

In The Matter Of:

DONUTS INC.

v.

*INTERNET CORPORATION FOR ASSIGNED NAMES AND
NUMBERS*

*INDEPENDENT REVIEW PROCESS HEARING
October 8, 2015*

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DONUTS INC.,)
)
) Claimant,) ICDR Case No.
)
) and) 01-14-0001-6263
)
INTERNET CORPORATION FOR)
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ASSIGNED NAMES AND NUMBERS,)
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) Respondent.) (Pages 1-153)
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REPORTER'S TRANSCRIPT OF
INDEPENDENT REVIEW PROCESS HEARING
THURSDAY, OCTOBER 8, 2015
9:44 A.M.

REPORTED BY:

SUSAN NELSON
C.S.R. No. 3202

1 Reporter's Transcript of Independent Process Review
2 Hearing, commencing at 9:44 A.M., on THURSDAY,
3 OCTOBER 8, 2015, at American Arbitration Association,
4 725 South Figueroa Street, Los Angeles, California,
5 before SUSAN NELSON, C.S.R. No. 3202.

6

7 THE TRIBUNAL

8 THE ARBITRATOR CHAIR:

9 PEPPERDINE UNIVERSITY SCHOOL OF LAW
10 JACK J. COE, JR., PROFESSOR OF LAW
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13 THE ARBITRATORS:

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19 ALSO APPEARING:

20 ELIZABETH LE, SENIOR COUNSEL, ICANN

21 CRYSTAL ONDO, DIRECTOR, LEGAL AFFAIRS AND
22 COMPLIANCE, DONUTS

23

24 AMY STATHOS, DEPUTY GENERAL COUNSEL, ICANN
25 (Via Telephone)

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1 LOS ANGELES, CALIFORNIA;

2 THURSDAY, OCTOBER 8, 2015;

3 9:44 A.M.

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5 ARBITRATOR COE: Ladies and gentlemen, allow
6 me to call this hearing to order. May I ask as a
7 reminder to myself that we have our cell phones on
8 vibrate mode. That we briefly introduce ourselves for
9 the record, including those people who are listening to
10 us, might weigh in.

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

13 ARBITRATOR COE: Yes.

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

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

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

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

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

24 MR. LEVEE: Jeff LeVee of Jones Day also
25 representing ICANN.

1 MS. LE: Elizabeth Le, senior counsel for
2 ICANN.

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

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

7 MR. LEVEE: Okay.

8 ARBITRATOR COE: Thank you, Amy.

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

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

15 MR. GENGA: We do.

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

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

21 MR. GENGA: Yes, thank you.

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

25 MR. GENGA: Oh.

1 see there's nothing written down there and I'll tell
2 you what we're going to cover today.

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

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

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

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

24 So let's turn to the first slide, the next
25 slide. So I just want to talk about ICANN and the

1 New gTLD Program generally.

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

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

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

23 And we'll get to, in a couple of slides, the
24 new gTLD applicant guidebook, which was a set of rules
25 that the applicants really -- like my client, really

1 relied upon in making their applications. But let's
2 talk about how the New gTLD Program started.

3 Let's go to the next slide.

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

10 It's expressed in the guidebook that the board
11 does have the ultimate responsibility for the program.
12 It has the authority at all times to consult with
13 independent experts, including those experts that are
14 designated to hear objections. It has the authority to
15 individually consider applications. And really the
16 appointment of the experts, including the experts that
17 decide the new gTLD objections, it's only the board
18 that has the power to appoint those experts or to
19 authorize their appointment. And, in fact, it's
20 expressed in the guidebook that the findings of
21 objection panels will be considered an expert
22 determination as understood under the bylaws. And that
23 comes within the board's purview. And under the
24 bylaws, expert recommendations are to be considered and
25 evaluated by the board.

1 THE REPORTER: By?

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

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

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

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

24 But ICANN is transitioning away from
25 government oversight to become an independent

1 organization. And as part of that transition, greater
2 and greater concerns have been raised within ICANN,
3 within the community, the Internet community, the
4 domain name industry about ICANN's accountability, how
5 important it is that ICANN be accountable to all of its
6 constituents, all of its stakeholders, and to the
7 public that uses the Internet. And ICANN has provided,
8 in the context of the work it does and the decisions it
9 makes that affect those who use the Internet, use the
10 domain name system, has provided accountability
11 mechanisms, but internal accountability mechanisms for
12 review of its actions and inactions.

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

20 The independent review process is a process --
21 if you turn to the next slide -- where a party affected
22 by an action that it contends is inconsistent with the
23 articles of incorporation or bylaws can seek review of
24 those actions and have a panel, such as this panel,
25 compare those contested actions with the articles or

1 the bylaws and make a determination as to whether the
2 board has acted consistently or not with those
3 provisions. And that's what we're here to do today.

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

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

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

23 And I know the panel has some questions about
24 the choice of law. ICANN's a California nonprofit.
25 We -- applicants, when applying under the New gTLD

1 Program, expressly agree that their application forms a
2 contract with ICANN. That contract we contend is
3 governed by California law.

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

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

15 MR. GENGA: Yes.

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

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

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

23 So -- and it's -- so -- and only the board has
24 the power to contract. I mean, if you look at
25 Article III of the bylaws, all powers of the

1 corporation are exercised through the board, including
2 contracting. And so when Donuts or any other applicant
3 applies for a new gTLD, they are obviously taking on a
4 number of obligations. They're agreeing to be bound by
5 the guidebook, and so is ICANN, and so -- through the
6 board.

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

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

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

24 Is it a business judgment rule? Is it as long
25 as ICANN acts in good -- if the board acts in good

1 faith or -- or refrains from acting in good faith, is
2 that sufficient? But we've had guidance on that
3 question from other independent review panels. And
4 it's expressed in the guidebook, by the way -- not in
5 the guidebook, but in the bylaws that decisions of
6 prior independent review panels have precedential value
7 on subsequent panels.

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

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

20 First of all, we're talking about -- excuse
21 me. We're talking about two cases, if you will, and
22 we've -- and that accounts for a lot of the bulk in the
23 binders, which I have to apologize, but we have a
24 situation where we're not directly reviewing those
25 decisions per se, but I think it's important that the

1 panel understand what happened in those cases so the
2 panel has the complete record of those cases. May
3 never need to consider those, that information, but I
4 think we would be remiss if we hadn't included it. But
5 what -- the consequences of these objection decisions
6 and what we contend to be the board's failure to
7 properly act upon them is what this panel is reviewing.

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

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

19 There are a number of types of objections, and
20 Mr. Moody will talk about that a little further, legal
21 rights objections, string confusion objections. Here
22 we're talking about community objections. And the
23 community objections that were brought in these cases,
24 one was brought in the .SPORTS case by a company called
25 SportAccord, which is also an applicant for the .SPORT

1 domain, and the other was brought by what was then
2 called the International Rugby Board, now called World
3 Rugby, which is a competing applicant for the .RUGBY
4 domain.

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

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

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

25 The non-unique situation, we have two domains

1 that have objection standards that need to be applied.
2 There are other situations that ICANN has set up where
3 it set up standards for evaluation of domain
4 applications where they have established training
5 protocols and standards that those applying those
6 standards understood.

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

13 ARBITRATOR COE: Can I just interrupt?

14 MR. GENGA: Sure.

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

19 MR. GENGA: Yeah.

20 ARBITRATOR COE: -- with respect to other
21 things?

22 MR. GENGA: No. I think the training comes in
23 with respect to making sure that documented policies
24 are applied uniformly and fairly, things like that,
25 that are in the bylaws. So we're talking about --

1 ARBITRATOR COE: But there have been specific
2 training programs?

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

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

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

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

25 So I'm going let Mr. Moody start into the

1 specifics of the matters under review.

