

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

Little Birch, LLC)
Minds + Machines Group Limited)
)
)
Claimants)
)
v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

ICDR Case No. _____

**REQUEST FOR INDEPENDENT REVIEW PROCESS
BY LITTLE BIRCH, LLC AND MINDS + MACHINES GROUP LIMITED**

Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted

Counsel for Claimants

I. IDENTIFICATION OF THE PARTIES

A. Claimants

1. The Claimants in this dispute are Little Birch LLC, a subsidiary of Donuts Inc. and Minds + Machines Group Limited, formerly known as Top Level Domain Holdings Limited. Full contact details of Claimants are provided as **Annex 1**.

2. Claimants are represented in these proceedings by:

Flip Petillion
Contact Information Redacted

B. Respondent

3. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). The Respondent's contact details are as follows: 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.

II. EXECUTIVE SUMMARY

4. ICANN organized a new gTLD application round in 2012, allowing interested entities to compete for operating new gTLDs or internet extensions of their choice. Where multiple entities applied for the same string, they were asked to come to an amicable agreement under which one or more applicants withdrew their applications. If no amicable solution was found, applicants in contention for the same string were invited to participate in an auction, the proceeds of which would go to ICANN.

5. ICANN wanted to offer some kind of protection to well-established communities that might otherwise lose out if the free-market competition for gTLD strings was allowed to go unchecked. ICANN therefore introduced a mechanism allowing such communities to apply for a so-called community-based gTLD string that would identify the community. If a community-based gTLD application met the stringent criteria for obtaining "community

priority”, the application was allowed to proceed, and non-community-based applications for the same string were set aside.

6. During ICANN’s recent new gTLD application round, Claimants applied to operate the .eco gTLD (**Annexes 2-3**). Another applicant, Big Room Inc. (Big Room), also applied for the .eco gTLD (**Annex 4**). Big Room claimed that its application was community-based. A panel of third-party evaluators, commissioned by ICANN, decided that Big Room’s application for .eco met the criteria for obtaining “community priority” (**Annex 5**). ICANN then adopted the panel’s determination, without any review.

7. The determination was, however, opaque, in violation of ICANN’s very policy on “community priority”, based on non-existent facts, made by a faceless panel, and in violation of ICANN’s fundamental obligations. Claimants have never been given an opportunity to comment, let alone contest, the undisclosed materials considered by the panel or the panel’s insufficient reasoning. As a result of the community priority evaluation (CPE), Claimants’ applications have been excluded without justification. Even if ICANN reconsiders the CPE, Claimants’ applications have been needlessly delayed and subjected to additional procedures (Documentary Information Disclosure Policy (DIDP) Request, Request for Reconsideration (RfR)). ICANN’s CPE was an abdication of responsibility and contrary to the evaluation policies ICANN had established for new gTLD applications, especially in view of the fact that community priority was denied for similarly situated applications. The CPE of Big Room’s application for .eco is not justified by any legitimate security or stability concerns. It is baseless and arbitrary.

8. Claimants repeatedly asked ICANN – among others in their DIDP Request and two consecutive RfRs – to comply with its own policy and remedy the improper treatment of the .eco applications. ICANN has not only declined, but has attempted to evade all responsibility.

9. ICANN’s treatment of Claimants’ applications is inconsistent with both the new gTLD

policies established in the Guidebook as well as with fundamental ICANN policies and obligations requiring fairness, non-discrimination, transparency, accountability, and good faith. By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment. Accordingly, Claimants request that ICANN be required to overturn the CPE in relation to .eco and allow Claimants' applications to proceed on their own merits.

III. SUMMARY OF RELEVANT FACTS

A. The parties

1. Claimants

10. Both Claimants offer services in the Internet's domain name system (DNS). Claimants and their affiliated companies have applied for numerous gTLDs with ICANN.

2. ICANN

11. ICANN is a non-profit public benefit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is responsible for administering technical aspects of the Internet's DNS. Core to its mission is increasing competition and fostering choice in the DNS. ICANN's Articles of Incorporation require ICANN to act "*for the benefit of the Internet community as a whole*" and "*in conformity with the relevant principles of international law and local law*" (RM¹ 1, Article 4). ICANN's fundamental principles, which are reiterated numerous times in ICANN's governance documents and other policies, require ICANN to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition, as well as to act in good faith.

B. ICANN established the new gTLD Program

12. ICANN's responsibilities include establishing a process for introducing new top-level

¹ Reference Material.

domains (TLDs) in order to promote consumer choice and competition (**RM 4**, Article 9.3). Before the introduction of the new gTLD program, ICANN had, over time, expanded the DNS from the original six generic TLDs (gTLDs) to 22 gTLDs and approximately 250 two-letter country-code TLDs (ccTLDs).

13. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs (**RM 6-7**). The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet (**RM 2**, Article X). In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with allocation criteria and contractual conditions (**RM 8-9**). These allocation criteria were set out in the Applicant Guidebook, which is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs. In June 2011, ICANN's Board approved the Guidebook and authorized the launch of the New gTLD Program (**RM 10**). The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains (**RM 11**).

14. The GNSO decided that there must be a clear and pre-published application process using objective and measurable criteria (**RM 9**, GNSO Recommendation 9). The Applicant Guidebook was for prospective applicants to make sure they understand what was required of them when applying for a new gTLD and what they could expect at each stage of the evaluation process (**RM 11**, p. 12; **RM 12**). The final version of the Applicant Guidebook was made available on 4 June 2012 (**RM 5**), *i.e.*, after the application window for new gTLD applicants closed on 30 May 2012 (**RM 13**).

C. Claimants applied for .eco

15. Claimants have individually filed applications to operate the .eco gTLD (**Annexes 2-**

3). Claimants relied on the objective and measurable criteria of the Applicant Guidebook and were confident that the decision as to which applicant ICANN would delegate the .eco gTLD – referring to the common dictionary word – would ultimately be dependent upon negotiations between applicants or an auction among applicants (assuming all applicants passed evaluation).

D. Big Room applied for .eco as a “community-based” gTLD

16. Big Room also filed an application to operate the .eco gTLD (**Annex 4**). In its application, Big Room claimed, first, to be representing a community and, second, that the gTLD was going to be operated for the benefit of this alleged community. The purpose of Big Room’s application for a so-called community-based gTLD was in fact to avoid competition for the gTLD string, a highly sought after generic word.

E. ICANN established a Policy in relation to CPE

17. The GNSO developed a policy of granting priority to so-called “qualified community-based applications”. What the GNSO “*had in mind and what [it] had at heart*” when developing the CPE policy was “*really to protect communities like the Navaho community* [²], *the communities that really didn’t have any other kind of protection, and they*[³] *wanted to protect these communities in a certain way*” (**RM 14**, p. 14). “*The community-based application was nothing more but to protect small communities. That was the intent of the GNSO*” (**RM 14**, p. 15). The purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD nor to pick winners and losers within a diverse commercial industry. Indeed, any such purpose would be contrary to the fundamental principles that form the basis of ICANN.

² The Navaho or Navajo community refers to the largest federally recognized tribe of indigenous people in the United States of America.

³ The GNSO members.

18. This purpose was clearly translated in the Applicant Guidebook. As a qualified community application eliminates all directly contending standard applications, ICANN considered it fundamental that “*very stringent requirements for qualification of a community-based application*” were applied (**RM 5**, Module 4-9). To be qualified, an application need to score at least 14 points in the CPE (**RM 5**, Module 4-10) and the scoring process was specifically developed to prevent “*undue priority [being given] to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string*” (**RM 5**, Module 4-9).

19. ICANN initially considered working with a comparative evaluation panel that would advise which applications should be given priority based on a comparative analysis between applications. However, ICANN rejected this idea and opted for a community priority evaluation panel, as there was an absolute consensus within the ICANN community that evaluations should be made on the basis of objective and predictable criteria (**RM 9**, GNSO Recommendation 9).

F. ICANN selected a CPE Panel, that made an arbitrary determination on the .hotel CPE

20. On the basis of a largely non-transparent selection process the Economist Intelligence Unit was selected to act as the CPE Panel (*infra*, Section VI.A). Having been selected, this CPE Panel arbitrarily determined that Big Room’s application for .eco be granted community priority (*infra*, Section VI.B).

G. The ICANN Board failed to assure compliance with ICANN’s Policies, as it accepted the CPE Panel’s arbitrary determination on .eco

21. The CPE Panel was given the task of preparing a recommendation document for ICANN to consider (**RM 15**, p. 4: final step). On receipt of this recommendation, ICANN published a report stating that the CPE Panel had determined that Big Room’s application met the requirements specified in the Applicant Guidebook. ICANN accepted that the application

prevailed in the CPE. ICANN added that the CPE results (i) “do not necessarily determine the final result of the application”, (ii) “might be subject to change”, and (iii) “do not constitute a waiver or amendment of any provision of the Applicant Guidebook” (**Annex 5**, p. 9).

22. Although the CPE Panel’s determination of Big Room’s application is discriminatory and completely at odds with the provisions of the Applicant Guidebook (*infra*, Sections VI.B.1 and VI.B.2), ICANN has repeatedly declined to reject or review the CPE Panel’s determination.

