International Center of Dispute Resolution

Dot Registry, LLC,  

Claimant,  

ICDR Case Number  

vs.  

01-14-0001-5004  

The Internet Corporation for Assigned Names and Numbers,  

Respondent.  

HEARING  

WASHINGTON, D.C.  

TUESDAY, MARCH 29, 2016  

11:00 a.m.  

Reported by:  Laurie Bangart Donovan  

Job NO.: 16074
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(Appearances continued)

ALSO PRESENT:

Amy Stathos, ICANN
Elizabeth Le, ICANN
Alexandre Alonso
Alyson Akoka
Michael Daly
Desiree Boxberger
Tess Pattison-Wade
Shaul Jolles
Nathaniel Morales

PANEL MEMBERS:

M. Scott Donahey, Chairman
Mark Kantor
The Honorable Charles N. Brower
PROCEEDINGS

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

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

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

There is to be no live testimony or no additional evidence presented today. Paragraph 3 of the Order sets out the time allotment, and I won't go through that in
detail, but that's also there. As I said, the transcript is going to be provided pursuant to paragraph 4, and in paragraph 8, the panelists have the opportunity to request post-hearing submissions should they decide that that might be helpful.

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

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

Relevant provisions of international law and international convention, California law, the articles of incorporation, bylaws, and the articles of incorporation and bylaws, we're referring to those of ICANN, which is a not-for-profit
California corporation organized under the laws of the state of California,

supplementary procedures for the ICANN IRP process, which are provided by the International Center for Dispute Resolutions, and finally, the International Center of Dispute Resolution International Arbitration Rules.

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

Are there any questions before we proceed?

Okay. In this matter then, Claimant has up to two and a half hours being divided between its opening and closing presentations, as Claimant should decide to do, and we have received -- thank you very much -- your very detailed presentations, at least in printed form, and understand that
you are going to elaborate on those at this point.

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

MR. ALI: It is indeed Mr. Ali.

Good morning, Mr. President.

MR. DONAHEY: Good morning, sir.

Would you like to proceed then?

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

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

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

The second is I --

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

MR. ALI: The second is I must congratulate you on your additionally
distinguished look, Mr. President. I have not seen you since you added to your visage. Really becoming.

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

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

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

Why are we here? We're here because our client, Dot Registry, was wronged. Our client spent millions of dollars in developing a concept, in developing a software, in developing relationships, investing goodwill, in
reaching out to secretaries of state and the National Association of Secretaries of State, in order to implement a system that will ultimately benefit the public at large.

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

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

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

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

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

Now, I should also mention that there is an additional slide that we sent to
Ms. Zernik which I asked her to print out. This is a slide which I hope will reduce ten of what is in the PowerPoint, and perhaps you could view those, Mr. Donahey. In fact, there's another one as well, I apologize, and that is nothing more than a re-creation of a slide that is already in your packet, slightly better formatted for easier review.

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

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

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

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

None of that happened here.

Now, the application Guidebook which contains -- which reflects ICANN policy, as Mr. LeVee will tell you and as you will see reflected in our slides -- and I'm simply going to point out to you where you can find certain supporting commentary in our slides to go along with the remarks that I'm
making. You will see at slides 7, 8 and 9, as well as slide 10, discussion of the rigor with which the Applicant Guidebook was prepared. The Applicant Guidebook in its module form contains the Community Priority Evaluation criteria.

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

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

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

Two years later, on 27 September 2013, the EIU issues CPE Guidelines subjectively interpreting what was contained in the AGB, and in fact, those CPE Guidelines were not subject to public comment, were not subject to any of the ICANN policy development processes. And those Guidelines not only expound upon and distort the base criteria,
policy development process that ICANN is bound to implement, but in their actual implementation, even with respect to their own interpreted guidelines, the EIU misapplied them, and we will demonstrate that to you and believe we have done so in our papers, together with our expert reports.

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

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

Slide 22, this is ICANN in one of its pleadings in the Despegar case. It is neither the role of the BGC or this IRP panel
to second-guess the substantive
determinations of independent third-party
evaluators. So what they were telling that
panel is that the EIU is supposed to act
independently.

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

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

    Now, the problem is -- and I'm
going to keep coming back to this over and
over again -- I have nobody here from EIU who
I can ask about any of this. I have nobody
here from ICANN staff that I can ask about
any of this. I have nobody here from the
board who I can ask about any of this, and
why is this significant?

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

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

    And what is it that the Board
Governance Committee does? The Board
Governance Committee evaluates whether one or more staff actions or inactions contradict established ICANN policies, and remember, the AGB is a reflection of ICANN policy.

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

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

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

Number one, procedural fairness.

Bylaws, Article I, section 2-8. The Board Governance Committee is there. One of its functions is to evaluate whether decisions were made by applying documented policies,
documented policy, i.e., the AGB. Did they make decisions by applying documented policies neutrally and objectively, with integrity and fairness?

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

What else is the Board Governance Committee supposed to do? Bylaws Article II, Section 3 provides, "ICANN shall not apply its standards, policies, procedures or practices" -- policies, again, policies or standards. "ICANN shall not apply its standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment, unless justified by substantial and reasonable cause, such as the promotion of effective competition."
The Board Governance Committee is supposed to look at that policy. The Board Governance Committee's duty is to determine whether the staff and EIU conducted themselves in a manner that violates that standard.

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

This is not stuff that I am making up. This is in the bylaws. The bylaws provide what a reconsideration request is supposed to do, and in this particular instance, it is for the board to determine whether staff, together with EIU -- because there's no doubt that they were not acting independently of each other -- that the staff, whether their action or inaction contradicted established ICANN policy.
So, so far we are in the realm of the EIU and staff applying criteria that is set out in the AGB, the document that was developed through the community process of policy making in ICANN.

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

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

So it is of immense significance.

It doesn't go to the Board, to the Board Governance Committee for any kind of secondary review. It, in fact, doesn't even go to what is called the New gTLD Program Committee, the NGPC, to determine whether the EIU or staff got it right. It goes directly to contracting. Immense power put into the hands of ICANN staff and the EIU.

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

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

So what is going to happen here? Dot Registry's applications for these strings will go into a pool with other applicants who
are not bound by any sort of restrictions associated with Dot Inc, Dot LLP and Dot LLC. None whatsoever. Google, one of the applicants, and Dot Registry, another of the applicants, will compete in an auction, an auction administered by ICANN, and what happens to the proceeds of those auctions? Millions and millions of dollars go into the coffers of ICANN.

I'm not making this stuff up.

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

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

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

They could also request -- the
third thing that they could do. They may
also request information relevant to the
request from third parties. Well, did they
do that? No. The Board Governance Committee
did not request any information from third
parties. Who could they have requested
information from? Perhaps the Delaware
secretary of state? You'd think that perhaps
the Delaware secretary of state would be an
interested third party. Well, ICANN may take
issue with that.

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

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

Well, I must say I was quite
surprised when I looked at the qualifications
of these individuals at the EIU who are
undertaking this incredibly consequential
review and making this incredibly
consequential decision, a decision that can
impact millions and millions of dollars of
value and a decision here that impacts very
serious public policy considerations.

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

Well, we have decisions taken, at
least so far as what we know, by a policy researcher, journalist,
with a bachelor's in liberal arts;
an economist with a master's in
economics; a researcher, master's in international
political economy; a researcher, master's in international
relations; visual data journalist, a bachelor's in modern languages.

Not a single one of them with any
qualifications whatsoever in US corporate law
or law at all. I'm not saying that they're
probably not very intelligent people, but I
don't know what their qualifications are,
because I cannot test them in front of you.

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

And the only way -- according to Mr. LeVee -- an applicant can win is if that coin drops and stands on its edge. Sorry. That is not what accountability is all about.

Recalling that ICANN operates today under contract from the United States government. Now, that's all under discussion as authority transfers to ICANN, but ICANN operates under authority from the United States government, and the United States government, as far as I recall, still believes in due process.

And that's where you come in, because we have gone from the application of standards to the exercise of discretion, the EIU's application of standards together with ICANN staff, to the exercise of discretion by the Board Governance Committee, and we go
from application of standards and exercise of
discretion into the realm of evidence.

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

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

Your remit is very clearly set out
in the bylaws. You are to compare contested
actions and inaction of the board to the
articles of incorporation and bylaws, and
what I hope I've done by now is to
demonstrate to you how all of this flows
back.
You have staff at EIU applying policy, the articles of incorporation, the bylaws, the BGC that is supposed to act according to the bylaws and the articles of incorporation, and your job is to determine whether contested actions or inaction of the board, how they compare to the articles of incorporation and the bylaws.

And in evaluating your remit, I cannot impress upon you the following point enough -- the following point upon you enough. This is our only shot. We don't get to go anywhere else because of the litigation waiver that ICANN requires of all applicants, a very broad litigation waiver, one that says "Applicant agrees not to challenge in court or in any other judicial forum any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed in court or any other judicial fora on the base of any other legal claim against ICANN and ICANN-affiliated parties," which includes the EIU, and Mr. LeVee will not dispute that, with respect to the application.
So we have no place else to go.

This is the final stop with respect to accountability, and that we ask you keep in mind when you think about the standard of proof, the allocation of the burden of proof, and how this process has worked to date.

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

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

And so we, we walk from the world of discretion into the world of evidence. And in fact, how do we know that other than simple logic, good sense, and what the tummy test should tell you? Don't be technicians
about it. Let's take a look at two documents which ICANN cannot deny or interpret in any particular way.

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

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

And if -- and I refer now to Article 26, 3. "If a party duly invited to produce evidence or take any other steps in
the proceeding fails to do so within the time
limit established by the tribunal, without
showing sufficient cause for such failure,
the tribunal may make the award on the
evidence before it."

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

All right. So let's also take a
look at the supplemental rules. The
supplemental rules, Article IV, provide:
"All evidence, including witness statements,
must be submitted in writing in advance."
Well, you have a witness statement from
Mr. Shaul Jolles. You have a witness
statement from Ms. Tess Pattison-Wade. You
have a witness statement from the secretary
of state of Delaware, and for all of us here
who are American lawyers and, in fact, those
who aren't American lawyers, understand the
importance of Delaware. The secretary of
state of Delaware and the president of the
National Association of Secretaries of State
have put in witness statements. They have
put in witness evidence, witness evidence,
witness statements specifically contemplated
by the supplemental rules.

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

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

It would be highly inappropriate
for you to not take into consideration, give
full weight to that evidence when ICANN tells
you that witness testimony can be put in,
but, ah, it doesn't have to be subject to
cross-examination, and ICANN chooses not to
put in any rebuttal witness testimony of any sort. I don't know if that troubles you.

That sure troubles me.

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

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

Mr. LeVee questions the qualifications of Mr. Flynn to have issued his report. Well, you know what? Why isn't Mr. Flynn here being cross-examined by Mr. LeVee, who is a trial lawyer with an incredible amount of expertise? And I have seen him examine several witnesses before.

In fact, why hasn't Mr. LeVee even put in a rebuttal expert report?

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

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

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

In this particular instance, it is
ICANN that has to demonstrate that what it
did was correct. Because of the way in which
these rules are framed and because of the way
in which the system plays itself out, it must
be ICANN that has to demonstrate by a
preponderance of the evidence that the
decisions taken by the Board Governance
Committee and the actions of staff and the
EIU are consistent with the articles of incorporation, bylaws and the Applicant Guidebook.

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

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

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

So what I think we should do now, I'm going to take a 15- to 20-minute pause, because I think it's important for you to
understand how these criteria that the EIU and staff were to apply were misapplied.

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

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

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

(Discussion was held off the record.)

MS. PATTISON-WADE: Good morning.
First I want to say thank you. I appreciate the time to speak with all of you today. My name is Tess Pattison-Wade. I'm the executive director of Dot Registry, and I'm also the author of the applications that we're discussing here today.

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

When I began writing and submitting the applications, I was working from Version 3 of the Applicant Guidebook which was published in September of 2011. In Module 1 of that publication, it tells us that "any applicant has the ability to designate their application as community-based, generic, top-level domain if it is intended to be operated for the benefit of a clearly delineated community."
Module 1 then goes on to tell us to consider four key points in answering questions 18 and 20 of the application. The first is that it asks the applicant to demonstrate an ongoing relationship with a clearly delineated community; that the gTLD that we have applied for strongly and specifically relates to the community named in our application; that we have proposed dedicated content and use policies which are supportive of the community-based nature of our application, and includes specific security verification mechanisms; and finally that we provide, in writing, endorsements from at least one community institution which is supportive of the concept and the community that we have provided.

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

Module 4 also reminds us that community in ICANN's eyes is very different than the concept of community that you or I might think of, where traditionally we think
of the word "fellowship," potentially the neighborhood we live in or the church that we belong to, in ICANN's world, "community" applies more to the concept of cohesion, and they tell us to focus less on commonality of interest and more on what the community makeup is and how it relates.

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

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

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

If Ms. Pattison-Wade is making an argument about something in the legal papers -- I don't know whether she's a lawyer, I don't care whether she is, and then I would not object. If the purpose of her segment here is to stand up and tell us what she did and why she thinks the EIU was wrong,
all of that is in her witness statement, and
I object to her repeating it now, because
it's outside the bounds of the rules.

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

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

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

MR. LEVEE: If I may respond,
Ms. Pattison-Wade's witness statement, which
is 23 pages long, goes into considerable
detail as to her views as to why the EIU got
it wrong, ICANN responded to that in its responsive papers, and of course, I intend to address that issue in some detail during my remarks, assuming I don't lose my voice from my cold.

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

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

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

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

MR. ALI: Okay, Mr. President. I'm going to take from that that you have
reviewed it already and that you are reviewing it again.

