In The Matter Of:

DONUTS INC.

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

INDEPENDENT REVIEW PROCESS HEARING

October 8, 2015
INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DONUTS INC., )

Claimant, ) ICDR Case No.

and ) 01-14-0001-6263

INTERNET CORPORATION FOR )

ASSIGNED NAMES AND NUMBERS, )

Respondent. ) (Pages 1-153)

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REPORTER'S TRANSCRIPT OF

INDEPENDENT REVIEW PROCESS HEARING

THURSDAY, OCTOBER 8, 2015

9:44 A.M.

REPORTED BY:

SUSAN NELSON

C.S.R. No. 3202

THE TRIBUNAL

THE ARBITRATOR CHAIR:

PEPPERDINE UNIVERSITY SCHOOL OF LAW
JACK J. COE, JR., PROFESSOR OF LAW

THE ARBITRATORS:

BOESCH LAW GROUP
PHILIP W. BOESCH, JR., ESQ.

WHITE & CASE LLP
RAYNER M. HAMILTON, ESQ.
APPEARANCES OF COUNSEL:

FOR CLAIMANT:

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    DON C. MOODY, J.D., M.S.
    KHURRAM A. NIZAMI, ESQ.

FOR RESPONDENT:

JONES DAY
BY: JEFFREY A. LEVEE, ESQ.
    CHARLOTTE S. WASSERSTEIN, ESQ.

ALSO APPEARING:

ELIZABETH LE, SENIOR COUNSEL, ICANN
CRYSTAL ONDO, DIRECTOR, LEGAL AFFAIRS AND COMPLIANCE, DONUTS
AMY STATHOS, DEPUTY GENERAL COUNSEL, ICANN
(Via Telephone)
ARBITRATOR COE: Ladies and gentlemen, allow me to call this hearing to order. May I ask as a reminder to myself that we have our cell phones on vibrate mode. That we briefly introduce ourselves for the record, including those people who are listening to us, might weigh in.

MR. GENGA: Since, Mr. Coe, you're looking at me, I'll start.

ARBITRATOR COE: Yes.

MR. GENGA: I'm John Genga from Genga & Associates representing the claimant Donuts.

MS. ONDO: Crystal Ondo, director of legal affairs of Donuts.

MR. MOODY: Don Moody. I'm representing on behalf of Donuts along with Mr. Genga.

MR. NIZAMI: Khurram Nizami. We're with Mr. Genga representing Donuts.

MS. WASSERSTEIN: Charlotte Wasserstein of Jones Day representing ICANN.

MR. LEVEE: Jeff LeVee of Jones Day also representing ICANN.
MS. LE: Elizabeth Le, senior counsel for ICANN.

MR. LEVEE: And what I do not know is whether Amy Stathos is on the phone and whether we'd be able to hear her.

MS. STATHOS: Yes, Amy Stathos is on the line.

MR. LEVEE: Okay.

ARBITRATOR COE: Thank you, Amy.

MR. LEVEE: Amy is the deputy general counsel of ICANN and was not able to join us, but was able to join us for some or all of the session today, depending on how long it runs.

ARBITRATOR COE: Okay. And I think you all know the tribunal.

MR. GENGA: We do.

ARBITRATOR COE: Are there any preliminary matters before we launch, ladies and gentlemen?

I think, according to our agreement, Mr. Genga, your team will go first for approximately an hour.

MR. GENGA: Yes, thank you.

ARBITRATOR COE: Can I just note, the PowerPoint in the print version, some of it's cut off --

MR. GENGA: Oh.
ARBITRATOR COE: -- in multiple slides.

There's also some merging. But some of the bottom end is cut off on some of it, so I don't know if it will be possible to, in due course, get a proper copy that would print. Maybe just send it to us PDF or something.

MR. GENGA: Sure.

MR. LEVEE: Actually, just as a housekeeping matter, I don't need an answer from you now, but we should address whether your slides and mine would be included on the record that gets posted on the ICANN Web site. We can do that after, but --

MR. GENGA: Sure.

MR. LEVEE: -- that's something that we can do and have done in the past.

MR. GENGA: Okay.

THE REPORTER: I'm going to ask everybody to keep their voice up, please, since everybody's -- this is a big room and we've got some construction in the background, I'd appreciate it. Thank you.

MR. GENGA: Thank you.

ARBITRATOR COE: At your pleasure.

MR. GENGA: Thank you.

Good morning, everybody. John Genga for Donuts. I -- just turn to the agenda page where you'll
see there's nothing written down there and I'll tell you what we're going to cover today.

First of all, I'm going to sort of start it and close it. Mr. Moody will take the meat of it in the middle, although I'm happy to chime in, and both of us will be happy to answer questions afterwards.

I'm not going to attempt to rehash what's already in the papers. You've got the large stacks of papers in front of you. You've probably read a lot of them. We took seriously the rule that you put everything up front in your papers and that's what we tried to do.

What I want to do today and what Mr. Moody's going to do today is really kind of highlight what we think are the key points, deal with some background so the panel has some context in which to understand more generally what's going on here because the panel may not have had the experience that we all have working in the ICANN context and with these types of matters.

So at any time, obviously, if the panel has any questions -- and there's no such thing as a bad question -- we're happy to answer and help out the panel.

So let's turn to the first slide, the next slide. So I just want to talk about ICANN and the
New gTLD Program generally.

ICANN is the Internet Corporation for Assigned Names and Numbers. They handle the domain name system on the Internet. They take all those crazy numbers that don't -- that people can't remember and have a technology where they can allow you to use -- type in names into your browser and find what you're looking for.

We're all familiar with .COM and .NET and .ORG and .BIZ, and recently they announced an expansion to essentially .ANYTHING. And we're here to talk about the new .ANYTHING world.

And the reason that that was done, one of the reasons, was to foster diversity and encourage competition in the domain name space. And to roll that out, there was a complicated -- not complicated, but certainly involved set of rules that were developed and procedures that were developed and applicants, such as my client Donuts, for new gTLDs, had to pay an application fee of $185,000 and have extensive back-end capabilities in place, so it was a significant investment for all new gTLD applicants.

And we'll get to, in a couple of slides, the new gTLD applicant guidebook, which was a set of rules that the applicants really -- like my client, really
relied upon in making their applications. But let's talk about how the New gTLD Program started.

Let's go to the next slide.

And I think it's important to understand that it's the ICANN board that has the ultimate authority over the New gTLD Program. You're going to hear a lot about board action or board inaction, and I think it's important to understand what the role of the board really is in the New gTLD Program.

It's expressed in the guidebook that the board does have the ultimate responsibility for the program. It has the authority at all times to consult with independent experts, including those experts that are designated to hear objections. It has the authority to individually consider applications. And really the appointment of the experts, including the experts that decide the new gTLD objections, it's only the board that has the power to appoint those experts or to authorize their appointment. And, in fact, it's expressed in the guidebook that the findings of objection panels will be considered an expert determination as understood under the bylaws. And that comes within the board's purview. And under the bylaws, expert recommendations are to be considered and evaluated by the board.
THE REPORTER: By?

MR. GENGA: By the board. Excuse me. Thank for -- I trailed off, yes.

Now, ICANN is a -- it's a California nonprofit public benefit corporation. It's no ordinary nonprofit. Certainly no ordinary corporation. It's a global entity obviously. It's organized to, according to the articles of incorporation, pursue the charitable and public purpose of promoting the global public interest in the operation and stability of the Internet.

So it does have a special mission, a public purpose, to protect the domain name system, operated for the public good. Prior IRP decisions -- and, of course, are recognized there. We've cited those decisions to the panel. The panel's probably had an opportunity to review them.

ICANN has for years operated under contract with the U.S. Department of Commerce, so there's been government oversight. There's also government involvement through an organization called the Governmental Advisory Committee, or the GAC. You'll hear a little bit about that.

But ICANN is transitioning away from government oversight to become an independent
organization. And as part of that transition, greater and greater concerns have been raised within ICANN, within the community, the Internet community, the domain name industry about ICANN's accountability, how important it is that ICANN be accountable to all of its constituents, all of its stakeholders, and to the public that uses the Internet. And ICANN has provided, in the context of the work it does and the decisions it makes that affect those who use the Internet, use the domain name system, has provided accountability mechanisms, but internal accountability mechanisms for review of its actions and inactions.

One is called the request for reconsideration. We talked about that in our papers. We described it a little bit. Donuts has engaged in those procedures, not specifically with respect to those domains that we're talking about today, but in related cases. And then we have the independent review process, which is what we're doing today.

The independent review process is a process -- if you turn to the next slide -- where a party affected by an action that it contends is inconsistent with the articles of incorporation or bylaws can seek review of those actions and have a panel, such as this panel, compare those contested actions with the articles or
the bylaws and make a determination as to whether the board has acted consistently or not with those provisions. And that's what we're here to do today.

And it's clear from the bylaws themselves Article IV, Section 3.11, that the panel reviews both board action and board inaction, and you'll be hearing a lot about that today and -- and the context within which we review those actions and inactions.

So we've cited to the panel in our papers some of the core values, some of the principles set forth in the bylaws that the board is obligated to observe and try to carry out to the best of its ability, and these are some of the things that we're going to be asking the panel to review in the context of what we contend are failures to act on behalf of the board.

Promoting a sustaining competitive environment, applying documented policies neutrally and fairly, not applying standards to -- so as to discriminate or single out one party over another, and otherwise carrying out activities according to the articles in conformity with relevant principles of international law and local law.

And I know the panel has some questions about the choice of law. ICANN's a California nonprofit. We -- applicants, when applying under the New gTLD
Program, expressly agree that their application forms a contract with ICANN. That contract we contend is governed by California law.

In terms of what is being -- other actions that are being reviewed here, which includes, not directly but indirectly, the objection proceedings as to which we contend there are irregularities by the board. Those took place in Paris. So we've talked about international principles of arbitration law. In particular, when we get to the .SPORTS arbitration, we're talking about conflicts relating to the disclosures and obligations of arbitrators.

ARBITRATOR COE: Can I just ask, is the contract that you enter into via the application --

MR. GENGA: Yes.

ARBITRATOR COE: -- does it expressly incorporate the guidebook?

MR. GENGA: It's actually in the guidebook, and I do believe it does.

If you look in Module 6 of -- there's actually a form at the end, and I do believe that it does expressly incorporate the guidebook.

So -- and it's -- so -- and only the board has the power to contract. I mean, if you look at Article III of the bylaws, all powers of the
corporation are exercised through the board, including contracting. And so when Donuts or any other applicant applies for a new gTLD, they are obviously taking on a number of obligations. They're agreeing to be bound by the guidebook, and so is ICANN, and so -- through the board.

So I've talked about the core values. And then I want to talk about the scope of review because that's an important part of what the panel has to understand in terms of what it has the authority to do, what the scope of its review is. And there are specific items set forth in Article IV, Section 3.4 of the bylaws that specify what it is the board is reviewing -- or the panel is reviewing.

Did the board act without conflict of interest? Did it exercise due diligence in making sure it had all the information it needed? Did the board exercise independent judgment believed to be in the best interest of the company?

Now, there's been discussions since the first IRPs back -- I don't even know how long ago. Mr. LeVee was probably actually involved in that. I was not -- as to what the scope of review really means.

Is it a business judgment rule? Is it as long as ICANN acts in good -- if the board acts in good
faith or -- or refrains from acting in good faith, is that sufficient? But we've had guidance on that question from other independent review panels. And it's expressed in the guidebook, by the way -- not in the guidebook, but in the bylaws that decisions of prior independent review panels have precedential value on subsequent panels.

And in the .AFRICA case, it said clearly in its most recent decision on page 22 that the standard of review is a de novo standard. It's an objective and independent standard that does not presume any correctness, it does not act -- does not ask about, did ICANN act in good faith? It asks whether, objectively viewed, did ICANN act or were its failures to act consistent or not, in the independent judgment of the panel, with the articles and bylaws and other governing documents of ICANN.

So let's talk about what we'll show you specifically today.

First of all, we're talking about -- excuse me. We're talking about two cases, if you will, and we've -- and that accounts for a lot of the bulk in the binders, which I have to apologize, but we have a situation where we're not directly reviewing those decisions per se, but I think it's important that the
panel understand what happened in those cases so the panel has the complete record of those cases. May never need to consider those, that information, but I think we would be remiss if we hadn't included it. But what -- the consequences of these objection decisions and what we contend to be the board's failure to properly act upon them is what this panel is reviewing.

Donuts had applied for a number of .ANYTHING domains, including .SPORTS, .RUGBY, and .SKI, which was part of this case, but is no longer part of this case because that one has settled.

Those cases involved -- those applications resulted in objections -- a number of Donuts's applications resulted in objections. And the objection process is one of the processes that ICANN established as a means of regulating or weeding out issues that people might have with different applications for various of these new .ANYTHING domains.

There are a number of types of objections, and Mr. Moody will talk about that a little further, legal rights objections, string confusion objections. Here we're talking about community objections. And the community objections that were brought in these cases, one was brought in the .SPORTS case by a company called SportAccord, which is also an applicant for the .SPORT
domain, and the other was brought by what was then called the International Rugby Board, now called World Rugby, which is a competing applicant for the .RUGBY domain.

And we'll get specifically, and Mr. Moody will get specifically to some of the things we'll be asking this panel to review, but I'm going to just highlight that what we intend to show today is we're dealing with both a unique situation in the case of SPORTS and not that unique a situation in the case of the two domains more generally.

The decision in SPORTS we contend resulted from a conflict of interest in the arbitrator. That conflict of interest or that -- or those disclosures that should have been made is something that the ICANN board was aware of and it consciously chose not to act in that situation, and we contend that that violated policies about taking decisions without conflict of interest.

We contend that it singled out Donuts for disparate treatment. We contend that the decision that was reached in that case reflects the bias of the arbitrator. All of those things we believe should have been addressed by the board.

The non-unique situation, we have two domains
that have objection standards that need to be applied. There are other situations that ICANN has set up where it set up standards for evaluation of domain applications where they have established training protocols and standards that those applying those standards understood.

We contend that, unlike in those situations, ICANN failed to act in this case in terms of training properly those who would be making decisions so as to ensure that the decisions would be uniformly applied. The written standards would be understood and applied properly.

ARBITRATOR COE: Can I just interrupt?

MR. GENGA: Sure.

ARBITRATOR COE: Do any of those apply to the grounds -- obviously not community objections, but the others? Is that where the trainings come in? Or is it --

MR. GENGA: Yeah.

ARBITRATOR COE: -- with respect to other things?

MR. GENGA: No. I think the training comes in with respect to making sure that documented policies are applied uniformly and fairly, things like that, that are in the bylaws. So we're talking about --
ARBITRATOR COE: But there have been specific training programs?

MR. GENGA: There have not been, and that much is clear. And I'll actually get to that at the end when I wrap up, but you'll recall we had a number of document requests and we were asking for information such as that, and it became clear that there is no such responsive information 'cause it didn't happen.

And, in fact, ICANN has admitted -- in reviewing the entire first round of the New gTLD Program, they've come out with an extensive draft report, and one of the things that they've said is, yeah, we didn't review anything. We consciously in fact chose not to do that.

Now, I think Mr. LeVee will say that's how they chose to do it and they were entitled to do it that way. Our view is, you can't just set up the process and wash your hands of it, particularly when confronted with the types of violations that we feel have occurred here.

So, in our view, if the board fails to act where it has express authority to act, that contravenes the core organizational values of ICANN and that's what we're here to address.

So I'm going let Mr. Moody start into the
specifics of the matters under review.

Thank you.

MR. MOODY: Thanks, everyone. Good morning.

And definitely thanks to the panel and the colleagues for, you know, taking time out from a busy schedule. I know everybody is very, very busy, including ICANN which is getting ready for a big trip to Dublin.

Hopefully that my presentation will at least -- and I'll give a couple of small caveats in addition to what Mr. Genga said. I too am not going to try and rehash anything that is in the two unwieldy books that are in front of you. I'm simply going to try to summarize and maybe highlight a few important points on some, quite frankly, what are largely arcane topics that use a lot of acronyms, use a lot of very, you know, strange terms that us in the, quote, unquote, ICANN world or the domain name world, shall we say, are readily familiar with, but not everybody might be. So, you know, all questions you want to hear about but are afraid to ask, that's what we're here for.

I also, because -- this is another caveat that's just totally unique to my presentation. Because this matter, as Mr. Genga touched on, is about the underlying community objection, the original objection -- right? -- between Donuts and SportAccord,
Donuts and World Rugby, and then -- which has been settled -- Donuts versus the Federation Internationale Ski. That's not on your plate, but that was the original groupings that were involved.

Those are not -- the IRP is Donuts versus ICANN. And it is a question of what did the board do, what did the board not do, what duty did the board have to do anything? I -- admittedly, these items that I'm going over are a little bit more tangential and they're just for background, they're just for context, just so you can understand what we were talking about, what the -- whether this was -- any of this that I'm laying out was the board's problem or not is the more meta issue that we're talking about with the bylaws that Mr. Genga already touched on and will touch on in closing. Right? I'm just going to explain what the original dispute was.

