

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case Number 01-16-0000-2315

Commercial Connect, LLC

Contact Information Redacted

(Claimant)

- v -

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300
Los Angeles, California, 90094-2536
USA

(Respondent)

**AMENDED REQUEST FOR INDEPENDENT REVIEW
following
PROCEDURAL ORDER #1 issued by the IRP Panel on September 6, 2016**

I. INTRODUCTION

1. Pursuant to the ICDR Rules, Claimant hereby requests the IRP Panel to decide Claimant's Request for Independent Review to reverse the decision by the Internet Corporation for Assigned Names and Numbers ("ICANN" or "Respondent") to enter into a Registry Agreement relating to the .SHOP gTLD and the subsequent delegation of such gTLD. In addition, Claimant requests the IRP Panel to impose and – in so far and to the extent such request would be outside of the powers of the IRP Panel – to recommend to the Respondent's Board of Directors to acknowledge the efforts undertaken by Claimant in being awarded the Registry Agreement for the .SHOP gTLD both in 2000 and 2016, acknowledge in so far and to the extent necessary the community-based character of Claimant's application submitted in the context of the New gTLD Program, and provide for a full compensation of any and all direct and indirect costs and expenses incurred in relation to its efforts to being awarded the Registry Agreement for the .SHOP gTLD.

II. PARTIES

A. Claimant

2. Claimant in these proceedings is Commercial Connect, LLC, incorporated in Louisville, the Commonwealth of Kentucky, USA.
3. Claimant is a legal entity having applied with Respondent for the top-level domain .SHOP in 2000, which application is still pending at the time of submission of this Amended Request.¹ Furthermore, Claimant also submitted a so-called community-based application in the context of ICANN's New gTLD Program. Reference is made to Application ID: 1-1830-1672 with Prioritization Number: 649.²
4. Claimant's preferred method of communication in these Proceedings is both via email and, if and when hardcopies need to be exchanged, by regular mail on the above address. Claimant's contact details are:

Commercial Connect, LLC
Contact Information Redacted

¹ See <http://archive.icann.org/en/tlds/mall1/> (**Annex 1**).

² See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/307;> <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/307?t:ac=307;> **Annex 2**.

B. Respondent

5. The Respondent is the Internet Corporation for Assigned Names and Numbers. ICANN's contact details are:

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
Tel: +1 310 301 5800
Fax: +1 310 823 8649

III. BACKGROUND OF THE INTERESTED PARTIES

A. Claimant

6. Claimant has submitted two applications for the .SHOP gTLD. The first application was submitted in 2000, when Respondent organized a first "round" of applications for new generic top-level domains (gTLDs). This initial application is made available on Respondent's website at <http://archive.icann.org/en/tlds/mall1/>, and has been attached to this Request as **Annex 1** (the "**Initial Application**").³

7. Furthermore, as a directive from Respondent, Claimant has submitted an additional "community-based" application with Respondent in the context of the latter's New gTLD Program. This new application was made in order not to forfeit Claimant's rights to the .SHOP gTLD in 2000. Claimant's application has been made available on Respondent's website at <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/307?t:ac=307>, which is attached hereto as **Annex 2** (the "**Second Application**") based on Respondent advertising and making available to the general public the GNSO's Final Report, which – according to Respondent – constitutes ICANN Policy that established Respondent's New gTLD Program. The Respondent also acknowledged in the context of a Request for Documentary Information Disclosure ("DIDP") to Applicant that there have been no new policies, procedures or otherwise that were implemented and is the basis of the Applicant Guidebook (which has been presented as a "Guidebook" that implements pre-existing statements originating from Respondent with respect to its "Mission", "Core Values" and "Policies", as well as specific procedures that have been established in the context of Respondent's New gTLD Program).

³ See also <http://archive.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

8. Respondent's New gTLD Program attracted in total 144 applications for e-commerce related gTLDs and 9 of these applications were for the .SHOP gTLD specifically, as displayed on the latter's website (see **Annex 3**).
9. In 2013, Respondent subjected all applications to a so-called "string similarity" review, as documented in their GNSO's Final Report available on Respondent's website at http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc48210865 and recorded in the Applicant Guidebook available on the Respondent's website at <https://newgtlds.icann.org/en/applicants/agb>.
10. Applicant and many others made several appeals to Respondent to properly evaluate the similar gTLDs in accordance with the policies developed by Respondent's Generic Names Supporting Organization (GNSO) in 2007, requesting Respondent to properly follow the guidelines that were outlined. Notwithstanding the efforts undertaken, Respondent ignored most all requests. Claimant refers to the fact that, subsequently, a significant number of complaint letters were received by ICANN, and most were not responded to. Respondent's response was to shorten the previously established 4-month period for raising objections to less than 5 business days for objections to be received. ALAC's report on appeal on confusingly similar strings can be found at <https://community.icann.org/display/alacpolicydev/At-Large+Confusingly+Similar+gTLDs+Workspace> where they ask the Respondent to:

The ALAC advises the Board to:

Review

the objection decision system with multiple panels that leads to inconsistency and not only review the obvious case of .cam/.com where conflicting objection decisions have forced such review;

Determine

a viable way forward which will not create unwarranted contention sets nor delegate multiple TLDs destined to ensure user confusion and implicit loss of faith in the DNS.

