 not raise it this morning, it's not in his
10 slides, and so I'm going to go past that.

11 On slide 15, this is the thrust of
12 our argument. The Board properly denied Dot
13 Registry's reconsideration requests. The
14 only Board action subject to independent
15 review are the reconsideration requests, and
16 the BGC, Board Governance Committee,
17 addressed each of the concerns with a
18 scoring, and determined that the EIU and
19 ICANN staff "had followed established
20 policies and procedures . . . the substantive
21 disagreement with the CPE reports [is] not a
22 basis for reconsideration and is not a basis
23 for independent review."

24 Nevertheless, this morning Mr. Ali
25 said that the Board Governance Committee did

1 not communicate with ICANN staff, because he
2 didn't get any documents to reflect that. I
3 will tell you that the Board Governance
4 Committee is aided by the Office of General
5 Counsel, which also consults with Board
6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

16 Mr. Ali then said, well, if the
17 Board Governance Committee was confused by
18 something, they could have simply asked Dot
19 Registry for more information. If you look
20 at Exhibit C-17 -- Exhibit C-17 is the
21 reconsideration form. You will see that
22 Exhibit C-17 is a very thorough submission
23 from Dot Registry of why it believed the
24 reconsideration was appropriate.

25 There was no need to go back to Dot

1 Registry. There was no need to ask
2 secretaries of state if they had views. If
3 Dot Registry had something to say to ICANN,
4 it was supposed to be in the reconsideration
5 requests, and if you look at Exhibit C-17, I
6 would suggest to you that Dot Registry did a
7 very thorough job.

8 So the Board Governance Committee
9 had all of the information that it needed to
10 have before it, and then when you look at
11 Exhibit C-4, which is the Board Governance
12 Committee report, it is a 23-page document.
13 It goes through every one of Dot Registry's
14 complaints, and, in response to Dot
15 Registry's complaints, gives you the Board's
16 view as to whether Dot Registry -- I'm
17 sorry -- as to whether EIU followed the
18 Guidebook and followed its own processes and
19 procedures.

20 It's this document that the panel
21 would have to find is literally wrong because
22 the Board didn't do its job, and I impress
23 upon you that it would be -- that would be a
24 very difficult finding to make.

25 The Board Governance Committee did

1 exactly what it was supposed to do. It read
2 the reconsideration request, it analyzed the
3 so-called "evidence" that accompanied the
4 reconsideration request, and it issued
5 findings.

6 To the extent that the
7 reconsideration requests said we think that
8 EIU got it wrong because we think that LLPs
9 and LLCs are a community, the Board
10 Governance Committee disregarded that,
11 because it found that the EIU followed the
12 Guidebook's definition.

13 Now, look, reasonable minds can
14 differ as to whether, you know, in applying
15 the Guidebook's definition, the 20 or odd so
16 people that are in these two rooms would
17 reach the same exact opinion and score the
18 three applications in the exact same way.

19 But so long as you find that the
20 Board Governance Committee did what it was
21 supposed to do to check the EIU's work and
22 make sure it followed the Guidebook, just as
23 the panel did in Dot Eco and in Dot Hotel and
24 in Dot Merck and so on, then we are done,
25 because the Board could not have violated its

1 bylaws or articles if the Board Governance
2 Committee did its work properly.

3 I'm going to skip slides 16 and 17.
4 Mr. Ali did not really cover them, and I'm
5 also going to skip slide 18, because Mr. Ali
6 didn't cover it.

7 On slide 19, Dot Registry argued
8 that there is double counting, and Dot
9 Registry argued that the panels did not
10 adhere to policy and procedure. The Board
11 Governance Committee report literally
12 addresses each and every one of these
13 allegations, and so I don't see how the Board
14 Governance Committee could have violated the
15 bylaws or articles by doing exactly what Dot
16 Registry said it did not do.

17 In the papers there was a
18 complaint -- I'm on slide 20 -- that the
19 determination by the Board Governance
20 Committee did not acknowledge that the NASS
21 was a co-requester in submitting the
22 reconsideration form.

23 And I suppose it would have been
24 nice if they had done that, but the fact that
25 NASS was a co-requester doesn't change the

1 outcome of whether the EIU got it right or
2 got it wrong in evaluating the criteria under
3 the Guidebook. All we're here to assess is
4 whether the EIU evaluated the criteria of the
5 Guidebook properly, not whether the EIU got
6 it right or wrong as a substantive matter.

7 And so at that point the Board
8 Governance Committee issued its report. Dot
9 Registry files an independent review
10 proceeding, and we wind up with two
11 declarations from secretaries of state, and I
12 thought it would be interesting to look at
13 those declarations briefly.

14 Mr. Ali focused on the declaration
15 of Mr. Bullock, and when I read the
16 declaration, here is what struck me as said.
17 "I, as the Secretary of State of the great
18 state of Delaware, don't like the idea that
19 ICANN is going to delegate any of these
20 top-level domains. I'm worried about any of
21 these domains going forward. I asked ICANN
22 to stop them. I asked the Government
23 Advisory Committee to stop them. I went to
24 the Department of Commerce of the United
25 States. Nobody would stop them."

1 And so what he says is -- I'm
2 reading from page 12 -- "While I have
3 considerable concerns about the wisdom of
4 ICANN delegating these strings at all, if
5 ICANN is going to do so, then these strings
6 should be awarded to an applicant like Dot
7 Registry that will maintain and enforce the
8 system with real-time and continuous
9 verification of each entity's legal status
10 according to the law."

11 I think the most fair reading of
12 Mr. Bullock's declaration is that he's not
13 happy at all that this is happening. It
14 would not be a fair reading of the
15 declaration to say, if he has looked at the
16 community priority guidelines and the bylaws
17 and that he has a view as to whether these
18 applications fulfill those guidelines, his
19 declaration is silent on that point.

20 As is the declaration of Elaine
21 Marshall, the secretary of state of North
22 Carolina and president of NASS, who says that
23 NASS has been tracking these applications,
24 and that NASS -- this is in paragraph 11.
25 NASS wrote a letter to ICANN saying we don't

1 want any of these extensions going forward,
2 and ICANN responded and ICANN said, look,
3 we're going to allow them to go forward.
4 There are various rules and procedures that
5 might assist, but we're not going to block
6 applications that we don't like.

7 Again, nothing in Ms. Marshall's
8 declaration even hints at the notion that
9 LLCs, LLPs or INCs are communities, much less
10 communities as defined by the Guidebook.

11 I think it was more interesting to
12 note when Mr. Bullock says -- let me find
13 it -- as to what his office does -- I'm going
14 to come back to it. I'll come back to it,
15 because I can't find the cite.

16 But my point is that neither of
17 these declarations would have told the Board
18 Governance Committee anything that would have
19 been helpful to the Board Governance
20 Committee in assessing whether the EIU
21 followed the Guidebook.

22 The declarations say, well, I don't
23 really like these applications, but if you're
24 going to select anybody, select Dot Registry,
25 because they're putting in more safeguards.

1 They will do some of our work for us. That's
2 fine, but it tells us nothing as to whether
3 the bylaws or the articles have been
4 breached.

5 Ms. Zernik is helping.

6 In paragraph 5 of Mr. Bullock's
7 declaration, he says something that's very,
8 very interesting on the topic of whether as
9 the Delaware secretary of state is an
10 organization mainly dedicated to advancing
11 LLCs, LLPs, and INCs. Here is what he says.

12 "The Delaware Department of State
13 is responsible for administering 18 agencies,
14 including, among others, divisions with
15 responsibilities in corporations, banking,
16 international investment and trade,
17 professional regulations, veteran services
18 and health care, arts, history, libraries,
19 archives, civil rights and more."

20 I don't know if the "and more"
21 includes drivers' licenses, but in the great
22 state of California, if you need to get a
23 driver's license, you're going to deal
24 somehow with the secretary of state and the
25 Department of Motor Vehicles.

1 My point is that the EIU was asked
2 to evaluate: Do secretaries of state mainly
3 advance the interests of LLCs or INCs or
4 LLPs? Had Mr. Bullock provided this
5 declaration to the EIU, the answer would have
6 been clear. The answer would have been no.
7 The Delaware secretary of state has so many
8 things to do, it can't possibly be
9 characterized as an organization dedicated to
10 a, quote-unquote, "community" that exists of
11 these legal entities.

12 Slide 21 of my slides. In the
13 Despegar and Little Birch IRP, that's Dot Eco
14 and Dot Hotel, as I've already mentioned,
15 "The Claimants filed reconsideration requests
16 challenging CPE reports . . . the
17 applications for Dot Eco and Dot Hotel "had
18 prevailed." The panel denied the request
19 "and agreed with the position that the review
20 . . . by the Board Governance Committee
21 should be a procedural review of the CPE
22 determination, not a substantive review."

23 On slide 22 I was anticipating an
24 argument that Mr. Ali had made in his papers
25 that the Board could have intervened, and I

1 see that you are looking at your watch, and
2 I'm going to finish after this slide, and I
3 guess we'll take a break if that's what
4 everyone wishes.

5 I want to make it clear that the
6 Board does have the right to reach out and
7 grab any feature of a top-level domain
8 application that it wishes to address. It
9 has used that right very sparingly, because
10 it does not wish to set a precedent that
11 the -- those of the 1,930 applications that
12 did not go to contract should all be racing
13 to the Board, raising their hands, saying
14 we're the one you should reach out to
15 protect, and so it literally has done so
16 fewer than a handful of times.

17 But the fact that the Board has the
18 discretion to use this power and elects not
19 to use this power cannot possibly violate the
20 articles or the bylaws, and in the next few
21 slides we have quotes from panels who have
22 rejected exactly that argument.

23 In particular, the Booking.com
24 quote on the bottom of page 23 or slide 23,
25 "The fact that the ICANN Board enjoys the

1 discretion to consider individually gTLD
2 applications and may choose to exercise it at
3 any time does not mean that it is bound to
4 exercise it, let alone at a time and in the
5 manner demanded by a claimant."

6 Slide 24 has quotes of the same.

7 So I have probably another 20 to 30
8 minutes, and in your collective judgment,
9 members of the panel, as to whether you wish
10 to break now or whether you wish to have me
11 finish.

12 MR. DONAHEY: I see -- at least I
13 thought I see The Honorable Mr. Brower
14 indicating that his stomach tells him when
15 it's time to break.

16 Am I correct, sir?

17 JUDGE BROWER: 20 minutes to
18 2:00 seems like --

19 MR. DONAHEY: All right. Let's
20 break now and reconvene in an hour. It's
21 1:40 eastern time, I believe, and then it
22 would be 2:40 eastern time.

23 MR. LEVEE: Washington, you were on
24 mute.

25 JUDGE BROWER: It's on now.

1 MR. LEVEE: Thank you.

2 (Whereupon, the lunch recess was
3 taken.)

4 MR. DONAHEY: Please proceed.

5 MR. LEVEE: Thank you.

6 So now I've gone from maybe
7 everyone hungry to everyone being full, and
8 I'll deal with that challenge by starting us
9 on slide 27 of the slides that I prepared for
10 today.

11 The title of the slide is that
12 "There is no other Board action at issue in
13 this IRP," and I wanted to note that over the
14 lunch break -- you'll see in the first bullet
15 I say that Dot Registry waited until years
16 after the adoption of the CPE Guidelines to
17 express concern with those guidelines.

18 Over the lunch break I actually
19 confirmed that Dot Registry did submit a
20 comment in conjunction with the draft EIU
21 guidelines, so the statement that they were
22 not put out for public comment is wrong, and
23 more importantly, Dot Registry did comment --
24 their comment addressed certain, how to deal
25 with letters that would be received by the

1 EIU and my team.

2 To the extent they are complaining
3 today about those guidelines, any complaint
4 would be time-barred, and more importantly,
5 the CPE guidelines expressly do not modify
6 the criteria set forth in the Guidebook.
7 They simply provide some further explanation
8 as to the types of things that the EIU would
9 be looking at, but the Guidebook controls.
10 It's the equivalent for these purposes of the
11 bylaws and the constitution. It's the
12 document that controls.

13 Now, the Guidebook expressly
14 says -- this is the last bullet of slide
15 27 -- that "ICANN had the right to make
16 reasonable updates and changes to the
17 Guidebook," and there have been some
18 ever-so-slight modifications to the
19 Guidebook, and in fact, as Mr. Ali noted,
20 there was a version of the Guidebook adopted
21 even after the applications came in, but
22 there were no substantive changes that are
23 relevant here.

24 So if you turn to slide 28, we're
25 reminding you that a substantive disagreement

1 with a CPE report is not a basis for an
2 independent review. And then if you turn to
3 slide 29, Dot Registry's expert does not
4 demonstrate that the CPE panel has erred.

5 There was reference earlier this
6 morning by Mr. Ali to Mr. Flynn's report, and
7 there are slides that Dot Registry provided
8 to you concerning that report, and I also
9 provide a couple of slides, but instead what
10 I did, after seeing the Dot Registry slides,
11 was that I thought it would be worthwhile to
12 take an even deeper dive into the Flynn
13 report, because in the event there is any
14 lingering concern that somehow we should
15 credit Mr. Flynn, an antitrust economist who
16 does other professional witness work, with
17 having opinions that are better than the
18 EIU's opinions, I really wanted to dispel
19 those concerns now.

20 So Mr. Flynn's report, a separate
21 document, I'm holding it up. You can't see
22 it. Well, one of you can. This, you know,
23 was provided to the parties and the panel
24 with the submissions that Dot Registry made,
25 and Mr. Ali criticized ICANN for not

1 providing its own expert report.

2 Well, the reason, of course, that
3 we didn't do that is that the EIU provided
4 its expertise. There was no reason for ICANN
5 to submit a further expert report. We're
6 here to confirm that the EIU, on a procedural
7 level, did what it was supposed to do, so
8 there wouldn't have been any rationale for
9 ICANN to retain its own expert.

10 What I'd like to do to explain to
11 you that the EIU did properly evaluate the
12 criteria of the Guidebook and the guidelines,
13 and by the way, for those looking for the
14 Guidebook, Mr. Flynn actually attaches as
15 Exhibit 1 to his report the criteria out of
16 the Guidebook that are relevant. He doesn't
17 attach the whole Guidebook, of course, and he
18 attaches as Exhibit 2 the Community Priority
19 Evaluation Guidelines. So it's an easy way
20 to navigate through all of these documents.

21 The reason I'm doing this is to
22 demonstrate to you that Mr. Flynn's report is
23 flawed, not that his opinions are wrong,
24 although I do think they are, but that his
25 interpretation of the Guidebook literally

1 ignores the words of the Guidebook.

2 More importantly, Mr. Flynn did no
3 original work in preparing for his report.
4 You would think, after he goes after the EIU
5 for not doing sufficient research, that he
6 would then drop footnotes that say here's
7 what I did, I researched this, I researched
8 this, I researched that. Instead, as I take
9 you through a piece of the report, you will
10 see that he did nothing. What we are left
11 with are his views.

12 So I decided to use the EIU's CPE
13 report for Dot LLC, and I'll explain why I
14 did that. Dot LLC, the report is Exhibit
15 C-18 in all of your materials, and I used the
16 LLC report, because it is the only report
17 that Mr. Flynn says should have received a
18 perfect score, 16 out of 16.

19 Exhibit C-18 is the EIU's report on
20 Dot LLC. It's a 7-page, single-spaced
21 document, and even a cursory review of the
22 document will show you that it goes through
23 each of the criteria out of the Guidebook to
24 demonstrate whether the application from Dot
25 Registry satisfies those criteria. I'm going

1 to go through two of the four criteria this
2 morning and afternoon for some of you.

3 Now, the criteria are listed right
4 on the front page of Exhibit C-18. There's
5 four of them: Community establishment; nexus
6 between proposed string and community;
7 registration policies; and community
8 endorsement. As I mentioned, I'm literally
9 going to only go through criterion 1 and
10 criterion 4.

11 Those are the easiest examples of
12 demonstrating that the EIU did exactly what
13 it was supposed to do. It went through each
14 of the four criteria pursuant to the terms of
15 the Guidebook.

16 Importantly, if the EIU did what it
17 was supposed to do vis-a-vis criterion 1,
18 community establishment, which is worth four
19 available points, and if zero points -- which
20 is what they gave to the application -- is
21 consistent with the Guidebook, then our
22 analysis is done. Why? Because if you don't
23 have 14 points out of 16, you cannot obtain
24 community priority establishing.

25 So I demonstrated to you that the

1 four -- that the zero out of four is
2 credible. I'm actually demonstrating to you,
3 without looking at the rest of the report,
4 that the report is accurate, and then more
5 importantly, when the Board Governance
6 Committee analyzes the report, it does so
7 properly by saying that the EIU followed the
8 terms of the Guidebook.

9 Now, starting at the bottom of page
10 1, the EIU evaluated criterion 1, which is
11 community establishment, and it starts with
12 the first factor, which is called
13 "Delineation," which requires a
14 straightforward membership definition, an
15 awareness of a community among its members.

16 So then if you turn to page 2 of
17 Exhibit C-18, you'll see that the EIU agrees
18 that the "community" definition does show a
19 clear and straightforward membership.
20 However, the EIU then states that "the
21 community does not have awareness and
22 recognition of a community among its members,
23 and that there is no evidence of LLCs from
24 different sectors acting as a community," as
25 defined by the Guidebook.

1 Now, Mr. Flynn disagrees, and his
2 disagreement is on page 51 of his report.
3 Again, I'll note that while the EIU has been
4 attacked here for not disclosing its
5 research, there is no indication at least in
6 this respect that Mr. Flynn did any either.

7 Instead, what he says on page 51 is
8 that "the mere fact that every LLC manages to
9 file paperwork with the various secretaries
10 of state in the United States demonstrates an
11 awareness of a community among its members."
12 Simply by filing paperwork, there's a
13 demonstration of awareness.

14 Now, as I said before, perhaps
15 reasonable minds could differ, but the EIU's
16 determination that the mere act of filing
17 paperwork does not demonstrate an awareness
18 and recognition of a community is not,
19 obviously, wrong, and it is applying the same
20 words out of the Guidebook that Mr. Flynn
21 applied.

22 The mere fact -- and this is just
23 common sense. The fact that a law firm or a
24 PR firm or a group of plumbers decides to
25 form as an LLC does not mean that simply by

1 filing papers with the secretaries of state,
2 they are showing an awareness of being a part
3 of a community, with real estate firms and
4 the accounting firms or the real estate
5 investors or any of the wide variety of
6 entities that elect to become an LLC.

7 Another example is with an LLP.
8 Dechert, Mr. Ali's firm, is an LLP. It's a
9 good law firm. That's how they chose to
10 register. Jones Day is not an LLP. We are a
11 regular partnership. The fact that Dechert
12 and Jones Day, two high-quality law firms,
13 have chosen not to file papers that
14 demonstrate that we are in the same --
15 organized as the same legal category doesn't
16 necessarily tell you anything about whether
17 we view ourselves as being members of a
18 community.

19 The community that we are in is law
20 firms. I would accept that maybe law firms
21 could be designated as a community, but the
22 mere fact of a designation of disparate
23 organizations and a selection by disparate
24 organizations, the selection by them of how
25 they wish to be organized for tax liability

1 and other purposes, it literally tells you
2 nothing about them or whether they share
3 common characteristics with anybody else that
4 happens to use the same corporate form.