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

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

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

Now, what do we mean by the misapplication of the criteria? We have the AGB criteria, going back again to what I said right at the beginning; we have the CPE non-reviewed guidelines that were not developed through any policy development process of ICANN that were then issued; and then the EIU, in its own -- in its actual decisions that it issued, added further requirements to the criteria that it applied, and certainly applied criteria to Dot Registry's applications that it did not apply to any of the others.
And frankly, if the same standards that were applied to Dot Registry were applied to the other applicants, those applicants should also -- those applications should also have been denied, the obvious being that if those applications, such as Dot Osaka, Dot Hotel, Dot Radio, Dot Eco, and Dot Spa, were accepted, then the three applications that have been put in and that are in issue before you should also have been accepted, applying the same standards.

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

EIU Contact Information Redacted tells you, "The EIU made it clear to ICANN that its public involvement in the application due process should be limited. While performing its contracted functions, the EIU would operate
largely in the background, and ICANN would be solely responsible for all legal matters pertaining to the application process."

So you have the EIU, which, by the way, statement also makes it very clear that the EIU and ICANN staff engaged in "a long and iterative process in the finalization of these applications."
Those are his words, "a long and iterative process."

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

The Board Governance Committee should do it. And why? Because it is incumbent upon the Board Governance Committee to ensure that ICANN shall not apply its standards, policies, procedures or practices inequitably or single out any particular
party for disparate treatment. It is incumbent upon the ICANN Board Governance Committee to ensure that decisions were made by applying documented policies neutrally and objectively, with integrity and fairness.

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

So what is it that the Board Governance Committee actually does? They issue a decision of 23 pages, double-spaced, with respect to the complaints that were raised, and of course, they limit themselves very narrowly in terms of how they define what complaints are being raised by the applicant. And somewhere around page 7, we actually get into the substantive evaluation, or some substantive analysis. The first six pages are nothing more than procedural background. Nothing more.
And then ICANN says, or the Board says, "ICANN has previously determined that the reconsideration process can properly be invoked by challenges to determinations rendered by panels formed by third-party service providers such as the EIU, where it can be stated that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination."

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

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

That's, in fact, what the Despegar
panel says. Yes. Here is what the Despegar panel says. "What is of critical importance" --

MR. DONAHEY: Is this in your slide somewhere?

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

MR. DONAHEY: All right.

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

The Despegar panel says, and I quote, "The panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies, which ICANN accepts it is, that it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made or the relevant policy. The BGC needs to have a
reasonable degree of assurance that the EIU
has correctly applied the policy."

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

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

Well, had the Board Governance
Committee deigned to do some further investigation, perhaps requested some information from the Delaware secretary of state, to give one example, here's what they might have heard.

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

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

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

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

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

Now, the EIU says a lot of research
was conducted. Well, I don't see that research anywhere in the decision. How can I figure out where they got -- how they made their finding or how they reached the conclusion that they ultimately did?

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

And Mr. Bullock, The Honorable Jeffrey Bullock, also tells you that "There is an interest on the part of not only the Delaware secretary of state, as well as other secretaries of state and the National Association of Secretaries of State, and raising the standards of all states helps
protect these communities, i.e., communities
or registered entities, and consumers from
other businesses unlawfully trading on their
name and reputation."

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

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

Whereas in defining or what is an
acceptable community, EIU and ICANN staff
chose not to accept the communities of
incorporated entities, LLCs or LLPs, which
are externally verifiable with external
information, they did accept the following.
This is from the Dot Radio application, and I
could go to Dot Osaka, I could go to Dot Eco,
I could go to Dot Spa, I could go to Dot
Hotel, but let's just take a look at Dot Radio.

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

"Also included are the radio professionals. However, the radio industry keeps evolving, and today many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their audio content via the internet. Some are not broadcasters in the traditional sense. Internet radio is also part of the radio community, and as such will be acknowledged by Dot Radio TLD, as will podcasters. Finally, the community includes a variety of companies providing specific
services or products to the radio industry."

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

Mr. Kantor, Professor Kantor, a long-standing transactional lawyer of significant repute, in deals that were done would want to know about the corporate structure, the legal structure, the legal identity of the counter-party to a deal. Are you an LLC? Are you an LLP? Are you an INC? Not just that particular entity, but that entity and how that entity is defined by other entities that form part of that community.
It may be boring, but it certainly doesn't mean that they aren't a community. And the members of the community, the advocates for the community as reflected in the National Association of Secretaries of State, and the secretary of state of the jurisdiction in which the most number of registrations are completed every year, tells you that there is a community, and that is unrebutted.

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

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

"The reconsideration request decision recognizes that the CPE panel, the
EIU, mistakenly identified the supporter's letters as involving the requester's application for Dot Inc," but the fact that the CPE panel and staff made a mistake is seen as being completely insignificant. Why? Because the requester provides no evidence demonstrating that the typographical error represented a substantive misunderstanding.

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

When you read the second paragraph of one of the first grounds that the request for reconsideration requests, it will become evident to you that what is being said there
is that Dot Registry has to prove the
negative without being asked any information
or having any participation in the final
determination of its fate. The only place it
can do that is right here, right now with
you.

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

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

As I just pointed out to you, all
they had to do was to ask the Delaware
secretary of state, who voluntarily provided
you with a witness statement and his position
in this proceeding. And why wasn't it
significant that NASS, the National
Association of Secretaries of State, joined
in the reconsideration request? Isn't that a
sufficient demonstration of support by an
organization that represents the affected
communities? They didn't ask.

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

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

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

Transparency bylaw, Article III,
section 1. "ICANN and its constituent body
shall operate to the maximum extent feasible
in an open and transparent manner, and
consistent with procedures designed to ensure
fairness." And let's not forget the other
one. "Making decisions by applying
documented policies neutrally, objectively,
and with integrity and fairness."

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

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

Now, that's the EIU telling you
what's important to the EIU. And funny
enough, that language seems to have
dovetailed very nicely with the various
policies that we've been discussing with you.
  
  Is there a basis for
reconsideration? We submit to you yes, but
the burden is not on us. It's on ICANN.
  
  I won't go into the rest of the
reconsideration request. It simply says over
and over again, the requester does not claim
that the panel has violated establishes
policy or procedure, but instead challenges
the substantive determinations of the panel
that that is not a basis for reconsideration.
  
  Conclusory statement without any
analysis whatsoever. Without requesting any
information, without requesting any input,
without conducting any due diligence. Our
answers to the misapplication of the
criteria, the discriminatory application of
the criteria, are set out in Mike Flynn's
report and Ms. Tess Pattison-Wade's witness
statement.
  
  So with that, Mr. Chairman, I don't
know how much time I've used up so far.

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

MR. ALI: Okay. I will stop there
and reserve the rest of my time for rebuttal, and if there are any questions that I can answer at this juncture, I would be happy to do so.

MR. DONAHEY: Thank you, Mr. Ali. Do either of my co-panelists have questions?

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

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

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

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

(Discussion was held off the record.)

MR. DONAHEY: Thank you very much.

JUDGE BROWER: You quoted from the statement of the secretary, secretary of state of Delaware who stated that ICANN, that EIU or ICANN had gotten it wrong in not finding it was a community. I'm just wondering what value should we place on the opinion of the secretary of state of Delaware
as to whether or not the criteria to be applied for CPE have been correctly applied or not.

MR. ALI: Very good question, Judge Brower.

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

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

As you've seen in the five applications that were accepted, what you
might call a most favored application standard, the Delaware secretary of state is
one view, but a very important view.

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

Now, looking at a particular result as reflected in a report, objectively speaking, one might say, okay, I agree with that outcome, but I submit to you here that
the outcome as reflective of our community is illogical, and it's not factually supportive when one looks at the underlying facts.

JUDGE BROWER: Let me put another scenario before you.

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

So that's my motive, okay? I'll do anything I can to get that done, and he says,
sure, I'll sign anything. I'll say they got it all wrong.

Does that make -- would that make any difference?

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

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

So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely
massive, because if somebody were to gain the
rights to these TLDs, or maybe it's not just
one company or one applicant, but three
different applicants, not a single one of
which is based in the United States, just
think of the prospect of a company registered
who knows where, representing to the world
that it's an INC. That would be highly
problematic. That would be -- that would
create the potential for significant consumer
fraud. I mean consumer fraud on the internet
is multibillion dollar liability. This
stands, if it's not done properly, to create
absolute havoc.

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

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

I have one other question, which
is --
MR. ALI: Very briefly on that particular point, because I think you've raised a very important point.

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

JUDGE BROWER: You're not using Dot Osaka?

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

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

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

JUDGE BROWER: I just have one other question.

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

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

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

MR. ALI: Well, it's sort of like -- I wouldn't call a university admissions board adjudicatory. It's an adversarial process. It's one in which the onus is put on the Board Governance Committee
to conduct further investigation in order to ensure that the applicant has been granted due process, and the fact that it's adjudicatory -- not my words, Mr. LeVee's words -- words come from a submission that was made in another case. I think that was in Despegar again.

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

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

(Discussion was held off the record.)

MR. ATTANASIO: "The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the board to affirm that, to
the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable."

MR. ALI: This was -- the language that my colleague just quoted was in the context of the panel's commentary as to its disappointment with the overall process that ICANN has put in place for review of CPEs. And so by nature, the Board exercises its discretion, and does so in what appears to be the best interests of the company. Here, the only adjudication that's taking place is before an independent review panel of three independent panelists, so I make that distinction.

JUDGE BROWER: Okay.

MR. ALI: Thank you.

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

MR. KANTOR: Not at this time.

Just so you are aware, Chairman Donahey, I will hold questions until after I have heard presentations by both sides.
MR. DONAHEY: Very good. I will keep that in mind. Thank you very much.

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

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

MR. DONAHEY: Thank you.
MR. ALI: Thank you, sir.

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

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

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

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

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

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

JUDGE BROWER: No, for rebuttal.

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

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

And if I may, in terms of lunch, I
understand that we did not coordinate sufficiently well with Jones Day over ensuring that there would be lunch at this side of the screen. So I believe that we have tried to make some arrangements.

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

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

(Whereupon, a short recess was taken.)

MR. LEVEE: Are we ready to go?

Okay.

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

Mr. LeVee.

MR. LEVEE: Thank you.

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

I did for the court reporter want
to introduce off screen two lawyers from ICANN's Office of General Counsel, Amy Stathos and Elizabeth Le. They are here, but they are -- in order to keep the screen focused, they are sort of off to the side.

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

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

But that is not the focus ultimately of the panel's purpose, because the singular purpose of an independent review proceeding, as confirmed time and again by
other independent review panels, is to test whether the conduct of the board of ICANN and only of the board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

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

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

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

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

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

A fair amount of what we heard this morning from Dot Registry was that they don't like aspects of the Guidebook. Mr. Ali
clearly doesn't like the rules that bring us here today, which are contained specifically in ICANN's bylaws.

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

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

Page 3 of our slides, ICANN received 1,930 new gTLD applications, a whopping number, far greater than anybody's expectation. Nobody had that number. We'll leave it at that.
"Applications proposing a community-based top-level domain" to be 
"operated for the benefit of a clearly delineated community," which is what brings 
us here today. They "are invited to participate in a Community Priority 
Evaluation."

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

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

Slide 4. ICANN did outsource the Community Priority Evaluations to EIU, and it outsourced virtually all of the other evaluations, because ICANN, with 1,930
applications, simply was not equipped to do the sorts of technical and financial and other evaluations that were necessary here. ICANN staff selected the Economist Intelligence Unit to assess whether community-based application meets the criteria set forth in the Guidebook.

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

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

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

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

The panel ruled in ICANN's favor,
and it did not undertake the sort of detailed
finding-by-finding analysis of EIU's work,
instead finding that ICANN's work did not act
inconsistent with its articles and bylaws, in requesting reconsideration requests that were filed claiming that the EIU was too -- interestingly, it should come as no surprise, of course, that the winners in a CPE process challenge the EIU as being too lenient or the losers as being too strict, and as I said, I will discuss the work of the EIU in some detail, and I'm going to compare it to the expert report that has been provided.

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

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

Page 5 of my slides. “In developing the Guidebook, the ICANN community
determined not to include an appellate mechanism for expert determinations . . . conducted pursuant to the Guidebook." As I noted, those determinations are financial, technical, they're string similarity reviews and so forth.

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

"The Board retained the right,"

under the Guidebook, "but clearly not the

obligation, to review any aspect of a gTLD

application, including a CPE determination,"

but nothing in the bylaws or in the articles

requires the Board to sit as a court of

review.

Slide 6. As we know, Dot Registry

submitted these community applications, and

there were a total of 21 applications for

LLC, LLP and for INC. Mr. Ali said the Dot

Registry spent millions of dollars. I have

no basis to know whether it did or didn't,

but Dot Registry knew from the Guidebook that

it faced the risk that it would not achieve

community priority status, and it knew that

the Guidebook set forth rules that were

intended to be stringent.

And so the fact that Dot Registry

spent money should not cause us to have

sympathy that they didn't win. Everybody

spent money on their applications, and there

are some winners and there are some losers.

The point is that the EIU
determined that Dot Registry should not essentially be able to trump the 18 other applications because it determined that these were not communities.

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

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

"The Board Governance Committee focuses on whether the policies and procedures set forth in the bylaws and
Guidebook book were followed and whether the 
dispute resolution provider followed its own 
policies and procedures." The EIU did that, 
and I will confirm that in a few minutes.

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

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

As noted in the Merck decision,
"The reconsideration process is of limited
"scope," and given that there is no appeals process in the Guidebook, "it is not open to the Panel to create one."

