

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR CASE NO. 01-14-0001-5004

Dot Registry, LLC,)
)
Claimant,)
)
v.)
)
Internet Corporation for Assigned Names and Numbers,)
)
Respondent.)

CLAIMANT'S POST-HEARING BRIEF

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I. INTRODUCTION

1. Claimant Dot Registry, LLC (“Dot Registry”) hereby addresses the questions posed by the Panel at the merits hearing in the above-referenced Independent Review Process (“IRP”) against Respondent Internet Corporation for Assigned Names and Numbers (“ICANN”). This IRP arises out of the harm Dot Registry has suffered as a result of the ICANN Board of Directors’ (“Board”) and the Board Governance Committee’s (“BGC”) actions, inaction, and decisions that violated ICANN’s Articles of Incorporation (“Articles”), Bylaws, the New gTLD Applicant Guidebook (“AGB”), and principles of international law in relation to Dot Registry’s applications for three generic Top-Level Domains (“gTLDs”): .INC, .LLC, and .LLP. It also arises from harm suffered as a result of the Economist Intelligence Unit’s (“EIU”) improper application (together with ICANN staff) of the AGB criteria for community priority applications in violation of established ICANN policies.¹

2. The Panel requested that Dot Registry and ICANN file post-hearing briefs on two issues. First, the Panel asked the parties to address the applicability of California law to ICANN: “What does the Business Judgment rule as applied in California to corporations provide and is it applicable to corporations like ICANN?”² Second, the Panel instructed that the parties provide supplemental briefing on the following:

Counsel for Dot Registry mentioned in the hearing a document in the contracting process (referred to as an “expression of interest”) completed by prospective third party providers to ICANN in these circumstances, and that it may have contained a statement by the prospective third party provider about compliance with ICANN Bylaws, Articles of Incorporation and/or policies and procedures. Please provide that document, if it exists, and explain what it says with respect to that subject.³

3. In this post-hearing brief, Dot Registry first will address the contents of ICANN’s “Expressions of Interest” document, which makes clear that the Economist Intelligence Unit is bound by ICANN’s principles and policies. Dot Registry will then show that neither the business judgment rule under California law nor any other basis for deference applies to the actions, inaction, and decisions that the Board, including the BGC, made with respect to Dot Registry’s applications.

¹ The errors are demonstrated, *inter alia*, by the Flynn expert report submitted by Dot Registry. Dot Registry emphasizes that ICANN has posted the incorrect version of the Flynn expert report on its IRP portal, a version which lacks the annexes detailing the extensive reference materials that Mr. Flynn considered in preparing the report. No reliance should be placed on the version that ICANN has erroneously chosen to post but instead the final version that Dot Registry submitted. *See* Expert Report of Michael A. Flynn (13 July 2015) (contained in the bundle of documents submitted for the hearing).

² Email from Chairman Donahey to the Parties (31 Mar. 2016).

³ *Id.*

II. THE EXPRESSION OF INTEREST DEMONSTRATES THAT THE EIU IS BOUND BY ICANN'S PRINCIPLES AND POLICIES.

4. Pursuant to the Panel's directions, Dot Registry hereby encloses ICANN's Call for Expressions of Interest ("EOI"), dated 31 July 2009, which explains the conditions for appointment as a new gTLD Evaluation Panel.⁴ The EOI was a public tender document informing potential providers about the background to this role as well as setting out the requisite skills and approach that they would be required to adopt.

