

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-16-0000-2315

COMMERCIAL CONNECT, LLC
Claimant,

and

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS,
Respondent

**INDEX TO EXHIBITS TO ICANN'S RESPONSE TO CLAIMANT'S REQUEST FOR
INDEPENDENT REVIEW**

<u>EXHIBIT</u>	<u>DESCRIPTION</u>
Resp. Ex. 1	Board Resolution Nos. 2015.10.22.15
Resp. Ex. 2	Minutes of 20 September 2015 NGPC Meeting.
Resp. Ex. 3	Final Declaration, <i>Booking.com v. ICANN</i> , ICDR Case No. 50-20-1400-0247
Resp. Ex. 4	Final Declaration, <i>Vistaprint Limited v. ICANN</i> , ICDR Case No. 01-14-0000-6505
Resp. Ex. 5	Final Declaration, <i>Merck KGaA v. ICANN</i> , ICDR Case No. 01-14-0000-9604
Resp. Ex. 6	Final Declaration, <i>Despegar Online et al. v. ICANN v. Little Birch et al.</i> , ICDR Case No. 01-15-0002-8061
Resp. Ex. 7	Community Priority Evaluation, https://newgtlds.icann.org/en/applicants/cpe
Resp. Ex. 8	Community Priority Evaluation Panel Process Document
Resp. Ex. 9	Preparing Evaluation for the new GtLD Application Process
Resp. Ex. 10	Rationale for NGPC Resolution 2013.05.18.NG04
Resp. Ex. 11	ICANN TLD Application Process: Information for Applicants

<u>EXHIBIT</u>	<u>DESCRIPTION</u>
Resp. Ex. 12	Commercial Connect LLC's Unsponsored TLD Application Transmittal Form
Resp. Ex. 13	Commercial Connect LLC's New gTLD Application 2000 Credit Request Form
Resp. Ex. 14	Community Priority Evaluation Report for Commercial Connect LLC's Application for .SHOP
Resp. Ex. 15	Community Priority Evaluation Report for GMO Registry's Application for .SHOP
Resp. Ex. 16	Reconsideration Request 15-13
Resp. Ex. 17	Resolution 2015.09.28.NG02
Resp. Ex. 18	17 November 2015 Email from J. Smith to Independent Review@icann.org
Resp. Ex. 19	18 November 2015 Email from E. Le to J. Smith
Resp. Ex. 20	3 December 2015 Email from J. Smith to Independent Review@icann.org
Resp. Ex. 21	4 December 2015 Email from J. Smith to E. Le
Resp. Ex. 22	12 December 2015 Email from E. Le to B. McKenna
Resp. Ex. 23	Intent to Auction Notification
Resp. Ex. 24	26 January 2016 Case Comments for Commercial Connect
Resp. Ex. 25	11 January 2015 Letter from E. Enson to P. Schurman
Resp. Ex. 26	<i>Commercial Connect, LLC v. ICANN</i> , USDC Western Dist. Kentucky, Case No. 316CV-00012-JHM, Memorandum and Order Denying Motion for Preliminary Injunction.
Resp. Ex. 27	Commercial Connect, LLC's Notice of Independent Review
Resp. Ex. 28	26 January 2016 Email from T. Simotas to E. Enson, B. Lieben
Resp. Ex. 29	26 January 2016 Email from J. Smith to Independent Review
Resp. Ex. 30	27 January 2016 Email from J. Smith to K. Rosette

<u>EXHIBIT</u>	<u>DESCRIPTION</u>
Resp. Ex. 31	27 January 2016 Emails between B. Lieben, T. Simotas, and E. Enson
Resp. Ex. 32	28 January 2016 – 5 February 2016 Emails between T. Simotas, B. Lieben, and R. Zernik
Resp. Ex. 33	BGC Determination on Requests 16-1 and 16-2
Resp. Ex. 34	Community Priority Evaluation Guidelines Prepared by the Economist Intelligence Unit

Resp. Ex. 1

RESPONDENT'S EXHIBIT



[ICANN Resolutions](#) » Decommissioning of the New gTLD Program Committee

Important note: The Board Resolutions are as reported in the Board Meeting Transcripts, Minutes & Resolutions portion of ICANN's website. Only the words contained in the Resolutions themselves represent the official acts of the Board. The explanatory text provided through this database (including the summary, implementation actions, identification of related resolutions, and additional information) is an interpretation or an explanation that has no official authority and does not represent the purpose behind the Board actions, nor does any explanations or interpretations modify or override the Resolutions themselves. Resolutions can only be modified through further act of the ICANN Board.

Decommissioning of the New gTLD Program Committee

Resolution of the ICANN Board

Topic:

Decommissioning of New gTLD Program Committee

Summary:

The ICANN Board of Directors approves the decommissioning of New gTLD Program Committee

Category:

Board
gTLDs
General
ICANN Structures

Meeting Date:

Thu, 22 Oct 2015

Resolution Number:

2015.10.22.15 – 2015.10.22.16

URL for Resolution:

<https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.c>

Resolution Text:

Whereas, in order to have efficient meetings and take appropriate actions with respect to the New gTLD Program, on 10 April 2012, the Board took action to create the New gTLD Program Committee (“NGPC”) in accordance with Article XII of the Bylaws.

Whereas, the Board delegated decision-making authority to the NGPC as it relates to the New gTLD Program for the current round of the Program and for the related Applicant Guidebook that applies to this current round.

Whereas, the reasons that led to the formation of the NGPC no longer exist as they did at formation.

Whereas, the Board Governance Committee (“BGC”) has considered the necessity of maintaining the NGPC as a standing committee of the Board, and recommended that the Board decommission the NGPC.

Resolved (2015.10.22.15), the ICANN Board New gTLD Program Committee is hereby decommissioned.

Resolved (2015.10.22.16), the Board wishes to acknowledge and thank the NGPC Chair and all of its members for the considerable energy, time, and skills that members of the NGPC brought to the oversight of the 2012 round of the New gTLD Program.

Rationale for Resolution:

Section 1, Article XII of the ICANN Bylaws provide that the Board may establish or eliminate Board committees, as the Board deems appropriate. (Bylaws, Art. XII, § 1.) The Board has delegated to the BGC the responsibility for periodically reviewing and recommending any charter adjustments to the charters of Board committees deemed advisable. (See BGC Charter at <http://www.icann.org/en/committees/board-governance/charter.htm>.)

In an effort to streamline operations and maximize efficiency, the BGC reviewed the necessity and appropriateness of moving forward with the current slate of standing Board committees. At the time of formation, the Board determined that establishing the New gTLD Program Committee (“NGPC”) as a new committee without conflicted Board members, and delegating to it decision making authority, would provide some distinct advantages. First, it would eliminate any uncertainty for actual, potential or

perceived conflicted Board members with respect to attendance at Board meetings and workshops since the New gTLD Program topics could be dealt with at the Committee level. Second, it would allow for actions to be taken without a meeting by the Committee. As the Board is aware, actions without a meeting cannot be taken unless done via electronic submission by unanimous consent; such unanimous consent cannot be achieved if just one Board member is conflicted. Third, it would provide the community with a transparent view into the Board's commitment to dealing with actual, potential or perceived conflicts.

After review, the BGC determined that reasons that lead to the formation of the NGPC no longer exist as they did at formation. At this time, only two voting members of the Board are conflicted with respect to new gTLDs and as a result do not serve on the NGPC. Three of the four Board non-voting liaisons are conflicted and do not serve on the NGPC. Additionally, staff is at the tail end of implementing the current round of the New gTLD Program. All New gTLD Program processes have been exercised¹, and a majority of unique gTLD strings have been delegated or are near delegation. Specifically, as of 30 September 2015, over 750 new gTLDs have been delegated. Numerous review and community activities are currently underway that will likely inform when the next round will take place and how it will be carried out.

In making its recommendation to the Board, the BGC noted, and the Board agrees, that decommissioning the NGPC does not mean that the topics addressed by the NGPC no longer exist, or are of any less import. The Board shall continue maintaining general oversight and governance over the New gTLD Program, and continue to provide strategic and substantive guidance on New gTLD-related topics as the current round of the Program comes to a conclusion. For example, there are active matters being considered by the NGPC, such as GAC advice concerning the protection for Intergovernmental Organizations, and matters that are subject to ICANN's accountability mechanisms (e.g. Requests for Reconsideration and Independent Review Processes). As a result of this resolution, the full Board will take up these matters at future meetings and address any conflict issues as appropriate.

In taking this action, the Board also reinforces its commitment to the 8 December 2011 Resolution of the Board (Resolution 2011.12.08.19) regarding Board member conflicts, and specifying in part: "Any and all Board members who approve any new gTLD application shall not take a contracted or employment position with any company sponsoring or in any way involved with that new gTLD for 12 months after the Board made the decision on the application."

It is not anticipated that there will be direct fiscal impacts on ICANN associated with the adoption of this resolution, and approval of this resolution will not impact security, stability or resiliency issues relating to the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

¹ As of 31 July 2015, two of the seven major Program processes defined in the Applicant Guidebook are complete (i.e. Application Window and Application Evaluation), and two are approximately 90% complete

(i.e. Dispute Resolution and Contention Resolution). Contracting and Pre-Delegation Testing are well over halfway complete, while Delegation is approximately 52% complete.

Resp. Ex. 2

RESPONDENT'S EXHIBIT

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Minutes | Meeting of the New gTLD Program Committee

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28 Sep 2015

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of Incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at <http://www.icann.org/en/groups/board/new-gTLD>.

A Regular Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held in Los Angeles, CA on 28 September 2015 at 15:45 local time.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Rinalia Abdul Rahim, Fadi Chehadé (President and CEO, ICANN), Steve Crocker (Board Chairman), Chris Disspain, Asha Hemrajani, Markus Kummer, Bruno Lanvin, Gonzalo Navarro, Ray Pizak, Georae Sadowsky, Mike Silber, and Kuo-Wei Wu.

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Secretary: John Jeffrey (General Counsel and Secretary).

ICANN Executives and Staff in attendance for all or part of the meeting: Akram Atallah (President, Global Domains Division); Susanna Bennett (Chief Operating Officer); Megan Bishop (Board Support Coordinator); Xavier Calvez (Chief Financial Officer); David Conrad (Chief Technology Officer); Allen Grogan (Chief Contract Compliance Officer); Dan Halloran (Deputy General Counsel); Jamie Hedlund (Vice President, Strategic Programs – Global Domains Division); Margie Milam (Sr. Director, Strategic Initiatives); Cyrus Namazi (Vice President, DNS Industry Engagement); Erika Randall (Senior Counsel); Amy Stathos (Deputy General Counsel); Theresa Swinehart (Sr. Advisor To The President On Strategy); Shawn White (Associate General Counsel); and Christine Willett (Vice President, Operations – Global Domains Division).

These are the Minutes of the Meeting of the New gTLD Program Committee, which took place on 28 September 2015.

1. **Consent Agenda:**
 - a. **Approval of Minutes**
2. **Main Agenda:**
 - a. **Reconsideration Request 15-13: Commercial Connect, LLC**
Rationale for Resolution 2015.09.28.NG02
 - b. **Discussion of possible dissolution of the New gTLD Program Committee**
 - c. **Review GDD efforts on Trust Marks and Public Interest Commitments (PIC) Repository**

1. Consent Agenda:

a. Approval of Minutes

The Chair introduced for approval the minutes of the 21 August 2015 meeting. The Committee took the following action by acclamation:

Resolved (2015.09.28.NG01), the Board New gTLD

Program Committee (NGPC) approves the minutes of its 21 August 2015 meeting.

All members of the Committee present voted in favor of Resolution 2015.09.28.NG01. Erika Mann was unavailable to vote on the Resolution. The Resolution carried.

2. Main Agenda:

a. Reconsideration Request 15-13: Commercial Connect, LLC

Amy Stathos presented the Committee with an overview of background information concerning Reconsideration Request 15-13. Amy explained that the Board Governance Committee (BGC) could not take a final action on the request because the Bylaws require Board-level action if a reconsideration request challenges an action taken by the Board (or the Committee acting with the authority of the Board). She reported that the requester was seeking reconsideration of the Community Priority Evaluation ("CPE") panel's report, and ICANN's acceptance of that report, finding that the requester did not prevail in CPE for the .SHOP string.

Amy reported that the BGC recommended that Reconsideration Request 15-13 be denied, citing that the issues raised by the requester were time-barred, and the requester did not demonstrate that the CPE Panel acted in violation of any established policy or procedure.

The Committee considered the BGC's recommendation and rationale that the Reconsideration Request be denied because the requester failed to state the proper grounds for reconsideration.

Mike Silber moved, and Ray Plzak seconded the proposed resolution. The Committee took the following action:

Whereas, Commercial Connect, LLC ("Requester") filed

Reconsideration Request 15-13 seeking reconsideration of the Community Priority Evaluation ("CPE") panel's report, and ICANN's acceptance of that report, finding that the Requester did not prevail in CPE for the .SHOP string ("CPE Report"), and also challenging various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for the Requester's application.

Whereas, the Board Governance Committee ("BGC") thoroughly considered the issues raised in Reconsideration Request 15-13 and all related materials.

Whereas, the BGC recommended that Reconsideration Request 15-13 be denied because the Requester has not stated proper grounds for reconsideration, and the New gTLD Program Committee ("NGPC") agrees.

Resolved (2015.09.28.NG02), the NGPC adopts the BGC Recommendation on Reconsideration Request 15-13, which can be found at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB].

All members of the Committee present voted in favor of Resolution 2015.09.28.NG02. Erika Mann was unavailable to vote on the Resolution. The Resolution carried.

Rationale for Resolution 2015.09.28.NG02

I. Brief Summary

The Requester submitted a community-based application for the .SHOP gTLD ("Application"). The Requester's Application was placed into a contention set with eight other applications for .SHOP, two applications for .SHOPPING, and one application for .通販 (Japanese for "online shopping") (".SHOP/SHOPPING Contention Set"). Since the Requester's Application is community-based, the Requester was invited to, and did, participate in CPE. The Application did not prevail

in CPE. As a result, the Application was placed back into the contention set.

The Requester claims that the CPE panel considering its Application ("CPE Panel"): (i) violated established policy or procedure in its consideration of the expressions of support for and opposition to the Requester's Application; and (ii) improperly applied the CPE criteria. The Requester also challenges various procedures governing the New gTLD Program including, among other things, the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the composition of the .SHOP/.SHOPPING Contention Set.

The Requester's claims are unsupported. First, all of the issues raised by the Requester are time-barred. Second, as to the Requester's challenge to the CPE Report, the Requester has not demonstrated that the CPE Panel acted in contravention of any established policy or procedure in rendering the CPE Report. The CPE Panel evaluated and applied the CPE criteria in accordance with all applicable policies and procedures, including but not limited to its consideration of the expressions of support for and opposition to the Requester's Application. The Requester presents only its substantive disagreement with the CPE Report, which is not a basis for reconsideration. Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding: (a) the procedures set forth in the Guidebook; (b) the outcome of the String Similarity Review; and (c) the outcome of its string confusion objections. The BGC therefore recommends that Request 15-13 be denied.

II. Facts

The BGC Recommendation on Reconsideration Request 15-13, which sets forth in detail the facts relevant to this matter, is hereby incorporated by reference and shall be deemed a part of this

Rationale. The BGC Recommendation on Reconsideration Request 15-13 is available at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB], and is attached as Exhibit B to the Reference Materials.

III. Issues

In view of the claims set forth in Request 15-13, the issues for reconsideration seem to be: (1) whether the CPE Panel violated established policy or procedure by failing to properly apply the CPE criteria in evaluating the Requester's Application; (2) whether the Board failed to consider material information or relied on false or inaccurate material information before approving the New gTLD Program and the Guidebook, specifically the application review procedures set forth in the Guidebook; and (3) whether the third-party experts that ruled on the Requester's 21 string confusion objections violated any established policy or procedure in rendering their determinations.

IV. The Relevant Standards for Evaluating Reconsideration Requests

The BGC Recommendation on Reconsideration Request 15-13, which sets forth the relevant standards for evaluating reconsideration requests and CPE, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Request 15-13 is available at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB], and is attached as Exhibit B to the Reference Materials.

V. Analysis and Rationale

The Requester challenges the "correctness" of the CPE Report, as well as various procedures governing the New gTLD Program, the String Similarity Review process and the adjudication of various string confusion objections, which

ultimately resulted in the contention set for the Requester's Application. As the BGC explains in detail in its Recommendation, all of the issues raised by the Requester are time-barred. Further, insofar as the Requester is challenging the CPE Report, the Requester has not demonstrated any misapplication of any policy or procedure by the CPE Panel in rendering the CPE Report. The Requester instead only presents its substantive disagreement with the scoring and analysis in the CPE Report, which is not a basis for reconsideration.

Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding the procedures set forth in the Guidebook or the processing of its Application. The Requester argues, among other things, that: (a) CPE should not be required at all; (b) the Guidebook improperly fails to provide an appeals mechanism for CPE panel determinations; and (c) the Guidebook does not conform to the recommendations of ICANN's Generic Names Supporting Organization ("GNSO"). As discussed above, any challenge to the procedures set forth in the Guidebook are time-barred. Furthermore, in challenging the approval of the Guidebook, the Requester seeks reconsideration of Board action but does not demonstrate, as it must, that the Board either failed to consider material information or relied on false or inaccurate material information before approving the New gTLD Program and the Guidebook.

The Requester also asks that the Board "[r]eview and fix the issue with name similarity especially with any and all similar and confusing eCommerce strings." The Requester appears to claim that applications for various strings other than .SHOP should be included in the Requester's contention set because, in the Requester's view, "issuing multiple random and similar gTLDs will only yield very small registrations [on each gTLD] which in turn would make sustainability unfeasible." Although Request 15-13 is unclear, the Requester

seems to make two different challenges in this respect. First, the Requester appears to challenge the Board's adoption of the String Similarity Review and string confusion objections procedures. Second, the Requester appears to challenge the actions of third-party evaluators and the Board with respect to: (1) the String Similarity Review performed for the Requester's .SHOP Application; and (2) the adjudication of the Requester's string confusion objections. Neither challenge warrants reconsideration. With respect to the Requester's first argument—not only is it long since time-barred, but the Requester has not identified any material information the Board failed to consider, or any false or inaccurate material information that the Board relied upon, in adopting the procedures governing String Similarity Review or string confusion objections. With respect to the Requester's second argument—not only is it also long since time-barred, but the Requester does not identify any policy or process violation in the String Similarity Review Panel's determination, nor has the Requester identified any violation of established policy or procedure by the third-party experts who ruled on the Requester's myriad string confusion objections.

