

I. INTRODUCTION and SUMMARY OF REQUEST

Corn Lake, LLC (“Corn Lake”) brings this request for independent review (“Request”) to rectify actions of ICANN’s Board of Directors contrary to its Articles of Incorporation and Bylaws. Action by the Board singling out Corn Lake has divested it of its right to compete for the .CHARITY top-level domain. The Board has conceded that such discriminatory action is “not in the best interest of the New gTLD Program and the Internet community,” yet refuses to correct it in this instance. ICANN has established the IRP as an accountability mechanism to deal with just such a situation.

This Request is brought in light of the fact that a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string.

The Board has previously initiated and followed a procedure to review and correct such “inconsistent and unreasonable” new gTLD objection rulings. It has established “inconsistent and unreasonable” as the standard for determining the objection decisions to review. However, it has unexplainably refused to apply the standard it created to include the two conflicting .CHARITY objection determinations in the review process that it established.

Specifically, the Board has provided for review of new gTLD objection proceedings where the same objector has asserted identical objections against more than one applicant for the same string and reached different results. This scenario has occurred only three times out of over 250 objections asserted against new gTLD applications:

The owner of the existing .COM registry, Verisign, brought string confusion objections against three different applications for the .CAM new gTLD. Verisign lost two of the objections but prevailed on the third, meaning that two of the .CAM applicants can proceed to the next step, while the third has lost all right to a .CAM gTLD.

Google, an applicant for .CAR through its Charleston Road Registry, asserted string confusion objections against three separate applications for .CARS. Google

prevailed against only one application for .CARS, placing that application in a contention set with the .CAR string applied for by Google, while the other two .CARS applications have avoided that contention set.

The Independent Objector mounted identical community objections against Corn Lake and another applicant for .CHARITY, Spring Registry Limited. The IO prevailed against Corn Lake but not against SRL. Consequently, SRL's application for .CHARITY can proceed, while Corn Lake's cannot – even though both must adhere to ICANN's implementation of GAC advice concerning protections for the domain, and neither has any obligation to impose any more restrictive measures.

In an October 2014 resolution of its NGPC, the Board directed establishing a 3-member panel to review the above .CAM objection proceedings and determine “whether the original Expert ... could have reasonably come to the decision reached ... through an appropriate application of” the substantive objection standards prescribed by the new gTLD Applicant Guidebook. The NGPC also notes that it would have provided for the same review of the .CAR/.CARS rulings, except the parties in those cases had settled their competing applications.

The only other objection rulings that “fit” this scenario pertain to .CHARITY, but for some reason were not included within the Board-directed procedure to review cases involving a common objector asserting the same objection against the same string. The Board's action thus singles out the .CHARITY decisions, and Corn Lake as the party adversely affected by their discrepancy, for disparate treatment in violation of the non-discrimination directive of ICANN's Bylaws.

The Board did recommend “establishing a review mechanism more broadly” in future rounds of the new gTLD program “to promote the goals of predictability and fairness,” but expressly *declined* to provide for review of *any other* new gTLD objection determinations in the current round. As its rationale, the Board suggests that “[a]pplicants have already taken action in reliance on many of the Expert Determinations.”

“Allowing these actions to be undone now,” according to the Board, “would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.” This stated concern does not comport with reality as it pertains to .CHARITY, as the other applicant for that domain has taken no action in reliance on the discriminatory treatment of Corn Lake. The Board’s position also ignores the reliance of Corn Lake in participating in the new gTLD program. Having invested substantial sums and resources to apply for and pursue the .CHARITY gTLD, Corn Lake had every right to, and did, expect proper application of Guidebook objection standards, compliance by ICANN with the contract created by the Corn Lake’s application and acceptance of the Guidebook’s terms, and adherence to the non-discrimination and other provisions of the Bylaws and Articles of Incorporation by a Board charged with upholding them.

The Bylaws and Articles compel the Board, in addition to acting in the best interest of the Internet community, to remain accountable to it. The Board makes a pass at accountability by providing for review of certain “inconsistent and unreasonable” objection decisions. It states that allowing such determinations to stand “would not be in the best interest of the Internet community.” Yet it leaves the contradictory .CHARITY rulings completely untouched. As such, the Board admits to not acting “in the best interests of the Internet community.” The Board fails the Bylaw directive of “remaining accountable to the Internet community” by refusing to employ the very “mechanism” it created to right the wrong perpetrated by the types of conflicting objection rulings that include those made regarding .CHARITY.

The Board’s action has “materially affected” Corn Lake which, absent review, has lost all right to the .CHARITY domain. The conduct cannot withstand the scrutiny of this IRP, a process created expressly to hold the Board accountable to its obligations under the Bylaws and Articles. This Panel has the power to declare the Board in breach of those governing documents. It can direct the Board to reverse the “inconsistent and unreasonable” community objection ruling against Corn Lake’s application for .CHARITY, or to order its review by the very process the Board established for just this situation.

II. THE PARTIES

1. Corn Lake is a limited liability company organized and existing under the laws of the U.S. state of Delaware, with its principal place of business at ^{Contact Information Redacted}, and may be contacted through counsel identified on the face page of this Request. Corn Lake submitted application no. 1-1384-49318 for .CHARITY. Ex. 1.¹

2. Respondent ICANN is a “non-profit public benefit corporation” organized and existing under the laws of the U.S. state of California. ICANN has its principal place of business at 12025 Waterfront Drive, Suite 300, Los Angeles, California 90094-2536 USA, with an email contact at independentreview@icann.org.

III. FRAMEWORK FOR THIS PROCEEDING

3. An IRP looks to the ICANN Bylaws and Articles. It holds ICANN accountable to its governing principles, and employs a standard of review defined in the Bylaws.