2 Thank you.

3 MR. MOODY: Thanks, everyone. Good morning.
4 And definitely thanks to the panel and the colleagues
5 for, you know, taking time out from a busy schedule. I
6 know everybody is very, very busy, including ICANN
7 which is getting ready for a big trip to Dublin.

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

21 I also, because -- this is another caveat
22 that's just totally unique to my presentation. Because
23 this matter, as Mr. Genga touched on, is about the
24 underlying community objection, the original
25 objection -- right? -- between Donuts and SportAccord,

1 Donuts and World Rugby, and then -- which has been
2 settled -- Donuts versus the Federation Internationale
3 Ski. That's not on your plate, but that was the
4 original groupings that were involved.

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

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

24 THE REPORTER: I'm sorry. You're turning your
25 face away. You're getting very hard to hear.

1 MR. MOODY: Okay. No problem.

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

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

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

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

23 Obviously, ICANN disagrees and that's what
24 I'll try to do is reconcile them, and then I'll turn it
25 back over to Mr. Genga.

1 Okay. With respect to the community
2 objections, before we even go into it, where did the
3 standards from the community objection come from? They
4 came from the applicant guidebook, from the AGB. And
5 Professor Coe already asked if that was incorporated
6 into the contract and we'll check on that issue for
7 you.

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

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

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

24 String confusion, which the ICDR handled,
25 which was basically a -- you know, sort of an orphan of

1 trademark law, borrowed some principles from trademark
2 law just to say is one string kind of confusing with
3 another. Right? Is it visually similar? Is it
4 auditorily similar? Things of that nature. Related to
5 trademark, but not trademark.

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

16 And -- if you go to the next slide.

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

22 Okay. So, anyway, say you did --

23 ARBITRATOR COE: Is it -- I'm sorry,
24 Mr. Moody?

25 MR. MOODY: Oh, yes?

1 that. Right? And if they walk right into a -- if they
2 try to walk in and say, well, you know, I'm Firestone,
3 I own the word "tires," Goodyear would say, um, no.
4 And if you tried monopolize that at the trademark
5 office, they'd laugh you out.

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

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

19 If you were in contention for a string, that
20 contention might be because you raised a formal
21 objection or the government weighed in with this
22 GAC advice. Those might be in contention. And it
23 might just be in contention because you're bidding
24 against them. It's an auction. Right? I say, you
25 know, I'm bidding a hundred bucks and Fred here is

1 going to bid 150. That's contention. Right? May not
2 be legal contention, but it's contention. Okay?

3 Next slide.

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

16 So a success -- but before you even get to the
17 auction part -- again, that could be contention without
18 a legal mechanism, but it's still contention -- these
19 objections, if you -- if you participate in the
20 objection and you don't automatically just knock
21 everybody else out, if, for example it's just an
22 open-and-shut case, if some -- if, for example,
23 Toyota -- .TOYOTA applied tried -- or Toyota applied --
24 tried to apply for .NISSAN -- right? -- if it wasn't
25 just an open-and-shut case, if you had a successful

1 objection bid, you have a lot of leverage at auction
2 for these seven- and eight-figure auctions. And not
3 all of them have been that way. Some of them haven't
4 been that high, but there have been a number of ones
5 that have been very big. And you might want to think
6 about your using an objection as a little bit of
7 leverage.

8 Next slide.

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

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

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

1 laughed out mostly by the ICDR.

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

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

1 favorite Scientologists.

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

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

1 was highly prone to abuse. Okay?

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

8 Next slide.

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

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

18 The reason that we bring them up is not only
19 the difference -- the similarities in strings, and not
20 only because SportAccord objected to them as well, they
21 were -- they objected to Dot Sport Limited. They also
22 objected to us. Right? It's because they
23 coincidentally had -- maybe not coincidentally. They
24 had the same panelist that we allege had some
25 conflicts, and they were able to -- I don't want to

1 say -- I don't want to say the word "remove," but the
2 ICC declined appointment of this panelist after it was
3 challenged by Dot Sport Limited.

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

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

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

17 In this case, I don't think there was a lot of
18 exposition as to why. However, Mr. Taylor was
19 appointed or proposed to be appointed. He made a
20 disclosure. And I'll show you in a minute he didn't
21 disclose everything. Our colleagues -- I don't want to
22 say "colleague," but I mean a competing applicant at
23 Famous Four made a challenge and said look at all this
24 stuff we found. I mean, you know, there's -- you know,
25 he says -- you know, he knew one person at Ski and

1 nothing else, well, you know, I mean it doesn't take
2 any Google search, I don't need Sherlock Holmes and a
3 slide rule to see all this other stuff. And they
4 brought it up, and the ICC said, okay, no, Jonathan
5 Peter Taylor, we're going to have this guy instead.

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

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

12 ARBITRATOR COE: Sorry for the --

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

20 Okay. Here we get into the ethics question.
21 And, again, no one on the ICANN board is accused of --
22 in this case, of any ethics violation. The only reason
23 I'm bringing it up is just so the panel can decide --
24 you know, the panel can understand or have some peace
25 of mind that, look, whether this was the board's

1 problem or not, at least we're not talking about some
2 kind of spoof story or some made-up thing. This
3 probably was an ethics violation. The only question is
4 what impact did that have on the board. Right? That's
5 the only reason I'm going into this analysis. And
6 we'll -- again, we'll be brief.

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

16 We hired for that reason -- I by no means
17 would characterize myself as any kind of ADR ethics
18 expert. I'm not. So we hired one and we put a witness
19 statement in. And if you can see that, his name is
20 Dr. Arman Sarvarian. He's a very good one. He's from
21 the U.K., and he is one of the pioneers in -- a very
22 nice gentleman -- in ADR ethics. He's written a lot of
23 stuff. He's done a lot of stuff with the UN and
24 very -- very -- you know, very, very interesting view
25 of topics.

1 He pointed because of -- he cited as well, and
2 he mentioned this in the witness statement. He cited
3 that the ICC, as I mentioned a minute ago, isn't the
4 most verbose when it comes to articulating standards
5 for when someone should be disqualified, when someone
6 should disclose, all these matters, they -- there's not
7 a whole lot of guidance. And you can look at the ICC
8 rules and there's not a whole lot there. I mean,
9 there's just --

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

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

19 In this case, it was predominantly just our
20 case manager looking at it. They really didn't tell us
21 exactly who or what they did. They just -- you know,
22 there was -- and you may see in the exhibits that we
23 gave yesterday, with respect to Dot Sport Limited, the
24 other competing applicant who had first raised the
25 issue about, you know, this -- Mr. Taylor's potential

1 bias, ICANN just kind of communicated this to the ICC
2 and then it just went in sort of a magic box and came
3 out, and the next week they said, okay, well, here's --
4 you know, here's --

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

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

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

22 So we -- again, we pointed -- and this is not
23 a new problem. So Dr. Sarvarian said yes, this happens
24 all the time. And typically in these situations, a
25 framework we find helpful is to bring up what is called

1 the International Bar Association guidelines, IBA
2 guidelines. And I'm sure the panel is familiar with
3 them.

4 Go to the next one.

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

12 Right? Should I be involved in this case at all?

13 Okay.

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

19 On questions of disclosure, at least according
20 to the IBA guidelines, there's a subjective test.
21 Arbitration's very heavily based on the parties'
22 consent, parties' expectations, you know. What do they
23 think about -- what do these parties think or will they
24 think about a potential relationship that I had or a
25 prior work appointment that I had. Okay?

1 When you get to questions of whether someone
2 should withdraw or participate at all versus whether I
3 should just tell them about it, because we always want
4 to -- and I -- this is certainly my reading. We don't
5 want to -- you know, these types of relationships, when
6 you have good arbitrators, they're going to have
7 relationships. And, number one, we don't want to run
8 out of qualified arbitrators. We use a little bit more
9 of an objective test to kind of limit things a little
10 bit more. It's more of whether a reasonable person
11 under -- a reasonable arbitrator under these
12 circumstances would consider withdrawal appropriate or
13 not participating, I should say, appropriate. Okay?