The full BGC Recommendation on Reconsideration Request 15-13, which sets forth the analysis and rationale in detail and with which the NGPC agrees, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Request 15-13 is available at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB], and is attached as Exhibit B to the Reference Materials.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Reconsideration Request 15-13. Following

consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Reconsideration Request 15-13

(<https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB]), which shall be deemed a part of this Rationale and is attached as Exhibit B to the Reference Materials to the NGPC Paper on this matter.

Adopting the BGC's recommendation has no direct financial impact on ICANN and will not impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. Review GDD efforts on Trust Marks and Public Interest Commitments (PIC) Repository

Cyrus Namazi made a report to the Committee about various industry-led efforts currently underway to establish a set of initiatives and best practices regarding registry standards of behavior in online operations. Cyrus noted that these industry-led initiatives have focused on using a form of "trust mark" that signals to end-users that the website they are engaging with has been vetted by impartial, independent third-party evaluators.

The Chair made note of previous discussions related to the industry-led efforts. These discussions were held during the 2015 ICANN Meeting in Singapore. He mentioned that the initiative is part of on-going discussions in the community about implementing the GAC's safeguard advice. Jamie Hedlund commented that the GAC also raised this matter in its most recent Buenos Aires Communiqué. The GAC recommended that the Committee "[c]reate a list of commended public interest commitment (PIC) examples related to verification and validation of credentials for domains in highly regulated sectors to serve as a model."

George Sadowsky asked whether the composition of the industry group that has taken up the initiative was broadly representative of the various viewpoints in the community about safeguards, and staff noted that they would look into this question.

Rinalia Abdul Rahim asked whether it was possible to make it more apparent to the community as to which of the TLDs associated with "highly-regulated" industries have registration restrictions requiring verification and/or validation of a potential registrants' credentials. Akarm Atallah noted that registry operators are able to change their registration restrictions, but staff would look at the possibility of making it easier for the community to search the Public Interest Commitments in the registry agreements of the string associated with "highly-regulated" industries.

Thomas Schneider noted that the GAC continues to have concerns about the implementation of the GAC's safeguard advice, and has attempted to make these concerns clear in several of its Communiqués.

c. **Discussion of possible dissolution of the New gTLD Program Committee**

The Committee continued its discussions about the possibility of dissolving the New gTLD Program Committee. The Chair noted that reasons for creating the Committee, as presented in the Board resolution establishing the Committee, seem to no longer exist. He reported that to dissolve the Committee, the matter would need to be taken up by the Board Governance Committee (BGC) and eventually by the full Board for action. The Chair noted that the BGC and Board intend to consider this matter at their meetings in Dublin.

Jamie Hedlund made note of the remaining open items under consideration by the Committee that would be considered by the full Board if the Committee were dissolved.


Akram Atallah commented that all of the all New gTLD Program processes have been exercised, and the Program is in its final phases of implementation. Steve Crocker suggested that the upcoming reviews and reports associated with the New gTLD Program should include an analysis of all of these Program processes. Akram reported that staff recently published for


public comment a report that provides staff observations from the operational experience of administering the 2012 round of the New gTLD Program. The report is intended to capture staff's experiences and lessons learned.


Rinalia Abdul Rahim mentioned that the Organizational Effectiveness Committee intends to share the lessons learned from conducting reviews in general. She suggested that this information may be useful to consider by those who are undertaking reviews of the New gTLD Program.


The Chair called the meeting to a close.


Published on 19 October 2015



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Resp. Ex. 3

RESPONDENT'S EXHIBIT

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-

ICDR Case No: 50-20-1400-0247

**Internet Corporation for Assigned Names
and Numbers (ICANN)**

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz

David H. Bernstein, Esq.

Stephen L. Drymer (Chair)

TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	THE PARTIES.....	3
	A. The Applicant: Booking.com	3
	B. The Respondent: ICANN.....	3
III.	FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF	3
	A. ICANN’s Adoption of the New gTLD Program and the Applicant Guidebook	3
	B. Booking.com’s Application for .hotels, and the Outcome	5
	C. DIDP Request and Request for Reconsideration	6
	D. The Cooperative Engagement Process	9
	E. The IRP Proceedings	10
	F. The Hearing.....	11
IV.	ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS.....	11
	A. Articles of Association	11
	B. Bylaws	11
	C. The gTLD Applicant Guidebook.....	16
	(i) <i>Initial Evaluation</i>	16
	(ii) <i>String Review, including String Similarity Review</i>	16
V.	SUMMARY OF THE PARTIES’ POSITIONS	21
	A. Booking.com’s position.....	21
	(i) <i>The Panel’s Authority</i>	21
	(ii) <i>Booking.com’s Claims</i>	22
	a. <i>The string similarity review process</i>	22
	b. <i>The case of .hotels</i>	24
	B. ICANN’s position	26
	(i) <i>The Panel’s Authority</i>	26
	(ii) <i>ICANN’s Response to Booking.com’s Claims</i>	27
	a. <i>The string similarity review process</i>	27
	b. <i>The case of .hotels</i>	29
VI.	ANALYSIS.....	29
	A. The Panel’s Authority	29
	B. The String Similarity Review Process	33
	C. The Case of .hotels	37
	D. Conclusion.....	42
VII.	THE PREVAILING PARTY; COSTS.....	43

DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel (“**IRP Panel**” or “**Panel**”), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration (“**Declaration**”):¹

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process (“**IRP**”) as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”; “**ICANN Bylaws**” or “**Bylaws**”). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 (“**ICDR**”; “**ICDR Rules**”) as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (“**Supplementary Procedures**”).
2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains (“**gTLDs**”, also known as gTLD “**strings**”) are applied for, reviewed and delegated into the Internet’s domain name system (“**DNS**”) root zone.
3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com’s applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN’s Articles of Incorporation, Bylaws and gTLD Applicant Guidebook (“**Guidebook**”).
4. Reading between the lines of the parties’ submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN’s guiding principles – transparency and fairness – as applied to one of ICANN’s most essential activities – the delegation of new gTLDs² – in circumstances in which various members of the Internet community, including certain members of the ICANN Board’s New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

¹ As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

² As stated in the very first sentence of the Guidebook: “New gTLDs have been in the forefront of ICANN’s agenda since its creation.”

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

II. THE PARTIES

A. The Applicant: Booking.com

5. The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as “the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations.”³ Booking.com’s primary focus is on the U.S. and other English-language markets.
6. Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B. The Respondent: ICANN

7. The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN’s mission is “to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN describes itself as “a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants.”⁴
8. ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9. We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties’ respective claims and the Panel’s analysis are discussed.

A. ICANN’s Adoption of the New gTLD Program and the Applicant Guidebook

10. Even before the introduction of ICANN’s New gTLD Program (“**Program**”), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.⁵ Indeed, as noted above, the introduction of new gTLDs has been “in the forefront of ICANN’s agenda” for as long as ICANN has existed.

³ Request, ¶ 10.

⁴ Response, ¶ 11-12.

⁵ Request, ¶ 12; see also Guidebook, *Preamble*.

11. The Program has its origins in what the Guidebook refers to as “carefully deliberated policy development work” by the ICANN community.⁶
12. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.⁷ As noted in the Guidebook:

Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.
13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.
14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.⁸ As explained in the Guidebook, ICANN’s work next focused on implementation of these recommendations, which it saw as “creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁹
15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.¹⁰
16. As described by ICANN in these proceedings, the Program “constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include

⁶ Guidebook, *Preamble*

⁷ Request, ¶ 13, Reference Material 7, “Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>; Reference Material 8, “GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as “ICANN’s main policy-making body for generic top-level domains”. Article X of ICANN’s Articles of Incorporation provides: “There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains” (Section 1); the GNSO shall consist of “a number of Constituencies” and “four Stakeholder Groups” (Section 2).

⁸ Guidebook, *Preamble*. A review of this policy process can be found at <http://qns0.icann.org/issues/new-gtlds> (last accessed on January 15, 2015).

⁹ Guidebook, *Preamble*: “This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook.”

¹⁰ RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven “elements” of the Program implemented in 2011. The other elements were: a draft communications plan; “operational readiness activities”; a program to ensure support for applicants from developing countries; “a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]”; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...”¹¹

17. The Guidebook is “continuously iterated and revised”, and “provides details to gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications.”¹² As noted by Booking.com, the Guidebook “is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”¹³

B. Booking.com’s Application for .hotels, and the Outcome

18. In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.
19. At the same time, Despegar Online SRL (“Despegar”), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.
20. “Hoteis” is the Portuguese word for “hotels”.
21. According to Booking.com, Despegar is “a competitor of Booking.com”.¹⁴ Booking.com claims that it intends “to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,”¹⁵ while Despegar similarly intends .hoteis to be dedicated primarily to “individuals that are interested in, and businesses that offer, hotel- and travel-related content.”¹⁶ That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD “on the U.S. (with its strongly Anglo-Saxon traditions) and other English-language markets,”¹⁷ whereas Despegar intends to target “Portuguese-speaking” markets.¹⁸
22. As part of the Initial Evaluation to which all applied-for gTLDs were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

¹¹ Response, ¶ 14.

¹² Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly “authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes.”

¹³ Request, ¶ 13. See also Guidebook, Module 1-2: “This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

¹⁴ Request, ¶ 17.

¹⁵ Request, ¶ 5.

¹⁶ Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

¹⁷ Request, ¶ 16.

¹⁸ Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

String Similarity Panel (“SSP”) selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. (“ICC”), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,¹⁹ in cooperation with University College London, to act as the SSP.

23. On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two “non-exact match” contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.²⁰ Booking.com’s applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.

24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.

Due to this finding, the ... two strings have been placed in a contention set.²¹

25. The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

C. DIDP Request and Request for Reconsideration

26. On 28 March 2013 Booking.com submitted a request for information under ICANN’s Documentary Information Disclosure Policy (“**DIDP Request**”) asking for “all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar.”²²

27. On the same date, Booking.com also filed a formal Request for Reconsideration (“**Request for Reconsideration**”). The “specific action(s)” that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

¹⁹ See <http://www.icc-uk.com/>

²⁰ Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a “non-exact match” connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another 752 applied-for gTLDs were put into 230 identical contention sets.

²¹ Request, Annex 3, ICANN letter dated 26 February 2013.

²² Request, ¶ 30 and Annex 3.

provide a “detailed analysis or a reasoned basis” for the decision to place .hotels in contention.²³

28. ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

*The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP’s String Similarity Process and Workflow on the New gTLD microsite ...*²⁴

29. By letter dated 9 May 2013 Booking.com replied to ICANN, writing that “ICANN’s response fails to provide any additional information or address any of Booking.com’s concerns as conveyed in its DIDP Request or Request for Reconsideration.”²⁵ On 14 May 2013, ICANN answered that it “intends to post the string similarity process documentation on or before ... 17 May 2013.”²⁶ ICANN further informed Booking.com that “ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration.”²⁷
30. On 7 June 2013, ICANN published the “String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description” (“**SSP Process Description**”).²⁸
31. On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that “the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration.” The letter concluded by stating: “Considering ICANN’s obligations of transparency and accountability, there cannot be any ‘compelling reason for confidentiality’.

²³ Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a “Request for Reconsideration of ... Staff [vs. Board] action/inaction.” The cover letter attaching the Request states that, “[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a ‘Staff action’. In the event that the decisions referenced above are determined to be a ‘Board action’, this request may be amended.” As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

²⁴ Request, Annex 5.

²⁵ Request, Annex 6.

²⁶ Request, Annex 7.

²⁷ Request, Annex 7.

²⁸ Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com].”²⁹

32. ICANN responded on 25 July 2013, explaining among other things that “the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ...” and “[t]he SSP’s work was subjected to quality review, as has been publicly discussed.”³⁰ Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further “summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ...” (“**SSP Manager’s Letter**”).³¹ According to that Letter:

When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:

- *Strings of similar visual length on the page;*
- *Strings within +/- 1 character of each other;*
- *Strings where the majority of characters are the same and in the same position in each string; and*
- *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*

o For example m~m & l~i

33. Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: “Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013.”³²
34. By virtue of Article IV, Section 3 of the Bylaws, ICANN’s Board Governance Committee (“**BGC**”) is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board’s New gTLD Program Committee (“**NGPC**”) receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com’s Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC “conclude[d] that Booking.com has not

²⁹ Request, Annex 9.

³⁰ Request, Annex 10.

³¹ Request, Annex 11.

³² Request, Annex 13.

stated proper grounds for reconsideration and we therefor recommend that Booking.com's request be denied" ("**BGC Recommendation**").³³

35. At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.³⁴

D. The Cooperative Engagement Process

36. Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

*Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment ...*³⁵

37. The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.
38. One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

³³ Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

³⁴ Request, Annex 15, NGPC Resolution dated 10 September 2013.

³⁵ Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

E. The IRP Proceedings

39. On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process (“**Request**”) accompanied by numerous supporting documents and reference materials.
40. In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.
41. On 25 April 2014, ICANN submitted a Response to ICANN’s Request with supporting documents (“**Response**”).
42. The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.
43. On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer’s appointment became effective and the Panel was duly constituted as of 1 August 2014.
44. On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.
45. On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.³⁶
46. In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN’s Response, accompanied by additional documents (“**Reply**”).

³⁶ Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN’s Response, “Booking.com shall only address two issues raised in Respondent’s Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant.” Paragraph 7 of Procedural Order No. 1 provided that “Respondent’s Sur-Reply ... shall address only the issues raised in the Reply.”

47. In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 (“**Sur-Reply**”).

F. The Hearing

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.
49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties’ extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists’ questions.
50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.
51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

52. We set out here the key elements of ICANN’s Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

A. Articles of Association

4. The Corporation shall operate 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 and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

[Underlining added]

B. Bylaws

ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers (“ICANN”) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers,

and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

[..]

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN

body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

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

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

a. evaluate requests for review or reconsideration;

- b. *summarily dismiss insufficient requests;*
- c. *evaluate requests for urgent consideration;*
- d. *conduct whatever factual investigation is deemed appropriate;*
- e. *request additional written submissions from the affected party, or from other parties;*
- f. *make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and*
- g. *make a recommendation to the Board of Directors on the merits of the request, as necessary.*

[...]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. *In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.*

2. *Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.*

3. *A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.*

4. *Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. *did the Board act without conflict of interest in taking its decision?;*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*

[...]

11. *The IRP Panel shall have the authority to:*

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
- e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- f. determine the timing for each proceeding.

[...]

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

[...]

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

[Underlining added]

53. Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term "action" (or "actions") as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) or inaction(s) by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning “Reconsideration”, which expressly refer to “actions or inactions of the ICANN Board”, but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that “[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”

C. The gTLD Applicant Guidebook

54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com's phrase) “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”³⁷
55. The Guidebook is divided into “Modules”, each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled “Introduction to the gTLD Application Process,” provides an “overview of the process for applying for a new generic top-level domains.”³⁸ Module 2, titled “Evaluation Procedures,” describes the “evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”³⁹ Module 4, titled “String Contention Procedures,” concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”

(i) *Initial Evaluation*

56. As explained in Module 1, “[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness.”⁴⁰ Initial Evaluation begins “immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.”⁴¹
57. Initial Evaluation is comprised of two main elements or types of review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) *String Review, including String Similarity Review*

58. String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

The following assessments are performed in the Initial Evaluation:

³⁷ Request, ¶ 13.

³⁸ Module 1-2. Each Module of the Guidebook is paginated separately. “Module 1-2” refers to Guidebook Module 1, page 2.

³⁹ Module 2-2.

⁴⁰ Guidebook, §1.1.2.2: “Administrative Completeness Check”, Module 1-5.

⁴¹ Guidebook, §1.1.2.5: “Initial Evaluation”, Module 1-8 (underlining added).

- *String Reviews*
 - *String similarity*
 - *Reserved names*
 - *DNS stability*
 - *Geographic names*

[...]

*An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.*⁴²

59. As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

[String review] focuses on the applied-for gTLD string to test:

- *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*
- *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*
- *Whether evidence of requisite government approval is provided in the case of certain geographic names.*⁴³

60. The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

2.2.1.1 String Similarity Review

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

Note: In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

⁴² Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

⁴³ Guidebook, §2.2: “Initial Evaluation”, Module 2-4 (underlining added). See also Module 1-9: “String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ...”

The visual similarity check that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review will be conducted by an independent String Similarity Panel.

2.2.1.1.1 Reviews Performed

The String Similarity Panel's task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

[...]

- Applied-for gTLD strings against other applied-for gTLD strings;

[...]

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or similar to one another. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

[...]

2.2.1.1.2 Review Methodology

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See <http://icann.sword-group.com/algorithm/>] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

[...]

The panel will examine all the algorithm data and perform its own review of similarities between strings and whether they rise to the level of string confusion. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

Standard for String Confusion – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.⁴⁴

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.” As explained in Module 4:

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called *contending strings*. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

⁴⁴ Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: “String Contention”, Module 1-13: “String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.”

(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set.

[...]

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...

[...]

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called “community” applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

[...]

62. As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.

[...]

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

63. Module 5 of the Guidebook, titled *Transition to Delegation*, describes “the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.”⁴⁵ Section 5.1 states:

*ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.*⁴⁶

[Underlining added]

V. SUMMARY OF THE PARTIES' POSITIONS

64. The following brief summary of the parties' respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties' allegations and arguments. Additional references to the parties' positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

A. Booking.com's position

(i) *The Panel's Authority*

65. Booking.com submits that the mandate of the Panel is “to determine whether the contested actions of the ICANN Board are consistent with applicable rules”.⁴⁷ According to Booking.com:

*The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.*⁴⁸

⁴⁵ Module 5-2.

⁴⁶ Module 5-4.

⁴⁷ Reply, ¶ 3.

⁴⁸ Reply, ¶ 3.

66. Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, “fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN’s Affirmation of Commitments and ICANN’s core values.”⁴⁹

(ii) Booking.com’s Claims

67. The purpose of the IRP initiated by Booking.com is, in its own words, “to challenge the ICANN Board’s handling of Booking.com’s application for the new gTLD .hotels.”⁵⁰ This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision and review* of the entire of string similarity review process, and the Board’s alleged failure “to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination” throughout.⁵¹
68. In effect, Booking.com’s specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.
69. Booking.com professes that this case “is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]”; it is about “ICANN’s failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review.”⁵²
70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook*. Rather, as indicated, it contests “the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board.”⁵³ Equally crucial, as will be seen, is Booking.com’s acknowledgment that *the established process was followed* in the case of the review of .hotels.

a. The string similarity review process

71. According to Booking.com, the problem began when the ICANN Board failed to “provide transparency in the SSP selection process,” in particular by failing “to make clear how

⁴⁹ Reply, ¶ 6.

⁵⁰ Reply, ¶ 7.

⁵¹ Reply, ¶ 15.

⁵² Reply, ¶ 14.

⁵³ Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so.”⁵⁴ The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com’s words:

[T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN’s contract with InterConnect Communications?”⁵⁵

72. Booking.com also faults ICANN for “allowing the appointed SSP to develop and perform an unfair and arbitrary review process”, specifically, by allowing the SSP “to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...”.⁵⁶
73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager’s Letter (see Part III.C above) only long after the string similarity review process had ended.⁵⁷
74. It also alleges that the factors identified in the SSP Manager’s Letter are “arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis.”⁵⁸ According to Booking.com: “The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN’s own policy.”⁵⁹
75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.⁶⁰
76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a “well-documented rationale” for each

⁵⁴ Reply, ¶ 20.

⁵⁵ Reply, ¶ 20.

⁵⁶ Reply, ¶ 23.

⁵⁷ Reply, ¶ 24.

⁵⁸ Reply, ¶ 25.

⁵⁹ Reply, ¶ 25.

⁶⁰ Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, “there is no basis on which decisions can be evaluated and, where appropriate, challenged.”⁶¹

77. Another ground for Booking.com’s challenge is the alleged failure by the ICANN Board to providing “effective supervision or quality control” of the SSP: “If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed.”⁶² Nor, according to Booking.com, does the quality review of the SSP’s work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

*Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisors to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*⁶³

78. In any case, says Booking.com, the “quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed,” which ICANN claims was performed on the SSP’s work,⁶⁴ could not provide adequate quality control of the string similarity review process.⁶⁵ Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – i.e., the decision to place .hotels and .hoteis in contention – demonstrates that, “whatever quality control review ICANN may have engaged in ... must therefore have been deficient.”⁶⁶

b. The case of .hotels

79. Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,⁶⁷ that “[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone ... The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings.”⁶⁸ It continues:

⁶¹ Reply, ¶ 28-29.

⁶² Reply, ¶ 30.

⁶³ Reply, ¶ 31. Booking.com states that it “doubts” that any quality review was in fact performed, whether by JAS Advisers or any other entity.

⁶⁴ Response, ¶ 30.

⁶⁵ Reply, ¶ 34.

⁶⁶ Reply, ¶ 38.

⁶⁷ Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet’s report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

⁶⁸ Request, ¶ 58.

Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.⁶⁹

80. According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to “individually consider a gTLD application”.⁷⁰
81. Booking.com claims that its DIDP Request alerted the Board to the need to intervene to “correct the errors in the process” related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP’s review of .hotels, “giving the Board ample opportunity to correct those errors.”⁷¹ Booking.com claims that the Board’s failure, when responding to the DIDP Request, “to offer any insight into the SSP’s reasoning”, its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that “the Reconsideration process ‘is not available as a mechanism to re-try the decisions of evaluation panels’”, and its failure to investigate Booking.com’s complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN’s governing rules regarding string similarity review.⁷²
82. According to Booking.com, among the most compelling evidence of ICANN’s failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com’s Request for Reconsideration was denied.⁷³ Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.
83. In its written submissions Booking.com asks the Panel to grant the following relief:

Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;

Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;

Awarding Booking.com its costs in this proceeding; and

⁶⁹ Request, ¶ 59.

⁷⁰ Reply, ¶ 39.

⁷¹ Reply, ¶ 41.

⁷² Reply, ¶ 41. In the passage of Booking.com’s submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN’s obligations of “due process”, which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN’s obligations under review in this IRP.

⁷³ See Part II.C, above.

Awarding such other relief as the Panel may find appropriate or Booking.com may request.

84. At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to “delegate both .hotels and .hoteis.”

B. ICANN's position

85. ICANN's position is best summed up by ICANN itself:

Booking.com's IRP Request is really about Booking.com's disagreement with the merits of the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar. But the Panel's determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN's Bylaws and Articles of Incorporation; it is not within the IRP Panel's mandate to evaluate whether the String Similarity Panel's conclusion that .hotels and .hoteis are confusingly similar was wrong.⁷⁴

86. According to ICANN, the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook.”⁷⁵

(i) The Panel's Authority

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.
88. As provided in Article IV, Section 3(4) of ICANN's Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”⁷⁶
89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific “standard of review” set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: “did the Board act without conflict of interest in taking its decision?”; “did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?”; and “did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?”⁷⁷

⁷⁴ Response, ¶ 9.

⁷⁵ Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the “rules” at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

⁷⁶ See for example Response, ¶2, ¶ 9.

⁷⁷ Response, ¶ 2.

90. ICANN further asserts that the IRP process “is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,”⁷⁸ such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an “appeal mechanism” by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.⁷⁹
91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN “reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set” and (as requested at the hearing) that ICANN “delegate both .hotels and .hoteis” – exceeds the authority of the Panel.⁸⁰

(ii) ICANN's Response to Booking.com's Claims

a. The string similarity review process

92. According to ICANN, “[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion;” and “[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook.”⁸¹
93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, “[t]his similarity review will be conducted by an independent String Similarity Panel,” not by ICANN itself. ICC was duly selected to perform the string similarity review further to “an open and public request for proposals,” pursuant to which, as the successful bidder, “ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook.”⁸² ICANN emphasizes that “the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC’s results.”⁸³
94. In ICANN’s submission, the alternative proposed by Booking.com, that “the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted,” is “untenable and is not supported by ICANN’s Bylaws or Articles.”⁸⁴ As noted by ICANN, the Guidebook defines six distinct

⁷⁸ Response, ¶ 3.

⁷⁹ Response, ¶ 49.

⁸⁰ Response, ¶ 55.

⁸¹ Response, ¶ 15 (underlining in original).

⁸² Response, ¶ 16.

⁸³ Response, ¶ 17.

⁸⁴ Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95. ICANN submits that “there simply is no requirement – under ICANN’s governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes.”⁸⁵ It asserts that, consistent with well-settled legal principles, “neither ICANN’s Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity.”⁸⁶
96. Moreover, ICANN asserts that “[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage.”⁸⁷
97. ICANN claims that that Booking.com’s repeated invocation of the Board’s so-called obligation to ensure “due process” in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook “specifically affords any gTLD applicant a right to procedural ‘due process’ similar to that which is afforded in courts of law.”⁸⁸ Second, because ICANN conducts its activities in the public interest it nevertheless provides “more opportunity for parties to be heard and to dispute actions taken”⁸⁹ than most private corporate entities. Third, the “decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others.”⁹⁰ Fourth, and perhaps most importantly, “ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN’s stakeholders and the broader Internet community.”⁹¹
98. ICANN’s response to Booking.com’s various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP’s methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

⁸⁵ Sur-Reply, ¶ 10.

⁸⁶ Sur-Reply, ¶ 10.

⁸⁷ Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN’s written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

⁸⁸ Sur-Reply, ¶ 18.

⁸⁹ Sur-Reply, ¶ 18.

⁹⁰ Sur-Reply, ¶ 18, fn 18.

⁹¹ Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting ... that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."⁹²

b. The case of .hotels

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.
100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;⁹³ the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.⁹⁴
101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar."⁹⁵
102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.
103. ICANN asks the Panel to deny Booking.com's IRP Request.

VI. ANALYSIS

A. The Panel's Authority

⁹² Sur-Reply, ¶¶ 20-42.

⁹³ A number of these applications were subsequently withdrawn.

⁹⁴ Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

⁹⁵ Response, ¶¶ 53.

104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

4. [The IRP Panel] shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*

[...]

11. *The IRP Panel shall have the authority to:*

[...]

c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

[...]

18. [...] *The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties [...]*

[Underlining added]

105. Similarly, Article 8 of the Supplementary Procedures reads:

8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107. ICANN submits that its Bylaws “specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”⁹⁶ Booking.com argues that this “is simply wrong. No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability.”⁹⁷
108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”
109. In other words, in making decisions the Board is required 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, with the policies and procedures established in the Guidebook.
110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN’s actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.
111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with “objectively” determining whether

⁹⁶ Response, ¶ 24.

⁹⁷ Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112. In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN -- ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' ICANN 'shall operate 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...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.⁹⁸

[Underlining added.]

113. While on no way bound by that decision, we agree with its conclusions in this respect.
114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

⁹⁸ ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an “objective” appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an “IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves⁹⁹), but merely to apply them to the facts.
116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B. The String Similarity Review Process

117. The Panel is not unsympathetic to Booking.com’s complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully “heard” on the substantive question of the similarity of their applied-for gTLD strings to others.
118. Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board’s New gTLD Program Committee which voted to accept the BGC’s Recommendation to deny Booking.com’s Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC’s 10 September 2013 meeting.¹⁰⁰

⁹⁹ As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN’s guiding principles of transparency and fairness, and regarding the published views of various members of ICANN’s NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP’s determination.

¹⁰⁰ Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although “he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN’s ... and the user’s best interests.”
 - Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation “because there was not sufficient rationale provided for why the string similarity review panel made its determination.”
 - In response to a comment by the Chair that the Request for Reconsideration deserved to be denied “[b]ecause the process was followed,” Mr. Ray Plzak “agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don’t agree with the outcome to make an objection, other than using a Reconsideration Request.”
 - Mr. Plzak “recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits.”
 - Ms. Madruga-Forti agreed and “recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.”
 - Mr. Bill Graham also agreed with Mr. Plzak’s suggestion, and noted that “generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members.”
 - The Chair “agreed with [Mr. Graham’s] sentiment.”
 - The General Counsel and Secretary noted that ICANN ... “has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.”
119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC’s Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:
- Mr. Plzak stated that he abstained from voting “because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process.”
 - Ms. Madruga-Forti stated that:

[T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to

establish a better record of the rationale of the string similarity review panel in circumstances such as this.

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.
- Mr. Sadowsky provided the following detailed statement:

I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect in my opinion an understanding of the current reality of the situation.

120. These statements reflect to an important degree the Panel's own analysis.
121. The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.¹⁰¹
122. The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"¹⁰². The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of the average, reasonable Internet user."¹⁰³
123. The Guidebook explains that string similarity review comprises merely a "visual similarity check",¹⁰⁴ with a view to identifying only "visual string similarities that would create a probability of user confusion."¹⁰⁵
124. The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.
125. Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed in part by an algorithmic score for ... visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform its own review of similarities between strings and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is entirely up to the [SSP's] judgment." (Underlining added)
126. In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

¹⁰¹ Request, ¶ 13.

¹⁰² Guidebook, §2.2 (Module 2-4).

¹⁰³ Guidebook, §2.2.1.1.2. (Underlining added)

¹⁰⁴ Guidebook, §2.2.1.1. (Underlining added)

¹⁰⁵ Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of “visual similarity”, nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of “confusion,” nor any definition or description of an “average, reasonable Internet user.” As Mr. Sadowski of the NGPC put it: “Confusion is a perceptual issue.” (Mr. Sadowski further noted: “String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply “its own review” of visual similarity and “whether similarities rise to the level of user confusion”, in addition to SWORD algorithm, which is intended to be merely “indicative”, yet provides no substantive guidelines in this respect.
128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP’s review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowski referred to as “the minimization of user confusion and ensuring user trust in using the DNS”. However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.
129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.
130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board’s actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

C. The Case of .hotels

131. In the light of the preceding analysis of Booking.com’s challenge concerning the ICANN Board’s actions in relation to the string similarity review process generally, the Panel is not

persuaded by its challenge concerning the Board's conduct in relation to the review of .hotels specifically.

132. There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed in all respects*.
133. Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.
134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".
135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:
- *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [for the Board] acted in contravention of established policies.*¹⁰⁶
 - *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*¹⁰⁷
 - *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

¹⁰⁶ BGC Recommendation, p. 2.

¹⁰⁷ BGC Recommendation, p. 4. The BGC explains that "Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change."

methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.¹⁰⁸

▪ Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that “it is contrary to ICANN policy to put them in a contention set.” (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.¹⁰⁹

▪ Booking.com argues that the contention set decision was taken without material information, including Booking.com’s linguistic expert’s opinion, or other “information that would refute the mistaken contention that there is likely to be consumer confusion between ‘.hotels’ and ‘.hoteis.’” (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)¹¹⁰

▪ Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com’s call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.¹¹¹

▪ [W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP’s] decision, no such narrative is called for in the process.¹¹²

▪ The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology

¹⁰⁸ BGC Recommendation, p. 5.

¹⁰⁹ BGC Recommendation, p. 6.

¹¹⁰ BGC Recommendation, p. 6.

¹¹¹ BGC Recommendation, pp. 6-7.

¹¹² BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).¹¹³

▪ *The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.¹¹⁴*

▪ *As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hotelis in a non-exact contention set, this Request should not proceed.¹¹⁵*

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.
137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.
138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:
- The Board's adoption of certain provisions of the Guidebook, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

¹¹³ BGC Recommendation, p. 7.

¹¹⁴ BGC Recommendation, p. 8.

¹¹⁵ BGC Recommendation, p. 10.

- The Board’s acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP’s determination. The Guidebook provides that applied-for strings “will be placed in contention set” where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP’s determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.
 - The Board’s denial of Booking.com’s Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN’s conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com’s Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com’s request.
 - The Board’s refusal to “step in” and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to “individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.” As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board’s inaction in this respect was inconsistent with ICANN’s Articles of Incorporation or Bylaws or indeed with ICANN’s guiding principles of transparency and fairness, given (1) Booking.com’s concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com’s Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com’s real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).
139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com’s dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com's claim – largely muted during the hearing – regarding alleged “discrimination” as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.
142. Booking.com purports to challenge “the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board”; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook*. It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own “expert evidence” regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of the SSP determination and it acknowledges that the process set out in the Guidebook was duly followed* in the case of its application for .hotels.
143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.
144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.
145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the “applicable rules” as set out in the Guidebook.
146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147. Booking.com's IRP Request must be denied.

VII. THE PREVAILING PARTY; COSTS

148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."
149. The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."
150. Similarly, the Supplementary Procedures state, at Article 11:

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.


151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").
152. ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.
153. The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154. However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

- (1) Booking.com's IRP Request is denied;
- (2) ICANN is the prevailing party;
- (3) In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US\$4,600.00, as well as the compensation and expenses of the Panelists totaling US\$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US\$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com
- (4) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.



Hon. A. Howard Matz
Date: March 2, 2015

David H. Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

March 2, 2015
Date


Hon. A. Howard Matz

I, David H, Bernstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

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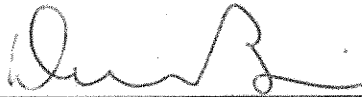
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 Hon. A. Howard Matz
 Date:



 David H. Bernstein
 Date: March 2, 2015

 Stephen L. Drymer,
 Chair of the IRP Panel
 Date:

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Hon. A. Howard Matz

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March 2, 2015
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David H, Bernstein

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Stephen L. Drymer

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Hon. A. Howard Matz

Date:

David H. Bernstein

Date:



Stephen L. Drymer,
Chair of the IRP Panel
Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

Date

Hon. A. Howard Matz

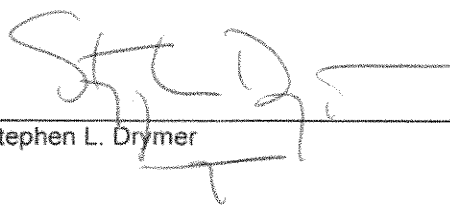
I, David H. Bernstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

Date

David H. Bernstein

I, Stephen L. Drymer, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

3 March 2015
Date



Stephen L. Drymer

Resp. Ex. 4

RESPONDENT'S EXHIBIT

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

Between:)
)
Vistaprint Limited)
)
Claimant)
)
v.) **ICDR Case No. 01-14-0000-6505**
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

FINAL DECLARATION OF THE INDEPENDENT REVIEW PANEL

IRP Panel:

Geert Glas
Siegfried H. Elsing
Christopher S. Gibson (Chair)

I. Introduction

1. This Final Declaration (“Declaration”) is issued in this Independent Review Process (“IRP”) pursuant to Article IV, §3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“Bylaws”; “ICANN”). In accordance with the Bylaws, the conduct of this IPR is governed by the International Centre for Dispute Resolution’s (“ICDR”) International Dispute Resolution Procedures, amended and effective June 1, 2014 (“ICDR Rules”), as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process, dated December 21, 2011 (“Supplementary Procedures”).
2. Claimant, Vistaprint Limited (“Vistaprint”), is a limited company established under the laws of Bermuda. Vistaprint describes itself as “an Intellectual Property holding company of the publicly traded company, Vistaprint NV, a large online supplier of printed and promotional material as well as marketing services to micro businesses and consumers. It offers business and consumer marketing and identity products and services worldwide.”¹
3. Respondent, ICANN, is a California not-for-profit public benefit corporation. As stated in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”² In its online Glossary, ICANN describes itself as “an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions.”³
4. As part of this mission, ICANN’s responsibilities include introducing new top-level domains (“TLDs”) to promote consumer choice and competition, while maintaining the stability and security of the domain name system (“DNS”).⁴ ICANN has gradually expanded the DNS from the original six generic top-level domains (“gTLDs”)⁵ to include 22 gTLDs and over 250 country-code TLDs.⁶ However, in June 2008, in a significant step ICANN’s Board of Directors (“Board”) adopted recommendations developed by one of its policy development bodies, the Generic Names Supporting Organization (“GNSO”), for

¹ Request for Independent Review Process by Vistaprint Limited dated June 11, 2014 (“Request”), ¶ 12.

² ICANN’s Response to Claimant Vistaprint Limited’s Request for Independent Review Process dated July 21, 2014 (“Response”), ¶ 13; Bylaws, Art. I, § 1.

³ Glossary of commonly used ICANN Terms, at <https://www.icann.org/resources/pages/glossary-2014-02-03-en#i> (last accessed on Sept. 15, 2015).