Steve Crocker from the GNSO along with numerous other wrote letters urging ICANN to correct their mistake on similar string review but their requests were ignored.⁴

11. A number of significant issues arose from the use of the objection processes designed by ICANN in the context of the New gTLD Applicant Guidebook (AGB) of similar (community-based) new gTLD applications whereby domain name subject matter experts were not used resulting in numerous

⁴ See [Annex 15](#)

conflicting determinations. Claimant was told there was no appeal process for this, which is against the GNSO Final Report Item 9 that specifies and promises that “There must be a clear and pre-published application process using objective and measurable criteria”.

12. Even though ICANN refused Claimant’s request for objecting to the ICDR’s name similarity determinations, they did allow one of our winning objections to be overturned in favor of another competing applicant. By doing this, ICANN acted contrary to Recommendation #1 of the Final Report which states that *“the evaluation and selection procedure for new gTLD registries should respect the principle of fairness, transparency and non-discrimination.”* (Mission - 1 through 3 and Core Values 1 through 11). Requester hereby refers to the fact that many organizations, including the European Court of Human Rights, have determined that the term “discrimination” covers both someone treating two identical cases in a dissimilar manner as well as two dissimilar cases in an equal manner. Claimant refers to the fact that it likely is one of the few parties having applied for the same gTLD during a previous round and – in order to preserve its rights – in the context of the New gTLD Program as well.

13. In 2014, Claimant was invited by ICANN to and did participate in community priority evaluation (“CPE”), which is one of the ways offered by ICANN to community-based applicants like Claimant to resolve the situation whereby various parties have applied for the same or confusingly similar extension. Respondent refused to abide by the GNSO’s documented guidelines and policies for community determination which Applicant had fully met requirements of a community application as per the GNSO’s Final Report Implementation Guidelines IG H Core Values 7 through 10.

14. On May 21, 2015, Claimant was informed of the fact that it did not prevail in CPE. Reference is made to the determination of said date by the Economist Intelligence Unit, which is the organization that has been appointed by ICANN to perform CPE. This determination has been published on the ICANN website at <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>.⁵ (hereinafter: the “EIU Determination”).

15. Upon information and belief, this EIU Determination was subsequently accepted by ICANN, apparently without ICANN further reviewing the contents of this EIU Determination, the information on which it was based and/or the process used by the EIU in this respect.

16. Claimant subsequently filed, in accordance with ICANN’s accountability mechanisms a Request for Reconsideration (the “Reconsideration Request”), with ICANN’s Board Governance Committee.⁶

17. As indicated in its Reconsideration Request, Claimant is of the opinion that:

⁵ See **Annex 10**.

⁶ See **Annex 11**; <https://www.icann.org/resources/pages/reconsideration-16-1-commercial-connect-request-2016-01-27-en>.
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- a. the EIU and ICANN have not followed the rules and criteria that have been laid down in the Applicant Guidebook, by relying on incorrect or even false and misleading information;
- b. the EIU and ICANN have, by developing additional guidelines in connection with the CPE process, not followed established policies, considering the fact that these guidelines have been developed:
 - i. not taking into account ICANN’s policy-making processes; and
 - ii. more than two years after the application round for new gTLDs were closed, and without providing community-based applicants like Claimant with the opportunity to modify the contents of their applications accordingly.

18. Notwithstanding various efforts undertaken by Claimant after the submission of both its Initial Application and the Second Application to award the .SHOP gTLD to Claimant, including repeated statements by Respondent that applications for new gTLDs received during previous rounds would receive a preferential treatment, Respondent disregarded the Initial Application, denied the community-based character of the Second Application, disregarded its own policies and procedures in relation to accountability and transparency (as will be further elaborated), and awarded the Registry Agreement for the .SHOP gTLD to a third party earlier this year.

19. This Request is submitted pursuant to Article IV, Section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”),⁷ the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”)⁸ and the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (the “Supplementary Procedures”).⁹ By way of this Request, Claimant seeks relief from the harm it has suffered as a result of the actions, inaction and decisions of the ICANN Board of Directors, and more in particular:

- a. Respondent not properly executing instructions for “string similarity” and significantly reducing the amount of time for objections, failing to provide adequate instruction to the ICDR and allowing the process to continue even after learning that domain name industry experts were not involved in this process;
- b. Failure to provide clear and pre-published application processes, using objective and measurable criteria in both domain name similarity issues as well as community evaluation and determination;

⁷ See **Annex 4**; <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁸ See **Annex 5**.

⁹ See **Annex 6**.

- c. Respondent not having awarded preferential treatment to Claimant’s Initial Application, despite numerous statements and confirmations made by Respondent that applicants and applications received prior to the implementation of the 2011 New gTLD Program would receive such preferential treatment;
- d. Respondent not having awarded preferential treatment to a community applicant as published even though Respondent did provide such preferential treatment to other community-based applications for new gTLDs relating to other strings;
- e. the Recommendation of ICANN’s Board Governance Committee (“BGC”) dated August 24, 2015;¹⁰
- f. the Determination by the New gTLD Program Committee (“NGPC”) regarding Claimant’s Reconsideration Request 15-13;¹¹

all being in violation of ICANN’s Articles of Incorporation,¹² Bylaws, New gTLD Applicant Guidebook (“AGB”),¹³ ICANN’s Top-Level Domain Application Terms and Conditions,¹⁴ and principles of international law.