5. The EOI makes it clear that ICANN intended selected providers, such as the EIU, to be bound by the same standards that bind ICANN, as set out in ICANN's governance documents. The EOI specifically directs that "[t]he evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoid potential conflicts of interest, and non-discrimination."⁵ These are the same principles re-iterated in virtually identical language that are found in the Bylaws and that comprise ICANN's core values.⁶ The EOI further specifies that the provider must (1) "exercis[e] consistent and somewhat subjective judgment in making its evaluations, (the Guidebook criteria seeks to make the judgment as objective as possible)," (2) "reach[] conclusions that are compelling and defensible," and (3) "document[] the way in which it has done so in each case."⁷ Further evidencing the applicability of these standards, each provider was required to present "a statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" as a pre-requisite for selection.⁸

6. To date, the EIU continues to affirm these commitments in an additional document, the Community Priority Evaluation Panel and its Processes ("CPE Panel and Processes"), which is publicly posted on ICANN's website.⁹ It continues, with one significant addition, to mirror the language in the Bylaws and the EOI: "The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. *Consistency of approach in scoring applications is of particular importance.*"¹⁰ Notwithstanding this acknowledgement of an obligation to ensure consistency of approach in scoring applications, ICANN has put forward

⁴ ICANN Call for Expressions of Interest (31 July 2009) [Ex. C-074].

⁵ *Id.*, p. 5.

⁶ ICANN Bylaws Art. I, §2 (8), Art. II, §3, Art.III, § 8 [Ex. C-001].

⁷ ICANN Call for Expressions of Interest (31 July 2009), p.5 [Ex. C-074].

⁸ *Id.*, p.6.

⁹ See Community Priority Evaluation Panel and its Processes (7 Aug. 2014) [Ex. C-016]; See also CPE Page Menu, available at <https://newgtlds.icann.org/en/applicants/cpe> [Ex. C-075].

¹⁰ ICANN Call for Expressions of Interest (31 July 2009), p. 1 [Ex. C-074] (emphasis added).

no evidence in these proceedings that the EIU or ICANN made any effort to ensure consistency in the application of the AGB criteria and protect against the disparate treatment of Dot Registry's applications.

7. Taken together, these two documents reflect the settled understanding of ICANN, the EIU, and applicants that the principles and standards set out in the Articles, Bylaws, AGB and international law would apply to providers of application evaluation services. Dot Registry was entitled to rely upon ICANN's promises to act in accordance with these core values, and the EIU agreed to be bound by them as the Community Priority Evaluation Provider. ICANN and the EIU have failed to uphold these core values in violation of Dot Registry's rights and legitimate expectations.¹¹

8. The *Despegar* panel reached consistent conclusions. That panel had to confront ICANN's concession that "the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency" and that "ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications."¹² Although the *Despegar* panel accepted without reflection ICANN's assertion that the core values did not apply to the EIU,¹³ there is no indication that the Panel reviewed or analysed the two documents considered here, the Call for Expressions of Interest and the Community Priority Evaluation Panel and its Processes.¹⁴ Instead, the *Despegar* panel concluded that it "failed to see why the EIU is not mandated to apply ICANN's core values in making its determinations" and that "ICANN's Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU."¹⁵ ICANN's Board has accepted this recommendation, providing vague assurances that ICANN's Board will seek to ensure applicability of the core values.¹⁶

¹¹ Additional Written Submission of Dot Registry, LLC (13 July 2015), ¶¶ 21-26.

¹² *Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC v. ICANN v. Little Birch, LLC and Minds + Machines Group Limited*, ICDR Case No. 01-15-0002-8061, Final Declaration (11 Feb. 2016), ¶ 146 [Ex. R-10].

¹³ *Id.*, ¶ 60, 70. ICANN has not produced or made public the transcript of the hearing. See *Little Birch LLC and Minds + Machines Group Limited v. ICANN (.ECO) & Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC v. ICANN (.HOTEL)*, available at <https://www.icann.org/resources/pages/various-v-icann-eco-hotel-2015-09-02-en>.

¹⁴ See generally *Despegar*, ICDR Case No. 01-15-0002-8061, Final Declaration (11 Feb. 2016) [Ex. R-10].

¹⁵ *Id.*, ¶ 150.

¹⁶ Approved Board Resolutions | Regular Meeting of the ICANN Board (10 Mar. 2016) pp.14-18 at 17 [Ex. C-076].