⁴ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (“Affirmation of Commitments”), Article 9.3 (Sept. 30, 2009), available at <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> (last accessed on Sept. 15, 2015).

⁵ The original six gTLDs consisted of .com; .edu; .gov; .mil; net; and .org.

⁶ Request, ¶ 14.

introducing additional new gTLDs.⁷ Following further work, ICANN's Board in June 2011 approved the "New gTLD Program" and a corresponding set of guidelines for implementing the Program – the gTLD Applicant Guidebook ("Guidebook").⁸ ICANN states that "[t]he New gTLD Program constitutes by far ICANN's most ambitious expansion of the Internet's naming system."⁹ The Guidebook is a foundational document providing the terms and conditions for new gTLD applicants, as well as step-by-step instructions and setting out the basis for ICANN's evaluation of these gTLD applications.¹⁰ As described below, it also provides dispute resolution processes for objections relating to new gTLD applications, including the String Confusion Objection procedure ("String Confusion Objection" or "SCO").¹¹ The window for submitting new gTLD applications opened on January 12, 2012 and closed on May 30, 2012, with ICANN receiving 1930 new gTLD applications.¹² The final version of the Guidebook was made available on June 4, 2012.¹³

5. This dispute concerns alleged conduct by ICANN's Board in relation to Vistaprint's two applications for a new gTLD string, ".WEBS", which were submitted to ICANN under the New gTLD Program. Vistaprint contends that ICANN's Board, through its acts or omissions in relation to Vistaprint's applications, acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation ("Articles") and Bylaws, both of which should be interpreted in light of the Affirmation of Commitments between ICANN and the United States Department of Commerce ("Affirmation of Commitments").¹⁴ Vistaprint also states that because ICANN's Bylaws require ICANN to apply established policies neutrally and fairly, the Panel must consider other ICANN policies relevant to the dispute, in particular, the policies in Module 3 of the Guidebook regarding ICANN's SCO procedures, which Vistaprint claims were violated.¹⁵
6. Vistaprint requests that the IRP Panel provide the following relief:
 - Find that ICANN breached its Articles, Bylaws, and the Guidebook;
 - Require that ICANN reject the determination of the Third Expert in the String

⁷ ICANN Board Resolution 2008.06.26.02, at <http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm> (last accessed on Sept. 11, 2015).

⁸ ICANN Board Resolution 2011.06.20.01, at <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm> (last accessed on Sept. 11, 2015). ICANN states that the "Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs." Response, ¶ 16. The Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb> (last accessed on Sept. 13, 2015).

⁹ Response, ¶ 16.

¹⁰ Response, ¶ 16.

¹¹ The Guidebook is organized into Modules. Module 3 (Objection Procedures) is of primary relevance to this IRP case.

¹² Response, ¶ 5; New gTLD Update (May 30, 2012) on the close of the TLD Application system, at <http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en> (last accessed on Sept. 11, 2015).

¹³ gTLD Applicant Guidebook, Version 2012-06-04.

¹⁴ Affirmation of Commitments.

¹⁵ Request, ¶ 58; Vistaprint's First Additional Submission, ¶ 34.

Confusion Objection proceedings involving Vistaprint (“*Vistaprint SCO*”)¹⁶, which found that the two proposed gTLD strings – .WEBS and .WEB – are confusingly similar, disregard the resulting “Contention Set”, and allow Vistaprint’s applications for .WEBS to proceed on their own merits;

- In the alternative, require that ICANN reject the *Vistaprint SCO* determination and organize a new independent and impartial SCO procedure, according to which a three-member panel re-evaluates the Expert Determination in the *Vistaprint SCO* taking into account (i) the ICANN Board’s resolutions on singular and plural gTLDs¹⁷, as well as the Board’s resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination¹⁸, and (ii) ICANN’s decisions to delegate the .CAR and .CARS gTLDs, the .AUTO and .AUTOS gTLDs, the .ACCOUNTANT and ACCOUNTANTS gTLDs, the .FAN and .FANS gTLDs, the .GIFT and .GIFTS gTLDs, the .LOAN and .LOANS gTLDs, the .NEW and .NEWS gTLDs and the .WORK and .WORKS gTLDs;
 - Award Vistaprint its costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate or Vistaprint may request.
7. ICANN, on the other hand, contends that it followed its policies and processes at every turn in regards to Vistaprint’s .WEBS gTLD applications, which is all that it is required to do. ICANN states its conduct with respect to Vistaprint’s applications was fully consistent with ICANN’s Articles and Bylaws, and it also followed the procedures in the Guidebook. ICANN stresses that Vistaprint’s IRP Request should be denied.

II. Factual and Procedural Background

8. This section summarizes basic factual and procedural background in this case, while leaving additional treatment of the facts, arguments and analysis to be addressed in sections III (ICANN’s Articles, Bylaws, and Affirmation of Commitments), IV (Summary of Parties’ Contentions) and V (Analysis and Findings).

A. Vistaprint’s Application for .WEBS and the String Confusion Objection

9. Vistaprint’s submitted two applications for the .WEBS gTLD string, one a standard application and the other a community-based application.¹⁹ Vistaprint states that it applied to operate the .WEBS gTLD with a view to reinforcing the reputation of its website

¹⁶ Request, Annex 24 (Expert Determination in the SCO case *Web.com Group, Inc. v. Vistaprint Limited*, ICDR Consolidated Case Nos. 50 504 T 00221 13 and 50 504 T 00246 13 (Jan. 24, 2014) (“*Vistaprint SCO*”).

¹⁷ ICANN Board Resolution 2013.06.25.NG07.

¹⁸ ICANN Board Resolution 2014.10.12.NG02.

¹⁹ Request, Annex 1 (Application IDs: 1-1033-22687 and 1-1033-73917). A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application. A standard application is one that has not been designated as community-based. Response, ¶ 22 n. 22; *see also* Glossary of commonly used terms in the Guidebook, at <http://newgtlds.icann.org/en/applicants/glossary> (last accessed on Sept. 13, 2015).

creation tools and hosting services, known under the identifier “Webs”, and to represent the “Webs” community.²⁰ The .WEBS gTLD would identify Vistaprint as the Registry Operator, and the products and services under the .WEBS gTLD would be offered by and for the Webs community.²¹

10. Seven other applicants applied for the .WEB gTLD string.²² Solely from the perspective of spelling, Vistaprint’s proposed .WEBS string differs by the addition of the letter “s” from the .WEB string chosen by these other applicants. On March 13, 2013, one of these applicants, Web.com Group, Inc. (the “Objector”), filed two identical String Confusion Objections as permitted under the Guidebook against Vistaprint’s two applications.²³ The Objector was the only .WEB applicant to file a SCO against Vistaprint’s applications. The Objector argued that the .WEBS and .WEB strings were confusingly similar from a visual, aural and conceptual perspective.²⁴ Vistaprint claims that the Objector’s “sole motive in filing the objection was to prevent a potential competitor from entering the gTLD market.”²⁵
11. As noted above, Module 3 of the Guidebook is relevant to this IRP because it provides the objection procedures for new gTLD applications. Module 3 describes “the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.”²⁶ The module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination. The Module states that
- “All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.”²⁷*
12. Module 3, § 3.2 (Public Objection and Dispute Resolution Process) provides that
- In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.*
13. A formal objection may be filed on any one of four grounds, of which the SCO procedure is relevant to this case:
- String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD*

²⁰ Request, ¶ 5.

²¹ Request, ¶ 17. Vistaprint states that the Webs community is predominantly comprised of non-US clients (54% non-US, 46% US).

²² Request, ¶ 5.

²³ Request, ¶ 32.

²⁴ Request, ¶ 32.

²⁵ Request, ¶ 80.

²⁶ Guidebook, Module 3, p. 3-2. Module 3 also contains an attachment, the New gTLD Dispute Resolution Procedure (“New gTLD Objections Procedure”), which sets out the procedural rules for String Confusion Objections.

²⁷ Guidebook, Module 3, p. 3-2.

or to another applied-for gTLD string in the same round of applications.²⁸

14. According to the Guidebook, the ICDR agreed to serve as the dispute resolution service provider (“DRSP”) to hear String Confusion Objections.²⁹ On May 6, 2013, the ICDR consolidated the handling of the two SCOs filed by the Objector against Vistaprint’s two .WEBS applications.³⁰
15. Section 3.5 (Dispute Resolution Principles) of the Guidebook provides that the “objector bears the burden of proof in each case”³¹ and sets out the relevant evaluation criteria to be applied to SCOs:

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.
16. On May 23, 2013, Vistaprint filed its responses to the Objector’s String Confusion Objections.
17. On June 28, 2013, the ICDR appointed Steve Y. Koh as the expert to consider the Objections (the “First Expert”). In this IRP Vistaprint objects that this appointment was untimely.³²
18. On 19 July 2013, the Objector submitted an unsolicited supplemental filing replying to Vistaprint’s response, to which Vistaprint objected.³³ Vistaprint claims that the supplemental submission should not have been accepted by the First Expert as it did not comply the New gTLD Objections Procedure.³⁴ The First Expert accepted the Objector’s submission and permitted Vistaprint to submit a sur-reply, which Vistaprint claims was subject to unfair conditions imposed by the First Expert.³⁵ Vistaprint filed its sur-reply on

²⁸ Guidebook, § 3.2.1.

²⁹ Guidebook, § 3.2.3.

³⁰ Request, ¶ 23, n. 24. The ICDR consolidated the handling of cases nos. 50 504 T 00221 13 and 50 504 T 00246 13. The Guidebook provides in § 3.4.2 that “[o]nce the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections.”

³¹ Guidebook, § 3.5. This standard is repeated in Article 20 of the Objection Procedure, which provides that “[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.”

³² Request, ¶ 33.

³³ Response, ¶ 26.

³⁴ Request, ¶ 42. Article 17 provides that “[t]he Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response.” Article 18 states that “[i]n order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.”

³⁵ Vistaprint states that “this surreply was not to exceed 5 pages and was to be submitted within 29 days. This page limit and deadline are in stark contrast with the 58 day period taken by [the Objector] to submit a 6-page (Continued...)”

August 29, 2013.

19. On September 18, 2013 the ICDR informed the parties that the expert determination for the SCO case would be issued on or about October 4, 2013.³⁶ Vistaprint claims that this extension imposed an unjustified delay beyond the 45-day deadline for rendering a determination.³⁷
20. On October 1, 2013, the ICDR removed the First Expert due to a conflict that arose. On October 14, 2013, the ICDR appointed Bruce W. Belding as the new expert (the “Second Expert”).³⁸ Vistaprint claims that the New gTLD Objections Procedure was violated when the First Expert did not maintain his independence and impartiality and the ICDR failed to react to Vistaprint’s concerns in this regard.³⁹
21. On October 24, 2013, the Objector challenged the appointment of the Second Expert, to which Vistaprint responded on October 30, 2013. The challenge was based on the fact that the Second Expert had served as the expert in an unrelated prior string confusion objection, which Vistaprint maintained was not a reason for doubting the impartiality or independence of the Second Expert or accepting the challenge his appointment.⁴⁰ On November 4, 2013, the ICDR removed the Second Expert in response to the Objector’s challenge.⁴¹ On November 5, 2013, Vistaprint requested that the ICDR reconsider its decision to accept the challenge to the appointment of the Second Expert. On November 8, 2013, the ICDR denied this request.⁴² Vistaprint claims that the unfounded acceptance of the challenge to the Second Expert was a violation of the New gTLD Objections Procedure and the ICDR’s rules. The challenge was either unfounded and the ICDR should have rejected it, or it was founded, which would mean that the ICDR appointed the Second Expert knowing that justifiable doubts existed as to the Expert’s impartiality and independence.⁴³
22. On November 20, 2013, the ICDR appointed Professor Ilhyung Lee to serve as the expert (the “Third Expert”) to consider the Objector’s string confusion objection. No party objected to the appointment of Professor Lee.⁴⁴

reply with no less than 25 additional annexes. Vistaprint considers that the principle of equality of arms was not respected by this decision.” Request, ¶ 42.

³⁶ Request, Annex 14.

³⁷ Request, ¶ 33; *see* New Objections Procedure, Art. 21(a).

³⁸ Response, ¶ 27; Request, Annexes 15 and 16.

³⁹ Request, ¶¶ 36 and 43. New Objections Procedure, Art. 13(c).

⁴⁰ Request, ¶ 37.

⁴¹ Response, ¶ 28; Request, ¶ 39, Annex 19.

⁴² Request, ¶ 39, Annex 21.

⁴³ Request, ¶¶ 37-40. Vistaprint states that the Objector’s challenge was “based solely on the fact that Mr. Belding had served as the Panel in an unrelated string confusion objection” administered by ICDR. Request, ¶ 37. ICDR “was necessarily aware” that Mr. Belding had served as the Panel in the string confusion objection proceedings. “If [ICDR] was of the opinion that the fact that Mr. Belding served as the Panel in previous proceedings could give rise to justifiable doubts as to the impartiality and independence of the Panel, it should never have appointed him in the case between Web.com and Vistaprint.”

⁴⁴ Response, ¶ 28; Request, ¶ 39, Annex 22.

23. On 24 January 2014, the Third Expert issued its determination in favor of the Objector, deciding that the String Confusion Objection should be sustained.⁴⁵ The Expert concluded that

*“the <.webs> string so nearly resembles <.web> – visually, aurally and in meaning – that it is likely to cause confusion. A contrary conclusion, the Panel is simply unable to reach.”*⁴⁶

24. Moreover, the Expert found that

*“given the similarity of <.webs> and <.web>..., it is probable, and not merely possible, that confusion will arise in the mind of the average, reasonable Internet user. This is not a case of ‘mere association’.”*⁴⁷

25. Vistaprint claims that the Third Expert failed to comply with ICANN’s policies by (i) unjustifiably accepting additional submissions without making an independent assessment, (ii) making an incorrect application of the burden of proof, and (iii) making an incorrect application of the substantive standard set by ICANN for String Confusion Objections.⁴⁸ In particular, Vistaprint claims that ICANN has set a high standard for a finding of confusing similarity between two gTLD strings, and the Third Expert’s determination did not apply this standard and was arbitrary and baseless.⁴⁹

26. Vistaprint concludes that “[i]n sum, the cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the [Third Expert] show a lack of either independence and impartiality or appropriate qualification.”⁵⁰ Vistaprint further states that it took 216 days for the Third Expert to render a decision in a procedure that should have taken a maximum of 45 days.⁵¹

27. The Guidebook § 3.4.6 provides that:

*The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.*⁵²

28. Vistaprint objects that ICANN simply accepted the Third Expert’s ruling on the String Confusion Objection, without performing any analysis as to whether the ICDR and the Third Expert complied with ICANN’s policies and fundamental principles, and without

⁴⁵ Request, ¶ 39, Annex 24 (Expert Determination, *Web.com Group, Inc. v. Vistaprint Limited*, ICDR Case Nos. 50 504 221 13 and 50 504 246 13 (Consolidated) (Jan. 24, 2014)).

⁴⁶ Request, Annex 24, p. 10.

⁴⁷ Request, Annex 24, p. 11.

⁴⁸ Request, ¶¶ 44-49.

⁴⁹ Vistaprint’s First Additional Submission, ¶¶ 1-2.

⁵⁰ Request, ¶ 49.

⁵¹ Request, ¶ 41; see New gTLD Objections Procedure, Art. 21(a).

⁵² Guidebook, § 3.4.6. The New gTLD Objections Procedure further provides in Article 2(d) that:

The ‘Expert Determination’ is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

giving any rationale for doing so.⁵³

29. Vistaprint contends that ICANN’s Board remains its ultimate decision-making body and that the Board should have intervened and “cannot blindly accept advice by third parties or expert determinations.”⁵⁴ In this respect, Vistaprint highlights the Guidebook, which provides in Module 5 (Transition to Delegation) § 1 that:

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result ... the use of an ICANN accountability mechanism.⁵⁵

[Underlining added]

30. As a result of the Third Expert sustaining the Objector’s SCO, Vistaprint’s application was placed in a “Contention Set”. The Guidebook in § 3.2.2.1 explains this result:

*In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.*⁵⁶

B. Request for Reconsideration and Cooperative Engagement Process

31. On February 6, 2014 Vistaprint filed a Request for Reconsideration (“Request for Reconsideration” or “RFR”).⁵⁷ According to ICANN’s Bylaws, a RFR is an accountability mechanism which involves a review conducted by the Board Governance Committee (“BGC”), a sub-committee designated by ICANN’s Board to review and consider Reconsideration Requests.⁵⁸ A RFR can be submitted by a person or entity that has been “adversely affected” by one or more staff actions or inactions that contradict established ICANN policies.⁵⁹
32. Article IV, §2.15 of ICANN’s Bylaws sets forth the BGC’s authority and powers for handling Reconsideration Requests. The BGC, at its own option, may make a final determination on the RFR or it may make a recommendation to ICANN’s Board for

⁵³ Request, ¶ 50.

⁵⁴ Vistaprint’s First Additional Submission, ¶¶ 29-30.

⁵⁵ Guidebook, § 5.1.

⁵⁶ Guidebook, § 3.2.2.1. Module 4 (String Contention Procedures) provides that “*Contention sets are groups of applications containing identical or similar applied-for gTLD strings.*” Guidebook, § 4.1.1. Parties that are identified as being in contention are encouraged to reach settlement among. Guidebook, § 4.1.3. It is expected that most cases of contention will be resolved through voluntary agreement among the involved applicants or by the community priority evaluation mechanism. Conducting an auction is a tie-breaker mechanism of last resort for resolving string contention, if the contention has not been resolved by other means. Guidebook, § 4.3.

⁵⁷ Request, Annex 25.

⁵⁸ Response, ¶ 29; Bylaws, Art. IV, § 2.

⁵⁹ Bylaws, Art. IV, § 2.2.a.

consideration and action:

For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.