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

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

23 Go to the next slide.

24 Now, the IBA guidelines, as you may have seen,
25 have this, you know, convenient red light, yellow

1 light, green light -- or should I say orange.
2 Technically, the yellow light at a stoplight is
3 orange -- where it talks -- you can apply a sort of
4 convenient color-coded situationed schema to every --
5 to not only questions of disclosure, but questions of
6 participation and withdrawal or whether a conflict --
7 whether this is really a conflict or not.

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

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

20 Orange, you're starting to get a little bit --
21 a little bit higher. There's perhaps I had -- I had
22 some involvement with, you know, Mr. Smith's firm in
23 the fact that maybe I represented them, maybe I did
24 some consulting work for them, but it was seven years
25 ago. It was a very small amount of money. It didn't

1 have anything to do with the facts at hand or even
2 close. Right?

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

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

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

23 However, there's a few things that, disclosure
24 or not, you just shouldn't be involved. You know, I
25 mean, there are some situations, and we don't even need

1 to go into them, that -- you know, that there's no
2 disclosure. You just should withdraw. Right?

3 Next slide.

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

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

1 And if they are Olympic sports for the Olympic Games,
2 they're organized under the IOC -- okay? -- or that
3 complex.

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

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

25 The lady that Mr. Taylor said I -- you know, I

1 know her from a working group in the past. She was
2 president of the winter sports association. And
3 Mr. Taylor's client, the ITF, the president of the
4 International Tennis Federation, is the president of
5 the summer sport association.

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

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

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

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

23 ARBITRATOR COE: Well, the ultra red is --

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

25 ARBITRATOR COE: -- a very small band. Right?

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

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

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

22 There's -- recall that there's two cases. In
23 prior IRP decisions -- right? -- there's not a whole
24 lot of jurisprudence, and I put that in quotes. There
25 are three total decisions decided to date in history.

1 One of them involved, as you might have seen,
2 the controversial, now launched XXX, adult-oriented
3 domain, which got a lot of drama and kerfuffle back in
4 the day, and I asked why if you can get one, but there
5 was a lot of controversy associated with it at the
6 time. There was an IRP back in the late 2000s, end of
7 2010. It has been almost universally agreed upon that
8 a lot has happened since then.

9 There have been a lot of changes to ICANN and
10 the bylaws and to other things that -- that case
11 doesn't have a ton of precedential value. We've all --
12 you know, I think we can pretty much all agree on that.

13 So we really are talking about a universe of
14 two cases. Right? Two, at least now.

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

22 In Booking, we argued in our pleadings -- and,
23 again, I can certainly, you know -- ICANN looks more at
24 Booking than Africa. We think Africa is more factually
25 similar. ICANN says that Booking is more factually

1 similar. And it's obviously up to the panel to decide
2 which is more appropriate.

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

11 It was a -- it was an evaluation by some, you
12 know, linguistics experts and subject matter experts to
13 examine just the question of whether looking at these
14 two strings, HOTELS and HOTEIS, that little
15 lower-case L kind of looks like an "I" or however you
16 would look at it visually, you know, is it similar?
17 And then they would ask, you know, people who are
18 Portuguese speakers, you know, would you know the
19 difference? Right? And they asked, you know, some
20 experts, subject matter experts, it wasn't a -- it was
21 not really a quasi legal mechanism like community
22 objection where it was factual determinations and
23 judges sitting on a panel and things of that nature.
24 This was just really more, I'm going to ask a linguist,
25 you know, who speaks the language what does this look

1 like. Right?

2 And there was a process associated with that,
3 and it was called "string similarity review." And
4 that's just designed to make everything thirty times
5 more confusing because you already have string
6 confusion at the ICDR. So we just want to have more
7 strings just to confuse everybody. But this was a very
8 limited -- this was not an objection. This was not
9 even -- in my view, even close to an objection. This
10 is much more similar to what's called "CPE," community
11 priority evaluation, and I definitely won't burden the
12 panel with that.

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

25 I mean, there was -- if you read Booking

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

11 And they said, well, okay, but the guidebook
12 came out like three years ago. And it's been -- a
13 lot's been -- happened for that and that's pretty old.

14 And they said, well, yeah, yeah, yeah, but,
15 you know, there's -- there's a lot of reasons to think
16 that this process was -- you know, it should never have
17 happened this way.

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

24 Said, yeah, yeah, that's pretty much it, but
25 it's bad.

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

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

21 When an IRP was brought, okay, the GAC
22 created, you know, did this GAC advice that I talked
23 about, which is kind of a sort of objection junior,
24 they brought their GAC advice and basically it had a
25 lot of the same effects as an objection in the fact

1 that the -- you know, one applicant for Africa was not
2 allowed to proceed and one was, allegedly, because of
3 favoritism.

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

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

19 Go to the next one.

20 And I wrote down here and you -- I won't go
21 into them because I'm running low on time. But not
22 only did they have -- not only did they find problems
23 with actions, quote, unquote, if we get really hyper
24 technical, the unfair behavior by the GAC
25 representatives -- namely, favoring one applicant over

1 another -- was an action. They found that to be a
2 problem. And they imputed that to ICANN because the
3 GAC is, as ICANN's pointed out, one of their
4 constituent bodies. They are a very important part of
5 ICANN.

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

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

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

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

23 Go to the next one.

24 And all these, that was seen as actionable by
25 the DCA panel.

1 Okay. And this will be very close to wrapping
2 up. How did both of these apply? Why is DCA more
3 applicable than Booking. Right? I'll break our little
4 action and inaction down. Right? Just like the DCA
5 panel did.

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

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

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

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

25 There's also some other things in terms of the

1 failure to ensure consistency and act for the benefit
2 of the Internet community as a whole.

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

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

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

21 Well, I don't think that you look at not just
22 who is -- who the parties at issue, who the
23 constituent, the -- the -- you know, person that was
24 the delegor, or if there was a person who was
25 delegated, you know, who that -- the status of that

1 person is, but you also look at the "what." You also
2 look at what would happen in the form of the dispute.

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

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

21 This was an objection -- this is the closest
22 thing to an objection case that -- that you can get.
23 Much more than Booking. And you can reconcile -- and
24 this is definitely my last point. Why would you say,
25 you know, that the process was followed, that

1 everything was okay in Booking and everything was not
2 okay in DCA?

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

10 And that's all I got to say.

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

14 MR. MOODY: Okay.

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

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

25 It's not an election of remedies type

1 situation where you have to go from, you know, one
2 lily pad to the next lily pad to the next lily pad.

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

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

8 MR. MOODY: Which we did.

9 ARBITRATOR COE: -- I know that, but.

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

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

21 MR. MOODY: Well, and that's a fair point.
22 The only thing that I would say is, in DCA, there was a
23 reconsideration motion in that. And I only brought it
24 up, as I said, because that was just another action
25 that they pointed to.

1 But, to me, DCA is far more important for what
2 it talked about with respect to inaction. Right? I
3 mean, there was a -- if I had to pick a nugget out of
4 DCA, it would be inaction. It said you didn't --
5 regardless of all these other things that you did or
6 didn't do, you had a -- you know, and this goes to
7 Mr. Genga's point -- ICANN is not -- ICANN is in a very
8 special position. Okay? And we've mentioned this in
9 our brief. I mean, and there's a lot going on with
10 ICANN right now. Like the world is watching, quote,
11 unquote.

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

15 Originally ICANN was delegated this very
16 special duty to protect this domain name system for the
17 good of the public. We liken it in our brief to, for
18 example, you know, if the Getty was donated a rare
19 artwork that you can't screw up -- right? -- you know,
20 or some -- or a museum or some rare wetlands or rain
21 forest or something like that, yeah, they're a
22 corporation and they have some discretion, but the
23 public is watching and is concerned about keeping this
24 resource for the public. This is important. You have
25 a special mission. And that's part of the reason, in

1 my view, that all these core values were adopted.