H. The ICANN Board improperly refused to grant Claimants the right to seek effective redress

1. Claimants’ Request for Reconsideration

23. ICANN’s Board ultimately has responsibility to ensure that ICANN policies are dutifully followed. In fact, its Bylaws (and this Independent Review Process) require it. As Claimants were confronted with a surprising and erroneous CPE result, Claimants asked the Board to fulfill its obligation to ensure compliance with ICANN’s policies. On 22 October 2014, Claimants filed a Request for Reconsideration (RfR) seeking reconsideration of ICANN’s decision to accept the CPE Panel’s recommendation that Big Room’s application for .eco be granted community priority (**Annex 6**).

2. Claimants requested necessary information

24. Claimants also realized that they had scant information as to the underlying process and reasoning. They were not given any insight into the documentation relied on by ICANN or the unidentified members of the CPE Panel. As the opaque CPE determination set aside all of Claimants’ applications to operate the .eco gTLD, on 22 October 2014 Claimants asked (in a DIDP request) for information as to how and by whom the decision had been reached (**Annex 7**). In the DIDP request, Claimants urged ICANN to comply with its transparency obligation surrounding the CPE decision (**Annex 7**). The purpose of Claimants’ DIDP request was to allow them to effectively exercise their right to seek recourse in the framework of Claimants’

RfR by obtaining equal access to documents and information surrounding the CPE. Without such access, Claimants were severely limited in their ability to defend their own position. They did not have access to the same material as the CPE Panel or ICANN, when challenging ICANN's acceptance of the CPE determination.

3. ICANN denied Claimants' DIDP Request

25. On 31 October 2014, ICANN denied the DIDP Request, refusing access to the information relating to the basis on which the Claimants' applications were rejected in favor of Big Room (**Annex 8**).

4. The ICANN Board denied Claimants' Request for Reconsideration

26. On 18 November 2014, ICANN's Board Governance Committee (BGC) also denied Claimants' RfR of 22 October 2014 (**Annex 9**). ICANN published the BGC's meeting minutes on 20 January 2015 (**Annex 10**).

I. Claimants had no choice but to initiate a request for an Independent Review Process

27. On 3 December 2014, in an ultimate attempt to convince ICANN voluntarily to remedy the errors made in the CPE, Claimants initiated a Cooperative Engagement Process (CEP) with ICANN. On 26 February 2015, ICANN informed Claimants that it had unilaterally decided to terminate the CEP.

28. As a result, Claimants had no choice but to initiate this request for an Independent Review Process. The challenged decisions and actions are attributable to the ICANN Board and materially affect Claimants. If the CPE determination is maintained, Claimants will be unable to compete for the .eco gTLD, in which all applicants have an equally legitimate interest. It follows that Claimants have standing to file this request.

IV. APPLICABLE LAW

29. In accordance with Article IV(3) of ICANN's Bylaws, an IRP Panel must determine

whether the contested actions of the ICANN Board are consistent with applicable rules. The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN’s Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN’s Affirmation of Commitments, and both of which require compliance with *inter alia* International law⁴ and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.

30. The IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with these principles. The most recent versions of ICANN’s Bylaws⁵ – which had not been introduced at the time of Claimants’ submissions of its applications⁶ – also require the IRP Panel to focus on whether the ICANN Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.

V. SUMMARY OF ICANN’S OBLIGATIONS

A. Apply policies neutrally, fairly and without discrimination

31. ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general

⁴ In particular, Article IV charges ICANN “with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law” (**RM 27**, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

⁵ Adopted on 11 April 2013 and subsequently amended on 7 February 2014. Also see ICANN’s Bylaws as amended on 16 March 2012, Article IV(3).

⁶ In 2012.

principles of international law, it is also laid down repeatedly in ICANN's governing documents. Article 2(3) of ICANN's Bylaws provides that:

“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause . . . ”

32. The above obligation is further elaborated upon in ICANN's Core Values, which require ICANN to make *“decisions by applying documented policies neutrally and objectively, with integrity and fairness.”*(**RM 2**, Art. I, §2)⁷

B. Remain transparent

33. Article 4 of ICANN's Articles of Incorporation provides that ICANN:

“shall operate for the benefit of the Internet community as a whole, carrying out its activities ... to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

34. Similarly, Article III of ICANN's Bylaws states that:

“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”

35. These provisions are supplemented by the 'Core Values' set out in ICANN's Bylaws.

The purpose of the Core Values is to *“guide the decisions and actions of ICANN”* in the performance of its mission (**RM 2**, Art. I, §2). The Core Values include:

“Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.”(**RM 2**, Art. I, §2(7))

36. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-

⁷ This requirement is also found in applicable California law, which requires that decisions be made according to procedures that are 'fair and applied uniformly', and not in an 'arbitrary and capricious manner.'

setting space that ICANN occupies. The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. The coupling of the terms ‘open’ and ‘transparent’, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision-making.