33. ICANN has determined that the reconsideration process can be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICDR, where it can be stated that the panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁶⁰
34. In its RFR, Vistaprint asked ICANN to reject the Third Expert's decision and to instruct a new expert panel to issue a new decision "that applies the standards defined by ICANN."⁶¹ Vistaprint sought reconsideration of the "various actions and inactions of ICANN staff related to the Expert Determination," claiming that "the decision fails to follow ICANN process for determining string confusion in many aspects."⁶² In particular, Vistaprint asserted that the ICDR and the Third Expert violated the applicable New gTLD Objection Procedures concerning:
- (i) the timely appointment of an expert panel;
 - (ii) the acceptance of additional written submissions;
 - (iii) the timely issuance of an expert determination;
 - (iv) an expert's duty to remain impartial and independent;
 - (v) challenges to experts;
 - (vi) the Objector's burden of proof; and
 - (vii) the standards governing the evaluation of a String Confusion Objection.
35. Vistaprint also argued that the decision was unfair, and accepting it creates disparate treatment without justified cause.⁶³
36. The Bylaws provide in Article IV, § 2.3, that the BGC "shall have the authority to":
- a. evaluate requests for review or reconsideration;*
 - b. summarily dismiss insufficient requests;*
 - c. evaluate requests for urgent consideration;*
 - d. conduct whatever factual investigation is deemed appropriate;*
 - e. request additional written submissions from the affected party, or from other parties;*
 - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without*

⁶⁰ See BGC Recommendation on Reconsideration Request 14-5 dated February 27, 2014 ("BGC Determination"), at p. 7, n. 7, Request, Annex 26, and available at <https://www.icann.org/en/system/files/files/determination-vistaprint-27feb14-en.pdf> (last accessed on Sept. 14, 2015).

⁶¹ Request, ¶ 51; Annex 25, p.7.

⁶² Request, Annex 25, p.2.

⁶³ Request, Annex 25, p.6.

reference to the Board of Directors; and
g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

37. On February 27, 2014 the BGC issued its detailed Recommendation on Reconsideration Request, in which it denied Vistaprint’s reconsideration request finding “no indication that the ICDR or the [Third Expert] violated any policy or process in reaching the Determination.”⁶⁴ The BGC concluded that:

*With respect to each claim asserted by the Requester concerning the ICDR’s alleged violations of applicable ICDR procedures concerning experts, there is no evidence that the ICDR deviated from the standards set forth in the Applicant Guidebook, the New gTLD Dispute Resolution Procedure, or the ICDR’s Supplementary Procedures for String Confusion Objections (Rules). The Requester has likewise failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC concludes that Request 14-5 be denied.*⁶⁵

38. The BGC explained what it considered to be the scope of its review:

*In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel’s substantive conclusion that the Requester’s applications for .WEBS are confusingly similar to the Requester’s application for .WEB. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that Determination.*⁶⁶

39. The BGC also stated that its determination on Vistaprint’s RFR was final:

*In accordance with Article IV, Section 2.15 of the Bylaws, the BGC’s determination on Request 14-5 shall be final and does not require Board (or NGPC⁶⁷) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC’s determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-5 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.*⁶⁸

40. On March 17, 2014, Vistaprint filed a request for a Cooperative Engagement Process

⁶⁴ BGC Determination, p. 18, Request, Annex 26.

⁶⁵ BGC Determination, p. 2, Request, Annex 26.

⁶⁶ BGC Determination, p. 7, Request, Annex 26.

⁶⁷ The “NGPC” refers to the New gTLD Program Committee, which is a sub-committee of the Board and “has all the powers of the Board.” See New gTLD Program Committee Charter | As Approved by the ICANN Board of Directors on 10 April 2012, at <https://www.icann.org/resources/pages/charter-2012-04-12-en> (last accessed Sept. 15, 2015).

⁶⁸ BGC Determination, p. 19, Request, Annex 26. As noted, the BGC concluded that its determination on Vistaprint’s RFR was final and made no recommendation to ICANN’s Board for consideration and action. Article IV, §2.17 of ICANN’s Bylaws sets out the scope of the Board’s authority for matters in which the BGC decides to make a recommendation to ICANN’s Board:

The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN’s website. The Board’s decision on the recommendation is final.

(“CEP”) with ICANN.⁶⁹ Vistaprint stated in its letter:

*Vistaprint is of the opinion that the Board of Governance Committee’s rejection of Reconsideration Request 14-5 is in violation of various provisions of ICANN’s Bylaws and Articles of Incorporation. In particular, Vistaprint considers this is in violation of Articles I, II(3), III and IV of the ICANN Bylaws as well as Article 4 of ICANN’s Articles of Incorporation. In addition, Vistaprint considers that ICANN has acted in violation of Articles 3, 7 and 9 of ICANN’s Affirmation of Commitment.*⁷⁰

41. The CEP did not lead to a resolution and Vistaprint thereafter commenced this IRP. In this regard, Module 6.6 of the Guidebook provides that an applicant for a new gTLD:

*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.*⁷¹

C. Procedures in this Case

42. On June 11, 2014, Vistaprint submitted its Request for Independent Review Process (“Request”) in respect of ICANN’s treatment of Vistaprint’s application for the .WEBS gTLD. On July 21, 2014, ICANN submitted its Response to Vistaprint’s Request (“Response”).
43. On January 13, 2015, the ICDR confirmed that there were no objections to the constitution of the present IRP Panel (“IRP Panel” or “Panel”). The Panel convened a telephonic preliminary hearing with the parties on January 26, 2015 to discuss background and organizational matters in the case. Having heard the parties, the Panel issued Procedural Order No. 1 permitting an additional round of submissions from the parties. The Panel received Vistaprint’s additional submission on March 2, 2015 (Vistaprint’s “First Additional Submission”) and ICANN’s response on April 2, 2015 (ICANN’s “First Additional Response”).
44. The Panel then received further email correspondence from the parties. In particular, Vistaprint requested that the case be suspended pending an upcoming meeting of ICANN’s Board of Directors, which Vistaprint contended would be addressing matters informative for this IRP. Vistaprint also requested that it be permitted to respond to arguments and information submitted by ICANN in ICANN’s First Additional Response. In particular, Vistaprint stated that ICANN had referenced the Final Declaration of March 3, 2015 in the IRP case involving *Booking.com v. ICANN* (the “*Booking.com Final Declaration*”).⁷² The *Booking.com Final Declaration* was issued one day after Vistaprint had submitted its First Additional Submission in this case. ICANN objected to Vistaprint’s requests, urging that there was no need for additional briefing and no justification for suspending the case.

⁶⁹ Request, Annex 27.

⁷⁰ Request, Annex 27.

⁷¹ Guidebook, § 6.6.

⁷² *Booking.com B.V. v. ICANN*, ICDR Case No. 50-2014-000247 (March 3, 2015) (“*Booking.com Final Declaration*”), at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf> (last accessed on Sept. 15, 2015)

45. On April 19, 2015, the Panel issued Procedural Order No. 2, which denied Vistaprint's request that the case be suspended and permitted Vistaprint and ICANN to submit another round of supplemental submissions. Procedural Order No. 2 also proposed two dates for a telephonic hearing with the parties on the substantive issues and the date of May 13, 2015 was subsequently selected. The Panel received Vistaprint's second additional submission on April 24, 2015 (Vistaprint's "Second Additional Submission") and ICANN's response to that submission on May 1, 2015 (ICANN's "Second Additional Response").
46. The Panel then received a letter from Vistaprint dated April 30, 2015 and ICANN's reply of the same date. In its letter, Vistaprint referred to two new developments that it stated were relevant for this IRP case: (i) the Third Declaration on the IRP Procedure, issued April 20, 2015, in the IRP involving *DotConnectAfrica Trust v. ICANN*⁷³, and (ii) the ICANN Board of Director's resolution of April 26, 2015 concerning the *Booking.com Final Declaration*. Vistaprint requested that more time be permitted to consider and respond to these new developments, while ICANN responded that the proceedings should not be delayed.
47. Following further communications with the parties, May 28, 2015 was confirmed as the date for a telephonic hearing to receive the parties' oral submissions on the substantive issues in this case. On that date, counsel for the parties were provided with the opportunity to make extensive oral submissions in connection with all of the facts and issues raised in this case and to answer questions from the Panel.⁷⁴
48. Following the May 28, 2015 hear, the Panel held deliberations to consider the issues in this IRP, with further deliberations taking place on subsequent dates. This Final Declaration was provided to the ICDR in draft form on October 5, 2015 for non-substantive comments on the text; it was returned to the Panel on October 8, 2015.

III. ICANN's Articles, Bylaws, and Affirmation of Commitments

49. Vistaprint states that the applicable law for these IRP proceedings is found in ICANN's Articles of Incorporation and Bylaws. Both Vistaprint and ICANN make numerous references to these instruments. This section sets out a number of the key provisions of

⁷³ Third Declaration on the IRP Procedure, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083 (April 20, 2015) ("*DCA Third Declaration on IRP Procedure*"), at <https://www.icann.org/en/system/files/files/irp-procedure-declaration-20apr15-en.pdf> (last accessed on Sept. 15, 2015)

⁷⁴ The Panel conducted these IRP proceedings relying on email and telephonic communications, with no objections to this approach from either party and in view of ICANN's Bylaws, Article IV, § 3.12 ("*In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone.*").

the Articles and the Bylaws, as they are relied upon by the parties in this IRP.⁷⁵ Vistaprint also references the Affirmation of Commitments – relevant provisions of this document are also provided below.

A. Articles of Incorporation

50. Vistaprint refers to the Articles of Incorporation, highlighting Article IV’s references to “relevant principles of international law” and “open and transparent processes”. Article 4 of the Articles provides in relevant part:

The Corporation shall operate 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 and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

[Underlining added]

51. Vistaprint states that general principles of international law – and in particular the obligation of good faith – serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.⁷⁶ The general principle of good faith is one of the most basic principles governing the creation and performance of legal obligations, and rules involving transparency, fairness and non-discrimination arise from it.⁷⁷ Vistaprint also emphasizes that the principle of good faith includes an obligation to ensure procedural fairness by adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.⁷⁸ The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken.⁷⁹

B. Bylaws

a. Directives to ICANN and its Board

52. The Bylaws contain provisions that address the role, core values and accountability of ICANN and its Board.
53. Article IV, § 3.2 specifies the right of “any person materially affected” to seek independent review (through the IRP) of a Board action alleged to be a violation of the

⁷⁵ ICANN’s Articles are available at <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on Sept. 15, 2015). ICANN’s Bylaws are available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on Sept. 15, 2015).

⁷⁶ Request, ¶ 55. Vistaprint also states that “U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.” Request, ¶ 60, n.8.

⁷⁷ Request, ¶ 59.

⁷⁸ Request, ¶ 60.

⁷⁹ Request, ¶ 66.

Articles or Bylaws:

Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

54. Vistaprint has relied on certain of ICANN's core values set forth in Article I, § 2 (Core Values) of the Bylaws. The sub-sections underlined below are invoked by Vistaprint as they relate to principles of promoting competition and innovation (Article I § 2.2, 2.5 and 2.6); openness and transparency (Article I § 2.7); neutrality, fairness, integrity and non-discrimination (Article I § 2.8); and accountability (Article I § 2.10). Article I § 2 provides in full:

Section 2. Core Values

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

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

3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

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

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

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

*8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*⁸⁰

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

⁸⁰ Vistaprint states that “[t]his requirement is also found in applicable California law, which requires that decisions be made according to procedures that are ‘fair and applied uniformly’, and not in an ‘arbitrary and capricious manner.’” Request, ¶ 62, n.9.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[Underlining added]

55. Vistaprint refers to Article II, § 3 in support of its arguments that the Board failed to act fairly and without discrimination as it considered Vistaprint's two .WEBS applications and the outcome of the *Vistaprint SCO* case. Article II, § 3 provides:

Section 3 (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

[Underlining added]

56. Vistaprint refers to Article III (Transparency), § 1 of the Bylaws in reference to the principle of transparency:

Section 1. PURPOSE

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

[Underlining added]

57. Vistaprint also refers Article IV (Accountability and Review), § 1 as it relates to ICANN's accountability and core values, providing in relevant part:

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.

[Underlining added]

b. Directives for the IRP Panel

58. ICANN's Bylaws also contain provisions that speak directly to the role and authority of the Panel in this IRP case. In particular, Article IV of the Bylaws creates the IRP as an accountability mechanism, along with two other mechanisms: (i) the RFR process, described above and on which Vistaprint relied, and (ii) an unrelated periodic review of

ICANN's structure and procedures.⁸¹

59. Article IV, § 1 of the Bylaws emphasizes that the IRP is a mechanism designed to ensure ICANN's accountability:

The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

[Underlining added]

60. In this respect, the IRP Panel provides an independent review and accountability mechanism for ICANN and its Board. Vistaprint urges that IRP is the *only* method established by ICANN for holding itself accountable through independent third-party review of its decisions.⁸² The Bylaws in Article IV, § 3.1 provides:

In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

61. ICANN states in its Response that “[t]he IRP Panel is tasked with determining whether the Board’s actions are consistent with ICANN’s Articles and Bylaws.”⁸³ ICANN also maintains that while the IRP is intended to address challenges to conduct undertaken by ICANN’s Board, it is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN’s activities.⁸⁴

62. In line with ICANN’s statement, the Bylaws provide in Article IV, § 3.4, that:

Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.⁸⁵

[Underlining added]

63. The Bylaws also include a standard of review in Article IV, § 3.4, providing that the Panel:

⁸¹ Note that Article V (Ombudsman) of the Bylaws also establishes the Office of Ombudsman to facilitate the fair, impartial, and timely resolution of problems and complaints for those matters where the procedures of the RFR or the IRP have not been invoked.

⁸² Request, ¶ 57.

⁸³ Response, ¶ 33.

⁸⁴ Response, ¶ 4.

⁸⁵ Bylaws, Art. IV, § 3.4. The reference to “actions” of ICANN’s Board should be read to refer to both “actions or inactions” of the Board. See Bylaws, Art. IV, § 3.11(c) (“The IRP Panel shall have the authority to:...(c) declare whether an *action or inaction* of the Board was inconsistent with the Articles of Incorporation or Bylaws”); see also Supplementary Procedures, which define “Independent Review” as referring

“to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation.

“must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?⁸⁶

64. The Bylaws in Article IV, § 3.11 set out the IRP Panel’s authority in terms of alternative actions that it may take once it has an IRP case before it:

The IRP Panel shall have the authority to:

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
- e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- f. determine the timing for each proceeding.⁸⁷

65. Further, the Bylaws in Article IV, § 3.18 state that

“[t]he IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party.”⁸⁸

[Underlining added]

66. The Bylaws address the steps to be taken after the Panel issues a determination in the IRP. Article IV, § 3.21⁸⁹ states that “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value”:

Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.

[Underlining added]

C. Affirmation of Commitments

67. Vistaprint claims that ICANN violated the ICANN’s Affirmation of Commitments, in particular Articles 3, 7 and 9. This Affirmation of Commitments is instructive, as it explains ICANN’s obligations in light of its role as regulator of the DNS. Article 3, 7 and 9 are set forth below in relevant part:

⁸⁶ Bylaws, Art. IV, § 3.4.

⁸⁷ Bylaws, Art. IV, § 3.11.

⁸⁸ Bylaws, Art. IV, § 3.18.

⁸⁹ This section was added by the amendments to the Bylaws on April 11, 2013.

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

* * * *

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

* * * *

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.... Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

[Underlining added]

IV. Summary of Parties' Contentions

68. This presentation of the parties' contentions is intended to provide a summary to aid in understanding this Final Declaration. It is not an exhaustive recitation of the entirety of the parties' allegations and arguments. Additional references to the parties' assertions are included in sections II (Factual and Procedural Background), III (ICANN's Articles, Bylaws and Affirmation of Commitments) and V (Analysis and Findings).
69. The IRP Panel has organized the parties' contentions into three categories, based on the areas of claim and dispute that have emerged through the exchange of three rounds of submissions between the parties and the Panel. The *first* section relates to the authority of the Panel, while the *second* and *third* sections address the allegations asserted by Vistaprint, which fall into two general areas of claim. In this regard, Vistaprint claims that the ICDR and Third Expert made numerous errors of procedure and substance during the String Confusion Objection proceedings, which resulted in Vistaprint being denied a fair hearing and due process. As a result of the flawed SCO proceedings, Vistaprint alleged that ICANN through its Board (and the BGC), in turn: (i) violated its Articles, Bylaws and the Guidebook (e.g., failed to act in good faith, fairly, non-arbitrarily, with accountability, due diligence, and independent judgment) by accepting the determination in the *Vistaprint SCO* and failing to redress and remedy the numerous alleged process and substantive errors in the SCO proceedings, and (ii) discriminated against Vistaprint, in violation of its Articles and Bylaws, by delaying Vistaprint's .WEBS gTLD applications and putting them into a Contention Set, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.
70. Thus, the three primary areas of contention between the parties are as follows:
- IRP Panel' Authority: The parties have focused on the authority of the IRP Panel, including the *standard of review* to be applied by the Panel, whether the Panel's IRP declaration is *binding* or *non-binding* on ICANN, and, on a very closely related point, whether the Panel has authority to award any *affirmative relief* (as compared to issuing only a declaration as to whether or not ICANN has acted in a manner that is consistent or not with its Articles and Bylaws).
 - SCO Proceedings Claim: Vistaprint claims ICANN's failed to comply with the obligations under its Articles and Bylaws by accepting the Third Expert's SCO determination and failing to provide a remedy or redress in response to numerous alleged errors of process and substance in the *Vistaprint SCO* proceedings. As noted above, Vistaprint claims there were process and substantive violations, which resulted in Vistaprint not being accorded a fair hearing and due process. Vistaprint states that because ICANN's Bylaws require ICANN to apply established policies neutrally and fairly, therefore, the Panel should also consider the policies in Module 3 of the

Guidebook concerning the String Confusion Objection procedures. Vistaprint objects to the policies themselves as well as their implementation through the ICDR and the Third Expert. Vistaprint claims that ICANN's Board, acting through the BGC or otherwise, should have acted to address these deficiencies and its choice not to intervene violated the Articles and Bylaws.