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

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

20 But outside of that, when you're talking
21 rubber-stamping, like which we talked about in DCA
22 which the DCA panel found troublesome against the GAC,
23 I mean, this -- you know, rubber-stamping in the
24 reconsideration context, you know, ICANN is pretty much
25 the -- you know, bought all the rubber stamps and

1 staples and it's been almost a pointless remedy. I
2 mean, it just -- the board -- you know, the board is
3 obviously, you know, concerned about, you know,
4 exposing themselves to some, you know, possible
5 outsider. They just don't want -- they don't want to
6 deal with it. And so reconsideration in -- you know, I
7 mean, for lack of a better term, has been a kangaroo
8 court.

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

13 MR. MOODY: Yes.

14 ARBITRATOR COE: -- conflicts?

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

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

19 MR. MOODY: Yeah.

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

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

22 MR. GENGA: The objection was transmitted to
23 the board by the objector. And then the board
24 simply -- I think the head of the New gTLD Program
25 committee then was -- communicated with the ICC and

1 said did you see this, and let us know what happens
2 basically, and then that was that. So that's in
3 Exhibit 67.

4 ARBITRATOR HAMILTON: So the ICC did know.

5 MR. MOODY: Yes.

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

8 MR. GENGA: Correct.

9 ARBITRATOR HAMILTON: -- with that knowledge.

10 MR. GENGA: Correct.

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

13 MR. GENGA: Correct. Correct.

14 MR. MOODY: That's our argument.

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

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

24 MR. MOODY: But --

25 MR. GENGA: There was no reconsideration.

1 MR. MOODY: But under DCA, it doesn't matter.

2 MR. GENGA: No, I --

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

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

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

14 MR. MOODY: Okay.

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

17 Is it any different here in this context?

18 MR. MOODY: I don't -- I have not seen the
19 word in the bylaws "stare decisis" anywhere. However,
20 you know, kind of course of dealing, course of
21 performance, everybody has certainly been -- and
22 "everybody" in the limited universe of these IRPs --
23 certainly has been treating the cases as having stare
24 decisis value and the words "precedential value" are in
25 there.

1 Now, we're talking about an area that is in
2 its -- I mean not just infancy, but I mean, you know,
3 zygote stage.

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

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

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

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

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

25 There's one file in there that -- and I

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

18 A lot people were clamoring for guidance. And
19 the panel in DCA, before they did any factual findings,
20 they came out with their declaration on the IRP
21 procedure. And it was a lot of housekeeping stuff, but
22 they basically articulated it was of precedential
23 value. Again, they didn't use the word "stare
24 decisis," but they -- it sure sounded like it to me.
25 Take that for, you know, what you want.

1 MR. GENGA: By the way, we did include that.

2 That was in our original filing as --

3 MR. MOODY: Oh, it was in Kilgard's opinion --

4 MR. GENGA: -- Appendix G in our original
5 filing.

6 MR. MOODY: Yeah, that's true.

7 MR. GENGA: And they -- they did --

8 MR. MOODY: It was under the emergency
9 arbitrator's filings with Mr. Kilgard.

10 MR. GENGA: Yeah, they did declare that --

11 MR. MOODY: Yeah.

12 MR. GENGA: -- our -- that the panel's orders
13 and procedures are binding and in --

14 MR. MOODY: Certainly the Booking panel in DCA
15 has treated it that way and has just about everybody
16 else.

17 MR. GENGA: And when I hear "precedential
18 value," that means, well, you follow precedent. And
19 they certainly -- both the Booking case and the DCA
20 case established that the standard of review is a
21 de novo standard and I think that's what -- I don't
22 know that this panel has discretion to ignore that.

23 ARBITRATOR BOESCH: I just have one question.

24 You sort of argued that if you analogize a
25 motion for reconsideration as a remedy that might or

1 might not be exhausted, the futility of doing that is
2 indicated by it having been only granted one time out
3 of 40 bazillion.

4 MR. MOODY: Yeah.

5 ARBITRATOR BOESCH: Is there any way --

6 MR. MOODY: Give or take a few bazillion.

7 ARBITRATOR BOESCH: I mean, is that
8 statistically something that is verifiable really?
9 Only one time has it ever been granted? Or is that --

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

12 MR. GENGA: You can actually go on the Web
13 site there.

14 MR. MOODY: Sure.

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

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

21 MR. GENGA: Yeah, and there is -- there is one
22 that was granted.

23 ARBITRATOR BOESCH: One out of -- okay.

24 MR. GENGA: Yeah, so.

25 MR. MOODY: Yeah, and perhaps -- you know, I

1 mean, certainly ICANN can clarify, you know, if
2 that's -- you know, if there's two or three. I mean,
3 I -- if I -- if there's more than one, I certainly
4 don't think that it would be more than you can count on
5 one hand.

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

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

19 Now, people do just because in -- you know,
20 from a practical standpoint, there's no filing fee
21 associated with a reconsideration motion. I mean --
22 yeah, there's no -- you know, you're not paying the
23 ICDR, you're not paying panelists to sit here, but, you
24 know, at the end of the day, I'm okay. I mean, you
25 know, there's an old saying, never mistake activity for

1 achievement, and I'm going to write a whole bunch of
2 briefs and I'm not going to get much back. I mean, so
3 why not just cut to the IRP? And that's a decision
4 each applicant can make.

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

10 MR. GENGA: Yeah.

11 MR. MOODY: I'm finished, certainly.

12 ARBITRATOR COE: Yeah, unless my colleagues
13 have --

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

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

25 ARBITRATOR COE: As part of the closing

1 segment, that actually might be helpful.

2 MR. GENGA: Yeah.

3 ARBITRATOR COE: But is that agreeable to --

4 MR. LEVEE: That's fine by me.

5 ARBITRATOR COE: Okay.

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

9 MR. MOODY: Sounds good.

10 ARBITRATOR COE: Sounds great. Thank you very
11 much.

12 MR. GENGA: Thank you.

13 (Recess taken.)

14 ARBITRATOR COE: Thank you.

15 MR. LEVEE: Thank you. Members of the panel.
16 First of all, on behalf of ICANN, let me thank you for
17 your close attention over the past few months in this
18 matter, and to being so sensitive to our interest in
19 having this proceeding conclude expeditiously.

20 As you know, there are other applicants for
21 these top-level domains. They are waiting -- I was
22 going to say patiently, but I'm not sure they're being
23 patient. They're waiting anxiously to have a result.
24 And we are very much appreciative that this proceeding
25 was moved forward at a pretty good pace.

1 I likewise have a PowerPoint presentation.
2 I've left copies for counsel and for the three of you.
3 And I likewise would very much encourage questions
4 during my presentation. I think as things come up for
5 you in real time, it's much more useful to get them
6 resolved at that moment. And indeed if we can do that,
7 I think it would shorten whatever I might have to say
8 at the back end of this hearing.

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

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

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

1 other things .BIZ, b-i-z, and .MUSEUM.

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

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

19 ICANN received 1,930 applications for new
20 gTLDs. No one anticipated that many. The claimant is
21 in part responsible for that because it filed well over
22 300 applications. And I don't think anyone on the
23 ICANN side of things anticipated that, but we were
24 delighted to have that level of interest.

25 Each application was subject to multiple

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

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

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

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

1 administer them.

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

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

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

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

23 So the ICC administered the disputes for both
24 the public interest and the community objections, so
25 they had a lot. There weren't as many public interest

1 objections as some of the others, but there were some.
2 And as noted before, ICANN wanted to make sure that if
3 an applicant proposed a name that, you know, let's kill
4 all of the X type of people, that there would be a
5 mechanism for making sure that that type of application
6 didn't find its way onto the Internet. There wouldn't
7 necessarily be a person who was designated to handle
8 those objections or to object. And so ICANN actually,
9 under the guidebook, created a person called -- whose
10 job it was to decide whether certain types of
11 objections such as public objections should be filed.