C. Remain accountable

37. As already noted, ICANN is required to ensure that it is accountable. Again, one of ICANN’s Core Values is that it must “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.” (**RM 2**, Art. I, §2(10) This is reiterated in Art. IV, § 1 of ICANN’s Bylaws, which requires ICANN to “be accountable to the community for operating in a manner that is consistent with the [...] Bylaws, and with due regard for the core values set forth in Article 1 of the [...] Bylaws.”

D. Promote competition and innovation

38. In performing its mission, ICANN must depend to the largest possible extent on market mechanisms to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. This follows clearly from ICANN’s Core Values, which include:

“2. Respecting the creativity, innovation, and flow of information made possible by the Internet by **limiting ICANN’s activities** to those matters within ICANN’s mission requiring or significantly benefiting from global coordination. [...]

5. Where feasible and appropriate, **depending on market mechanisms to promote and sustain a competitive environment.**

6. Introducing and **promoting competition** in the registration of domain names where practicable and beneficial in the public interest.”(**RM 2**, Art. I, §2)

E. Act in good faith

39. Many of the guiding substantive and procedural rules in ICANN’s Articles and Bylaws

– including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”⁸

40. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.⁹ ICANN’s core values require ICANN to obtain informed input from those entities most affected by ICANN’s decisions (**RM 2**, Art. I, §2(9)).

VI. SUMMARY OF ICANN’S BREACHES

A. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel

41. Rather than itself performing the CPE, the ICANN Board decided to rely on the recommendation of third party contractors. As a result, the ICANN Board sought third party providers for “Applicant Evaluation Teams (Technical and Financial Evaluation)”, “Geographic Name Evaluation”, “String Similarity Examiners” and a “Comparative Evaluation Panel” (which later became a “Community Priority Evaluation Panel”) (**RM 16**). The ICANN Board made a number of significant errors in the resulting CPE.

42. In establishing the selection criteria for evaluation panels, and in making selections, the ICANN Board had a duty to ensure compliance with ICANN’s fundamental obligations. As expressly stated in ICANN’s Call for Expressions of Interest (CfEoI) for CPE Panel, the

⁸ Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits) (**RM 28**); *see also* Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”) (**RM 29**).

⁹ U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.

process for selecting the CPE had *inter alia* to “*respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination*” (**RM 17-18**, p. 5).

43. However, ICANN did not provide transparency in relation to the CPE selection process. ICANN failed to make clear how it would evaluate candidate responses or how it ultimately did so. The only action taken by ICANN in this regard was to state, in the CfEoI, that responses would be evaluated on the basis of criteria defined in the CfEoI and the Applicant Guidebook (**RM 18**, p. 6). At that time, the Applicant Guidebook was still in an early draft form, and neither the Applicant Guidebook nor the CfEoI in fact contained any information as to how responses would be evaluated. In addition, the identities of the unsuccessful candidates (if any) for the CPE panel’s role remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ICANN has revealed only that, overall, there were 12 candidates for all the different evaluation panel roles, and that EIU was selected to perform the String Similarity Review (**RM 19**, p. 1). There is no indication that any other candidate expressed an interest in performing the CPE. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the CPE? How did this impact on the discussions with the CPE Panel? What are the terms of ICANN’s contract with the CPE Panel?

44. It also remains unclear whether the minimum selection criteria were met. ICANN has never demonstrated that any of the following required information was provided by the CPE Panel selected by the ICANN Board:

- a “*plan for ensuring fairness, nondiscrimination and transparency*” (**RM 18**, p. 6);
- a “*plan for ensuring that evaluation teams[...] consist of qualified individuals and that the candidate will make every effort to ensure a consistently diverse and international panel*” (**RM 18**, p. 6);

- a “*Statement of Suitability that includes a detailed description of the candidate’s ability to perform the work [...] which demonstrates knowledge, experience and expertise, including but not limited to projects, consulting work, research, publications and other relevant information*” (**RM 18**, p. 6);
- a “*curriculum vitae for each person proposed by the candidate to manage or lead work on th[e] project, the candidate’s selection process for persons being proposed to ICANN, and explanation of the role that each named person would play*” (**RM 18**, p. 6);
- an indication of “*the experience and availability of proposed evaluators*” (**RM 18**, p. 6).