- Disparate Treatment Claim: Vistaprint claims ICANN discriminated against Vistaprint through ICANN's (and the BGC's) acceptance of the Third Expert's allegedly baseless and arbitrary determination in *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

A. Vistaprint's Position

a. IRP Panel's Authority

71. Standard of review: Vistaprint emphasizes that ICANN is accountable to the community for operating in a manner that is consistent with the Article and Bylaws, and with due regard for the core values set forth in Article I of the Bylaws. To achieve this required accountability, the IRP Panel is "charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."⁹⁰ Vistaprint states that the IRP Panel's fulfillment of this core obligation is crucial to ICANN's commitment to accountability. The IRP is the only method established by ICANN for holding itself accountable through third-party review of its decisions.⁹¹
72. Vistaprint contends that ICANN is wrong in stating (in its Response⁹²) that a deferential standard of review applies in this case.⁹³ No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would be inappropriate. It would fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by Article 9.1 of ICANN's Affirmation of Commitments and ICANN's core values, which require ICANN to "remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness".⁹⁴
73. Vistaprint states further that the most recent version of ICANN's Bylaws, amended on

⁹⁰ Request, ¶ 55-56 (citing Bylaws, Art. IV, §§1 & 3.4).

⁹¹ Request, ¶ 57.

⁹² Response, ¶ 33.

⁹³ Vistaprint's First Additional Submission, ¶ 36.

⁹⁴ Vistaprint's First Additional Submission, ¶¶ 36-37; Request, ¶ 57.

April 11, 2013, require that the IRP Panel focus on whether ICANN's Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.⁹⁵ Vistaprint asserts, however, that these issues are mentioned by way of example only. The Bylaws do not restrict the IRP Panel's remit to these issues alone, as the Panel's fundamental task is to determine whether the Board has acted consistently with the Articles and Bylaws⁹⁶

74. IRP declaration binding or non-binding: Vistaprint contends that the outcome of this IRP is binding on ICANN and that any other outcome “would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability.”⁹⁷
75. Vistaprint states that since ICANN's amendment of its Bylaws, IRP declarations have precedential value.⁹⁸ Vistaprint asserts the precedential value – and binding force – of IRP declarations was confirmed in a recent IRP panel declaration,⁹⁹ which itself has precedential value for this case. Vistaprint argues that any other outcome would effectively grant the ICANN Board arbitrary and unfettered discretion, something which was never intended and would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability.¹⁰⁰
76. Vistaprint contends that the IRP is not a mere "corporate accountability mechanism" aimed at ICANN's internal stakeholders.¹⁰¹ The IRP is open to any person materially affected by a decision or action of the Board¹⁰² and is specifically available to new gTLD applicants, as stated in the Guidebook, Module 6.4. Vistaprint claims that *internally*, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. *Externally*, however, the ICANN Board's discretionary power is limited, and ICANN and its Board must offer redress when its decisions or actions harm third parties.¹⁰³
77. Vistaprint argues further that the IRP has all the characteristics of an international arbitration.¹⁰⁴ The IRP is conducted pursuant to a set of independently developed

⁹⁵ Bylaws, Article IV, § 3.4.

⁹⁶ Vistaprint's First Additional submission, ¶ 35.

⁹⁷ Vistaprint's First Additional Submission, ¶ 37.

⁹⁸ Vistaprint's First Additional Submission, ¶ 37 (citing Bylaws, Art. IV § 3.21).

⁹⁹ See *DCA Third Declaration on IRP Procedure*, ¶ 131 (the panel ruled that “[b]ased on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties”).

¹⁰⁰ Vistaprint's First Additional Submission, ¶ 37.

¹⁰¹ Vistaprint's Second Additional Submission, ¶ 29.

¹⁰² Bylaws, Article IV § 3.2 (“Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.”).

¹⁰³ Vistaprint's Second Additional Submission, ¶ 15.

¹⁰⁴ Vistaprint's Second Additional Submission, ¶ 27.

international arbitration rules: the ICDR Rules, as modified by the Supplementary Procedures. The IRP is administered by the ICDR, which is a provider of international arbitration services. The decision-maker is not ICANN, but a panel of neutral individuals selected by the parties in consultation with the ICDR, and appointed pursuant to the ICDR Rules.

78. Vistaprint provides further detailed argument in its Second Additional Submission that the IRP is binding in view of ICANN's Bylaws, the ICDR Rules and the Supplementary Procedures, and that any ambiguity on this issue should weigh against ICANN as the drafter and architect of the IRP:

31. As mentioned in Vistaprint's Reply, a previous IRP panel ruled that "[v]arious provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the [IRP] Panel's decisions, opinions and declarations are binding" and that "[t]here is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the [IRP] Panel either advisory or non-binding" (RM 32, para 98).¹⁰⁵

32. Indeed, as per Article IV(3)(8) of the ICANN Bylaws, the ICANN Board has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures (RM 32, para. 101). The Supplementary Procedures supplement the ICDR Rules (Supplementary Procedures, Preamble and Section 2). The preamble of the ICDR Rules provides that "[a] dispute can be submitted to an arbitral tribunal for a final and binding decision". Article 30 of the ICDR Rules specifies that "[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties". No provision in the Supplementary Procedures deviates from the rule that the Panel's decisions are binding. On the contrary, Section 1 of the Supplementary Procedures defines an IRP Declaration as a decision/opinion of the IRP Panel. Section 10 of the Supplementary Procedures requires that IRP Declarations i) are made in writing, and ii) specifically designate the prevailing party. Where a decision must specifically designate the prevailing party, it is inherently binding. Moreover the binding nature of IRP Declarations is further supported by the language and spirit of Section 6 of the Supplementary Procedures and Article IV(3)(11)(a) of the ICANN Bylaws. Pursuant to these provisions, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the IRP Panel would not be considered advisory (RM 32, para. 107).

33. Finally, even if ICANN's Bylaws and Supplementary Procedures are ambiguous - quod non - on the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Vistaprint is clearly an adhesive one. In such a situation, the rule of contra proferentem applies. As the drafter and architect of the IRP Procedure, it was possible for ICANN, and clearly within its power, to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure (RM 32, paras. 108-109).

79. Finally, Vistaprint contends that ICANN conceived of the IRP as an alternative to dispute

¹⁰⁵ Citing *DCA Third Declaration on IRP Procedure*, ¶ 98.

resolution by the courts. To submit a new gTLD application, Vistaprint had to agree to terms and conditions including a waiver of its right to challenge ICANN's decisions on Vistaprint's applications in a court, provided that as an applicant, Vistaprint could use the accountability mechanisms set forth in ICANN's Bylaws. Vistaprint quotes the *DCA Third Declaration on Procedure*, in which the IRP panel stated:

*assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for [Vistaprint] is the IRP.*¹⁰⁶

80. Authority to award affirmative relief: Vistaprint makes similar arguments in support of its claim that the IRP Panel has authority to grant affirmative relief. Vistaprint quotes the *Interim Declaration on Emergency Request for Interim Measures of Protection in Gulf Cooperation Council v. ICANN* (“GCC Interim IRP Declaration”),¹⁰⁷ where that panel stated that the right to an independent review is

a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process.

81. Accordingly, Vistaprint argues that the IRP Panel's authority is not limited to declare that ICANN breached its obligations under the Articles, Bylaws and the Guidebook. To offer effective redress to gTLD applicants, the Panel may indicate what action ICANN must take to cease violating these obligations. The point is all the stronger here, as ICANN conceived the IRP to be the sole independent dispute resolution mechanism available to new gTLD applicants.¹⁰⁸

b. SCO Proceedings Claim

82. Vistaprint states that this case relates to ICANN's handling of the determination in the *Vistaprint SCO* proceedings following String Confusion Objections to Vistaprint's .WEBS applications, but does not relate to the merits of that SCO determination.¹⁰⁹
83. Vistaprint's basic claim here is that given the errors of process and substance in those proceedings, Vistaprint was not given a fair opportunity to present its case. Vistaprint was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules. Further, Vistaprint was not given any meaningful opportunity for remedy or redress once the decision was made, and in this way ICANN's Board allegedly violated its Articles and Bylaws.¹¹⁰

¹⁰⁶ *DCA Third Declaration on IRP Procedure*, ¶ 40.

¹⁰⁷ *Interim Declaration on Emergency Request for Interim Measures of Protection in Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065, ¶ 59 (February 12, 2015) (“GCC Interim IRP Declaration”).

¹⁰⁸ Vistaprint's Second Additional Submission, ¶ 24.

¹⁰⁹ Request, ¶ 4.

¹¹⁰ Request, ¶ 71.

84. Although Vistaprint challenged the SCO decision through ICANN's Request for Reconsideration process, ICANN refused to reconsider the substance of the challenged decision, or to take any action to remedy the lack of due process. In doing so, Vistaprint claims ICANN failed to act in a fair and non-arbitrary manner, with good faith, accountability, due diligence and independent judgment, as required by ICANN's Bylaws and Articles.¹¹¹ ICANN's acceptance of the SCO determination and refusal to reverse this decision was an abdication of responsibility and contrary to the evaluation policies ICANN had established in the Guidebook.¹¹²
85. A number of Vistaprint's contentions regarding the alleged violations of process and substance in SCO proceedings are described in part II.A above addressing Vistaprint's .WEBS applications and the SCO proceedings. Vistaprint's alleges as follows:
- (i) ICDR's appointment of the First Expert was untimely, in violation of Article 13(a) of the New gTLD Objections Procedure¹¹³;
 - (ii) the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure¹¹⁴;
 - (iii) ICDR violated Article 21 of the New gTLD Objections Procedure¹¹⁵ by failing to ensure the timely issuance of an expert determination in the SCO;
 - (iv) the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure¹¹⁶;
 - (v) ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR's Supplementary Procedures for String Confusion Objections (Rules);
 - (vi) the Determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure;
 - (vii) the Third Expert incorrectly applied the Objector's burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure, which place the burden of proof on the Objector; and

¹¹¹ Request, ¶ 71.

¹¹² Request, ¶ 8.

¹¹³ Article 13(a) of the Procedure provides: "The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response."

¹¹⁴ Request, ¶ 42. Article 17 provides that "[t]he Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response." Article 18 states that "[i]n order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence."

¹¹⁵ Article 21(a) of the Procedure provides that "[t]he DSRP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel."

¹¹⁶ Article 13(c) of the New gTLD Objections Procedure provides that "[a]ll Experts acting under this Procedure shall be impartial and independent of the parties." Section 3.4.4 of the Guidebook provides that the ICDR will "follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence."

(viii) the Third Expert incorrectly applied ICANN’s substantive standard for evaluation of String Confusion Objections, as set out in Section 3.5.1 of the Guidebook, in particular the standards governing the evaluation of a string confusion objection.

86. Based on these alleged errors in process and substance, Vistaprint concludes in its Request:

49. In sum, the cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the Panel show a lack of either independence and impartiality or appropriate qualification on the fact of the Panel. The former is contrary to Article 13 of the Procedure; the latter is contrary to the Applicant Guidebook, Module 3-16, which requires that a panel (ruling on a string confusion or other objection) must consist of “appropriately qualified experts appointed to each proceeding by the designated DRSP”.¹¹⁷

87. Vistaprint states that ICANN’s Board disregarded these accumulated infringements and turned a blind eye to the Third Expert’s lack of independence and impartiality. Vistaprint asserts that ICANN is not entitled to blindly accept expert determinations from SCO cases; it must verify whether or not, by accepting the expert determination and advice, it is acting consistent with its obligations under its Articles, Bylaws and Affirmation of Commitments.¹¹⁸ Vistaprint further claims ICANN would be in violation of these obligations if it were to accept an expert determination or advice in circumstances where the ICDR and/or the expert had failed to comply with the New gTLD Objections Procedure and/or the ICDR Rules for SCOs, or where a panel – even if it had been correctly appointed – had failed to correctly apply the standard set by ICANN.¹¹⁹

88. Vistaprint states that following ICANN’s decision to accept the *Vistaprint SCO* determination, Vistaprint filed its Reconsideration Request detailing how ICANN’s acceptance of the Third Expert’s determination was inconsistent with ICANN’s policy and obligations under its Articles, Bylaws and Affirmation of Commitments. Background on the RFR procedure is provided above in part II.B. Despite this, Vistaprint states that ICANN refused to reverse its decision.

89. The IRP Panel has summarized as follows Vistaprint’s SCO Proceedings Claim concerning ICANN’s alleged breaches of its obligations under the Articles, Bylaws and Affirmation of Commitments:

- (1) ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint’s .WEBS applications.¹²⁰ Good faith encompasses the obligation to ensure procedural fairness and due process, including equal and fair treatment of the parties, fair notice, and a fair opportunity to present one’s case. These are more than just formalistic procedural requirements. The opportunity must be meaningful: the party must be given adequate notice of the relevant

¹¹⁷ Request, ¶ 49.

¹¹⁸ Request, ¶ 6.

¹¹⁹ Request, ¶ 6.

¹²⁰ Request, ¶¶ 69-71.

rules and be given a full and fair opportunity to present its case. And the mechanisms for redress must be both timely and effective.

Vistaprint claims that it was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure. Thus, ICANN's Board failed to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles.

- (2) ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the Guidebook and Bylaws.¹²¹ Vistaprint argues that there is no probability of user confusion if both .WEBS and .WEB were delegated as gTLD strings. Vistaprint states expert evidence confirms that there is no risk that Internet users will be confused and the Third Expert could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings. As confirmed by the Objector,¹²² the average reasonable Internet user is used to distinguishing between words (and non-words) that are much more similar than the strings, .WEBS and .WEB. Since these strings cannot be perceived confusingly similar by the average reasonable Internet user, the *Vistaprint SCO* determination that they are confusingly similar is contradictory to ICANN's policy as established in the Guidebook.
- (3) ICANN failed to comply with its obligation to act fairly and with due diligence and independent judgment as called for under Article 4 of the Articles of Incorporation, Articles I § 2.8 and IV § 3.4 of the Bylaws by accepting the SCO determination made by the Third Expert, who was allegedly not independent and impartial.¹²³ Vistaprint claims that the Third Expert was not independent and impartial and/or is not appropriately qualified. However, Vistaprint claims this did not prevent ICANN from accepting the determination by the Third Expert, without even investigating the dependence and partiality of the Expert when serious concerns were raised to the ICANN Board in the RFR. This is a failure of ICANN to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles.
- (4) ICANN failed to comply with its obligations under the Article 4 of the Articles, and Article I §§ 2.7 and 2.8 and Article III § 1 of the Bylaws (and Article 9.1 of the Affirmation of Commitments) to act fairly and transparently by failing to disclose/perform any efforts to optimize the service that the ICDR provides in the New gTLD Program.¹²⁴ Vistaprint contends that the BGC's determination on Vistaprint's RFR shows that the BGC made no investigation into Vistaprint's fundamental questions about the Panel's arbitrariness, lack of independence, partiality, inappropriate

¹²¹ Request, ¶ 72.

¹²² Request, Annex 10.

¹²³ Request, ¶ 73.

¹²⁴ Request, ¶¶ 52 and 77.

qualification. In addition, rather than identifying the nature of the conflict that forced the First Expert to step down, the BGC focused on developing hypotheses of reasons that could have led to this expert to stepping down. According to Vistaprint, this shows that the BGC did not exercise due diligence in making its determination and was looking for unsubstantiated reasons to reject Vistaprint's Reconsideration Request rather than making a fair determination.

In addition, as it is ICANN's responsibility to ensure that its policies and fundamental principles are respected by its third party vendors, ICANN had agreed with the ICDR that they were going to "communicate regularly with each other and seek to optimize the service that the ICDR provides as a DRSP in the New gTLD Program" and that ICANN was going to support the ICDR "to perform its duties...in a timely and efficient manner".¹²⁵ However, ICANN has failed to show that it sought in any way to optimize the ICDR's service vis-à-vis Vistaprint or that it performed any due diligence in addressing the concerns raised by Vistaprint. Instead, the BGC denied Vistaprint's RFR without conducting any investigation.

- (5) ICANN failed to comply with its obligation to remain accountable under Articles I § 2.10 and IV § 1 of the Bylaws (and Articles 3(a) and 9.1 of the Affirmation of Commitments) by failing to provide any remedy for its mistreatment of Vistaprint's gTLD applications.¹²⁶ Vistaprint claims that because of ICANN's unique history, role and responsibilities, its constituent documents require that it operate with complete accountability. In contrast to this obligation, throughout its treatment of Vistaprint's applications for .WEBS, ICANN has acted as if it and the ICDR are entitled to act with impunity. ICANN adopted the Third Expert's determination without examining whether it was made in accordance with ICANN's policy and fundamental principles under its Articles and Bylaws. When confronted with process violations, ICANN sought to escape its responsibilities by relying on unrealistic hypotheses rather than on facts that should have been verified. Additionally, ICANN has not created any general process for challenging the substance of SCO expert determinations, while acknowledging the need for such a process by taking steps to develop a review process mechanism for certain individual cases involving SCO objections.
- (6) ICANN failed to promote competition and innovation under Articles I § 2.2 (and Article 3(c) of the Affirmation of Commitments) by accepting the Third Expert's determination.¹²⁷ Vistaprint's argues that the Objector's sole motive in filing the SCO against Vistaprint was to prevent a potential competitor from entering the gTLD market. This motive is contrary to the purpose of ICANN's New gTLD Program. The Board's acceptance of the determination in the *Vistaprint SCO*, which was filed with an intent contrary to the interests of both competition and consumers, was contrary to ICANN's Bylaws.

c. Disparate Treatment Claim

¹²⁵ Request, ¶¶ 52.

¹²⁶ Request, ¶¶ 78-79.

¹²⁷ Request, ¶ 80.