4. The ICANN Articles, Bylaws and “Core Values” therein “guide the decisions and actions” of ICANN and its Board. These include:

- a. Not applying its standards, policies, procedures, or practices inequitably or singling out any particular party for disparate treatment, App. A Art. II § 3;
- b. Promoting competition in domain names, *id.* §§ 2.5, 2.6;
- c. Operating “for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and ... local law,” App. B § 4; and
- d. Remaining accountable to the Internet community. *id.*, Art. I § 2.10.

5. The Bylaws provide for IRP as an accountability method. A party has the right to independent review of a Board action that is “inconsistent with the Articles of Incorporation or Bylaws” Bylaws Art. IV § 3.2. The Bylaws explicitly “charge” an IRP Panel with “comparing

¹ Evidence supporting this Request appears in a Compendium of Exhibits and the Witness Statement of Jonathon Nevett (“Nevett Stmt.”), both submitted concurrently. Selected authorities, such as ICANN’s Bylaws and Articles, appear under lettered dividers in an accompanying Appendix of Applicable Authorities (“App.”). Also, terms and abbreviations perhaps not familiar to the Panel are defined in a Table of Abbreviations at the back of this Request.

contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions” thereof. *Id.* § 3.4.

6. The Bylaws, *id.*, “apply a defined standard of review” to Board Action, namely:
 - a. Whether the Board acted without conflict of interest in taking its decision;
 - b. Whether the Board exercised due diligence and care in having a reasonable amount of facts in front of them; and
 - c. Whether the Board exercised independent judgment in taking the decision, believed to be in the best interests of the company.

The “company” in whose “best interests” the Board must act is ICANN, which itself must remain faithful to “the public interest” and “accountable to the Internet community...” *Id.* Art. I §§ 2.6, 2.10; App. B § 4.

7. A reviewing panel, therefore, must take these interests into account. According to one recent IRP ruling, the standard of review requires the Board “to conduct itself reasonably in what it considers to be ICANN’s best interests; *where it does so*, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, ... the Guidebook.” *See* App. I ¶ 109 (emphasis added). The panel reviews Board action “objectively” and “independently,” without “any presumption of correctness.” *Id.* ¶ 111.²

8. Conducting such review, this Panel will find that the Board did not exercise due diligence to consider key facts regarding the at-odds .CHARITY objection decisions. Consequently, it overstepped the Bylaws and admittedly failed to act “in the best interests” of the Internet community. While granting review for certain “inconsistent and unreasonable” objection rulings, the Board refused to do so regarding .CHARITY. Out of over 250 new gTLD

² These pronouncements have “precedential value” as to how this Panel should conduct its review. *See* App. A Art. IV § 3.21. Corn Lake urges the Panel to follow this guidance, even though it comes from an IRP ruling *against* the claimant. While Corn Lake accepts the decision’s *procedural* declaration regarding standard of review, it finds the *substantive* result readily distinguishable, as discussed in greater detail below.

objections, the .CHARITY community objections yielded the only rulings situated *identically* to the objection determinations for which the Board did direct review.³

IV. FACTS

9. Consistent with its governing principles, ICANN adopted its new gTLD program to enhance choice and competition in domain names and promote free expression online.⁴ Corn Lake applied for .CHARITY to allow consumers to make use of the gTLD in accordance with the meanings they ascribe to that dictionary word. Investing \$185,000 and significant resources into the application, Corn Lake also selected this generic term for its TLD to minimize the risk that it would succumb to objections for which, as described below, the Guidebook established strict standards on which Corn Lake specifically relied. See Nevett Stmt. ¶¶ 5-6.

A. The Guidebook Establishes Defined Objections to New gTLD Applications.

10. The Board approved the Guidebook as “the basis of the New gTLD Program.” App. C Preamble, § 1.2.11. On top of the rules and qualifications that applicants must satisfy, the Guidebook provides for four types of objections to new gTLD applications. It allows for “string confusion,” “legal rights” and “limited public interest” objections (respectively, “SCO,” “LRO” and “LPI”), as well as the “community” objection type at issue in this case. *Id.* § 3.2.1.

11. For each variety of objection, the Guidebook lays out explicit and detailed elements, all of which the objector bears the burden of proving. *Id.* §§ 3.5 and 3.5.1-3.5.4. A community objector “must meet all four tests” below:

- a. A “clearly delineated community” invoked by the objector;
- b. “Substantial opposition” to the application from that community;
- c. A “strong association” between the community and the TLD applied for;

³ The only other decision that approaches the scenario here involves .HOSPITAL, which fell to a LPI objection (on a 2-1 decision) while nine other TLDs, all on unanimous 3-member panel decisions, withstood such objections. That determination remains in “cooperative engagement” with ICANN, and could lead to an IRP only if that process does not result in a resolution. With no like circumstances presented by any other objections, *this* IRP Panel would not open any “floodgates” by granting the relief that Corn Lake seeks.

⁴ See App. A Art. I §§ 2.5, 2.6; App. B § 4; App. C Preamble, § 1.1.2.3, Mod. 2 Attmt. at A-1; App. D § 9.3. Because the Guidebook exceeds 300 pages, we include only Module 3 and the Procedure attached to it, together with any other portions specifically cited herein.

d. A “likelihood” that the application will cause “material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be ... targeted.”

Id. § 3.5.4. As described more fully below, a panelist upheld a community objection brought against Corn Lake’s .CHARITY application by the Independent Objector (“IO”),⁵ but at the same time denied the IO’s virtually identical objection against a similarly situated .CHARITY application.