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

20 This was important to ICANN. There was no
21 infrastructure at ICANN then or now to administer these
22 type of proceedings, not unlike the proceeding that
23 brings us here today. ICANN doesn't administer this
24 proceeding. The ICDR does. Nor was ICANN equipped
25 with expertise to address whether a particular expert

1 was a good expert, a bad expert, whether that expert
2 had a conflict as a result of something he or his law
3 firm had done, whether the expert was suitable, had the
4 right amount of knowledge. ICANN outsourced all of
5 that, specifically under the terms of the guidebook.

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

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

21 "Each DRSP" -- dispute resolution
22 service provider -- "will follow its
23 adopted procedures for requiring such
24 independence, including procedures for
25 challenging and replacing an expert

1 for lack of independence."

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

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

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

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

25 Now, why didn't the board do that? Answer:

1 It knew that there would be, and in fact have been,
2 hundreds of expert reso- -- of objections that went to
3 expert reports, and the board clearly did not want to
4 put itself in the position of being the ultimate
5 arbiter of each and every review that was done by an
6 expert via a dispute resolution provider.

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

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

25 Again, most importantly, because this is an

1 independent review proceeding, nothing in the bylaws,
2 nothing in the articles requires the board to sit as a
3 court of appeal to review these kinds of
4 determinations.

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

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

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

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

23 So there was a really good opportunity, if
24 Donuts had a concern, that the dispute resolution
25 provider had failed to follow its own policies, for

1 Donuts to file reconsideration requests on these
2 applications, which it did not do.

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

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

20 So in .GAY, g-a-y and .MED, m-e-d, short for
21 medicine, reconsideration requests were filed that said
22 that the provider had done something wrong, the board,
23 through the board governance committee, decided that it
24 would send those reconsideration requests back to the
25 provider and do it again.

1 The board still isn't making the decision.
2 Under any circumstances, the board isn't going to make
3 a decision. But in those situations and a couple of
4 others I'm about to get to, the board says, we want you
5 to do it again. We're not sure, we're not comfortable
6 that you followed your own policies or that you
7 followed the policies that were set forth in the
8 guidebook.

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

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

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

23 What it should have done, if it thought the
24 ICC had not followed its rules, was file a
25 reconsideration request.

1 It had done that on many other objections.
2 I've read them. I don't know why Donuts didn't do it
3 here. I don't know what strategic litigation decision
4 was made, but it's an important omission.

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

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

23 Let's be clear. The ICANN board has not
24 considered the issues that bring us here today. Not
25 ever at any time. So maybe there's board inaction that

1 we'll talk about in a moment, which is apparently the
2 thrust of Donuts's argument. But not once did any
3 board in any meeting at ICANN consider these requests
4 or concerns about the decisions that were issued by the
5 ICC.

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

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

20 Section 3, paragraph 4, continues:

21 The IRP must apply a defined standard of
22 review -- I'll come back to that phrase in a minute --
23 focusing on: Did the board act without conflict of
24 interest? Did the board exercise due diligence and
25 care in having a reasonable amount of facts in front of

1 them? And did the board members exercise independent
2 judgment in taking the decision believed to be in the
3 best interest of the company?

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

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

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

1 briefs.

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

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

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

21 You have bylaws that set up an independent
22 review process. It's a unique process. I'm not aware
23 of any other corporation in the world that has allowed
24 itself to be second-guessed on its decisions in the
25 manner that we are second-guessing certain things here.

1 But I can establish that as a result of accountability
2 measures that it wanted to provide to the community.

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

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

20 With respect to the role of the panel -- and
21 let me stop there because I want to answer the question
22 of precedential value. That the bylaws specifically
23 say that prior independent review determinations or
24 declarations -- 'cause what you'll issue is a
25 declaration -- should have precedential value. And

1 it's for the reason that I believe Professor Coe
2 specifically mentioned, so that we don't wind up with
3 decisions that are totally at odds with one another
4 over the course of the years.

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

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

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

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

22 "It is not for the Panel to opine
23 on whether the board could have acted
24 differently than it did, rather, our
25 role is to assess whether the board's

1 action was consistent with applicable
2 rules found in the articles, bylaws,
3 and guidebook. Nor, as stated, is it
4 for us to purport to appraise the
5 policies and procedures established by
6 ICANN in the guidebook (since, again,
7 this IRP is not a challenge to those
8 policies and procedures themselves),
9 but merely to apply them to the
10 facts."

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

19 The problem is, that these are really
20 challenges to the terms of the guidebook themselves.
21 It's really saying, we don't like that something
22 happened as set forth in the guidebook. And as the
23 Booking panel found -- I think the guidebook was
24 adopted in 2011. The next version was adopted in 2012.
25 Certainly Donuts did not file an independent review

1 within 90 days as it would have been required to do if
2 it was unhappy with a particular provision of the
3 guidebook.

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

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

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

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

25 The ICC appointed Mr. Taylor. The ICC also

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

7 Let's go on to the next.

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

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

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

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

1 and so I really don't have a view.

2 All I can tell you is that the expert report
3 on -- it's in one of the next slides -- the emphasis
4 person that Donuts hired, on a couple of things that
5 Donuts said were conflicts, he says, ah, probably not
6 really. And his ultimate decision is, yeah, it may be
7 a conflict, but it's not his determination to make.
8 It's the ICC's determination. And I don't read his
9 report as saying that it's black or white.

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

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

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

24 ARBITRATOR BOESCH: But what about our role
25 supposedly --

1 MR. LEVEE: Your role -- because the board
2 didn't do anything, your role does not change. So
3 under the most egregious example, the ICC knowingly put
4 the worst possible expert to make that determination,
5 Donuts had recourse. Could have exercised that
6 recourse at the ICC, could have recognized -- it could
7 have advanced that recourse in a reconsideration
8 request.

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

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

23 With respect to .RUGBY, this one is even
24 more -- even less objectionable, I suppose, if that's
25 the right word, because Donuts did object to the

1 initial designation of Mr. McLaren as the expert. And
2 he was replaced by Mark Kantor, East Coast lawyer.

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

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

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

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

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

25 And then Donuts argues in its reply brief, but

1 again not this morning, that SportAccord has lost its
2 support and that's -- that ought to be relevant to you.

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

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

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

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

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

25 And in this respect -- assuming for the moment

1 that the SportAccord argument is credible, if you go on
2 the Internet, it looks like SportAccord has tons of
3 support, and I make no representation one way or the
4 other, but -- as to whether it has lost any notion of
5 its support. But it's something that happened
6 apparently in 2015, not something that happened when
7 the decision was made.

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

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

17 Charlotte, would you pass out Article XI-A.

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

24 Article XI-A refers to advisory mechanisms for
25 the establishment of policy. It permits the board to

1 retain experts to assist in policy development.

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

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

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

23 Nothing in this article relates to the
24 New gTLD Program. Nothing in this article relates in
25 any way to outsourcing objection determinations.

1 These are experts who are reta- --
2 Article XI-A refers to experts that the board wants to
3 retain to assist the board, because you've got a
4 fundamental issue. For example, the question of
5 whether wine sold throughout the country -- throughout
6 the world has certain meanings in different parts of
7 the world and ICANN actually got some legal advice, it
8 sought out an expert, because there were disputes
9 regarding .WINE.

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

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

24 Article 3.1 is entitled "GAC Advice on New
25 gTLDs." Section 3.1 of Module 3 refers to the

1 situation where the GAC speaks. It doesn't like an
2 application. And it says ICANN will consider the GAC
3 advice. So the GAC declares, as it did in AFRICA, we
4 don't want a specific application to proceed. What it
5 says on page 3-3, it says:

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

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

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

25 And what it says is, when an expert such as

1 Mr. Taylor issues a report, quote:

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

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

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

13 Let me discuss the DCA decision.

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

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

24 Instead, what the board -- what the panel did
25 in DCA was, it said, well, there was GAC advice against

1 DCA's application for .AFRICA. And there are two
2 provisions in the governing documents that actually
3 require the board to consider that advice.