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

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

In response to your question, Mr. President, as to the enforceability of the waiver, I will tell you that there have been two lawsuits filed against [ICANN]. There was a lawsuit filed a couple of months ago by an entity called Commercial Connection, and the court denied a temporary restraining order, finding that the waiver was valid. In the DCA matter and the IRP, the panel did ask for briefing on enforceability, and the panel made a few comments, but ultimately never issued any sort of adjudication.

MR. DONAHEY: The panel being --

I'm sorry.
MR. LEVEE: The IRP panel did not adjudicate its views as to whether the waiver was enforceable, and Mr. Ali then terminated his relationship with [DCA]*. Subsequently DCA retained a new firm, and they have filed a lawsuit in Los Angeles, and there is a motion for preliminary injunction that they have filed which is on for hearing on April 4, and of course, one of the critical issues is whether it may --

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

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

The bylaws set forth the purpose of

*Correction to transcript - agreed by counsel*
an independent review proceeding, which, as I mentioned, is simply to compare actions of the Board through the articles and the bylaws to see if the Board acted consistent with the articles and the bylaws. Independent review proceedings are not to address whether you think the staff did something right or wrong. It's not subject to review in this proceeding.

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

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

ICANN and Mr. Ali's client both had
to pay millions of dollars to adjudicate a single issue. ICANN changed the bylaws so that we streamlined the process. It's the process. Complaints about the process are time-barred. It's how it works.

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

Slide 11. Standard of Review. You asked about it at the beginning. I'm going to discuss it in these slides.
The bylaws contain the specific provision in Article IV, Section 3, Paragraph 4, which asks the panel to focus on these three items on slide 11. Mr. Ali says these are not the three only items, and I agree. The bylaws don't say these are the only things that a panel can consider.

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

Slide 12, Booking.com, I'm not going to read this entire quotation, but it says, picking up at about the fourth line, "It is not for the Panel to opine on whether the Board could have acted differently ..."
Our role is to assess whether the Board's action was consistent with the applicable rules found in the articles, bylaws and Guidebook." It's not to appraise the policies or procedures, "but merely to apply them to the facts."

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

So slide 14. To summarize Dot Registry's arguments -- now, I will tell you in all candor that I was going off the slides that were presented, and so -- I'm sorry -- off the briefs that were done. I didn't have Dot Registry's slides. So a few of my slides that we're about to get to are irrelevant in the face that Dot Registry didn't include those issues either in its slides or in Mr. Ali's argument this morning.
The gist -- Mr. Ali does argue that the Board Governance Committee improperly denied its reconsideration requests, but the primary challenge is that the EIU got it wrong. And in the papers, Dot Registry had raised a challenge to the Board's acceptance of GAC advice regarding the safeguards associated with these strings. Mr. Ali did not raise it this morning, it's not in his slides, and so I'm going to go past that.

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

Nevertheless, this morning Mr. Ali said that the Board Governance Committee did
not communicate with ICANN staff, because he
didn't get any documents to reflect that. I
will tell you that the Board Governance
Committee is aided by the Office of General
Counsel, which also consults with Board
staff.

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

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

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

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

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

The Board Governance Committee did
exactly what it was supposed to do. It read
the reconsideration request, it analyzed the
so-called "evidence" that accompanied the
reconsideration request, and it issued
findings.

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

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

But so long as you find that the
Board Governance Committee did what it was
supposed to do to check the EIU's work and
make sure it followed the Guidebook, just as
the panel did in Dot Eco and in Dot Hotel and
in Dot Merck and so on, then we are done,
because the Board could not have violated its
bylaws or articles if the Board Governance Committee did its work properly.

I'm going to skip slides 16 and 17.

Mr. Ali did not really cover them, and I'm also going to skip slide 18, because Mr. Ali didn't cover it.

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

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

And I suppose it would have been nice if they had done that, but the fact that NASS was a co-requester doesn't change the
outcome of whether the EIU got it right or
got it wrong in evaluating the criteria under
the Guidebook. All we're here to assess is
whether the EIU evaluated the criteria of the
Guidebook properly, not whether the EIU got
it right or wrong as a substantive matter.

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

Mr. Ali focused on the declaration
of Mr. Bullock, and when I read the
declaration, here is what struck me as said.
"I, as the Secretary of State of the great
state of Delaware, don't like the idea that
ICANN is going to delegate any of these
top-level domains. I'm worried about any of
these domains going forward. I asked ICANN
to stop them. I asked the Government
Advisory Committee to stop them. I went to
the Department of Commerce of the United
States. Nobody would stop them."
And so what he says is -- I'm reading from page 12 -- "While I have considerable concerns about the wisdom of ICANN delegating these strings at all, if ICANN is going to do so, then these strings should be awarded to an applicant like Dot Registry that will maintain and enforce the system with real-time and continuous verification of each entity's legal status according to the law."

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

As is the declaration of Elaine Marshall, the secretary of state of North Carolina and president of NASS, who says that NASS has been tracking these applications, and that NASS -- this is in paragraph 11. NASS wrote a letter to ICANN saying we don't
want any of these extensions going forward,
and ICANN responded and ICANN said, look,
we're going to allow them to go forward.
There are various rules and procedures that
might assist, but we're not going to block
applications that we don't like.

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

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

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

The declarations say, well, I don't
really like these applications, but if you're
going to select anybody, select Dot Registry,
because they're putting in more safeguards.
They will do some of our work for us. That's fine, but it tells us nothing as to whether the bylaws or the articles have been breached.

Ms. Zernik is helping.

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

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

I don't know if the "and more" includes drivers' licenses, but in the great state of California, if you need to get a driver's license, you're going to deal somehow with the secretary of state and the Department of Motor Vehicles.
My point is that the EIU was asked to evaluate: Do secretaries of state mainly advance the interests of LLCs or INCs or LLPs? Had Mr. Bullock provided this declaration to the EIU, the answer would have been clear. The answer would have been no. The Delaware secretary of state has so many things to do, it can't possibly be characterized as an organization dedicated to a, quote-unquote, "community" that exists of these legal entities.

Slide 21 of my slides. In the Despegar and Little Birch IRP, that's Dot Eco and Dot Hotel, as I've already mentioned, "The Claimants filed reconsideration requests challenging CPE reports . . . the applications for Dot Eco and Dot Hotel "had prevailed." The panel denied the request "and agreed with the position that the review . . . by the Board Governance Committee should be a procedural review of the CPE determination, not a substantive review." On slide 22 I was anticipating an argument that Mr. Ali had made in his papers that the Board could have intervened, and I
see that you are looking at your watch, and
I'm going to finish after this slide, and I
guess we'll take a break if that's what
everyone wishes.

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

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

In particular, the Booking.com
quote on the bottom of page 23 or slide 23,
"The fact that the ICANN Board enjoys the
discretion to consider individually 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 a claimant."

Slide 24 has quotes of the same.

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

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

Am I correct, sir?

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

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

MR. LEVEE: Washington, you were on mute.

JUDGE BROWER: It's on now.
MR. LEVEE: Thank you.

(Whereupon, the lunch recess was taken.)

MR. DONAHEY: Please proceed.

MR. LEVEE: Thank you.

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

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

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

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

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

So if you turn to slide 28, we're reminding you that a substantive disagreement
with a CPE report is not a basis for an
independent review. And then if you turn to
slide 29, Dot Registry's expert does not
demonstrate that the CPE panel has erred.

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

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

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

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

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

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

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

Exhibit C-18 is the EIU's report on Dot LLC. It's a 7-page, single-spaced document, and even a cursory review of the document will show you that it goes through each of the criteria out of the Guidebook to demonstrate whether the application from Dot Registry satisfies those criteria. I'm going
to go through two of the four criteria this morning and afternoon for some of you.

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

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

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

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

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

So then if you turn to page 2 of Exhibit C-18, you'll see that the EIU agrees that the "community" definition does show a clear and straightforward membership. However, the EIU then states that "the community does not have awareness and recognition of a community among its members, and that there is no evidence of LLCs from different sectors acting as a community," as defined by the Guidebook.
Now, Mr. Flynn disagrees, and his disagreement is on page 51 of his report. Again, I'll note that while the EIU has been attacked here for not disclosing its research, there is no indication at least in this respect that Mr. Flynn did any either.

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

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

The mere fact -- and this is just common sense. The fact that a law firm or a PR firm or a group of plumbers decides to form as an LLC does not mean that simply by
filing papers with the secretaries of state, they are showing an awareness of being a part of a community, with real estate firms and the accounting firms or the real estate investors or any of the wide variety of entities that elect to become an LLC.

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

The community that we are in is law firms. I would accept that maybe law firms could be designated as a community, but the mere fact of a designation of disparate organizations and a selection by disparate organizations, the selection by them of how they wish to be organized for tax liability
and other purposes, it literally tells you nothing about them or whether they share common characteristics with anybody else that happens to use the same corporate form.

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

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

And Mr. Flynn says the EIU shouldn't have undertaken this analysis, because those words aren't in the Guidebook. Well, I looked in the Guidebook on page 4-11.
It's Exhibit A to Mr. Flynn's report, and the definition of "community" specifically includes, quote, "an awareness and recognition of a community among its members."

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

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

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

The next step in the EIU's analysis was to look at organization, and I'm still looking at the EIU's report. I'm now down at
the bottom of page 2 of Exhibit C-18. This condition requires -- and again I'm quoting from page 4-11 of the Guidebook, "that there is at least one entity mainly dedicated to the community, with documented evidence of community activities."

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

As I noted previously, in Mr. Bullock's declaration, paragraph 5, he lists 18 different agencies that the secretary of state works with, "ranging from corporations to banking, to veterans services, the arts, histories, libraries, archives, civil rights and more." So when we're asking the question, is there an organization mainly dedicated to the community, when the EIU answers that the secretaries of state are not that
organization, that answer seems to me to be absolutely correct.

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

The key purpose and function of these offices.

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

And let's be clear. The secretaries of state are not a trade organization. They don't function to support particular types of entities. They are not mainly dedicated to LLCs or LLPs or INCs or any of the applications submitted here.
They facilitate for all of these organizations, and indeed when you compare the secretaries of state to the real communities that supported applications for Dot Hotel and Dot Eco, among others, you can see an enormous contrast between the types of communities and the types of organizations mainly supporting those communities that the EIU was looking for under the Guidebook.

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

Likewise, the CPE report for Dot Eco, which is Exhibit 41, shows several organizations that are mainly dedicated to the Dot Eco community, including the International Union for Conservation of Nature, the Worldwide Fund for Nature, the United Nations Environmental Program, the Global Reporting Initiative, Greenpeace, and numerous others, all of which, by the way,
supported that application.

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

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

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

What he's doing is offering his personal opinion. It's fine for him to do so, but his opinion is clearly no better than
the EIU's opinion. It's clear what the EIU was supposed to do -- what it did and what it was supposed to do.

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

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

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

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

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

And he cites no evidence that LLCs across the United States have some kind of an awareness that they are part of a community of LLCs. Think to yourself, who represents the community of LLCs? Who speaks on their behalf? There is no one. They're not organized that way. There's not even evidence that LLCs share a kindred spirit, much less that they organize and that they
publish and that they have activities. I can't even find a picnic that they attend.

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

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

Let me briefly discuss criterion 4 on page 6 of the report, which involves community endorsement. I mentioned this
issue because Mr. Flynn raises it, and slides 39 and 40 of Dot Registry's presentation address it. Mr. Ali did not this morning, but it's in his slides.

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

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

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

And that's the point that EIU is
making, not that it was required by Dot Registry to demonstrate consistent support from virtually every secretary of state, the point that the EIU made was it didn't have letters that demonstrated that many of the secretaries of state had any support. The EIU said that while several secretaries of state express support, others express clearly qualified support, and many others did not respond to the verification request.

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

So what did EIU do? It gave Dot Registry one point, not two. Mr. Flynn would have preferred two points, but his logic is no more compelling than the EIU's logic. EIU looked at all the letters, and it saw that there was not consistent support; and you can see that with your own eyes when you look at the two declarations that were filed in
support of Dot Registry's application to you, because to be clear, those declarations make it clear that, all things being equal, those secretaries of state would prefer that nobody gets these strings. It's not unqualified support for Dot Registry's application.

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

The EIU's point of view was based on the words of the Guidebook, the experience that those individuals had, and then when the Board Governance Committee looked at this report -- and that's largely what they did, among all sorts of other things, because Dot Registry submitted a lot of information, but the first thing that the Board Governance Committee does, it looks at Exhibit C-18. It looks to make sure did the EIU do what the Guidebook told them to do.
And I took you through half of that report, and the answer is clearly yes. The only reason I'm not taking you through the other half is I fear boredom and time constraints, but if I did take you through the other half, it would demonstrate exactly the same. The EIU followed the words of the Guidebook.

So let me wrap up.

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

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

So Dot Registry has not demonstrated that the Board's review of the reconsideration request violated the articles or the bylaws, and we urge you to reach the
same conclusion that the panel in Dot Eco and Dot Hotel reached, which is that there was not a basis to determine that the EIU got it wrong either substantively, which the other panels didn't look at, or procedurally, which the panel did look at, and appropriately so.

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

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

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

To be clear, Dot Registry has not identified any Board action or inaction other
than the Board Governance Committee's review, and so I do urge you to look at Exhibit C-4, to go through it and to see that in those 23 pages, the Board Governance Committee responded to Dot Registry's concerns and confirmed that the EIU did what the Guidebook told it to do.

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

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

There is no support under the bylaws that a panel can do more than that and issue some form of affirmative recommendation that the Board should take all sorts of
additional steps. The panel's jurisdiction
and authority under the bylaws does not
really permit it to do so.

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

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

ICANN is going through that same
process today. There is in conjunction with
the United States government's review of its
contract with IANA, and whether the United
States government will continue to have a
supervisory role vis-a-vis certain ICANN
functions, the community of ICANN has
literally proposed a new structure for ICANN,
a new manner of electing ICANN board members.