B. The New gTLD Objection Process Encounters Controversy.

12. The objection phase did not proceed without other such anomalies, and came under attack as a result. A ruling upholding a SCO by an applicant for .SHOP against the Japanese-character TLD for “online shopping,” for example, elicited comments that the panel had misapplied Guidebook objection standards.⁶ The same .SHOP applicant had previously lost its SCO against an application for a Chinese-character “shop” TLD.⁷ The losing party in each of these objection proceedings sought reconsideration (another accountability process for which the Bylaws provide at Art. IV § 2). The BGC denied both requests, but in each “recommended that staff provide a report ... setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving” the two foreign-character strings.⁸

13. Conflicting decisions came out around the same time in SCO cases brought by the owner of the .COM registry, Verisign, against three separate applicants for .CAM. Two of

⁵ The Guidebook provides for ICANN to appoint an IO, who “acts solely in the best interests of the public who use the global Internet.” ICANN appointed Professor Alain Pellet to serve as IO. The Guidebook gives him the power to file only community and LPI objections, and only against “highly objectionable” gTLD applications to which no other person has objected on the same grounds. The IO alone decides whether to object; ICANN may not “direct or require the IO to file or not file any particular objection.” See App. C § 3.2.5. Prof. Pellet filed over 20 such objections. See <http://newgtlds.icann.org/en/program-status/odr/determination>.

⁶ See, e.g., <http://domainnamewire.com/2013/08/23/how-string-confusion-objections-became-a-clusterfck/>; <http://domainnamewire.com/2013/08/22/string-confusions-amazon-idn/> (“string confusions have officially gone off the deep end”).

⁷ <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-994-1450-en.pdf>.

⁸ <https://www.icann.org/en/system/files/files/recommendation-amazon-10oct13-en.pdf> at 14, <https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf> at 11.

the objections failed,⁹ but one succeeded.¹⁰ As a result, two applicants for .CAM could compete for the TLD, while a third applicant for the same string could not.

14. Contradictory outcomes also occurred in proceedings involving .CAR and .CARS. The applicant for .CAR prevailed on one SCO against an applicant for .CARS,¹¹ but lost against two others.¹² The winning objection placed .CAR in a contention set against one applicant for .CARS, but the loss on the others allowed two other .CARS applicants to escape the same contention set. These and the conflicting rulings regarding .COM and .CAM brought further complaints among applicants and commentators.¹³

15. Critics did not restrict themselves only to string confusion objections, however. Community objections, such as that leveled at .CHARITY, also came under attack. Rulings on such objections engendered more articles,¹⁴ some parodic,¹⁵ questioning the training of panelists and their application of Guidebook objection standards. Applicants also got involved, expressing their grievances in letters directly to ICANN.¹⁶ One,¹⁷ joined in by Corn Lake's parent company, Donuts Inc., complained of "significant departures from the ... Guidebook" and called for some form of "appeals mechanism" to apply to decisions on objections other than SCOs.

⁹ <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-882-71415-en.pdf>;
<http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1234-83704-en.pdf>.

¹⁰ <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1255-75865-en.pdf>.

¹¹ <http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determination-1-1-909-45636-en.pdf>.

¹² <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1377-8759-en.pdf>;
<http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-845-37810-en.pdf>.

¹³ <http://domainnamewire.com/2013/10/09/uh-oh-icann-will-be-forced-to-act-after-conflicting-cars-decisions/>;
http://www.circleid.com/posts/20130820_icann_must_now_decide_string_similarity_question/.

¹⁴ See, e.g., <http://domainnamewire.com/2013/09/10/key-takeaways-from-architect-community-objection-decision/>; <http://www.thedomains.com/2013/10/29/wow-icc-upholds-objection-of-sportsaccord-to-famous-fours-app-for-new-gtld-sport-giving-sportaccord-the-extension/>; <http://domainincite.com/15304-should-new-gtlds-objections-have-an-appeals-process>.

¹⁵ See; <http://domainnamewire.com/2013/10/29/breatheaccord-wins-community-objection-against-breathe-top-level-domain-name/>.

¹⁶ See <https://www.icann.org/resources/correspondence/sahjwani-westerdal-to-chalaby-et-al-2013-09-24-en>.

¹⁷ <https://www.icann.org/en/system/files/correspondence/sahjwani-et-al-to-chalaby-et-al-01nov13-en.pdf>.

C. Corn Lake’s .CHARITY Application Falls Victim to Inconsistent and Unreasonable Application of the Guidebook’s Community Objection Standards.

16. Corn Lake applied for .CHARITY to promote competition, choice and freedom of expression. Nevett Stmt. ¶ 9. It envisioned that the TLD “will be of interest to the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need.... In addition, the term CHARITY, which connotes kindness toward others, is a means for expression for those devoted to compassion and good will. We would operate the .CHARITY TLD in the best interest of registrants who use the TLD in varied ways, and in a legitimate and secure manner.” Ex. 1 § 18(a).

17. The IO filed a community objection against the application on 12 March 2013. He took issue with Corn Lake’s proposal to operate the .CHARITY domain as an “open” registry, contending, among other things, that it should take affirmative steps to limit registrants to “charities and charitable organizations.” Ex. 2 ¶ 19.¹⁸

18. At the same time, the IO brought a community objection against SRL, the other applicant for .CHARITY.¹⁹ Like Corn Lake, SRL had proposed to operate the TLD in an “open” manner. For example, its application states as follows:

The Applicant’s mission and purpose is to create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, ... an Internet space whose central function is to provide a platform for creating, producing and disseminating informative, creative and innovative content that is easily recognizable as pertaining to its stakeholder group.... [T]he aim of ‘.charity’ is to create a blank canvas for online

¹⁸ The Guidebook, on which Corn Lake relied, creates no affirmative obligation to manage a TLD on behalf of any particular community. To the contrary, an applicant has sole discretion over whether to submit a standard or a community application. App. C § 1.2.3.1. While the Guidebook creates the *advantage* that a “qualified community application eliminates all directly contending standard applications,” AGB § 4.2.3 at 4-9, it does not *penalize* an applicant for *not* making a community-based application, as the IO suggested and the panelist ultimately decided.