20. According to Claimant, ICANN committed numerous breaches of its Articles of Incorporation, its Bylaws, the AGB, the Top-Level Domain Application Terms and Conditions, as well as principles of international and local law in its handling and treatment of the Community Priority Evaluation of the Application.

21. Under its Articles of Incorporation, ICANN is required to *“operate for the benefit of the community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”*¹⁵

22. Furthermore, ICANN’s Bylaws require it to act in an open, transparent and non-discriminatory manner, remaining accountable to the Internet community and parties that are affected by ICANN’s actions, and consistent with procedures designed to ensure fairness.

23. Furthermore, the ICANN Board failed to ensure that adequate safeguards were put in place in order to (i) provide for sufficient and effective safeguards for applications for new gTLDs that have been submitted to Respondent in previous rounds and where Respondent failed to take a decision, and (ii) provide for reasonable policies (more in particular in or in the framework of the AGB) requiring Respondent to accurately, transparently and in an unbiased manner, review whether or not established

¹⁰ See **Annex 7** (<https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf>).

¹¹ See **Annex 8** (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>).

¹² See **Annex 9**; (<https://www.icann.org/resources/pages/governance/articles-en>).

¹³ See **Annex 10**; <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

¹⁴ See **Annex 11** <https://newgtlds.icann.org/en/applicants/agb/terms>.

¹⁵ Articles of Incorporation, Section 4.

processes have been followed by the EIU in performing the CPE, and (iii) provide for effective and efficient oversight over Respondent's actions.

24. As the IRP Panel can determine on the basis of other Requests for Independent Review as well as decisions taken by other Panels appointed by the ICDR in this respect, Respondent has each and every time deployed tactics including invoking time-barring arguments in responding to issues raised by interested parties. In light of the fact that Respondent initiated the new gTLD Program in 2011, and quite a few applicants for new gTLDs are still awaiting a final decision on their applications, it is obvious that such arguments are becoming increasingly moot. Furthermore, bearing in mind the fact that Respondent's decision with respect to the .SHOP application that was submitted to Respondent by Claimant in 2000 is still pending after sixteen years, it seems reasonable for any argument by Respondent in relation to time-barring to be rejected by the Panel. More in particular, ICANN has self-established an incredibly short period of time to formally issue requests for reconsideration, time barred does not excuse ICANN from answering to claims of misconduct, especially when ICANN purposely delays answers and responses just have to time pass whereby they feel that no longer have a duty to respond.

25. Therefore, Claimant requests that the IRP Panel affirms that ICANN has to answer for their actions that are against their Mission and Core Values. Just because time has passed – which, in the present matter is even open for dispute – does not excuse ICANN's actions nor does it give ICANN a free pass to continue to do inappropriate and possibly illegal activities hoping that two weeks will pass before anyone notices.

26. In the case at hand, Claimant seeks review of (i) ICANN's decision to ignore the implementation guidelines in the GNSO's Final Report (ii) ICANN's decision not to accept the findings contained in the EIU Determination; and resulting therefrom (iii) ICANN's decision not to award community-based status to Claimant's Application, which should have ultimately lead to resolving the .SHOP contention set in favor of Claimant.

B. ICANN

27. The Internet Corporation for Assigned Names and Numbers, founded in 1998, has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (DNS).

IV. PROCEDURAL ASPECTS

28. In relation to the proceedings on the merits, Claimant requests that the IRP be considered by a three-member panel, composed of one arbitrator selected by each party and a presiding arbitrator selected by the parties either by mutual agreement or, in the event the parties are unable to reach an agreement, selected by the parties from a list of five potential presiding arbitrators chosen by the two party-appointed arbitrators.

29. On January 22, 2016, Claimant submitted a Notice of Independent Review, supplemented with a Request for Emergency Arbitration.

30. Notwithstanding the fact that this Request for Emergency Arbitration is to be considered an accountability mechanism according to ICANN's Bylaws, which should – according to ICANN's Policy – have suspended the “method of last resort” auction that aimed at resolving the .SHOP gTLD string contention, Respondent disregarded Claimant's efforts to properly present its case, and proceeded with the auction.

31. Reference is made to ICANN's “New gTLD Program Auctions” page, which is available at <https://newgtlds.icann.org/en/applicants/auctions>. The paragraph describing the “Auction Eligibility” requirements that have been defined by ICANN in the context of the New gTLD Program Auctions” reads as follows:

“Auction Eligibility

A string contention set will be eligible to enter into a New gTLD Program Auction under the following circumstances only:

- *All active applications in the contention set have:*
 - o *Passed evaluation*
 - o *Resolved any applicable GAC advice*
 - o *Resolved any objections*
 - o ***No pending ICANN Accountability Mechanisms***
- *Each applied-for gTLD in the contention set is:*
 - o *Not classified as “High-Risk” per the Name Collision Occurrence Management Plan”*
(emphasis added)

32. In the case at hand, the “string contention set” relates to the applications for .SHOP (or any confusingly similar string).