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

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

And so to the extent the panel
feels that any portion of this process with
respect to the first, the Guidebook that it
has concerns, I just wish that you would rest
assured that all of these issues are being
evaluated, not only in conjunction with ICANN's bylaws, but in conjunction with the possibility or eventuality that we will have what ICANN refers to as Round 2, a second round of gTLD applications that are unlimited, which will one day occur.

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

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

JUDGE BROWER: I do not.

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

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

MR. DONAHEY: I'm not going to ask the obvious question, but I want to let both parties know the amount of time remaining.
Mr. Ali, you have an hour at your disposal, sir, and — I'm sorry. Mr. Ali, you have an hour and a half. Mr. LeVee, you have an hour and 15 minutes.

MR. LEVEE: I hope not to use them.

MR. DONAHEY: Mr. Ali?

MR. ALI: Thank you, Mr. President. Well, we heard a lot from my friend Jeff LeVee. I will say that I'm appreciative of the fact that every time my team wins a case, ICANN sees fit to have to change its bylaws, and perhaps that's because we're right.

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

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

You've also got before you a
decision involving DCA Trust and ICANN, a
very informative decision as to what it is
that panels should or should not do, and we
won that one as well, and ICANN now is taking
a look at how its entire system should
function.

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

Well, that's not the point. The
point is: It isn't ICANN that defines the
way in which these proceedings function and
are conducted. You do. And ICDR rules
specifically grant you authority to conduct
the proceedings as you see fit, and to ensure
that each party has a full and fair
opportunity to present its case, and the
bylaws require you to look at the conduct of
the Board and the conduct of the Board in
reviewing what it is that the EIU and staff
did.
So I'm going to come back to something I said at the very beginning. If you listen to what Mr. LeVee has to say and you listen to what ICANN has to say, it really is heads I win, tails you lose, and unless the coin falls and rests on its edge, you haven't got a chance. No claimant has a chance. That can't be right.

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

And you have the Despegar panel's determination and language that it's not simply a procedural review, it's not simply a perfunctory review, that you take the EIU report as the BGC and say, oh, yes, they included the words in there, they looked at
each of these requirements, we're done. No. It's a substantive review. The Despegar panel specifically required that the BGC must be reasonably assured that what it is that the EIU and staff did complies with policies that ICANN has promulgated. And I took you through all those policies as reflected in Article I, Section 2-8, Article II, Section 3, and Article III, Section 1.

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

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

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

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

Now, Mr. LeVee told you that you won't find anything that ICANN influenced the EIU's scoring. Now, there's a difference in an evidentiary proceeding between submission and evidence, and in all of these proceedings that I've ever been through with Mr. LeVee, I
honestly do question when it is that he's

testifying and when it is that he is arguing,
because the two are constantly alike.

I am a traditionalist, and I

believe that panelists sitting in a process

such as this need to respect evidence.

Permit me a slight detour.

The very system of adjudication/

arbitration today is being criticized,
because panelists are too busy and don't

spend time looking at the evidence. You are

required to look at the evidence. And when

Mr. LeVee tells you that he has satisfied his

burden of proof, with what? By simply

challenging some aspects of what it is that

we have presented as affirmative evidence?

If indeed we bear the burden of

proof, with what has he satisfied his burden

of proof, or with what has he rebutted our


We'll go through that in a second,

but it is your job to look at the evidence

that is before you, and it is your job to

question us on that evidence, and it was your

job to have before you individuals to whom
you could have put the evidence, but ICANN has gamed the system, and they accuse us of gaming the system, for trying to put in place a system that will prevent abuse or, on the internet, consumer fraud?

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

So Mr. LeVee tells you that Dot Registry bears the burden. I presented to you why, as a matter of the language of the bylaws, the language of the IRP process, and the way in which this accountability system is structured, as to why ICANN bears the burden; but if Dot Registry, if I am to bear the burden, then, members of the panel, the standard of proof must be a very, very low one. How can we satisfy a burden, whatever that might be, when we have no witnesses to cross-examine, we don't have any rebuttal evidence on their side to address, we don't have any fact witnesses on their side to address?
Mr. LeVee says, well, those are the rules of the games, Arif. Those are the rules of the game that you signed up to. No cross-examination. No witness testimony. Well, the rules provide for expert witness rebuttals, and the rules didn't stop ICANN from presenting a witness statement, two witness statements, or any witness statements to rebut the witness statements that we put forward.

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

Now, Mr. LeVee tells you that, well, we didn't need an expert. We didn't need to put forward any experts. Why? Because we have the EIU. The EIU were our experts who we contracted to perform the CPEs, and you have their expert opinion. Well, all you need do is compare what it is that Mr. Flynn has put together by way of analysis and compare it to any one of the CPE
reports that the EIU prepared. Again, I'm not talking about simply one being bigger than the other. Look at the substance.

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

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

    Now, Mr. LeVee tells you we had 1,900 applications. 1,900 applications. We
were overwhelmed, the regulator of the internet, operating under contract with the United States government, the Board would have been inundated. Please take out your iPhones or your BlackBerries or whatever and multiply 185,000 by 1,900, and add a little bit more to that, and that's not even accounting for all the other revenue streams that ICANN has.

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

Oh, my goodness! 1,900 applications, but you know what Mr. LeVee also told you in the next breath? There are only 21 CPEs, of which five passed. How difficult can it really be for the Board to exercise its discretion in order to collect further information, in order to do more due diligence, to ask some more questions,
because we'll set a precedent, and everybody will come screaming, asking for the Board to do more. Don't be misled by 1,900. 1,900 times 185,000 is perhaps more important to focus on, especially when you're a public service corporation.

As the regulator of the internet, one of your core functions is to ensure that the expansion of the domain space takes place in accordance with what the bylaws and the articles of incorporation required, and the articles of incorporation provide for international law, and international law in this particular instance provides a prism or a lens through which you should interpret terms that are included in the bylaws. California law, too. It's kind of like bi-focals, lenses through which you must interpret these terms, but both California law and international law, in the words of Judge Schwebel, provide for a principle of good faith and underlies every single word that exists in those bylaws. Transparency, fairness, objectivity, integrity.

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

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

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

We don't see any emails going from anybody on the Board to ICANN legal or ICANN anybody saying here are the things that we are interested in, here are the things that you should be looking at. What do they do? They get a report from ICANN, they get something from ICANN, but remember what I told you? There is ample evidence in the record of the fact that ICANN staff and the
EIU were working hand in glove.

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

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

That's not how this is supposed to work. You exercise your rights in order to
do what? To make your decisions by applying
documented policies neutrally and
objectively, with integrity and fairness.
You exercise your right to ensure
transparency, transparency to the maximum
extent feasible. I don't think that was done
here at all.

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

In fact, the fact that The
Honorable Secretary of State Bullock was so
troubled by all of this suggests to me that
this was a decision that was taken with great
care and deliberation by the Delaware
secretary of state. Went into two things,
not only in supporting this application -- in
fact, by three things. Putting in a witness
statement and voting together with 49 other
secretaries of state, to unanimously adopt a
NASS resolution in favor of supporting a community applicant, and there's only one community applicant, Dot Registry, and you also, by the way, have support letters from NASS with unqualified support for Dot Registry.

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

And if we can criticize -- if Mr. LeVee's criticism of Mr. Flynn is to be accepted in any way because of the differing subjective views, because Mr. LeVee has one view and the EIU has another view and Mr. Flynn has another view, well, there's an
objective standard, and that objective standard is let's take a look at all the applications in reference to each other.

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

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

Well, I challenge him to show me one other letter of support given by any other institution that references the guidelines.

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

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

Oh, the other criticisms that we heard. Well, neither declaration, whether from Secretary of State Bullock, a publicly elected official, or from NASS, the president of NASS, neither declaration would have helped the Board. Well, how does he know? He wasn't there. And if was there, then he's
testifying, and I'd like to put some questions to him. Oh, by the way, neither declaration would have helped the EIU. Well, how do you know? How does he know? He doesn't know. He wasn't there.

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

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

And oh, by the way, for the international lawyers who are on the panel, all three of you, it is a well-established principle that it is the power, it is the authority, it's the state -- sorry. That party which has the authority, that party which has the police power, that party which regulates that bears the burden of
demonstrating that there is no discrimination.

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

Evidence versus submission.

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

Here's another one. Here's another one that was just thrown into the mix. You have to demonstrate, according to Mr. LeVee, that they share a "bond" of some type. Where does it say that? I couldn't find that language anywhere in the Guidebook. Even by
logical, reasonable, good faith extension, I don't find that to be reasonable extension.

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

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

So over here the notion is to determine whether or not a logical community
can be construed. Does logical community exist? Has the community been created for the purposes of the application? No. The community exists. The applicant simply recognizes that and presents information to the EIU, as it has done to you, with witness and expert testimony that there is a community that deserves some sort of -- that has an identity, and in fact, the community and the purpose behind this application is a really good one. It's a really good one.

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

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

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

And I indeed find it surprising that Mr. LeVee, who actually, representing the regulator of the internet and, I would put it to you, has a duty to be candid with you regarding the law, would be so selective in terms of his quotation of certain standards. And his skewing of what it is that those cases say, trusting in this process, this ICANN-created process, whereby law will come out all right in the end, because the advocates will have at it, and the judges will make their decision at the end of the day. There's a duty of candor and good faith as well, in respect of these principles and policies that are now informing the way in which the internet
regulator functions. Not to be taken lightly. This is really serious stuff.

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

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

Well, I put it to you that that assurance doesn't come from a memo from a lawyer from ICANN, who, of course, is going
to be defending their client and the erroneous decision that was made in issue. It's the Board's independent obligation, even according to the Despegar panel, and plainly according to the bylaws and the plain language of the bylaws. I'm not stretching the language at all.

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

I think that Jeff and I will be in
agreement that the standard today is that
groups must apply an objective and de novo
review without any deference to the Board's
decision.

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

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

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

MR. ALI: Thank you, Mr. President.

So just a few quick points to close
up. We can go through the -- if we had the
time, and we've done this in our written
submissions, and I elaborated on some of this
eyear this morning. We can go through this
BGC decision, the BGC decision that was issued within a couple of hours -- was taken, rather, within a couple of hours, without any real due diligence or investigation, which is, I would put it to you, incumbent on the Board and the circumstances.

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

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

Now remember what Mr. LeVee told you. Mr. LeVee told you that we are here to evaluate if the EIU evaluated the AGB
criteria appropriately, and as we know, he has previously said that the EIU is supposed to act independently; but then he also told you that the interaction between the EIU and ICANN, of which we have presented an abundance of evidence, and I quote, "is a good way to make sure that the EIU is looking at the right things." I guess "the right things," according to ICANN.

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

So what's the consequence of some of this? The consequence of this is that ICANN knows about the verification letters,
knows about the European community's retraction, and -- tell me if I get this wrong -- of its objection. Well, if we are to take at face value that ICANN is telling the EIU to look at the right things, did ICANN tell the EIU to look at this thing called the EU retraction? Because you know what they had? EC retraction. You know what they had? Well, we'd have gotten another point.

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

Well, the EIU, which, by the way, remember Mr. LeVee telling you that the EIU applied the criteria "to a T," quote-unquote. The EIU says the application did not indicate an appeals process. I'd encourage you to
take a look at what it is that ICANN's 18, 20, 28 and 29 of the applications say with respect to the appeals process. By the way, when you look at our appeals process in substance, in substance, compared to what is stated in some of the other applications which talk about a future appeals process or don't even mention an appeals process, whereas we do include an appeals process, and it is an appeals process that is objectively verifiable and external, because it involves the secretary of state, I submit to you that it's a very, very rigorous appeals process. It's just that the EIU couldn't figure out what a secretary of state is and didn't take the trouble to do any investigation.

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

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

Let's take another example.

Mr. LeVee talked about criterion number 1, community establishment, which there are three requirements or three elements: Delineation, organization, preexistence. And
he said that if you fail on this one, you
kind of bomb the whole thing.

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

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

And let's be very upset when we see
that the Board Governance Committee abdicated
its responsibilities in not conducting any
sort of due diligence, not asking any
questions of its own from ICANN staff; simply saying in a sentence quite likely drafted by ICANN staff, oh, well, the applicant is disagreeing with the substantive determination. How on earth does the Board even know without looking at the substance? It can't have. It's impossible. It didn't do it.

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

Well, there was no independent research that was done. There was no independent research that was cited to. There was an obligation of transparency that exists in the bylaws. The Board is required to police that obligation of transparency and to do so with integrity and fairness, and as I read to you before -- and I'll leave you simply with these words -- and for you to
determine whether or not this is what was satisfied by EIU or anywhere along the review process by ICANN.

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

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

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

Thank you, and I'm ready to answer
any questions.

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

(Whereupon, a short recess was taken.)

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

All right. Very good.

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

MR. LEVEE: I am.

MR. DONAHEY: Please do.

MR. LEVEE: Thank you,

Mr. President.

Mr. Ali closed by saying that he thinks the rhetoric is on his side and the facts are on ours, ours being his client's, and I guess that's as best a place as any, as a point of departure, to disagree. I thought the presentation that I gave to the panel this morning was fact-based. It went through portions of the Flynn report. It went
through portions of one of the CPE reports. I quoted to you from the Guidebook. I quoted to you from other IRP panels.