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

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

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

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

24 In that case, DCA also had filed a request for
25 a reconsideration. And the board considered that

1 request. And DCA argued, hey, this is board action. I
2 never argued that it wasn't at the hearing. Of course
3 it was board action. The board governance committee is
4 part of the board. And the panel determined that more
5 information could have been provided in that situation.

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

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

18 So let's be clear. Why is this -- why is the
19 DCA matter irrelevant here? The matter before you
20 involves no board decision. The matter before you
21 involves no obligation to decide. Certainly doesn't
22 involve the GAC. GAC had no role in the issues that
23 bring us here today. And the matter before you today
24 likewise does not involve any of ICANN's other
25 constituent committees. There's no obligation on the

1 part of the ICC to do anything other than it was
2 contracted to do.

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

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

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

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

23 I'm not going to get into the merits, of
24 course, of that, but the point was that it was -- that
25 was Booking's two-pronged approach. You have the power

1 and you should act because the expert made a
2 substantive decision that was bad.

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

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

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

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

23 It has been mentioned in the papers and also
24 this morning that the board in fact did accept what
25 amounts to a rehearing in conjunction with two sets of

1 objections, .COM, .CAM, and .SHOP and the Japanese
2 character for online shopping. I'm going to discuss
3 .CAM, .COM because it's harder for me with the Japanese
4 character.

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

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

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

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

22 That's a very different situation than what we
23 have here. There's no effort by Donuts to say, well,
24 our result is inconsistent to some other TLD, or our
25 result is going to put -- be in a situation where you

1 now have two reports that are just demonstrably at odds
2 with one another.

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

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

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

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

19 MR. LEVEE: You recall accurately. I don't
20 have the -- I remember reading it several times. I
21 don't have the language handy. But the board does
22 explain that this is unusual, we're not doing it in the
23 ordinary course, because the board did not want a flood
24 of people coming back to it to say, well, our situation
25 is just like CAM/COM. So the board was very cautious.

1 And I don't want to characterize whether the board did
2 this reluctantly, but it did it after a lot of
3 due diligence.

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

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

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

23 More importantly, there's no board action
24 involved, so I don't know what this expert declaration
25 tells you.

1 Finally, there was discussion earlier about
2 Dr. Sarvarian offering his opinions. To be clear, the
3 board is not the arbiter of whether the ICC should or
4 should have not reject someone. But more importantly,
5 I thought it was important in the conclusion,
6 Dr. Sarvarian actually says that he considers the
7 conflict of interest to be -- to have the level of
8 seriousness to potentially merit disqualification.

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

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

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

21 Donuts alleges that the board had an
22 obligation to create an appellate review of expert
23 determinations, and the failure do so demonstrates some
24 kind of lack of accountability. But Donuts does not
25 identify truly what the source is of that obligation.

1 Citing articles and bylaws that says that
2 ICANN should be fair or treat people kindly, that
3 doesn't do it. There's got to be an actual bylaw that
4 says you ought to be doing something in this situation.

5 Second, slide 26:

6 "Donuts alleges that the board
7 failed to act 'in the public interest'
8 and was not 'accountable' to that
9 interest by opting against an
10 appellate mechanism."

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

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

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

22 This one I don't understand at all. The board
23 promoted so much competition, that it received 1,930
24 new applications. To be clear, the applicant guidebook
25 makes it clear no one's got a right to a TLD. Simply

1 by applying, you do not have a right to get a registry
2 agreement.

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

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

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

22 And then finally Donuts argues that Mr. Taylor
23 had a conflict of interest. And we spent a lot of time
24 this morning hearing about it, but none of it is
25 supportive of an independent review proceeding. There

1 was no board action. Donuts didn't file a request for
2 reconsideration, which was the time and place to raise
3 that issue. Instead, Donuts skipped it for tactical
4 reasons that don't any longer matter.

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

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

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

23 ARBITRATOR COE: Thank you very much.

24 Would Donuts like to weigh in now by way of a
25 rebuttal or -- I'm at your pleasure. Do we need a

1 small break?

2 MR. GENGA: Could we have a short break?

3 ARBITRATOR COE: Let's say ten minutes.

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

5 (Recess taken.)

6 MR. LEVEE: Professor Coe, if it is okay, I
7 would like to make one correction to something I said.

8 I mentioned the .WINE situation. And ICANN
9 did hire a lawyer, but they did not do it pursuant to
10 the provisions of the bylaws that I referenced. It was
11 done in conjunction with a different attempt to resolve
12 disputes to get expertise on -- that ICANN did not have
13 relating to the use of certain words.

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

17 ARBITRATOR COE: Okay. Thank you.

18 MR. GENGA: Okay. Thank you.

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

25 I can guarantee you there will be no

1 substitute for looking at those decisions. And they
2 are very persuasive in terms of -- in my view, of
3 course, and obviously I prefer the result of the DCA
4 case. I think it applies. I'm the advocate that's
5 saying that. But I think you'll find the same thing.

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

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

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

20 ICANN's board, which contracted with the
21 applicants, and the applicants who relied on the
22 processes of the guidebook to be followed and they
23 weren't, ICANN has an obligation. And the board has --
24 the board is the only party with the power to enter
25 into contracts.

1 And so the board takes on the responsibility
2 of carrying out these obligations to make sure that its
3 policies and processes are followed. And that was not
4 the case here.

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

7 MR. GENGA: There is no duty to file a request
8 for reconsideration.

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

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

21 But the fact of the matter is, if you look at
22 the bylaws, if you look at Article IV, Section 2 and
23 Article IV, Section 3, the two processes are completely
24 independent. One is not a prerequisite for the other.
25 I -- you're right, I lose the advantage if I don't file

1 a reconsideration request of being able to point to
2 that as evidence of board action, but it's not a
3 waiv- -- it's certainly not a waiver of any of the
4 grounds that I can raise on an IRP. And we've raised
5 those grounds. And there's certainly evidence in the
6 record of the board being aware of these circumstances.
7 They're aware of the conflict.

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

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

20 And the board with respect to -- Mr. LeVee
21 mentioned the RUGBY case, and in both cases we're
22 saying -- well, one, we have a conflict in this
23 SportAccord situation. We talked about that. I'll get
24 back to that in a minute. But in both the SPORTS and
25 the RUGBY cases we're saying that the processes laid

1 out in the guidebook, and particularly the elements and
2 grounds for objection, were not applied and the board
3 had a responsibility to make sure that they were.

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

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

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

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

1 interpretive guidance.

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

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

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

17 Nor did they review them afterwards. And we
18 don't talk about a review mechanism in that, yeah,
19 ICANN should have provided for an appellate process.
20 We don't suggest that at all, 'cause we know that ICANN
21 considered it and comments were raised during the
22 drafting of the guidebook about that, and the
23 guidebook, which resulted from the input of all of the
24 various constituent organizations and stakeholders,
25 decided not to do that. And we're not challenging

1 that.

2 But in circumstances where these situations
3 are brought to the attention of the board as in the
4 case of COM and CAM, things were done about it.

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

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

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

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

25 MR. GENGA: Correct.

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

9 MR. GENGA: Yes.

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

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

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

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

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

21 ARBITRATOR COE: Right.

22 MR. GENGA: -- decided, look, there are a lot
23 of reasons why a lot of these decisions could have been
24 inconsistent. Here are some of the reasons why they
25 could have been. And you know what? We're not going

1 to bother ourselves with trying to figure that out.

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

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

20 And we think that the panels were misinformed
21 or not adequately informed about the guidebook
22 standards, and we specifically raised that point. And
23 ICANN has admitted that, you're probably right, that
24 there wasn't enough training or there wasn't any
25 training. They admit there was no training and it

1 would have been a good idea.