III. THE PANEL IS NOT REQUIRED TO DEFER TO THE ACTIONS, INACTION, AND DECISIONS OF ICANN’S BOARD OF DIRECTORS.

9. Neither the business judgment rule nor any other rule of deference shields ICANN in an IRP proceeding from *de novo* review of its decisions regarding Dot Registry’s CPE applications. The business judgment rule, as applied in California, protects corporate directors from complaints by shareholders and other specifically defined parties via a limited presumption that certain decisions “are made in good faith” and “based upon sound and informed business judgment.”¹⁷ This deference, which ICANN has effectively waived in its Articles and Bylaws, does not apply to claims against a corporate board by third parties. However, even if the business judgment rule otherwise applied to the Board, the Board is entitled to no deference because of its failure to conduct reasonable inquiry into the CPE process when Dot Registry submitted its Reconsideration Requests.

A. Neither the Business Judgment Rule Nor Any Other Deferential Standard of Review Applies to the Board’s Actions in Relation to Dot Registry.

10. The Panel must employ a *de novo* standard of review when evaluating the Board’s decisions, granting the Board no deference. Prior IRP panels have consistently held that the standard is a “*de novo*, objective, and independent one, which does not require any presumption of correctness”¹⁸ and ICANN’s Bylaws grant their declarations precedential value.¹⁹ Most notably, the Panel in *ICM v. ICANN* first rejected a deferential standard of review specifically in relation to the business judgment rule.²⁰ The Panel held that, in an IRP proceeding, the

¹⁷ *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 715 (1996) [Ex. CLA-144]. The directors of nonprofit corporations, such as ICANN, are also protected by the business judgment rule. *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d at 490, 513-14 (1986) [Ex. CLA-145]; *Scheenstra v. California Dairies, Inc.*, 213 Cal. App. 4th at 370, 386, 386 n. 11 (2013) [Ex. CLA-146].

¹⁸ *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, Final Declaration (9 July 2015), ¶ 62-77 [Ex. CLA-009]. *Booking.com v. ICANN* asserted that an “IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.” *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), ¶ 111 [Ex. CLA-008]. Consistent with this decision, the *DotConnectAfrica Trust v. ICANN* panel enforced a “*de novo*, objective and independent” standard of review. *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, Final Declaration (9 July 2015), ¶ 76 [Ex. CLA-009]. The *Vistaprint v. ICANN* reaffirmed the *de novo* standard of review, holding that “in this IRP the ICANN Board’s conduct is to be reviewed and appraised by this Panel objectively and independently, without any presumption of correctness.” *Vistaprint v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration (9 Oct. 2015), ¶ 125-26, 125 n. 182 [Ex. R-8].

¹⁹ ICANN Bylaws, Art. IV § 3(21) [Ex. C-001] (“The declarations of the IRP Panel ... are final and have precedential value.”).

²⁰ *ICM Registry LLC v. ICANN*, ICDR Case No. 20 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), ¶ 136 [Ex. CLA-028].

Board “is not entitled to deference whether by application of the ‘business judgment’ rule or otherwise”²¹
Subsequent IRP panels have chosen not to revisit this settled issue of California law.²²

11. California law does not accord ICANN’s Board deference through the business judgment rule. California’s business judgment rule consists of two components, one statutory and one common law, neither of which applies to the Board’s actions, inaction, and decisions in regards to Dot Registry’s three gTLD applications.

12. The first component, codified in California’s Corporations Code, protects directors from personal liability for their decisions.²³ Section 5231 of the Code, governing non-profit public benefit corporations such as ICANN, states:

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. . . .

(c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.²⁴

California courts have thus held that, where a proceeding does not involve allegations of personal liability against individual Board directors, the statutory aspect of the business judgment rule cannot be applied.²⁵ In this proceeding, Dot Registry seeks, among other relief, a final declaration that the Board breached the Articles, Bylaws, and AGB, a declaration that the applications satisfy the CPE criteria, and an award for costs, legal fees,

²¹ *Id.*, ¶ 152.