45. Furthermore, the many failures in the CPE Panel’s performance of the CPE, described below¹⁰, create a strong presumption that appropriate selection criteria were not met.

B. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in allowing the appointed CPE Panel to develop and perform an unfair and arbitrary review process

46. The international law standard of good faith encompasses an obligation to ensure procedural fairness and due process. General principles of ‘international due process’ include equal and fair treatment of the parties, fair notice, and a fair opportunity to present one’s case. These requirements are basic principles that inform transnational procedural public policy. They are more than just formalistic procedural requirements. Compliance must be meaningful: parties must be given adequate notice of the relevant rules and a full and fair opportunity to present their case. The mechanisms for redress must be both timely and effective. In view of ICANN’s general obligations and the selection criteria for the CPE Panel established by ICANN, new gTLD applicants could reasonably expect that the CPE would, at a minimum, (i) act in accordance with a plan for “*ensuring fairness, nondiscrimination and transparency*”, (ii) reach conclusions that were “*compelling and defensible*” and (iii) “*document the way in which [the CPE performed evaluations] in each case*” (**RM 18**, pp. 5 and 6). Instead, the ICANN Board allowed the CPE Panel to perform the CPE (i) arbitrarily and discriminatory (Section

¹⁰ *Infra*, Section VI.B.

VI.B.1), (ii) without (fairly) applying ICANN’s policy (Section VI.B.2), (iii) without providing meaningful reasoning (Section VI.B.3), and (iv) without providing any transparency regarding the evaluators (Section II.B.4). The ICANN Board did not exercise due diligence and care in accepting the CPE Panel’s advice on .eco, despite clear indications that the advice was erroneous and that its acceptance resulted in inequitable treatment towards similarly situated applicants. In blindly accepting the erroneous advice, the ICANN Board failed to exercise independent judgment in a decision that is clearly not in the best interests of the Internet community, and, by extension, ICANN.

1. **The ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting community priority of Big Room’s application, while other applications with identical characteristics were denied community priority**

47. Big Room is not the only applicant that sought to exploit the application process by invoking an alleged community with a view to obtaining community priority for a highly sought-after generic word. Other applicants used the same strategy:

- Starting Dot applied for the .immo gTLD, destined to serve “*a community restricted to businesses, organizations, associations and governmental and non-governmental organisations operating in the real estate industry*” (**RM 20**);
- dotgay llc attempted to invoke community priority for the .gay gTLD aimed at “*individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society*” (**RM 21**);
- Dadotart Inc attempted to invoke community priority for the .art gTLD aimed at the Art community, “*comprised of individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities*” (**RM 22**);
- EFLUX.ART, LLC attempted to invoke community priority for the .art gTLD aimed at “*individuals, organizations and companies who are actively involved on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics*” (**RM 23**).
- Taxi Pay GmbH attempted to invoke community priority for the .taxi gTLD aimed at “*[t]he global taxi community, including its four main community groups*” consisting of taxi drivers, offices and entrepreneurs, members of the immediate surrounding industry, superordinate organizations and affiliated businesses (**RM 24**).
- .MUSIC LLC attempted to invoke community priority for the .music gTLD aimed at the Global Music Community, “*comprised of an international range of associations and organizations and the millions of individuals these organizations represent, all of whom are involved in the creation, development, publishing, recording, advocacy,*

promotion, distribution, education, preservation and or nurturing of the art of music” **(RM 25)**;

- Tennis Australia Ltd attempted to invoke community priority for the .tennis gTLD, which was to “*serve the Australian tennis community, which is comprised of the eight Australian state-and territory-based Member Associations*” related to tennis **(RM 26)**.

48. None of these applications was granted community priority. No applicant affiliated with an industry sector besides Big Room and Hotel Top-Level-Domain Sàrl (HTLD) was granted community priority over other applicants for a string related to that industry sector. The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE. There is no legitimate reason to differentiate between the .eco CPE, on the one hand, and the CPEs for .immo, .gay, .art, .taxi, .music and .tennis, on the other. The CPE for .hotel is challenged on similar grounds as the CPE for .eco **(RM 32)**.

49. By way of example, in relation to .art, the CPE panel considered that there is a need for a community “*that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes*” this entire community **(RM 22 and 23)**. This requirement is not taken up in the CPE evaluation of .eco. And, by Big Room’s own admission, there is no single entity that encompasses the ‘community’ defined by Big Room. Big Room claims, without foundation, that the “*Community has historically structured and organized itself and its work through an international network of organizations*”. Big Room makes no claim that this alleged network of organizations encompasses the entire community as defined by Big Room. Even the organization that was specifically created by Big Room for the purposes of its community-based application does not encompass the entire community. It represents only “*the majority of the Community*” **(Annex 4, p. 18)**. Hence, Big Room has not therefore established that there

is at least one entity that is mainly dedicated to, encompasses and/or organizes the entire ‘community’ defined by Big Room.