5 So there is no community, certainly
6 not as defined by the Guidebook, created
7 simply because of a way an entity is
8 organized for legal purposes. And more
9 importantly, there is literally zero basis to
10 say that the EIU did not follow the Guidebook
11 by determining that an LLC did not meet the
12 community definition.

13 Then on page 86 of his report,
14 Mr. Flynn criticizes the EIU, and this can
15 also be found on slide 35 of Dot Registry's
16 slides provided to you for today, that the
17 EIU found that there was no evidence that
18 LLCs "act as a community" -- I'm putting
19 those words in quote -- or that they, quote,
20 "associate themselves as being part of a
21 community."

22 And Mr. Flynn says the EIU
23 shouldn't have undertaken this analysis,
24 because those words aren't in the Guidebook.
25 Well, I looked in the Guidebook on page 4-11.

1 It's Exhibit A to Mr. Flynn's report, and the
2 definition of "community" specifically
3 includes, quote, "an awareness and
4 recognition of a community among its
5 members."

6 In other words, the exact criticism
7 that Mr. Flynn lodged of the EIU is simply
8 wrong. The Guidebook contains the words that
9 the EIU used.

10 The EIU then states on the second
11 page of its report that "there is no evidence
12 of LLCs from different sectors acting as a
13 community as defined by the Guidebook," and
14 let's be clear. Mr. Flynn does not give the
15 panel any evidence of that either.

16 So there's zero evidence from
17 Mr. Flynn that all of the different types of
18 LLCs that I've just referenced, ranging from
19 accounting firms to plumbers, real estate
20 investors, you name it, that they somehow
21 share a bond of any type simply by the way
22 they elected to organize themselves legally.

23 The next step in the EIU's analysis
24 was to look at organization, and I'm still
25 looking at the EIU's report. I'm now down at

1 the bottom of page 2 of Exhibit C-18. This
2 condition requires -- and again I'm quoting
3 from page 4-11 of the Guidebook, "that there
4 is at least one entity mainly dedicated to
5 the community, with documented evidence of
6 community activities."

7 Now, the EIU concluded that there
8 was not one entity mainly dedicated to the
9 LLC community, because secretaries of state
10 do not purport to represent any community,
11 much less the LLC community, but instead, the
12 EIU found that the secretaries of state
13 fulfilled a function, which, of course, is
14 what they do.

15 As I noted previously, in
16 Mr. Bullock's declaration, paragraph 5, he
17 lists 18 different agencies that the
18 secretary of state works with, "ranging from
19 corporations to banking, to veterans
20 services, the arts, histories, libraries,
21 archives, civil rights and more." So when
22 we're asking the question, is there an
23 organization mainly dedicated to the
24 community, when the EIU answers that the
25 secretaries of state are not that

1 organization, that answer seems to me to be
2 absolutely correct.

3 Now, Mr. Flynn disagrees, but I
4 want to be clear. He does so without a
5 single citation. It's based on his opinion.
6 He thinks that the fact that secretaries of
7 state have multiple functions does not
8 disqualify them from the fact that
9 administering LLCs is what Mr. Flynn calls a
10 "key purpose and function of these offices."
11 The key purpose and function of these
12 offices.

13 Well, it's Mr. Flynn's opinion, but
14 there's a problem. Those words aren't in the
15 Guidebook, and so the EIU didn't look at
16 whether the secretaries of state served a key
17 purpose or function. They looked at whether
18 they were an entity mainly dedicated to the
19 community of LLCs.

20 And let's be clear. The
21 secretaries of state are not a trade
22 organization. They don't function to support
23 particular types of entities. They are not
24 mainly dedicated to LLCs or LLPs or INCs or
25 any of the applications submitted here.

1 They facilitate for all of these
2 organizations, and indeed when you compare
3 the secretaries of state to the real
4 communities that supported applications for
5 Dot Hotel and Dot Eco, among others, you can
6 see an enormous contrast between the types of
7 communities and the types of organizations
8 mainly supporting those communities that the
9 EIU was looking for under the Guidebook.

10 For example, Exhibit C-31 is the
11 CPE report for Dot Hotel. It shows that the
12 applicant for Dot Hotel had received support
13 from the International Hotel and Restaurant
14 Association, Hospitality Europe, the American
15 Hotel and Lodging Association, the China
16 Hotel Association, and several others.

17 Likewise, the CPE report for Dot
18 Eco, which is Exhibit 41, shows several
19 organizations that are mainly dedicated to
20 the Dot Eco community, including the
21 International Union for Conservation of
22 Nature, the Worldwide Fund for Nature, the
23 United Nations Environmental Program, the
24 Global Reporting Initiative, Greenpeace, and
25 numerous others, all of which, by the way,

1 supported that application.

2 Now, these are the types of
3 communities, the ones that supported Dot
4 Hotel and Dot Eco, that are "mainly dedicated
5 to the community that they serve." The
6 contrast to the secretaries of state is
7 obvious. I'm not going to belabor it. Well,
8 maybe I already have.

9 Now, again, I suppose that
10 reasonable minds could differ on this issue,
11 but I would tell you that in my opinion,
12 Mr. Flynn is just 100 percent wrong. He uses
13 words that don't come out of the Guidebook in
14 order to create in the secretaries of state a
15 function that is not what the Guidebook is
16 looking for.

17 He certainly is not objectively
18 correct. You cannot look at his report and
19 say, you know what, he's right, the EIU is
20 clearly wrong, because secretaries of states
21 are somehow mainly dedicated to the support
22 of LLCs.

23 What he's doing is offering his
24 personal opinion. It's fine for him to do
25 so, but his opinion is clearly no better than

1 the EIU's opinion. It's clear what the EIU
2 was supposed to do -- what it did and what it
3 was supposed to do.

4 Mr. Ali criticized the credentials
5 of some of the EIU members, saying that none
6 of them had a law degree. I don't know what
7 having a law degree has to do with serving
8 the functions that the EIU served. I can
9 anticipate that it would receive a lot of
10 applications. We have no way of knowing what
11 those applications would be.

12 It retained a firm that had a wide
13 range of expertise, and in fact -- and these
14 were the people not necessarily who did the
15 scoring. These were the people sort of in
16 charge, the list that Mr. Ali gave to you.
17 There was an accountant, an economist, people
18 from different backgrounds.

19 There was no reason why someone who
20 had a law degree would be necessary to
21 evaluate whether LLCs organized themselves as
22 a community. If there was evidence of that,
23 we would have been able to find it. Having a
24 law degree doesn't help us.

25 And indeed, most LLCs and most INCs

1 and most LLPs are not law firms. They're
2 just a way of organizing as a corporate
3 entity, and there are lots of people who can
4 look at those objectively and say, yes, these
5 entities are organized as an INC or as an
6 LLP. Now let me evaluate whether they meet
7 the definition of a community for purposes of
8 the Guidebook.

9 Then EIU's report then discusses on
10 page 3 -- we're back on C-18 -- the question
11 of extension -- I'm on page 3 -- "which is
12 focused on the size and longevity of the
13 proposed community." And again, Mr. Flynn
14 disagrees with the EIU's report, but not on
15 the basis of any independent work. He just
16 disagrees.

17 And he cites no evidence that LLCs
18 across the United States have some kind of an
19 awareness that they are part of a community
20 of LLCs. Think to yourself, who represents
21 the community of LLCs? Who speaks on their
22 behalf? There is no one. They're not
23 organized that way. There's not even
24 evidence that LLCs share a kindred spirit,
25 much less that they organize and that they

1 publish and that they have activities. I
2 can't even find a picnic that they attend.

3 So what does that mean for us? I
4 have just gone through the criteria for
5 number 1, community establishment. I have
6 demonstrated to you what the words of the
7 Guidebook say. I've told you that the EIU
8 used those precise words in finding that LLCs
9 did not meet the tests set for it in the
10 Guidebook.

11 So long as the Board Governance
12 Committee did the same analysis, as it did,
13 it's in the report, it looked at what the EIU
14 did, it said the EIU analyzed these things
15 under the words of the Guidebook; and so long
16 as the EIU credibly found that the score for
17 the first point, for the first set of
18 criteria was zero, as I mentioned before, at
19 that point we could put down our pens,
20 because there is no way this application
21 could achieve community priority status. It
22 can't get 14 points.

23 Let me briefly discuss criterion 4
24 on page 6 of the report, which involves
25 community endorsement. I mentioned this

1 issue because Mr. Flynn raises it, and slides
2 39 and 40 of Dot Registry's presentation
3 address it. Mr. Ali did not this morning,
4 but it's in his slides.

5 On slide 39, Dot Registry complains
6 that the EIU only gave Dot Registry one point
7 of the community endorsement criteria, and
8 Dot Registry said, hey, we had the support of
9 the National Association of Secretaries of
10 State and several other secretaries of state.
11 We should have gotten two points.

12 On slide 40, Dot Registry
13 criticizes the EIU, because it says that the
14 EIU -- and now I'm going to quote -- "require
15 that Dot Registry demonstrate consistent
16 support from virtually every secretary of
17 state." These are the words from Dot
18 Registry's slide.

19 Now, first I want to tell you that
20 the slide misquotes the EIU's report. I'm
21 going to read from page 7 of the EIU report
22 where it says, "The viewpoints expressed in
23 the letters [from the various secretaries of
24 state] were not consistent across states."

25 And that's the point that EIU is

1 making, not that it was required by Dot
2 Registry to demonstrate consistent support
3 from virtually every secretary of state, the
4 point that the EIU made was it didn't have
5 letters that demonstrated that many of the
6 secretaries of state had any support. The
7 EIU said that while several secretaries of
8 state express support, others express clearly
9 qualified support, and many others did not
10 respond to the verification request.

11 So it was completely accurate for
12 the EIU to say that Dot Registry did not have
13 unqualified support from all the secretaries
14 of state, and that's even assuming the
15 secretaries of state serve as some kind of a
16 proxy for LLCs, which the EIU was willing to
17 accept for this purpose.

18 So what did EIU do? It gave Dot
19 Registry one point, not two. Mr. Flynn would
20 have preferred two points, but his logic is
21 no more compelling than the EIU's logic. EIU
22 looked at all the letters, and it saw that
23 there was not consistent support; and you can
24 see that with your own eyes when you look at
25 the two declarations that were filed in

1 support of Dot Registry's application to you,
2 because to be clear, those declarations make
3 it clear that, all things being equal, those
4 secretaries of state would prefer that nobody
5 gets these strings. It's not unqualified
6 support for Dot Registry's application.

7 I'm going to stop there with the
8 evaluation of Mr. Flynn's report. I hope
9 that I've made the point that Mr. Flynn's
10 report does not tell you that he's better or
11 has a better perspective or did more research
12 or that he's more qualified. It simply tells
13 you that somebody else has a different point
14 of view. That's it.

15 The EIU's point of view was based
16 on the words of the Guidebook, the experience
17 that those individuals had, and then when the
18 Board Governance Committee looked at this
19 report -- and that's largely what they did,
20 among all sorts of other things, because Dot
21 Registry submitted a lot of information, but
22 the first thing that the Board Governance
23 Committee does, it looks at Exhibit C-18. It
24 looks to make sure did the EIU do what the
25 Guidebook told them to do.

1 And I took you through half of that
2 report, and the answer is clearly yes. The
3 only reason I'm not taking you through the
4 other half is I fear boredom and time
5 constraints, but if I did take you through
6 the other half, it would demonstrate exactly
7 the same. The EIU followed the words of the
8 Guidebook.

9 So let me wrap up.

10 What I've just done is gone through
11 slides 29, 30 and 31 of my slide presentation
12 from this morning, so let me go to slide 32,
13 which is our conclusions.

14 Dot Registry has not demonstrated
15 that it has met its burden that the ICANN
16 Board did not act in conformance with the
17 articles and the bylaws. I can't imagine
18 that the burden is on ICANN. Even if it was,
19 ICANN has come forward today. We clearly
20 demonstrated that the EIU did the work that
21 it was supposed to do.

22 So Dot Registry has not
23 demonstrated that the Board's review of the
24 reconsideration request violated the articles
25 or the bylaws, and we urge you to reach the

1 same conclusion that the panel in Dot Eco and
2 Dot Hotel reached, which is that there was
3 not a basis to determine that the EIU got it
4 wrong either substantively, which the other
5 panels didn't look at, or procedurally, which
6 the panel did look at, and appropriately so.

7 So long as the EIU followed the
8 processes of the Guidebook, whether we
9 disagree with them or not, there's no
10 violation of the bylaws or articles.

11 Not taking further action, that is,
12 the Board not reaching out to grab these
13 three and do something separate with them is
14 not a violation of the bylaws or articles,
15 because there's clearly no obligation to do
16 so. The Board has the right, it does not
17 have an obligation, and it is using that
18 right extremely sparingly.

19 To the extent that what you heard
20 today are challenges to the selection of the
21 EIU or challenges to the EIU's Guidelines,
22 those challenges are time-barred, and
23 candidly, they are challenges that we reject.

24 To be clear, Dot Registry has not
25 identified any Board action or inaction other

1 than the Board Governance Committee's review,
2 and so I do urge you to look at Exhibit C-4,
3 to go through it and to see that in those 23
4 pages, the Board Governance Committee
5 responded to Dot Registry's concerns and
6 confirmed that the EIU did what the Guidebook
7 told it to do.

8 Finally, there is a request by Dot
9 Registry for what I'm going to call various
10 forms of affirmative relief, including that
11 this panel not only find in its favor but
12 find that it has actually met the Guidelines
13 for the applicant.

14 And multiple panels have found that
15 their jurisdiction is to interpret and make a
16 declaration as to whether the Board in this
17 instance, the Board Governance Committee,
18 followed the bylaws, followed the articles
19 and followed the Guidebook in conjunction
20 with its review of the reconsideration
21 request.

22 There is no support under the
23 bylaws that a panel can do more than that and
24 issue some form of affirmative recommendation
25 that the Board should take all sorts of

1 additional steps. The panel's jurisdiction
2 and authority under the bylaws does not
3 really permit it to do so.

4 Let me respond to one other point,
5 which is the notion that somehow all the
6 rules of the game should change. As some of
7 you know, Mr. Ali, of course, knows, ICANN's
8 bylaws are the product of an extraordinary
9 amount of community input. ICANN does not
10 just change its bylaws lightly.

11 The version of the bylaws that keep
12 us here today and that created the rules of
13 IRPs were done following an extraordinary
14 amount of community input. ICANN engaged a
15 number of experts that addressed
16 international arbitration concepts, and the
17 bylaws ultimately, with a lot of community
18 input, were revised.

19 ICANN is going through that same
20 process today. There is in conjunction with
21 the United States government's review of its
22 contract with IANA, and whether the United
23 States government will continue to have a
24 supervisory role vis-a-vis certain ICANN
25 functions, the community of ICANN has

1 literally proposed a new structure for ICANN,
2 a new manner of electing ICANN board members.

3 And just last week, the lawyers for
4 ICANN and the lawyers for the community --
5 the community has its own law firm, Sidley
6 and Austin, among others. Sat down to
7 negotiate the new bylaws, and so many of the
8 issues that Mr. Ali has expressed concern
9 about, they're bubbling up again, and perhaps
10 the next version of the bylaws we'll have an
11 IRP addressing staff action, or there will be
12 a different way of adjudicating independent
13 review proceedings.

14 Maybe we'll have live hearings,
15 maybe we'll have witnesses, but it will be as
16 a result of an extensive and extraordinary
17 amount of community activity, and then that
18 process will result in draft bylaws which
19 will then be posted for further public
20 comment.

21 And so to the extent the panel
22 feels that any portion of this process with
23 respect to the first, the Guidebook that it
24 has concerns, I just wish that you would rest
25 assured that all of these issues are being

1 evaluated, not only in conjunction with
2 ICANN's bylaws, but in conjunction with the
3 possibility or eventuality that we will have
4 what ICANN refers to as Round 2, a second
5 round of gTLD applications that are
6 unlimited, which will one day occur.

7 So thank you very much. Happy to
8 answer your questions, and then, of course,
9 here as long as the panel indulges that
10 counsel from here on answer.

11 MR. DONAHEY: Thank you, Mr. LeVee.
12 I'm going to -- Mr. Kantor has reserved --
13 Judge Brower, do you have any questions for
14 Mr. LeVee at this time?

15 JUDGE BROWER: I do not.

16 MR. DONAHEY: I have no questions,
17 Mr. LeVee.

18 MR. LEVEE: Okay. I'm getting off
19 easy. What I'm going to do is just move this
20 podium. I had some podium jealousy when I
21 saw Mr. Ali had a podium. I'm putting it
22 back here.

23 MR. DONAHEY: I'm not going to ask
24 the obvious question, but I want to let both
25 parties know the amount of time remaining.

1 Mr. Ali, you have an hour at your disposal,
2 sir, and -- I'm sorry. Mr. Ali, you have an
3 hour and a half. Mr. LeVee, you have an hour
4 and 15 minutes.

5 MR. LEVEE: I hope not to use them.

6 MR. DONAHEY: Mr. Ali?

7 MR. ALI: Thank you, Mr. President.

8 Well, we heard a lot from my friend
9 Jeff LeVee. I will say that I'm appreciative
10 of the fact that every time my team wins a
11 case, ICANN sees fit to have to change its
12 bylaws, and perhaps that's because we're
13 right.

14 Mr. LeVee told you that the Triple
15 X case, they decided to revamp the IRP system
16 by changing the rules, to eliminate witness
17 testimony, to eliminate cross-examination, to
18 limit the number of briefs, et cetera, et
19 cetera, all the pages.

20 Well, a few months ago in a
21 decision that you have before you, in fact,
22 you have the ICM decision before you, which
23 was rendered by Judge Schwebel, together with
24 Judge Tevrizian and Professor Paulsson.

25 You've also got before you a

1 decision involving DCA Trust and ICANN, a
2 very informative decision as to what it is
3 that panels should or should not do, and we
4 won that one as well, and ICANN now is taking
5 a look at how its entire system should
6 function.

7 And why is it doing that? Because
8 we all know that the system of accountability
9 that has been created is simply unfair. It
10 doesn't -- irrespective of the facts, that
11 Mr. LeVee can say, well, you signed up to get
12 punched in the nose, so don't complain when
13 you get punched in the nose.

14 Well, that's not the point. The
15 point is: It isn't ICANN that defines the
16 way in which these proceedings function and
17 are conducted. You do. And ICDR rules
18 specifically grant you authority to conduct
19 the proceedings as you see fit, and to ensure
20 that each party has a full and fair
21 opportunity to present its case, and the
22 bylaws require you to look at the conduct of
23 the Board and the conduct of the Board in
24 reviewing what it is that the EIU and staff
25 did.

1 So I'm going to come back to
2 something I said at the very beginning. If
3 you listen to what Mr. LeVee has to say and
4 you listen to what ICANN has to say, it
5 really is heads I win, tails you lose, and
6 unless the coin falls and rests on its edge,
7 you haven't got a chance. No claimant has a
8 chance. That can't be right.

9 I took you through an analysis of
10 how the EIU and the staff are bound by the
11 articles of incorporation, the bylaws, and
12 the AGB. I demonstrated to you that what I
13 have just said as to what they are bound by,
14 which instruments they are bound by must be
15 correct because of the language in the bylaws
16 as to what the BGC must do, which is to
17 determine whether one or more staff actions
18 or inactions contradict established ICANN
19 policies.