And I'll definitely be brief about -- on all these topics because of their -- you know, they're not, you know, specific to the IRP. Now, every time I say that, I get up here talking I'm going to brief, I get encouraged from the FTC about false advertising, but I think it's when you're --

THE REPORTER: I'm sorry. You're turning your face away. You're getting very hard to hear.
MR. MOODY: Okay. No problem.

Anyways, there are basically three things that I'm going to cover on my topics.

First, what a community -- what a community objection was, and what I think is even more important, what it is not, the processes involved, explain a few of these tough terms.

We're also going to go into, just very briefly, a summary of an alleged ethics violation involving one of the panelists. I understand that the ethics violation is not alleged as against anyone in the board. It was a panelist. Right? But before we get into a question of whether that violation was, quote, unquote, ICANN's problem or not, we should at least know that there probably was a violation and we think there was. And I'm going to explain why.

Finally, I'll try to reconcile two cases that the panel I'm sure has seen, you know, over and over mentioned, two cases involving that have been the latest IRPs that have come out. We think that one is more factually similar than the other and to our situation and I'll explain why.

Obviously, ICANN disagrees and that's what I'll try to do is reconcile them, and then I'll turn it back over to Mr. Genga.
Okay. With respect to the community objections, before we even go into it, where did the standards from the community objection come from? They came from the applicant guidebook, from the AGB. And Professor Coe already asked if that was incorporated into the contract and we'll check on that issue for you.

This was grouped into modules. Okay? The guidebook had numerous aspects to it, both technical, legal, business strategy, lots of different things.

One Module in particular was Module 3. And this dealt with objections and dispute resolution. Okay? And Module 3, not to go too much into the -- the weeds of it, but it had a basically four or four and a half types of objections. Okay? You could raise a number of different grounds. You could raise a, quote, unquote, legal rights objection, which is a fancy way of saying trademark rights. I think that .SAMSUNG is I'm Samsung and he's not.

You could raise a limited public interest objection, which is we really don't think anybody having .NAZI or .FREEEBOLASAMPLES is a really good idea, so we're going to just have a minimum threshold.

String confusion, which the ICDR handled, which was basically a -- you know, sort of an orphan of
trademark law, borrowed some principles from trademark law just to say is one string kind of confusing with another. Right? Is it visually similar? Is it auditorily similar? Things of that nature. Related to trademark, but not trademark.

And then there was this -- there was two others. There was the community objection, which is a brand-new standard that had never been done before. It was made specifically for this process. And then a fifth process, which is -- which was not labeled under objections, but had many of the same characteristics and it was called "GAC advice." And you probably have seen the GAC mentioned several times in the .AFRICA case and that just stands for Government Advisory Committee.

And -- if you go to the next slide.

The difference between the objections and the GAC advice, they're all found in Module 3, dispute resolution. The difference is, one is private -- is like a private right of action by a private party and GAC advice is from a government. Right?

Okay. So, anyway, say you did --

ARBITRATOR COE: Is it -- I'm sorry,

Mr. Moody?

MR. MOODY: Oh, yes?
ARBITRATOR COE: Is it a government or group of governments?

MR. MOODY: It's a group of governments. And in the DCA case, for example -- we'll go into that a little bit more in a minute -- there was, for example, some allegations of a conflict of interest involving -- allegations involving a representative from the African Union, because it was about .AFRICA. Right? And they said, you know, this person was favoring his own interests, and whether that was true or not, that was the African side of things and it unfairly influenced the government committee.

This is admittedly another tangential topic, but I still do think that it is important just for context. Okay?

Resolving string contention and why -- and I'll tell why you this is important once we go through it. If -- for example, whether there's an objection involved or whether there's just two people that desire the same domain name -- right? -- and don't have some other, you know, claim to it. Right? If it's something fairly generic that -- a lot of people might want, you know, .TIRES. I mean, you might have Goodyear. You might have, you know, Firestone. You might have lots of people, you know, very interested in
that. Right? And if they walk right into a -- if they
try to walk in and say, well, you know, I'm Firestone,
I own the word "tires," Goodyear would say, um, no.
And if you tried monopolize that at the trademark
office, they'd laugh you out.

You can fight for these, you know, domains.
Right? You can -- number one, you can convince ICANN
that you are the best applicant. You're going to --
you know, you have better technical infrastructure.
You're more sound financially. You have better
management. You have better strategy of what you're
going to do with it. You're not just going to let it
sit there. And let's just be honest, you're the
highest bidder. And there was a whole process for
resolving string contention.

Now, "string," as Mr. Genga mentioned, is just
a fancy way for saying domain name. It is a string of
characters. Okay?

If you were in contention for a string, that
contention might be because you raised a formal
objection or the government weighed in with this
GAC advice. Those might be in contention. And it
might just be in contention because you're bidding
against them. It's an auction. Right? I say, you
know, I'm bidding a hundred bucks and Fred here is
going to bid 150. That's contention. Right? May not be legal contention, but it's contention. Okay?

Next slide.

This is kind of summarizing where I was just going. There's -- many of the strings auctions -- and this is key. Many of the string auctions, assuming that there was no objection, assuming maybe back to the tires example a moment ago. Right? If different people wanted "tires" -- right? -- and there was no, say, trademark issue, there was no community issue, or it is not .NAZI or anything of that nature, they might bid against one another. And many of the price tags have been in -- as you might imagine, if it's a good domain name, fairly short, they've been in seven and eight figures. Okay? They haven't been cheap.

So a success -- but before you even get to the auction part -- again, that could be contention without a legal mechanism, but it's still contention -- these objections, if you -- if you participate in the objection and you don't automatically just knock everybody else out, if, for example it's just an open-and-shut case, if some -- if, for example, Toyota -- .TOYOTA applied tried -- or Toyota applied -- tried to apply for .NISSAN -- right? -- if it wasn't just an open-and-shut case, if you had a successful
objection bid, you have a lot of leverage at auction for these seven- and eight-figure auctions. And not all of them have been that way. Some of them haven't been that high, but there have been a number of ones that have been very big. And you might want to think about your using an objection as a little bit of leverage.

Next slide.

Unfortunately, community objections out of all of them -- now, as I mentioned, there's several different types of objections. There were ones that are just classic trademark dispute. And I primarily come from a trademark and patent and IP background, so that's always near and dear to my heart.

If somebody walks in and, you know, if -- for example, you know, Rawlings or Adidas or somebody walks into the United States Patent and Trademark Office and says, "I am SPORTS, give me that word, no one can use it but me," they'd be laughed out. They'd be told to just jump off Santa Monica Pier.

So there were some people that even tried that, by the way. I mean, they tried legal rights objections, which are trademark law, while just taking principles of fair use and just throwing them in the Pacific Ocean and they didn't work, and they were
laughed out mostly by the ICDR.

The ICDR had a lot of string confusion
decisions that were dismissed and people thought that
they were just nonsense. There were some legit, some.
Not all -- didn't dismiss all of them.

Community, however, you -- presented a very
unique situation. It was a brand-new field that was
just, quite frankly, made up for this purpose. I'm not
going to say what the, quote, unquote, you know, intent
of the program was because that -- you know, I mean,
I'll let -- let ICANN mention that. That's much more,
you know, their purview. However, some of the
standards, some possible illustrations that have come
up in the guidebook that have been oft discussed of
what types of people were -- they were trying to help
protect or to isolate with these community objections
would be someone who is in a narrow group that is --
and whether they're disadvantaged or multimillionaires.
Right? I mean, you could have a local church down the
street that is -- is just, you know, three parishioners
and a -- and a pastor and then you could also have the
Church of Scientology, which is not poor. They are
both potential communities. Right? You can say I am a
Scientologist. We were all talking about Tom Cruise a
moment ago with Jack Reacher. Right? One of our
favorite Scientologists.

It was designed to protect, I think, my understanding, different groups that had a definable membership characteristic. Okay? You know, the Mormon Church, the Navajo Indian tribe, the Boy Scouts of America, you know, types things. And you could obviously -- now, in -- you know, just to step back, I mean, obviously, the Boy Scouts of America could always apply for .BOYSCOUTSOFAMERICA, and it's this big long, you know, unwieldy string, but the question would be in a community context whether they can apply for .SCOUT. Okay? That's a much tougher question. Because then the Girl Scouts come out and they say, wait a minute, what about us? We're Scouts. You know, what about -- you know, then there's I believe Scout -- Jeep had a Scout -- did they not? -- for many years, the four-wheel drive.

Okay. These were -- many of these community objections, there was -- because this was made up, there was virtually no precedential guidance. And because it had some similarities, it kind of smacked of trademark law, but without the, you know, annoying fair use, and these were often involving generic terms like "sports" and "rugby." They were very desirable and they could have -- they were an avenue that we think
was highly prone to abuse. Okay?

And that abuse is not only -- not just with respect to the alleged conflict of interest, which I'm about to get to, that's a whole separate case -- but abuse just in bringing, quote, unquote, frivolous objections that just have no basis on what should never have been brought.

Next slide.

Just very briefly, I won't even go into all this because the panel's probably already seen it. This was the landscape of what was filed against whom. The only thing to recall, SKI was settled. SPORTS and RUGBY, we're dealing with here.

There was another application for .SPORT -- singular, not plural -- by another applicant, Dot Sport Limited, a company -- related to a company called Famous Four.

The reason that we bring them up is not only the difference -- the similarities in strings, and not only because SportAccord objected to them as well, they were -- they objected to Dot Sport Limited. They also objected to us. Right? It's because they coincidentally had -- maybe not coincidentally. They had the same panelist that we allege had some conflicts, and they were able to -- I don't want to
say -- I don't want to say the word "remove," but the
ICC declined appointment of this panelist after it was
challenged by Dot Sport Limited.

ARBITRATOR COE: Counsel, are those reasoned
opinions, the challenge? When ICC makes a
determination not to proceed with a particular neutral
or -- do those produce reasoned opinions?

MR. MOODY: Well, I think that each one is
probably -- you know, I think that the amount of detail
varies as often as the cases come up.

In this case, the ICC and I -- and this is
purely from just me going back and forth with the
treatises. The ICC has been kind of known to just not
really say why they do things. They just kind of give
a summary, you know, we don't -- he's not here, Fred
is.

In this case, I don't think there was a lot of
exposition as to why. However, Mr. Taylor was
appointed or proposed to be appointed. He made a
disclosure. And I'll show you in a minute he didn't
disclose everything. Our colleagues -- I don't want to
say "colleague," but I mean a competing applicant at
Famous Four made a challenge and said look at all this
stuff we found. I mean, you know, there's -- you know,
he says -- you know, he knew one person at Ski and
nothing else, well, you know, I mean it doesn't take any Google search, I don't need Sherlock Holmes and a slide rule to see all this other stuff. And they brought it up, and the ICC said, okay, no, Jonathan Peter Taylor, we're going to have this guy instead.

ARBITRATOR COE: And you didn't do a similar Google search?

MR. MOODY: No. We looked, but, at the same time, we relied on his disclosure. Okay? We relied heavily on his disclosure. And we'll go into that in a minute. Okay?

ARBITRATOR COE: Sorry for the --

MR. MOODY: I mean, there's one thing -- if the panelist says I have no involvement with X -- right? -- I mean the burden is not on me to investigate. The burden is typically on a -- especially in a sole arbitrator context, the burden is on him to disclose. Right? And we'll go into that in a second.

Okay. Here we get into the ethics question. And, again, no one on the ICANN board is accused of -- in this case, of any ethics violation. The only reason I'm bringing it up is just so the panel can decide -- you know, the panel can understand or have some peace of mind that, look, whether this was the board's
problem or not, at least we're not talking about some
type of spoof story or some made-up thing. This
probably was an ethics violation. The only question is
what impact did that have on the board. Right? That's
the only reason I'm going into this analysis. And
we'll -- again, we'll be brief.

As the panel I'm sure is aware, ADR conflicts
is an extremely arcane and complex area of law. It is
venue specific. The ICDR may do things that the ICC
does not. It is location specific. We asked about
choice of law a moment ago. It is very fact specific
as in -- you know, each case really is -- you know,
there's a lot of judgment calls with respect to should
this have been disclosed? Should this have been a
conflict? You know, there's a lot of subjectivity.

We hired for that reason -- I by no means
would characterize myself as any kind of ADR ethics
expert. I'm not. So we hired one and we put a witness
statement in. And if you can see that, his name is
Dr. Arman Sarvarian. He's a very good one. He's from
the U.K., and he is one of the pioneers in -- a very
nice gentleman -- in ADR ethics. He's written a lot of
stuff. He's done a lot of stuff with the UN and
very -- very -- you know, very, very interesting view
of topics.
He pointed because of -- he cited as well, and he mentioned this in the witness statement. He cited that the ICC, as I mentioned a minute ago, isn't the most verbose when it comes to articulating standards for when someone should be disqualified, when someone should disclose, all these matters, they -- there's not a whole lot of guidance. And you can look at the ICC rules and there's not a whole lot there. I mean, there's just --

ARBITRATOR COE: As a factual matter, are those determinations made by the ICC secretariat or their court or --

MR. MOODY: This -- in this case, although this is a very unique -- I hesitate to start generalizing between all of the units of the ICC, 'cause recall this is the ICC center for expertise. This is their very, you know, technical, business-focused unit.

In this case, it was predominantly just our case manager looking at it. They really didn't tell us exactly who or what they did. They just -- you know, there was -- and you may see in the exhibits that we gave yesterday, with respect to Dot Sport Limited, the other competing applicant who had first raised the issue about, you know, this -- Mr. Taylor's potential
bias, ICANN just kind of communicated this to the ICC and then it just went in sort of a magic box and came out, and the next week they said, okay, well, here's -- you know, here's --

ARBITRATOR COE: So we don't know whether Mr. Taylor had a conversation with the ICC and voluntarily stepped down or they recommended it or --

MR. MOODY: Completely unknown. I didn't get much of any background. And we were trying to find a little bit more out, you know, through discovery, but, you know, there may not be anything there.

I mean, the ICC -- you know, certainly in fairness to ICANN, the ICC, as I said, you know, I -- when we were dealing with preparing this brief, you know, I spent several hours in the UCLA law library looking at these ar- -- you know, arbitration treatises and they all say the same thing. That the ICC, out of all the venues -- ICDR or, you know, some of the investment dispute providers -- again, they're just not the most verbose. They aren't. They just kind of say here it is and that's the way it is.

So we -- again, we pointed -- and this is not a new problem. So Dr. Sarvarian said yes, this happens all the time. And typically in these situations, a framework we find helpful is to bring up what is called
the International Bar Association guidelines, IBA
guidelines. And I'm sure the panel is familiar with
them.

Go to the next one.

They provide a framework for looking at some
of these ethical conflicts. Okay? And there's -- we
should differentiate -- and, again, I'm sure the panel
has already -- you know, knows this far better than I
do -- between a -- questions of disclosure, on the one
hand, and questions of should I as an arbitrator or
panelist, or whatever label we use, participate.
Right? Should I be involved in this case at all?
Okay.

On questions of disclosure, if I have
something in my background -- I know my background
better than the litigants or participants in this
arbitration -- should I disclose relationship X or
prior work history Y? Okay.

On questions of disclosure, at least according
to the IBA guidelines, there's a subjective test.
Arbitration's very heavily based on the parties'
consent, parties' expectations, you know. What do they
think about -- what do these parties think or will they
think about a potential relationship that I had or a
prior work appointment that I had. Okay?
When you get to questions of whether someone should withdraw or participate at all versus whether I should just tell them about it, because we always want to -- and I -- this is certainly my reading. We don't want to -- you know, these types of relationships, when you have good arbitrators, they're going to have relationships. And, number one, we don't want to run out of qualified arbitrators. We use a little bit more of an objective test to kind of limit things a little bit more. It's more of whether a reasonable person under -- a reasonable arbitrator under these circumstances would consider withdrawal appropriate or not participating, I should say, appropriate. Okay?

So we have for disclosure, subjective test, what do these parties -- what would these parties think of my involvement? Whether the conflict exists and should I not participate, that is an objective test. At least under the IBA guideline.

And, as I mentioned, the ADR panelists bear the burden, at least in disclosure, because, you know, they certainly know more about their work history than we do.

Go to the next slide.

Now, the IBA guidelines, as you may have seen, have this, you know, convenient red light, yellow
light, green light -- or should I say orange.

Technically, the yellow light at a stoplight is orange -- where it talks -- you can apply a sort of convenient color-coded situationed schema to every -- to not only questions of disclosure, but questions of participation and withdrawal or whether a conflict -- whether this is really a conflict or not.

And Dr. Sarvarian, you know, laid it out extremely well in his witness statement, you know, laid it out for me, which was very helpful.

If you look at -- if you had a situation, for example, like if I knew Mr. Smith in a -- you know, in an -- I just bumped into him at Ralphs one day, it is highly unlikely that anyone would ever see that as a conflict or material for any involvement at all. And what if it was ten years ago? It's old. It's ancient history. That's probably a green, both with respect to disclosure and green with respect to should I participate in this case? It's, who cares?