33. On January 28, 2016, Respondent awarded the Registry Agreement for the .SHOP gTLD to a third party through a “method of last resort auction” that resolved the contention set for this new gTLD. In

total, ICANN collected 41,501,00.00 (forty one million, five hundred and one thousand) USD in auction fees from the prevailing applicant.¹⁶

34. Considering the fact that Respondent has proceeded with the “method of last resort” auction for the .SHOP gTLD notwithstanding the fact that an Accountability Mechanism was invoked by Claimant, which technically made the Request for Emergency Arbitration obsolete, Claimant requested the ICDR to submit an Amended Request for Independent Review. This request was submitted the ICDR **Notice for Independent Review** on November 17, 2015 which was granted by the ICDR on February 5, 2016.

35. Claimant notes that it submitted on February 10, 2016 a **Reconsideration Request**, attached to this Request for Independent Review as **Annex 14**, requesting ICANN to suspend and reconsider the award of the .SHOP gTLD to the prevailing applicant in the New gTLD Program Auction. Prior to the auction there were other accountability mechanisms in place that should have suspended such auction as per ICANN Policy, which mechanisms Respondent blatantly refused to acknowledge. On the same date, Claimant submitted a Request for Independent Review to the ICDR in respect of ICANN’s treatment of Claimant’s applications for the generic top-level domain .SHOP.

36. On September 5, 2016, a preparatory hearing was convened by the appointed IRP Panel for purpose of discussing the matters in dispute and related organizational matters, and Procedural Order 1 was issued.

V. SUMMARY OF RELEVANT FACTS

A. Initial Programs Initiated by Respondent in order to Expand the gTLD Space

37. In the years following the creation of the original gTLDs (including .COM, .NET, .ORG, .INT, .GOV, .MIL and .EDU), various discussions were organized within ICANN concerning the addition of new gTLDs. During the first process that was organized by Respondent in 2000, seven new gTLDs were handpicked in 2001 and 2002 and introduced into the root. Four of the new TLDs (.biz, .info, .name, and .pro) are unsponsored. The other three new TLDs (.aero, .coop, and .museum) are sponsored.

38. Claimant submitted an application for – amongst others – the .SHOP gTLD in 2000, on which Respondent has not taken a decision (**Annex 1**).

39. In 2003, ICANN initiated a process that resulted in the introduction of six new TLDs (.asia, .cat, .jobs, .mobi, .tel and .travel) that are sponsored.

B. ICANN’s New gTLD Program

¹⁶ See <https://gtdresult.icann.org/application-result/applicationstatus/auctionresults> (**Annex 12**).

40. For over a decade, ICANN has been developing its so-called New gTLD Program in order to increase competition in domain name registrations, and increase consumer choice.

41. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet.

42. As stated above, Claimant is an applicant for the .SHOP generic top-level domain (gTLD), and this by way of:

- a. An application that has been submitted to ICANN in 2000 during the first round of applications for new gTLDs;¹⁷
- b. An application for a so-called community-based gTLD, submitted to ICANN in the context of the New gTLD Program on April of 2012.

43. During the first round of applications for new gTLDs, ICANN received three (3) applications for the .SHOP gTLD, of which Claimant's application is the only one that is still active; in the context of the New gTLD Program ("2012", or "3rd round"), ICANN received 9 applications in total for this string.

44. However, as mentioned above, ICANN has never taken any decision with respect to Claimant's application submitted in the context of the 2000 round: this application has never been approved by ICANN nor denied. Furthermore, Claimant's application was not in contention at that time, which implies that due to the fact that ICANN organized a new round in 2012, inviting and allowing other applicants for the same and similar strings without giving any preference to previous applicants, Claimant was clearly put at a disadvantage.

C. Development and Finalization of the Applicant Guidebook

45. The policy development process for the 2012 round included detailed and lengthy consultations with the many constituencies of ICANN's global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists.

46. In 2008, the ICANN Board adopted 19 specific policy principles, recommendations and implementation guidelines developed by ICANN's Generic Names Supporting Organization (GNSO) for implementing new gTLDs, with certain allocation criteria and contractual conditions.¹⁸

¹⁷ <http://archive.icann.org/en/tlds/mall1/>.

¹⁸ See <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm>; **Annex 6**.

47. After approval of the GNSO's policy principles (Final Report), recommendations and implementation guidelines, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook, as provided for in ICANN's operating principles.
48. In June 2011, ICANN's Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. 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.
49. The application window opened on January 12, 2012, which lasted for four months. Ultimately, Respondent received 1,930 applications for new gTLDs.
50. On 17 December 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the New gTLD Program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.
51. Furthermore, Respondent published the final version of the Applicant Guidebook on June 4, 2012, which is almost two months after the closing of the application round for new gTLDs (which was officially set for April 12, 2012).¹⁹

D. About Domain Name Similarity

52. Top level domain names are defined to be rare and non-confusing. The actual definition of the internet contains this description – see <https://www.ietf.org/rfc/rfc1591.txt>.
53. ICANN stated that it would handle the confusingly similar strings in two phases. The first was that ICANN's staff would do a visual check when they received the new applications to determine if any application strings looked similar to other strings. An example of this was .HOTEL and .HOTEIS.
54. Then ICANN was to submit for review to a linguistic committee those extensions ICANN was contracted to determine which strings “sounded alike, looked alike, has same or similar meanings or could be confused with others in anyway” and the would provide a list of these and the similar strings would all have to be included in one contention set and only one TLD could prevail.

¹⁹ See <https://newgtlds.icann.org/en/applicants/agh>.