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

The BGC has made it clear that it is not conducting a substantive review on the merits. So when Mr. Ali has suggested that the BGC could have asked questions and how come the EIU did this and how come the EIU
did that, the Board Governance Committee hasn't done that with any of the reviews that it has undertaken, and there have been literally dozens of them. Many of them have wound up in IRP, but many of them have not. And so the Board Governance Committee's view of its task has been upheld by many IRP panels, including, most prominently, the Merck panel, which I do thank Mr. Ali very much misrepresented. The Merck panel says we are not going to look at the differences in substantive opinion as to whether an expert got it right or got it wrong in analyzing the law. It's not the Board Governance Committee's mandate. They don't have the expertise to do that, and a substantive review of any of these things, including CPE reviews, would require the Board Governance Committee to have the sort of expertise that it expressly decided to outsource. That's the purpose of having a different company, an outside vendor do the CPE reviews. It's the purpose of having a different company do the string similarity
reviews. That was the Booking case. It's the purpose of having WIPO conduct objection proceedings with respect to certain legal rights interests. The purpose was -- in receiving applications, ICANN didn't know how many it would get, but it did get 1,900.

The Board knew that others would need to apply their expertise to decide certain of these issues. It left in the hands of those others those decisions, and so long as those decisions were made without bias, so long as those decisions were made pursuant to the rules that the vendors had established, and so long as those decisions were made pursuant to the Guidebook provisions, the Board Governance Committee was not going to second-guess those decisions. There was great logic in setting it up that way, and the panels have uniformly determined that that is -- that it was absolutely appropriate for the Board Governance Committee to approach the proceedings in that way.

I'm going to run through, but I'm going to do so relatively quickly, because a
fair amount of what Mr. Ali said candidly was at me, I thought, personally. I feel no compunction to defend myself. I think I stated the facts as accurately as I could state them in my first presentation.

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

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

Mr. Ali then said, well, I don't know where this notion of an awareness of a community comes from, and so all I can do, members of the panel, is to refer to page
4-11 of the Guidebook, Criteria 1
Definitions.

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

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

When I criticized Mr. Flynn's report for doing no research, Mr. Ali then stands up and says I don't know if he did any
research, but he had a lot of footnotes.

What I would ask you to do, members of the panel, is to look at Mr. Flynn's report. There are a lot of footnotes. Almost every footnote is either referring to the EIU's various reports, the Guidebook, or the guidelines that the EIU promulgated.

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

Mr. Ali noted to you that there were only 23 CPE applications, and it's important that you know that only five of them passed. Why is that important? Because the Guidebook tells us, as I noted in my introduction this morning, that the rules are to be very stringently applied. ICANN expected most of the community applications to fail CPE. Does that mean the applications are dead? No, of course not. It means that
the applications have to compete with the
other applications that are filed for the
same string.

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

The Guidebook also says, I should
note, that ICANN strongly encourages those
who are in a contention set to work out
something, so they could have a private
auction, they could cut a deal, the
applicants can combine their applications.
There's a variety of ways. ICANN wasn't
looking to raise money as a result of these
auctions, but the bottom line is somebody has
to break the tie if there is a tie, and if
more than one application is pending at the conclusion of all this, Dot Registry will have just as much opportunity to submit a bid at auction as any other.

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

My big point, of course, is that we are not today, by denying CPE status to these applications and by confirming that the Board Governance Committee did not violate its bylaws, we are not telling Dot Registry that its applications are dead. Quite the contrary. It will proceed against the 18
other applicants that have submitted applications for these strings.

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

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

Mr. Ali repeats that he thinks ICANN should have had fact witnesses and it should have had experts. As I explained before, we chose not to retain an expert because we had an expert. The EIU. We compared the EIU's work to Mr. Flynn's work,
and we were very comfortable with how that comparison goes.

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

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

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

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

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

Mr. Ali suggested that somehow ICANN has not given Dot Registry fair and
equitable treatment, and I did want to respond to that.

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

And so we are obligated undoubtedly to treat people fairly, but fair and equitable treatment does not mean that if you work hard and submit a good application, that you're going to get a top-level domain. What it means in this context is there were three applications. They tried to get community priority. Getting community priority, by the way, would have knocked out, as I said, 18 other applications, and had they achieved community priority, we would be here today
nevertheless with many of those applicants
having filed an IRP, saying that the EIU got
it wrong, just as what happened in Dot Hotel
and Dot Eco.

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

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

Dot Registry said we think we
should have gotten two points here, we should
have gotten one point here. The Board
Governance Committee goes through each and
every one of those. This is the document, Exhibit C-4, that the panel needs to evaluate as to whether somehow this document violates the bylaws and the articles, because this is the single decision made by the Board that is reviewable.

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

The bylaws don't require any of the work that Mr. Ali suggested, and certainly the Guidebook does not, and as I told you earlier, instead, what the Guidebook does is give the Board discretion, discretion that it has chosen to exercise rarely, and that several other IRP panels -- the Booking panel is the one that comes fastest to mind -- confirmed 100 percent that the Board does not have an obligation to reach out and adjudicate these determinations on its own or to conduct itself as an appellate body. It
has the right but not the obligation, and not exercising the right, even with 23 CPE applications, cannot honestly be said to violate the bylaws.

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

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

And so when you look at, when you
look at the only decision that the Board made
in this instance that brings us here today
and that is reviewable by the three members
of the panel, the decision by the Board
Governance Committee, that decision was --
just as the other decisions that other IRP
panels have confirmed, that decision was not
a violation of the bylaws.

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

The other IRP panels have expected
the Board Governance Committee to make
decisions regarding the EIU's procedure,
procedures of the other vendors, and so long as those procedures were followed, we are done with our analysis.

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

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

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

MR. LEVEE: I am.

MR. DONAHEY: Thank you, sir.

Mr. Kantor, your patience is now to be rewarded. We turn now to the panel' questions, and since you have had no questions, withheld all your questions to the end, I want to give you the first opportunity.
MR. KANTOR: Thank you, Mr. Donahey. Can the people in California hear me clearly?

MR. LEVEE: Yes, we can.

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

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

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

There may also be in some of the questions a silent assumption or even an outright assumption. I would be grateful if you answered the question rather than telling
me the assumption is wrong and why. After you've answered the question, then I would be grateful if you identified an assumption that you thought was incorrect and told me why, but first, please just answer the question.

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

Is that correct?

MR. LEVEE: Yes.

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

MR. KANTOR: Very good.

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

It says, "If a community-based
application is found to meet the criteria, quote, 'that applicant will be declared to prevail in the Community Priority Evaluation and may proceed,'" unquote.

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

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

MR. KANTOR: That's correct.

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

MR. KANTOR: Very good.

Mr. Ali, do you agree, disagree?

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

MR. KANTOR: Thank you.

MR. LAVEE: I should add that there is a -- the Guidebook contains what I'll call a presumption that ICANN will automatically accept any recommendation by any of these
vendors. There's language throughout the
Guidebook that says "there will be a string
similarity review, and that will be accepted
by ICANN. It becomes the decision."

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

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

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

MR. KANTOR: Would that be conduct
of ICANN?

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

MR. DONAHEY: I don't understand
the reference, the decision to which you
refer. What decisions are you referencing?

I'm probably misunderstanding something.

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

MR. ALI: May I --  

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

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

MR. LEVEE: Yes, I did.  

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

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

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

MR. LEVEE: I can't give you a
MR. KANTOR: Okay. I'll turn to context in a moment, but first I want to hear from Mr. Ali.

MR. ALI: Thank you, Mr. Kantor.

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

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

And what then happens after that determination -- because there has to be a determination made by somebody, because the application then goes directly to contracting
for purposes of signing the registry
agreement, which is then I believe submitted
for Board action.

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

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

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

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

And the AGB Module 5.1 says ICANN's
board of directors has ultimate
responsibility for the gTLD program. Bylaws, Article II, Section 1, "Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board."

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

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

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

Am I correct that there is a difference of view there?
MR. LEVEE: Yes. I was going to read from the Guidebook.

MR. KANTOR: Please.

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

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

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

MR. KANTOR: Mr. LeVee, earlier you described that process as either a
presumption under the Guidebook or saying that if there is a determination by the panel absent some challenge, that determination is accepted by ICANN staff.

Did I correctly understand that?

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

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

MR. KANTOR: At an earlier stage in
these proceedings, the panel asked some
questions, and we were advised that action
here includes both actions and omissions.

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

MR. LEVEE: Only to Board.

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

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

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

MR. LEVEE: I will.

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

Article IV, Section 3.4, which
apparently I keep skipping over, says,
"Requests for an independent review shall be
referred to an independent review process
panel, which shall be charged with comparing
contested actions of the Board to the
Articles of Incorporation and Bylaws, and
with declaring whether the Board has acted
consistently with the provisions of those Articles of Incorporation and Bylaws."

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

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

Mr. Ali, your view?

MR. ALI: To me, the language will declare -- somebody has to declare -- if it's not the EIU as a vendor that is making the decision or declaration of any sort, then it
has to be ICANN staff that does that. The
notion that this is somehow paper shuffling
or pressing a button whereby an application
goes from one inbox to the next inbox or
somehow in some type of a process flow makes
absolutely no sense.

At the end of the day, there is a
declaration, a decision, an active -- an
action or active conduct that results in the
application going on to contracting, which is
a very significant event, without any further
Board review, and this is very important.
It's something I mentioned earlier,
Mr. Kantor, which is that accepted
applications or applications that are
declared as satisfying CPE do not go to the
Board Governance Committee or to the New gTLD
Program Committee, otherwise known as the
NGPC. It goes directly on to contracting.
So staff action and inaction is directly
implicated.

MR. KANTOR: Let's turn for a
moment to conduct of ICANN's staff, and I
understand there is a difference of view on
that, so the questions I'm now going to
ask -- I appreciate there's a difference of
view, and no need to repeat that difference
of view unless it is directly relevant to try
to answer my question.

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

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

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

And there is also a provision of
the articles, Article IV of the articles,
about corporation operating for the benefit
of the community in conformity with relevant
principles of international law and
international conventions and local law and,
to the extent appropriate and consistent with
these articles and bylaws, through open and
transparent processes.

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

   MR. LEVEE: No.

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

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

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

   MR. LEVEE: Including its staff,
yes.

MR. DONAHEY: Including its staff.

ICANN, its staff and its constituent bodies, constituent bodies being those bodies that advise it from the community at large?

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

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

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

MR. DONAHEY: Could you mute that back there?

MR. ALI: Sorry.

MR. LEVEE: Thank you.

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

The distinction is that ICANN also used a number of outside vendors, EIU being
one of several. It used the ICDR. It used
the ICC. It used a company that had an
algorithm for string similarity, and as to
those entities, those entities are not
c constituent bodies of ICANN. They are
outside vendors. And so the Board does not
view them as having the same obligations that
ICANN does in its constituent bodies.
What the panel in Despegar said was
that we are concerned about that, and we'd
like the Board to take a look at it. And of
course, the Board will look at that question
for the next round of applications, but the
work has already been done, and so we cannot
look at it in conjunction with the work that
has already been completed.
MR. KANTOR: My chair anticipated a
question I was going to ask, but he combined
it with a question about constituent bodies.
I believe I heard, Mr. LeVee, that you said
that while the CPE panel is not bound by the
provisions I identified, ICANN staff is.
Is that correct?
MR. LEVEE: Yes. ICANN views its
staff as being obligated to conform to the
various article and bylaw provisions that you cite. I think it goes without saying that it does not create -- that does not mean that the decision by a staff member is reviewable in an IRP, and the point I wanted to --

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

MR. LEVEE: I apologize.

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

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

The BGC itself says that reconsideration can be raised in respect of action by third-party vendors, and the reconsideration that has been raised is with
respect to one or more staff actions or inactions which contradict established ICANN policies.

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

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

MR. KANTOR: Your answer responded to the portion of my question relating to the EIU to be CPE panel. Do I assume correctly
that you have no disagreement with Mr. LeVee
that the provisions to which I refer are
binding on ICANN staff.

MR. ALI: Completely binding on
ICANN staff.

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

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

There was some doubt at the
beginning. If we had the conduct of the EIU
just as an example, where is that reviewable?
And the Board Governance Committee determined
that it would review the actions of a vendor
just as it would review the actions of the
Board or staff or anyone else within its purview.

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

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

Is that a correct statement?

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

Thank you for the clarification.
MR. KANTOR: My apologies if my questions are round around the edges. I'm working hard at it.

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

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

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

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

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

Is that correct so far?

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

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

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

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

MR. KANTOR: And can you expand on that to explain why the Board considers that those are not part of its scope of review?
MR. LEVEE: The Board retained these vendors pursuant to public processes. Vendors then signed contracts with ICANN. Well, I should clarify. The Board really wasn't involved in selecting vendors. It was done primarily by staff, but contracts were then signed, and the obligation of the vendors was to comply with their contracts. An outside third party does not, simply by contracting with ICANN to perform a function, necessarily subject itself to ICANN's bylaws vis-a-vis transparency or any other legal concept, and ICANN did not, in contracting with the vendors, ask the vendors to assume those obligations. And so ICANN knew that there would be a certain amount of information provided to all of the vendors so that they could do their jobs. ICANN was not asking all of the vendors to do what the Board might do, listen to the whole community, listen to all the various constituents with respect to individual decisions of vendors. ICANN was asking these vendors to perform specific and assigned tasks and contracting on that basis.
and paying their vendors accordingly.

MR. DONAHEY: So if a vendor acts unfairly in its work, in its evaluation work, what is the remedy for the aggrieved party who was treated unfairly?

MR. LEVEE: If a vendor acts unfairly -- and there are presumably thousands of permutations of what that means.

MR. DONAHEY: Of course.

MR. LEVEE: The applicant would file a reconsideration request, and the Board Governance Committee would determine whether a policy of ICANN was violated by the nature of whatever "unfair," quote-unquote, conduct had occurred.

MR. DONAHEY: So is acting fairly a policy of ICANN?

MR. LEVEE: It is a policy of ICANN, yes.