²² See *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015) ¶¶111-3 [Ex. CLA-008]; *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, Final Declaration (9 July 2015), ¶70 [Ex. CLA-009]; *Vistaprint v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration (9 Oct. 2015), ¶¶125-6 [Ex. R-8].

²³ *Scheenstra*, 213 Cal. App. 4th at 386-87 [Ex. CLA-146]. California’s Corporations Code, section 309 codified the business judgment rule and applies it to directors of a corporation. The same protection applies to directors of nonprofit public benefit corporations, such as ICANN, and nonprofit mutual benefit corporations. Compare Cal. Corp. Code § 309 [Ex. CLA-125] with Cal. Corp. Code. § 5231 [Ex. CLA-126] (concerning nonprofit public benefit corporations) and Cal. Corp. Code § 7231 [Ex. CLA-147] (concerning nonprofit mutual benefit corporations). Given that all three sections provide the same protections to entities via the business judgment rule and contain similar language, opinions that discuss only one of the three Code sections are equally applicable to the other sections. Compare Cal. Corp. Code § 309 [Ex. CLA-125] with Cal. Corp. Code. § 5231 [Ex. CLA-126] and Cal. Corp. Code § 7231 [Ex. CLA-147].

²⁴ Cal. Corp. Code § 5231(a), (c) [Ex. CLA-126].

²⁵ See *Scheenstra*, 213 Cal. App. 4th at 386-87 [Ex. CLA-146]. (“This lawsuit does not attempt to impose personal liability on the directors[.] . . . Therefore, the first part of the business judgment rule has no application in this case.”).

and expenses.²⁶ Dot Registry’s claims are therefore directed against the Board as a whole, and not a specific Board director.²⁷ The statutory business judgment rule does not apply to such claims.²⁸

13. The second, common law, component of the business judgment rule also does not apply to ICANN in this IRP. California common law recognizes a general “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”²⁹ However, this rule does not protect the Board’s blind acceptance of the EIU’s actions. The common-law component of the business judgment rule only applies to situations involving parties owed a fiduciary duty by the Board, such as shareholders or creditors of a corporation, and not to third parties like Dot Registry.³⁰ The court in *Frances T. v. Vill. Green Owners Assn.* “reject[ed] the defendant directors’ assertion that a director’s liability to *third persons* is controlled by the statutory duty of care” because the “statutory standard of care, referred to as the ‘business judgment rule,’ applies to parties ... to whom the directors owe a fiduciary obligation.”³¹ Hence, the business judgment rule does not protect the Board from liability for the harm it caused Dot Registry, a third party that has no special relationship with ICANN other than the mistreatment it has suffered from ICANN.

14. Moreover, California law also recognizes a judicial deference rule for community associations.³² This rule requires courts to defer in general to a community association board’s authority, and is therefore analogous to the business judgment rule.³³ However, a court’s deference to a community association’s board

²⁶ See *infra* ¶ 20.

²⁷ See *supra* ¶¶ 20-21.

²⁸ See *Scheenstra*, 213 Cal. App. 4th at 386-87 [Ex. CLA-146].

²⁹ *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th at 1020, 1045 (2009) [Ex. CLA-148] (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)) [Ex. CLA-149]. The codified component of the business judgment rule is derived from the common law as well. *Id.* (“[T]he common law [business judgment] rule ‘has two components ... [o]nly the first component is embodied in Corporations Code section 309.’” (citing *Lee*, 50 Cal. App. 4th at 714)).