55. At this point in the application process ICANN discovered that the individual in charge of the new gTLDs at ICANN (Kurt Pritz) had an undisclosed conflict of interest and needed to resign. Respondent brought in a new employee, Christine Willett. Ms. Willett was immediately influenced by certain other key applicants who claim to be her personal friends (check her call and email logs) and for some unknown reason she instructed the "LINGUISTICS COMMITTEE" to also only look at visual similarity. ICANN decided that only two sets of strings were visually similar.

56. In total, ICANN received applications for 1930 Top Level Domain Name Strings. Of those 1930 strings, 964 were brands, which left 966 for generic strings. Of the 966, there were 706 unique strings and if categorized ICANN should have released 56 generic new gTLDs and 37 of these were qualified as community-based.

57. Because of ICANN not properly engaging the Linguistics Committee they decided to approve 1248 new GTLD's so far instead of the 792 maximum with branding and geographic strings.

58. Another impact of ICANN not doing their job was that Applicant had to file appeals with the ICDR (International Center for Dispute Resolution) about the 23 strings that they felt were similar and/or confusingly similar. Claimant had requested that ICANN reconsider their actions and also to give us more time to determine similar strings and both were denied.

59. Each appeal costs the Applicant approximately \$10K, so Claimant had to submit about \$220K for appeals that should have not been necessary if ICANN had properly executed the procedures provided by their own GNSO. In fact, ICANN received several letters and notifications whereby the GNSO informed ICANN that they were not following their guidelines and ICANN's response was to FASTTRACK the decision and with ICANN's 15-day deadline to object to their actions, the in essence buried this wrong action with demands for other actions from applicants which, if not completed ICANN would have declined their application.

60. Respondent promised to use domain industry experts to make determinations on similar strings. These experts were expected to know ICANN's standards and policies which are published on similar top level domain name strings. ICDR did not use industry experts. The results came back for all who filed appeals completely random. Some ruled that CAT and CATS were not confusing and other ruled that Car and CARS were confusing similar. As for our 22 other strings including .shopping, .store, .buy, sale, sell, service, etc. we won .shopping and .store in Japanese but lost .SHOP (the exact same meaning) in Chinese. After come influence from Google – the ICDR made a strange and reverse decision on the .Store string in Japanese and took this one away from us without allowing us to get .shop reconsidered in Chinese. Clearly not transparent, not fair nor non-discriminate.

61. What was supposed to be a new e-commerce name space for the Internet will now never exist – there will be many registries offering e-commerce reference domain names without the end user having the much needed knowledge to know which strings would be providing safe, secure and verified community based e-commerce and which domain names simply have no restriction as to who can own them.

62. This is a clear example of how ICANN has failed the world in providing a safe, secure and stable place for eCommerce. In fact, we feel that ICANN had completely failed in its promise to maintain the structure and stability of the internet. If you release confusingly similar TLD's then the end user will never know which TLD stands for thus polluting the internet with random TLD's which may never be able to be sustainable and thus it is anticipated that the registries will fail and ownership will be transferred to the large registries that this program was designed to prevent. See <https://newgtlds.icann.org/en/program-status/statistics>.

E. About Community Priority Evaluation

63. Community Priority Evaluation (“CPE”) is an added method to resolve string contention, described in full detail in section 4.2 of the Applicant Guidebook (AGB). According to the AGB, Community Priority Evaluation will only occur if a so-called “community-based application” is both in contention and elects to pursue CPE. This procedure was placed in the AGB but does not agree with the GNSO's Final Report which publicly announced how a Community would be determined.

64. According to the CPE, in order to qualify as a community-based application, the applicant must (i) have answered specific questions in the application form put at the disposal by ICANN during the application round, and (ii) have indicated to ICANN that the application should be subject to CPE. Additional fees of up to USD 22,000 are due for participating in CPE.

65. According to the GNSO's Final Report an applicant needs to simply claim community and they would be taken at their word unless there is significant objection by the same community against the applicant. According to the CPE, a community-based application must receive a score of at least 14 out of 16 points in order to pass the CPE. The direct effect of such acknowledgement is that such application prevails over any standard application for the same or confusingly similar gTLD application. There is no mention on how to treat applicants that meet the GNSO's Final Report Community definition but does not pass the CPE.

66. The CPE itself, which includes the scoring of the application as explained above, is an independent analysis conducted by a panel selected by ICANN.

F. The EIU Was Selected as The Sole Community Priority Evaluator for Community-Based Applications

67. On July 31, 2009, ICANN published on its website a “Call for Expressions of Interest (EOIs) for a New gTLD Community Priority Evaluation Panel – formerly Comparative Evaluation Panel”, inviting providers to submit their proposals on how to “conduct the comparative evaluation of applications in contention”.²⁰

68. The selection criteria for independent evaluators have been published included, amongst other criteria, the following:

Criterion 4: *“Considering the comparative evaluation criteria defined in Module 4 of the Applicant Guidebook and described in Section 3 of this document, the provider must propose a panel that is capable of:*

- a. exercising consistent and somewhat subjective judgment in making its evaluations, (the Guidebook criteria seeks to make the judgment as objective as possible)*
- b. reaching conclusions that are compelling and defensible, and documenting the way in which it has done so in each case.”*

Criterion 7: *“The evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.”*²¹

69. Furthermore, in its response to the requirements set out in the EOI, the applicant had to provide “A statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”²²

70. Later on, ICANN awarded the contract for performing Community Priority Evaluations to the Economist Intelligence Unit (“EIU”). The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe.²³

71. On August 16, 2013, over a year after the close of the applications, the EIU published a set of draft Guidelines that panelists will use to score Community-based applicants.²⁴ It is important to note that these NEW Guidelines were imposed on the applicants after the application was submitted which according to the GNSO is not allowed and should have never been allowed. See Item 1 of the GNSO’s Final report which states “... The evaluation and selection procedure for new gTLD registries should respect the principle of fairness, transparency and non-discrimination. All applicants for a new gTLD registry

²⁰ See <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>; **Annex 8**.