20 And you have the Despegar panel's
21 determination and language that it's not
22 simply a procedural review, it's not simply a
23 perfunctory review, that you take the EIU
24 report as the BGC and say, oh, yes, they
25 included the words in there, they looked at

1 each of these requirements, we're done. No.
2 It's a substantive review. The Despegar
3 panel specifically required that the BGC must
4 be reasonably assured that what it is that
5 the EIU and staff did complies with policies
6 that ICANN has promulgated. And I took you
7 through all those policies as reflected in
8 Article I, Section 2-8, Article II, Section
9 3, and Article III, Section 1.

10 So some of you heard me say this
11 before. Rebuttals are often -- are not
12 really symphonic. They don't have a
13 beginning, middle, an end and a coda.
14 There's something more. The Bohemian
15 rhapsody. So if you'll bear with me, I will
16 try to hit a variety of different points, and
17 they will -- they are not in particular
18 order, but I'll try and do them as best I can
19 according to Mr. LeVee's presentation.

20 Now, Mr. LeVee criticized us for
21 not liking aspects of the Guidebook. We're
22 not complaining about Module 4 of the
23 Guidebook, per se. I think I made it
24 abundantly clear that what we're complaining
25 about is the application of the criteria in

1 the Guidebook.

2 Let's be absolutely clear about
3 that. We appreciate the Guidebook says what
4 the Guidebook says. We signed up to be bound
5 by Applicant Guidebook Version 3 and what
6 Module 4 says, and we didn't sign up for some
7 interpretation thereafter by the EIU of what
8 it is that the EIU is actually going to do.

9 And you will, you will note that
10 all Mr. LeVee told you was that you please
11 accept what I have to say, that the CPE
12 guidelines absolutely reflect what it is that
13 the AGB says. Well, if that's the case, then
14 why have the CPE guidelines at all? What's
15 the purpose of those guidelines? Why create
16 different rules and hide under the umbrella
17 that every applicant accepts that ICANN may
18 change the rules of the game midstream?
19 That's not right.

20 Now, Mr. LeVee told you that you
21 won't find anything that ICANN influenced the
22 EIU's scoring. Now, there's a difference in
23 an evidentiary proceeding between submission
24 and evidence, and in all of these proceedings
25 that I've ever been through with Mr. LeVee, I

1 honestly do question when it is that he's
2 testifying and when it is that he is arguing,
3 because the two are constantly alike.

4 I am a traditionalist, and I
5 believe that panelists sitting in a process
6 such as this need to respect evidence.

7 Permit me a slight detour.

8 The very system of adjudication/
9 arbitration today is being criticized,
10 because panelists are too busy and don't
11 spend time looking at the evidence. You are
12 required to look at the evidence. And when
13 Mr. LeVee tells you that he has satisfied his
14 burden of proof, with what? By simply
15 challenging some aspects of what it is that
16 we have presented as affirmative evidence?

17 If indeed we bear the burden of
18 proof, with what has he satisfied his burden
19 of proof, or with what has he rebutted our
20 evidence? Nothing. Sixteen exhibits? No.

21 We'll go through that in a second,
22 but it is your job to look at the evidence
23 that is before you, and it is your job to
24 question us on that evidence, and it was your
25 job to have before you individuals to whom

1 you could have put the evidence, but ICANN
2 has gamed the system, and they accuse us of
3 gaming the system, for trying to put in place
4 a system that will prevent abuse or, on the
5 internet, consumer fraud?

6 Excuse me, ICANN. Excuse me. In
7 fact, the fault lies with ICANN for putting
8 in place a system that doesn't give claimants
9 a fair shot, and with that let me address the
10 burden of proof issue.

11 So Mr. LeVee tells you that Dot
12 Registry bears the burden. I presented to
13 you why, as a matter of the language of the
14 bylaws, the language of the IRP process, and
15 the way in which this accountability system
16 is structured, as to why ICANN bears the
17 burden; but if Dot Registry, if I am to bear
18 the burden, then, members of the panel, the
19 standard of proof must be a very, very low
20 one. How can we satisfy a burden, whatever
21 that might be, when we have no witnesses to
22 cross-examine, we don't have any rebuttal
23 evidence on their side to address, we don't
24 have any fact witnesses on their side to
25 address?

1 Mr. LeVee says, well, those are the
2 rules of the games, Arif. Those are the
3 rules of the game that you signed up to. No
4 cross-examination. No witness testimony.
5 Well, the rules provide for expert witness
6 rebuttals, and the rules didn't stop ICANN
7 from presenting a witness statement, two
8 witness statements, or any witness statements
9 to rebut the witness statements that we put
10 forward.

11 So have we satisfied the burden?
12 Not simply as a matter of who has more, who
13 has more paper on one side versus the other.
14 We have satisfied it because we put forward
15 evidence, that evidence is substantive and
16 that evidence is unrebutted.

17 Now, Mr. LeVee tells you that,
18 well, we didn't need an expert. We didn't
19 need to put forward any experts. Why?
20 Because we have the EIU. The EIU were our
21 experts who we contracted to perform the
22 CPEs, and you have their expert opinion.
23 Well, all you need do is compare what it is
24 that Mr. Flynn has put together by way of
25 analysis and compare it to any one of the CPE

1 reports that the EIU prepared. Again, I'm
2 not talking about simply one being bigger
3 than the other. Look at the substance.

4 Mr. LeVee says, well, Mr. Flynn has
5 not cited to a single footnote or provided a
6 single footnote showing any original work or
7 original research, but I can't tell you
8 whether that's true or not. Well, I can tell
9 you that there are 210 footnotes that
10 substantiate pretty much every point that
11 Mr. Flynn has made, but the fact of the
12 matter is, Mr. LeVee could have had Mr. Flynn
13 here to put the substance of his report to
14 him, and you could have invited Mr. LeVee
15 [sic] here to put questions to him.

16 What we have is submission by
17 counsel on the other side, but that's not a
18 rebuttal of the substance of the report as a
19 matter of expert evidence. We don't even
20 have somebody from the EIU who responded to
21 Mr. Flynn. I'm going to go through the EIU's
22 report in just a second, a couple of their
23 reports.

24 Now, Mr. LeVee tells you we had
25 1,900 applications. 1,900 applications. We

1 were overwhelmed, the regulator of the
2 internet, operating under contract with the
3 United States government, the Board would
4 have been inundated. Please take out your
5 iPhones or your BlackBerries or whatever and
6 multiply 185,000 by 1,900, and add a little
7 bit more to that, and that's not even
8 accounting for all the other revenue streams
9 that ICANN has.

10 Forgive me, but I find that to be
11 incredibly disingenuous. For \$185,000 per
12 application, I expect you to be bound by your
13 bylaws, your guidelines, by principles of
14 fairness, by principles of transparency, by
15 fair and equitable treatment, and language
16 that is specifically included in the bylaws.
17 I'm not making that language up. It's there.

18 Oh, my goodness! 1,900
19 applications, but you know what Mr. LeVee
20 also told you in the next breath? There are
21 only 21 CPEs, of which five passed. How
22 difficult can it really be for the Board to
23 exercise its discretion in order to collect
24 further information, in order to do more due
25 diligence, to ask some more questions,

1 because we'll set a precedent, and everybody
2 will come screaming, asking for the Board to
3 do more. Don't be misled by 1,900. 1,900
4 times 185,000 is perhaps more important to
5 focus on, especially when you're a public
6 service corporation.

7 As the regulator of the internet,
8 one of your core functions is to ensure that
9 the expansion of the domain space takes place
10 in accordance with what the bylaws and the
11 articles of incorporation required, and the
12 articles of incorporation provide for
13 international law, and international law in
14 this particular instance provides a prism or
15 a lens through which you should interpret
16 terms that are included in the bylaws.

17 California law, too. It's kind of like
18 bi-focals, lenses through which you must
19 interpret these terms, but both California
20 law and international law, in the words of
21 Judge Schwebel, provide for a principle of
22 good faith and underlies every single word
23 that exists in those bylaws. Transparency,
24 fairness, objectivity, integrity.

25 So what is it that we are told by

1 Mr. LeVee? Well, the BGC -- "the Board does
2 have the right to grab any feature of a TLD,
3 but it doesn't have the obligation." Well, I
4 would put it to you that rights and
5 obligations are on a balance. They're not
6 absolutes. And I would put it to you when
7 one looks at the fundamental nature of the
8 rights that are at stake, and the fact that
9 you only have 16 to look at within the
10 context of the CPE process, what could be
11 more important? Or certainly it should be
12 one of your top priorities, that you exercise
13 that right to conduct the very due diligence
14 that the bylaws provide for.

15 Remember what I told you. ICANN's
16 Board Governance Committee may ask the ICANN
17 staff for its views on the matter, which
18 comments should be made publicly available.
19 It may request -- well, that didn't happen.
20 The Board Governance Committee may request
21 additional information or clarifications from
22 the requester and may elect to conduct a
23 meeting. They didn't do that either, and
24 they may also request information relevant to
25 the request from third parties, and they

1 didn't do that either.

2 So they didn't do anything, and in
3 fact, they didn't -- the Board Governance
4 Committee didn't even ask ICANN staff, didn't
5 pose questions to ICANN's staff, didn't
6 define the contours of what it is that they
7 needed to look at, and you know how I know
8 that? Because I have ICANN's privilege log.
9 And I would encourage you to take a look at
10 that private log, because all you see or most
11 relevant is a message that goes from Amy
12 Stathos, who is one of the lawyers in the
13 ICANN legal department, to the Board
14 governance LISTSERV, on July 18, 2014,
15 just -- I think that's about a week before
16 the Board Governance Committee met.

17 We don't see any emails going from
18 anybody on the Board to ICANN legal or ICANN
19 anybody saying here are the things that we
20 are interested in, here are the things that
21 you should be looking at. What do they do?
22 They get a report from ICANN, they get
23 something from ICANN, but remember what I
24 told you? There is ample evidence in the
25 record of the fact that ICANN staff and the

1 EIU were working hand in glove.

2 And in fact, Mr. LeVee says I'm not
3 embarrassed by that fact. In fact, doesn't
4 that tell you how good a job they did. They
5 were working hand in glove. Well, the very
6 people who have denied the requests or the
7 applications, what do you expect them to say
8 to the Board? Did the Board members, did the
9 Board members exercise independent judgment,
10 as they are required to do? That's what the
11 bylaws say. That's what the Board is
12 required to do, and they didn't do that.

13 So now what did they do? The
14 meeting takes place on July 24. There's
15 seven agenda items, a jam-packed agenda that
16 they have. The meeting starts at 8:00 p.m.
17 GMT, and the decision is made the same day.
18 Did they really conduct any due diligence?
19 Did they really look into the fact, what it
20 is that Mr. LeVee says they're supposed to
21 do? Did the EIU do its job? No. All they
22 did was take whatever it is that Stathos says
23 and -- (pounds podium) -- rubber stamp.

24 That's not how this is supposed to
25 work. You exercise your rights in order to

1 do what? To make your decisions by applying
2 documented policies neutrally and
3 objectively, with integrity and fairness.
4 You exercise your right to ensure
5 transparency, transparency to the maximum
6 extent feasible. I don't think that was done
7 here at all.

8 So Mr. LeVee attacked -- that's
9 perhaps a strong word. Mr. LeVee criticized
10 Secretary of State Bullock and the National
11 Association of Secretaries of State for not
12 providing unqualified support. Believe me, I
13 know the AGB. I actually even know the CPE
14 guidelines quite well. I don't see any
15 requirement in there for unqualified support.

16 In fact, the fact that The
17 Honorable Secretary of State Bullock was so
18 troubled by all of this suggests to me that
19 this was a decision that was taken with great
20 care and deliberation by the Delaware
21 secretary of state. Went into two things,
22 not only in supporting this application -- in
23 fact, by three things. Putting in a witness
24 statement and voting together with 49 other
25 secretaries of state, to unanimously adopt a

1 NASS resolution in favor of supporting a
2 community applicant, and there's only one
3 community applicant, Dot Registry, and you
4 also, by the way, have support letters from
5 NASS with unqualified support for Dot
6 Registry.

7 So Mr. LeVee mocked our position
8 regarding the Delaware secretary of state by
9 talking about the website of the Delaware
10 secretary of state. The Applicant Guidebook
11 acknowledges that an entity administering the
12 community may have additional roles or
13 functions beyond administering the community
14 exclusively. If what the AGB, if what the
15 community intended by -- the ICANN community
16 intended for purposes of community
17 applications were organizations that fit ISO
18 criteria, or trade associations and only
19 trade associations, say so. Be transparent.

20 And if we can criticize -- if
21 Mr. LeVee's criticism of Mr. Flynn is to be
22 accepted in any way because of the differing
23 subjective views, because Mr. LeVee has one
24 view and the EIU has another view and
25 Mr. Flynn has another view, well, there's an

1 objective standard, and that objective
2 standard is let's take a look at all the
3 applications in reference to each other.

4 And when you do that analysis,
5 which Mr. Flynn has done in his report, all
6 Mr. Flynn has to do in that instance -- if
7 you are to accept Mr. LeVee's criticism that
8 he didn't do any original research, well, he
9 took the three applications from Dot Registry
10 and he compared them quite diligently to the
11 other applications that had passed, because
12 that gives you an insight into how the EIU is
13 doing its job, and that is an obligation of
14 the BGC if it wasn't an obligation of the
15 staff, which is to ensure consistency. In
16 fact, the EIU tells you in the document I
17 read out to you, consistency is a fundamental
18 principle and premise of the evaluations.
19 That's EIU's own document.

20 So we heard from Mr. LeVee that
21 Mr. Bullock and NASS didn't include anything
22 when they were talking about community, with
23 reference to the guidelines and the AGB.
24 Mr. LeVee tells you, oh, disregard Secretary
25 of State Bullock, because he's not talking

1 about the guidelines. He's not talking about
2 community with reference to the guidelines.
3 Well, I challenge him to show me one other
4 letter of support given by any other
5 institution that references the guidelines.

6 Mr. LeVee keeps criticizing
7 Mr. Flynn for identifying standards and
8 language that can't be found in the AGB. I
9 counted five instances at least where
10 Mr. LeVee did the same thing. Sorry. You
11 don't add to the guidelines and criteria in a
12 hearing.

13 Not a single other letter of
14 support is provided by an entity mainly
15 representative of the community defining or
16 with reference to the AGB criteria, so don't
17 impose that requirement on us, because it
18 doesn't exist in the AGB.

19 Oh, the other criticisms that we
20 heard. Well, neither declaration, whether
21 from Secretary of State Bullock, a publicly
22 elected official, or from NASS, the president
23 of NASS, neither declaration would have
24 helped the Board. Well, how does he know?
25 He wasn't there. And if was there, then he's

1 testifying, and I'd like to put some
2 questions to him. Oh, by the way, neither
3 declaration would have helped the EIU. Well,
4 how do you know? How does he know? He
5 doesn't know. He wasn't there.

6 Big criticism. The secretary of
7 state is not a trade organization. Haven't
8 been to Osaka recently, but I don't believe
9 that the Osaka Prefecture is a trade
10 organization either.

11 Treat like with like. Our
12 applications are entitled to the same level
13 of treatment and the same type of treatment
14 as all of the others that passed. That is
15 the essence of ensuring that there is no
16 disparate treatment without justifiable
17 cause.

18 And oh, by the way, for the
19 international lawyers who are on the panel,
20 all three of you, it is a well-established
21 principle that it is the power, it is the
22 authority, it's the state -- sorry. That
23 party which has the authority, that party
24 which has the police power, that party which
25 regulates that bears the burden of

1 demonstrating that there is no
2 discrimination.

3 Investor state case after investor
4 state case well established the claimant
5 doesn't need to prove discrimination. It's
6 the same in the United States law. I
7 presented enough evidence of inequitable and
8 disparate treatment. ICANN bears the burden,
9 not through submission, but through evidence,
10 to demonstrate that there was no disparate
11 treatment here.

12 Evidence versus submission.

13 Mr. LeVee pointed to the fact that
14 awareness of a community amongst its members,
15 which is language that's taken from the
16 AGB -- by the way, this notion of acting as a
17 community, that doesn't exist in the AGB.
18 They're just making that up. That's just an
19 added criterion, "acting like a community."

20 Here's another one. Here's another
21 one that was just thrown into the mix. You
22 have to demonstrate, according to Mr. LeVee,
23 that they share a "bond" of some type. Where
24 does it say that? I couldn't find that
25 language anywhere in the Guidebook. Even by

1 logical, reasonable, good faith extension, I
2 don't find that to be reasonable extension.

3 Filing paperwork and choosing to be
4 a particular type of entity -- legal form,
5 having a particular type of legal form, that
6 apparently doesn't demonstrate awareness of
7 belonging to a particular type of community.
8 Frankly, I fail to understand that.

9 When an entity files, when it
10 chooses, when it makes an election as a
11 matter of conscious choice, it does so
12 because of the rules and regulations and the
13 implications associated with that type of
14 entity, and because of what other entities
15 that fit those requirements also want and do
16 and want to represent. If the notion is one
17 is to take an extremely limited view of
18 community -- i.e., trade association or ISO
19 listing -- like I said before, just say it.
20 And in fact, in other instances in the very
21 Guidebook, for example, with respect to
22 geographic names, ICANN does list or use ISO
23 criteria.

24 So over here the notion is to
25 determine whether or not a logical community

1 can be construed. Does logical community
2 exist? Has the community been created for
3 the purposes of the application? No. The
4 community exists. The applicant simply
5 recognizes that and presents information to
6 the EIU, as it has done to you, with witness
7 and expert testimony that there is a
8 community that deserves some sort of -- that
9 has an identity, and in fact, the community
10 and the purpose behind this application is a
11 really good one. It's a really good one.

12 So let's take a look and see, take
13 a look at some of these cases before we are
14 too far afield from the law.

15 In every instance all of these
16 cases that have been cited, Merck,
17 Booking.com, Vistaprint, all of these cases
18 make it very clear. The focus questions are
19 just that. The focus questions do not in any
20 way remove your obligation, which is to
21 compare the actions and inaction of the Board
22 to the articles and the bylaws. And the
23 action and inaction we're talking about here
24 is the evaluation of whether or not EIU and
25 staff did what they were supposed to do with

1 reference to the articles of incorporation,
2 bylaws and AGB.

3 So we're not asking you to make any
4 new law. Since ICM, whenever that was -- I
5 can't remember now, 2000 something, 2005 --
6 panels have said that there is no deference
7 to which the Board's decisions are due. It
8 is a de novo and objective standard of
9 review. This is now reasonably well settled.

10 And I indeed find it surprising
11 that Mr. LeVee, who actually, representing
12 the regulator of the internet and, I would
13 put it to you, has a duty to be candid with
14 you regarding the law, would be so selective
15 in terms of his quotation of certain
16 standards. And his skewing of what it is
17 that those cases say, trusting in this
18 process, this ICANN-created process, whereby
19 law will come out all right in the end,
20 because the advocates will have at it, and
21 the judges will make their decision at the
22 end of the day. There's a duty of candor and
23 good faith as well, in respect of these
24 principles and policies that are now
25 informing the way in which the internet

1 regulator functions. Not to be taken
2 lightly. This is really serious stuff.