90. Vistaprint claims that ICANN’s Board discriminated against Vistaprint through the Board’s (and the BGC’s) acceptance of the Third Expert’s allegedly baseless and arbitrary determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.
91. Vistaprint states that the “IRP Panel’s mandate includes a review as to whether or not ICANN’s Board discriminates in its interventions on SCO expert determinations,” and contends that “[d]iscriminating between applicants in its interventions on SCO expert determinations is exactly what the Board has done with respect to Vistaprint’s applications.”¹²⁸
92. Vistaprint asserts that in contrast to the handling of other RFRs, the BGC did not give the full ICANN Board the opportunity to consider the *Vistaprint SCO* matter and did not provide detailed minutes of the meeting in which the BGC’s decision was taken.¹²⁹ Vistaprint states this is all the more striking as, in other matters related to handling of SCOs with no concerns about the impartiality and independence of the expert or the procedure, the Board considered potential paths forward to address perceived inconsistencies in expert determinations in the SCO process, including implementing a review mechanism. The Board also directed ICANN’s President and CEO, or his designee, to publish this proposed review mechanism for public comment.¹³⁰ Vistaprint emphasizes that ICANN’s Board took this decision the day before Vistaprint filed its Reconsideration Request regarding the *Vistaprint SCO*. However, this did not prevent the BGC from rejecting Vistaprint’s RFR without considering whether such a review mechanism might also be appropriate for dealing with the allegedly unfair and erroneous treatment of the SCO related to Vistaprint’s .WEBS applications.¹³¹
93. The core of Vistaprint’s discrimination and disparate treatment claims is stated in its First Additional Submission:
7. *Other applicants have equally criticized SCO proceedings. In a letter to ICANN’s CEO, United TLD Holdco, Ltd. denounced the process flaws in the SCO proceedings involving the strings .com and .cam. DERCars, LCC filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .car and .cars. Amazon EU S.a.r.l. filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .shop and .通販 (which means ‘online shopping’ in Japanese). The ICANN Board took action in each of these matters.*
- *With respect to the Expert Determination finding .cam confusingly similar to .com, the ICANN Board ordered that an appeals process be developed to address the “perceived inconsistent or otherwise unreasonable SCO Expert Determination”.*
 - *With regard to the Expert Determination finding .cars confusingly similar to .car, the ICANN Board ordered its staff to propose a review mechanism. DERCars decided to withdraw its*

¹²⁸ Vistaprint’s Second Additional Submission, ¶ 20-21.

¹²⁹ Request, ¶ 52.

¹³⁰ Request, ¶ 52 (referencing NGPC Resolution 2014.02.05.NG02).

¹³¹ Request, ¶ 52.

application for .cars before the review mechanism was implemented. As a result, it was no longer necessary for the ICANN Board to further consider the proposed review process.

- With regard to the Expert Determination finding 通販 confusingly similar to .shop, the ICANN Board ordered that an appeals process be developed to address the “perceived inconsistent or otherwise unreasonable SCO Expert Determination”.

8. While the ICANN Board took action in the above-mentioned matters, it did not do so with respect to the .webs / .web determination. However, the .webs / .web determination was equally unreasonable, and at least equally serious substantive and procedural errors were made in these SCO proceedings. There is no reason for ICANN to treat the .webs / .web determination differently.

* * * *

12. When there are clear violations of the process and the outcome is highly objectionable (all as listed in detail in the request for IRP), the ICANN Board must intervene, as it has done with regard to other applications. The ICANN Board cannot justify why it intervenes in certain cases (.cars / .car, .cam / .com and 通販 / .shop), but refuses to do so in another case (.webs / .web). This is a clear violation of its Bylaws and Articles of Incorporation. The Panel in the current IRP has authority to order that ICANN must comply with its Bylaws and Articles of Incorporation and must disregard the expert determination in relation to Vistaprint’s .webs applications.¹³²

* * * *

31. When the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants. Article II, Section 3 of ICANN’s Bylaws provides that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition”. However, with regard to the SCO proceedings, the ICANN Board has done the exact opposite. It created the opportunity for some aggrieved applicants to participate in an appeals process, while denying others.

32. As explained above, there is no justification for this disparate treatment, and the ICANN Board has not given any substantial and reasonable cause that would justify this discrimination.

94. Vistaprint also contends that ICANN cannot justify the disparate treatment:

22. ICANN’s attempt to justify the disparate treatment of Vistaprint’s applications is without merit. ICANN argues that its Board only intervened with respect to specific expert determinations because there had been several expert determinations regarding the same strings that were seemingly inconsistent (fn. omitted). Vistaprint recognizes that the ICANN Board intervened to address “perceived inconsistent or otherwise unreasonable SCO Expert Determinations” (fn. omitted). However, ICANN fails to explain why the SCO Expert Determination on Vistaprint’s .webs applications was not just as unreasonable as the SCO Expert Determinations involving .cars/.car, .cam/.com and 通販 / .shop. Indeed, the determination concerning Vistaprint’s .webs applications expressly relies on the determination concerning .cars/.car, that was considered inconsistent or otherwise unreasonable by the ICANN Board that rejected the reasoning applied in the two other .cars/.car expert determinations (fn. omitted).

23. Therefore, Vistaprint requests the IRP Panel to exercise its control over the ICANN Board and to declare that ICANN discriminated Vistaprint’s applications.

95. Timing: Vistaprint contends that the objections it raises in this IRP concerning the Third Expert’s SCO determination and the Guidebook and its application are timely.¹³³ While

¹³² Vistaprint’s First Additional Submission, ¶ 12.

¹³³ Vistaprint’s Second Additional Submission, ¶¶ 8-12.

ICANN argues that the time for Vistaprint to object to the SCO procedures as established in the Guidebook has long passed,¹³⁴ Vistaprint responds that the opportunity to challenge the erroneous application of the Guidebook in violation of ICANN's fundamental principles only arose when the flaws in ICANN's implementation of the Guidebook became apparent. At the time of the adoption of the Guidebook, Vistaprint was effectively barred from challenging it by the fact that it could not – at that time – show any harm. Further, to raise an issue at that time would have required Vistaprint to reveal that it was contemplating making an application for a new gTLD string, which might have encouraged opportunistic applications by others seeking to extract monetary value from Vistaprint. Although the IRP panel in the *Booking.com v. ICANN* IRP raised similar timing concerns, it did not draw the distinction between the adoption of the general principles and their subsequent implementation.

B. ICANN's Position

a. IRP Panel's Authority

96. Standard of review: ICANN describes the IRP as a unique mechanism available under ICANN's Bylaws.¹³⁵ The IRP Panel is tasked with determining whether the Board's actions are consistent with ICANN's Articles and Bylaws. ICANN states that its Bylaws specifically identify a deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, and the rules are clear that the IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.¹³⁶ In particular, ICANN cites to Article IV, § 3.4 of the Bylaws indicating the IRP Panel is to apply a defined standard of review to the IRP Request, focusing on:
- a. did the Board act without conflict of interest in taking its decision?;
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
97. Further, ICANN states that the IRP addresses challenges to conduct undertaken by ICANN's Board of Directors; it is not a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN's activities.¹³⁷ The IRP is also not an appropriate forum to challenge the BGC's ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN's Articles or Bylaws.¹³⁸
98. IRP Declaration binding or non-binding: ICANN states that the IRP "is conducted pursuant to Article IV, section 3 of ICANN's Bylaws, which creates a non-binding method

¹³⁴ ICANN's First Additional Response, ¶¶ 28-29.

¹³⁵ Response, ¶ 32.

¹³⁶ Response, ¶ 33; ICANN's First Additional Response, ¶ 10.

¹³⁷ Response, ¶ 4.

¹³⁸ Response, ¶ 12.

of evaluating certain actions of ICANN's Board.¹³⁹ The Panel has one responsibility – to “declar[e] whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws.”¹⁴⁰ The IRP is not an arbitration process, but rather a means by which entities that participate in ICANN's processes can seek an independent review of decisions made by ICANN's Board.

99. ICANN states that the language of the IRP provisions set forth in Article IV, section 3 of the Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP panel declarations are not binding on ICANN:¹⁴¹ ICANN explains as follows in its First Additional Response:

35. First, the Bylaws charge an IRP panel with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." The Board is then obligated to "review[]"¹⁴² and "consider" an IRP panel's declaration at the Board's next meeting "where feasible."¹⁴³ The direction to "review" and "consider" an IRP panel's declaration means that the Board has discretion as to whether it should adopt that declaration and whether it should take any action in response to that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.

100. ICANN contends that the IRP Panel's declaration is not binding because the Board is not permitted to outsource its decision-making authority.¹⁴⁴ However, the Board will, of course, give serious consideration to the IRP Panel's declaration and, “where feasible,” shall consider the IRP Panel's declaration at the Board's next meeting.¹⁴⁵

101. As to the drafting process, ICANN provides the following background in its First Additional Response:

36. Second, the lengthy drafting history of ICANN's independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations (fn. omitted). And when, in 2001, the Committee on ICANN Evolution and Reform (ERC) recommended the creation of an independent review process, it called for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws" (fn. omitted). The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP "decisions will be nonbinding, because the Board will retain final decision-making authority" (fn. omitted).

¹³⁹ Response, ¶ 2.

¹⁴⁰ Response, ¶ 2 (quoting Bylaws, Art. IV, § 3.4).

¹⁴¹ ICANN's First Additional Response, ¶ 34.

¹⁴² ICANN's First Additional Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.11.d).

¹⁴³ ICANN's First Additional Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).

¹⁴⁴ Response, ¶ 35.

¹⁴⁵ Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).

37. In February 2010, the first IRP panel to issue a final declaration, the ICM IRP Panel, unanimously rejected the assertion that IRP panel declarations are binding¹⁴⁶ and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect." Nothing has occurred since the issuance of the ICM IRP Panel's declaration that changes the fact that IRP panel declarations are not binding. To the contrary, in April 2013, following the ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the ICM IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

38. The amendments to the Bylaws, which occurred following a community process on proposed IRP revisions, added, among other things, a sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value" (fn. omitted). Vistaprint argues that this new language, which does not actually use the word "binding," nevertheless provides that IRP panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, and the plain text of the Bylaws. This argument is meritless.

39. First, relying on the use of the terms "final" and "precedential" is unavailing – a declaration clearly can be both non-binding and also final and precedential:....

40. Second, the language Vistaprint references was added to ICANN's Bylaws to meet recommendations made by ICANN's Accountability Structures Expert Panel (ASEP). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN's accountability mechanisms, including the Independent Review process. The ASEP recommended, among other things, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to reevaluate the declaration of the IRP Panel in the ICM IRP. To prevent claimants from challenging Board action taken in direct response to a prior IRP panel declaration, the ASEP recommended that "[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value" (fn. omitted).

41. The ASEP's recommendations in this regard did not convert IRP panel declarations into binding decisions (fn. omitted). One of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. As Graham McDonald, one of the three ASEP experts, explained, because California law requires that the board "retain responsibility for decision-making," the Board has "final word" on "any recommendation that ... arises out of [an IRP]" (fn. omitted). The ASEP's recommendations were therefore premised on the understanding that the declaration of an IRP panel is not "binding" on the Board.

102. Authority to award affirmative relief: ICANN contends that any request that the IRP Panel grant affirmative relief goes beyond the Panel's authority.¹⁴⁷ The Panel does not have the authority to award affirmative relief or to require ICANN to undertake specific

¹⁴⁶ Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, ¶ 133 (Feb. 19, 2010) ("ICM Registry Final Declaration").

¹⁴⁷ Response, ¶ 78.

conduct. The Panel is limited to declaring whether an action or inaction of the Board was inconsistent with the Articles or Bylaws, and recommending that the Board stay any action or decision, or take any interim action, until such time as the Board reviews and acts upon the opinion of the Panel.¹⁴⁸ ICANN adds that the IRP panel in *ICM Registry Declaration* found that

*“[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.”*¹⁴⁹

b. SCO Proceedings Claim

103. ICANN states that Vistaprint is using this IRP as a means to challenge the merits of the Third Expert’s determination in the *Vistaprint SCO*.¹⁵⁰ As ICANN states in its Response:

12. Ultimately, Vistaprint has initiated this IRP because Vistaprint disagrees with the Expert Panel’s Determination and the BGC’s finding on Vistaprint’s Reconsideration Request. ICANN understands Vistaprint’s disappointment, but IRPs are not a vehicle by which an Expert Panel’s determination may be challenged because neither the determination, nor ICANN accepting the determination, constitutes an ICANN Board action. Nor is an IRP the appropriate forum to challenge a BGC ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN’s Articles or Bylaws. Here, ICANN followed its policies and processes at every turn with respect to Vistaprint, which is all it is required to do.

104. ICANN states that the IRP Panel has one chief responsibility – to “determine whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”¹⁵¹ With respect to Vistaprint’s claim that ICANN’s Board violated its Articles and Bylaws by “blindly accepting” the Third Expert’s SCO determination without reviewing its analysis or result, ICANN responds that there is no requirement for the Board to conduct such an analysis. “Accepting” or “reviewing” the Expert’s determination is not something the Board was tasked with doing or not doing. Per the Guidebook, the “findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”¹⁵² The Guidebook further provides that “[i]n a case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures).”¹⁵³ This step is a result not of any ICANN Board action, but a straightforward application of Guidebook provisions for SCO determinations.

105. ICANN states the Board thus took no action with respect to the Third Expert’s determination upon its initial issuance, because the Guidebook does not call for the Board to take any action and it is not required by any Article or Bylaw provision. Accordingly, it cannot be a violation of ICANN’s Articles or Bylaws for the Board to not conduct a

¹⁴⁸ ICANN’s First Additional Response, ¶ 33 (citing Bylaws, Art. IV, §§ 3.4 and 3.11(d)).

¹⁴⁹ *ICM Registry Final Declaration*, ¶ 133.

¹⁵⁰ Response, ¶ 12; ICANN’s First Additional submission, ¶ 4.

¹⁵¹ Response, ¶ 2 (citing Bylaws, Art. IV, § 3.4).

¹⁵² Response, ¶ 9 (citing Guidebook, § 3.4.6).

¹⁵³ Response, ¶ 9 (citing Guidebook, § 3.2.2.1).

substantive review of an expert's SCO determination. And as such, there is no Board action in this regard for the IRP Panel to review.

106. ICANN states that “the sole Board action that Vistaprint has identified in this case is the BGC’s rejection of Vistaprint’s Reconsideration Request. However, ICANN maintains that nothing about the BGC’s handling of the RFR violated ICANN’s Articles or Bylaws.”¹⁵⁴
107. In this regard, ICANN states that the BGC was not required, as Vistaprint contends, to refer Vistaprint’s Reconsideration Request to the entire ICANN Board.¹⁵⁵ The Bylaws provide that the BGC has the authority to “make a final determination of Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors.”¹⁵⁶ Because Vistaprint’s Reconsideration Request was a challenge to alleged staff action, the BGC was within its authority, and in compliance with the Bylaws, when it denied Vistaprint’s Reconsideration Request without making a referral to the full Board.
108. ICANN states that the BGC did what it was supposed to do in reviewing Vistaprint’s Reconsideration Request – it reviewed the Third Expert’s and ICANN staff’s compliance with policies and procedures, rather than the substance of the Third Expert’s SCO determination, and found no policy or process violations.¹⁵⁷ ICANN urges that Vistaprint seeks to use the IRP to challenge the substantive decision of the Third Expert in the *Vistaprint SCO*. However, this IRP may only be used to challenge ICANN Board actions on the grounds that they do not comply with the Articles or Bylaws, neither of which is present here.
109. ICANN nevertheless responds to Vistaprint’s allegations regarding errors of process and substance in the SCO proceedings, and contends that the BGC properly handled its review of the *Vistaprint SCO*. ICANN’s specific responses on these points are as follows:
- (i) As to Vistaprint’s claim that the ICDR’s appointment of the First Expert was untimely, missing the deadline by 5 days, ICANN states that the BGC determined that Vistaprint failed to provide any evidence that it contemporaneously challenged the timeliness of the ICDR’s appointment of the First Expert, and that a Reconsideration Request was not the appropriate mechanism to raise the issue for the first time. In addition, the BGC concluded that Vistaprint had failed to show that it was “materially” and “adversely” affected by the brief delay in appointing the First Expert, rendering reconsideration inappropriate.
 - (ii) Regarding Vistaprint’s claim that the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure, ICANN states that Article 17 provides the

¹⁵⁴ ICANN’s First Additional Submission, ¶ 4.

¹⁵⁵ Response, ¶ 43.

¹⁵⁶ Response, ¶ 44 (citing Bylaws, Art. IV, § 2.3(f)).

¹⁵⁷ Response, ¶ 11.

expert panel with the discretion to accept such a filing:¹⁵⁸ “The Panel *may decide* whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.”¹⁵⁹ Thus, as the BGC correctly found, it was not the BGC’s place to second-guess the First (or Third) Expert’s exercise of permitted discretion.

- (iii) As to Vistaprint’s claim that the ICDR violated Article 21 of the New gTLD Objections Procedure by failing to ensure the timely issuance of an expert SCO determination, ICANN contends that the BGC properly determined that Vistaprint’s claims in this regard did not support reconsideration for two reasons. First, on October 1, 2013, before the determination was supposed to be issued by the First Expert, the ICDR removed that expert. The BGC therefore could not evaluate whether the First Expert rendered an untimely determination in violation of the Procedure. Second, the BGC correctly noted that 45-day timeline applies to an expert’s submission of the determination “in draft form to the [ICDR’s] scrutiny as to form before it is signed” and the ICDR and the Expert are merely required to exercise “reasonable efforts” to issue a determination within 45 days of the constitution of the Panel.¹⁶⁰
- (iv) Regarding Vistaprint’s claim that the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure, ICANN argues this claim is unsupported.¹⁶¹ As the BGC noted, Vistaprint provided no evidence demonstrating that the First Expert failed to follow the applicable ICDR procedures for independence and impartiality. Rather, all indications are that the First Expert and the ICDR complied with these rules as to this “new conflict,” which resulted in a removal of the First Expert. Further, Vistaprint presented no evidence of being materially and adversely affected by the First Expert’s removal, which is another justification for the BGC’s denial of the Reconsideration Request.
- (v) Vistaprint claimed that the ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR’s Supplementary Procedures for String Confusion Objections.¹⁶² ICANN contends that the BGC properly determined that this claim did not support reconsideration. The ICDR Rules for SCOs make clear that the ICDR had the “sole discretion” to review and decide challenges to the appointment of expert panelists. While Vistaprint may disagree with the ICDR’s decision to accept the Objector’s challenge, it is not the BGC’s role to second guess the ICDR’s discretion, and it was

¹⁵⁸ Response, ¶ 50.

¹⁵⁹ New gTLD Objections Procedure, Art. 17.

¹⁶⁰ Response, ¶ 53, citing New gTLD Objections Procedure, Art. 21(a)-(b).

¹⁶¹ Response, ¶¶ 54-56.

¹⁶² Article 2, § 3 of the ICDR’s Supplementary Procedures for String Confusion Objections provides that:

Upon review of the challenge the DRSP in its sole discretion shall make the decision on the challenge and advise the parties of its decision.
[Underlining added]

not a violation of the Articles or Bylaws for the BGC to deny reconsideration on this ground.