Orange, you're starting to get a little bit -- a little bit higher. There's perhaps I had -- I had some involvement with, you know, Mr. Smith's firm in the fact that maybe I represented them, maybe I did some consulting work for them, but it was seven years ago. It was a very small amount of money. It didn't
have anything to do with the facts at hand or even close. Right?

In many cases, you start to get a little bit more towards should I disclose? But probably I don't need to withdraw. I just -- I should let people know about it just to be thorough, but I probably -- most likely, I don't need to withdraw. Okay? That's when you get into orange.

Then you start getting into the red light situations. And the IBA guidelines even break out the red light into super red light and maybe just pink.

In a red waiveable situation, withdrawal is either mandatory or strongly encouraged, but you can at least offer the parties the opportunity to waive. If they -- I mean, if it really does not look good, if it looks like it should be a potential conflict and a lot of people would have questions, you can say here it is. This is out there. If you guys want me, know that I have this in my work history, period. And if the parties say fine, you're the most qualified person around, we really need you and we're willing to waive that, you can do that.

However, there's a few things that, disclosure or not, you just shouldn't be involved. You know, I mean, there are some situations, and we don't even need
to go into them, that -- you know, that there's no
disclosure. You just should withdraw. Right?

Next slide.

In this case, Dr. Sarvarian looked very
closely and he broke down all the -- there were various
things in -- and this is in your exhibits, by the
way -- various things that the panelist Mr. Taylor
disclosed but -- and then failed to disclose. Okay?

Recall that in the objection, or the
objections, there was SKI, which is now settled. There
was -- there's RUGBY, which is now at issue, and
there's SPORTS which is at issue. And all three of
those had three different parties behind them, although
they worked very closely in conjunction because
SportAccord, as you might have seen, is an umbrella
organization for umbrella organizations. Right? I
mean, so if you had -- for example, I don't know if
anybody's a basketball fan. If you had -- you know, if
you had what's called FIBA, the -- or FIFA if you're a
soccer fan, an organization for international sports
might have, you know, a body that helps organize some
activities. Right? They don't necessarily -- you
know, sometimes those bodies think that their role is a
little more expansive than it is, but all of those are
typically organized under the SportAccord umbrella.
And if they are Olympic sports for the Olympic Games, they're organized under the IOC -- okay? -- or that complex.

Dr. Sarvarian went through various things that Mr. Taylor disclosed and did not disclose. Okay? With respect to SKI, for example, he said I know one of the more prominent women at the FIS -- which was the ski association. I know her because I was on a working group with her once. Right? And it was a long time ago. I don't know anything else, but I've never done anything with all these others. And you can see the disclosure and what he did in your exhibits.

Well, there was actually a lot of representation, and within three years. Three years is kind of the magic number within the guidelines, the IBA guidelines. He was -- you know, Taylor was lead counsel for the International Tennis Federation who is an extremely prominent SportAccord member and whose president is -- SportAccord is broken down, as you might imagine, into summer sports and winter sports. I mean, they have, you know, basketball, baseball, everything on the summer sports side. Then they have skiing and the luge and everything like that on the winter side.

The lady that Mr. Taylor said I -- you know, I
know her from a working group in the past. She was president of the winter sports association. And Mr. Taylor's client, the ITF, the president of the International Tennis Federation, is the president of the summer sport association.

Well, Dr. Sarvarian -- I won't go into too much detail. You can look at witness statement -- breaks down all the different things. But bottom line, Dr. Sarvarian found not only -- at least with respect to a group of activities, not only was there a strong duty to disclose, but there was a duty on Mr. Taylor's part to either withdraw or, at minimum, for the ICC not to utilize this person, which, in the competing case, was the -- a challenge was basically successful.

I mean, now again, we don't know -- it wasn't articulated, as we mentioned ago, exactly why, but it doesn't -- again it doesn't take --

ARBITRATOR COE: So, just to be clear, some of these items, according to the expert, fell in the what you call the pink list?

MR. MOODY: Yes, and at least pink. They were ones that you -- I mean it's -- I mean --

ARBITRATOR COE: Well, the ultra red is --

MR. MOODY: The ultra red, I mean --

ARBITRATOR COE: -- a very small band. Right?
MR. MOODY: I don't -- I don't -- I will say this. If you read the -- if you read the declaration, is there any allegation in the declaration that Lefty and Guido showed up with a briefcase of money? No. But there were certainly some -- you know, this guy has represented a lot of SportAccord members and within three years as lead counsel in very important cases and just said, well, I don't have anything to do with SportAccord.

Well, that's like saying, if you're perhaps a football fan, you know, if it's the NFL, you have the Dallas Cowboys, the Oakland Raiders, the Los Angeles Rams, well, I've never done anything with the NFL. Well, yeah, you did it with the Cowboys and the Raiders and the Rams, you know, that's -- and, you know, it's -- there are lot of issues that they have in common. Okay? So that's really where we are, but I don't belabor that point.

Okay. So just very briefly, and I know I'm running short on time, so I will keep things really short with this one.

There's -- recall that there's two cases. In prior IRP decisions -- right? -- there's not a whole lot of jurisprudence, and I put that in quotes. There are three total decisions decided to date in history.
One of them involved, as you might have seen, the controversial, now launched XXX, adult-oriented domain, which got a lot of drama and kerfuffle back in the day, and I asked why if you can get one, but there was a lot of controversy associated with it at the time. There was an IRP back in the late 2000s, end of 2010. It has been almost universally agreed upon that a lot has happened since then.

There have been a lot of changes to ICANN and the bylaws and to other things that -- that case doesn't have a ton of precedential value. We've all -- you know, I think we can pretty much all agree on that. So we really are talking about a universe of two cases. Right? Two, at least now.

We have a case called Booking involving Booking.com, the Web site you might have heard of. And a case involving, as I mentioned a bit ago, the DCA case, which is DCA Trust versus ICANN. It involved, we'll just call it the .AFRICA decision because it's easier to remember. Right? It involved the proposed .AFRICA decision.

In Booking, we argued in our pleadings -- and, again, I can certainly, you know -- ICANN looks more at Booking than Africa. We think Africa is more factually similar. ICANN says that Booking is more factually
similar. And it's obviously up to the panel to decide which is more appropriate.

In Booking -- just a little small amount of background. Okay? There was a process -- the strings at issue were HOTELS and HOTEIS. And my Portuguese is horrible, so I don't even think that's right. But the dispute was not really -- or the process that was evaluated with an outside expert was not really an objection. Okay? And that was why I went into all this objection, you know, background before.

It was a -- it was an evaluation by some, you know, linguistics experts and subject matter experts to examine just the question of whether looking at these two strings, HOTELS and HOTEIS, that little lower-case L kind of looks like an "I" or however you would look at it visually, you know, is it similar? And then they would ask, you know, people who are Portuguese speakers, you know, would you know the difference? Right? And they asked, you know, some experts, subject matter experts, it wasn't a -- it was not really a quasi legal mechanism like community objection where it was factual determinations and judges sitting on a panel and things of that nature. This was just really more, I'm going to ask a linguist, you know, who speaks the language what does this look
1 like. Right?
2 And there was a process associated with that, and it was called "string similarity review." And that's just designed to make everything thirty times more confusing because you already have string confusion at the ICDR. So we just want to have more strings just to confuse everybody. But this was a very limited -- this was not an objection. This was not even -- in my view, even close to an objection. This is much more similar to what's called "CPE," community priority evaluation, and I definitely won't burden the panel with that.

Just know that in Booking, and I think this -- ICANN treats a lot of Booking in their pleadings -- you know, they treat -- you know, they go way into the facts and I think that really the main take-away of Booking -- I think it was not that analogous to our case -- was that in Booking, you had this expert evaluation. It was really more subject matter based. But the IRP panel, when looking at whether or not this finding -- right? -- by the expert panel was correct or incorrect or whether it -- whether it was incorrect or correct, is it ICANN's problem? Right? They were not unsympathetic to the underlying claim.

I mean, there was -- if you read Booking
pretty closely, they say, yeah, we don't think this job was done very well. However, there was an allegation and it was just, you know, more of an admission than anything else, that when they asked, you know, counsel or a witness, I don't remember exactly who it was, what are you really disputing here? Are you disputing the -- are you disputing the processes in the guidebook? You're trying to say that the guidebook was just not followed? And they said, yeah, that's what we're saying.

And they said, well, okay, but the guidebook came out like three years ago. And it's been -- a lot's been -- happened for that and that's pretty old. And they said, well, yeah, yeah, yeah, but, you know, there's -- there's a lot of reasons to think that this process was -- you know, it should never have happened this way.

They said, well, you're basically just saying the entire guidebook process and as old as it is, is just flawed. You're not really saying that there was anything additional after that. There's no -- you know, everything happened according to the guide, what was supposed to happen in the guidebook.

Said, yeah, yeah, that's pretty much it, but it's bad.
And they say, well, we sympathize with you and, yeah, we do -- we kind of do think it's bad, and we're not unsympathetic to your claims. However, you -- this is time barred and its admission -- it's an admission that there is -- basically the guidebook was followed.

In the DCA case, however, which is the next one, we think much more than that. There were allegations, as we mentioned, of a proposed conflict of interest by one of the African Union members. The person did not just say the -- you know, well, you know, everything in the guidebook was done like it was supposed to be done. No. They said that this was -- the GAC was -- had to have -- you know, had to be free as a constituent body, had to be -- there is, you know, numerous -- how shall I say it? -- activities that the GAC conducts, and, as a constituent body of ICANN, they needed to, you know, adhere to themselves firmly -- you know, fairly and transparently, things of that nature, and they didn't do it.

When an IRP was brought, okay, the GAC created, you know, did this GAC advice that I talked about, which is kind of a sort of objection junior, they brought their GAC advice and basically it had a lot of the same effects as an objection in the fact
that the -- you know, one applicant for Africa was not
allowed to proceed and one was, allegedly, because of
favoritism.

When an IRP was brought to review
this -- okay? -- ICANN argued, as it did here and as it
has in Booking, it argued that there's no, quote,
unquote, board action. Right? The board didn't do
anything.

The DCA panel said, well, you know, that's not
really that simple. I mean, number one, the word
"inaction" is right there in the bylaws. And then the
question became, okay, well, maybe the word "inaction"
is in there, but you have to have kind of a duty to
act. You have to have -- you know, if I didn't do
anything affirmatively, at least if I'm held to a
standard for inaction, I have to have some obligation
to act. Right? Well, DCA found that. They said you
do have a duty to act.

Go to the next one.

And I wrote down here and you -- I won't go
into them because I'm running low on time. But not
only did they have -- not only did they find problems
with actions, quote, unquote, if we get really hyper
technical, the unfair behavior by the GAC
representatives -- namely, favoring one applicant over
another -- was an action. They found that to be a problem. And they imputed that to ICANN because the GAC is, as ICANN's pointed out, one of their constituent bodies. They are a very important part of ICANN.

Action number 2. The board implemented the GAC advice. The DCA panel noted that the -- GAC's advice would have no meaning if the board didn't actually do something about it. That was an action.

Action number 3. The New gTLD Program committee issued a decision denying request for reconsideration. That was another action. We didn't do any reconsideration, it's not an issue here, but it's another action.

There was also -- and this is of particular importance. There were several inactions that were seen as actionable, pardon the pun.

There was a -- they said that the board failed to conduct adequate diligence to ensure that its procedures were being applied fairly. And it made decisions with a reasonable amount of facts in front of it. Basically, they rubber-stamped what the GAC did.

Go to the next one.

And all these, that was seen as actionable by the DCA panel.
Okay. And this will be very close to wrapping up. How did both of these apply? Why is DCA more applicable than Booking. Right? I'll break our little action and inaction down. Right? Just like the DCA panel did.

 Mostly and admittedly, most of our allegations in our brief are inaction. Okay? They are, but we feel that there was a sufficient duty to act. Okay? And here's why.

 First, the board failed to conduct adequate diligence, and with a reasonable amount of facts before it, as to whether the procedures were being followed at the ICC. Most notably with respect to the arbitrator conflict.

 The board also, and this is in your exhibits, describes how they -- they really did not -- when they were dealing with the ICC, they -- they almost purposefully held everything at arm's length. And I can give you a specific paragraph and page number if you like for citations that talk about this.

 If they were not even going to ask, we're not going to give any guidance to the ICC just because we want to keep them over there -- right? -- we think that that is an actionable inaction.

 There's also some other things in terms of the
failure to ensure consistency and act for the benefit
of the Internet community as a whole.

I think, just to wrap up, there's an important
distinction. If you look at -- in ICANN's response,
they differentiate -- they say Booking is more
applicable than DCA because the GAC, the Governmental
Advisory Committee is, quote, a -- quote, unquote, a
constituent body of ICANN and then welsh it.

Sure, you know, their conduct is being
imputed, and sure, we had, you know, some -- you know,
we should have looked at what they were doing. But
this is the ICC. We delegated this to an expert
provider and we just, you know, don't want to look at
anything they do just -- just to preserve and, you
know, pardon the expression, plausible deniability just
because that's why you delegate.

Well, the GAC, and that's why it's more like
the, quote, unquote, the situation ICANN would say is
more like the string review -- string similarity review
panel, which was just kind of an expert delegation.

Well, I don't think that you look at not just
who is -- who the parties at issue, who the
constituent, the -- the -- you know, person that was
the delegor, or if there was a person who was
delegated, you know, who that -- the status of that
person is, but you also look at the "what." You also
look at what would happen in the form of the dispute.

If you look at -- and this is why I went
through this whole thing about GAC advice. Okay?
GAC advice is very similar to an objection. It's in
Module 3, just like the other objections. String
similarity review is really more of, as I mentioned,
just kind of a factual -- it's like a -- it's like
hiring an IT consultant or something to come in and
make a judgment about something, you know.

The GAC is a government with a quasi legal
process coming in and saying don't do this because we,
the government, have an objection -- have concerns
about this. Whereas the other objections are simply
like, if you had a private right of action, like, say,
Section 5 of the FTC Act, the government could step in
and I could sue for it if I thought that I was
aggrieved. Right? Those are all in Module 3 and
grouped that way. And that's in a lot of ways why DCA
is highly applicable to our situation.

This was an objection -- this is the closest
thing to an objection case that -- that you can get.
Much more than Booking. And you can reconcile -- and
this is definitely my last point. Why would you say,
you know, that the process was followed, that
everything was okay in Booking and everything was not okay in DCA?

   In Booking, it was seen as ancient history because the person basically admitted that the guidebook, quote, unquote, was followed and the guidebook came out a long time before the objection, like three years. And in DCA, there was a conflict of interest. And as they say at the Limburger cheese factory, boy, something here smells bad.

   And that's all I got to say.

ARBITRATOR COE: Before the break, can I just ask you to tell me a little bit about a request for reconsideration, that process --

MR. MOODY: Okay.

ARBITRATOR COE: -- and how it fits in here, because I noticed that many if not most of some of what we've studied started in that way, and, as you've said, you -- I don't want to say skipped that stage, but elected not pursue that. At least in this case.

MR. MOODY: At least in this case, no, that was -- there's no requirement that you -- you know, it's not from -- you know, certainly from my understanding of the procedures, although I come at it, you know, a different view.

It's not an election of remedies type
situations where you have to go from, you know, one lily pad to the next lily pad to the next lily pad.

There are issues with respect to seeking perhaps like a mediation-style process, what's called the cooperative engagement process to make sure --

ARBITRATOR COE: Which you engaged in, I know --

MR. MOODY: Which we did.

ARBITRATOR COE: -- I know that, but.

MR. MOODY: And you could also go to what’s called the ombudsman who helps hear some disputes and things like that. But there's no requirement that you have to go into reconsideration, to my knowledge. And I only brought it up just because it was an action --

ARBITRATOR COE: Yeah, I shouldn't have said "skipped." I'm just curious about where it fits in because in so many of the other cases, that was the route pursued. And it struck me that that started the chain of what might be actual ICANN affirmative sort of involvement. So I'm wondering --

MR. MOODY: Well, and that's a fair point.

The only thing that I would say is, in DCA, there was a reconsideration motion in that. And I only brought it up, as I said, because that was just another action that they pointed to.
But, to me, DCA is far more important for what it talked about with respect to inaction. Right? I mean, there was a -- if I had to pick a nugget out of DCA, it would be inaction. It said you didn't -- regardless of all these other things that you did or didn't do, you had a -- you know, and this goes to Mr. Genga's point -- ICANN is not -- ICANN is in a very special position. Okay? And we've mentioned this in our brief. I mean, and there's a lot going on with ICANN right now. Like the world is watching, quote, unquote.

I mean there's a -- you know, there's what's called the transition out of -- I mean, you know, you may have seen the history.

Originally ICANN was delegated this very special duty to protect this domain name system for the good of the public. We liken it in our brief to, for example, you know, if the Getty was donated a rare artwork that you can't screw up -- right? -- you know, or some -- or a museum or some rare wetlands or rain forest or something like that, yeah, they're a corporation and they have some discretion, but the public is watching and is concerned about keeping this resource for the public. This is important. You have a special mission. And that's part of the reason, in
my view, that all these core values were adopted.