¹⁹ The IO asserted a third community objection against an applicant for the TLD in Chinese characters. The ICC consolidated all three objections shortly thereafter. See Ex. 8 ¶¶ 12-13.

charity services ... a consolidated, versatile and dedicated space to access charity information and donation services.... [C]onsumer choice will be augmented All stakeholders within the sector will be able to sample reactions to new ideas.... This will drive innovation and competition

Ex. 10 § 18(a). SRL indicates that it will make registration open “to ensure competition, fairness, trust and reliability for Registrars, Registrants, the user community, and other stakeholders,” and that “all domain names will generally be registered on a first-come, first-served basis.” *Id.* § 18(b). The IO appears to have quarreled with such an approach as he had similarly complained against the Corn Lake application. *See, e.g.*, Ex. 11 ¶ 64.

19. In its case, Corn Lake timely filed a response to the IO's objection on 6 June 2013. Among other things, it contended that the restrictions for which the IO campaigned would improperly stifle rights of free expression, and emphasized the wide array of protections, provided for in its application,²⁰ to curb abuse without chilling speech. Ex. 3 at 14.

20. The IO requested and obtained leave to make a further submission (“Reply”), which he timely did on 22 August 2013. The Reply noted that the GAC, in its April 2013 Beijing Communiqué,²¹ had called for additional protections for what it called “Category 1” TLDs — .CHARITY among them — in “sectors” that the GAC viewed as “regulated” or “highly regulated.” The IO noted that Corn Lake opposed such measures, and that this somehow showed that its operation of the TLD would cause material detriment to the charity “community.” Ex. 4 ¶ 27.

21. Corn Lake filed a Sur-Reply on 6 September 2013, in which it noted that neither it nor ICANN then had any obligation to implement the GAC recommendations, but that if ICANN ultimately chose to adopt any or all of them, Corn Lake of course would adhere to them. Ex. 5 at 8. Donuts also had a PIC on file with protections to which it would contractually bind itself in registry agreements for a number of TLDs, including Corn Lake's .CHARITY. *See* Ex. 9.

²⁰ Corn Lake offers 12 protective measures for the TLD over and above the 14 that ICANN requires. Ex. 1 § 18(a).

²¹ <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

22. At around the same time, SRL informed the objection panelist in a sur-reply that it had submitted to ICANN an amendment to its PIC whereby it would impose eligibility criteria in a .CHARITY domain that would limit registration of second-level names to those who could “establish that they are a charity or a ‘not-for-profit’ enterprise with charitable purposes. See Ex. 10 ¶ 90. However, a review of the PIC itself shows that SRL also takes care to “reserve the right to amend or change this PIC Spec once the details of the [new gTLD] Program are finalized.” See Ex. 12 § 2, 2d ¶. In other words, SRL is bound to do no more than what ICANN ultimately might require.

23. The ICANN Board did subsequently announce its intent to accept certain additional protections proposed by the GAC, proposing to implement them in a form PIC that it would require from registries operating “Category 1” gTLDs. See Ex. 13.²² Corn Lake promptly sought to advise the panel that this mooted the IO’s “material detriment” argument since, if awarded the .CHARITY string, Corn Lake would need to include in its registry agreement a PIC to provide the new protections, thereby fully addressing the IO’s concerns. See Ex. 6. The panel declined to consider Corn Lake’s additional submission. Ex. 7.

24. On 9 January 2014, the panel upheld the community objection against Corn Lake, finding harm from a .CHARITY TLD operated as anything other than on a community basis: [T]he targeted community ... would be harmed if access to the “.Charity” string were not restricted to persons ... which can establish that they are a charity or a not-for-profit enterprise with charitable purposes.

Ex. 8 ¶ 152. Because Corn Lake’s application “expressly avoids such a limitation,” and contains “nothing ... to indicate that [Corn Lake] will act in accordance with the rights and interests of the community,” the panel turned on its head both the burden of proof and an applicant’s right under the Guidebook *not* to apply for a TLD on a community basis, and found a likelihood of material detriment from a .CHARITY TLD in the hands of Corn Lake. *Id.* ¶¶ 153-54.

²² The Board formally adopted the PIC with slightly modified terms in its 5 February 2014 NGPC resolution. See Ex. 14 and Annex 2 thereto.

25. On the same day, the same panel rejected the objection against SRL. It found that SRL's late-added PIC, specifying that only "a charity or a not-for-profit enterprise with charitable purposes will qualify to be a registrant of a .CHARITY domain name," negated the IO's claim of material detriment. Ex. 11 ¶¶ 129-132; Ex. 12 at 3 ("Eligibility Policy").

26. Reviewing the decision against Corn Lake and the ruling in favor SRL together, it becomes clear that the PIC proffered by SRL formed the sole basis for the differing outcomes. The analyses on the other three community objection criteria track closely, and often verbatim, in the two rulings. *Compare* Ex. 8 ¶¶ 113-145 to Ex. 11 ¶¶ 94-122. So, too, do the "material detriment" sections, up until the points where the panelist finds that Corn Lake has not negated the possibility of harm, but that SRL has. *Compare* Ex. 8 ¶¶ 146-151 to Ex. 11 ¶¶ 123-128 (nearly identical); *contrast* Ex. 8 ¶¶ 152-156 with Ex. 11 ¶¶ 129-133 (completely divergent).