²¹ <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>, page 5; **ibid**.

²² <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>, page 6, Requirement 5; **ibid**.

²³ See <https://newgtlds.icann.org/en/applicants/cpe>.

²⁴ See <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>; **Annex 8**.

should therefore be evaluated against transparent and predictable criteria, fully available to the applicants **prior** to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process. See: ICANN’s Mission, 1 through 3 and Core Values, 1 through 11.

G. ICANN / The EIU Did Not Perform Due Diligence in Evaluating Claimant’s Application

72. On the basis of the information contained in the EIU Determination, the Community Priority Evaluation Panel demonstrates that it has taken into account certain information that is either in the public domain or has been communicated to the EIU in the context of the Community Priority Evaluation process. The AGB indeed authorizes CEP panels to *“perform independent research, if deemed necessary to reach informed scoring decisions”*.²⁵

73. Upon information and belief, based upon the contents of the EIU Determination, it is clear that the information relied upon by the EIU were false, incomplete or materially incorrect. Claimant therefore believes that, if the EIU would have taken into account accurate and up-to-date information, it would have come to a different conclusion, as stated in the Reconsideration Request and the submissions made by Claimant in this context.

H. The CPE Guidelines Created New ICANN Policy, Outside the Established Policy Framework

74. In its Determination, the BGC refers to the fact that the CPE Panel has published *“supplementary guidelines (“CPE Guidelines”) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored”*. (BGC Determination, page 6). In the Determination, the BGC refers on various occasions that the CPE Panel has *“applied the Guidebook scoring guidelines”* apparently as opposed to the *“standards governing CPE”* that are *“set forth in Section 4.2 of the Guidebook”* (BGC Determination, pages 6, 10, 12, 14, 15 and 18) (emphasis added).

75. Claimant is of the opinion that the CPE Panel did not have the authority under ICANN Policy and in particular under the Applicant Guidebook to publish such additional “CPE Guidelines”. Furthermore, the rules and processes for developing “ICANN Policy” have not been followed in defining these “CPE Guidelines” and contradicts the GNSO’s Final Report.

²⁵ AGB, §4.2.3.

76. For these two reasons alone, the CPE Guidelines cannot be considered “ICANN Policy”, and should therefore have been disregarded by the EIU in developing the CPE Report and by ICANN in making the Determinations.

77. In Claimant’s view, the only reference point to be used by the CPE Panel is the Applicant Guidebook as long as it coincides with the instructions of the GNSO’s Final Report as ICANN has indicated that no new policies have been implanted toward the new gTLD program since the GNSO’s Final Report.²⁶

78. In this respect, Claimant also points out to the fact that these CPE Guidelines have been published about one year and a half after the closing of the application window in April / May of 2012.²⁷ Claimant hereby refers to Recommendation 9 contained in the GNSO’s Principles, Recommendations & Implementation Guidelines, according to which ICANN had to implement “[...] a clear and pre-published application process using objective and measurable criteria” for new gTLDs.²⁸ According to Resolution 2008.06.26.02 of the ICANN Board, dated June 26, 2008, “[...] the Board [adopted] the GNSO policy recommendations for the introduction of new gTLDs <<http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>>.”²⁹

79. In conclusion: by expressly referring to the fact that the CPE Panel has utilized its own CPE Guidelines, which do not form part of the Applicant Guidebook, nor are to be considered ICANN Policy, the CPE Panel has not applied ICANN’s policies and procedures in accordance with its Bylaws. Since the BGC has expressly confirmed in the Determination that the CPE Panel has applied “*the (Applicant) Guidebook scoring guidelines and the CPE Guidelines*”, the BGC has in fact acknowledged that guidelines other than what has to be considered ICANN Policy have been followed ...

80. Given the obscurity of the evaluation and scoring process, and in the absence of further insights in which information has been used and considered by the EIU in the context of CPE, Claimant is unable to determine or demonstrate that the scoring provided by the CPE Panel would have been different if these CPE Guidelines would not have been applied. In order to do this, additional factual information and documentation would be required, which Respondent consistently refused to disclose within the context of Claimant’s DIDP and Reconsideration Requests.

81. All in all, Respondent has created by way of the Applicant Guidebook, Guidelines, Advisories and other sorts of documents that were published on its website a shady, nontransparent process, whereby

²⁶ See [Annex 16](#)

²⁷ Reference is made to <http://newgtlds.icann.org/en/applicants/cpe> - CPE Resources.

²⁸ <http://gns0.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf> and <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

²⁹ See ICANN Board Resolution 2008.06.26.02, available at https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113171, which expressly refers to the GNSO’s Principles, Recommendations and Implementation Guidelines.

applicants did not have a proper opportunity to develop their case and to amend their applications according to shifting policy that was developed after the submission of the applications for new gTLDs.