MR. DONAHEY: So then they would determine whether or not they were acting unfairly?

MR. LEVEE: If a vendor was accused of acting unfairly, the Board Governance Committee would look at that, yes. What I'm
trying to --

MR. DONAHEY: They would make a determination -- not just look at it. They would make a determination as to whether they were acting fairly or unfairly?

MR. LEVEE: Yes, but I want to clarify that ICANN did not ask its vendors to assume the responsibilities that exist under the bylaws, because, as an example, one of the core values of ICANN is to be transparent. ICANN works hard at being transparent.

Not all of the vendors, some of whom were conducting financial reviews of individual applications to determine whether the registry operator had the financial wherewithal to be registry operators, ICANN does not want those vendors releasing information, so it is telling the vendor you do so under a confidentiality restriction.

So there are -- there were many instances where the types of obligations that existed in the bylaws really could not have been extended to the vendors. I'm going beyond the use situation, but I'm giving
MR. DONAHEY: You've answered my question.

MR. LEVEE: Okay.

MR. DONAHEY: I apologize.

MR. KANTOR: Mr. LeVee, do I correctly understand the answer is different if the Board is reviewing staff conduct because staff is bound by those obligations?

MR. LEVEE: Yes, you are correct.

MR. KANTOR: And in the course of the Board Governance Committee's own conduct in evaluating a reconsideration request -- bear with me a moment. The Board Governance Committee itself is bound by those provisions, correct?

MR. LEVEE: Correct.

MR. KANTOR: Mr. Ali, anything that you would agree or disagree with in what Mr. LeVee has said?

MR. ALI: The short answer for us is for us is that staff and third-party vendors such as the EIU are de jure and de facto one and the same, de facto within the context of the facts of this case and as a
matter of the way in which the whole system
is set up, in our view, the same -- the
vendors have to operate consistently with the
articles and the bylaws.

MR. KANTOR: May I assume that you
agree with Mr. LeVee when he says the Board
Governance Committee itself is also bound by
those provisions I identified?

MR. ALI: Absolutely, yes.

MR. KANTOR: Okay.

When the Board Governance Committee
reviews a request for reconsideration, I see
in the bylaws, Section 4-2, paragraph 11,
that "The Board Governance Committee may ask
the ICANN staff for its views on the matter,
which comments shall be made publicly
available on the website."

In the context of these particular
reconsideration requests, did the Board
Governance Committee ask for the views of
staff?

MR. LEVEE: It did, and Mr. Ali
referenced our privilege log. There are
actually -- if you look at the log, there is
a fair amount of dialogue between the
governance committee and staff, but the
dialogue was managed by the Office of General
Counsel, which is why it was put onto a
privilege log. So there was a dialogue, but
it was not produced.

MR. DONAHEY: Not made publicly
available on the website?

MR. LEVEE: That is also correct.

MR. KANTOR: Is there a provision
in the articles, the bylaws regarding whether
attorney/client privilege or a litigation
work product privilege or any other asserted
privilege affects the language of
subparagraph 11 that I just read regarding
information being publicly available on the
website?

MR. LEVEE: All I could quote to
you -- or not quote, but ICANN is a
California corporation. Every California
corporation that I've ever worked with
retains counsel and does not post on its
website, except in very unusual situations,
the dialogue of communications between the
corporation and its counsel.

MR. DONAHEY: You're talking about
inside counsel or outside counsel?

MR. LEVEE: Either.

MR. DONAHEY: Because you know internationally the rule of privilege is different whether it's inside counsel or outside counsel.

MR. LEVEE: I know that the rule varies country by country and that some countries -- there are countries that don't even acknowledge the privilege at all, like China, but ICANN is a California corporation, and it certainly, where appropriate, uses its lawyers and does not communicate the results, does not post the results of those communications.

MR. DONAHEY: Is there any -- just one quick question. Is there any reason why, in paragraph 11, it is not stated that the Board Governance Committee may use the ICANN staff for views on the matter which comments shall be made publicly available on the website unless such comments are privileged?

MR. LEVEE: Not that I'm aware of, there's no particular reason, no.

MR. KANTOR: Before I question
Mr. Ali on these points, Mr. LeVee, could you turn to paragraph 14 in the same section?

That says that "The Board Governance Committee shall act on a reconsideration request on the basis of the public written record, including information submitted by the parties seeking reconsideration or review by the ICANN staff and by any third party."

For these three reconsideration requests, did the Board Governance Committee act solely on the basis of the public written record, or did it act on the basis of both public written record and other information?

MR. LEVEE: As I said, I know that there was exchange with staff that was privileged, and it certainly had information that the staff had provided to it, including the Office of General Counsel. I also know, because you looked at it, that Dot Registry submitted a pretty thorough reconsideration request. I am not aware of any other information that it had before.

MR. KANTOR: There's a note you should read, I guess.
MR. LEVEE: Yeah, that -- if the, if there was other information that the BGC relies on, which it certainly does from time to time, it notes that typically in footnotes in its report.

MR. KANTOR: For these three reconsideration requests, other than items withheld on account of an asserted privilege, was everything else that the Board relied upon in the public written record, the Board Governance Committee relied upon?

MR. LEVEE: That is my understanding, yes.

MR. KANTOR: So the only items that would not have been in the public written record are those for which ICANN has asserted privilege in these proceedings?

MR. LEVEE: Yes.

MR. KANTOR: Okay. Mr. Ali?

MR. ALI: Mr. Kantor, as I indicated earlier, the only thing that we know is what's in the privilege log. There's no communication that went from BGC to ICANN staff. All we have is a privilege document dated July 17, 2014 from Amy Stathos to the
Board Governance Committee the week before
the, the one in which they made the decision.
And to the extent that there was any other
material, as far as we know, per the bylaws,
it should have been publicly made available,
so there wasn't anything, and that's all we
know.

MR. KANTOR: Mr. LeVee, from your
answers may I presume that any communications
within the Board Governance Committee about
these reconsideration requests were passed
through counsel and thus privileged?

MR. LEVEE: Yes, because -- the
answer is yes.

MR. KANTOR: And who drafted the
reconsideration requests -- I'm sorry -- the
responses to the reconsideration requests?

MR. LEVEE: It's a collective input
by not only counsel but also by staff.

MR. KANTOR: Did the Board
Governance Committee itself do anything more
than just review and essentially accept those
recommendations?

MR. LEVEE: Well, I did not attend
these meetings. I don't normally attend
these meetings. I'm certainly aware that there are frequent situations where the Board Governance Committee makes a number of comments and asks for their comments to be reflected in revisions to initial drafts.

Initial drafts are typically put together by staff in consultation that the Board Governance Committee. I'm trying to remember how many people are on the Board Governance Committee. Six voting members, and the Board Governance Committee is very active.

So I fear that I'm leaving the impression that this is something as to which they are passive. They are not. They are extremely active, and there's considerable exchanges leading up to the meeting that they had.

MR. KANTOR: Would it be fair to say that that activity is in effect shielded by assertions of privilege, at least reviewed by this panel?

MR. LEVEE: It is in this case, yes.

MR. KANTOR: I understand the
clarification.

I know you all wanted to get there,
so finally let's turn to Article IV, 3-4, and
the scope of authority of this panel.

Mr. LeVee, can you explain how the
Board Governance Committee in this particular
matter exercised its due diligence and care
in having a reasonable amount of facts in
front of them in reviewing the three
reconsideration requests, and can you be as
specific as possible?

MR. LEVEE: I can.

So the Board Governance Committee
had the EIU, the three EIU reports, and it
had the lengthy challenge submitted by Dot
Registry regarding those reports. As I've
said before, the Board Governance Committee
does not go out and obtain separate
substantive advice, because the nature of its
review is not a substantive review.

So I don't know what else it would
need, but my understanding is that apart from
privileged communication, what it had before
it was the materials that I've just
referred, EIU's reports and Dot Registry's
reconsideration requests, which had attached
to it a number of exhibits.

MR. KANTOR: So in evaluating that
request and the CPE panel report, would it be
correct to say that the diligence and care
the Board Governance Committee took in having
a reasonable amount of facts in front of it,
were those two submissions an inquiry of
staff which is privileged?

MR. LEVEE: Yes.

MR. KANTOR: Subclause C: How did
the Board Governance Committee go about
exercising its independent judgment in taking
the decisions it took on the reconsideration
requests? Again, with as much specificity as
you can reasonably undertake.

MR. LEVEE: The primary thing I
obviously have to refer you to is the report,
the 23-page report of the Board Governance
Committee. I, I don't have other materials
that I have tendered to the panel to say that
the Board members exercised their independent
judgment, beyond the fact that they wrote a
document which goes pretty much point by
point through the complaints that Dot
Registry asserted, evaluated each of those points independently, and reached the conclusions that they reached.

MR. DONAHEY: Were there drafts of that 23-page report?

MR. LEVEE: Yes.

MR. DONAHEY: And were those produced?

MR. LEVEE: They were not.

MR. DONAHEY: And was that because they were privileged?

MR. LEVEE: Yes.

MR. KANTOR: Mr. LeVee, what exists in the record before this panel to show that the Board Governance Committee exercised its judgment independent from that of ICANN's staff, including office general counsel?

MR. LEVEE: The record is simply that the six voting members of the Board Governance Committee authorized this particular report after discussing the report. I cannot give you a length of time that it was discussed. I don't have a record of that, but I can tell you, as reflected in many other situations where similar questions
have been asked, that the voting members of
the Board take these decisions seriously.
They are then reflected in minutes of the
Board Governance Committee which are
published on ICANN's website.

    Candidly, I'm not sure what else I
could provide.

    MR. DONAHEY:  Are there minutes
published on the website that reflect the
discussions they took in this case?

    MR. LEVEE:  There are minutes of
the Board Governance Committee meetings that
are posted on the website.

    MR. DONAHEY:  That reflect
discussions of this particular case?

    MR. LEVEE:  Yes.

    MR. DONAHEY:  And that are
unprivileged?

    MR. LEVEE:  Yes.

    MR. DONAHEY:  And were those
produced?

    MR. LEVEE:  Yes. Well, they're on
the website.

    MR. DONAHEY:  I understand that,
but, you know, unless we knew that, we
 wouldn't have gone there to look for them.
I'm just wondering --

   MR. LEVEE: I'm checking to see if
either of the sides marked the minutes as an
exhibit. I don't remember off the top of my
head. The minutes do not have normally a
back and forth and back and forth as to who
took which position. They simply reflect
that the Board Governance Committee --

   MR. DONAHEY: Considered it and
voted on it?

   MR. LEVEE: It identifies the
individuals on the Board Governance Committee
who were present and that a decision was
taken.

   MR. DONAHEY: Okay.

   MR. KANTOR: Mr. LeVee, in those
minutes or in the determinations on the
reconsideration requests, is there evidence
that the Board considered whether or not the
CPE panel report or any conduct of the staff
complied with the various provisions of the
bylaws to which I referred, core values,
inequitability, nondiscriminatory treatment,
or to the maximum extent open and
transparent?

MR. LAVEE: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

MR. KANTOR: Mr. Ali, anything you wish to add?

MR. ALI: We were just looking for the expression of interest document that ICANN put out. It's not on record, but it is all part of ICANN public documentation. I think that that document does reflect that those who expressed interest to become vendors are bound by or subscribe to ICANN's principles and policies and what-have-you. I wanted to try and find that for you if Mr. LeVee will permit.

The only other comment I would make is that Mr. LeVee said a couple of times, referring to the BGC, that they wrote, in terms of the drafts of the, of the BGC reconsideration decision. They didn't write
anything. It was all written by ICANN staff, and the only thing that we have on record is this privilege log which reflects the document that was sent by Amy Stathos.

Now, if there were further communications, I would simply ask that you take a look at the attestation or the affirmation that was provided by one of ICANN's lawyers in respect of the production that was made by ICANN.

I will say no more, because I think that that affirmation speaks for itself, and I have an immense amount of respect for Mr. LeVee, and I would not want to say anything that would cause him offense.

MR. KANTOR: Leaving to one side that last implied criticism, which I would be grateful if you would not do again,

Mr. LeVee, do you have any comments?

MR. LEVEE: I do. I'm looking at the privilege log that we produced, and there's certainly more than one email. I'm looking at a number of emails that were produced and marked privileged, because
Ms. Stathos was either the primary recipient or the author, or Ms. Le, who is also with us today, was the author of reconsider -- of questions and regarding the reconsideration request, draft results, materials to be considered by the Board, with attachments, two separate emails.

And so those are seven exchanges between the Board Governance Committee and -- well, five between the Board Governance Committee and ICANN's staff, and then there are three that are between Ms. Stathos or Mr. Dan Halloran, another lawyer, and other staff relating to these particular reconsideration requests. So it's not just one email.

MR. KANTOR: Very good. Unsurprisingly, this whole line of inquiry leads me to be thinking about burden of proof, and this question clearly has some assumptions in it. The assumption is that either Board staff undertook conduct or that the EIU, through the CPE panel, is bound by the obligations we've been discussing in the bylaws and the articles.
And I recognize there is a
difference of view between the parties on
that, and by asking the question, I am not
indicating one way or another how I would
consider the answer to that question. I'm
just asking it so I understand what would
happen if the panel were to conclude that one
or both of those assumptions was accurate.

Mr. LeVee, if the panel were to
conclude that --

MR. DONAHEY: Excuse me. Could you
please turn the mid off in the back when you
start shuffling documents? It makes it very
difficult for us here.

MR. ALI: Sorry, Mr. President.

MR. DONAHEY: It makes it hard for
us here in California to hear, Mr. Kantor.

MR. ALI: With that turned off, can
you still hear us?