27. No legitimate basis exists, however, to distinguish the two applications. The PIC offered by SRL (reserving rights) [Ex. 12], as well as the PICs to which Donuts has committed and will be required to agree [Exs. 9 and 14 Ann. 2], implement the GAC Beijing advice regarding top-level names, .CHARITY included, denoting "highly regulated" market sectors. Both the IO's objection and the panel's ruling against Corn Lake turn entirely on its perceived lack of the type of protections to which the panel found SRL had acceded in its PIC. Because Corn Lake in fact must implement such protections as a contractual condition to an award of the TLD, and because SRL has the unilateral right to change its PIC language, the applicants should not be subject to disparate treatment. At minimum, the Board should provide for review of that issue, as the following shows it to have done in the only other cases where the same party has asserted several objections on the same grounds to the same string and reached opposing results.

D. The Board Establishes a Process to Review "Inconsistent and Unreasonable" New gTLD Objection Determinations, Yet Excludes .CHARITY from It.

28. On 5 February 2014, the NGPC proposed a "review mechanism for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion

Objections process.” Ex. 12 at 3-4. However, it suggested the mechanism “be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.” *Id.* at 3. ICANN published the proposed review mechanism for public comment shortly thereafter. See Ex. 15.

29. Certain responses expressed that the proposal did not go far enough, calling for ICANN to “widen” the review process “to include cases” where “the results were just as inconsistent,” both in the string confusion and other contexts.²³ Donuts itself urged “a similar review mechanism in cases of inconsistent outcomes with ... Community objections.”²⁴ Among the over 250 objections filed, the only “review mechanism” which would be “similar” to that proposed would apply in the community context only to .CHARITY.

30. After receiving such comments, the Board’s NGPC issued its 12 October 2014 resolution (“Resolution”), which provides:

The NGPC directs the President and CEO ... [to] take all steps necessary to establish processes and procedures, in accordance with this resolution and related rationale, pursuant to which the International Centre for Dispute Resolution (ICDR) shall establish a three-member panel to re-evaluate the materials presented, and the Expert Determinations, in the ... objection proceedings [involving .COM and .CAM]

Ex. 16 at 3 of 22.²⁵ The Resolution characterizes the .CAM and .COM decisions as “inconsistent or otherwise unreasonable” and “not in the best interest of the Internet community.” *Id.* at 4 of 22. Their “inconsistency” arises from, and the proposed review procedure pertains to,

²³ See <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfRLQ8MpMNuv.pdf>. See also <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfwgCYo2go5h.pdf>.

²⁴ See <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfJC5UktBBxf.pdf>.

²⁵ While the February 2014 proposal also proposed review of the inconsistent objection determinations regarding .CAR and .CARS, the Resolution does not include those strings because it notes that the applicants for those gTLDs “recently have resolved their contending applications” *Id.* at 7 of 22. As such, this Request focuses on the .COM and .CAM objection results as compared to those reached regarding .CHARITY.

“objections raised by the same objector against different applications for the same string, where the outcomes of the [objections] differ.” See Ex. 15 at 2.

31. This describes the conflicting .CHARITY objection determinations *exactly*. Moreover, *no* community objection rulings *other* than those regarding .CHARITY, out of the approximately 250 objections filed, share these same characteristics. Nevertheless, the Board has omitted .CHARITY from the purview of its Resolution. Indeed, the Board deliberately declined review of *any* other objection determination on any basis. *This IRP seeks relief from that specific Board action.*

V. THE BOARD HAS BREACHED ICANN BYLAWS AND ARTICLES

32. Corn Lake has been “materially affected by a decision or action by the Board ... inconsistent with the Articles of Incorporation or Bylaws” of ICANN. Bylaws Art. IV § 3.2. The Board acted when it established a process for determining whether certain new gTLD objection decisions appropriately applied the substantive standards prescribed by the Guidebook for determining objections, but then expressly refused to follow the process it had established to provide for review of any others. The Board did not include the inconsistent .CHARITY decisions within the review process notwithstanding that they follow a pattern identical to the objection determinations for which the Board did order review.

33. The Board action “materially affected” Corn Lake by depriving it of the opportunity for review of a determination *granting* an objection, brought by the same party who objected on the same grounds to the same string applied for by a different candidate in a case where the *same* panelist *denied* the objection. Denying such review harms Corn Lake directly by letting stand an objection ruling that goes against Corn Lake and eliminates it from competition for the .CHARITY domain,²⁶ giving it standing to bring this IRP. Bylaws Art. IV § 3.2.

²⁶ Corn Lake timely brings this Request, pursuant to Bylaws Art. IV § 3.3, within 30 days of notice of the Board action for which it seeks review. When the Board issued the Resolution of its NGPC in October 2014, .CHARITY was the subject of a “cooperative engagement” process (“CEP”) with ICANN (as provided *id.* § 3.14). CEP tolls that 30-day period for up to as much time as the parties may mutually agree. See *id.* and incorporated CEP Rules, App. H at 2. ICANN agreed with Corn Lake to toll the deadline to March 24, 2015. Nevett Stmt. ¶ 15 and Ex. 17.

34. The Board action in the form of its NGPC Resolution transgressed a number of precepts found in ICANN's Bylaws and Articles, and most blatantly the prohibition against discrimination therein. The Board admittedly acted in a manner "not in the best interest of the New gTLD Program and the Internet community," and abdicated its obligation to "remain accountable to the Internet community." These violations of ICANN's Bylaws and Articles entitle Corn Lake to independent review *and correction* of the Board's arbitrary action.