50. Another example of discrimination without legitimate reason is the disparate treatment in assessing the nexus between the proposed string and the community. In cases where the string did not match or identify the peripheral industries and entities that are included in the definition of the community, the CPE Panel considered that there was a misalignment between the proposed string and the community as defined by the applicant (**RM 20**, **RM 24**; see also **RM 22**). In such cases, the CPE granted no points for the nexus requirement. If the CPE Panel used the same standard as, *e.g.*, in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met.

2. The CPE process was unfair and non-transparent because of the evaluators’ disregard of ICANN’s policy

51. The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy. As outlined in Claimants’ RfR, the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a “community” within the definition of that term under the rules of the Applicant Guidebook, requiring an analysis of the awareness and recognition of the community among the members. The CPE panel did not verify whether such awareness and recognition was present, but simply considered that there is cohesion and awareness among the members of the community, “*because each individual or entity [that is defined as community members in the application] has a clear, public and demonstrable involvement in environmental activities*” (**Annex 5**, pp. 2-3). The CPE panel continued by referencing separate organizations which it considered demonstrated cohesion among their members. However, the CPE panel did not investigate or consider whether any cohesion existed between these separate organizations.

52. The alleged community invoked by the Big Room was explicitly related for the

purposes of the application for .eco, as is demonstrated in the application. The Applicant Guidebook does not permit this approach. To meet the Applicant Guidebook's requirement of community delineation, the applicant needed to prove the existence of a clearly delineated and pre-existing community (**RM 5**, Module 4-10). The Guidebook specified that “*Pre-existing means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007*” (**RM 5**, Module 4-11). There must be “*some understanding of the community's existence prior to September 2007*” (**RM 5**, Module 4-11). However, Big Room was only founded in November 2007 (**Annex 11**). By its own admission, Big Room only launched a consultation process between a number of environmental organizations in 2009 (**Annex 4**, p. 18). This consultation process took place with the specific aim of aiding Big Room's application for the .eco gTLD. No charter was in place before September 2010. There is no evidence of any understanding of the purported community's existence prior to September 2007. Big Room alleges that the purported community has historically structured and organized itself and its work through an international network of organizations (**Annex 4**, p. 19). However there is no evidence that such a network existed prior to Big Room's initiative to create a network for the purpose of applying for the .eco gTLD.

53. The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel. The CPE Panel contented itself with the statement that many of the organizations that fall within the application's delineation have been active prior to 2007. However, the supposed 'community' Big Room invokes is, in fact, nothing more than an amalgam of different organisations with little or no pre-existing commonality, precluding any reasonable designation of their being a 'community'. The CPE Panel failed to investigate whether there was any recognition of a community across the organizations that were grouped by Big Room.

54. In addition, Big Room claimed that “[m]embers of the Community are delineated from Internet users generally by community-recognized memberships, accreditations, registrations, and certifications that demonstrate active commitment, practice and reporting” (**Annex 4**, p. 18). However, Big Room has never specified any characteristics for these memberships, accreditations, registrations, etc. It is clear from the application that the Organization that was created by Big Room for the purpose of the application has decisive power whether or not to consider an organization, business or individual as part of the ‘community’. The CPE Panel has failed to address the elemental concern: how can there be community awareness prior to 2007, if the organization that establishes the community was yet to be created?

55. Other examples of policy violations are taken up in Claimants’ RfR (**Annex 6**).

3. The CPE process was unfair, non-transparent and arbitrary, because of the lack of meaningful reasoning

56. The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts. The CPE Panel granted the maximum score (1 point) for the CPE’s uniqueness requirement, considering that the eco string “*does not have any other meaning beyond identifying the community described in the application*” (**Annex 5**, pp. 6-7). However, the eco string has several other meanings beyond identifying the alleged community in Big Room’s application. *E.g.*, Eco is the surname of a famous Italian novelist and semiotician, Umberto Eco; In French the term is used as an abbreviation of the adjective for ‘economic’; Eco is the proposed name for the common currency that the West African Monetary Zone plans to introduce in the framework of Economic Community of West African States; Eco is an abbreviation for *inter alia* Encyclopedia of Chess Openings, the English Chamber Orchestra, Engineering Change Order and equity carve-out; Eco is the ISO code for the synthetic rubber Epichlorohydrin; Eco is the name of a computer simulation game; Eco is the name of a character, played by Jacqueline Duncan, on the Australian television children’s show The Shak; etc. (**RM 33**). In its application for .eco, Big Room acknowledged that eco

was a “*known international acronym*” for the European Communications Office and for the Economic Cooperation Organization, an intergovernmental regional group established by Iran, Pakistan and Turkey to promote economic cooperation in the region (**Annex 4**, p. 27). Big Room also acknowledged that eco is the name of the Association of the German Internet Industry (**Annex 4**, p. 27).