We are a higher standard because we really --
we have an important job. Okay? And with great power
comes great responsibility, you know, to quote not only
Voltaire, but Spider-Man. You know, that's why all
these big words are in the bylaws about transparency
and fairness and non-discrimination and all this stuff
like that. And you have an important job. Right? And
there's -- they are held to little bit of higher
standard.

I think that because -- and how this bleeds
into reconsideration, reconsideration has been
basically the board, so far, policing itself. And
hasn't been a whole lot of policing. There's been one
decision out of about 40 bazillion, and it involved
the -- involved the domain name .GAY, and the -- we
don't need to go into the weeds of it. It was just --
there was a procedural issue that they didn't consider
some evidence. That's all it was.

But outside of that, when you're talking
rubber-stamping, like which we talked about in DCA
which the DCA panel found troublesome against the GAC,
I mean, this -- you know, rubber-stamping in the
reconsideration context, you know, ICANN is pretty much
the -- you know, bought all the rubber stamps and
staples and it's been almost a pointless remedy. I mean, it just -- the board -- you know, the board is obviously, you know, concerned about, you know, exposing themselves to some, you know, possible outsider. They just don't want -- they don't want to deal with it. And so reconsideration in -- you know, I mean, for lack of a better term, has been a kangaroo court.

ARBITRATOR COE: And I just want to close the gap on something that Mr. Genga said. Did I understand it's your representation that ICANN knew about Mr. Taylor's --

MR. MOODY: Yes.

ARBITRATOR COE: -- conflicts?

MR. MOODY: And that would -- and you can see in the exhibits I sent last night, yes.

MR. GENGA: Yeah, that's in -- I think it's the last exhibit that we submitted yesterday --

MR. MOODY: Yeah.

MR. GENGA: -- Exhibit 67. There was a --

MR. MOODY: Yeah, they knew and the ICC knew.

MR. GENGA: The objection was transmitted to the board by the objector. And then the board simply -- I think the head of the New gTLD Program committee then was -- communicated with the ICC and
said did you see this, and let us know what happens basically, and then that was that. So that's in Exhibit 67.

ARBITRATOR HAMILTON: So the ICC did know.

MR. MOODY: Yes.

ARBITRATOR HAMILTON: And they took whatever action they took --

MR. GENGA: Correct.

ARBITRATOR HAMILTON: -- with that knowledge.

MR. GENGA: Correct.

ARBITRATOR HAMILTON: And the board did nothing with their knowledge. Is that --

MR. GENGA: Correct. Correct.

MR. MOODY: That's our argument.

MR. GENGA: And to your point, Mr. Coe, I think -- I think I understand what you were asking, which was, had there been a reconsideration in this case, that could have been something we could have pointed to as a board action. Right?

We -- you're right. We don't have that here. We can't point to that. Some incorrect decision, for example, on a reconsideration would not be a board action that we can point to in this case.

MR. MOODY: But --

MR. GENGA: There was no reconsideration.
MR. MOODY: But under DCA, it doesn't matter.

MR. GENGA: No, I --

MR. MOODY: The biggest -- the biggest nugget in DCA is inaction, in my view.

ARBITRATOR HAMILTON: I have one -- I just -- I'm puzzled by that.

The word "precedential" value in the bylaws, now what does that -- does that have any special meaning here? Or is that just like two judges in the District Court, the Southern District of New York, to pick my jurisdiction, one judge does this, one judge does that, they look at it, they're interested, fine, but it's not binding.

MR. MOODY: Okay.

ARBITRATOR HAMILTON: It's an interesting -- something that I have to keep in mind.

Is it any different here in this context?

MR. MOODY: I don't -- I have not seen the word in the bylaws "stare decisis" anywhere. However, you know, kind of course of dealing, course of performance, everybody has certainly been -- and "everybody" in the limited universe of these IRPs -- certainly has been treating the cases as having stare decisis value and the words "precedential value" are in there.
Now, we're talking about an area that is in its -- I mean not just infancy, but I mean, you know, zygote stage.

ARBITRATOR COE: Would you say persuasive authority? That's --

MR. MOODY: Yeah, I think it's stronger than persuasive. I mean every -- certainly, you know, the Booking panel -- or the Booking panel looked at XXX, but acknowledged that there was a lot of changes before then. It said we can take some guidance out of it, but a lot has happened since then.

DCA looked at Booking -- that's for sure -- and, you know, we think that, you know, that -- given that there's at least two cases going on and we think that one is more analogous than the other, it -- you know, it should have at least a strong bearing at least, if not be mandatory authority, I think so.

ARBITRATOR COE: Functionally, it's a suggestion that the IRP declarations ought to be consistent.

MR. MOODY: Yes, and -- you're right. And speaking of the word "declaration," I'm glad you brought that up, if you remember in DCA, DCA had a big complex, you know, pleading chain. Right?

There's one file in there that -- and I
greatly apologize. We did not include it in the exhibits yesterday and it was completely my oversight. There is a, quote, unquote, before the decision in DCA came out, which said here is the -- here's our finding, before they did anything, there were so many people with these pending IRPs -- as we've mentioned when SportAccord was trying to come in. You know, there's like twelve or thirteen IRPs going right now at various stages. And, as I said, this is all in the -- we're at very early stages of it. A lot of people were clamoring asking the ICDR for guidance for this, you know, sort of brand-new thing -- right? -- this brand-new avenue, which I'm sure is going to expand, especially as, you know, issues of ICANN accountability get even more and more public. Congress weighing in on, you know, these -- you know, the transition. This will become more important.

A lot people were clamoring for guidance. And the panel in DCA, before they did any factual findings, they came out with their declaration on the IRP procedure. And it was a lot of housekeeping stuff, but they basically articulated it was of precedential value. Again, they didn't use the word "stare decisis," but they -- it sure sounded like it to me. Take that for, you know, what you want.
MR. GENGA: By the way, we did include that.
That was in our original filing as --
MR. MOODY: Oh, it was in Kilgard's opinion --
MR. GENGA: -- Appendix G in our original filing.
MR. MOODY: Yeah, that's true.
MR. GENGA: And they -- they did --
MR. MOODY: It was under the emergency arbitrator's filings with Mr. Kilgard.
MR. GENGA: Yeah, they did declare that --
MR. MOODY: Yeah.
MR. GENGA: -- our -- that the panel's orders and procedures are binding and in --
MR. MOODY: Certainly the Booking panel in DCA has treated it that way and has just about everybody else.
MR. GENGA: And when I hear "precedential value," that means, well, you follow precedent. And they certainly -- both the Booking case and the DCA case established that the standard of review is a de novo standard and I think that's what -- I don't know that this panel has discretion to ignore that.

ARBITERATOR BOESCH: I just have one question.
You sort of argued that if you analogize a motion for reconsideration as a remedy that might or
might not be exhausted, the futility of doing that is indicated by it having been only granted one time out of 40 bazillion.

MR. MOODY: Yeah.

ARBITRATOR BOESCH: Is there any way --

MR. MOODY: Give or take a few bazillion.

ARBITRATOR BOESCH: I mean, is that statistically something that is verifiable really?

Only one time has it ever been granted? Or is that --

MR. MOODY: If these are public decisions, yes.

MR. GENGIA: You can actually go on the Web site there.

MR. MOODY: Sure.

MR. GENGIA: I think at the time -- I think we put that statistic in our opening papers. At that time, there was something like 114 reconsideration decisions to date.

MR. MOODY: And they change all the time, so that's why I didn't want to --

MR. GENGIA: Yeah, and there is -- there is one that was granted.

ARBITRATOR BOESCH: One out of -- okay.

MR. GENGIA: Yeah, so.

MR. MOODY: Yeah, and perhaps -- you know, I
mean, certainly ICANN can clarify, you know, if that's -- you know, if there's two or three. I mean, I -- if I -- if there's more than one, I certainly don't think that it would be more than you can count on one hand.

ARBITRATOR COE: So is the answer to your question as to why you didn't do it simply that, the futility of it?

MR. MOODY: Yeah. And other strategic -- you know, cost considerations and things of that nature. I mean -- and IRP, as I said, it's not a choice-of-election remedies thing. I mean, you can -- an IRP, you know, can be elected. You can go straight to that if you want to, provided you satisfy the cooperative engagement process and you pursue methods to possibly resolve it amicably first. As long as you do those things, you don't have to go to reconsideration.

Now, people do just because in -- you know, from a practical standpoint, there's no filing fee associated with a reconsideration motion. I mean -- yeah, there's no -- you know, you're not paying the ICDR, you're not paying panelists to sit here, but, you know, at the end of the day, I'm okay. I mean, you know, there's an old saying, never mistake activity for
achievement, and I'm going to write a whole bunch of briefs and I'm not going to get much back. I mean, so why not just cut to the IRP? And that's a decision each applicant can make.

ARBITRATOR COE: Well, I was -- I intervened more than I expected to based on my initial projections. I'll have a couple more when we go into segment 3, but can we manage with a seven-minute break? If that's --

MR. GENGA: Yeah.

MR. MOODY: I'm finished, certainly.

ARBITRATOR COE: Yeah, unless my colleagues have --

ARBITRATOR HAMILTON: Yeah, he was going to come, wasn't he?

MR. GENGA: You know, I was, but I think Mr. Moody used a lot of the time, which was fine. There are some things that I'm happy to wrap up later in the context of the questions, or if I can have a few minutes toward the end just to make sure that some of the comments are -- we then focus the panel on where certain of these things appear in the record, which I'm prepared to do. But I don't think, I mean, there's anything that --

ARBITRATOR COE: As part of the closing
segment, that actually might be helpful.

MR. GENGA: Yeah.

ARBITRATOR COE: But is that agreeable to --

MR. LEVEE: That's fine by me.

ARBITRATOR COE: Okay.

MR. LEVEE: I'm ready and willing to go straightforward now. We'll take a short break, so we can stretch our legs.

MR. MOODY: Sounds good.

ARBITRATOR COE: Sounds great. Thank you very much.

MR. GENGA: Thank you.

(Recess taken.)

ARBITRATOR COE: Thank you.

MR. LEVEE: Thank you. Members of the panel.

First of all, on behalf of ICANN, let me thank you for your close attention over the past few months in this matter, and to being so sensitive to our interest in having this proceeding conclude expeditiously.

As you know, there are other applicants for these top-level domains. They are waiting -- I was going to say patiently, but I'm not sure they're being patient. They're waiting anxiously to have a result. And we are very much appreciative that this proceeding was moved forward at a pretty good pace.
I likewise have a PowerPoint presentation. I've left copies for counsel and for the three of you. And I likewise would very much encourage questions during my presentation. I think as things come up for you in real time, it's much more useful to get them resolved at that moment. And indeed if we can do that, I think it would shorten whatever I might have to say at the back end of this hearing.

I will relatively briefly respond to a few of the things that my esteemed adversary counsel said during their presentation and you may well have questions of me based on that presentation, but I will do that at the end, if that's okay with you.

A little bit of background, and I'm going to give much less background than Donuts's counsel.

ICANN was formed in 1998 and it initially approved the first new set of top-level domains in the year 2000. It was a grand total of seven. And those additions were for the purpose of making sure that the security and stability of the Internet were not adversely affected by adding new top-level domains, a proposition that ICANN's sort of original founder Dr. John Postel had assured everyone was the case, but the Internet was too valuable even by that time to mess with it. And so we added seven. They were, among
other things .BIZ, b-i-z, and .MUSEUM.

In the year 2008, ICANN approved the large-scale expansion of the domain name system that we are now -- that a portion of which brings us here today. And they approved the "Applicant Guidebook" in the year 2011. It took three years of drafting of the applicant guidebook, multiple drafts, thousands of public comments on those drafts for ICANN to reach the guidebook that many of us in the ICANN world actually walk around with today. This is on hard copy, but I've got multiple versions on my laptop. And it was the product of a consensus approach that the board adopted.

ICANN is unusual in the sense that almost everything it does that involves policy includes public notice and comment periods. How unusual for a corporation to ask the public their views. But because of the nature of ICANN, the public's views are critical to the evolution of a document such as this.

ICANN received 1,930 applications for new gTLDs. No one anticipated that many. The claimant is in part responsible for that because it filed well over 300 applications. And I don't think anyone on the ICANN side of things anticipated that, but we were delighted to have that level of interest.

Each application was subject to multiple
rounds of reviews, six different reviews in particular, but there was a technical review and a financial review. I mean, ICANN actually made sure that an applicant had the financial wherewithal to operate a top-level domain on the Internet, because if it didn't, and if the top-level domain failed quickly, that would not be in the best interests of the Internet in terms of its security and stability.

There were registry service capabilities and then a string similarity review. There's been discussion of that this morning. I won't elaborate further.

ICANN outsourced these reviews because ICANN simply did not have the expertise in-house to conduct so many reviews of so many applications.

Now, each application also could be the subject of four different types of objections. And Mr. Moody covered them so I don't have to, but they were separately administered by the ICC, WIPO, and the ICDR. And the entire purpose was so that ICANN would not be responsible for administering objections that were raised under the applicant guidebook. There would be entities that had experience, that had rules, that had processes to do these types of adjudications. And so ICANN contracted with the ICC, WIPO, and the ICDR to
administer them.

And to be clear, ICANN did not administer any of the objections, not a single one. ICANN did not designate an expert for any of the objections, not a single one.

Mr. Moody said late in his argument that ICANN was very aware -- actually said the ICANN board was very aware that Mr. Taylor had been appointed. That's false. The board had no involvement, didn't keep track, was never involved in the appointment of experts.

What the staff at ICANN monitored was that it was from time to time aware that objections had been filed. And the document that was attached and arrived on my email last night at 6:45, the very last exhibit, says, the ICANN staff person sending to the ICC, just wanting to make sure you know of this. And the ICC saying, yup, we'll take care of it.

That's the full extent of ICANN's role. No decision, no input, no gee, Mr. Taylor looks like he might be good or bad or otherwise. Simply making sure that the ICC was keeping track.

So the ICC administered the disputes for both the public interest and the community objections, so they had a lot. There weren't as many public interest
objections as some of the others, but there were some.
And as noted before, ICANN wanted to make sure that if
an applicant proposed a name that, you know, let's kill
all of the X type of people, that there would be a
mechanism for making sure that that type of application
didn't find its way onto the Internet. There wouldn't
necessarily be a person who was designated to handle
those objections or to object. And so ICANN actually,
under the guidebook, created a person called -- whose
job it was to decide whether certain types of
objections such as public objections should be filed.

Pursuant to Section 3.4.4 of the guidebook --
I'm going to quote it to you in the next slide so you
don't have to look it up -- each of the dispute
resolution providers used its own rules in processing
the objections, including the selection of the experts
who would adjudicate the objections and the procedures
for challenging the experts for lack of independence or
bias.

This was important to ICANN. There was no
infrastructure at ICANN then or now to administer these
type of proceedings, not unlike the proceeding that
brings us here today. ICANN doesn't administer this
proceeding. The ICDR does. Nor was ICANN equipped
with expertise to address whether a particular expert
was a good expert, a bad expert, whether that expert had a conflict as a result of something he or his law firm had done, whether the expert was suitable, had the right amount of knowledge. ICANN outsourced all of that, specifically under the terms of the guidebook.

So, most importantly, the board had no obligation to repose its own procedures for challenging experts or to create procedures. Nothing that Donuts has provided to you in writing or this morning explains why the board would have to do something that it is not equipped to do, that it didn't want to do, and that the guidebook following community input clearly established it would not do.

Here's the quote from Section 3.4.4. It is in the exhibits that were provided to you. Donuts submitted Module 3 of the guidebook as one of its exhibits, I forget now which one, but -- and I'm going to actually give you some other pieces of the guidebook this morning. But here's the quote of what it says, and most importantly the last sentence:

"Each DRSP" -- dispute resolution service provider -- "will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert
for lack of independence."

You got a problem with an expert, you raise it with the dispute resolution provider.

Donuts also argues that the board was required to train the experts or to train the dispute resolution providers. Honestly, I have no notion of where that -- the source of that obligation would come from. The whole point of retaining the ICDR or the ICC or WIPO was to use their expertise. It wasn't expertise ICANN wanted to acquire in-house.

And so there's no specific -- there's no statement in the guidebook, there's nothing in the bylaws, there's nothing in the articles that says that the board has some obligation in this regard. It simply doesn't. It, in its wisdom, outsourced these functions.

As I mentioned, the community submitted significant comments on these and other issues in connection with multiple drafts of the guidebook. Most importantly -- and we repeat it so many times in our papers, I was almost embarrassed to say it in the slides -- but the guidebook does not establish a court of appeal in the board or an appellate mechanism to be in the board to review expert determinations.

Now, why didn't the board do that? Answer:
It knew that there would be, and in fact have been, hundreds of expert reso- -- of objections that went to expert reports, and the board clearly did not want to put itself in the position of being the ultimate arbiter of each and every review that was done by an expert via a dispute resolution provider.

The point was, is that the board was hiring experts to do the work that they do. And the fifteen or sixteen members of the ICANN board had no interest in sitting as a court of appeal on each and every one.