MR. DONAHEY: When you need to
talk, you can turn the mic on, but when
you're shuffling documents around, we hear a
bunch of noise.

MR. KANTOR: Mr. LeVee and

Mr. Donahey, did you hear my last set of
questions?

MR. DONAHEY: No. Well, I'm not sure. Would you repeat them for my benefit?

MR. KANTOR: Sure. My apologies for any repetition.

The unstated assumptions and now stated are that either ICANN staff conduct occurred or that the CPE panel is bound by provisions in the ICANN bylaws and articles that I identified. I understand that's in dispute. By asking this question, I'm not trying to indicate one way or another my view about how that dispute -- those disputes ought to be resolved.

But assuming that one or both of those assumptions are accurate, what -- in your view, Mr. LeVee, has Dot Registry made a prima facie case for failure on the part of the Board Governance Committee to determine whether or not staff and/or the EIU complied with those provisions of the bylaws and the articles?

MR. LEVEE: No.

MR. KANTOR: Can you expand upon that?
MR. LEVEE: Of course.
The reason I say no is because I don't believe Dot Registry has presented evidence to you of any wrongdoing, substantive or procedural, by the EIU. The evidence is that the EIU followed the Guidebook, including specific definitions out of the Guidebook, conducted an analysis, reached an outcome.

The challenge today has primarily been to the substance of that outcome, although I do not feel that Dot Registry has presented a prima facie case that would allow you to conclude -- when I think of prima facie case, I think of presenting enough evidence so that if ICANN didn't respond, you would be compelled to rule in favor of Dot Registry.

I don't think Dot Registry gave you that evidence. They gave you an expert report of an individual with no qualifications any better or different than the members of the EIU, and all he did was fly speck the EIU's work. He really doesn't have any independent opinions, and certainly
not ones that are grounded on analysis that he did.

He simply took the EIU's reports, picked and chose some of the words that they used to disagree with them and said you know what? I think the secretaries of state are primarily representing LLCs and LLPs and so forth.

So I seriously doubt that Dot Registry has given to you a prima facie case.

In terms of procedure, the allegations throughout this case have been that somehow the EIU applied the wrong criteria. What I tried to do today -- I only did half of it; maybe I should have done all of this, since I didn't use all my time -- was to take you through the EIU's report and show you that the words of their report and the analysis of their report come straight out of the Guidebook, not the EIU's guidelines even. Straight out of the Guidebook.

So as a matter of procedure, although we have Mr. Flynn quarreling with words, I don't think we have a prima facie
case. The EIU did what it was supposed to do.

MR. KANTOR: Mr. Ali?

MR. ALI: Professor Kantor, I've said what I had to say in the morning and in my rebuttal and in our witness submissions with respect to the evidence that's been presented. I would just make a couple of observations, addressing questions that you put to Mr. LeVee.

This notion that Mike Flynn has not done any independent research and all he's done is reflect his own opinion, you might just want to take a look at all the various statistics that Mr. Flynn has provided regarding the percentage of LLCs within the United States or outside the United States, how many corporations or entities are registered in Delaware and what-have-you. That's just one example of the type of independent research that he's done.

The criticism that Mr. Flynn is not qualified but the EIU is qualified based on simply Mr. LeVee's submissions, again I put it to you that those submissions should fall
on deaf ears, since they are simply that, submissions. We don't have the witnesses here so you can evaluate their credentials, you can look into their analysis. That's how you test this stuff.

The other thing is that -- what else did Mr. Flynn do? He's conducted an analysis comparing application against application, the three applications at issue here with other applications. That in and of itself is independent analysis that remains unrebutted by ICANN.

Now, insofar -- so our position is yes, we have made out more than a prima facie case if the burden, in fact, rests on us, and we've done so with respect to all of the different claims that we've put forward where ICANN has breached the articles and the bylaws.

And I'll also just make one other point with respect regarding the privilege log. I don't know what privilege log it is that Mr. LeVee is looking at, but I have a three-page privilege log which contains four entries that refer to the Board Governance
Committee LISTSERV.

One of those is probably about a month after or three weeks after the decision was taken by the Board Governance Committee to deny the reconsideration requests. Two of them relate to what seemed to be just informational, that reconsideration requests have been submitted, and there is this one document from Ms. Stathos which probably included -- with an attachment, which probably included the draft of whatever it is that staff wanted the Board Governance Committee to understand.

We are taking it at face value that what Ms. Le is saying is that there are absolutely no other documents is correct. Nothing is posted, nothing else is on the privilege log, and nothing else was produced. So either the attestation is false, which I hope is not the case, or there weren't any other pieces of paper generated either from the Board to the staff or from the staff to the Board.

MR. KANTOR: Mr. Ali, I understand that California law has a business judgment
rule for California corporations. What role
does the business judgment rule play in this
panel's determinations regarding decisions of
the Board Governance Committee?

MR. ALI: Very good question, and I
knew the answer to that at one point
addressed in the context of the ICM versus
ICANN case, and in that particular case I
believe the panel determined that the
California business judgment rule has no role
within the context of ICANN and the type of
organization that it is and the function that
it performs.

MR. DONAHEY: Maybe I don't really
understand the business judgment rule. This
has been bothering me, and maybe the
corporate lawyers can clarify it for me.

My understanding as of the business
judgment rule is that it protects directors
who exercise independent judgment on behalf
of the corporation, from being sued by the
shareholders of the corporation, and held
liable for exercising their business
judgment, because the stock price went down
or something else happened to cut the
shareholders interest. I don't see how that applies at all here.

Am I wrong?

MR. KANTOR: Mr. LeVee, anything you or your colleagues wish to add in light of Mr. Donahey's inquiry?

MR. LEVEE: The rule can also be applied -- what you have just stated is the most widely used application of the rule. The rule can also be applied to say that a court will defer, to some degree, to a decision of a board exercised in its business judgment that the board's decision is presumptively correct, and I had understood Professor Kantor's question to raise that issue.

MR. DONAHEY: I'm not familiar with that, and I would defer to your greater knowledge.

MR. LEVEE: And there has -- there was -- Mr. Ali and I have had an earlier matter in 2008 with respect to the application for Dot Triple X, and in that matter Judge Tabrizian dissented from the panel's decision, and in his dissent he wrote
that he would apply a business judgment rule
to what the Board did and give the Board --
I'm paraphrasing -- some deference.

Since that time, there have not
been any other IRP declarations that have
adopted Judge Tabrizian's suggestion as to
how to evaluate these matters.

MR. KANTOR: Mr. Chairman, in light
of both that answer and the earlier request
by Mr. Ali for time to look at the expression
of interest document, I would appreciate it
if we considered that as to how we deal with
post-hearing briefing.

Mr. Ali --

MR. ALI: May I address the
business judgment rule point?

MR. KANTOR: You may, briefly. I
think my colleagues are getting tired of me.

MR. ALI: Well, hopefully not of
us.

The ICM panel rejected the
application of the business judgment rule
precisely on the proposition that President
Donahey put forward, and it's been
consistently rejected in Vistaprint, DCA
1      Trust, Despegar, ICM and Booking.com.
2                The California business judgment
3      rule, notwithstanding all respect to Judge
4      Tevrizian and his view as to how it might
5      have some relevance, ultimately it has no
6      relevance in this context.
7                MR. LEVEE:  May I just add one
8      thought?
9                MR. KANTOR:  Of course.
10                MR. LEVEE:  When Mr. Ali says that
11      these other IRP panels rejected the business
12      judgment rule, ICANN did not argue in
13      Booking, in Despegar and the others that the
14      business judgment rule was the applicable
15      standard.  So there was no rejection by
16      panels.  It simply was not addressed.
17                MR. KANTOR:  Mr. Ali, you recall I
18      made a number of caveats about unstated or
19      stated assumptions in the question I put to
20      Mr. LeVee.  Would you please bear in mind all
21      of those caveats for my next question?
22                If you would assume hypothetically
23      if this tribunal were to conclude that there
24      were failures on the part of the Board to
25      comply with provisions of the bylaws and
articles relating to the process that has been undertaken, but that the panel was also to agree with Mr. LeVee's argument that, with respect to the merits, there would be no basis for concluding that Dot Registry would receive 14 points, is there a harmless error rule here relating to failures on the part of the Board Governance Committee with respect to process-oriented conduct?

MR. ALI: I'm not sure I understand the question.

MR. KANTOR: No harm, no foul, Mr. Ali.

MR. ALI: Well, I think the position that's been articulated is that ultimately they end up in this auction with 18 other applicants. I think that there is a lot of foul, because ultimately --

MR. KANTOR: I'm not asking you to argue the merits again.

MR. ALI: Right. I'm sorry.

MR. KANTOR: I'm asking you to take the assumptions that I've given you. Based on those hypothetical rulings by the panel, is there a rule that says the process --
should the panel take into account, in
determining what it says in the declaration,
the hypothetical ruling that on the merits
Dot Registry would not reach 14 points?

MR. ALI: No.

MR. KANTOR: Why?

MR. ALI: Because you have no basis
in order to make that determination based on
the evidence that is before you. In order to
make that determination, you would have to
make certain evidentiary rulings or make
certain -- would have to apply certain
presumptions. Whether those are evidentiary
or somehow based on some principle of law,
it's the only way you get there completely.

MR. DONAHEY: Mr. Ali, isn't it
true that we would have to substitute our own
independent judgments as to whether or not
those provisions have been met by the
presentations of Dot Registry, and how are we
capable of even doing that?

MR. ALI: President Donahey, as
I've said, you live in the world, and your
world is defined by rules of evidence.
There's a difference between substituting
your judgment and applying rules of evidence.

In applying the evidence that's before you, the clear outcome is that we get the 14 or 15 points with respect to each application. You have it all in front of you. It doesn't mean that -- you are not permitted, if you follow the other standards that are out there as articulated by other panels, to defer. Yours is an objective and de novo review.

MR. DONAHEY: Yes, but with all due respect, I don't believe -- no due respect to myself, I don't believe, number one, I'm capable of doing that, because I don't believe I'm capable of substituting or acting as an expert in this case. That's number one.

And number two, I don't see anything in -- and you'll have to point it to me. I don't see anything in the procedures that I'm supposed to apply and follow that gives me the right to indicate a decision in this. At best, I can see, even if I agree totally, it would be sent back to the committee and say, hey, what are you going to
do with this? I don't think you did it right.

MR. ALI: Then we're back here in another 12 months time, so ultimately I will say, because what you're asking -- without guidance being given to whoever it is that's going to review this, if that's what you were to decide, we've ultimately done nothing but spin our wheels.

Now, I would ask for you to review the ICM decision in terms of what the panel determined in ICM, what the panel determined in DCA Trust, and even what the panel has determined in Vistaprint with respect to a binding declaration regarding the question of liability and a recommended course of action with respect to remedying the wrong. Otherwise, this whole process is, with all respect, hollow.

MR. DONAHEY: Fortunately, I have two co-arbitrators, two co-panelists who are much smarter than I am. So maybe they will be able to see what I can't see right now.

MR. LEVEE: May I respond briefly?

MR. KANTOR: Mr. LeVee, I would be
grateful if you would. I know that we're coming close to the end, so you will have the last word, and then I will cease asking questions.

JUDGE BROWER: And I have questions before you finish.

MR. LEVEE: With respect to the ICM and DCA Trust matters, those matters involved the board review of GAC advice, Government Advisory Committee advice, and the DCA panel determined that the GAC, as a constituent body of ICANN, owned the core values, the transparency and so forth. That's a very different analysis than all of the other IRP declarations that have looked at outside vendor determinations.

To your question, Mr. President, not only are you making the point that the panel would be substituting whatever expertise it has were it to rule that Dot Registry should have received 14 points, but the equally salient point that I've tried to make today, not effectively enough, is that the Board Governance Committee likewise did not wish to place itself in the position that
Dot Registry is proposing to place you in, of making the substantive evaluation.

And from the very first IRP relating to a vendor decision -- that was the Booking.com decision -- in that decision, very briefly, we had two proposed strings, Dot Hotels and Dot Hoteis. Two strings, six letters, Hotels, Hoteis. The only difference was an L instead of an I. ICANN hired an outside expert who said these two strings are confusingly similar. Only one of them should be placed in the internet. Only one should win.

The applicant for Dot Hotels submitted an IRP with an expert report that looked a lot like this in terms of volume, and he said, hey, I'm an expert. I can tell you that people will not be confused by those two strings. They both could be operating on the internet.

And I argue to that panel that the whole purpose of not performing a substantive review by the Board Governance Committee was to avoid asking the Board Governance Committee to become the expert. That's
exactly what ICANN in the Guidebook
outsourced. It didn't think it had that
expertise.

Merck said to us: We wish you had
hired a lawyer so that you could tell us that
the phrase "Merck" carries with it
intellectual property rights that a German
company called Merck owns and that a US
company also called Merck doesn't own. And
we said that's not substantive expertise that
the Board Governance Committee wished to
have.

So my whole point is not only
shouldn't the panel substitute its views, but
in so doing it's the entire rationale for why
the Board Governance Committee does not
undertake a substantive review.

Thank you.

MR. KANTOR: Mr. Chair, I'm
grateful for everyone's patience. I know
Judge Brower has some follow-up questions.

MR. DONAHEY: And Mr. Brower, I
will not interrupt you as I did Mr. Kantor.

MR. ALI: Judge Brower, I'm sorry.
If I may. I don't want to let this point the
Mr. President, the issue here is not about asking you to substitute your judgment, but to do what your jurisdiction requires, which is to evaluate the relevance and materiality of the evidence that is before you as you're required to do by the rules.

Now, that may ultimately result in you coming to a different conclusion than the EIU or the Board Governance Committee, but that is your role. We're not asking you to do a substantive evaluation or a CPE. There is a distinction.