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

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

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

20 That was very important to ICANN to see that
21 happen. It was very important for ICANN to see that
22 happen with respect to the initial evaluation of all
23 applications. But for some reason, it wasn't important
24 to ICANN to see to it with respect to the objections,
25 and we contend that selectively picking and choosing

1 that is not appropriate.

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

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

9 MR. GENGA: Standard application.

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

14 MR. GENGA: Sure. Sure.

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

18 THE REPORTER: Non-standard applications?

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

23 A community application that's accepted as
24 such and is demonstrated to have satisfied the criteria
25 for an adequate community application automatically

1 eliminates all competing non-community applications for
2 the same string.

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

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

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

17 MR. GENGA: Right.

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

21 MR. GENGA: Right.

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

24 MR. GENGA: No.

25 ARBITRATOR HAMILTON: No, no.

1 MR. GENGA: That's a very good question.

2 So as you can imagine, there are some strings
3 that got a lot of applications.

4 .LAWYER, I think, got five or six. Don't ask
5 me why, but anyway.

6 So if you have a number of competing
7 applications, you first go to an objection process. If
8 there are no objections, all of the applicants are
9 still alive, they're put into what's called a
10 contention set.

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

18 And there are two -- there are actually two
19 different auction processes. One that's actually
20 specifically provided. I think the other was
21 created -- you can correct me if I'm wrong, but -- I'm
22 looking at my client here. I think it was actually
23 created by the private advocates themselves where they
24 have their own private action. Rather than going to
25 the final ICANN auction, they create a private auction

1 where essentially the losing parties get -- at least
2 they get -- they recover some of their money. Because
3 they wouldn't --

4 MS. ONDO: It's a private -- private --

5 MR. GENGA: Yeah, the winning --

6 MS. ONDO: -- contention resolution --

7 MR. GENGA: -- bid- -- yeah.

8 MS. ONDO: -- itself, not --

9 MR. GENGA: Exactly. The winning bidder, some
10 of that money goes to the losing applicants.

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

15 MR. GENGA: Correct.

16 ARBITRATOR HAMILTON: Who gets that
17 \$5 million?

18 MR. GENGA: The --

19 MR. MOODY: That is still to be determined,
20 from what I understand.

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

23 ARBITRATOR HAMILTON: Something.

24 MR. GENGA: -- something. Right.

25 ARBITRATOR HAMILTON: Okay.

1 ARBITRATOR COE: In the private --

2 MR. GENGA: In the private setting.

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

5 MS. ONDO: Yeah.

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

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

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

14 MS. ONDO: -- process.

15 MR. GENGA: Right.

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

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

19 MS. ONDO: Correct.

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

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

24 ARBITRATOR COE: It goes to ICANN?

25 MR. GENGA: It goes to ICANN, yeah.

1 ARBITRATOR COE: Okay.

2 MR. GENGA: Right.

3 MS. ONDO: ICANN collects all that money and
4 at this time, there's no determination as to what ICANN
5 is doing with it.

6 ARBITRATOR COE: All right. Okay.

7 MR. GENGA: Right. So the private auction is
8 just -- it's the parties resolving among themselves
9 that, hey, I'm the last standing applicant and so now
10 you -- I get this string.

11 ARBITRATOR COE: So objections are a way to
12 limit the number that end up in the contention set?

13 MR. GENGA: Correct, correct. With respect to
14 all but string confusion, which I won't bore you with,
15 but yes.

16 So a successful objection on community
17 grounds, on legal rights grounds, on limited public
18 interest grounds will eliminate the application. The
19 application will not proceed. That's the language of
20 the guidebook.

21 ARBITRATOR COE: And help me -- I read
22 Mr. Kantor's expertise, his decision, but help me
23 understand what your complaint about it is exactly.

24 MR. GENGA: Well, the complaint is that
25 essentially -- there's four elements to an objection

1 for the community. One of which is, and the biggest
2 really one is, is the -- that the -- there will be a
3 material detriment to the community if the applicant
4 were allowed to proceed with the application.

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

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

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

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

24 MR. GENGA: Well, there's a number of reasons
25 for it, but one -- there's actually a -- there's an

1 additional dispu- -- there's a post delegation dispute
2 resolution procedure that applies to community domains
3 that doesn't apply to non-community domains.

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

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

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

23 So that's the reason Donuts didn't apply for
24 any domains as communities. And they specifically and
25 very carefully selected what they believe to be generic

1 terms that would have wide appeal and that ought not to
2 have been subject to most of the objections that they
3 caught.

4 Donuts caught about 55 objections in total and
5 prevailed on almost all of them. These two
6 unfortunately --

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

9 MR. GENGA: 307.

10 ARBITRATOR COE: 307.

11 MR. GENGA: Yes.

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

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

15 MR. GENGA: Right at the top.

16 MR. LEVEE: Right.

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

20 ARBITRATOR COE: Sorry for interrupting. I --

21 MR. GENGA: No, that's okay. I think actually
22 we've probably covered -- I think I've pointed the
23 panel to the places in the record that I wanted you to
24 look. And -- oh, there's one other point that
25 Mr. LeVee raised that I wanted to respond to.

1 The conflict point that was raised by
2 Mr. LeVee that we didn't object specifically to -- to
3 Mr. Taylor as a .SPORT panelist. And the issue that's
4 raised by Dr. Sarvarian is that the burden was on the
5 panelist to make the disclosure. The panelist never
6 made the disclosure. It's not -- the burden is not on
7 the litigant to find the conflict. The burden is on
8 the panelist to make the disclosure. And had the
9 disclosure been made, then perhaps we could have done
10 something about it, but it never it was.

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

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

21 And we believe that ICANN's board being on
22 notice of this situation and deciding not to get
23 involved, if you look at the DCA case, the DCA
24 panelists said, you just can't make that -- you don't
25 have the discretion to decide not to get involved once

1 you know what's going on. You have an obligation to
2 investigate it.

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

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

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

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

23 MR. GENGA: Correct.

24 ARBITRATOR COE: And for you, the triggering
25 is the -- Exhibit 67 which calls attention --

1 MR. GENGA: Right.

2 ARBITRATOR COE: -- their attention --

3 MR. GENGA: Right.

4 ARBITRATOR COE: -- and veri- -- it

5 substantiates you say --

6 MR. GENGA: Right.

7 ARBITRATOR COE: -- they knew about it.

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

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

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

25 So under the DCA case, I believe it was

1 obligated to inquire and find out more about it instead
2 of just saying, here, this is yours, this goes in your
3 court, we're not touching it.

4 And that's all I have.

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

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

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

25 MR. GENGA: Well --

1 ARBITRATOR BOESCH: Is there a question in
2 there? I --

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

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

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

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

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

23 ARBITRATOR BOESCH: Thank you.

24 MR. GENGA: If there's no other questions, I
25 thank the panel.

1 ARBITRATOR COE: Thank you.

2 MR. LEVEE: May I respond briefly?

3 ARBITRATOR COE: Of course, yes.

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

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

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

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

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

20 On page 107, the draft report says:

21 Recognizing that all of the
22 selected DRSPs are world renowned
23 experts in the field, and to support
24 the intent to maintain independence in
25 the dispute resolution process, ICANN

1 did not attempt to direct or provide
2 the DRSPs with interpretive guidance
3 that might unduly influence the
4 outcomes. However, ICANN received
5 comments from the community regarding
6 the areas of expertise of panelists
7 and suggestions that the panelists
8 lacked training on the objection
9 standards. Given the untested nature
10 of the standards of the objection
11 grounds, ICANN may wish to provide
12 training for the DRSPs in the next
13 round.

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

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

24 Once all the expert -- each expert
25 report was issued, the determination

1 made determinations that procedural grounds, either of
2 the guidebook or of a review and dispute resolution
3 provider, that procedural things that were supposed to
4 occur didn't occur, and, on that basis, ICANN granted
5 reconsideration.