Now, did the board have the right to reach out and consider an individual application? You bet. In the bylaws, Section 5.1, quoted extensively in both sides' papers, the board had the right. And it says in Section 5.1 that it would exercise that right in extraordinary circumstances. Not as a matter of routine. It would do so in extraordinary circumstances. And I'm going to come in a moment to the two situations referenced in the briefs of when the board decided to act, to reach out, look at determinations that were made by outside experts and do something about it and why it did something about it in those, but not with respect to the applications before you.

Again, most importantly, because this is an
independent review proceeding, nothing in the bylaws, nothing in the articles requires the board to sit as a court of appeal to review these kinds of determinations.

Now the panel started asking questions about reconsideration requests and I'm going to cover that on this slide because it's actually pretty important.

Following an adverse expert determination, a gTLD applicant has the right to file what's called a request for reconsideration, which is a formal process established by Article IV, Section 2 of the bylaws. It's the section that comes immediately before the provisions relating to independent review proceedings.

When a reconsideration request is filed, it initially goes to the ICANN board governance committee, a subcommittee of the board, which considers those requests.

It's pretty important here because what the BGC does is, it focuses on whether the policies and the procedures set forth in the guidebook were followed, including whether the dispute resolution provider followed its own policies and procedures.

So there was a really good opportunity, if Donuts had a concern, that the dispute resolution provider had failed to follow its own policies, for
Donuts to file reconsideration requests on these applications, which it did not do.

Now, there's a reason that the board -- that the board governance committee has only granted reconsideration on two, not one, two reconsideration requests brought in connection with the New gTLD Program. Most of those who were filing reconsideration requests are simply unhappy, they think that the expert got it wrong. They think that the law is different. They think that the facts are different.

ICANN had announced early on, we aren't going to conduct substantive reviews, we're not going look into the law, we're not going to reevaluate the facts. The board governance committee doesn't have the expertise to do that. But more importantly, it would then be inviting every applicant to submit a reconsideration request and make the board the court of appeal that the board had already decided it would not be.

So in .GAY, g-a-y and .MED, m-e-d, short for medicine, reconsideration requests were filed that said that the provider had done something wrong, the board, through the board governance committee, decided that it would send those reconsideration requests back to the provider and do it again.
The board still isn't making the decision. Under any circumstances, the board isn't going to make a decision. But in those situations and a couple of others I'm about to get to, the board says, we want you to do it again. We're not sure, we're not comfortable that you followed your own policies or that you followed the policies that were set forth in the guidebook.

So here, Donuts claims that the ICC did not follow its own policies and procedures. It did a bad job in two ways.

First, it should have disqualified Mr. Taylor, and it didn't. Now, let's be clear. Donuts didn't object. It learned, it says, of facts later. Not clear to me when it learned of those facts. And remember that Mr. Taylor didn't issue his decision for six months after the paperwork went in, and Donuts was very unhappy about that.

Whenever Donuts learned of the regularities that it thinks it learned of, it said nothing. It may have written a letter to the ICANN board, but that wasn't going to do anything.

What it should have done, if it thought the ICC had not followed its rules, was file a reconsideration request.
It had done that on many other objections. I've read them. I don't know why Donuts didn't do it here. I don't know what strategic litigation decision was made, but it's an important omission.

It had the opportunity to do two things. One, say to the BGC, the board governance committee, something that should have been done wasn't done. We're not talking substance, but something that should have been done wasn't done. And on the RUBGY issue, where again it didn't object to the panel as -- who ultimately was used and that panel has issued a very lengthy decision, it could have said, hey, the panelist used the wrong procedures that you had set up under the guidebook for deciding whether a community objection should be accepted. So it wasn't -- we're not arguing with the substance, but the panelist just -- he misread the guidebook. You got to fix that. Those requests could have been made and they weren't.

Had the board then denied those requests, we would then have board action that could lead to an independent review process. Instead, we find ourselves in the position where the board did nothing.

Let's be clear. The ICANN board has not considered the issues that bring us here today. Not ever at any time. So maybe there's board inaction that
we'll talk about in a moment, which is apparently the thrust of Donuts's argument. But not once did any board in any meeting at ICANN consider these requests or concerns about the decisions that were issued by the ICC.

Now, the other accountability mechanism that's contained in the bylaws, of course, is the independent review process. Pursuant to the bylaws, Article IV, Section 3, IRPs are available -- and I'm quoting -- to any person materially affected by a decision or action of the board that he asserts is inconsistent with the articles of incorporation or bylaws.

Continuing on to paragraph 4, requests for independent review shall be referred to an independent review process panel -- the three of you -- which shall be charged with comparing contested actions of the board to the articles of incorporation and bylaws, and with declaring whether the board acted consistently with the provisions of the articles and the bylaws.

Section 3, paragraph 4, continues:

The IRP must apply a defined standard of review -- I'll come back to that phrase in a minute -- focusing on: Did the board act without conflict of interest? Did the board exercise due diligence and care in having a reasonable amount of facts in front of
them? And did the board members exercise independent judgment in taking the decision believed to be in the best interest of the company?

Well, that's pretty odd here, because you can't apply any of these three standards to this case 'cause the board actually didn't do it. Didn't do anything. It didn't act without a conflict of interest, it didn't have opportunity to exercise due diligence, it didn't take an action that may or may not have involved independent judgment. There's nothing that the board did against which you can evaluate conduct for A, B, and C, the things that an IRP panel are supposed to be looking at.

Now, ICANN certainly does not take the position that board inaction could never be reviewable in an independent review proceeding. If the board has a duty to act and it specifically declines to, well, that's inaction. That's board inaction. And it's reviewable.

But if as here the board -- the allegation of board inaction is simply that the board did not reach out to do something that it had the legal ability to do, but no obligation to do, that's board inaction that is not reviewable in an independent review proceeding, and thus, the reason we keep talking about that in our
briefs.

Not only did the board not do anything here, but there's nothing in the articles or the bylaws that tells us that they should have, that tells us that it was wrong to let the ICC pick Mr. Taylor or tells us that it was wrong that Mr. Kantor, the person who ultimately issued I think the decision in RUBGY, that he wrote a very extensive and thorough opinion, but you could argue that it was wrong. The board had no obligation to reach out and grab that.

You asked in your guidance to us two days ago to discuss the applicable law. And I think Mr. Genga did that briefly. I'm not sure I have any disputes with what he said.

We're a California corporation. Clearly California law applies. Our articles reference that we act in an international arena and that certain international protocols likely also apply to us. None of that, as best as I can tell, has any relevance to the decision you have before you.

You have bylaws that set up an independent review process. It's a unique process. I'm not aware of any other corporation in the world that has allowed itself to be second-guessed on its decisions in the manner that we are second-guessing certain things here.
But I can establish that as a result of accountability measures that it wanted to provide to the community.

But -- so you are to take those bylaws and the rules that are set forth, you're to look at the articles and you're to compare what the board did to see whether the board acted inconsistently with the articles or the bylaws or the guidebook in this instance. That's the scope of what brings us here today. And I don't think that the applicable outside law, California or other law, has any effect on those principles.

There was a lot of characterization a few minutes ago by Mr. Moody about the Booking.com decision. I'm going to quote from it somewhat extensively this morning because Donuts's position seems to be that Booking is distinguishable because the claimant sort of conceded things that it was too late to adjudicate challenges to the guidebook. The Booking decision is much, much more than that.

With respect to the role of the panel -- and let me stop there because I want to answer the question of precedential value. That the bylaws specifically say that prior independent review determinations or declarations -- 'cause what you'll issue is a declaration -- should have precedential value. And
it's for the reason that I believe Professor Coe specifically mentioned, so that we don't wind up with decisions that are totally at odds with one another over the course of the years.

Is a decision stare decisis? No, nothing in the bylaws suggest that.

Is a decision binding? Well, the DCA panel ruled that it was binding on the parties. ICANN disputed that. But it certainly is not binding on you, and it wasn't the intent of the panel to make its decision binding on you.

And so I think the word "precedential value" means exactly what it was intended to mean and what simple English would have it say. It's persuasive. We urge you to look to it. I'm going to urge you to adopt the decision that the Booking.com panel adopted and explain to you why the decision by the DCA panel was inapplicable and likewise the ICM panel. But you are free to issue the decision that you think is best.

The Booking.com panel -- I'm not going to read this whole slide, but what the panel says is:

"It is not for the Panel to opine on whether the board could have acted differently than it did, rather, our role is to assess whether the board's
action was consistent with applicable
rules found in the articles, bylaws,
and guidebook. Nor, as stated, is it
for us to purport to appraise the
policies and procedures established by
ICANN in the guidebook (since, again,
this IRP is not a challenge to those
policies and procedures themselves),
but merely to apply them to the
facts."

Much of you what heard this morning was
essentially, you know, we don't think the ICC did a
very good job and ICANN should have known that. Or, we
don't know that the ICC even should have been selected
under the guidebook, or the provisions of the guidebook
weren't followed because the ICC did something and
ICANN should have just sort of known that something was
awry.

The problem is, that these are really
challenges to the terms of the guidebook themselves.
It's really saying, we don't like that something
happened as set forth in the guidebook. And as the
Booking panel found -- I think the guidebook was
adopted in 2011. The next version was adopted in 2012.
Certainly Donuts did not file an independent review
within 90 days as it would have been required to do if it was unhappy with a particular provision of the guidebook.

So to the extent that this challenge is about being unhappy with the terms of the guidebook, I would urge you to do what the Booking.com panel did and say, "Well, ICANN, next time around, you might want to think about these things." But we're not -- certainly not going to find that the board acted contrary to its bylaws if it did what it was supposed to do.

I'm going to run through the next couple of slides pretty quickly because these are just the facts on .SPORTS and the facts on .RUGBY.

As you know, there were three applicants for either "sport" or "sports." SportAccord submitted a community application where it proposed to represent the community. Donuts submitted a standard application where it proposed to not represent anyone in particular.

SportAccord objected, you get a community objection to Donuts's application, and it alleged that there was substantial opposition from a significant portion of the community to which a "sports" string was targeted.

The ICC appointed Mr. Taylor. The ICC also
appointed Mr. Taylor on an objection to .SPORT. The objection with respect to .SPORT, the claimant said we don't like Mr. Taylor. The ICC issued a one-sentence statement saying, okay, Mr. Taylor is not confirmed. There's no basis for the statement, no explanation, that's it. It was one sentence.

Let's go on to the next.

Donuts, as I said, did not object. They want you to find that, even though they didn't object, that two years later we should find that he was biased because an expert thinks he might have been and send it back to the ICC for a determination.

That's just not what an IRP is for. There's no board action. And there were other means for Donuts to raise that issue. In particular, a request for reconsideration.

ARBITRATOR COE: Do you have any particular view on whether Mr. Taylor was conflicted to an extent that he should have stepped down or not?

MR. LEVEE: I don't. I don't. I will say this. Mr. Taylor issued a pretty thorough decision. You can agree or disagree with it, but it looked to me to be pretty thorough. I don't read the decision as reflecting bias, but I recognize that he is alleged to have had clients in that space. I don't know the facts
and so I really don't have a view.

All I can tell you is that the expert report on -- it's in one of the next slides -- the emphasis person that Donuts hired, on a couple of things that Donuts said were conflicts, he says, ah, probably not really. And his ultimate decision is, yeah, it may be a conflict, but it's not his determination to make.

It's the ICC's determination. And I don't read his report as saying that it's black or white.

I do say this. It would have been useful if Donuts had filed a request for reconsideration and given to the ICANN board governance committee that witness statement.

ARBITRATOR BOESCH: Can I just ask, does the nature of the conflict inform your argument to the extent that, for example, suppose the evidence was that -- let's take a bagman example -- you've got proof that the guy took a hundred grand, you know, under the table to make his decision, would your argument be the same?

MR. LEVEE: Yes, of course. In that case, a request for reconsideration almost certainly would have been granted, using your bagman example.

ARBITRATOR BOESCH: But what about our role supposedly --
MR. LEVEE: Your role -- because the board didn't do anything, your role does not change. So under the most egregious example, the ICC knowingly put the worst possible expert to make that determination, Donuts had recourse. Could have exercised that recourse at the ICC, could have recognized -- it could have advanced that recourse in a reconsideration request.

It may seem odd that I'm standing here saying that the answer would be the same for me, which is that there's no board action, but there wouldn't have been board action. There would not have been anything the board would have done, so how could it be a violation of its bylaws or its articles?

Now, I can't say that Donuts might not have sent a letter to ICANN or to the sixteen members of its board saying, hey, we just found out that the .SPORT determination was rigged because someone paid a hundred thousand dollars to make that happen. The board could have reached out at that point to do something. But, of course, those aren't the facts that we have before us.

With respect to .RUGBY, this one is even more -- even less objectionable, I suppose, if that's the right word, because Donuts did object to the
initial designation of Mr. McLaren as the expert. And
he was replaced by Mark Kantor, East Coast lawyer.

Donuts did not object to Mr. Kantor's
appointment, has never said boo that Mr. Kantor is
conflicted or biased. And Mr. Kantor issued again a
very lengthy expert determination upholding the
community objection.

Donuts doesn't like it on a substantive level.
They don't think that he applied the guidebook
provisions the way a good lawyer would have, but it's a
substantive challenge. It's not a challenge to
Mr. Kantor. And, again, Donuts did not send in a
reconsideration request.

So let me summarize the three Donuts arguments
as I understand them. Others were made this morning
also for us.

Donuts claims that the ICANN board should have
acted to overturn the objection and violated the
articles and the bylaws by failing to do so.

Donuts argues, although not this morning, that
the board elected to review certain other objections,
showing that it knows how to do this, it has the legal
right to do it, and that not doing so here
discriminates against Donuts.

And then Donuts argues in its reply brief, but
again not this morning, that SportAccord has lost its support and that's -- that ought to be relevant to you.

I've now said it so many times, but I just want to be clear again. The ICANN board didn't actually make any decisions, so let's get past that.

Second, the board had no obligation to review the expert determinations and no obligation to create a review procedure for them.

The board's decision to require new expert determinations with respect to two sets of disputed TLDs involve completely different situations that I'm going to come to in a moment.

And then, as I said, whether or not SportAccord has lost its support, it's really not relevant at this point because it involves an after-the-fact challenge to the objection. It's a substantive challenge to the outcome of the expert determination. And the board has made it clear it does not get into the substance.

Now, that doesn't mean that there aren't potential available remedies, but they don't involve an independent review proceeding, because an independent review proceeding is limited to what the board has done.

And in this respect -- assuming for the moment
that the SportAccord argument is credible, if you go on
the Internet, it looks like SportAccord has tons of
support, and I make no representation one way or the
other, but -- as to whether it has lost any notion of
its support. But it's something that happened
apparently in 2015, not something that happened when
the decision was made.

I've already covered here on slide 16 most of
what I've already said. Emphasizing the fourth point,
that although the board reserves the right to consider
gTLD applications, guidebook Section 5.1 makes it clear
that it would do so only under exceptional
circumstances. There's no obligation to reach out.

Now, Donuts has three arguments with respect
to why the board appoints experts. And I want to get
into those in some additional detail.

Charlotte, would you pass out Article XI-A.

So members of the panel, you have the bylaws.
I think it's the first exhibit on Donuts's papers. But
so much of Donuts's argument is based on Section XI-A,
that I wanted to hand that out so that you can
appreciate what Section -- Article XI applies to and
what it doesn't.

Article XI-A refers to advisory mechanisms for
the establishment of policy. It permits the board to
retain experts to assist in policy development.

What I've quoted here is Section 1, the purpose.

"The purpose of seeking external expert advice is to allow the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN. In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the board and constituent bodies should be encouraged to seek advice from other expert bodies or individuals."

The rest of that article -- and this is the reason I wanted you to have it as a separate piece of paper -- discusses the mechanics of how you would retain an expert, the fact that the GAC has an opportunity to comment on the expert's report, and the fact that other advisory committees do as well.

Nothing in this article relates to the New gTLD Program. Nothing in this article relates in any way to outsourcing objection determinations.
These are experts who are retain -- Article XI-A refers to experts that the board wants to retain to assist the board, because you've got a fundamental issue. For example, the question of whether wine sold throughout the country -- throughout the world has certain meanings in different parts of the world and ICANN actually got some legal advice, it sought out an expert, because there were disputes regarding .WINE.

But the board was not reaching out to an expert to resolve an objection. The board was trying to get governments in the same room to talk to each other with respect to "wine." And nothing about Article XI-A applies in any respect to the guidebook. This is the first time any applicant has even hinted that it does.

We also have seen in the papers and this morning, I think it's in one of the very first slides that Mr. Genga reviewed, that bylaws -- I'm sorry -- that Module 3, Section 3.1 has a provision that also authorizes the board to hire experts. And what I wanted you to see, I forgot to copy it, but it's in your materials.