That has already been done, and that has been presented to you by way of evidence, which you must evaluate and which is specifically provided for within the framework of these proceedings, not only in the ICDR rules that I cited to you earlier, but in the supplemental rules that ICANN put together that contemplate the possibility of expert opinions and fact witness testimony.

So your duty in our submission is
to evaluate the credibility and the materiality and the relevance of the evidence and make a determination that may have the effect of being contrary to what has previously been decided by the Board Governance Committee, and I think that that distinction is a very important one in terms of the context of this proceeding and what this proceeding is about.

I'll stop there.

MR. DONAHEY: Mr. Ali, I'm sure I'll do my best to do my duty in the case.

Judge Brower?

JUDGE BROWER: This question goes to both sides. Why should there be a burden of proof at all in this case? "The independent review process panel," according to the bylaws, "shall be charged with comparing contested actions of the Board to the articles of incorporation and bylaws in declaring whether the Board has acted consistently with the provisions of those articles of incorporation or bylaws."

Simply, we have to be satisfied.

The application of a burden of
proof implies that a case can be decided on the basis of a failure to carry the burden. Of course, panelists always try and avoid that result if they can, but why should there be a burden of proof applicable in this proceeding?

MR. KANTOR: Designate one of them to answer first, Judge.

JUDGE BROWER: Alphabetical order.

MR. ALI: Judge Brower, in all candor, I don't have a good answer to that question. I need to think about it further. I think it's a very good question. If I simply thought aloud, I might say something that I'd regret.

JUDGE BROWER: Always dangerous.

MR. ALI: Yes. Mostly the unspoken words slate the spoken.

JUDGE BROWER: Mr. LeVee, are you more daring?

MR. LEVEE: A little bit.

I think in any proceeding, be it this proceeding, an arbitration, a court proceeding, anything adversarial, I think it has become comfortable for one side or the
other to be designated with carrying a burden of proof, because it helps the panel think about whose evidence do I think about first, and have they met some threshold that I'm going to intellectually characterize as a burden of proof.

Your question is thoughtful. It's not one I've had before, and it does suggest at least the possibility that the bylaws do not necessarily require a burden, but in every IRP that I've participated in, there has been an assumption that the claimant had a burden, and then it was a question of whether the claimant met the burden.

There's -- because the IRP is initiated by a claimant, the claimant has to come forward with evidence. Dot Registry did come forward with evidence. It knew that it could not simply say we think we've been wronged, good luck. ICANN now has to prove that we weren't wrong.

So I think Dot Registry understood that the bylaws and the ICANN supplementary procedures that required a claimant to come forward with evidence necessarily implied a
burden on the claimant, but it is correct to say that the bylaws do not specifically say that, in other words, say who has a burden.

MR. ALI: If I could add to that, I think that the only place where one could draw the notion that the bylaws or the procedure contemplate a burden may be implicit in the notion that you have to declare which side is the prevailing party.

Now, that may not be necessarily -- may not go specifically to your point, but I agree with Mr. LeVee that there is no absolute guidance in the, in the framework that applies to these proceedings.

JUDGE BROWER: I will only add that it's different, in my mind, from the issue of whether or not the applicant or petitioner has made out a prima facie case. I think that's a different issue, and if I may say so, in my view, contrary to what you said earlier, Mr. LeVee, the fact that a party has made out a prima facie case does leave you the alternative of either accepting it or rejecting it, because it means that you can accept it, but you can also reject it if you
have questions about the proof. That's usually in questions of credibility, but it can relate to other evidence as well.

I have been mystified from the beginning by the provision in Roman IV 3-4, the first part of which I recited a moment ago, but I'm looking at a part that says "The IRP panel must apply a defined standard of review to the IRP request," focusing on A, B, C, and our colleague, Mark Kantor, took you through two of those, as I recall.

Now, what's the defined standard of review? I haven't seen it defined anywhere or heard it defined. Do we have to apply a defined standard of review, but what is it, or is it your view that it consists of what appears at A, B, C only?

MR. LEVEE: My view is that it does focus on A, B and C, but it is not exclusive to A, B and C. In other words, if the panel were to determine that -- I'll make it easy. If the panel were to determine that ICANN decided not to accept, not to accept somebody's application even though they submitted their $185,000 and checked all the
boxes, and ICANN simply said, you know what, that applicant didn't wear green on St. Patrick's Day, and so we decline to accept that applicant's application.

That would not be necessarily listed here, but it would be -- it would demonstrate some type of discrimination, undoubtedly.

MR. DONAHEY: I'm sure it would be within your rights.

MR. LEVEE: And so there certainly are things that the panel can be looking at. I agree with you and your question is, when the bylaws use the word "defined," is there a definition some place, and the answer is no. And so other panels have looked at this language and quoted it and simply adopted a standard that looks at what the Board Governance Committee did.

There are also some IRP decisions where there is action of the full Board, and they've looked at what the full Board has done, and they, they review it without really formally articulating what the review standard is.
JUDGE BROWER: Food for thought for your further negotiations and discussions in the reformation of ICANN, I guess.

Next question is, I haven't found in the bylaws a statement of the scope of review when the Governance Committee entertains a request for reconsideration.

What is the standard review?

MR. LEVEE: No, it's the same -- so, so paragraph 4 that you are looking at --

JUDGE BROWER: Yeah.

MR. LEVEE: -- which refers to actions of the Board, the committees of the Board are --

JUDGE BROWER: This is restricted to the IRP panel, what I'm, what I've been looking at.

MR. LEVEE: Maybe I'm not understanding your question, but the IRP panel is to use paragraph 4 in conjunction with any review of any decision by the Board, and in this instance the Board Governance Committee did act on behalf of the Board, and we acknowledge that the Board Governance Committee decision is reviewable by this
panel. It's reviewable pursuant -- as if it were the Board.

JUDGE BROWER: That I understand, but when the Board Governance Committee is considering an application for reconsideration, what is the standard that it applies? I haven't found any.

MR. LEVEE: I apologize. So the previous portion of Article IV -- so it's Article IV, Section 2 -- sets forth the terms of reconsideration, and if you look at in particular subparagraph 2, "Any person or entity may submit a request for reconsideration or review of ICANN action or inaction," and then it goes through whether staff actions contradict ICANN policies, whether actions have been taken or refused to be taken without consideration of material information, et cetera; whether one or more actions or inactions of the Board relied on false or inaccurate material information.

And what ICANN did, as I mentioned earlier, was early on in this process -- so the reconsideration sections of the bylaws normally apply to decisions by ICANN staff or
by the Board. What ICANN did was to say that we have these vendors who are doing things on our behalf, pursuant to contracts that were signed.

When an applicant is dissatisfied with the decision of a vendor -- in this instance, the EIU -- we, ICANN, will allow you to file a reconsideration request, and we will act on it. There was some initial ambiguity as to whether the reconsideration request even applied to decision of the vendors, but then it was clarified by ICANN. Yes, we will look at those decisions, and when we do reconsideration requests, these are the rules that we'll follow.

JUDGE BROWER: Okay. I only ask the question because Section 2, reconsideration, paragraph 2 spells out what a person or entity must submit, and when you get to 3, the Board has designated the Board Governance Committee to review and consider any such reconsideration request. All it does is list the powers of the Board to get more information.

So I think you're telling me
basically it's implicit in 2 and 3 that the scope of the consideration, of the jurisdiction, as it were, of the Governance Committee on reconsideration, it's implicit in 2 and 3.

MR. LEVEE: Yes, and if you read our brief, and I think it may also be in our slides, we lay out in our brief the process that ICANN went through in deciding that it would have the Board Governance Committee review decisions of the EIU and the other vendors that were retained by ICANN, and what specifically the review would entail, which was a procedural review, not a substantive review. So it's in the first five or so pages of our brief.

JUDGE BROWER: Right. That I understand. I was just looking for how it is rooted in the, in the bylaws.

The last question is for both of you. Suppose our reaction to all of this is either you're right, Dot Registry, you were done in, okay, it should have been a community thing, or, on the other hand, for God's sake, how can anybody consider this a
community thing.

I mean suppose looking at all this, we have a view as to what was right. Does that make any difference? That's not within our remit or it's irrelevant?

MR. LEVEE: I don't think it's irrelevant. I think, however, that your remit, to use your word, is to determine whether the Board Governance Committee acted consistent with the bylaws and the articles in deciding that the reconsideration request that Dot Registry submitted would fail, that is, the request would lose.

The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.

And I think, look, we're all human beings. The Board Governance Committee had read the EIU's report. My suspicion is that if the Board Governance Committee thought that the EIU had made a tragic error, it
would also probably find that the EIU had violated various policies, although maybe it wouldn't have. I wouldn't, I wouldn't know, and I didn't quiz the members of the BGC to ask them that question.

I think often if there is some kind of flagrant outcome that really turns a stomach, that ICANN would not be immune to thinking about that, and I wouldn't expect that the three of you would be immune to thinking about it, but I also think that it is beyond the specific assignment given to you here.

MR. ALI: I believe I already answered that question in my clarification or my attempted clarification to President Donahue on the specific point, but I will just leave you with one statistic, which is that the BGC has decided against all -- other than two, it has decided against every reconsideration request, and there have been about a hundred of them.

So pretty much every single time, the BGC says, well, somebody down the line got it right, and we're going to get it
right, and the two in which reconsideration was granted are Dot Gay and Dot Med, and I believe in respect of Dot Gay and perhaps in the case of both, I'll have to verify this with respect to Dot Med, the reconsideration was granted on the basis of improper validation of support letters, but in our instance, in our case, there are a number of other reasons why the reconsideration request was improperly denied.

JUDGE BROWER: Okay. Those are my questions. I'm done.

MR. DONAHEY: All right. I have nothing. I do have some procedural questions, however, and I would like to ask my co-panelists whether either of you would like any additional briefing done on any particular topics.

JUDGE BROWER: I personally don't feel the need, but that's me.

MR. KANTOR: Mr. Chair, I heard proffers from the parties on two issues. One is the document called "Expression of Interest," and the extent to which a third-party contractor accepted that it would
be bound by the provisions of the articles and bylaws; and second, on the business judgment rule and the scope and extent of it under California law. I would find briefing on those two issues to be helpful.

And if that requires introducing further authorities or documents into the record, that would also be helpful for me, although I trust there won't be any treatises.

MR. DONAHEY: All right. We'll then adopt Mr. Kantor's suggestion and ask that you provide further briefing. How much time would you like for that? Do you have something else?

JUDGE BROWER: No, no. You said further briefing, but it's limited to the topics.

(Discussion was held off the record.)

MR. DONAHEY: Mr. Ali or Mr. LeVee, I would appreciate your thoughts on that.

Let me ask you, Madam Reporter, are you there?

THE REPORTER: Yes.
MR. DONAHEY: When do you think we will be receiving the transcript of the proceedings? Because that might influence the parties as to how much time they'll need.

THE REPORTER: Usually it's a two-week turnaround unless you need it earlier.

MR. DONAHEY: So then I will repeat the question. What time would you like on those two issues?

MR. LEVEE: So I am envisioning a brief that is three or so pages.

MR. DONAHEY: Mr. Kantor, is that sufficient for your needs, or do you want to expand the page limit?

MR. KANTOR: I would defer to the parties on their pages and request them to be as brief as they can possibly be without repeating anything that's already in the record. We do not need any redundancy here.

MR. LEVEE: So if we could have -- today is Tuesday, the 29th. If we could have until the middle of next week or -- I'm trying to think if there is any reason I would like to have the transcript in order to
provide my thoughts on this, but I'm not sure that I need the transcript. Maybe a week from Friday.

MR. ALI: We have the electronic transcript, so --

MR. LEVEE: How about a week from Friday?

MR. ALI: I'm looking at my colleagues, because I just can't remember the other deadlines that we have. We've got some pretty pressing deadlines in two other cases. I think a week from Friday is doable on something that's this focused.

MR. LEVEE: Okay. So that would be April 8.

MR. DONAHEY: And for my benefit as well as the parties, Mr. Kantor, could you write out the very short description of what you would like briefed?

MR. KANTOR: I will do so tonight and circulate it to all.

MR. DONAHEY: Thank you very much, and the other thing that I have is that since we're going to get additional briefing, we're not going to get a transcript within two
weeks. I will be contacting my co-panelists about setting up the time for deliberations.

We can get together.

Is there anything further from any of the parties? Questions? Procedural issues? Anything at all you want to raise at this time?

MR. LEVEE: Not from our side.

You've been very indulgent.

MR. ALI: Nothing from our side either, Mr. President. Thank you.

MR. DONAHEY: All right. I want to thank all of you for your presentations. It's helpful. I'm sure my colleagues have as well.

I want to thank Jones Day for providing all the facilities and food and everything else that we've enjoyed here, and I know you've enjoyed it in Washington as well.

And so we look forward then to receiving your briefing, and Mr. Kantor will be sending you out something that will specify precisely what he would like to have briefed, and then you will have your briefs
to us by April 8.

JUDGE BROWER: I think the court reporter has been out of sight to you all out there, but I've been sitting right next to her, and I've rarely experienced one going on so endlessly without looking for relief, so I think she deserves our accolades.

(Applause.)

MR. DONAHEY: Thank you. I know we haven't been easy to follow. Thank you all, and we will look forward to hearing from you further, and I'm sure you'll look forward to hearing from us.

MR. LEVEE: Thank you.

MR. ALI: Thank you very much.

(Whereupon, the hearing was concluded at 6:35 p.m.)
CERTIFICATE OF SHORTHAND REPORTER -- NOTARY PUBLIC

I, Laurie Bangart Donovan, Registered Professional Reporter, Certified Realtime Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 7th day of April, 2016.

My commission expires: March 14th, 2021

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NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA
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