82. Dispute resolution and challenge processes were not established for the CPE process against the GNSO's Final Report which made it impossible for Claimant to correct the CPE inaccuracies.

I. Respondent Moved On with its “Method of Last Resort” Auction, Notwithstanding the fact that Claimant Invoked Accountability Mechanisms

83. Following the acceptance of the EIU Determination, Claimant invoked numerous Accountability Mechanisms with Respondent, including the Documentary Information Disclosure process (DIDP), submitted Reconsideration Requests, initiated the Cooperative Engagement Process and even initiated a Request for Independent Review.

84. Respondent consistently disregarded any request or action undertaken by Claimant, and proceeded with a so-called “method of last resort” auction for the .SHOP gTLD, which resulted in awarding this extension to a third party in return for a fee of over 41 million USD.

VI. STANDING, SUMMARY OF BREACHES BY ICANN OF ITS BY-LAWS, THE TERMS AND CONDITIONS, AND APPLICABLE LAW

85. Claimant has standing to initiate these Proceedings in accordance with Section 6 of ICANN's Top-Level Domain Application Terms and Conditions, which state:

*“[...] APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. [...]”*³⁰

86. Respondent's decision, on the basis of the EIU Determination, that Claimant's Application for the .SHOP gTLD did not prevail in CPE, resulted in ICANN putting Claimant's Application in contention with various other applicants for the .SHOP gTLD.

87. On January 27, 2016, ICANN organized a so-called New gTLD Program Auction in order to resolve the contention set for all applicants for the .SHOP gTLD in the context of ICANN's New gTLD Program (i.e. the 3rd round), hereby ignoring Claimant's application for the .SHOP extension that was still outstanding from the 2000 round. Furthermore, ICANN ignored the fact that Claimant has submitted prior to the New gTLD Program Auction a Reconsideration Request and a Notice of Independent Review. Both actions are

³⁰ <https://newgtlds.icann.org/en/applicants/agg/terms>.

considered Accountability Mechanisms and, if ICANN would have followed its own processes for organizing New gTLD Program Auctions, should have suspended such auction process.

88. The outright denial by Respondent of Claimants efforts in obtaining the right to become the registry operator for the .SHOP gTLD, both during the 2000 round and in the context of the New gTLD Program, which became obvious at the time of Respondent organizing the “method of last resort” auction in order to resolve the .SHOP string contention, clearly demonstrates that Respondent acted contrary to its Articles of Association, By-Laws, self-designed policies and procedures, and principles of international law.

89. In the context of this auction, Respondent collected USD 41,501,000.00 (forty-one million five hundred and one thousand) in auction proceeds from the prevailing applicant, which is almost equal to 225 times the initial application fee paid by an applicant for a new gTLD.

90. Based on the above, it is obvious and indisputable that the breaches committed by ICANN (i) in accepting the EIU Determination, including (ii) any and all responses to Documentary Information Disclosure Requests, (iii) determinations made in the context of Reconsideration Requests, as well as (iv) Respondent’s conduct in the context of the “last resort” auction procedure for resolving the .SHOP contention set are manifold.

91. It is therefore clear that the EIU Determination and Respondent’s acceptance thereof materially affects Claimant’s Application and interests in the .SHOP gTLD, causes irreparable harm, considering the fact that they have invested more than USD \$50,000 in application fees paid to ICANN in 2000, USD 185,000 (minus 2000 credit) in application fees paid to ICANN, USD 22,000 in CPE fees, as well as significant consulting and attorney fees in the context of developing, submitting and managing each of these applications.

92. Bearing in mind the fact that an acknowledgement by ICANN of the community-based status of Claimant’s application for the .SHOP gTLD would have resulted in ICANN awarding the Registry Agreement for said extension to Claimant, without any further fees relating to such application being due by Claimant to ICANN. This, in itself, shows that Respondent had no interest at all in accepting the Accountability Mechanisms invoked by Claimant, allowing ICANN to collect an astonishing amount of more than forty-one million USD from the prevailing applicant.

93. So although Respondent has always stated that its processes were designed in order to be fair and transparent towards all participating applicants for new gTLDs, the facts and evidence set forth in this Amended Request clearly show that Respondent has consistently, consequently and undisputedly acted with a bias against community-based applicants, in particular in those situations where Respondent had a clear financial interest in the outcome of a “method of last resort” auction organized by Respondent.