A. The Board's Action Discriminates against Corn Lake's .CHARITY Application.

35. The Board "has ultimate responsibility for the New gTLD Program." AGB § 5.1. It can consider an application for a new gTLD individually and determine whether to approve it, *id.*, including by consulting directly with the experts designated to hear objections, *id.* § 3.1.

36. The Board acknowledges in the Resolution that its action comes pursuant to its power under the Bylaws and "ultimate responsibility" over the new gTLD program stated in the Guidebook. *See* Ex. 16 at 6 of 22. It refuses, however, to exercise that power and responsibility to rectify inconsistent new gTLD objection decisions beyond those concerning .COM and .CAM.

37. "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment" Bylaws Art. II § 3. The Board *established* a practice to handle "inconsistent and unreasonable" objection decisions, then *consciously declined to follow* that practice for the .CHARITY determinations, which fall directly within its scope. That action "singles out" the .CHARITY decisions – and Donuts, as the party aggrieved by their inconsistency – for "disparate treatment" in violation of the Bylaws' non-discrimination provision.

38. The Resolution goes relatively far to tout the wisdom of extending review to other objection determinations. *See* Ex. 16 at 7 of 22 ("establishing a review mechanism more broadly" would "promote the goals of predictability and fairness"). Indeed, it commends wider review as "appropriate as part of future community discussions about subsequent rounds of the New gTLD Program." *Id.* It stops short of broadening review now, however, based on a perception that "Applicants have already taken action in reliance on many of the Expert

Determinations Allowing these actions to be undone now ... would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.” *Id.* at 7-8 of 22.

39. Corn Lake does not challenge the Board’s decision not to extend review beyond only “inconsistent and unreasonable” objection determinations. However, the Board’s stated rationale for limiting its review only to one type of objection, SCO, raises at least three critical issues that the Board appears to have overlooked.

40. First, the Board does not identify any action taken by anyone in reliance on an inconsistent objection decision of any type. In the particular instance of .CHARITY, nothing indicates that SRL has done anything to pursue its application further after the objection ruling in its favor.

41. Second, the Board’s professed concern about actions taken in reliance on the Guidebook ignores those who applied for new gTLDs trusting the Guidebook’s strict criteria and expecting that experts designated to hear objections – regardless of which of the four objection types – would apply those standards faithfully and uniformly. Applicants investing millions of dollars in the new gTLD program deserve predictability, which would be aided by review and correction of at least those decisions coming within the same “inconsistent and unreasonable” scope as those expressly included in the Resolution.

42. Third, the Board concludes that expanding review would unfairly impact a number of participants in the new gTLD program without reasonably considering the available facts. Examining those facts reveals that *only* the decisions on the .CHARITY community objections, and *no others*, come within the realm of review established by the NGPC. No flood of cases awaits if the Board follows, for community objection determinations, the principle its Resolution establishes for reviewing for “inconsistent and unreasonable” objection results.

43. The Resolution articulates a specific standard for what objection decisions to review: those that are “inconsistent and unreasonable.” Ex. 16 at 3-4 of 22. It observes that expert determinations may be “inconsistent” yet not unreasonable. Procedurally, a panelist makes a determination based on the information presented to him or her, which could vary

from one objection to the next. *Id.* at 7 of 22. Substantively, “nuanced distinctions” could exist in the situations at issue in different objections. For “the seeming discrepancies” between .COM and .CAM, however, the NGPC could not find such “a reasonable explanation.” Accordingly, “[t]o allow these Expert Determinations to stand would not be in the best interests of the Internet community.” *Id.*

44. The same applies to the .CHARITY decisions. Procedurally, each case presented the same information in support of the same objection to the same string. Substantively, while the panel apparently perceived a “nuanced distinction” between the protections the two applicants appeared willing to provide in a .CHARITY domain, in fact both the prevailing applicant SRL and the unsuccessful applicant Corn Lake would have to enter into the same PICs by which ICANN would implement the GAC Beijing recommendations. *See* Ex. 14 Ann. 2. Corn Lake should not lose the opportunity to compete for the TLD, when it contractually would have to adhere to all of ICANN’s *mandatory* PICs, simply because another applicant for the same domain *offers* to do *more* but reserves the right *not* to do so at any time.²⁷ *See* Ex. 12 at 1.

45. *This* Panel need not make *that* determination, however. *At minimum*, it can and should defer to the same review mechanism provided for in the Resolution: a 3-member review panel, examining only the materials offered in the original proceeding, asking solely “whether the original Expert Panel could have *reasonably* come to the decision reached ... through an *appropriate* application of the standard of review *as set forth in the Applicant Guidebook.*” Ex. 16 at 5 of 22 (emphases added). From the time it joined in the November 2013 letter to ICANN referenced above, this is all Donuts ever has asked – for actual application of Guidebook rules.²⁸

46. No other decisions among the approximately 250 objections align so precisely with the .COM/.CAM rulings as the .CHARITY determinations do. Like .COM and .CAM, this case

²⁷ If that difference means losing its prospects for the TLD, Corn Lake will agree to the same PIC as SRL.

²⁸ The Board has acknowledged the importance of this. It notes that “adopting a review mechanism this far along in the process could potentially be unfair because applicants agreed to the processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes.” *Id.* at 6 of 22. For the Board to call for any review at all in the face of these concerns shows how seriously it takes such “consistency.”

involves two objections by the same objector against different applications for the same string that yielded different results. The IO in both .CHARITY objections alleged harm to the charity “community” from operation of the TLD by either applicant. Implementing the GAC Beijing advice, ICANN will require both to agree to the same protections for the TLD.