3 Despegar. I read the standard to
4 you previously, but this is the important
5 point from Despegar. In the context of the
6 facts of that case in which various
7 concessions were made by counsel in written
8 submissions and at the hearing, perhaps the
9 outcome of that case on the facts may have
10 been right, but the standard, the standard
11 that is to be drawn from that case is very
12 important.

13 The panel agrees that if the BGC
14 were charged with considering whether the EIU
15 correctly applied ICANN policies, which ICANN
16 accepts it is, then it needs to look into how
17 the standard was applied. It is not
18 sufficient to limit the review to the
19 question of whether mention was made of the
20 relevant policy. The BGC needs to have a
21 reasonable degree of assurance that the EIU
22 has correctly applied the policy.

23 Well, I put it to you that that
24 assurance doesn't come from a memo from a
25 lawyer from ICANN, who, of course, is going

1 to be defending their client and the
2 erroneous decision that was made in issue.
3 It's the Board's independent obligation, even
4 according to the Despegar panel, and plainly
5 according to the bylaws and the plain
6 language of the bylaws. I'm not stretching
7 the language at all.

8 So Merck, the Merck case. Again,
9 you have to look at the standards articulated
10 in Merck in light of what the underlying
11 issue was. In Merck, the underlying issue
12 was a WIPO decision that emerged from an
13 adversarial type of process. You can't just
14 pick and choose language in the abstract.
15 The language and the standards that are being
16 formulated here, which are, as Mr. LeVee has
17 told you, guiding the way in which the
18 internet governance body is formulating its
19 future governance documents, it matters. So
20 plucking a few quotes from here and there
21 doesn't do it. I would encourage you to look
22 at the language that Mr. LeVee has quoted
23 within the procedural and factual context of
24 the cases.

25 I think that Jeff and I will be in

1 agreement that the standard today is that
2 panels must apply an objective and de novo
3 review without any deference to the Board's
4 decision.

5 Vistaprint. The IRP panel is aware
6 that three other IRP panels have considered
7 this issue of standard review and degree of
8 deference to be accorded, if any, when
9 assessing the conduct of ICANN's Board. All
10 of them have reached the same conclusion.
11 The Board's conduct is to be reviewed and
12 appraised by the IRP panel, using an
13 objective and independent standard, without
14 any presumption of correctness. That's your
15 standard.

16 Now, Mr. President, I don't know
17 how much more time I have.

18 MR. DONAHEY: Sir, you have about
19 12 minutes.

20 MR. ALI: Thank you, Mr. President.

21 So just a few quick points to close
22 up. We can go through the -- if we had the
23 time, and we've done this in our written
24 submissions, and I elaborated on some of this
25 early this morning. We can go through this

1 BGC decision, the BGC decision that was
2 issued within a couple of hours -- was taken,
3 rather, within a couple of hours, without any
4 real due diligence or investigation, which
5 is, I would put it to you, incumbent on the
6 Board and the circumstances.

7 So there are numerous violations,
8 and in fact, in this document they
9 acknowledge mistakes were made by the EIU.
10 So when Mr. LeVee tells you that the EIU
11 followed the Applicant Guidebook "to a T,"
12 that's not correct. It says it in the BGC
13 report itself that mistakes were made, and
14 oh, by the way, the EIU in the discovery and
15 the evidence that we presented to you
16 acknowledges that it didn't even take into
17 consideration the EIU's retraction of its
18 objection.

19 So they didn't follow it to a T.
20 They followed whatever they wanted to follow.
21 In fact, not what they wanted to follow; what
22 they were told to follow.

23 Now remember what Mr. LeVee told
24 you. Mr. LeVee told you that we are here to
25 evaluate if the EIU evaluated the AGB

1 criteria appropriately, and as we know, he
2 has previously said that the EIU is supposed
3 to act independently; but then he also told
4 you that the interaction between the EIU and
5 ICANN, of which we have presented an
6 abundance of evidence, and I quote, "is a
7 good way to make sure that the EIU is looking
8 at the right things." I guess "the right
9 things," according to ICANN.

10 EIU Contact Information Redacted tells us that the EIU
11 is operating in the background. Mr. LeVee
12 just tells you that the interaction between
13 EIU and ICANN is a good way to make sure that
14 the EIU is looking at the right things. Not
15 the EIU telling ICANN that it is looking at
16 the right things, but the EIU being told by
17 ICANN what to look at and how to apply these
18 criteria. So much for independence. So much
19 so that ICANN staff is dictating to the EIU
20 what to put into their reports, and you have
21 evidence of that in the record and, in fact,
22 in our PowerPoint slides.

23 So what's the consequence of some
24 of this? The consequence of this is that
25 ICANN knows about the verification letters,

1 knows about the European community's
2 retraction, and -- tell me if I get this
3 wrong -- of its objection. Well, if we are
4 to take at face value that ICANN is telling
5 the EIU to look at the right things, did
6 ICANN tell the EIU to look at this thing
7 called the EU retraction? Because you know
8 what they had? EC retraction. You know what
9 they had? Well, we'd have gotten another
10 point.

11 Now, Mr. LeVee tells you forget
12 about all the other points, because they
13 failed on the main thing. They failed
14 insofar as community establishment,
15 delineation, et cetera, was concerned, but
16 before I get there, I'll just deal very
17 quickly with one of the criteria that
18 Mr. LeVee did not address, which addresses
19 the fact that the three applications received
20 zero points for enforcement.

21 Well, the EIU, which, by the way,
22 remember Mr. LeVee telling you that the EIU
23 applied the criteria "to a T," quote-unquote.
24 The EIU says the application did not indicate
25 an appeals process. I'd encourage you to

1 take a look at what it is that ICANN's 18,
2 20, 28 and 29 of the applications say with
3 respect to the appeals process. By the way,
4 when you look at our appeals process in
5 substance, in substance, compared to what is
6 stated in some of the other applications
7 which talk about a future appeals process or
8 don't even mention an appeals process,
9 whereas we do include an appeals process, and
10 it is an appeals process that is objectively
11 verifiable and external, because it involves
12 the secretary of state, I submit to you that
13 it's a very, very rigorous appeals process.
14 It's just that the EIU couldn't figure out
15 what a secretary of state is and didn't take
16 the trouble to do any investigation.

17 MR. DONAHEY: Mr. Ali, you have
18 five minutes.

19 MR. ALI: Thank you, Mr. President.
20 I'll be done at the end of the time.

21 Let's take another example.
22 Mr. LeVee talked about criterion number 1,
23 community establishment, which there are
24 three requirements or three elements:
25 Delineation, organization, preexistence. And

1 he said that if you fail on this one, you
2 kind of bomb the whole thing.

3 Well, the EIU in its report
4 acknowledges insofar as criterion 1(a) is
5 concerned that, and I quote, "the community
6 definition shows a clear and straightforward
7 membership." Okay. So delineation, clear
8 and straightforward membership. Nonetheless,
9 they award zero points. This T is beginning
10 to me to look like a crooked Q.

11 So let's not get too hung up on the
12 precision of the analysis of the EIU, because
13 it wasn't very precise. It was very
14 perfunctory. Let's perhaps be skeptical on
15 the fact that we had all this interaction
16 between ICANN staff and the independent,
17 so-called independent EIU. Let's be very
18 skeptical when all we see is a memo that goes
19 from a lawyer for ICANN to the Board
20 Governance Committee, quite likely defending
21 the decision that was taken.

22 And let's be very upset when we see
23 that the Board Governance Committee abdicated
24 its responsibilities in not conducting any
25 sort of due diligence, not asking any

1 questions of its own from ICANN staff; simply
2 saying in a sentence quite likely drafted by
3 ICANN staff, oh, well, the applicant is
4 disagreeing with the substantive
5 determination. How on earth does the Board
6 even know without looking at the substance?
7 It can't have. It's impossible. It didn't
8 do it.

9 And let's be really annoyed when
10 the Board says in its reconsideration
11 request -- just to point out to you one of
12 many flaws -- "that the requester cites to no
13 established policy or procedure because there
14 is none requiring a CPE panel to disclose
15 details regarding the sources, scope or
16 methods of its independent research."

17 Well, there was no independent
18 research that was done. There was no
19 independent research that was cited to.
20 There was an obligation of transparency that
21 exists in the bylaws. The Board is required
22 to police that obligation of transparency and
23 to do so with integrity and fairness, and as
24 I read to you before -- and I'll leave you
25 simply with these words -- and for you to

1 determine whether or not this is what was
2 satisfied by EIU or anywhere along the review
3 process by ICANN.

4 The evaluation process respects the
5 principles of fairness, transparency,
6 avoidance of potential conflicts of interest,
7 and nondiscrimination. Consistency of
8 approach in scoring applications is of
9 particular importance.

10 Members of the panel, thank you
11 very much for your time. I put it to you
12 that ICANN has failed egregiously in its
13 obligations. The Board has failed
14 egregiously in its obligations. The EIU
15 staff, in collusion with ICANN, failed to act
16 independently. We believe that they wanted
17 to achieve a particular outcome, and they did
18 everything that they could to get to that
19 outcome.

20 At the end of the day the evidence
21 is on our side, the rhetoric and submission
22 on theirs, and it's your function to evaluate
23 the evidence and apply the standards in light
24 of that evidence.

25 Thank you, and I'm ready to answer

1 any questions.

2 MR. DONAHEY: Thank you. I think
3 we'll take five minutes and then we'll see if
4 we have -- we'll hold the questions now until
5 the end. We only have one more presentation.
6 So let's take five.

7 (Whereupon, a short recess was
8 taken.)

9 MR. DONAHEY: Are we ready on your
10 end? I think you're still muted.

11 All right. Very good.

12 Mr. LeVee, are you ready to
13 proceed, sir?

14 MR. LEVEE: I am.

15 MR. DONAHEY: Please do.

16 MR. LEVEE: Thank you,
17 Mr. President.

18 Mr. Ali closed by saying that he
19 thinks the rhetoric is on his side and the
20 facts are on ours, ours being his client's,
21 and I guess that's as best a place as any, as
22 a point of departure, to disagree. I thought
23 the presentation that I gave to the panel
24 this morning was fact-based. It went through
25 portions of the Flynn report. It went

1 through portions of one of the CPE reports.
2 I quoted to you from the Guidebook. I quoted
3 to you from other IRP panels.

4 I will take some umbrage at
5 Mr. Ali's suggestion that I have somehow
6 played fast and loose, or whatever his words
7 were, with the language of the other panels.
8 Not only have I quoted to you in our slides
9 directly from other panel decisions, but I do
10 encourage the panel, this panel, to take a
11 look at those other decisions, because those
12 other decisions are uniformly in support of
13 ICANN's position in this proceeding, that the
14 purpose of this review is limited to deciding
15 whether the Board acted consistently with its
16 articles and with its bylaws, and that the
17 BGC's decision to undertake a procedural
18 review and not a substantive review is
19 100 percent appropriate under the
20 circumstances.

21 The BGC has made it clear that it
22 is not conducting a substantive review on the
23 merits. So when Mr. Ali has suggested that
24 the BGC could have asked questions and how
25 come the EIU did this and how come the EIU

1 did that, the Board Governance Committee
2 hasn't done that with any of the reviews that
3 it has undertaken, and there have been
4 literally dozens of them. Many of them have
5 wound up in IRP, but many of them have not.

6 And so the Board Governance
7 Committee's view of its task has been upheld
8 by many IRP panels, including, most
9 prominently, the Merck panel, which I do
10 thank Mr. Ali very much misrepresented.

11 The Merck panel says we are not
12 going to look at the differences in
13 substantive opinion as to whether an expert
14 got it right or got it wrong in analyzing the
15 law. It's not the Board Governance
16 Committee's mandate. They don't have the
17 expertise to do that, and a substantive
18 review of any of these things, including CPE
19 reviews, would require the Board Governance
20 Committee to have the sort of expertise that
21 it expressly decided to outsource.

22 That's the purpose of having a
23 different company, an outside vendor do the
24 CPE reviews. It's the purpose of having a
25 different company do the string similarity

1 reviews. That was the Booking case. It's
2 the purpose of having WIPO conduct objection
3 proceedings with respect to certain legal
4 rights interests. The purpose was -- in
5 receiving applications, ICANN didn't know how
6 many it would get, but it did get 1,900.

7 The Board knew that others would
8 need to apply their expertise to decide
9 certain of these issues. It left in the
10 hands of those others those decisions, and so
11 long as those decisions were made without
12 bias, so long as those decisions were made
13 pursuant to the rules that the vendors had
14 established, and so long as those decisions
15 were made pursuant to the Guidebook
16 provisions, the Board Governance Committee
17 was not going to second-guess those
18 decisions. There was great logic in setting
19 it up that way, and the panels have uniformly
20 determined that that is -- that it was
21 absolutely appropriate for the Board
22 Governance Committee to approach the
23 proceedings in that way.

24 I'm going to run through, but I'm
25 going to do so relatively quickly, because a

1 fair amount of what Mr. Ali said candidly was
2 at me, I thought, personally. I feel no
3 compunction to defend myself. I think I
4 stated the facts as accurately as I could
5 state them in my first presentation.

6 First, Mr. Ali said that the panel
7 has the right to conduct these proceedings,
8 and I will tell the three of you I think you
9 have done that thoroughly. You have been
10 patient. You have issued appropriate orders.
11 You have done exactly what an IRP panel is
12 supposed to do, and we thank you for that.

13 Second, Mr. Ali said that he's not
14 complaining about the Guidebook, but he's
15 complaining of the EIU's interpretation of
16 the Guidebook. And I will tell you that what
17 I had done in analyzing the Flynn report and
18 comparing it to Exhibit C-18, which was the
19 CPE report for Dot LLC, was to demonstrate to
20 you that the EIU actually used the rules of
21 the Guidebook in its evaluation.

22 Mr. Ali then said, well, I don't
23 know where this notion of an awareness of a
24 community comes from, and so all I can do,
25 members of the panel, is to refer to page

1 4-11 of the Guidebook, Criteria 1
2 Definitions.

3 First bullet: Community. It says,
4 "The usage of the expression 'community' has
5 evolved considerably from its Latin origin,
6 *communitas*, meaning fellowship, while still
7 implying more of a cohesion than a mere
8 commonality of interest. Notably, as
9 'community' is used throughout the
10 application, there should be an awareness and
11 recognition of a community among its
12 members."

13 This isn't rhetoric. This is
14 quoting to you from the Guidebook, which is
15 what the EIU did, and the EIU then evaluated
16 whether in its view Dot LLC and the others
17 reflected an awareness and recognition of a
18 community among its members by virtue of the
19 fact that each LLC applies to a governmental
20 authority to conduct its business as an LLC.
21 The EIU found no such awareness and no such
22 recognition.

23 When I criticized Mr. Flynn's
24 report for doing no research, Mr. Ali then
25 stands up and says I don't know if he did any

1 research, but he had a lot of footnotes.
2 What I would ask you to do, members of the
3 panel, is to look at Mr. Flynn's report.
4 There are a lot of footnotes. Almost every
5 footnote is either referring to the EIU's
6 various reports, the Guidebook, or the
7 guidelines that the EIU promulgated.

8 What he was doing was looking at
9 the evidence in no way different than what
10 the EIU was doing. Mr. Flynn did not do any
11 original research. That should cause you to
12 pause as to why the Flynn report should have
13 any value to you. If it's one man's opinion
14 versus the EIU's opinion, of course, he has a
15 different opinion. He was paid to have it.

16 Mr. Ali noted to you that there
17 were only 23 CPE applications, and it's
18 important that you know that only five of
19 them passed. Why is that important? Because
20 the Guidebook tells us, as I noted in my
21 introduction this morning, that the rules are
22 to be very stringently applied. ICANN
23 expected most of the community applications
24 to fail CPE. Does that mean the applications
25 are dead? No, of course not. It means that

1 the applications have to compete with the
2 other applications that are filed for the
3 same string.

4 It may be that the ultimate
5 resolution is an auction, as Mr. Ali noted.
6 Many of the contention sets -- "contention
7 set" meaning more than one application for
8 the same string -- have been resolved short
9 of an auction, but if there is an auction,
10 the Guidebook provides that the money would
11 go to ICANN to use for the public interest.
12 It does not go to ICANN to get to spend on
13 whatever it wishes. The community, with the
14 Board, will determine where that money should
15 go.

16 The Guidebook also says, I should
17 note, that ICANN strongly encourages those
18 who are in a contention set to work out
19 something, so they could have a private
20 auction, they could cut a deal, the
21 applicants can combine their applications.
22 There's a variety of ways. ICANN wasn't
23 looking to raise money as a result of these
24 auctions, but the bottom line is somebody has
25 to break the tie if there is a tie, and if

1 more than one application is pending at the
2 conclusion of all this, Dot Registry will
3 have just as much opportunity to submit a bid
4 at auction as any other.

5 I should also note that the
6 Government Advisory Committee imposed or
7 requested ICANN to impose, not imposed, a
8 variety of regulations that apply to these
9 particular applications, and so while it is
10 true that Dot Registry self-selected that it
11 would impose a lot of regulations, the
12 Government Advisory Committee requested that
13 ICANN also impose, for all of the
14 applications, a number of regulations. All
15 of those applications are now subject to
16 those regulations, and all of the applicants
17 will have to deal with those regulations when
18 they decide how to bid at auction.

19 My bigpoint, of course, is that we
20 are not today, by denying CPE status to these
21 applications and by confirming that the Board
22 Governance Committee did not violate its
23 bylaws, we are not telling Dot Registry that
24 its applications are dead. Quite the
25 contrary. It will proceed against the 18

1 other applicants that have submitted
2 applications for these strings.

3 What the EIU recommended and what
4 the Board adopted is that these applications
5 would not receive priority, because had they
6 received priority, then the other
7 applications, the 18 applications, those
8 applications would have been dead, and that's
9 the reason community priority was supposed to
10 be difficult to achieve, and the fact that
11 only five of 23 such applications have
12 prevailed means that things are turning out
13 exactly as the Guidebook says that they will.

14 Mr. Ali repeated that he does not
15 think Dot Registry bears the burden of proof
16 here, but he does not cite an IRP decision
17 saying that ICANN bears the burden of proof,
18 because there is none. Not a single panel
19 looked at it from that point of view.

20 Mr. Ali repeats that he thinks
21 ICANN should have had fact witnesses and it
22 should have had experts. As I explained
23 before, we chose not to retain an expert
24 because we had an expert. The EIU. We
25 compared the EIU's work to Mr. Flynn's work,

1 and we were very comfortable with how that
2 comparison goes.

3 As to fact witnesses, I don't
4 understand what fact witnesses would have
5 done to help you. The Board Governance
6 Committee issued its report, and that's the
7 report you are evaluating. Moreover, the
8 fact witnesses that Dot Registry provided to
9 you were two individuals who talked to you
10 about the process of going through the
11 application, the expert report, and then the
12 two individuals who were from the secretary
13 of state.

14 I've already discussed the
15 secretary of state declarations. The other
16 declarations are helpful in providing
17 background to you as to why Dot Registry did
18 what it did. There was no response from
19 ICANN that would have been appropriate.
20 There was nothing that we would have been
21 able to shed light on as to why Dot Registry
22 submitted community applications and the work
23 that it did in coordinating with the
24 secretaries of state.

25 We have no quarrel with the work

1 that was done. Our quarrel is with whether,
2 as a result of doing that work, the Dot
3 Registry application should have achieved
4 priority status. The EIU said no, and ICANN
5 agreed with that determination procedurally.