³⁰ *Frances*, 42 Cal. 3d at 507, 507 n. 15 [Ex. CLA-145] (“[W]e must reject the defendant directors’ assertion that a director’s liability to *third persons* is controlled by the statutory duty of care[.] ... This statutory standard of care, referred to as the ‘business judgment rule,’ applies to parties ... to whom the directors owe a fiduciary obligation.”), 507 n. 15 (disputing “the dissent’s unique notion that the business judgment rule defines both the fiduciary duty directors owe to their shareholders *and* the standard of care they owe to third parties”); see also *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th at 1368, 1387 (2000) [Ex. CLA-150] (noting the California Supreme Court’s analysis of the business judgment rule asserts that “sections 7231 and 309 [of the Corporations Code] concerns only the director’s fiduciary duty to the corporation, and not to outsiders”).

³¹ *Frances*, 42 Cal. 3d at 507 [Ex. CLA-145].

³² *Ritter & Ritter, Inc. v. Churchill Condominium Ass’n*, 166 Cal. App. 4th at 103, 122 (2008) [Ex. CLA-151]. The judicial deference rule applies only because the business judgment rule does not apply to community associations. *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.*, 21 Cal. 4th at 249, 257-65 (1999) [CLA-152].

³³ See *Scheenstra*, 213 Cal. App. 4th at 385-86 [CLA-146].

under the rule of judicial deference is eliminated when “the association’s governing documents” provide for more intensive review.³⁴ This rule does not apply to ICANN. ICANN is not a community association but a non-profit public benefit corporation. Moreover, ICANN has limited any deference through its Bylaws. Under the Bylaws, the IRP Panel must determine whether “an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”³⁵ Mr. LeVee, on behalf of ICANN, affirmed this during the *DotConnectAfricaTrust v. ICANN* hearing on the merits.³⁶ Despite this standard, the Board did not act consistently with the Bylaws or the Articles in regards to Dot Registry’s applications.

B. Alternatively, even if the Business Judgment Rule Applies to the Board, It Would Still Not Protect the Board’s Actions, Inaction, and Decisions.

15. In the alternative, even if the business judgment rule would otherwise apply to ICANN in this proceeding (which it does not), the Board still would not receive its protection. The business judgment rule does not protect actions performed “without reasonable inquiry”³⁷ or where the directors failed “to exercise proper care, skill and diligence.”³⁸ The Board acted without reasonable inquiry and without proper care, skill, and diligence when deciding on Dot Registry’s applications.

16. While the ICANN Board was permitted to delegate the CPE Process to ICANN Staff and the EIU, it was also required to conduct a reasonable inquiry into the results of that process when Dot Registry raised it in the Reconsideration Requests.³⁹ Dot Registry raised in its Reconsideration Requests both substantial and

³⁴ *Ritter & Ritter, Inc. v. Churchill Condominium Ass’n*, 166 Cal. App. 4th at 122 (“The *Lamden* court also noted that the rule of judicial deference to board decision-making can be limited in certain circumstances; (e.g., by the association’s governing documents)”) [CLA-151].

³⁵ ICANN Bylaws, Art. IV § 3(11)(c) [Ex. C-001]. The “focus questions” contained in Art. IV of the Bylaws do not affect the limitations placed on the Board’s discretion; the questions do not exclude “other potential questions that might arise in a particular case ... In this regard, the ICANN Board’s discretion is limited by the articles and By-laws, and it is against the provisions of these instruments that the Board’s conduct must be evaluated.” *Vistaprint*, Final Declaration (9 Oct. 2015), ¶ 123 [Ex. R-8].

³⁶ *DotConnectAfricaTrust v. ICANN*, Hearing Transcript, 598:8- 598:11 (23 May 2015) (“PRESIDENT BARIN: So do you agree that the Panel can decide whether there 10 was an action or inaction? MR. LEVEE: Oh, absolutely.”) [Ex. CLA-153].

³⁷ *Lee*, 50 Cal. App. 4th at 715 [Ex. CLA-144]; *Everest Inv’rs 8 v. McNeil Partners*, 114 Cal. App. 4th at 411, 430 (2003) [Ex. CLA-154] (“The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.”); see Cal. Corp. Code §§ 309(a) [CLA-125]; 5231(a) [CLA-126]; 7231(a) [Ex. CLA-147].