47. No justification exists to treat this situation any differently than .COM and .CAM. Not including .CHARITY within the ambit of review ordered in the Resolution truly would “single out” that TLD for disparate treatment, because no community objection decisions, other than those issued for .CHARITY, fit the review criteria. The Board simply failed to “exercise due diligence and care in having a reasonable amount of facts in front of them” regarding the .CHARITY objection decisions when it refused to provide for their review as similarly “inconsistent and unreasonable” as the determinations for which it did order review. Bylaws Art. IV § 3.4.a. The Board did not exercise its judgment regarding the .CHARITY rulings independently of those for which it did provide a review mechanism.²⁹ *Id.* § 3.4.b. Even under the stringent IRP standard of review, this Panel cannot but find the Board to have transgressed the Bylaws’ anti-discrimination provision. It should declare the Board in violation and remedy it by granting the relief that Corn Lake seeks.

B. The Board Has Not Acted “in the Best Interests of the Internet Community.”

48. ICANN’s Articles charge the Board with acting “for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.” App. B § 4. The Board fails to carry out these duties in the Resolution of its NGPC.

²⁹ This case, therefore, differs in that important respect from the *Booking.com* IRP, which went *against* the claimant. There, the panel (i) found no *Board* action, (ii) observed that – as claimant conceded – established processes were followed, and (iii) held that, simply because the Board has the *power* to act, does not mean it has the *obligation* to do so. App. I ¶ 138. Here, no question exists that the Board *did* act. Moreover, when it *does*, it *must* do so on a non-discriminatory basis. The Board violated that stricture in this instance: with regard to the conflicting .CHARITY objection determinations, it refused to follow the review procedure that it *had in fact established* for the similarly “inconsistent and unreasonable” objection rulings in .COM and .CAM.

49. The Resolution expressly recognizes that, as in the cases involving .COM and .CAM, differing outcomes where the same party asserts the same objection against multiple applicants for the same string is “would not be in the best interests of the Internet community.” Ex. 16 at 7 of 22. Since the .CHARITY objection decisions reflect exactly that scenario, the Board admits that it has not acted “in the best interests of the Internet community” when it refuses to include them in the procedure it established for the review of such determinations.

50. This action by the Board allows the .CHARITY objection determination against Corn Lake to stand. Its application for .CHARITY “will proceed no further” as a result. App. C § 1.1.2.9. The “public interest” includes “promoting competition in the registration of domain names.” Bylaws Art. I § 2.6. The Board action squelches such competition.

51. Such conduct by the Board diserves not only “the best interests of the Internet community,” but also the legitimate expectations of those such as Corn Lake who have applied for new gTLDs in reliance on adherence to Guidebook standards articulated with great specificity after years of input from ICANN’s multiple stakeholders. Such reliance does not come from nowhere; it arises as a matter of law from the contract formed with ICANN by those who apply for new gTLDs or object to such applications.

52. Specifically, applicants agree to the terms of the Guidebook by applying for a New gTLD, thus forming an agreement on those terms with ICANN, a California non-profit corporation. App. C, Mod. 6 Intro. Those with successful applications must then enter into registry agreements providing for exclusive California enforcement jurisdiction. *Id.* Mod. 6 § 10; Mod. 5 Attmt. § 5.2 (Draft Registry Agmt). California law implies in all contracts a covenant of good faith and fair dealing that neither party will “do anything which will deprive the other parties thereto of the benefits of the contract.” *Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960); *see also Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218 Cal. App. 4th 1230, 1244 (2013). Corn Lake had the right to anticipate that, by submitting an application in compliance with the Guidebook, the application and any objection to it would be evaluated in accordance with applicable Guidebook provisions, and that it would be treated the same as any other

similarly situated applicant. It also could legitimately expect the Board to act consistently with the Bylaws and Articles in connection with its application.

53. The .CHARITY objection panelist’s disparate treatment of Corn Lake, and the Board’s perpetuation of such discrimination, impede Corn Lake from obtaining the benefits of the contract and its terms as spelled out in the Guidebook. In addition to not acting “for the benefit of the Internet community as a whole,” the Board’s failure to “carry[] out its activities in conformity with relevant principles of ... local law” violates the Articles and entitles Corn Lake to IRP relief. App. A Art. IV § 3.2; App. B § 4.

C. The Board Action Abdicates Its Accountability Obligation.

54. The “core values” of ICANN’s Bylaws include “[r]emaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.” App. A Art. IV § 2.10. In fact, ICANN has included “mechanisms” of “accountability” directly in its Bylaws. These include the request for reconsideration procedure, of which Corn Lake availed itself with respect to .CHARITY,³⁰ and this IRP.

55. Accountability has come under increased scrutiny recently, particularly as ICANN starts to transition away from the oversight that the U.S. government has exercised over it since inception.³¹ A unanimous GNSO,³² for example, has requested “the Board to support community creation of an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction in contravention of an agreed upon compact with the community” as “a necessary and integral element of the ... transition.” It went on:

³⁰ Corn Lake did not succeed on its reconsideration request. Only two out of over a hundred ever have done so in more than fifteen years. See <https://www.icann.org/resources/pages/reconsideration-2012-02-25-en>.

³¹ See <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

³² GNSO members span the entire namespace: commercial and non-commercial users ranging from business and intellectual property interests and Internet service providers to non-profits, as well as registries that operate TLDs and registrars who sell users second-level names. See <http://gns0.icann.org/en/about/stakeholders-constituencies>.