Article 3.1 is entitled "GAC Advice on New gTLDs." Section 3.1 of Module 3 refers to the
situation where the GAC speaks. It doesn't like an application. And it says ICANN will consider the GAC advice. So the GAC declares, as it did in AFRICA, we don't want a specific application to proceed. What it says on page 3-3, it says:

"ICANN will consider the GAC advice on new gTLDs as soon as practicable. The board may consult with independent experts such as those designated to hear objections in the new gTLD dispute resolution procedure."

The point was, when the GAC issues advice, the board has the right under the guidebook to go talk to an expert. And it even refers to experts who are otherwise working to hear objections on the program. But nothing about Section 3.3 relates to objections -- all the other objections -- I'm sorry, it's Section 3.1 -- relates to a community objection. And none of this says, oh, the board is the one hiring the experts. We didn't. We hired the ICC.

Finally, there's a reference to Section 3.4.6, also in your materials with the guidebook, which is the section actually entitled "Expert Determination."

And what it says is, when an expert such as
Mr. Taylor issues a report, quote:

"The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process."

So, likewise, this does not say that ICANN hires the experts or that ICANN should be hiring the experts or that ICANN is somehow even involved in any way.

So the arguments that Donuts has made with respect to the board sort of control over these experts are from provisions that are inapplicable here.

Let me discuss the DCA decision.

I did litigate the DCA decision, and ICANN lost. The DCA decision is not all about board inaction. It's exactly the opposite scenario.

DCA alleged multiple violations of the guidebook and the bylaws. And the board -- I'm sorry -- the panel identified two in its decision and said all the other allegations, we're not ruling on them. So the board inaction that Mr. Moody was referring to, the panel expressly declares we're not ruling on that subject.

Instead, what the board -- what the panel did in DCA was, it said, well, there was GAC advice against
DCA's application for .AFRICA. And there are two provisions in the governing documents that actually require the board to consider that advice.

Section 3.1 of the guidebook says specifically that the board is obligated to consider GAC advice. And Article XI, Section 2.j of the bylaws likewise says specifically that when the GAC tells ICANN we want you to do something, you got to affirmatively consider it. You can't ignore it.

And what the DCA panel said was, we do not think the ICANN board adequately considered what the GAC did. The board did consider, there's no doubt. The board had a vote. It voted unanimously to accept the GAC advice. But the panel did not believe that the board had brought enough information before it.

So going back to the basis for an independent review, the panel found that the board should have gotten more information from the GAC as to why the GAC had issued GAC advice.

So clearly a board action, because the board had a duty to act, and it did, and the DCA panel found that the board acted insufficiently, and so it violated its bylaws.

In that case, DCA also had filed a request for a reconsideration. And the board considered that
request. And DCA argued, hey, this is board action. I
never argued that it wasn't at the hearing. Of course
it was board action. The board governance committee is
part of the board. And the panel determined that more
information could have been provided in that situation.

The board also determined -- or I'm sorry --
the panel also determined that the GAC is a constituent
body of the ICANN board, and, as a constituent body of
the ICANN board, it has an obligation to be
transparent. And it felt that the GAC's conduct was
not sufficiently transparent, or at least that the
board hadn't fully investigated whether it was.

And so the DCA panel's declaration involved
the board's actual consideration. A vote was taken.
The board discussed the GAC advice. It accepted the
GAC advice and issued a board resolution to that
effect.

So let's be clear. Why is this -- why is the
DCA matter irrelevant here? The matter before you
involves no board decision. The matter before you
involves no obligation to decide. Certainly doesn't
involve the GAC. GAC had no role in the issues that
bring us here today. And the matter before you today
likewise does not involve any of ICANN's other
constituent committees. There's no obligation on the
part of the ICC to do anything other than it was
contracted to do.

So if there was a failure by the ICC to do
something, the DCA decisions does not stand for the
proposition that the ICC's failure to apply its own
rules is a bad thing, much less that it violates the
bylaws or the articles. Instead, I would urge you to
take a much closer look at the Booking.com decision.

You already know the facts. Are .HOTEIS and
.HOTEIS -- by the way, it's Hoteis -- are they
confusingly similar?

I looked at it and said, I think so, but I'm
not the expert involved. There was an expert. It
looked at it, it had an algorithm, and it concluded
that they are confusingly similar.

Booking.com argued that the board should have
reviewed that determination by the outside expert
because the board had the power to do it and because
Booking.com had given to the board in its request for
reconsideration a lengthy expert report where the
expert said, "I don't think these are confusingly
similar."

I'm not going to get into the merits, of
course, of that, but the point was that it was -- that
was Booking's two-pronged approach. You have the power
and you should act because the expert made a substantive decision that was bad.

And this is what Booking.com panel said, this is the most important quotation from the entire decision:

"The fact that the ICANN board enjoys the discretion to consider individual gTLD applications and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at a time and in the manner demanded by the claimant."

In other words, a decision not to exercise is not a violation of the bylaws or the articles.

The Booking.com panel also determined that the lack of a court of appeal or an appellate mechanism for expert determinations likewise did not violate the articles or the bylaws. And it held that the -- in addition, that with respect to challenging provisions of the guidebook, including the fact that it doesn't have a court of appeal, that the time had long passed for any party to do that.

It has been mentioned in the papers and also this morning that the board in fact did accept what amounts to a rehearing in conjunction with two sets of
objections, .COM, .CAM, and .SHOP and the Japanese
character for online shopping. I'm going to discuss
.CAM, .COM because it's harder for me with the Japanese
character.

Verisign operates the registry for .COM. Two
applicants applied for .CAM. They went to different
experts. One expert said .CAM is confusingly similar
to .COM, you can't proceed. The second expert said
.CAM is not confusingly similar.

So with respect to the very same application,
.CAM, we now have what appears to be an inconsistent
result.

So the board decided -- by the way, the board,
before it made any decisions, went out for public
comment. What should we do? We're not in the ordinary
course reaching out for these things, but this one
looks confusing, looks inconsistent.

The public supported the board sending it back
to the dispute resolution provider and said do it
again. One single panel consolidated proceeding, so
only one answer will come out.

That's a very different situation than what we
have here. There's no effort by Donuts to say, well,
our result is inconsistent to some other TLD, or our
result is going to put -- be in a situation where you
now have two reports that are just demonstrably at odds with one another.

If anything, the two reports that are before you essentially reach the same result. Right? The community objection was supported with respect to .SPORTS, and the community objection was supported with respect to .RUGBY.

So there's -- the factual pattern that leads up to the decision by the board to reach out and ask the dispute resolution provider to try again is very different than the situation today.

And, as I want to make clear, the board is still not doing the evaluation. It's going back to the provider.

ARBITRATOR COE: Do I recall there was a -- language in the resolution explaining why they didn't extend this kind of additional review to other kinds of objections?

MR. LEVEE: You recall accurately. I don't have the -- I remember reading it several times. I don't have the language handy. But the board does explain that this is unusual, we're not doing it in the ordinary course, because the board did not want a flood of people coming back to it to say, well, our situation is just like CAM/COM. So the board was very cautious.
And I don't want to characterize whether the board did this reluctantly, but it did it after a lot of due diligence.

So Donuts submitted three witness statements. The first was from an ICANN former employee, Kurt Pritz. He opines that ICANN should have created measures to create as much consistency as possible. But he doesn't tell you that that's a violation of the articles or the bylaws when ICANN decided not to.

Really what he's saying is, the next time around, the board might want to rethink this. That's fair. The next time around, we may review it.

Donuts has a sports so-called expert, Mr. Edelman, who provides a history of sports in general -- it was interesting reading -- and basically says I would have found in Donuts's favor. That's the thrust of what he said. But it really doesn't tell you anything. Right? It's a substantive challenge to the decision that Mr. Taylor made. I'm confident that every time somebody loses an objection, they can find someone who said they should have won. That's beside the point.

More importantly, there's no board action involved, so I don't know what this expert declaration tells you.
Finally, there was discussion earlier about Dr. Sarvarian offering his opinions. To be clear, the board is not the arbiter of whether the ICC should or should have not reject someone. But more importantly, I thought it was important in the conclusion, Dr. Sarvarian actually says that he considers the conflict of interest to be -- to have the level of seriousness to potentially merit disqualification.

I don't read his report as saying that Taylor clearly should have been excused. I read his report as saying I think the ICC should have looked at it harder and we don't know whether it did or not.

I'm going to skip SportAccord because it really wasn't addressed this morning. And that takes to us slide 25. Almost done.

To summarize, there was no board action here. At best, for Donuts, there was board inaction in a situation where Donuts believes the board had both the power and the obligation to act. And we argue otherwise.

Donuts alleges that the board had an obligation to create an appellate review of expert determinations, and the failure do so demonstrates some kind of lack of accountability. But Donuts does not identify truly what the source is of that obligation.
Citing articles and bylaws that says that ICANN should be fair or treat people kindly, that doesn't do it. There's got to be an actual bylaw that says you ought to be doing something in this situation.

Second, slide 26:
"Donuts alleges that the board failed to act 'in the public interest' and was not 'accountable' to that interest by opting against an appellate mechanism."

But, again, this is in the eyes of the beholder. Right? ICANN is supposed to act in the public interest, we don't deny that. That's the core value of ICANN, will always be the core value of ICANN.

But does outsourcing expert determinations in a guidebook, does that tell you that they are or are not acting in the public interest? And, of course, the time to challenge what the guidebook says has long past.

"Donuts alleges that the board failed to 'promote competition.'"

This one I don't understand at all. The board promoted so much competition, that it received 1,930 new applications. To be clear, the applicant guidebook makes it clear no one's got a right to a TLD. Simply
by applying, you do not have a right to get a registry agreement.

The whole point of the objection process was to weed out objections where there were -- weed out applications where there were credible objections to them. And so the fact that these two applications will not proceed, that doesn't tell us anything about whether we promoted competition. We've done a great job in promoting competition.

Finally number 4, Donuts alleges that we failed to promote well-informed decisions based on expert advice, but the citation of that in Article I -- in the bylaws, I think, Article I, Section 2.7, again relates to policy development.

Every time that there's a reference in the guidebook and in the bylaws to retaining an expert, it relates to policy development, not the adjudication of disputes as here. Of course the board wants to create good policy and consult with experts who may assist it in doing so. But I think if you actually look at the provisions that Donuts cite, none of them is relevant.

And then finally Donuts argues that Mr. Taylor had a conflict of interest. And we spent a lot of time this morning hearing about it, but none of it is supportive of an independent review proceeding. There
was no board action. Donuts didn't file a request for reconsideration, which was the time and place to raise that issue. Instead, Donuts skipped it for tactical reasons that don't any longer matter.

The point is we're here, following the failure to file a reconsideration motion and following a situation where Donuts doesn't like an expert that was selected, but the board had nothing to do with it.

I'm going to skip the last slide, slide 28. I'll be candid, I don't think there was a lot discussed in the papers that Donuts filed on whether we produced or didn't produce our documents correctly. If there are issues that come up later, I'll address them. But we spent a lot of time and money producing documents. We didn't find documents where we communicated with the ICC on things that Donuts would have liked us to communicate with the ICC on. We had a feeling they wouldn't be there and they weren't.

I think I've now covered most of what my excellent counsel on the other side has said. So unless the panel has questions, I'll sit down and let Mr. Genga return.

ARBITRATOR COE: Thank you very much. Would Donuts like to weigh in now by way of a rebuttal or -- I'm at your pleasure. Do we need a
small break?

MR. GENGA: Could we have a short break?

ARBITRATOR COE: Let's say ten minutes.

MR. GENGA: That would be great. Thank you.

(Recess taken.)

MR. LEVEE: Professor Coe, if it is okay, I would like to make one correction to something I said. I mentioned the .WINE situation. And ICANN did hire a lawyer, but they did not do it pursuant to the provisions of the bylaws that I referenced. It was done in conjunction with a different attempt to resolve disputes to get expertise on -- that ICANN did not have relating to the use of certain words.

So I misspoke that it was done pursuant to a specific authority that is being -- that is at issue in the bylaw provisions cited in the case.

ARBITRATOR COE: Okay. Thank you.

MR. GENGA: Okay. Thank you.

You know, I'm going to be brief because I think -- I don't want to go over old ground. Certainly Mr. LeVee and I can argue back and forth about whether this case is more like the Booking case or more like the DCA case. That's what lawyers do. We've stated our positions. Mr. LeVee has stated his position.

I can guarantee you there will be no
substitute for looking at those decisions. And they are very persuasive in terms of -- in my view, of course, and obviously I prefer the result of the DCA case. I think it applies. I'm the advocate that's saying that. But I think you'll find the same thing.

It is a very similar circumstance, and I think you'll find it very persuasive. And I think you'll see that the case holds that ICANN and the ICANN board can't simply bury its head in the sand, particularly when it's on notice of these types of situations.

And we're not -- this is not a case, by the way, where we're complaining about the processes in the guidebook or that they were -- somehow the guidebook is flawed. That's what the folks in the Booking case complained about, and that's what the Booking.com panel said, hey, you should have raised that a long time ago.

We're saying that the processes in the guidebook were in fact not followed, and ICANN and its board should have done something about it.

ICANN's board, which contracted with the applicants, and the applicants who relied on the processes of the guidebook to be followed and they weren't, ICANN has an obligation. And the board has -- the board is the only party with the power to enter into contracts.
And so the board takes on the responsibility of carrying out these obligations to make sure that its policies and processes are followed. And that was not the case here.

ARBITRATOR HAMILTON: What about your duty to file a request for reconsideration?

MR. Genga: There is no duty to file a request for reconsideration.

ARBITRATOR HAMILTON: But isn't that the way the board learns that there is a, quote, problem out there?

MR. Genga: That's a way that a board can learn that. And I think I responded to Mr. Coe earlier when he asked that question. I think -- we don't have that here. That is correct. We cannot say -- we cannot point to a reconsideration decision, because there is none here, as evidence of board action or inaction. We just can't do that. We're not required to have done it, but we can't point to that -- that additional fact as evidencing board action or inaction.

But the fact of the matter is, if you look at the bylaws, if you look at Article IV, Section 2 and Article IV, Section 3, the two processes are completely independent. One is not a prerequisite for the other. I -- you're right, I lose the advantage if I don't file
a reconsideration request of being able to point to
that as evidence of board action, but it's not a
waiv- -- it's certainly not a waiver of any of the
grounds that I can raise on an IRP. And we've raised
those grounds. And there's certainly evidence in the
record of the board being aware of these circumstances.
They're aware of the conflict.

If you look at Exhibit 67, which we provided
to the panel, there's a letter that was directed to the
ICC, but also copied to the board by email, and ICANN
staff simply contacted the ICC says, hey, I hope you're
handling this. And the ICC says, we'll let you know,
and then they never -- then nothing ever happened. So
the board never followed up on that.

And I think that in contracting with parties
that are spending a lot of money in reliance on
procedures being followed, conflicts not existing, that
the board has an obligation, particularly when it's
placed on notice, to do something about this.

And the board with respect to -- Mr. LeVee
mentioned the RUGBY case, and in both cases we're
saying -- well, one, we have a conflict in this
SportAccord situation. We talked about that. I'll get
back to that in a minute. But in both the SPORTS and
the RUBGY cases we're saying that the processes laid
out in the guidebook, and particularly the elements and
grounds for objection, were not applied and the board
had a responsibility to make sure that they were.

The -- again, the applicant's contract with
the board in reliance on the provisions of the
guidebook. We've seen evidence and we have evidence in
the record of situations in which the board will ensure
that training is appropriate for these kinds of
circumstances.

Mr. Pritz talks about, in his witness
statement, about how mechanisms were put in place to
assure that uniform standards were applied for the
initial evaluation of all 1,930 applications. That was
a much bigger job and a much bigger task than the
review of the smaller subset of objection decisions
that were rendered in this case or that were rendered
in this first phase of the program.

So we've seen that ICANN can do it and knows
how to do it and does it in analogous circumstances and
didn't do it here. And we've also provided the panel
with ICANN's own very candid report about how -- how
did we do in this first round of the New gTLD Program?

And if you look at -- I've got it in front of
you -- at page 107 of that report, it admits it did not
provide the dispute resolution providers with
interpretive guidance.

And, in fact, they got adverse comments from the community that the panelists lacked the proper training and they say, hey, that would have been a good idea. They're basically admitting that we probably could have done something about this, but didn't.

Now, Mr. LeVee will say, and he has said, well, maybe that's a good idea for next time and we've learned something.

But my view is that these are things that ought to have been considered going in. Applicants spent a lot money and reliance on these provisions being followed. They weren't followed in this circumstance. And I believe that the board that contracted with these parties had an obligation to do something about it.

Nor did they review them afterwards. And we don't talk about a review mechanism in that, yeah, ICANN should have provided for an appellate process. We don't suggest that at all, 'cause we know that ICANN considered it and comments were raised during the drafting of the guidebook about that, and the guidebook, which resulted from the input of all of the various constituent organizations and stakeholders, decided not to do that. And we're not challenging
But in circumstances where these situations are brought to the attention of the board as in the case of COM and CAM, things were done about it.

This was also -- if you look at Exhibits 51 and 52 of our submission, Donuts and others brought the lack of training, lack of proper application of guidebook standards to the attention of the board specifically. The board actually responds to that in the NGPC resolution that implemented the review process for CAM and COM and for SHOP and the Japanese characters, said, hey, you know, that would have been a good idea.