³⁸ *Burt v. Irvine Co.*, 237 Cal. App. 2d at 828, 852-53 (1965) [Ex. CLA-155]; see *Galliard v. Natomas Co.*, 208 Cal. App. 3d at 1250, 1263-64 (1989) [Ex. CLA-156]; *Berg & Berg Enterprises*, 178 Cal. App. 4th at 1047 [Ex. CLA-148].

³⁹ *Id.*; Cal. Corp. Code §5231(b) [Ex. CLA-126] (permitting directors of a non-profit public benefit corporations to rely on information from a committee as long as “the director acts in good faith, after reasonable inquiry when the need therefor is indicated”).

procedural errors with the CPEs for .INC, .LLC, and .LLP. Although on notice of the alleged inconsistencies with applicable policies and procedures, the Board did not conduct any reasonable investigation into the matter let alone exercise reasonable care, skill, and diligence.⁴⁰

17. ICANN’s document production index and privilege log are conclusive on this issue. The privilege log reveals that no BGC member inquired about or otherwise participated in evaluating the Reconsideration Requests.⁴¹ In fact, the privilege log does not contain a single entry, or a single pertinent produced document, that bears the name of a BGC member.⁴² The document production of approximately six hundred pages similarly shows not one document that considers the substance of the EIU’s recommendation in order to decide the Reconsideration Requests. Nor does it contain a single inquiry from a BGC member about Dot Registry’s applications.

18. Even outside of the BGC, almost no effort was undertaken to investigate the allegations in Dot Registry’s Reconsideration Requests. The privilege log records only a solitary email chain regarding the requests, not sent by BGC or Board members, and two requests from ICANN staff to the EIU: (1) to confirm the EIU did not know the European Commission had retracted its opposition and (2) to ask who were the supposed EIU panelists for the CPEs.⁴³ This lack of diligence led the BGC to uncritically accept the Determination on the Reconsideration Request, which was almost certainly drafted by ICANN staff and subject to *pro forma* BGC approval.

* * *

19. In conclusion, the ICANN Board enjoys no protection from the business judgment rule under California law. A corporate board does not enjoy special protection from responsibility for harm it causes third

⁴⁰ See *Berg & Berg Enterprises*, 178 Cal. App. 4th at 1047 [Ex. CLA-148] (asserting that the business judgment rule will not protect directors for an “abdication of duty; the failure to have exercised judgment with reasonable care, skill, and diligence; or even an unreasonable failure to have investigated”). The issues raised in Dot Registry’s Reconsideration Requests provided sufficient facts to call for an investigation. *Lee*, 50 Cal. App. 4th at 715 [Ex. CLA-144] (noting that applying the “reasonable inquiry” exception to the business judgment rule requires “allegations of facts which would reasonably call for such an investigation” or “which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment”).

⁴¹ See ICANN’s Privilege Log [Ex. C-077].

⁴² See *id.*

⁴³ *Id.*, pp. 1-2.

parties simply because it is a corporation. ICANN's Board in particular merits no special treatment. It utterly failed in its obligation to make reasonable inquiry and to employ proper care, skill, and diligence.

IV. REQUEST FOR RELIEF

20. Dot Registry requests a final and binding declaration—
- That the Board breached its Articles, its Bylaws and the AGB, including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
 - That ICANN and the EIU breached the Articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for .INC, .LLC, and .LLP and by treating Dot Registry's applications discriminatorily;
 - That Dot Registry's CPE applications for the .INC, .LLC, and .LLP strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
 - Recommending that the Board issue a resolution confirming the foregoing;
 - Awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
 - Awarding such other relief as the Panel may find appropriate in the circumstances.

21. Dot Registry does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper. As Dot Registry considers it is the Panel's role to independently resolve this dispute, it affirmatively requests that the Panel *not recommend* a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry's CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.

Respectfully submitted,



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