57. Despite the overwhelming weight of evidence that numerous and diverse meanings are associated with the eco string, the CPE Panel considered that eco had no other meaning than identifying the community invoked by Big Room. The CPE Panel did not discuss, nor even reference any of the other meanings associated to the eco string. It did not even refer to the fact that Big Room itself acknowledged the fact that eco had diverse meanings. The CPE Panel refers to a definition in the Oxford English Dictionary (OED) to conclude that the string identifies the invoked community. However, the OED defines “eco” as an informal adjective or a combining form which stands for “*ecology, ecological, etc.*” (**RM 34**). The OED’s definition of “eco” does not refer to any community, but the OED does refer to Umberto Eco (**RM 34**). It is unclear on what basis the CPE panel was able to conclude that “eco” has no significant meaning beyond that of the community invoked.

58. It is a mystery to Claimants why the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED. The CPE Panel’s behavior is even more bizarre in view of the fact that Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.

59. In addition, the CPE was also incorrect in its evaluation of whether Big Room’s registration policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms. In its evaluation, the CPE Panel considered that there was “*an appeal mechanism, whereby a registrant has the right to seek the opinion of an independent*

arbiter approved by the registry” (**Annex 5**, p. 8). However, this is only a partial representation of Big Room’s appeal mechanism. Big Room’s application mentions further that “the Registry [i.e., Big Room] may choose to refer the dispute to the Organization [created under the auspices of Big Room as the representative membership institution for Big Room’s .eco gTLD] for a final decision [...] [, i]f the Registry is dissatisfied with the recommendation of the independent mediator or arbiter” (**Annex 4**, p. 30). In other words, if Big Room is not satisfied with the decision of the independent arbiter, that decision may be overturned by an organization which is directly connected with Big Room. The CPE Panel has never considered the appropriateness of such ‘appeal’ process. In contrast, however, the CPE Panel did investigate the appropriateness of proposed appeal processes in other CPEs, requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement (**RM 25**, p. 7).

4. **The CPE process was unfair, non-transparent and discriminatory due to the use of anonymous evaluators**

60. ICANN’s obligation to safeguard due process rights covers the right to be heard by an independent and impartial adjudicator.¹¹ That right is violated if the adjudicator remains anonymous.¹² The right to know the identity of the adjudicator – with a view to knowing whether there might be grounds for challenging or removing them – is a fundamental requirement.¹³

61. In this case, Claimants had no notice, and absolutely no opportunity to present their case. Claimants were deprived of procedural fairness and the opportunity to be heard through ICANN's failure to provide advance notice of the applicable standards, failure to allow any

¹¹ E.g., Article 14 ICCPR (**RM 30**).

¹² IAComHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 115-118 (**RM 31**).

¹³ See IAComHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 116 (**RM 31**).

opportunity to contest those standards, and failure to provide any means of remedy or redress. Put simply, Claimants were not offered any opportunity to be heard on their own case.

62. Further, Claimants were not given any opportunity for remedy or redress once the decision had been made. Although Claimants challenged the decision through ICANN's Reconsideration process, ICANN's Board explicitly refused to reconsider the substance of the challenged decision, instead relying on a cursory analysis of procedural requirements.

63. Claimants were never given any meaningful opportunity to be heard on the substance of the CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), nor any opportunity to seek redress for the erroneous decision. Accordingly, the CPE determination was made without due process, and ICANN's acceptance of the determination, and repeated failure to remedy the wrongful determination through the Reconsideration process or otherwise, is a failure to act with due diligence and independent judgment, and a failure to act in good faith as required by ICANN's Bylaws and Articles of Incorporation.

C. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process by blindly accepting the advice of the CPE, without providing effective quality control

64. The CPE Panel's description of the CPE process shows that the Panel's final step in that process is the preparation of a "final recommendation document" (**RM 15**). In other words, the CPE Panel does not take a decision, instead it is supposed to give a recommendation to ICANN.

65. There is no indication that any quality review process – other than the CPE Panel's internal quality review process – has been put in place or followed by ICANN. ICANN simply accepted the recommendation and posted it on its website without review.