Again, Mr. LeVee would say, yeah, it would have been a good idea for next time, but we didn't have to do it this time, and we didn't. And sorry we messed up, but we had no obligation.

Well, I don't agree. It would have been a good idea and it was a good idea and it should have been done.

ARBITRATOR COE: The resolution that I read and that's what I was trying to get to with Mr. LeVee, I seem to recall a conversation that we thought about other objections and --

MR. GENGA: Correct.
ARBITRATOR COE: -- and it's not as simple as that, if I remember. That when upon looking at it, it seemed that there were reasons for the perceived inconsistencies which could be explained in -- particularly in legitimate ways. That actually the advocacy was slightly different, or there were different facts that -- I mean, there was an explanation in there that made it --

MR. GENGA: Yes.

ARBITRATOR COE: -- look like there was a reasoned process that led to limiting it the way they did.

MR. GENGA: I think there was a -- there was an explanation, and we can find it, and I'm happy to --

ARBITRATOR COE: I have it in my binder somewhere, so.

MR. GENGA: Okay. Yeah, I do, too.

But the gist of it is that I think that ICANN decided, the board decided -- we're talking about the New gTLD Program committee of the board --

ARBITRATOR COE: Right.

MR. GENGA: -- decided, look, there are a lot of reasons why a lot of these decisions could have been inconsistent. Here are some of the reasons why they could have been. And you know what? We're not going
to bother ourselves with trying to figure that out.

Well, why they could have been and why they
actually were are two different things. And so when
you raise specifically, as we have raised here, that
certain procedures weren't followed, then that is
something that is a proper specific point that requires
review, as opposed to trying to figure out, out of --
among any number of, you know, dozens of community
applications and objections, for example, why one
decision might have come out one way and one might have
come out another way.

So, you know, specifically here, and in the
context of this IRP, we have identified what we think
ought to have occurred specifically, where specifically
we think policies were violated, including an apparent
determination in these cases that essentially would
have required Donuts to have applied as a community
even though they have every right not to have done
that.

And we think that the panels were misinformed
or not adequately informed about the guidebook
standards, and we specifically raised that point. And
ICANN has admitted that, you're probably right, that
there wasn't enough training or there wasn't any
training. They admit there was no training and it
would have been a good idea.

And we're contending that in this case ICANN has shown that it knows how to do that. It did it in connection with the independent -- in the initial evaluation process. If you go to the next slide, they did it in connection with what's called community priority evaluation.

There's no obligation according to Mr. LeVee and the guidebook that this happen, but I think the obligation adheres in the contract that applicants entered into with ICANN -- and only the board can enter into those contracts -- to see to it that the processes are followed. And that's what ICANN did in connection with community priority evaluation. It said that:

"We anticipate significant training and preparation would be required for the evaluation panels to achieve the desired consistency across evaluations."

That was very important to ICANN to see that happen. It was very important for ICANN to see that happen with respect to the initial evaluation of all applications. But for some reason, it wasn't important to ICANN to see to it with respect to the objections, and we contend that selectively picking and choosing
that is not appropriate.

They should have employed the same procedures, engaged in the same type of training that we contend was lacking here.

ARBITRATOR COE: Could I just ask you to develop just a little bit the distinction between a community application and a non-community application called "standard." Am I correct?

MR. GENGA: Standard application.

ARBITRATOR COE: And do I understand that you suggest that the net effect is a form of discrimination if you're a non-community applicant? Is that -- can you develop that a little bit?

MR. GENGA: Sure. Sure.

A community application that's accepted as such eliminates all other competing non-standard applications, just right off the bat.

THE REPORTER: Non-standard applications?

MR. GENGA: No, no. I started to say "non-community" and then I said "standard," but it came out as "non-standard," so let me repeat so the record's clear.

A community application that's accepted as such and is demonstrated to have satisfied the criteria for an adequate community application automatically
eliminates all competing non-community applications for the same string.

So in the case of SPORTS, for example, you have two non-community applicants, one community applicant. If the community applicant elected community priority evaluation and passed that process, then -- then the competing applications would be up.

By the way, SportAccord didn't do that. SportAccord took a first bite at the apple by objecting on a community basis and therefore did not have to -- didn't have to go through CPE, community priority evaluation, because it eliminated its only two competitors by the objection process.

ARBITRATOR HAMILTON: Just clarify for me how this process works, the significance. You put in an application.

MR. GENGA: Right.

ARBITRATOR HAMILTON: You pay your, whatever it is, $185,000. There are two or three other competing applications and they all paid $185,000.

MR. GENGA: Right.

ARBITRATOR HAMILTON: ICANN approves one of them. Is that --

MR. GENGA: No.

ARBITRATOR HAMILTON: No, no.
MR. GENGA: That's a very good question.
So as you can imagine, there are some strings that got a lot of applications.
.LAWYER, I think, got five or six. Don't ask me why, but anyway.
So if you have a number of competing applications, you first go to an objection process. If there are no objections, all of the applicants are still alive, they're put into what's called a contention set.

The contention set gets resolved -- can get resolved in a number of different ways. The parties can amicably resolve the contention set. There's some horse trading that goes on, say, okay, I'll take .LAWYER if you take this one, whatever. We'll eliminate all these others. Or if it's not resolved, the final resolution is an auction process.

And there are two -- there are actually two different auction processes. One that's actually specifically provided. I think the other was created -- you can correct me if I'm wrong, but -- I'm looking at my client here. I think it was actually created by the private advocates themselves where they have their own private action. Rather than going to the final ICANN auction, they create a private auction
where essentially the losing parties get -- at least
they get -- they recover some of their money. Because
they wouldn't --

MS. ONDO: It's a private -- private --
MR. GENGA: Yeah, the winning --
MS. ONDO: -- contention resolution --
MR. GENGA: -- bid-- yeah.
MS. ONDO: -- itself, not --
MR. GENGA: Exactly. The winning bidder, some
of that money goes to the losing applicants.

ARBITRATOR HAMILTON: And where does the rest
go? I mean, I don't understand this auction process.
There's an auction process and they're paying a big
number, let's say $5 million.
MR. GENGA: Correct.

ARBITRATOR HAMILTON: Who gets that
$5 million?
MR. GENGA: The --
MR. MOODY: That is still to be determined,
from what I understand.

MR. GENGA: Yeah, I think the -- at least the
nonprevailing applicants get --

ARBITRATOR HAMILTON: Something.
MR. GENGA: -- something. Right.

ARBITRATOR HAMILTON: Okay.
ARBITRATOR COE: In the private --

MR. GENGA: In the private setting.

ARBITRATOR COE: Well, in the private setting, it's a private arrangement and --

MS. ONDO: Yeah.

ARBITRATOR COE: -- and essentially -- I don't want to say the phrase "bought off," but compensation is given for --

MS. ONDO: No, it's just -- it's contention resolution through a private process that's outside of ICANN --

ARBITRATOR COE: Right. And so then they're essentially -- it's bargain --

MS. ONDO: -- process.

MR. GENGA: Right.

ARBITRATOR COE: -- it's pure bargain market driven.

MR. GENGA: It's -- it's --

MS. ONDO: Correct.

ARBITRATOR COE: It's market driven. Whereas the public ICANN process of auction, this is where we're not sure where the money is --

MS. ONDO: If it goes -- it goes to ICANN.

ARBITRATOR COE: It goes to ICANN?

MR. GENGA: It goes to ICANN, yeah.
1          ARBITRATOR COE:  Okay.
2          MR. GENGA:  Right.
3          MS. ONDO:  ICANN collects all that money and
4 at this time, there's no determination as to what ICANN
5 is doing with it.
6          ARBITRATOR COE:  All right.  Okay.
7          MR. GENGA:  Right.  So the private auction is
8 just -- it's the parties resolving among themselves
9 that, hey, I'm the last standing applicant and so now
10 you -- I get this string.
11          ARBITRATOR COE:  So objections are a way to
12 limit the number that end up in the contention set?
13          MR. GENGA:  Correct, correct.  With respect to
14 all but string confusion, which I won't bore you with,
15 but yes.
16          So a successful objection on community
17 grounds, on legal rights grounds, on limited public
18 interest grounds will eliminate the application.  The
19 application will not proceed.  That's the language of
20 the guidebook.
21          ARBITRATOR COE:  And help me -- I read
22 Mr. Kantor's expertise, his decision, but help me
23 understand what your complaint about it is exactly.
24          MR. GENGA:  Well, the complaint is that
25 essentially -- there's four elements to an objection
for the community. One of which is, and the biggest
really one is, is the -- that the -- there will be a
material detriment to the community if the applicant
were allowed to proceed with the application.

And essentially the ruling of Mr. Kantor was
that no one can really run this domain unless they run
it as a community. And so therefore we find -- I find
per se, essentially, that Donuts would not be an
appropriate steward on behalf of the community even
though the -- Donuts has the absolute right, any
applicant has the absolute right to apply as a standard
or as a community application.

And -- and my point is that that requirement
in the guidebook, that freedom that any applicant has,
was completely ignored. And the ruling essentially
held that Donuts would have had to operate in this
community when in fact it had the right not to do that.

ARBITRATOR COE: And help me understand why
you would prefer to be standard rather than a community
application?

It's just that then the -- those who register
with that domain name would have to be of the
community? Is that what it would limit it to?

MR. GENGA: Well, there's a number of reasons
for it, but one -- there's actually a -- there's an
additional dispute -- there's a post delegation dispute resolution procedure that applies to community domains that doesn't apply to non-community domains.

So if, for example, I apply for .SPORTS as a community domain and I'm awarded it as such, and then someone thinks I'm not really operating it as a community domain or in the best interest of the community, I'm subject to a post delegation dispute resolution mechanism that says -- that challenges and says, hey, you can't -- you lose the domain 'cause you haven't done what you've undertaken to do as a steward of this community. So that's a reason.

Another reason is, and this is -- this is Donuts's reason, I mean, it's stated publicly many times, is that Donuts believe in a free and open Internet and that generic terms belong to everybody, not just someone who can say that, hey, I'm a big sporting organization, for example, so therefore "sports," which appeals to 7 billion people in the world, really is a community.

We don't buy it. We don't buy that. So we don't -- that's not Donuts's philosophy.

So that's the reason Donuts didn't apply for any domains as communities. And they specifically and very carefully selected what they believe to be generic
terms that would have wide appeal and that ought not to have been subject to most of the objections that they caught.

Donuts caught about 55 objections in total and prevailed on almost all of them. These two
Unfortunately --

ARBITRATOR COE: And what was the total number of applications? Three -- three --

MR. GENGIA: 307.

ARBITRATOR COE: 307.

MR. GENGIA: Yes.

ARBITRATOR COE: And how does that -- that's fairly ambitious, as I understand?

MR. LEVEE: That puts them right at the top.

MR. GENGIA: Right at the top.

MR. LEVEE: Right.

MR. GENGIA: Three times as many as the next one, pretty much. The next two are -- Google and Amazon are right around a hundred each, so.

ARBITRATOR COE: Sorry for interrupting. I --

MR. GENGIA: No, that's okay. I think actually we've probably covered -- I think I've pointed the panel to the places in the record that I wanted you to look. And -- oh, there's one other point that Mr. LeVee raised that I wanted to respond to.
The conflict point that was raised by Mr. LeVee that we didn't object specifically to -- to Mr. Taylor as a .SPORT panelist. And the issue that's raised by Dr. Sarvarian is that the burden was on the panelist to make the disclosure. The panelist never made the disclosure. It's not -- the burden is not on the litigant to find the conflict. The burden is on the panelist to make the disclosure. And had the disclosure been made, then perhaps we could have done something about it, but it never it was.

So I think that's an important distinction that I think was missed in Mr. LeVee's argument that is really the essence of what we're saying here.

But, again, I think -- whether or not there is a conflict or whether or not there was an obligation to disclose it, the question becomes, well, what's ICANN's responsibility for that? And here ICANN did have awareness of the issue, and it's a very important principal in ICANN's bylaws that decisions be made without conflicts of interest.

And we believe that ICANN's board being on notice of this situation and deciding not to get involved, if you look at the DCA case, the DCA panelists said, you just can't make that -- you don't have the discretion to decide not to get involved once
you know what's going on. You have an obligation to investigate it.

ARBITRATOR COE: How do you respond to the implied argument, maybe it was express, that the ICC is a hundred-year-old institution that has been resolving conflicts issues, independence and impartiality of arbitrators particularly for, you know, a hundred years or something, and that maybe they've developed an expertise in that that -- where one ought to defer to them?

MR. GENGA: Well, I understand that certainly the ICC ought to have some expertise in that, but that doesn't relieve the board of its obligation, which it has an independent obligation to make sure that decisions are made without conflicts of interest.

So particularly when they're put on notice of the situation, I think they have an obligation, yeah.

ARBITRATOR COE: So in your mind, the -- I mean, where you and Mr. LeVee I think are on the same ground, he suggested administrative burden and you're saying no, we're just talking about exceptional circumstances.

MR. GENGA: Correct.

ARBITRATOR COE: And for you, the triggering is the -- Exhibit 67 which calls attention --
MR. GENGA: Right.

ARBITRATOR COE: -- their attention --

MR. GENGA: Right.

ARBITRATOR COE: -- and veri- -- it substantiates you say --

MR. GENGA: Right.

ARBITRATOR COE: -- they knew about it.

MR. GENGA: Correct. They knew that this -- and we had no way of knowing that an objection had been made by the other applicant to the appointment of doctor -- or of Mr. Taylor, 'cause that information is not -- that doesn't go in the public file. So we had no way of knowing it, and we didn't know it.

So knowing all of what it knew at the time and -- and Mr. LeVee is right, ICC didn't give a reason why it disqualified Mr. Taylor from the .SPORT panel, but it was -- the objection was that there was a conflict and then all of a sudden he's gone.

So the inference is, ICC saw the conflict and notwithstanding that it was appointing Mr. Taylor at the exact same time with respect to the exact same string and didn't do anything about it, yeah, something ought to have been done. And the board was on notice of the other objection.

So under the DCA case, I believe it was
obligated to inquire and find out more about it instead of just saying, here, this is yours, this goes in your court, we're not touching it.

And that's all I have.

ARBITRATOR BOESCH: I have one question and it's -- maybe it's too general and I don't mean to dumb down excellent argument by both counsel on various specifics. But there seemed to be somewhat in both arguments a bit of a dichotomy or a discussion between procedural situations that might be more reviewable versus substantive problems that might be less reviewable, if reviewable.

And when I'm sitting there trying to think, okay, when you have a standard of generalities such as fairness or something of that nature, I might have a little bit of trouble determining whether I'm looking at a procedural issue that should be reviewable maybe, or a substantive issue which maybe should not be reviewable to the same extent.

So where do you draw the line between -- you know, I'm having a hard time making a bright line distinction between procedure and substance, particularly if I'm looking at general fairness and integrity and things like that.

MR. GENGA: Well --
ARBITRATOR BOESCH: Is there a question in there? I --

MR. GENGA: Yeah, no, I think there actually --

ARBITRATOR BOESCH: -- maybe you can help me out there.

MR. GENGA: Yeah, no, I think there is a question in there. I think that the -- the -- this point about fairness and integrity comes at the tail end of a core value that says "shall apply documented policies with" blah, blah, blah, integrity, fairness, neutrality, objectivity.

So we're contending that there were documented policies here and they simply weren't applied by these panels. And the ICANN board did nothing to ensure either by way of training or by way of review that these policies and documented procedures were followed, and that it ought to have done that.

So I'm not sure if that answers your question, but those things are tied into these documented policies and procedures that we've pointed out were not followed here.

ARBITRATOR BOESCH: Thank you.

MR. GENGA: If there's no other questions, I thank the panel.
ARBITRATOR COE: Thank you.

MR. LEVEE: May I respond briefly?

ARBITRATOR COE: Of course, yes.

MR. LEVEE: Okay. I would like to start with Exhibit 62 because Mr. Genga made a lot of statements about what it says.

First, so that everyone is clear, this is a document marked "Draft."

Second, so that everyone is clear, this document was issued on September 16th, 2015. And so I alluded to it before, but I do take some umbrage at the fact that we received a stack of exhibits at 6:45 last night.

None of these exhibits were created in the last three weeks. All of them could have been provided to you sooner.

Having said that, if you look at the specific portions that Mr. Genga referred to, it actually says exactly the opposite of what he represents.

On page 107, the draft report says:

Recognizing that all of the selected DRSPs are world renowned experts in the field, and to support the intent to maintain independence in the dispute resolution process, ICANN
did not attempt to direct or provide
the DRSPs with interpretive guidance
that might unduly influence the
outcomes. However, ICANN received
comments from the community regarding
the areas of expertise of panelists
and suggestions that the panelists
lacked training on the objection
standards. Given the untested nature
of the standards of the objection
grounds, ICANN may wish to provide
training for the DRSPs in the next
round.