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

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

16 Then it goes on, on page 111.

17 ICANN received comments from the
18 community about the lack of appeal
19 mechanism in the objection process.
20 Some parties chose to invoke ICANN
21 accountability mechanisms to have
22 their cases considered. The
23 accountability mechanisms provided
24 parties with an opportunity to
25 challenge action or inaction in terms

1 of procedure. These are the
2 procedures broadly applicable to
3 ICANN's accountability in its work
4 that were not designed to provide an
5 opportunity for the merits of an
6 objection case to be reviewed.

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

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

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

24 And a claimant -- an applicant submitted a
25 claim for .INC and sought -- it pays extra money -- to

1 have the community evaluator decide whether that should
2 be a community application. If the applicant is given
3 community status, all of the standard applications are
4 put on hold.

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

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

19 ICANN verified that a single firm
20 could handle the workload and that the
21 firm was able to certify it did not
22 have a conflict of interest. And then
23 the panel drafted a set of guidelines
24 that its team would use to perform the
25 evaluation.

1 So ICANN didn't draft the guidelines, the
2 panel did. So the notion that this paragraph tells us
3 that ICANN is somehow now acknowledging that it should
4 have adopted guidelines and informed the dispute
5 resolution providers, that's just not what this report
6 says.

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

11 Two other things.

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

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

23 Now, ICANN has actually been accused in some
24 circumstances of creating -- of not granting objections
25 that could have reduced the number of auctions so that

1 we could generate more money by doing all of these
2 auctions.

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

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

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

20 And then finally a question of whether it's a
21 prerequisite to file a reconsideration motion.
22 Mr. Genga is absolutely correct. There's nothing that
23 requires an applicant to file a reconsideration
24 request. But if you have a problem with a procedure
25 that wasn't followed, that's the appropriate thing to

1 do, it's the logical thing to do. Because the board
2 had announced multiple times and in every
3 reconsideration request that it has done in conjunction
4 with the program, has stated in big bold letters, we're
5 not going to review the substance, but we will review
6 the procedure. And if you tell us that a procedure
7 wasn't followed, we will listen carefully.

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

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

19 Instead, Donuts skipped that part. It had the
20 right to. But it also has to deal with the
21 consequences of exercising that right. It then lands
22 in an independent review process in a situation where
23 the board had never touched Donuts's application for
24 any purpose. And thus, it's forced to argue that it
25 should have reached out because these are somehow so

1 egregious, these two determinations are so egregious,
2 that the board should grab them by the neck and throw
3 them out the window of -- we're on the fourth floor.

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

12 I'll leave you with that note. Thanks.

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

18 MR. LEVEE: Yes.

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

25 MR. LEVEE: I've never had that question

1 before. Let me -- I'll respond --

2 ARBITRATOR BOESCH: We are subject --

3 MR. LEVEE: I understand.

4 ARBITRATOR BOESCH: -- to the California
5 Arbitration Act.

6 MR. LEVEE: Undoubtedly.

7 ARBITRATOR BOESCH: Okay. And there's --

8 ARBITRATOR COE: Which one?

9 MR. LEVEE: Well, you're subject to California
10 law. I don't know -- I mean, trying to think if the
11 California Arbitration Act has provisions that actually
12 are relevant to us.

13 ARBITRATOR BOESCH: Well, disclosures --

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

15 ARBITRATOR BOESCH: Disclosures, for instance,
16 under California law --

17 MR. LEVEE: Well, this is not an arbitration,
18 so I'm not sure in that respect that the disclosures
19 would apply. I know that the three of you submitted
20 disclosures to the ICDR. And if and to the extent
21 California law somehow applies to those disclosures,
22 I've never had that subject come up.

23 I certainly did not intend to say that
24 international law is not relevant to anything we do
25 here. ICANN's articles do reference principles of

1 international law. And the Internet, of course, is an
2 international resource.

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

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

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

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

25 MR. LEVEE: I think that ICANN set up a

1 process whereby it would -- it specifically disclaimed
2 that a party could take an expert determination and
3 take it into court and say that it was wrong. There's
4 no mechanism in the guidebook that would permit a party
5 to do that.

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

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

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

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

1 arbitrations.

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

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

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

14 ARBITRATOR COE: Of course.

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

1 bias rehear these objections. That --

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

6 MR. GENGA: Correct.

7 ARBITRATOR COE: -- perform some training.

8 MR. GENGA: Correct. Yes.

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

12 MR. LEVEE: I do.

13 MR. GENGA: I do.

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

16 ARBITRATOR COE: Yes?

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

21 MR. GENGA: Oh, right.

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

24 Just to summarize, there have been three
25 decisions so far in IRP. The XXX decision was, you

1 know, fairly old, we all agree. The two that are --
2 we're arguing about, Booking and DCA.

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

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

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

18 MR. GENGA: Yes.

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

21 ARBITRATOR COE: A critical distinction, I
22 would say.

23 MR. LEVEE: Yes. Legal costs are borne by the
24 parties. The panel in the ordinary course would
25 allocate costs -- charge costs against the losing

1 party. The decision in Booking, the panel decided to
2 split the costs, which it has the right to do under the
3 rules.

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

6 MR. LEVEE: Correct, not including legal fees.

7 MR. GENGA: Not including legal fees.

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

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

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

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

25 MR. LEVEE: Thank you for staying awake.

1 ARBITRATOR COE: Well, it was actually very
2 interesting for me --

3 ARBITRATOR HAMILTON: Very helpful.

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

8 ARBITRATOR HAMILTON: So do I.

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

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

19 MR. GENGA: Great.

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

22 ARBITRATOR COE: Thank you.

23 MR. GENGA: We'd like a copy.

24 MR. MOODY: Yes. And, Professor Coe, we can
25 overnight you a hard copy if you like. There's --

1 apologies about that cut-off on the slide --

2 ARBITRATOR COE: That would be useful.

3 MR. MOODY: Sending the hard copy?

4 ARBITRATOR COE: Yes.

5 MR. NIZAMI: Hard copy or PDF?

6 MR. MOODY: Hard copy.

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

10 MR. MOODY: We can do both.

11 MR. GENGA: All right. Thank you.

12 ARBITRATOR COE: And that would to all three
13 of us. Yes?

14 MR. GENGA: Yes.

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

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

19 THE REPORTER: Thank you.

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

25 MR. LEVEE: ICANN would -- how do I say this

1 politically correct?

2 ICANN would welcome a ruling without the need
3 for additional post filing briefs --

4 ARBITRATOR COE: Understood.

5 MR. LEVEE: -- because of the additional time.
6 But in the event you view briefing as essential, we
7 would, of course, accept that decision and look for an
8 accelerated schedule.

9 ARBITRATOR COE: As I recall, your first
10 comments were, there are people out there waiting for
11 us to get busy.

12 MR. LEVEE: Yes.

13 ARBITRATOR COE: That is more or less what you
14 said.

15 MR. LEVEE: Along those lines, yes.

16 ARBITRATOR COE: And these are lovely parting
17 gifts for us to take?

18 MR. LEVEE: They are.

19 ARBITRATOR COE: So back to your comment about
20 the gym, I didn't get my workout in, but I do now.

21 Thank you very much, ladies and gentlemen.

22 MR. LEVEE: Thank you.

23 MR. GENGA: Thank you very, very much.

24 (Whereupon, at 1:26 P.M., the
25 hearing was adjourned.)

1 STATE OF CALIFORNIA)
2 COUNTY OF LOS ANGELES) ss.

3

4 I, SUSAN NELSON, C.S.R. 3202, in and for the
5 State of California, do hereby certify:

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

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

14 Witness my hand this 19th day of October,
15 2015.

16



17

18 Susan Nelson, C.S.R. No. 3202
19 Certified Shorthand Reporter
20 State of California

21

22

23

24

25

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