D. ICANN failed to promote competition and innovation by accepting the CPE

66. ICANN's core mission requires ICANN to be as non-interventionist as possible, and

the purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD nor to pick winners and losers within a diverse commercial industry. Despite this, the ICANN Board's decision to accept the CPE Panel's determination does exactly that. It picks a winner, Big Room, on the basis of a purely arbitrary decision, and eliminates all possible competition for obtaining the .eco gTLD.

E. The ICANN Board failed to correct the mistakes in the CPE process and denied Claimants their right to be heard

67. The ICANN Board should have corrected the mistakes in the CPE process on its own motion. Since ICANN's Board has ultimate responsibility for the New gTLD Program, it is required to supervise and assure the compliance of that program (and its implementation) with ICANN's fundamental obligations under its Articles of Incorporation and Bylaws. The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism (**RM 5**, Module 5-4), such as a Request for Reconsideration (**RM 2 and RM 3**, Article IV(2)). ICANN's Bylaws prohibit the Board from exercising (or electing not to exercise) its discretionary power in a manner that discriminates between applicants.

68. Claimants' RfR and DIDP request (**Annexes 6 and 7**), and the fact that ICANN discovered affected applicants had insufficient information regarding the process, should have alerted the ICANN Board to the need to investigate and correct the errors in that process. Instead, the ICANN Board chose, in its own self-interest, to invoke the excuse of confidentiality (**Annexes 8 and 9**) and to refuse to offer any transparency in relation to the CPE process.

69. When Claimants filed their RfR with the ICANN Board, they informed the Board of the many errors in the CPE process, giving the Board ample opportunity to correct those errors. However, the Board chose, through the BGC, to take no action, not even to investigate the conformity of the CPE process with its fundamental obligations. The BGC contented itself

with issuing a statement that Claimants’ “arguments reflect only a substantive disagreement with the CPE Panel’s conclusions” and that “such a substantive disagreement is not a proper basis for reconsideration” (**Annex 9**). The BGC considered that Claimants did “not claim that the CPE Panel violated established policy or procedure, but instead challenge[d] the substantive determinations of the Panel” (**Annex 9**). However, Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation. In addition, the BGC refused to review compliance of ICANN’s actions with ICANN’s fundamental obligations. Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process, and to implement the Applicant Guidebook in compliance with these fundamental obligations. Moreover, even if a published policy or process were explicitly to derogate from fundamental due process rights (which is not the case here), ICANN could not implement that policy or process without violating its Articles of Incorporation and Bylaws, regardless of the contents of the Applicant Guidebook. Instead of investigating compliance with those policies and principles (*i.e.*, its governing rules), the ICANN Board – through the BGC – chose to misinterpret and ignore Claimants’ RfRs. As a result, the ICANN Board denied Claimants their right to be heard.

VII. PROCEDURAL MATTERS

70. Pursuant to Article IV, Section 3(9) of the Bylaws, Claimants hereby request that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

71. It does not appear that ICANN has established the omnibus standing panel described in Art. IV, Section (6) of the Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, Claimants suggest that the parties agree to the following method for appointing the IRP Panel:

each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

72. Claimants propose that both Claimants and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

VIII. RELIEF REQUESTED

73. Based on the foregoing, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel:

- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook;
- Declare that ICANN must reject the determination that Big Room's application for .eco be granted community priority;
- Award Claimants their costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,

Flip Petillion
March 13, 2015

Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted

Counsel for Claimant

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List of annexes

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- Annex 2 - Little Birch, LLC (subsidiary of Donuts Inc.)'s application to operate the .eco gTLD (Application ID 1-1434-1370)
- Annex 3 - Minds + Machines Group Limited (formerly known as Top Level Domain Holdings Limited)'s application to operate the .eco gTLD (Application ID 1-1039-91823)
- Annex 4 - Big Room Inc. 's application to operate the .eco gTLD (Application ID 1-912-59314)
- Annex 5 - Community priority evaluation report of Big Room Inc.'s application to operate the .eco gTLD, dated 6 October 2014
- Annex 6 - Claimants' Request for Reconsideration 14-46 of 22 October 2014
- Annex 7 - Claimants' DIDP Request of 22 October 2014
- Annex 8 - ICANN's Response to DIDP Request of 31 October 2014
- Annex 9 - Board Governance Committee determination on Request for Reconsideration 14-46 of 18 November
- Annex 10 - Minutes of the Meeting of the Board Governance Committee on 18 November October 2014, published on 20 January 2015
- Annex 11 - Proof of establishment of Big Room Inc.

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