So let's be clear, there's no admission here
that ICANN did something wrong. This report says
exactly what I said earlier, which is that ICANN didn't
train the DRSPs because it felt that the DRSPs were
highly qualified to do their own work. Others have
complained, but there's certainly no consensus that has
evolved.

Mr. Genga then referred to page 111 relating
to review mechanisms. And I'm going to paraphrase it
'cause it's a long paragraph.

Once all the expert -- each expert
report was issued, the determination
was shared with the parties with ICANN. They get posted on ICANN's Web site. ICANN accepted the determination -- in other words, the determination comes to us and we say, okay, it's a determination -- and acted on the determination, either allowing it to proceed -- the application to proceed or not.

There's no interpretation by ICANN that it's good, that it's bad. We get it, it's a "yes" or a "no," it should -- the objection is withheld, and we just implement it.

The guidebook did not provide for a process by which ICANN or any other body could conduct a substantive review of the expert panelist's determination.

Let me stop there. Mr. Genga just told you what he thinks was wrong with the .RUGBY determination. He thinks that the panelist got it wrong by creating the standard and applying that he didn't like. That is a substantive review.

And so in response, Mr. Boesch, to your question, ICANN was fully prepared and has, in fact,
made determinations that procedural grounds, either of
the guidebook or of a review and dispute resolution
provider, that procedural things that were supposed to
occur didn't occur, and, on that basis, ICANN granted
reconsideration.

It didn't happen frequently. We didn't expect
it to happen frequently. But it was a basis for
review. Donuts didn't take advantage of that
opportunity.

As to procedural matters, if there was a
problem, ICANN had the ability to fix it. As to
substance, ICANN had already made the determination it
simply would not review the substance. These are
expert determinations done by experts. Mr. Kantor was
determined to be an expert.

Then it goes on, on page 111.

ICANN received comments from the
community about the lack of appeal
mechanism in the objection process.
Some parties chose to invoke ICANN
accountability mechanisms to have
their cases considered. The
accountability mechanisms provided
parties with an opportunity to
challenge action or inaction in terms
of procedure. These are the
procedures broadly applicable to
ICANN's accountability in its work
that were not designed to provide an
opportunity for the merits of an
objection case to be reviewed.

So, again, just to be clear, this draft report
does not find that ICANN violated its bylaws or its
articles or did something wrong. ICANN is
acknowledging that, in some instances, people in the
community have said, maybe when you do it the next time
around, you ought to change it. And, of course, we
listened.

The last one that Mr. Genga referenced was on
pages 117 and 118. And in this one, he suggests that
the board actually made a finding that it had to train
the DRSPs. That's not what this says.

What it says at the bottom of page 117 is that
there were community applications. So there were
applications made by communities, such as .SPORT, where
there were ten other applications. And another
example -- I'm in an IRP on one right now -- there were
lots of applications for .INC, I-n-c, as incorporation.

And a claimant -- an applicant submitted a
claim for .INC and sought -- it pays extra money -- to
have the community evaluator decide whether that should
be a community application. If the applicant is given
community status, all of the standard applications are
put on hold.

So it's a good thing if you want to only apply
on behalf of the community to get community status.
You pay extra money, but you can only be selling your
domains to members of that community.

What ICANN did in that instance was select a
single vendor, the Economic Intelligence Unit, to act
as what's called the CPE panel, community priority
evaluation panel. And the portion that Mr. Genga
referred to was that ICANN decided that this one vendor
was so good at what they do and lacked any conflicts
with all of the other applicants that had provided
community applications, that ICANN decided it was going
to select one firm, essentially one expert, to do the
work in this area. It says:

ICANN verified that a single firm
could handle the workload and that the
firm was able to certify it did not
have a conflict of interest. And then
the panel drafted a set of guidelines
that its team would use to perform the
evaluation.
So ICANN didn't draft the guidelines, the panel did. So the notion that this paragraph tells us that ICANN is somehow now acknowledging that it should have adopted guidelines and informed the dispute resolution providers, that's just not what this report says.

Nothing in this report is an admission that we did anything wrong. I'm quite confident of that. All it is saying is, that there are lots of things that we need to review for the next round.

Two other things.

Just to clarify, yes, the auction proceeds go to ICANN. And ICANN under the guidebook has committed to find a worthy use of those. In other words, they can't be used for ICANN operations. They might be given to a foundation to expand the use of the Internet in regions today that don't have access. There have been a lot of suggestions.

The reason that -- or a reason that ICANN didn't specify in the guidebook is that ICANN had no notion of how much money would be generated as a result.

Now, ICANN has actually been accused in some circumstances of creating -- of not granting objections that could have reduced the number of auctions so that
we could generate more money by doing all of these auctions.

This situation is exactly the opposite of that. We're actually forgoing the ability to have an auction by having an applicant lose at the objection process.

ICANN stated that it was very indifferent. The notion of an auction is specifically referred to in the guidebook as a last resort. And when applicants such as Donuts offer to engage in a private resolution of those where they could work it out themselves, the money goes wherever the money goes, thereby putting ICANN in a position where it would receive zero dollars, ICANN announced to the world, please do that. We'd rather you do that 'cause our auctions are auctions of last resort.

I don't know whether that's relevant to anything we've discussed today, but I didn't want to leave the issue hanging.

And then finally a question of whether it's a prerequisite to file a reconsideration motion.

Mr. Genga is absolutely correct. There's nothing that requires an applicant to file a reconsideration request. But if you have a problem with a procedure that wasn't followed, that's the appropriate thing to
do, it's the logical thing to do. Because the board had announced multiple times and in every reconsideration request that it has done in conjunction with the program, has stated in big bold letters, we're not going to review the substance, but we will review the procedure. And if you tell us that a procedure wasn't followed, we will listen carefully.

The problem here is that when Donuts elected voluntarily not to file a reconsideration request, it put itself in a position where there actually was no board action.

If it had filed a reconsideration request and the request had been turned down, then I would be here telling you, yes, you should be reviewing the decision by the board governance committee turning down the reconsideration request, and I'd be justifying to you, if that's what had happened, why the board governance committee had done that.

Instead, Donuts skipped that part. It had the right to. But it also has to deal with the consequences of exercising that right. It then lands in an independent review process in a situation where the board had never touched Donuts's application for any purpose. And thus, it's forced to argue that it should have reached out because these are somehow so
egregious, these two determinations are so egregious, that the board should grab them by the neck and throw them out the window of -- we're on the fourth floor.

Out of all of the other objections -- there were more than 2- or 300 filed -- the board ought to take these two. It didn't do that. Instead, the board and the guidebook said, only in exceptional circumstances where we do it. And as the Booking.com panel said, there's clearly no obligation. If the board exercises its discretion not to act, that's consistent with the bylaws.

I'll leave you with that note. Thanks.

ARBITRATOR BOESCH: I had a question from what you said earlier. I know we were holding our questions until this point. But what you said earlier was interesting to me where both sides acknowledge the application of California law.

MR. LEVEE: Yes.

ARBITRATOR BOESCH: And then you said that outside California law has no effect on the principles that you were arguing. And I started thinking about it and I wonder, because these experts are engaged in decision making of a magnitude that is important, are they subject to the California Arbitration Act?

MR. LEVEE: I've never had that question
Before. Let me -- I'll respond --

ARBITRATOR BOESCH: We are subject --

MR. LEVEE: I understand.

ARBITRATOR BOESCH: -- to the California

Arbitration Act.

MR. LEVEE: Undoubtedly.

ARBITRATOR BOESCH: Okay. And there's --

ARBITRATOR COE: Which one?

MR. LEVEE: Well, you're subject to California

law. I don't know -- I mean, trying to think if the

California Arbitration Act has provisions that actually

are relevant to us.

ARBITRATOR BOESCH: Well, disclosures --

MR. LEVEE: This is not an arbi-- --

ARBITRATOR BOESCH: Disclosures, for instance,

under California law --

MR. LEVEE: Well, this is not an arbitration,

so I'm not sure in that respect that the disclosures

would apply. I know that the three of you submitted

disclosures to the ICDR. And if and to the extent

California law somehow applies to those disclosures,

I've never had that subject come up.

I certainly did not intend to say that

international law is not relevant to anything we do

here. ICANN's articles do reference principles of
international law. And the Internet, of course, is an international resource.

The point I was making, perhaps inarticulately, was that I don't think the claimant and ICANN have a dispute as to whether there are laws here, either in California or international, that apply that would affect the outcome of this proceeding. And that's what I was intending to say, if I didn't say it.

ARBISTRATOR BOESCH: What I really had in mind is, we're sitting here, you know, in your capacity, and I'm looking at the -- 1282 gives you some specific guidelines on when arbitration awards should and shouldn't be overturned. And you start looking at what we're looking at here, and I'm wondering whether -- I don't know whether it applies by analogy, or if both of you acknowledge California law applies, I'm just wondering what would be the effect of 1282?

MR. LEVEE: 1282 has no effect on this proceeding, because this proceeding is not an arbitration.

ARBISTRATOR BOESCH: I was thinking of actually what was happening below in the presentation of material by both sides to an independent decision maker expert who renders a decision.

MR. LEVEE: I think that ICANN set up a
process whereby it would -- it specifically disclaimed
that a party could take an expert determination and
take it into court and say that it was wrong. There's
no mechanism in the guidebook that would permit a party
to do that.

    MR. GENGA: I don't think there's a mechanism
that prohibits that, by the way, but I think -- so
whether one could have gone in and sought to vacate
that award as an arbitration award under 1282 or under
Section 10 of the Federal Arbitration Act, that's an
interesting question.

    I think Mr. LeVee is right that it doesn't
apply here because that's not what we've done.

    I think what the panel here is looking at is
standards that it's obligated to apply, which are
whether the actions of the board or inactions of the
board adhered or not to the bylaws and articles of
incorporation. Not whether, you know, there were
grounds to vacate the award, for example.

    MR. LEVEE: Well, and the last portion of your
question relating to the underlying expert decisions,
again, those were not arbitrations either in the sense
of the word used under California law. They're created
by ICANN's bylaws, and they are administered by dispute
resolution providers, but they're not viewed as
arbitrations.

Certain rules are imported into them --
discovery rules, prehearing rules, and whatnot -- but I
don't think any of these are -- were intended to be
reviewed as arbitrations.

And so the rules of overturning either under
of the Federal Act, the California Act or whatever the
act might be in Europe, as an example -- and I'm not
well versed in the arbitration rules in Europe -- but I
just know that the whole Section 1280 and its multiple
provisions, which I'm certainly comfortable applying in
an arbitration, that they're just not relevant here.

MR. GENGA: Okay. Can I add one thing?

ARBITRATOR COE: Of course.

MR. GENGA: And that is, I think that
Mr. LeVee talked about us asking you to throw these
decisions out the window. I mean, that's -- I'd be
delighted if you did that. But there's a middle ground
here. And that is, to say exactly what ICANN
determined with respect to COM and CAM, that these
things ought to be -- this panel has the power to say
we don't accept these determinations because the --
there was an obligation on the part of the ICANN board
to have done something. Therefore, we're going to send
them back and have a properly trained panel without
bias rehearse these objections. That --

ARBITRATOR COE: I'm sorry. Just to be clear, which implies that ICANN would train them or see that they were trained? Because nothing's happened to train them in the interim, so you'd have to --

MR. GENGA: Correct.

ARBITRATOR COE: -- perform some training.

MR. GENGA: Correct. Yes.

ARBITRATOR COE: Okay. Do both sides feel that they've had a fair opportunity to express themselves fully?

MR. LEVEE: I do.

MR. GENGA: I do.

MR. MOODY: I just have one small administrative topic that we need to touch on.

ARBITRATOR COE: Yes?

MR. MOODY: The second-to-the-last slide, there are -- I'm not going to go into a lengthy dissertation, but there are some cost and allocation issues.

MR. GENGA: Oh, right.

MR. MOODY: I won't pontificate as to which way the panel should allocate costs or not.

Just to summarize, there have been three decisions so far in IRP. The XXX decision was, you
know, fairly old, we all agree. The two that are -- we're arguing about, Booking and DCA.

In DCA, the requester, DCA, won and they were awarded a hundred percent of the costs.

In Booking where the requester lost -- it is worth looking at, and this is the very last page of the Booking decision, by the way -- the panel said, despite all this qualification, despite the fact that you're complaining about the guidebook which is years old, despite the fact that you claim the processes were followed, we are not unsympathetic to your case -- to your claim, and therefore we're going to allocate at least cost 50-50 even though you technically lose.

ARBITRATOR COE: All right. I recall that. And there's a distinction between, I guess, out-of-pocket and administrative costs and the costs of tribunal versus legal costs. Is that --

MR. GENGA: Yes.

MR. MOODY: Yes, and they talk about it right --

ARBITRATOR COE: A critical distinction, I would say.

MR. LEVEE: Yes. Legal costs are borne by the parties. The panel in the ordinary course would allocate costs -- charge costs against the losing
party. The decision in Booking, the panel decided to split the costs, which it has the right to do under the rules.

ARBITRATOR COE: When you say "costs," not including legal fees or including?

MR. LEVEE: Correct, not including legal fees.

MR. GENGA: Not including legal fees.

The other point I wanted to make -- I'm sorry -- 'cause I had proposed an intermediate remedy that the panel could impose, that's if the panel determines that both SPORT and RUBGY, based on our arguments, ought to be -- that it finds irregularities with respect to both of those on essentially the same grounds that we've talked about.

SPORTS, of course, there's the additional issue of the conflict of the arbitrator. So the panel could, in fact, grant us relief on SPORTS and not RUBGY in addition to either -- in addition to denying all relief or granting all relief. So there is another middle ground there.

ARBITRATOR COE: Okay. Final thoughts, ladies and gentlemen?

MR. GENGA: We appreciate the panel's hard work, that's for sure.

MR. LEVEE: Thank you for staying awake.
ARBITRATOR COE: Well, it was actually very interesting for me --

ARBITRATOR HAMILTON: Very helpful.

ARBITRATOR COE: -- and helpful, which is the main point of these exercises. And thank you for meeting face to face. I, for one, really think it makes a big difference.

ARBITRATOR HAMILTON: So do I.

ARBITRATOR COE: And I am -- I have mixed feelings about no one insisting on live witnesses, but I understand that's not what -- it didn't seem to bother one of the tribunals say -- talk to some live witnesses.

In any case, thank you very much for tremendous advocacy and good preparation and educating us, and now we have the hard mission ahead of us. And we will pick up on that right away. In fact, we've scheduled the afternoon for jumping right in, so.

MR. GENGA: Great.

MR. LEVEE: And we will forward the transcript to you as soon as we receive it.

ARBITRATOR COE: Thank you.

MR. GENGA: We'd like a copy.

MR. MOODY: Yes. And, Professor Coe, we can overnight you a hard copy if you like. There's --
apologies about that cut-off on the slide --

ARBIRATOR COE: That would be useful.

MR. MOODY: Sending the hard copy?

ARBIRATOR COE: Yes.

MR. NIZAMI: Hard copy or PDF?

MR. MOODY: Hard copy.

ARBIRATOR COE: Well, actually, no, PDF is fine as long as my printer understands what it is it's intended to do.

MR. MOODY: We can do both.

MR. GENGA: All right. Thank you.

ARBIRATOR COE: And that would to all three of us. Yes?

MR. GENGA: Yes.

THE REPORTER: Regular turnaround time for the final transcript? It would ten business days, is that --

MR. LEVEE: Yes. And we're ordering a copy.

THE REPORTER: Thank you.

ARBIRATOR COE: Ladies and gentlemen, we still haven't decided whether we'll invite post hearing briefs, just to be clear on that. Seriously, we're -- if agnostic is the rule, that's where we stand at the moment.

MR. LEVEE: ICANN would -- how do I say this
1 politically correct?
2 ICANN would welcome a ruling without the need
3 for additional post filing briefs --
4 ARBITRATOR COE: Understood.
5 MR. LEVEE: -- because of the additional time.
6 But in the event you view briefing as essential, we
7 would, of course, accept that decision and look for an
8 accelerated schedule.
9 ARBITRATOR COE: As I recall, your first
10 comments were, there are people out there waiting for
11 us to get busy.
12 MR. LEVEE: Yes.
13 ARBITRATOR COE: That is more or less what you
14 said.
15 MR. LEVEE: Along those lines, yes.
16 ARBITRATOR COE: And these are lovely parting
17 gifts for us to take?
18 MR. LEVEE: They are.
19 ARBITRATOR COE: So back to your comment about
20 the gym, I didn't get my workout in, but I do now.
21 Thank you very much, ladies and gentlemen.
22 MR. LEVEE: Thank you.
23 MR. GENGA: Thank you very, very much.
24 (Whereupon, at 1:26 P.M., the
25 hearing was adjourned.)
I, SUSAN NELSON, C.S.R. 3202, in and for the State of California, do hereby certify:

That said hearing was taken down by me stenographically at the time and place therein named, and thereafter transcribed via computer-aided transcription under my direction, and the same is a true, correct and complete transcript of said proceedings;

I further certify that I am not interested in the event of the action.

Witness my hand this 19th day of October, 2015.

Susan Nelson, C.S.R. No. 3202
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