6 Mr. Ali suggested that I said that
7 ICANN was overwhelmed because of the 1,930
8 applications. I did not say that. What I
9 said was that ICANN anticipated a number of
10 applications, anticipated that it would not
11 have the expertise to adjudicate the various
12 tests in essence that each of those
13 applications had to undergo or the objections
14 that were asserted by others in conjunction
15 with an application, such as with respect to
16 intellectual property rights, which is the
17 objection that came up in the Merck context.

18 The Board has been busy, to be
19 sure, and the staff has been busy, to be
20 sure, but the fact that we received 1,930
21 applications has no bearing whatsoever on
22 whether Dot Registry's application should
23 have passed CPE review.

24 Mr. Ali suggested that somehow
25 ICANN has not given Dot Registry fair and

1 equitable treatment, and I did want to
2 respond to that.

3 The Guidebook is clear that many of
4 the applicants will not receive a top-level
5 domain. You know that when you submit your
6 application, notwithstanding a \$185,000 fee,
7 no applicant has a right to a top-level
8 domain. In this instance, Dot Inc, Dot LLC
9 and Dot LLP proved to be very popular, so 21
10 applications were submitted. Absent some
11 deal on the back end among those applicants,
12 not all of those applications will be
13 approved. Only three of them ultimately
14 will.

15 And so we are obligated undoubtedly
16 to treat people fairly, but fair and
17 equitable treatment does not mean that if you
18 work hard and submit a good application, that
19 you're going to get a top-level domain. What
20 it means in this context is there were three
21 applications. They tried to get community
22 priority. Getting community priority, by the
23 way, would have knocked out, as I said, 18
24 other applications, and had they achieved
25 community priority, we would be here today

1 nevertheless with many of those applicants
2 having filed an IRP, saying that the EIU got
3 it wrong, just as what happened in Dot Hotel
4 and Dot Eco.

5 There are regrettably some winners
6 and some losers, and that doesn't tell you
7 that ICANN did not act fairly. It tells you
8 nothing on that topic. The rules had to
9 apply to everyone, and ICANN applied those
10 rules.

11 The Board Governance Committee,
12 which Mr. Ali attacked extensively for
13 failing to do all sorts of things that he
14 theorizes they did not do, wrote a 23-page
15 report, and they didn't write that report in
16 an hour or two hours. They wrote a 23-page
17 report, and in the last several pages of the
18 report -- well, really beginning on page 8 --
19 the Board Governance Committee goes through
20 each and every one of Dot Registry's
21 complaints.

22 Dot Registry said we think we
23 should have gotten two points here, we should
24 have gotten one point here. The Board
25 Governance Committee goes through each and

1 every one of those. This is the document,
2 Exhibit C-4, that the panel needs to evaluate
3 as to whether somehow this document violates
4 the bylaws and the articles, because this is
5 the single decision made by the Board that is
6 reviewable.

7 Mr. Ali suggests that it would be a
8 good thing for ICANN to have all sorts of
9 other things reviewed. Staff decisions.
10 Staff emails with the EIU. Even in this
11 instance the decision by the Board not to
12 reach out and do its own CPE evaluation of
13 all 23 applications for CPE status.

14 The bylaws don't require any of the
15 work that Mr. Ali suggested, and certainly
16 the Guidebook does not, and as I told you
17 earlier, instead, what the Guidebook does is
18 give the Board discretion, discretion that it
19 has chosen to exercise rarely, and that
20 several other IRP panels -- the Booking panel
21 is the one that comes fastest to mind --
22 confirmed 100 percent that the Board does not
23 have an obligation to reach out and
24 adjudicate these determinations on its own or
25 to conduct itself as an appellate body. It

1 has the right but not the obligation, and not
2 exercising the right, even with 23 CPE
3 applications, cannot honestly be said to
4 violate the bylaws.

5 Mr. Ali mentioned that a mistake
6 was made, and there was in the BGC report an
7 acknowledgement that there was a letter from
8 the European Commission that apparently was
9 either not received or not properly credited,
10 and so the mistake, if it was a mistake, was
11 some confusion because the letter was not
12 sent to ICANN, and it was outside of the
13 14-day period, but assume for the moment that
14 there was a mistake made.

15 The Board Governance Committee
16 acknowledged, well, it's possible that the
17 EIU could have given one additional point on
18 that, but we're not going to grant
19 reconsideration in a situation where an
20 application receives five points, arguably
21 should have received six, but needs 14. I
22 can't emphasize enough. These weren't close
23 calls. These CPE applications were eight or
24 nine points away from obtaining CPE status.

25 And so when you look at, when you

1 look at the only decision that the Board made
2 in this instance that brings us here today
3 and that is reviewable by the three members
4 of the panel, the decision by the Board
5 Governance Committee, that decision was --
6 just as the other decisions that other IRP
7 panels have confirmed, that decision was not
8 a violation of the bylaws.

9 To say that in analyzing the EIU's
10 single-spaced reports, the EIU conducted
11 itself appropriately, it followed the
12 Guidebook, it followed its own procedures, it
13 issued a report that addressed the various
14 topics that it was supposed to address, and
15 when we look at the complaints by Dot
16 Registry, those complaints go exclusively to
17 the substance, not to the procedure. I know
18 Dot Registry thinks the substance is wrong,
19 but that was not the decision that the Board
20 Governance Committee was asked to make, was
21 charged to make, or that any other IRP panel
22 has expected it to make.

23 The other IRP panels have expected
24 the Board Governance Committee to make
25 decisions regarding the EIU's procedure,

1 procedures of the other vendors, and so long
2 as those procedures were followed, we are
3 done with our analysis.

4 There were a number of other
5 statements by Mr. Ali, some of them directed
6 to me, which I'm going to ignore.

7 I think I have, through the course
8 of my first hour and 15 minutes, addressed
9 the points that ICANN wishes to make. I'm
10 certainly delighted to be here for questions,
11 look forward to them, but I don't want to
12 belabor this any further. I think I've
13 covered the points I need to make, so thank
14 you.

15 MR. DONAHEY: So Mr. LeVee, if I
16 understand you correctly, you're foregoing
17 your additional time?

18 MR. LEVEE: I am.

19 MR. DONAHEY: Thank you, sir.

20 Mr. Kantor, your patience is now to
21 be rewarded. We turn now to the panel'
22 questions, and since you have had no
23 questions, withheld all your questions to the
24 end, I want to give you the first
25 opportunity.

1 MR. KANTOR: Thank you,
2 Mr. Donahey. Can the people in California
3 hear me clearly?

4 MR. LEVEE: Yes, we can.

5 MR. KANTOR: And I trust the people
6 here in Washington can hear me clearly.

7 Before I begin asking questions, I
8 want to emphasize for all of you that I may
9 ask a question which appears to have the
10 benefit of one party in mind and the
11 detriment of another party in mind. I do
12 that regularly, and I will be equally
13 aggressive with each side.

14 However, you should not assume
15 anything from the nature of questions like
16 that. They are intended to try to force out
17 information that I would find helpful in my
18 own mind in reaching the conclusion, but
19 they're not intended to indicate that I have
20 one or the other side's view in mind in
21 asking the question.

22 There may also be in some of the
23 questions a silent assumption or even an
24 outright assumption. I would be grateful if
25 you answered the question rather than telling

1 me the assumption is wrong and why. After
2 you've answered the question, then I would be
3 grateful if you identified an assumption that
4 you thought was incorrect and told me why,
5 but first, please just answer the question.

6 I want to try to understand as best
7 I can the decision-making structure that
8 we're facing here, and I see in Guidebook
9 paragraph 4.2.2 that ICANN appoints the
10 panel, and I trust there's no dispute that
11 ICANN appoints a CPE panel.

12 Is that correct?

13 MR. LEVEE: Yes.

14 MR. ALI: There's no dispute,
15 correct.

16 MR. KANTOR: Very good.

17 And then I see in the CPE reports
18 at issue here that the panels have made
19 determinations about the applications. In
20 looking at the Guidebook, the Guidebook is a
21 little unclear, in my mind, in paragraph
22 4.2.2, about the -- by whom that
23 determination is made. The second paragraph
24 of paragraph 4.2.2 uses third person passive.

25 It says, "If a community-based

1 application is found to meet the criteria,
2 quote, 'that applicant will be declared to
3 prevail in the Community Priority Evaluation
4 and may proceed,'" unquote.

5 Is that declaration conduct of
6 ICANN, even though it is articulated by the
7 panel?

8 MR. LEVEE: The declaration that,
9 of the, of whether it passes CPE or not?

10 MR. KANTOR: That's correct.

11 MR. LEVEE: So the vendors such as
12 the EIU make recommendations to ICANN, and
13 ICANN accepts them. There is -- if there is
14 a decision, I suppose a final authority does
15 rest with ICANN.

16 MR. KANTOR: Very good.

17 Mr. Ali, do you agree, disagree?

18 MR. ALI: I agree that what the EIU
19 does is make a recommendation of the final
20 decision that's made by ICANN.

21 MR. KANTOR: Thank you.

22 MR. LAVEE: I should add that there
23 is a -- the Guidebook contains what I'll call
24 a presumption that ICANN will automatically
25 accept any recommendation by any of these

1 vendors. There's language throughout the
2 Guidebook that says "there will be a string
3 similarity review, and that will be accepted
4 by ICANN. It becomes the decision."

5 Now, there's not an active decision
6 that ICANN makes or a group of people sitting
7 around ICANN saying I see that the CPE report
8 has come in, should we accept it. It's not
9 done that way.

10 MR. KANTOR: Just to clarify,
11 though, in light of what you said, Mr. LeVee,
12 the acts or omissions of ICANN in that
13 connection would be conduct of ICANN, in your
14 view?

15 MR. LEVEE: Of ICANN's staff, yes.
16 The Board has no role in those decisions to
17 which you refer.

18 MR. KANTOR: Would that be conduct
19 of ICANN?

20 I'm sorry. Mr. Chairman, go ahead.

21 MR. DONAHEY: I don't understand
22 the reference, the decision to which you
23 refer. What decisions are you referencing?
24 I'm probably misunderstanding something.

25 MR. LEVEE: When a CPE report or

1 some other report from a vendor is issued,
2 the question is: Does ICANN then somehow
3 affirmatively accept these reports? And my
4 understanding is that there's no active
5 decision by ICANN. No decision itself really
6 is made. ICANN receives the decision from
7 the vendor. It proceeds on the basis of the
8 decision. There is no -- there's nothing in
9 the process where either the Board or, for
10 that matter, the staff actually does any.

11 MR. ALI: May I --

12 MR. KANTOR: Bear with me, Mr. Ali.
13 I will turn to you in a moment.

14 Just to be clear, Mr. LeVee, you
15 drew a distinction between staff and the
16 Board.

17 MR. LEVEE: Yes, I did.

18 MR. KANTOR: Is conduct of ICANN
19 staff conduct of ICANN?

20 MR. LEVEE: Not for purposes of an
21 IRP. The bylaws --

22 MR. KANTOR: That isn't the
23 question I asked, Mr. LeVee. Is conduct of
24 ICANN staff conduct of ICANN?

25 MR. LEVEE: I can't give you a

1 yes-or-no answer to that, Mr. Kantor. It
2 depends on the context.

3 MR. KANTOR: Okay. I'll turn to
4 context in a moment, but first I want to hear
5 from Mr. Ali.

6 MR. ALI: Thank you, Mr. Kantor.

7 So just three brief points in
8 response to the question that you were just
9 asking.

10 First of all, as I understand it
11 and what I agreed to with respect to
12 something Mr. LeVee said is that the vendor
13 makes a recommendation. ICANN staff makes a
14 decision. So that is the proposition that I
15 accept, and I don't know now where Mr. LeVee
16 stands on that particular point, because he
17 then, in response to your next question,
18 indicated that it's actually the vendor that
19 makes the decision or determination, but our
20 position is recommendation, and then staff
21 makes the determination.

22 And what then happens after that
23 determination -- because there has to be a
24 determination made by somebody, because the
25 application then goes directly to contracting

1 for purposes of signing the registry
2 agreement, which is then I believe submitted
3 for Board action.

4 So something must trigger, and I
5 believe that that is not the EIU's
6 recommendation, but that goes to the point
7 that we were making earlier --

8 MR. KANTOR: I'm not making any
9 points, Mr. Ali.

10 MR. ALI: No, it's my point. My
11 point is that there is somewhere in there, we
12 believe, an ICANN staff or ICANN decision
13 that results in something then transpiring
14 thereafter.

15 Now, with respect to this notion
16 that there is a presumption in the Guidebook
17 that whatever a vendor says or does will be
18 automatically accepted by ICANN, it would be
19 helpful to me to see where that presumption
20 is articulated and how it's articulated,
21 because ultimately again our position is that
22 staff takes a decision, and the staff acts
23 under the control ultimately of the Board.

24 And the AGB Module 5.1 says ICANN's
25 board of directors has ultimate

1 responsibility for the gTLD program. Bylaws,
2 Article II, Section 1, "Except as otherwise
3 provided in the Articles of Incorporation or
4 these Bylaws, the powers of ICANN shall be
5 exercised by, and its property controlled and
6 its business and affairs conducted by or
7 under the direction of, the Board."

8 And the CEO of ICANN is a member of
9 the Board.

10 So my understanding is that when
11 the articles of incorporation and the bylaws
12 talk about ICANN, they look at ICANN as a
13 body that comprises the staff, staff action,
14 inaction, board, board action, inaction.

15 MR. KANTOR: Just to be clear on
16 two points here. First of all, I hear a
17 disagreement between the parties on whether
18 the conduct of -- the conduct that I had
19 prescribed is conduct of ICANN or whether it
20 is conduct of the ICANN staff as
21 distinguished from the ICANN board, and I
22 hear a difference of view between the parties
23 on that.

24 Am I correct that there is a
25 difference of view there?

1 MR. LEVEE: Yes. I was going to
2 read from the Guidebook.

3 MR. KANTOR: Please.

4 MR. LEVEE: In section 4.2.2, it
5 says, "If a single community-based
6 application is found to meet the community
7 priority criteria, that applicant will be
8 declared to prevail in the Community Priority
9 Evaluation and may proceed," and then it goes
10 on.

11 What it says on the next page is
12 that the results of each Community Priority
13 Evaluation "will be posted when completed."

14 So if you're suggesting that there
15 is a decision made, there is no decision.
16 The process continues. If an applicant
17 achieves CPE status, it heads one direction,
18 and if an applicant does not achieve CPE
19 status, it gets put into a contention set,
20 which is what happened here. There's no
21 decision that involves some discretion or
22 individual thinking at his or her desk, what
23 should I do.

24 MR. KANTOR: Mr. LeVee, earlier you
25 described that process as either a

1 presumption under the Guidebook or saying
2 that if there is a determination by the panel
3 absent some challenge, that determination is
4 accepted by ICANN staff.

5 Did I correctly understand that?

6 MR. LEVEE: Accepted in the sense
7 that you then go to the next phase. The
8 staff -- there are people who take each
9 application through the process. A community
10 priority application essentially is one piece
11 of the process, and if an applicant succeeds
12 in that, in obtaining community priority, the
13 effect is that a bunch of other applications
14 for the same string are automatically stopped
15 in the process.

16 So it is simply -- when I say that
17 the process, that our presumption, what I'm
18 referring to is there is a process that is
19 followed pursuant to the terms of the
20 Guidebook of things that occur, and I'm
21 drawing a distinction between somebody at
22 ICANN actually making an affirmative
23 decision. The Guidebook has already told us
24 what happens if you do or do not pass CPE.

25 MR. KANTOR: At an earlier stage in

1 these proceedings, the panel asked some
2 questions, and we were advised that action
3 here includes both actions and omissions.

4 Does that apply to conduct of ICANN
5 staff or only to conduct of ICANN Board?

6 MR. LEVEE: Only to Board.

7 MR. KANTOR: So passive conduct by
8 ICANN staff in your view is not an action; do
9 I understand that correctly?

10 MR. LEVEE: You do, based on the
11 specific provisions of the bylaws.

12 MR. KANTOR: Can you draw my
13 attention to the provision of the bylaws,
14 please, that you're speaking about?

15 MR. LEVEE: I will.

16 So the bylaws are Exhibit 1, and
17 I'm trying to find the page number.

18 Article IV, Section 3.4, which
19 apparently I keep skipping over, says,
20 "Requests for an independent review shall be
21 referred to an independent review process
22 panel, which shall be charged with comparing
23 contested actions of the Board to the
24 Articles of Incorporation and Bylaws, and
25 with declaring whether the Board has acted

1 consistently with the provisions of those
2 Articles of Incorporation and Bylaws."

3 MR. KANTOR: I followed that,
4 Mr. LeVee, and that tells me the ultimate
5 obligation on the part of this panel. It may
6 or may not be the case -- I think the parties
7 disagree on that -- that in order to reach a
8 conclusion about that, we must make some
9 determinations about the role of the Board or
10 a committee of the Board with respect to
11 conduct of staff or the EIU or both.

12 So I'm taking this step by step to
13 try to get to that ultimate question. At
14 this stage I'm still looking toward the
15 ground, and I'm trying to understand whether
16 the, in your words, acceptance passive
17 conduct of the staff regarding the CPE panel
18 report, is that conduct of the staff. I
19 understand you draw a distinction. You say
20 no. I understand.

21 Mr. Ali, your view?

22 MR. ALI: To me, the language will
23 declare -- somebody has to declare -- if it's
24 not the EIU as a vendor that is making the
25 decision or declaration of any sort, then it

1 has to be ICANN staff that does that. The
2 notion that this is somehow paper shuffling
3 or pressing a button whereby an application
4 goes from one inbox to the next inbox or
5 somehow in some type of a process flow makes
6 absolutely no sense.

7 At the end of the day, there is a
8 declaration, a decision, an active -- an
9 action or active conduct that results in the
10 application going on to contracting, which is
11 a very significant event, without any further
12 Board review, and this is very important.

13 It's something I mentioned earlier,
14 Mr. Kantor, which is that accepted
15 applications or applications that are
16 declared as satisfying CPE do not go to the
17 Board Governance Committee or to the New gTLD
18 Program Committee, otherwise known as the
19 NGPC. It goes directly on to contracting.
20 So staff action and inaction is directly
21 implicated.

22 MR. KANTOR: Let's turn for a
23 moment to conduct of ICANN's staff, and I
24 understand there is a difference of view on
25 that, so the questions I'm now going to

1 ask -- I appreciate there's a difference of
2 view, and no need to repeat that difference
3 of view unless it is directly relevant to try
4 to answer my question.

5 As an over-generalization, in the
6 bylaws, I see at least three sections of the
7 bylaws that identify standards for ICANN, and
8 those provisions do not distinguish between
9 ICANN staff and ICANN Board.

10 First is Article I, Section 2, core
11 values. Second is Article II, Section 3,
12 which is a little more complicated. It says
13 that "ICANN shall not apply its standard
14 policies, procedures and practices
15 inequitably, nor single out any particular
16 party for unjustified disparate treatment."

17 And then third, Article III,
18 Section 1, that "ICANN and its constituent
19 body shall operate to the maximum extent
20 feasible in an open transparent manner and
21 consistent with procedures designed to ensure
22 fairness."

23 And there is also a provision of
24 the articles, Article IV of the articles,
25 about corporation operating for the benefit

1 of the community in conformity with relevant
2 principles of international law and
3 international conventions and local law and,
4 to the extent appropriate and consistent with
5 these articles and bylaws, through open and
6 transparent processes.