VII. CONCLUSIONS AND RELIEF REQUESTED

94. For all of the reasons set out above, Claimant respectfully requests the appointment of a Panel by the ICDR to:

- (1) determine that, in light of the above facts and circumstances, which may be further elaborated and supplemented in the context of this Independent Review Proceedings, the ICANN Board, and more in particular the BGC and the NGPC, have breached ICANN's Articles of Association, its Bylaws, the criteria and procedures set forth in the AGB, ICANN's Top-Level Domain Application Terms and Conditions, and principles of international law in
 - a. not taking into account in the contention set resolution process Claimant's application for the .SHOP gTLD that was submitted in the context of the 2000 round, which is a clear violation of ICANN's Core Values (in particular ##7, 8, 9 and 10), and outright discriminatory;
 - b. not awarding Claimant's application for the .SHOP gTLD in the context of the 2000 round, which is a clear violation of ICANN's Core Values (in particular ##7, 8, 9 and 10);
 - c. ignoring the fact that Claimant had a compliant application outstanding from the 2000 round, which was disregarded by ICANN in both the 2000 and the 2012 round, which is a clear violation of ICANN's Core Values (in particular ##7, 8, and 9);
 - d. performing the CPE for Claimant's Application in violation of ICANN's Core Values ## 7, 8 and 10;
- (2) determine that Claimant should have been given preference in the context of the new gTLD application process, considering the fact that ICANN did not take any decision with respect to Claimant's application that was submitted to ICANN in 2000, which is a clear violation of ICANN's Core Values ##8, 9 and 10;
- (3) determine that the lack of domain name similarity cost Applicant both financially as well as harm done to the value of an eCommerce domain name space as opposed to what ICANN has allowed to be put in place today, which is in clear violation of ICANN Mission 1 through 3 and ICANN's Core Values 1-6-11.
- (4) determine that the CPE Guidelines have been developed outside of the policy context provided for by the GNSO in 2007, which has been adopted by the ICANN Board in 2008, and should hence be disregarded in the context of Community Priority Evaluation, which is a clear violation of ICANN's Core Values ##7 and 8;

- (5) determine that the CPE guidelines were not clear and pre-published processes using objective and measurable criteria as required in the GNSO's Final Report;
- (6) determine that the review and scoring of Claimant's Application was done on the basis of false or inaccurate material information as is proven by the submissions made by the Claimant to ICANN and in the context of these Independent Review Proceedings, and that they have not performed due diligence by independently verifying the information available to them, which is a clear violation of ICANN's Core Values ##8 and 10, as well as ICANN's Accountability and Review obligations;
- (7) determine that, based upon the above, the EIU erred in reviewing and scoring Claimant's Application;
- (8) determine that dispute resolution and challenge processes were missing from the CPE process in opposition to the GNSO's Final Report;
- (9) temporarily restore the "Application Status" of Claimant's application to "In CPE" until Claimant's Application has been re-evaluated against the Community Priority criteria set out in the GNSO's Final Report and reflected in the Applicant Guidebook;
- (10) in the meantime, also revise ICANN's decision whereby Claimant's Application for the .SHOP gTLD has been put "In Contention" with remaining active applications for the .SHOP gTLD, submitted by third parties;
- (11) determine that Claimant's Application meets the Community Priority Evaluation Criteria set forth in the GNSO's final report and translated to the AGB;
- (12) if the Panel would determine that it would not be qualified to perform such a Community Priority Evaluation, appoint (or instruct ICANN to appoint) a third party other than the Economist Intelligence Unit to perform such Community Priority Evaluation, taking only into account the criteria and standards set out in the GNSO's Final Report which will contain only objective and measurable criteria;
- (13) in any case: instruct Respondent to refund to Claimant all fees paid by Claimant to Respondent and its vendors including EIU and ICDR in connection with its applications for the .SHOP gTLD.
- (14) Determine financial loss of 16 years of reliance based on other gTLD's awarded in 2000 and determine ICANN's accountability of loss of income.

95. In brief, According to Claimant, Respondent's conduct in connection with Claimant's gTLD applications – both the initial application submitted in 2000 as well as the second application submitted in connection with ICANN's New gTLD Program – proves numerous causes of action that are contrary on

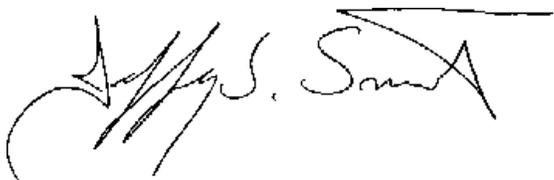
state law, including but not limited to breach of contract, breach of the implied duty of care, good faith and fair dealing, fraud in the inducement (by misleading Claimant for over sixteen years in not taking any decision with respect to the latter's application that was submitted in 2000), fraud, unfair business practices, unjust enrichment, and breach of fiduciary duty.

VIII. RESERVATION OF RIGHTS

96. Claimant reserves all of its rights to seek additional emergency relief or interim measures of protection, request the ICDR to supplement or amend its arguments, claims and requested relief during these and the Independent Review proceedings, including but not limited to its rights to further elaborate upon, substantiate and supplement the factual and legal positions and arguments set out herein within the context of the ICDR Rules, bearing in mind that Claimant has not been offered the opportunity to properly initiate, conduct and finalize the Cooperative Engagement Process that has been initiated on at least two occasions with ICANN, and that ICANN has acted contrary to its own processes and policies by allowing the New gTLD Program Auction process for the .SHOP gTLD to take place and having awarded the .SHOP gTLD to a third party notwithstanding the fact that Accountability Mechanisms (in particular a Reconsideration Request and the present IRP) were submitted and still pending at the time of the initiation and finalization of said auction.

97. In this respect, Claimant in particular refers to §8 of Procedural Order #1, which states that *"The terms of this Procedural Order No. 1 may be varied by the IRP Panel on its own motion or upon application by a party"*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey Smith". The signature is written in a cursive, somewhat stylized font. A horizontal line is drawn above the signature, extending from the left side of the page towards the right, ending just above the signature.

Jeffrey Smith
President
Commercial Connect, LLC

September 29, 2016