True accountability does not mean ICANN is only accountable to itself [T]he Board's decisions must be open to challenge and the Board cannot be in a position of reviewing and certifying its own decisions. We need an independent accountability structure that holds the ICANN Board ... accountable under ICANN's governing documents ... as an ultimate review of Board/Staff decisions...³³

The Board had an opportunity to bring such accountability to *all* of the inconsistent objection results reached on common TLDs, but excluded the sole community objection situation that fell within the ambit of what it did.

56. This Tribunal operates to enforce such accountability. ICANN has resisted this in the past. Among other things, it amended its Bylaws to constrict the standard of review after losing the first IRP ever to reach a final ruling.³⁴ Also, in a pending IRP matter, ICANN has argued that its Board need not follow rulings of an IRP panel. App. G ¶¶ 90-97. Unmoved, the panel in that case found a “need for a minimum adequate remedy ... where, as in this case, the party arguing that there is no compulsory remedy is ... entrusted with a special, internationally important and valuable operation” such as the DNS. *Id.* ¶ 113. Refusing to accept the IRP as “a remedial scheme with no teeth,” the panel held that “it has the power to interpret and determine the IRP Procedure” and bind the parties. *Id.* ¶¶ 115, 129, 131. The Panel here should likewise hold ICANN accountable for its Board’s actions.³⁵

57. The NGPC Resolution itself represents an attempt at accountability. The Board’s accountability obligation, however, does not apply selectively; it cannot decide with whom it will act accountably and with whom it will not. This Panel can make the Board appropriately more broadly accountable by ordering it to employ for .CHARITY the review mechanism it has established for .COM and .CAM.

³³http://www.circleid.com/posts/20140628_gnso_constituencies_unanimous_joint_statement_icann_accountability/ transcribes the entire GNSO statement.

³⁴ See IRP decision in *ICM Registry*, App. E, and then-existing Bylaws Art. IV § 3, App. F.

³⁵ “The declarations of the IRP Panel ... have precedential value.” App. A Art IV § 3.21.

VI. CONCLUSION AND RELIEF REQUESTED

58. Under the standard of review applicable to this proceeding, this Panel can and should find ICANN’s Board in violation of its Bylaws and Articles. The Panel further has the power to remedy these transgressions. It may, and Corn Lake respectfully requests it to: (i) direct the Board to reverse the .CHARITY objection ruling against Corn Lake; (ii) subject that ruling to the same review as provided in the Resolution for the similarly situated .COM and .CAM decisional conflicts; or (iii) reinstate Corn Lake’s application conditioned upon its acceptance of the PIC agreed to by SRL.

59. Corn Lake also hereby requests that, effective immediately, the status of all applications for .CHARITY be set to “On Hold” status during the course of these proceedings, and that ICANN refrain from engaging in any contracting or delegation processes related to same. Corn Lake certifies that a copy of this Request was sent to ICANN

(independentreview@icann.org) and its authorized representative (Jeffrey LeVe at Jones Day,

Contact Information Redacted

ia e-mail on the date listed below.

DATED: March 24, 2015

Respectfully submitted,

THE IP and TECHNOLOGY LEGAL GROUP, P.C.

By: _____/jmg/_____
John M. Genga
Attorneys for Claimant
CORN LAKE, LLC

TABLE OF ABBREVIATIONS AND DEFINITIONS

AGB, Guidebook	ICANN New gTLD Applicant Guidebook
AOC	ICANN-DOC Affirmation of Commitments
Articles, AOI	ICANN Articles of Incorporation
Beijing Communiqué	A communiqué issued at the April 2013 ICANN meeting in Beijing by the GAC
BGC	ICANN Board Governance Committee
Board	ICANN Board of Directors
Booking.com Declaration or simply <i>Booking</i>	The Independent Review Process entitled “ <i>In the Matter of Booking.com B.V. v. ICANN</i> ” (ICDR Case No. 50-20-1400-0247) and its final Panel Declaration dated March 2, 2015
Bylaws	ICANN’s current Bylaws, as amended July 30, 2014
.CAM String Confusion Decisions	String confusion objection decisions <i>VeriSign, Inc. v. United TLD Holdco Ltd.</i> (ICDR Case No. 50 504 229 13); <i>VeriSign, Inc. v. dot Agency Limited</i> (ICDR Case No. 50 504 266 13); <i>VeriSign, Inc. v. AC Webconnecting Holding B.V.</i> (ICDR Case No. 50 504 224 13)
CE or CEP	Cooperative Engagement or Cooperative Engagement Process
DCA Case	<i>DotConnectAfrica Trust v. ICANN</i> , ICDR IRP Case No. 50-2013-001083
DNS	Domain Name System
DOC	Department of Commerce
Donuts	Donuts Inc.
DRSP	Dispute Resolution Service Provider
GAC	ICANN’s Government Advisory Committee
GNSO	ICANN Generic Names Supporting Organization
gTld	Generic Top-Level Domain
ICC	The International Chamber of Commerce
ICANN	Respondent Internet Corporation for Assigned Names and Numbers
ICDR	The International Centre for Dispute Resolution
ICM Case	<i>ICM Registry, LLC v. ICANN</i> , ICDR IRP Case No. 50-117-T-00224-08
IE	Initial Evaluation of new gTLD applications

IO	ICANN's Independent Objector, Alain Pellet
IRP	Independent Review Process
NGPC	New gTLD Program Committee
October 2014 Resolution	ICANN Board Resolution No. 2014.10.12.NG02 – 2014.10.12.NG03, dated October 12, 2014
Ombudsman	ICANN's Ombudsman, Chris LaHatte
Procedure	New gTLD Dispute Resolution Procedure, AGB Mod. 3 Attachment
RR	Reconsideration Request
SRL	Spring Registry Limited
TLD	Top-Level Domain