7 The first question: With respect
8 to those provisions, is a CPE panel bound to
9 try to comply with those provisions,
10 Mr. LeVee?

11 MR. LEVEE: No.

12 MR. KANTOR: Can you elaborate as
13 to why you believe that is the case?

14 MR. LEVEE: Yes, and this issue did
15 come up in the Despegar decision which
16 Mr. Ali quoted from earlier today. All of
17 the provisions that you just referenced are
18 provisions that apply to ICANN and its
19 constituent bodies.

20 MR. DONAHEY: So when you hear the
21 word "ICANN" or see the word "ICANN" in the
22 bylaws or articles, you believe that that is
23 a, is a reference to ICANN's board and its
24 constituent bodies?

25 MR. LEVEE: Including its staff,

1 yes.

2 MR. DONAHEY: Including its staff.
3 ICANN, its staff and its constituent bodies,
4 constituent bodies being those bodies that
5 advise it from the community at large?

6 MR. LEVEE: Well, there are -- as
7 you know, there are a number of bodies
8 identified in the bylaws, the address of
9 supporting organizations, the country codes
10 of organizations, generic names of supporting
11 organization, and so forth.

12 MR. DONAHEY: And there are others
13 that aren't identified.

14 MR. LEVEE: Yes, and so the bodies
15 that are created pursuant to the bylaws of --

16 MR. DONAHEY: Could you mute that
17 back there?

18 MR. ALI: Sorry.

19 MR. LEVEE: Thank you.

20 The various core values and
21 operating openly, those apply to the GMSO and
22 the article that the various supporting
23 organizations that ICANN has created.

24 The distinction is that ICANN also
25 used a number of outside vendors, EIU being

1 one of several. It used the ICDR. It used
2 the ICC. It used a company that had an
3 algorithm for string similarity, and as to
4 those entities, those entities are not
5 constituent bodies of ICANN. They are
6 outside vendors. And so the Board does not
7 view them as having the same obligations that
8 ICANN does in its constituent bodies.

9 What the panel in Despegar said was
10 that we are concerned about that, and we'd
11 like the Board to take a look at it. And of
12 course, the Board will look at that question
13 for the next round of applications, but the
14 work has already been done, and so we cannot
15 look at it in conjunction with the work that
16 has already been completed.

17 MR. KANTOR: My chair anticipated a
18 question I was going to ask, but he combined
19 it with a question about constituent bodies.
20 I believe I heard, Mr. LeVee, that you said
21 that while the CPE panel is not bound by the
22 provisions I identified, ICANN staff is.

23 Is that correct?

24 MR. LEVEE: Yes. ICANN views its
25 staff as being obligated to conform to the

1 various article and bylaw provisions that you
2 cite. I think it goes without saying that it
3 does not create -- that does not mean that
4 the decision by a staff member is reviewable
5 in an IRP, and the point I wanted to --

6 MR. KANTOR: Going step by step on
7 this, Mr. LeVee. I understand. We'll get to
8 the standard for an IRP in due course. Bear
9 with me and be patient with me.

10 MR. LEVEE: I apologize.

11 MR. KANTOR: With that same
12 injunction, Mr. Ali, do you have comments on
13 what Mr. LeVee just said?

14 MR. ALI: Okay. From our
15 perspective, the EIU, acting as a contractor
16 to ICANN staff, has to be bound and is bound
17 by the policies and principles and rules that
18 are contained in the articles of
19 incorporation and bylaws, and that was the
20 purpose of that one-pager that I handed out
21 at the very beginning.

22 The BGC itself says that
23 reconsideration can be raised in respect of
24 action by third-party vendors, and the
25 reconsideration that has been raised is with

1 respect to one or more staff actions or
2 inactions which contradict established ICANN
3 policies.

4 So if you read the BGC's position
5 in light of what the reconsideration process
6 and standard provides for, the third-party
7 vendors must be bound by the very same
8 standards, because otherwise you'd have this
9 anomalous situation where ICANN staff are
10 bound by certain standards, and the panels
11 are not, and it would be contradictory in
12 what it is that the BGC itself has stated.

13 And I just draw your attention back
14 to the fact that the EIU itself, in one of
15 its own documents, recognizes the sort of
16 standards and principles that it's bound by.
17 It doesn't specifically state we are bound by
18 the bylaws and the articles of incorporation,
19 but they certainly reflect the principles in
20 substance that are reflected in the various
21 provision of articles and bylaws that you
22 have directed us to.

23 MR. KANTOR: Your answer responded
24 to the portion of my question relating to the
25 EIU to be CPE panel. Do I assume correctly

1 that you have no disagreement with Mr. LeVee
2 that the provisions to which I refer are
3 binding on ICANN staff.

4 MR. ALI: Completely binding on
5 ICANN staff.

6 MR. KANTOR: Okay. Mr. LeVee, if
7 there is a disagreement on the part of a
8 disappointed applicant, and that disappointed
9 applicant files a reconsideration request, is
10 the CPE panel report binding on the Board
11 Governance Committee?

12 MR. LEVEE: I'm not sure what you
13 mean by "binding." The Board Governance
14 Committee reviews the report as it would any
15 other report of any other vendor. As I said,
16 it's presumptively correct, but the BGC had
17 announced that it would review the actions of
18 all of the vendors similar so that there
19 would be a mechanism to have a review.

20 There was some doubt at the
21 beginning. If we had the conduct of the EIU
22 just as an example, where is that reviewable?
23 And the Board Governance Committee determined
24 that it would review the actions of a vendor
25 just as it would review the actions of the

1 Board or staff or anyone else within its
2 purview.

3 I'm not sure I've answered your
4 question.

5 MR. KANTOR: Well, you've discussed
6 that the Board Governance Committee reviews,
7 and to the extent it's reviewing something
8 and applying a standard -- and we'll get to
9 that in a moment -- it must then consider
10 that the CPE panel report is not binding on
11 it to the extent the review concludes that
12 there is an inconsistency with whatever that
13 standard is.

14 Is that a correct statement?

15 MR. LEVEE: That is absolutely
16 correct. If the Board Governance Committee,
17 as an example, were to find that a policy or
18 procedure, either of the EIU or of ICANN --
19 let's say the Guidebook -- was not followed,
20 the Board Governance Committee would grant
21 reconsideration and would -- and therefore it
22 would not be correct to say that the Board
23 Governance Committee views that report as
24 binding on it. It does not.

25 Thank you for the clarification.

1 MR. KANTOR: My apologies if my
2 questions are round around the edges. I'm
3 working hard at it.

4 Mr. Ali, any agreement or
5 disagreement with what LeVee has just said?

6 MR. ALI: I believe to the extent
7 that I understood it, no disrespect by making
8 that clarification there, the Board is not
9 bound by the CPE evaluation. It conducts its
10 own independent review.

11 MR. KANTOR: Well, that brings us
12 to the question of the standards that the
13 Board Governance Committee applies in the
14 course of whatever this review is.

15 Mr. LeVee, let me describe what I
16 heard from your earlier argument, and I'd be
17 grateful if you could tell me whether I've
18 got it right, whether I'm omitting something,
19 or whether it needs some clarification.

20 To simplify what you said, I think
21 what you said is that the Board Governance
22 Committee applies a process review, not a
23 substance review.

24 Is that correct so far?

25 MR. LEVEE: Yes.

1 MR. KANTOR: Now, here is an open
2 issue, I think, with respect to your argument
3 I want your views on.

4 In the course of that process
5 review, does the Board Governance Committee
6 consider itself that it is bound to
7 determine -- I'm sorry. Let me rephrase
8 that.

9 Does the Board Governance Committee
10 consider that the provisions I mentioned
11 earlier -- core values, inequitability,
12 nondiscriminatory treatment, and a
13 transparent process and consideration with
14 fairness -- does it consider those items to
15 be policies or procedures or standards that
16 it applies for the purpose of reviewing a
17 determination that is the object of a
18 reconsideration request?

19 MR. LEVEE: With respect to the
20 review of the vendors retained in conjunction
21 with the gTLD program, the answer to your
22 question is no.

23 MR. KANTOR: And can you expand on
24 that to explain why the Board considers that
25 those are not part of its scope of review?

1 MR. LEVEE: The Board retained
2 these vendors pursuant to public processes.
3 Vendors then signed contracts with, with
4 ICANN. Well, I should clarify. The Board
5 really wasn't involved in selecting vendors.
6 It was done primarily by staff, but contracts
7 were then signed, and the obligation of the
8 vendors was to comply with their contracts.

9 An outside third party does not,
10 simply by contracting with ICANN to perform a
11 function, necessarily subject itself to
12 ICANN's bylaws vis-a-vis transparency or any
13 other legal concept, and ICANN did not, in
14 contracting with the vendors, ask the vendors
15 to assume those obligations.

16 And so ICANN knew that there would
17 be a certain amount of information provided
18 to all of the vendors so that they could do
19 their jobs. ICANN was not asking all of the
20 vendors to do what the Board might do, listen
21 to the whole community, listen to all the
22 various constituents with respect to
23 individual decisions of vendors. ICANN was
24 asking these vendors to perform specific and
25 assigned tasks and contracting on that basis

1 and paying their vendors accordingly.

2 MR. DONAHEY: So if a vendor acts
3 unfairly in its work, in its evaluation work,
4 what is the remedy for the aggrieved party
5 who was treated unfairly?

6 MR. LEVEE: If a vendor acts
7 unfairly -- and there are presumably
8 thousands of permutations of what that means.

9 MR. DONAHEY: Of course.

10 MR. LEVEE: The applicant would
11 file a reconsideration request, and the Board
12 Governance Committee would determine whether
13 a policy of ICANN was violated by the nature
14 of whatever "unfair," quote-unquote, conduct
15 had occurred.

16 MR. DONAHEY: So is acting fairly a
17 policy of ICANN?

18 MR. LEVEE: It is a policy of
19 ICANN, yes.

20 MR. DONAHEY: So then they would
21 determine whether or not they were acting
22 unfairly?

23 MR. LEVEE: If a vendor was accused
24 of acting unfairly, the Board Governance
25 Committee would look at that, yes. What I'm

1 trying to --

2 MR. DONAHEY: They would make a
3 determination -- not just look at it. They
4 would make a determination as to whether they
5 were acting fairly or unfairly?

6 MR. LEVEE: Yes, but I want to
7 clarify that ICANN did not ask its vendors to
8 assume the responsibilities that exist under
9 the bylaws, because, as an example, one of
10 the core values of ICANN is to be
11 transparent. ICANN works hard at being
12 transparent.

13 Not all of the vendors, some of
14 whom were conducting financial reviews of
15 individual applications to determine whether
16 the registry operator had the financial
17 wherewithal to be registry operators, ICANN
18 does not want those vendors releasing
19 information, so it is telling the vendor you
20 do so under a confidentiality restriction.

21 So there are -- there were many
22 instances where the types of obligations that
23 existed in the bylaws really could not have
24 been extended to the vendors. I'm going
25 beyond the use situation, but I'm giving

1 examples.

2 MR. DONAHEY: You've answered my
3 question.

4 MR. LEVEE: Okay.

5 MR. DONAHEY: I apologize.

6 MR. KANTOR: Mr. LeVee, do I
7 correctly understand the answer is different
8 if the Board is reviewing staff conduct
9 because staff is bound by those obligations?

10 MR. LEVEE: Yes, you are correct.

11 MR. KANTOR: And in the course of
12 the Board Governance Committee's own conduct
13 in evaluating a reconsideration request --
14 bear with me a moment. The Board Governance
15 Committee itself is bound by those
16 provisions, correct?

17 MR. LEVEE: Correct.

18 MR. KANTOR: Mr. Ali, anything that
19 you would agree or disagree with in what
20 Mr. LeVee has said?

21 MR. ALI: The short answer for us
22 is for us is that staff and third-party
23 vendors such as the EIU are de jure and de
24 facto one and the same, de facto within the
25 context of the facts of this case and as a

1 matter of the way in which the whole system
2 is set up, in our view, the same -- the
3 vendors have to operate consistently with the
4 articles and the bylaws.

5 MR. KANTOR: May I assume that you
6 agree with Mr. LeVee when he says the Board
7 Governance Committee itself is also bound by
8 those provisions I identified?

9 MR. ALI: Absolutely, yes.

10 MR. KANTOR: Okay.

11 When the Board Governance Committee
12 reviews a request for reconsideration, I see
13 in the bylaws, Section 4-2, paragraph 11,
14 that "The Board Governance Committee may ask
15 the ICANN staff for its views on the matter,
16 which comments shall be made publicly
17 available on the website."

18 In the context of these particular
19 reconsideration requests, did the Board
20 Governance Committee ask for the views of
21 staff?

22 MR. LEVEE: It did, and Mr. Ali
23 referenced our privilege log. There are
24 actually -- if you look at the log, there is
25 a fair amount of dialogue between the

1 governance committee and staff, but the
2 dialogue was managed by the Office of General
3 Counsel, which is why it was put onto a
4 privilege log. So there was a dialogue, but
5 it was not produced.

6 MR. DONAHEY: Not made publicly
7 available on the website?

8 MR. LEVEE: That is also correct.

9 MR. KANTOR: Is there a provision
10 in the articles, the bylaws regarding whether
11 attorney/client privilege or a litigation
12 work product privilege or any other asserted
13 privilege affects the language of
14 subparagraph 11 that I just read regarding
15 information being publicly available on the
16 website?

17 MR. LEVEE: All I could quote to
18 you -- or not quote, but ICANN is a
19 California corporation. Every California
20 corporation that I've ever worked with
21 retains counsel and does not post on its
22 website, except in very unusual situations,
23 the dialogue of communications between the
24 corporation and its counsel.

25 MR. DONAHEY: You're talking about

1 inside counsel or outside counsel?

2 MR. LEVEE: Either.

3 MR. DONAHEY: Because you know
4 internationally the rule of privilege is
5 different whether it's inside counsel or
6 outside counsel.

7 MR. LEVEE: I know that the rule
8 varies country by country and that some
9 countries -- there are countries that don't
10 even acknowledge the privilege at all, like
11 China, but ICANN is a California corporation,
12 and it certainly, where appropriate, uses its
13 lawyers and does not communicate the results,
14 does not post the results of those
15 communications.

16 MR. DONAHEY: Is there any -- just
17 one quick question. Is there any reason why,
18 in paragraph 11, it is not stated that the
19 Board Governance Committee may use the ICANN
20 staff for views on the matter which comments
21 shall be made publicly available on the
22 website unless such comments are privileged?

23 MR. LEVEE: Not that I'm aware of,
24 there's no particular reason, no.

25 MR. KANTOR: Before I question

1 Mr. Ali on these points, Mr. LeVee, could you
2 turn to paragraph 14 in the same section?

3 That says that "The Board
4 Governance Committee shall act on a
5 reconsideration request on the basis of the
6 public written record, including information
7 submitted by the parties seeking
8 reconsideration or review by the ICANN staff
9 and by any third party."

10 For these three reconsideration
11 requests, did the Board Governance Committee
12 act solely on the basis of the public written
13 record, or did it act on the basis of both
14 public written record and other information?

15 MR. LEVEE: As I said, I know that
16 there was exchange with staff that was
17 privileged, and it certainly had information
18 that the staff had provided to it, including
19 the Office of General Counsel. I also know,
20 because you looked at it, that Dot Registry
21 submitted a pretty thorough reconsideration
22 request. I am not aware of any other
23 information that it had before.

24 MR. KANTOR: There's a note you
25 should read, I guess.

1 MR. LEVEE: Yeah, that -- if the,
2 if there was other information that the BGC
3 relies on, which it certainly does from time
4 to time, it notes that typically in footnotes
5 in its report.

6 MR. KANTOR: For these three
7 reconsideration requests, other than items
8 withheld on account of an asserted privilege,
9 was everything else that the Board relied
10 upon in the public written record, the Board
11 Governance Committee relied upon?

12 MR. LEVEE: That is my
13 understanding, yes.

14 MR. KANTOR: So the only items that
15 would not have been in the public written
16 record are those for which ICANN has asserted
17 privilege in these proceedings?

18 MR. LEVEE: Yes.

19 MR. KANTOR: Okay. Mr. Ali?

20 MR. ALI: Mr. Kantor, as I
21 indicated earlier, the only thing that we
22 know is what's in the privilege log. There's
23 no communication that went from BGC to ICANN
24 staff. All we have is a privilege document
25 dated July 17, 2014 from Amy Stathos to the

1 Board Governance Committee the week before
2 the, the one in which they made the decision.
3 And to the extent that there was any other
4 material, as far as we know, per the bylaws,
5 it should have been publicly made available,
6 so there wasn't anything, and that's all we
7 know.

8 MR. KANTOR: Mr. LeVee, from your
9 answers may I presume that any communications
10 within the Board Governance Committee about
11 these reconsideration requests were passed
12 through counsel and thus privileged?

13 MR. LEVEE: Yes, because -- the
14 answer is yes.

15 MR. KANTOR: And who drafted the
16 reconsideration requests -- I'm sorry -- the
17 responses to the reconsideration requests?

18 MR. LEVEE: It's a collective input
19 by not only counsel but also by staff.

20 MR. KANTOR: Did the Board
21 Governance Committee itself do anything more
22 than just review and essentially accept those
23 recommendations?

24 MR. LEVEE: Well, I did not attend
25 these meetings. I don't normally attend

1 these meetings. I'm certainly aware that
2 there are frequent situations where the Board
3 Governance Committee makes a number of
4 comments and asks for their comments to be
5 reflected in revisions to initial drafts.

6 Initial drafts are typically put
7 together by staff in consultation that the
8 Board Governance Committee. I'm trying to
9 remember how many people are on the Board
10 Governance Committee. Six voting members,
11 and the Board Governance Committee is very
12 active.

13 So I fear that I'm leaving the
14 impression that this is something as to which
15 they are passive. They are not. They are
16 extremely active, and there's considerable
17 exchanges leading up to the meeting that they
18 had.

19 MR. KANTOR: Would it be fair to
20 say that that activity is in effect shielded
21 by assertions of privilege, at least reviewed
22 by this panel?

23 MR. LEVEE: It is in this case,
24 yes.

25 MR. KANTOR: I understand the

1 clarification.

2 I know you all wanted to get there,
3 so finally let's turn to Article IV, 3-4, and
4 the scope of authority of this panel.

5 Mr. LeVee, can you explain how the
6 Board Governance Committee in this particular
7 matter exercised its due diligence and care
8 in having a reasonable amount of facts in
9 front of them in reviewing the three
10 reconsideration requests, and can you be as
11 specific as possible?

12 MR. LEVEE: I can.

13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.

21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's

1 reconsideration requests, which had attached
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an inquiry of
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a
24 document which goes pretty much point by
25 point through the complaints that Dot

1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.

4 MR. DONAHEY: Were there drafts of
5 that 23-page report?

6 MR. LEVEE: Yes.

7 MR. DONAHEY: And were those
8 produced?

9 MR. LEVEE: They were not.

10 MR. DONAHEY: And was that because
11 they were privileged?

12 MR. LEVEE: Yes.

13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office general counsel?

18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions

1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.

6 Candidly, I'm not sure what else I
7 could provide.

8 MR. DONAHEY: Are there minutes
9 published on the website that reflect the
10 discussions they took in this case?

11 MR. LEVEE: There are minutes of
12 the Board Governance Committee meetings that
13 are posted on the website.

14 MR. DONAHEY: That reflect
15 discussions of this particular case?

16 MR. LEVEE: Yes.

17 MR. DONAHEY: And that are
18 unprivileged?

19 MR. LEVEE: Yes.

20 MR. DONAHEY: And were those
21 produced?

22 MR. LEVEE: Yes. Well, they're on
23 the website.

24 MR. DONAHEY: I understand that,
25 but, you know, unless we knew that, we

1 wouldn't have gone there to look for them.

2 I'm just wondering --

3 MR. LEVEE: I'm checking to see if
4 either of the sides marked the minutes as an
5 exhibit. I don't remember off the top of my
6 head. The minutes do not have normally a
7 back and forth and back and forth as to who
8 took which position. They simply reflect
9 that the Board Governance Committee --

10 MR. DONAHEY: Considered it and
11 voted on it?

12 MR. LEVEE: It identifies the
13 individuals on the Board Governance Committee
14 who were present and that a decision was
15 taken.

16 MR. DONAHEY: Okay.

17 MR. KANTOR: Mr. LeVee, in those
18 minutes or in the determinations on the
19 reconsideration requests, is there evidence
20 that the Board considered whether or not the
21 CPE panel report or any conduct of the staff
22 complied with the various provisions of the
23 bylaws to which I referred, core values,
24 inequitability, nondiscriminatory treatment,
25 or to the maximum extent open and

1 transparent?

2 MR. LAVEE: I doubt it. Not that
3 I'm aware of. As I said, the Board
4 Governance Committee has not taken the
5 position that the EIU or any other outside
6 vendor is obligated to conform to the bylaws
7 in this respect. So I doubt they would have
8 looked at that subject.

9 MR. KANTOR: Mr. Ali, anything you
10 wish to add?

11 MR. ALI: We were just looking for
12 the expression of interest document that
13 ICANN put out. It's not on record, but it is
14 all part of ICANN public documentation. I
15 think that that document does reflect that
16 those who expressed interest to become
17 vendors are bound by or subscribe to ICANN's
18 principles and policies and what-have-you. I
19 wanted to try and find that for you if
20 Mr. LeVee will permit.

21 The only other comment I would make
22 is that Mr. LeVee said a couple of times,
23 referring to the BGC, that they wrote, in
24 terms of the drafts of the, of the BGC
25 reconsideration decision. They didn't write

1 anything. It was all written by ICANN staff,
2 and the only thing that we have on record is
3 this privilege log which reflects the
4 document that was sent by Amy Stathos.

5 Now, if there were further
6 communications, if there were further
7 communications, I would simply ask that you
8 take a look at the attestation or the
9 affirmation that was provided by one of
10 ICANN's lawyers in respect of the production
11 that was made by ICANN.

12 I will say no more, because I think
13 that that affirmation speaks for itself, and
14 I have an immense amount of respect for
15 Mr. LeVee, and I would not want to say
16 anything that would cause him offense.

17 MR. KANTOR: Leaving to one side
18 that last implied criticism, which I would be
19 grateful if you would not do again,
20 Mr. LeVee, do you have any comments?

21 MR. LEVEE: I do. I'm looking at
22 the privilege log that we produced, and
23 there's certainly more than one email. I'm
24 looking at a number of emails that were
25 produced and marked privileged, because

1 Ms. Stathos was either the primary recipient
2 or the author, or Ms. Le, who is also with us
3 today, was the author of reconsider -- of
4 questions and regarding the reconsideration
5 request, draft results, materials to be
6 considered by the Board, with attachments,
7 two separate emails.

8 And so those are seven exchanges
9 between the Board Governance Committee and --
10 well, five between the Board Governance
11 Committee and ICANN's staff, and then there
12 are three that are between Ms. Stathos or
13 Mr. Dan Halloran, another lawyer, and other
14 staff relating to these particular
15 reconsideration requests. So it's not just
16 one email.

17 MR. KANTOR: Very good.
18 Unsurprisingly, this whole line of inquiry
19 leads me to be thinking about burden of
20 proof, and this question clearly has some
21 assumptions in it. The assumption is that
22 either Board staff undertook conduct or that
23 the EIU, through the CPE panel, is bound by
24 the obligations we've been discussing in the
25 bylaws and the articles.

1 And I recognize there is a
2 difference of view between the parties on
3 that, and by asking the question, I am not
4 indicating one way or another how I would
5 consider the answer to that question. I'm
6 just asking it so I understand what would
7 happen if the panel were to conclude that one
8 or both of those assumptions was accurate.

9 Mr. LeVee, if the panel were to
10 conclude that --

11 MR. DONAHEY: Excuse me. Could you
12 please turn the mic off in the back when you
13 start shuffling documents? It makes it very
14 difficult for us here.

15 MR. ALI: Sorry, Mr. President.

16 MR. DONAHEY: It makes it hard for
17 us here in California to hear, Mr. Kantor.

18 MR. ALI: With that turned off, can
19 you still hear us?

20 MR. DONAHEY: When you need to
21 talk, you can turn the mic on, but when
22 you're shuffling documents around, we hear a
23 bunch of noise.

24 MR. KANTOR: Mr. LeVee and
25 Mr. Donahey, did you hear my last set of

1 questions?

2 MR. DONAHEY: No. Well, I'm not
3 sure. Would you repeat them for my benefit?

4 MR. KANTOR: Sure. My apologies
5 for any repetition.

6 The unstated assumptions and now
7 stated are that either ICANN staff conduct
8 occurred or that the CPE panel is bound by
9 provisions in the ICANN bylaws and articles
10 that I identified. I understand that's in
11 dispute. By asking this question, I'm not
12 trying to indicate one way or another my view
13 about how that dispute -- those disputes
14 ought to be resolved.

15 But assuming that one or both of
16 those assumptions are accurate, what -- in
17 your view, Mr. LeVee, has Dot Registry made a
18 prima facie case for failure on the part of
19 the Board Governance Committee to determine
20 whether or not staff and/or the EIU complied
21 with those provisions of the bylaws and the
22 articles?

23 MR. LEVEE: No.

24 MR. KANTOR: Can you expand upon
25 that?

1 MR. LEVEE: Of course.

2 The reason I say no is because I
3 don't believe Dot Registry has presented
4 evidence to you of any wrongdoing,
5 substantive or procedural, by the EIU. The
6 evidence is that the EIU followed the
7 Guidebook, including specific definitions out
8 of the Guidebook, conducted an analysis,
9 reached an outcome.

10 The challenge today has primarily
11 been to the substance of that outcome,
12 although I do not feel that Dot Registry has
13 presented a prima facie case that would allow
14 you to conclude -- when I think of prima
15 facie case, I think of presenting enough
16 evidence so that if ICANN didn't respond, you
17 would be compelled to rule in favor of Dot
18 Registry.

19 I don't think Dot Registry gave you
20 that evidence. They gave you an expert
21 report of an individual with no
22 qualifications any better or different than
23 the members of the EIU, and all he did was
24 fly speck the EIU's work. He really doesn't
25 have any independent opinions, and certainly

1 not ones that are grounded on analysis that
2 he did.

3 He simply took the EIU's reports,
4 picked and chose some of the words that they
5 used to disagree with them and said you know
6 what? I think the secretaries of state are
7 primarily representing LLCs and LLPs and so
8 forth.

9 So I seriously doubt that Dot
10 Registry has given to you a prima facie case.

11 In terms of procedure, the
12 allegations throughout this case have been
13 that somehow the EIU applied the wrong
14 criteria. What I tried to do today -- I only
15 did half of it; maybe I should have done all
16 of this, since I didn't use all my time --
17 was to take you through the EIU's report and
18 show you that the words of their report and
19 the analysis of their report come straight
20 out of the Guidebook, not the EIU's
21 guidelines even. Straight out of the
22 Guidebook.

23 So as a matter of procedure,
24 although we have Mr. Flynn quarreling with
25 words, I don't think we have a prima facie

1 case. The EIU did what it was supposed to
2 do.

3 MR. KANTOR: Mr. Ali?

4 MR. ALI: Professor Kantor, I've
5 said what I had to say in the morning and in
6 my rebuttal and in our witness submissions
7 with respect to the evidence that's been
8 presented. I would just make a couple of
9 observations, addressing questions that you
10 put to Mr. LeVee.

11 This notion that Mike Flynn has not
12 done any independent research and all he's
13 done is reflect his own opinion, you might
14 just want to take a look at all the various
15 statistics that Mr. Flynn has provided
16 regarding the percentage of LLCs within the
17 United States or outside the United States,
18 how many corporations or entities are
19 registered in Delaware and what-have-you.
20 That's just one example of the type of
21 independent research that he's done.

22 The criticism that Mr. Flynn is not
23 qualified but the EIU is qualified based on
24 simply Mr. LeVee's submissions, again I put
25 it to you that those submissions should fall

1 on deaf ears, since they are simply that,
2 submissions. We don't have the witnesses
3 here so you can evaluate their credentials,
4 you can look into their analysis. That's how
5 you test this stuff.

6 The other thing is that -- what
7 else did Mr. Flynn do? He's conducted an
8 analysis comparing application against
9 application, the three applications at issue
10 here with other applications. That in and of
11 itself is independent analysis that remains
12 un rebutted by ICANN.

13 Now, insofar -- so our position is
14 yes, we have made out more than a prima facie
15 case if the burden, in fact, rests on us, and
16 we've done so with respect to all of the
17 different claims that we've put forward where
18 ICANN has breached the articles and the
19 bylaws.

20 And I'll also just make one other
21 point with respect regarding the privilege
22 log. I don't know what privilege log it is
23 that Mr. LeVee is looking at, but I have a
24 three-page privilege log which contains four
25 entries that refer to the Board Governance

1 Committee LISTSERV.

2 One of those is probably about a
3 month after or three weeks after the decision
4 was taken by the Board Governance Committee
5 to deny the reconsideration requests. Two of
6 them relate to what seemed to be just
7 informational, that reconsideration requests
8 have been submitted, and there is this one
9 document from Ms. Stathos which probably
10 included -- with an attachment, which
11 probably included the draft of whatever it is
12 that staff wanted the Board Governance
13 Committee to understand.

14 We are taking it at face value that
15 what Ms. Le is saying is that there are
16 absolutely no other documents is correct.
17 Nothing is posted, nothing else is on the
18 privilege log, and nothing else was produced.
19 So either the attestation is false, which I
20 hope is not the case, or there weren't any
21 other pieces of paper generated either from
22 the Board to the staff or from the staff to
23 the Board.

24 MR. KANTOR: Mr. Ali, I understand
25 that California law has a business judgment

1 rule for California corporations. What role
2 does the business judgment rule play in this
3 panel's determinations regarding decisions of
4 the Board Governance Committee?

5 MR. ALI: Very good question, and I
6 knew the answer to that at one point
7 addressed in the context of the ICM versus
8 ICANN case, and in that particular case I
9 believe the panel determined that the
10 California business judgment rule has no role
11 within the context of ICANN and the type of
12 organization that it is and the function that
13 it performs.

14 MR. DONAHEY: Maybe I don't really
15 understand the business judgment rule. This
16 has been bothering me, and maybe the
17 corporate lawyers can clarify it for me.

18 My understanding as of the business
19 judgment rule is that it protects directors
20 who exercise independent judgment on behalf
21 of the corporation, from being sued by the
22 shareholders of the corporation, and held
23 liable for exercising their business
24 judgment, because the stock price went down
25 or something else happened to cut the

1 shareholders interest. I don't see how that
2 applies at all here.

3 Am I wrong?

4 MR. KANTOR: Mr. LeVee, anything
5 you or your colleagues wish to add in light
6 of Mr. Donahey's inquiry?

7 MR. LEVEE: The rule can also be
8 applied -- what you have just stated is the
9 most widely used application of the rule.
10 The rule can also be applied to say that a
11 court will defer, to some degree, to a
12 decision of a board exercised in its business
13 judgment that the board's decision is
14 presumptively correct, and I had understood
15 Professor Kantor's question to raise that
16 issue.

17 MR. DONAHEY: I'm not familiar with
18 that, and I would defer to your greater
19 knowledge.

20 MR. LEVEE: And there has -- there
21 was -- Mr. Ali and I have had an earlier
22 matter in 2008 with respect to the
23 application for Dot Triple X, and in that
24 matter Judge Tabrizian dissented from the
25 panel's decision, and in his dissent he wrote

1 that he would apply a business judgment rule
2 to what the Board did and give the Board --
3 I'm paraphrasing -- some deference.

4 Since that time, there have not
5 been any other IRP declarations that have
6 adopted Judge Tabrizian's suggestion as to
7 how to evaluate these matters.

8 MR. KANTOR: Mr. Chairman, in light
9 of both that answer and the earlier request
10 by Mr. Ali for time to look at the expression
11 of interest document, I would appreciate it
12 if we considered that as to how we deal with
13 post-hearing briefing.

14 Mr. Ali --

15 MR. ALI: May I address the
16 business judgment rule point?

17 MR. KANTOR: You may, briefly. I
18 think my colleagues are getting tired of me.

19 MR. ALI: Well, hopefully not of
20 us.

21 The ICM panel rejected the
22 application of the business judgment rule
23 precisely on the proposition that President
24 Donahey put forward, and it's been
25 consistently rejected in Vistaprint, DCA

1 Trust, Despegar, ICM and Booking.com.

2 The California business judgment
3 rule, notwithstanding all respect to Judge
4 Tevrizian and his view as to how it might
5 have some relevance, ultimately it has no
6 relevance in this context.

7 MR. LEVEE: May I just add one
8 thought?

9 MR. KANTOR: Of course.

10 MR. LEVEE: When Mr. Ali says that
11 these other IRP panels rejected the business
12 judgment rule, ICANN did not argue in
13 Booking, in Despegar and the others that the
14 business judgment rule was the applicable
15 standard. So there was no rejection by
16 panels. It simply was not addressed.

17 MR. KANTOR: Mr. Ali, you recall I
18 made a number of caveats about unstated or
19 stated assumptions in the question I put to
20 Mr. LeVee. Would you please bear in mind all
21 of those caveats for my next question?

22 If you would assume hypothetically
23 if this tribunal were to conclude that there
24 were failures on the part of the Board to
25 comply with provisions of the bylaws and

1 articles relating to the process that has
2 been undertaken, but that the panel was also
3 to agree with Mr. LeVee's argument that, with
4 respect to the merits, there would be no
5 basis for concluding that Dot Registry would
6 receive 14 points, is there a harmless error
7 rule here relating to failures on the part of
8 the Board Governance Committee with respect
9 to process-oriented conduct?

10 MR. ALI: I'm not sure I understand
11 the question.

12 MR. KANTOR: No harm, no foul,
13 Mr. Ali.

14 MR. ALI: Well, I think the
15 position that's been articulated is that
16 ultimately they end up in this auction with
17 18 other applicants. I think that there is a
18 lot of foul, because ultimately --

19 MR. KANTOR: I'm not asking you to
20 argue the merits again.

21 MR. ALI: Right. I'm sorry.

22 MR. KANTOR: I'm asking you to take
23 the assumptions that I've given you. Based
24 on those hypothetical rulings by the panel,
25 is there a rule that says the process --

1 should the panel take into account, in
2 determining what it says in the declaration,
3 the hypothetical ruling that on the merits
4 Dot Registry would not reach 14 points?

5 MR. ALI: No.

6 MR. KANTOR: Why?

7 MR. ALI: Because you have no basis
8 in order to make that determination based on
9 the evidence that is before you. In order to
10 make that determination, you would have to
11 make certain evidentiary rulings or make
12 certain -- would have to apply certain
13 presumptions. Whether those are evidentiary
14 or somehow based on some principle of law,
15 it's the only way you get there completely.

16 MR. DONAHEY: Mr. Ali, isn't it
17 true that we would have to substitute our own
18 independent judgments as to whether or not
19 those provisions have been met by the
20 presentations of Dot Registry, and how are we
21 capable of even doing that?

22 MR. ALI: President Donahey, as
23 I've said, you live in the world, and your
24 world is defined by rules of evidence.
25 There's a difference between substituting

1 your judgment and applying rules of evidence.

2 In applying the evidence that's
3 before you, the clear outcome is that we get
4 the 14 or 15 points with respect to each
5 application. You have it all in front of
6 you. It doesn't mean that -- you are not
7 permitted, if you follow the other standards
8 that are out there as articulated by other
9 panels, to defer. Yours is an objective and
10 de novo review.

11 MR. DONAHEY: Yes, but with all due
12 respect, I don't believe -- no due respect to
13 myself, I don't believe, number one, I'm
14 capable of doing that, because I don't
15 believe I'm capable of substituting or acting
16 as an expert in this case. That's number
17 one.

18 And number two, I don't see
19 anything in -- and you'll have to point it to
20 me. I don't see anything in the procedures
21 that I'm supposed to apply and follow that
22 gives me the right to indicate a decision in
23 this. At best, I can see, even if I agree
24 totally, it would be sent back to the
25 committee and say, hey, what are you going to

1 do with this? I don't think you did it
2 right.

3 MR. ALI: Then we're back here in
4 another 12 months time, so ultimately I will
5 say, because what you're asking -- without
6 guidance being given to whoever it is that's
7 going to review this, if that's what you were
8 to decide, we've ultimately done nothing but
9 spin our wheels.

10 Now, I would ask for you to review
11 the ICM decision in terms of what the panel
12 determined in ICM, what the panel determined
13 in DCA Trust, and even what the panel has
14 determined in Vistaprint with respect to a
15 binding declaration regarding the question of
16 liability and a recommended course of action
17 with respect to remedying the wrong.
18 Otherwise, this whole process is, with all
19 respect, hollow.

20 MR. DONAHEY: Fortunately, I have
21 two co-arbitrators, two co-panelists who are
22 much smarter than I am. So maybe they will
23 be able to see what I can't see right now.

24 MR. LEVEE: May I respond briefly?

25 MR. KANTOR: Mr. LeVee, I would be

1 grateful if you would. I know that we're
2 coming close to the end, so you will have the
3 last word, and then I will cease asking
4 questions.

5 JUDGE BROWER: And I have questions
6 before you finish.

7 MR. LEVEE: With respect to the ICM
8 and DCA Trust matters, those matters involved
9 the board review of GAC advice, Government
10 Advisory Committee advice, and the DCA panel
11 determined that the GAC, as a constituent
12 body of ICANN, owned the core values, the
13 transparency and so forth. That's a very
14 different analysis than all of the other IRP
15 declarations that have looked at outside
16 vendor determinations.

17 To your question, Mr. President,
18 not only are you making the point that the
19 panel would be substituting whatever
20 expertise it has were it to rule that Dot
21 Registry should have received 14 points, but
22 the equally salient point that I've tried to
23 make today, not effectively enough, is that
24 the Board Governance Committee likewise did
25 not wish to place itself in the position that

1 Dot Registry is proposing to place you in, of
2 making the substantive evaluation.

3 And from the very first IRP
4 relating to a vendor decision -- that was the
5 Booking.com decision -- in that decision,
6 very briefly, we had two proposed strings,
7 Dot Hotels and Dot Hoteis. Two strings, six
8 letters, Hotels, Hoteis. The only difference
9 was an L instead of an I. ICANN hired an
10 outside expert who said these two strings are
11 confusingly similar. Only one of them should
12 be placed in the internet. Only one should
13 win.

14 The applicant for Dot Hotels
15 submitted an IRP with an expert report that
16 looked a lot like this in terms of volume,
17 and he said, hey, I'm an expert. I can tell
18 you that people will not be confused by those
19 two strings. They both could be operating on
20 the internet.

21 And I argue to that panel that the
22 whole purpose of not performing a substantive
23 review by the Board Governance Committee was
24 to avoid asking the Board Governance
25 Committee to become the expert. That's

1 exactly what ICANN in the Guidebook
2 outsourced. It didn't think it had that
3 expertise.

4 Merck said to us: We wish you had
5 hired a lawyer so that you could tell us that
6 the phrase "Merck" carries with it
7 intellectual property rights that a German
8 company called Merck owns and that a US
9 company also called Merck doesn't own. And
10 we said that's not substantive expertise that
11 the Board Governance Committee wished to
12 have.

13 So my whole point is not only
14 shouldn't the panel substitute its views, but
15 in so doing it's the entire rationale for why
16 the Board Governance Committee does not
17 undertake a substantive review.

18 Thank you.

19 MR. KANTOR: Mr. Chair, I'm
20 grateful for everyone's patience. I know
21 Judge Brower has some follow-up questions.

22 MR. DONAHEY: And Mr. Brower, I
23 will not interrupt you as I did Mr. Kantor.

24 MR. ALI: Judge Brower, I'm sorry.
25 If I may. I don't want to let this point the

1 president is struggling with to get lost in
2 the discussion. I'll be very brief.

3 Mr. President, the issue here is
4 not about asking you to substitute your
5 judgment, but to do what your jurisdiction
6 requires, which is to evaluate the relevance
7 and materiality of the evidence that is
8 before you as you're required to do by the
9 rules.

10 Now, that may ultimately result in
11 you coming to a different conclusion than the
12 EIU or the Board Governance Committee, but
13 that is your role. We're not asking you to
14 do a substantive evaluation or a CPE. There
15 is a distinction.

16 That has already been done, and
17 that has been presented to you by way of
18 evidence, which you must evaluate and which
19 is specifically provided for within the
20 framework of these proceedings, not only in
21 the ICDR rules that I cited to you earlier,
22 but in the supplemental rules that ICANN put
23 together that contemplate the possibility of
24 expert opinions and fact witness testimony.

25 So your duty in our submission is

1 to evaluate the credibility and the
2 materiality and the relevance of the evidence
3 and make a determination that may have the
4 effect of being contrary to what has
5 previously been decided by the Board
6 Governance Committee, and I think that that
7 distinction is a very important one in terms
8 of the context of this proceeding and what
9 this proceeding is about.

10 I'll stop there.

11 MR. DONAHEY: Mr. Ali, I'm sure
12 I'll do my best to do my duty in the case.

13 Judge Brower?

14 JUDGE BROWER: This question goes
15 to both sides. Why should there be a burden
16 of proof at all in this case? "The
17 independent review process panel," according
18 to the bylaws, "shall be charged with
19 comparing contested actions of the Board to
20 the articles of incorporation and bylaws in
21 declaring whether the Board has acted
22 consistently with the provisions of those
23 articles of incorporation or bylaws."

24 Simply, we have to be satisfied.

25 The application of a burden of

1 proof implies that a case can be decided on
2 the basis of a failure to carry the burden.
3 Of course, panelists always try and avoid
4 that result if they can, but why should there
5 be a burden of proof applicable in this
6 proceeding?

7 MR. KANTOR: Designate one of them
8 to answer first, Judge.

9 JUDGE BROWER: Alphabetical order.

10 MR. ALI: Judge Brower, in all
11 candor, I don't have a good answer to that
12 question. I need to think about it further.
13 I think it's a very good question. If I
14 simply thought aloud, I might say something
15 that I'd regret.

16 JUDGE BROWER: Always dangerous.

17 MR. ALI: Yes. Mostly the unspoken
18 words slate the spoken.

19 JUDGE BROWER: Mr. LeVee, are you
20 more daring?

21 MR. LEVEE: A little bit.

22 I think in any proceeding, be it
23 this proceeding, an arbitration, a court
24 proceeding, anything adversarial, I think it
25 has become comfortable for one side or the

1 other to be designated with carrying a burden
2 of proof, because it helps the panel think
3 about whose evidence do I think about first,
4 and have they met some threshold that I'm
5 going to intellectually characterize as a
6 burden of proof.

7 Your question is thoughtful. It's
8 not one I've had before, and it does suggest
9 at least the possibility that the bylaws do
10 not necessarily require a burden, but in
11 every IRP that I've participated in, there
12 has been an assumption that the claimant had
13 a burden, and then it was a question of
14 whether the claimant met the burden.

15 There's -- because the IRP is
16 initiated by a claimant, the claimant has to
17 come forward with evidence. Dot Registry did
18 come forward with evidence. It knew that it
19 could not simply say we think we've been
20 wronged, good luck. ICANN now has to prove
21 that we weren't wrong.

22 So I think Dot Registry understood
23 that the bylaws and the ICANN supplementary
24 procedures that required a claimant to come
25 forward with evidence necessarily implied a

1 burden on the claimant, but it is correct to
2 say that the bylaws do not specifically say
3 that, in other words, say who has a burden.

4 MR. ALI: If I could add to that, I
5 think that the only place where one could
6 draw the notion that the bylaws or the
7 procedure contemplate a burden may be
8 implicit in the notion that you have to
9 declare which side is the prevailing party.

10 Now, that may not be necessarily --
11 may not go specifically to your point, but I
12 agree with Mr. LeVee that there is no
13 absolute guidance in the, in the framework
14 that applies to these proceedings.

15 JUDGE BROWER: I will only add that
16 it's different, in my mind, from the issue of
17 whether or not the applicant or petitioner
18 has made out a prima facie case. I think
19 that's a different issue, and if I may say
20 so, in my view, contrary to what you said
21 earlier, Mr. LeVee, the fact that a party has
22 made out a prima facie case does leave you
23 the alternative of either accepting it or
24 rejecting it, because it means that you can
25 accept it, but you can also reject it if you

1 have questions about the proof. That's
2 usually in questions of credibility, but it
3 can relate to other evidence as well.

4 I have been mystified from the
5 beginning by the provision in Roman IV 3-4,
6 the first part of which I recited a moment
7 ago, but I'm looking at a part that says "The
8 IRP panel must apply a defined standard of
9 review to the IRP request," focusing on A, B,
10 C, and our colleague, Mark Kantor, took you
11 through two of those, as I recall.

12 Now, what's the defined standard of
13 review? I haven't seen it defined anywhere
14 or heard it defined. Do we have to apply a
15 defined standard of review, but what is it,
16 or is it your view that it consists of what
17 appears at A, B, C only?

18 MR. LEVEE: My view is that it does
19 focus on A, B and C, but it is not exclusive
20 to A, B and C. In other words, if the panel
21 were to determine that -- I'll make it easy.
22 If the panel were to determine that ICANN
23 decided not to accept, not to accept
24 somebody's application even though they
25 submitted their \$185,000 and checked all the

1 boxes, and ICANN simply said, you know what,
2 that applicant didn't wear green on
3 St. Patrick's Day, and so we decline to
4 accept that applicant's application.

5 That would not be necessarily
6 listed here, but it would be -- it would
7 demonstrate some type of discrimination,
8 undoubtedly.

9 MR. DONAHEY: I'm sure it would be
10 within your rights.

11 MR. LEVEE: And so there certainly
12 are things that the panel can be looking at.
13 I agree with you and your question is, when
14 the bylaws use the word "defined," is there a
15 definition some place, and the answer is no.
16 And so other panels have looked at this
17 language and quoted it and simply adopted a
18 standard that looks at what the Board
19 Governance Committee did.

20 There are also some IRP decisions
21 where there is action of the full Board, and
22 they've looked at what the full Board has
23 done, and they, they review it without really
24 formally articulating what the review
25 standard is.

1 JUDGE BROWER: Food for thought for
2 your further negotiations and discussions in
3 the reformation of ICANN, I guess.

4 Next question is, I haven't found
5 in the bylaws a statement of the scope of
6 review when the Governance Committee
7 entertains a request for reconsideration.

8 What is the standard review?

9 MR. LEVEE: No, it's the same --
10 so, so paragraph 4 that you are looking at --

11 JUDGE BROWER: Yeah.

12 MR. LEVEE: -- which refers to
13 actions of the Board, the committees of the
14 Board are --

15 JUDGE BROWER: This is restricted
16 to the IRP panel, what I'm, what I've been
17 looking at.

18 MR. LEVEE: Maybe I'm not
19 understanding your question, but the IRP
20 panel is to use paragraph 4 in conjunction
21 with any review of any decision by the Board,
22 and in this instance the Board Governance
23 Committee did act on behalf of the Board, and
24 we acknowledge that the Board Governance
25 Committee decision is reviewable by this

1 panel. It's reviewable pursuant -- as if it
2 were the Board.

3 JUDGE BROWER: That I understand,
4 but when the Board Governance Committee is
5 considering an application for
6 reconsideration, what is the standard that it
7 applies? I haven't found any.

8 MR. LEVEE: I apologize. So the
9 previous portion of Article IV -- so it's
10 Article IV, Section 2 -- sets forth the terms
11 of reconsideration, and if you look at in
12 particular subparagraph 2, "Any person or
13 entity may submit a request for
14 reconsideration or review of ICANN action or
15 inaction," and then it goes through whether
16 staff actions contradict ICANN policies,
17 whether actions have been taken or refused to
18 be taken without consideration of material
19 information, et cetera; whether one or more
20 actions or inactions of the Board relied on
21 false or inaccurate material information.

22 And what ICANN did, as I mentioned
23 earlier, was early on in this process -- so
24 the reconsideration sections of the bylaws
25 normally apply to decisions by ICANN staff or

1 by the Board. What ICANN did was to say that
2 we have these vendors who are doing things on
3 our behalf, pursuant to contracts that were
4 signed.

5 When an applicant is dissatisfied
6 with the decision of a vendor -- in this
7 instance, the EIU -- we, ICANN, will allow
8 you to file a reconsideration request, and we
9 will act on it. There was some initial
10 ambiguity as to whether the reconsideration
11 request even applied to decision of the
12 vendors, but then it was clarified by ICANN.
13 Yes, we will look at those decisions, and
14 when we do reconsideration requests, these
15 are the rules that we'll follow.

16 JUDGE BROWER: Okay. I only ask
17 the question because Section 2,
18 reconsideration, paragraph 2 spells out what
19 a person or entity must submit, and when you
20 get to 3, the Board has designated the Board
21 Governance Committee to review and consider
22 any such reconsideration request. All it
23 does is list the powers of the Board to get
24 more information.

25 So I think you're telling me

1 basically it's implicit in 2 and 3 that the
2 scope of the consideration, of the
3 jurisdiction, as it were, of the Governance
4 Committee on reconsideration, it's implicit
5 in 2 and 3.

6 MR. LEVEE: Yes, and if you read
7 our brief, and I think it may also be in our
8 slides, we lay out in our brief the process
9 that ICANN went through in deciding that it
10 would have the Board Governance Committee
11 review decisions of the EIU and the other
12 vendors that were retained by ICANN, and what
13 specifically the review would entail, which
14 was a procedural review, not a substantive
15 review. So it's in the first five or so
16 pages of our brief.

17 JUDGE BROWER: Right. That I
18 understand. I was just looking for how it is
19 rooted in the, in the bylaws.

20 The last question is for both of
21 you. Suppose our reaction to all of this is
22 either you're right, Dot Registry, you were
23 done in, okay, it should have been a
24 community thing, or, on the other hand, for
25 God's sake, how can anybody consider this a

1 community thing.

2 I mean suppose looking at all this,
3 we have a view as to what was right. Does
4 that make any difference? That's not within
5 our remit or it's irrelevant?

6 MR. LEVEE: I don't think it's
7 irrelevant. I think, however, that your
8 remit, to use your word, is to determine
9 whether the Board Governance Committee acted
10 consistent with the bylaws and the articles
11 in deciding that the reconsideration request
12 that Dot Registry submitted would fail, that
13 is, the request would lose.

14 The fact that you may have your own
15 personal views as to whether the EIU got it
16 right or got it wrong may or may not inform
17 you, your thinking in terms of whether the
18 Board Governance Committee, in assessing the
19 EIU's reports from a procedural standpoint,
20 did so correctly, in essence.

21 And I think, look, we're all human
22 beings. The Board Governance Committee had
23 read the EIU's report. My suspicion is that
24 if the Board Governance Committee thought
25 that the EIU had made a tragic error, it

1 would also probably find that the EIU had
2 violated various policies, although maybe it
3 wouldn't have. I wouldn't, I wouldn't know,
4 and I didn't quiz the members of the BGC to
5 ask them that question.

6 I think often if there is some kind
7 of flagrant outcome that really turns a
8 stomach, that ICANN would not be immune to
9 thinking about that, and I wouldn't expect
10 that the three of you would be immune to
11 thinking about it, but I also think that it
12 is beyond the specific assignment given to
13 you here.

14 MR. ALI: I believe I already
15 answered that question in my clarification or
16 my attempted clarification to President
17 Donahey on the specific point, but I will
18 just leave you with one statistic, which is
19 that the BGC has decided against all -- other
20 than two, it has decided against every
21 reconsideration request, and there have been
22 about a hundred of them.

23 So pretty much every single time,
24 the BGC says, well, somebody down the line
25 got it right, and we're going to get it

1 right, and the two in which reconsideration
2 was granted are Dot Gay and Dot Med, and I
3 believe in respect of Dot Gay and perhaps in
4 the case of both, I'll have to verify this
5 with respect to Dot Med, the reconsideration
6 was granted on the basis of improper
7 validation of support letters, but in our
8 instance, in our case, there are a number of
9 other reasons why the reconsideration request
10 was improperly denied.

11 JUDGE BROWER: Okay. Those are my
12 questions. I'm done.

13 MR. DONAHEY: All right. I have
14 nothing. I do have some procedural
15 questions, however, and I would like to ask
16 my co-panelists whether either of you would
17 like any additional briefing done on any
18 particular topics.

19 JUDGE BROWER: I personally don't
20 feel the need, but that's me.

21 MR. KANTOR: Mr. Chair, I heard
22 proffers from the parties on two issues. One
23 is the document called "Expression of
24 Interest," and the extent to which a
25 third-party contractor accepted that it would

1 be bound by the provisions of the articles
2 and bylaws; and second, on the business
3 judgment rule and the scope and extent of it
4 under California law. I would find briefing
5 on those two issues to be helpful.

6 And if that requires introducing
7 further authorities or documents into the
8 record, that would also be helpful for me,
9 although I trust there won't be any
10 treatises.

11 MR. DONAHEY: All right. We'll
12 then adopt Mr. Kantor's suggestion and ask
13 that you provide further briefing. How much
14 time would you like for that? Do you have
15 something else?

16 JUDGE BROWER: No, no. You said
17 further briefing, but it's limited to the
18 topics.

19 (Discussion was held off the
20 record.)

21 MR. DONAHEY: Mr. Ali or Mr. LeVee,
22 I would appreciate your thoughts on that.

23 Let me ask you, Madam Reporter, are
24 you there?

25 THE REPORTER: Yes.

1 MR. DONAHEY: When do you think we
2 will be receiving the transcript of the
3 proceedings? Because that might influence
4 the parties as to how much time they'll need.

5 THE REPORTER: Usually it's a
6 two-week turnaround unless you need it
7 earlier.

8 MR. DONAHEY: So then I will repeat
9 the question. What time would you like on
10 those two issues?

11 MR. LEVEE: So I am envisioning a
12 brief that is three or so pages.

13 MR. DONAHEY: Mr. Kantor, is that
14 sufficient for your needs, or do you want to
15 expand the page limit?

16 MR. KANTOR: I would defer to the
17 parties on their pages and request them to be
18 as brief as they can possibly be without
19 repeating anything that's already in the
20 record. We do not need any redundancy here.

21 MR. LEVEE: So if we could have --
22 today is Tuesday, the 29th. If we could have
23 until the middle of next week or -- I'm
24 trying to think if there is any reason I
25 would like to have the transcript in order to

1 provide my thoughts on this, but I'm not sure
2 that I need the transcript. Maybe a week
3 from Friday.

4 MR. ALI: We have the electronic
5 transcript, so --

6 MR. LEVEE: How about a week from
7 Friday?

8 MR. ALI: I'm looking at my
9 colleagues, because I just can't remember the
10 other deadlines that we have. We've got some
11 pretty pressing deadlines in two other cases.
12 I think a week from Friday is doable on
13 something that's this focused.

14 MR. LEVEE: Okay. So that would be
15 April 8.

16 MR. DONAHEY: And for my benefit as
17 well as the parties, Mr. Kantor, could you
18 write out the very short description of what
19 you would like briefed?

20 MR. KANTOR: I will do so tonight
21 and circulate it to all.

22 MR. DONAHEY: Thank you very much,
23 and the other thing that I have is that since
24 we're going to get additional briefing, we're
25 not going to get a transcript within two

1 weeks. I will be contacting my co-panelists
2 about setting up the time for deliberations.
3 We can get together.

4 Is there anything further from any
5 of the parties? Questions? Procedural
6 issues? Anything at all you want to raise at
7 this time?

8 MR. LEVEE: Not from our side.
9 You've been very indulgent.

10 MR. ALI: Nothing from our side
11 either, Mr. President. Thank you.

12 MR. DONAHEY: All right. I want to
13 thank all of you for your presentations.
14 It's helpful. I'm sure my colleagues have as
15 well.

16 I want to thank Jones Day for
17 providing all the facilities and food and
18 everything else that we've enjoyed here, and
19 I know you've enjoyed it in Washington as
20 well.

21 And so we look forward then to
22 receiving your briefing, and Mr. Kantor will
23 be sending you out something that will
24 specify precisely what he would like to have
25 briefed, and then you will have your briefs

1 to us by April 8.

2 JUDGE BROWER: I think the court
3 reporter has been out of sight to you all out
4 there, but I've been sitting right next to
5 her, and I've rarely experienced one going on
6 so endlessly without looking for relief, so I
7 think she we deserves our accolades.

8 (Applause.)

9 MR. DONAHEY: Thank you. I know we
10 haven't been easy to follow. Thank you all,
11 and we will look forward to hearing from you
12 further, and I'm sure you'll look forward to
13 hearing from us.

14 MR. LEVEE: Thank you.

15 MR. ALI: Thank you very much.

16 (Whereupon, the hearing was
17 concluded at 6:35 p.m.)

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CERTIFICATE OF SHORTHAND REPORTER -- NOTARY PUBLIC

I, Laurie Bangart Donovan,
Registered Professional Reporter, Certified
Realtime Reporter, the officer before whom
the foregoing proceedings were taken, do
hereby certify that the foregoing transcript
is a true and correct record of the
proceedings; that said proceedings were taken
by me stenographically and thereafter reduced
to typewriting under my supervision; and that
I am neither counsel for, related to, nor
employed by any of the parties to this case
and have no interest, financial or otherwise,
in its outcome.

IN WITNESS WHEREOF, I have hereunto
set my hand and affixed my notarial seal this
7th day of April, 2016.

My commission expires: March 14th, 2021

LAURIE BANGART DONOVAN
NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

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