- (vi) Vistaprint claimed that the determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure. ICANN claims that the BGC properly held that this claim did not support reconsideration.¹⁶³ On November 20, 2013, the ICDR appointed the Third Expert. Vistaprint claimed in its Reconsideration Request that pursuant to Article 21, the determination therefore “should have been rendered by January 4, 2014,” which was forty-five (45) days after the Panel was constituted. Because “it took this Panel until January 24, 2014 to render the Decision,” Vistaprint contended that the determination was untimely because it was twenty days late. ICANN states that, according to the Procedure, the Expert must exercise “reasonable efforts” to ensure that it submits its determination “in draft form to the DRSP’s scrutiny as to form before it is signed” within forty-five (45) days of the Expert Panel being constituted. As the BGC noted, there is no evidence that the Third Expert failed to comply with this Procedure, and reconsideration was therefore unwarranted on this ground.
- (vii) ICANN responded to Vistaprint’s claim that the Third Expert incorrectly applied the Objector’s burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure (which place the burden on the Objector). Vistaprint claimed that the Third Expert contravened ICANN’s process because the Expert did not give an analysis showing that the Objector had met the burden of proof.¹⁶⁴ ICANN states that the BGC found the Expert extensively detailed support for the conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in meaning – that it is likely to cause confusion. The BGC noted that the Expert had adhered to the procedures and standards set forth in the Guidebook relevant to determining string confusion and reconsideration was not warranted on this basis.
- (viii) Finally, as to Vistaprint’s claim that the Third Expert incorrectly applied ICANN’s substantive standard for evaluation of String Confusion Objections (as set out in Section 3.5.1 of the Guidebook), ICANN contends the BGC properly found that reconsideration was not appropriate.¹⁶⁵ Vistaprint contended that the Expert failed to apply the appropriate high standard for assessing likelihood of confusion.¹⁶⁶ ICANN states that Section 3.5.1 of the Guidebook provides that

“[f]or the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user.”

ICANN claims that disagreement as to whether this standard should have resulted in a finding in favor of Vistaprint does not mean that the Third Expert violated any policy or process in reaching his decision. Vistaprint also claimed that the Third

¹⁶³ Response, ¶¶ 61-62.

¹⁶⁴ Response, ¶¶ 63-64.

¹⁶⁵ Response, ¶¶ 65-68.

¹⁶⁶ Request, ¶ 47.

Expert “failed to apply the burden of proof and the standards imposed by ICANN” because the Expert questioned whether the co-existence between Vistaprint’s domain name, <webs.com>, and the Objector’s domain name, <web.com> for many years without evidence of actual confusion is relevant to his determination. ICANN states that, as the BGC noted, the relevant consideration for the Expert is whether the *applied-for gTLD string* is likely to result in string confusion, not whether there is confusion between second-level domain names. Vistaprint does not cite any provision of the Guidebook, the Procedure, or the Rules that have been contravened in this regard.

110. In sum, ICANN contends that the BGC did its job, which did not include evaluating the merits of Third Expert’s determination, and the BGC followed applicable policies and procedures in considering the RFR.¹⁶⁷

111. Regarding Vistaprint’s claims of ICANN’s breach of various Articles and Bylaws, ICANN responds as follows in its Response:

71. First, Vistaprint contends that ICANN failed to comply with the general principle of “good faith.” But the only reason Vistaprint asserts ICANN failed to act in good faith is in “refus[ing] to reconsider the substance” of the Determination or to “act with independent judgment” (fn. omitted). The absence of an appeal mechanism by which Vistaprint might challenge the Determination does not form the basis for an IRP because there is nothing in ICANN’s Bylaws or Articles of Incorporation requiring ICANN to provide one.

72. Second, Vistaprint contends that ICANN failed to apply its policies in a neutral manner. Here, Vistaprint complains that other panels let other applications proceed without being placed into a contention set, even though they, in Vistaprint’s opinion, presented “at least equally serious string similarity concerns” as .WEBS/.WEB (fn. omitted). Vistaprint’s claims about ICDR’s treatment of other string similarity disputes cannot be resolved by IRP, as they are even further removed from Board conduct. Different outcomes by different expert panels related to different gTLDs are to be expected. Claiming that other applicants have not suffered adverse determinations does not convert the Expert Panel’s Determination into a “discriminatory ICANN Board act.”

73. Third, Vistaprint contends that the ICANN Board violated its obligation to act transparently for not investigating the “impartiality and independence” of the Expert Panel and thereby “did not seek to communicate with [ICDR] to optimize [its] service” (fn. omitted). Aside from the disconnect between the particular Bylaws provision invoked by Vistaprint requiring ICANN’s transparency, and the complaint that the ICDR did not act transparently, Vistaprint fails to identify any procedural deficiency in the ICDR’s actions regarding the removal of the First Expert, as set forth above. Moreover, Vistaprint cites no obligation in the Articles or Bylaws that the ICANN Board affirmatively investigate the impartiality of an Expert Panel, outside of the requirement that the ICDR follow its policies on conflicts, which the ICDR did.

74. Fourth, Vistaprint contends that ICANN “has not created any general process for challenging the substance of the so-called expert determination,” and thus has “brashly flouted” its obligation to remain accountable (fn. omitted). But again, Vistaprint does not identify any provision of the Articles or Bylaws that requires ICANN to provide such an appeals process.

75. Fifth, Vistaprint “concludes” that the ICANN Board neglected its duty to promote competition and innovation (fn. omitted) when it failed to overturn the Expert Panel’s Determination. Vistaprint claims that the Objector’s “motive in filing the objection was to prevent a potential competitor from entering

¹⁶⁷ Response, ¶ 69.

the gTLD market” and therefore ICANN’s “acceptance” of the objection purportedly contravenes ICANN’s core value of promoting competition. But every objection to a gTLD application by an applicant for the same string seeks to hinder a competitor’s application. By Vistaprint’s logic, ICANN’s commitment to promoting competition requires that no objections ever be sustained and every applicant obtains the gTLD it requests. There is no provision in the Articles or Bylaws that require such an unworkable system.

76. All in all, Vistaprint’s attempt to frame its disappointment with the Expert Panel’s decision as the ICANN Board’s dereliction of duties does not withstand scrutiny.

c. Disparate Treatment Claim

112. ICANN states that Vistaprint objects to the Board’s exercise of its independent judgement in determining not to intervene further (beyond the review of the BGC) with respect to the Third Expert’s determination in the *Vistaprint SCO*, as the Board did with respect to expert determinations on String Confusion Objections regarding the strings (1) .COM/.CAM, (2) .CAR/.CARS, and (3) .SHOP/.通販 (online shopping in Japanese).¹⁶⁸
113. ICANN states that the Guidebook provides that in “exceptional circumstances,” such as when accountability mechanisms like RFR or IRP are invoked, “the Board might individually consider an application”¹⁶⁹ and that is precisely what occurred in Vistaprint’s case. Because Vistaprint sought reconsideration, the BGC considered Vistaprint’s Reconsideration Request and concluded that the ICDR and Third Expert had not violated any relevant policy or procedure in rendering the Expert’s determination.
114. ICANN states that the ICANN Board only intervened with respect to these other expert determinations because there had been several independent expert determinations regarding the same strings that were seemingly inconsistent with one another. That is not the case with respect to Vistaprint’s applications – no other expert determinations were issued regarding the similarity of .WEB and .WEBS.¹⁷⁰ “Unlike .WEB/.WEBS, the COM/.CAM, .CAR/.CARS, and .SHOP/.通販 strings were all the subject of several, seemingly inconsistent determinations on string confusion objections by different expert panels. So, for example, while one expert upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, another expert overruled a separate string confusion objection asserting precisely the same thing.”¹⁷¹
115. Further, ICANN explains that

16. Given what were viewed by some as inconsistent determinations, the BGC requested that ICANN staff draft a report for the ICANN Board’s New gTLD Program Committee (“NGPC”), “setting out

¹⁶⁸ ICANN’s First Additional Submission, ¶ 14.

¹⁶⁹ ICANN’s First Additional Submission, ¶ 5 (citing Guidebook, § 5.1). ICANN quotes the *Booking.com Final Declaration*, where the IRP Panel stated in relation to § 5.1 “the fact that the ICANN Board enjoys such discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by *Booking.com*.”

¹⁷⁰ ICANN’s First Additional Submission, ¶ 5.

¹⁷¹ ICANN’s First Additional Submission, ¶ 15.

options for dealing...[with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes...."¹⁷² The NGPC subsequently considered potential approaches to addressing perceived inconsistent determinations on string confusion objections, including possibly implementing a new review mechanism.¹⁷³ ICANN staff initiated a public comment period regarding framework principles of a potential such review mechanism.¹⁷⁴ Ultimately, having considered the report drafted by ICANN staff, the public comments received, and the string confusion objection process set forth in the Guidebook, the NGPC determined that the inconsistent expert determinations regarding .COM/.CAM and .SHOP/.通販 were "not[] in the best interest of the New gTLD Program and the Internet community" and directed ICANN staff to establish a process whereby the ICDR would appoint a three-member panel to re-evaluate those expert determinations.¹⁷⁵

116. ICANN contends that Vistaprint has identified no Articles or Bylaws provision violated by the Board in exercising its independent judgment to intervene with respect to inconsistent determinations in certain SCO cases, but not with respect to the single expert SCO determination regarding .WEBS/.WEB. The Board was justified in exercising its discretion to intervene with respect to the inconsistent expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販 - the Board acted to bring certainty to multiple and differing expert determinations on String Confusion Objections regarding the same strings.¹⁷⁶ That justification was not present with respect to the single *Vistaprint SCO* determination at issue here. Thus, ICANN contends Vistaprint was not treated differently than other similarly-situated gTLD applicants.
117. Timing: Finally, ICANN also states that the time for Vistaprint to challenge the Guidebook and its standards has past. The current version of the Guidebook was published on June 4, 2012 following an extensive review process, including public comment on multiple drafts.¹⁷⁷ Despite having ample opportunity, Vistaprint did not object to the Guidebook at the time it was implemented. If Vistaprint had concerns related to the issues it now raises, it should have pursued them at the time, not years later and only after receiving the determination in the *Vistaprint SCO*. ICANN quotes the *Booking.com Final Declaration*, where the IRP stated,

*"the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws."*¹⁷⁸

118. ICANN states that while the Guidebook process at issue in this case is different for the

¹⁷² See BGC Determination on Reconsideration Request 13-10, at 11.

¹⁷³ See Rationale for NGPC Resolution 2014.02.05.NG02, at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en> (last accessed Sept. 15, 2015).

¹⁷⁴ See <https://www.icann.org/public-comments/sco-rramework-principles-2014-02-11-en> (last accessed Sept. 15, 2015).

¹⁷⁵ ICANN's First Additional Submission, ¶ 16; see NGPC Resolution 2014.1 0.12.NG02, at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-1-0-12-en#2.b> (last accessed Sept. 15, 2015).

¹⁷⁶ ICANN's First Additional Submission, ¶ 18.

¹⁷⁷ ICANN's First Additional Response, ¶ 27.

¹⁷⁸ *Booking.com final Declaration*, ¶ 129.

process at issue in the *Booking.com IRP* – the SCO process rather than the string similarity review process – the Booking.com IRP panel's reasoning applies equally. ICANN argues that because both processes were developed years ago, as part of the development of the Guidebook, challenges to both are time-barred.¹⁷⁹

V. Analysis and Findings

a. IRP Panel's Authority

119. Standard of Review: The IRP Panel has benefited from the parties' submissions on this issue, noting their agreement as to the Panel's primary task: comparing contested actions (or inactions)¹⁸⁰ of ICANN's Board to its Articles and Bylaws and declaring whether the Board has acted consistently with them. Yet when considering this Panel's comparative task, the parties disagree as to the level of deference to be accorded by the Panel in assessing the Board's actions or inactions.

120. Vistaprint has sought independent review through this IRP, claiming that it has been "harmed" (i.e., its .WEBS application has not been allowed to proceed and has been placed in a Contention Set) by the Board's alleged violation of the Articles and Bylaws. In accordance with Article IV, § 3.2 of the Bylaws:

Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

121. As noted above, Article IV, § 1 of the Bylaws emphasizes that the IRP is an accountability mechanism:

The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws.

122. The Bylaws in Article IV, § 3.4 detail the IRP Panel's charge and issues to be considered in a defined standard of review:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*

¹⁷⁹ ICANN's First Additional Submission, ¶ 28.

¹⁸⁰ Bylaws, Art. IV, § 3.11(c) ("The IRP Panel shall have the authority to... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" (underlining added)).

- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*¹⁸¹

[Underlining added]

123. The Bylaws state the IRP Panel is “*charged*” with “*comparing*” contested actions of the Board to the Articles and Bylaws and “*declaring*” whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN. In the IRP Panel’s view this more detailed listing of a defined standard cannot be read to remove from the Panel’s remit the fundamental task of comparing actions or inactions of the Board with the Articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstances may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard, the ICANN Board’s discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board’s conduct must be measured.
124. The Panel agrees with ICANN’s statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As Vistaprint has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel’s review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel’s primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN’s commitment to maintain and improve robust mechanisms for accountability, as required by ICANN’s Affirmation of Commitments, Bylaws and core values.

¹⁸¹ The Supplementary Rules provide similarly in section 1 that the IRP is designed “to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation” with the standard of review set forth in section 8:

8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

125. The IRP Panel is aware that three other IRP panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of them have reached the same conclusion: the Board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard, without any presumption of correctness.¹⁸² As the IRP Panel reasoned in the *ICM Registry Final Declaration*:

ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization" – including ICANN – ICANN is charged with "promoting the global public interest in the operational stability of the Internet..." ICANN "shall operate 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..." Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN...that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.¹⁸³

126. The IRP Panel here agrees with this analysis. Moreover, Article IV, §3.21 of the Bylaws provides that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value" (underlining added). The IRP Panel recognizes that there is unanimity on the issue of degree of deference, as found by the three IRP panels that have previously considered it. The declarations of those panels have precedential value. The Panel considers that the question on this issue is now settled. Therefore, in this IRP the ICANN Board's conduct is to be reviewed and appraised by this Panel objectively and independently, without any presumption of correctness.
127. On a related point as to the scope of the IRP Panel's review, the Panel agrees with ICANN's point of emphasis that, because the Panel's review is limited to addressing challenges to conduct by ICANN's Board, the Panel is not tasked with reviewing the

¹⁸² *ICM Registry Final Declaration*, ¶ 136 ("the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially"); *Booking.com final Declaration*, ¶ 111 ("the IRP Panel is charged with 'objectively' determining whether or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."); Final Declaration of the IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, ¶ 76 (July 9, 2015) ("*DCA Final Declaration*"), at <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (last accessed on Sept. 15, 2015) ("The Panel therefore concludes that the "standard of review" in this IRP is a *de novo*, objective and independent one, which does not require any presumption of correctness").

¹⁸³ *ICM Registry Final Declaration*, ¶ 136.

actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN (such as the ICDR or the experts in the *Vistaprint SCO*). With this in mind, and with the focus on the Board, the only *affirmative* action of the Board in relation to Vistaprint's .WEBS gTLD application was through the BGC, which denied Vistaprint's Reconsideration Request.¹⁸⁴ ICANN states that "the sole Board action that Vistaprint has identified in this case is the Board Governance Committee's ('BGC') rejection of Vistaprint's Reconsideration Request, which sought reconsideration of the Expert Determination."¹⁸⁵ It appears that ICANN's focus in this statement is on affirmative action taken by the BGC in rejecting Vistaprint's Reconsideration Request; however, this does not eliminate the IRP Panel's consideration of whether, in the circumstances, inaction (or omission) by the BGC or the full ICANN Board in relation to the issues raised by Vistaprint's application would be considered a potential violation of the Articles or Bylaws.

128. As discussed below, the Panel considers that a significant question in this IRP concerns one of "omission" – the ICANN Board, through the BGC or otherwise, did not provide relief to Vistaprint in the form of an additional review mechanism, as it did to certain other parties who were the subject of an adverse SCO determination.
129. IRP declaration binding or non-binding: As noted above, Vistaprint contends that the outcome of this IRP is binding on ICANN, and that any other result would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability. ICANN, on the other hand, contends that the IRP Panel's declaration is intended to be advisory and non-binding.
130. In analyzing this issue, the IRP Panel has carefully reviewed the three charter instruments that give the Panel its authority to act in this case: the Bylaws, the Supplementary Procedures, and the ICDR Rules. The Panel views that it is important to distinguish between (i) the findings of the Panel on the question of whether the ICANN Board's conduct is consistent (or not) with the Articles and Bylaws, and (ii) any consequent remedial measures to be considered as a result of those findings, at least insofar as those

¹⁸⁴ The BGC is a committee of the Board established pursuant to Article XII, § 1 of the Bylaws. Article IV, § 2.3 of the Bylaws provide for the delegation of the Board's authority to the BGC to consider Requests for Reconsideration and indicate that the BGC shall have the authority to:

- a. evaluate requests for review or reconsideration;
- b. summarily dismiss insufficient requests;
- c. evaluate requests for urgent consideration;
- d. conduct whatever factual investigation is deemed appropriate;
- e. request additional written submissions from the affected party, or from other parties;
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

The BGC has discretion to decide whether to issue a final decision or make a recommendation to ICANN's Board. In this case, the BGC decided to make a final determination on Vistaprint's RFR.

¹⁸⁵ ICANN's First Additional Submission, ¶ 4. By contrast to the IRP Panel's focus on the Board's conduct, the BGC in its decision on Vistaprint's Reconsideration request considered the action or inaction of ICANN staff and third parties providing services to ICANN (i.e., the ICDR and SCO experts).

measures would direct the Board to take or not take any action or decision. The Panel considers that, as to the first point, the findings of the Panel on whether the Board has acted in a manner that is consistent (or not) with the Articles or Bylaws is akin to a finding of breach/liability by a court in a contested legal case. This determination by the Panel is “binding” in the sense that ICANN’s Board cannot overrule the Panel’s declaration on this point or later decide for itself that it disagrees with the Panel and that there was no inconsistency with (or violation of) the Articles and Bylaws. However, when it comes to the question of whether or not the IRP Panel can *require* that ICANN’s Board implement any form of redress based on a finding of violation, here, the Panel believes that it can only raise remedial measures to be considered by the Board in an advisory, non-binding manner. The Panel concludes that this distinction – between a “binding” declaration on the violation question and a “non-binding” declaration when it comes to recommending that the Board stay or take any action – is most consistent with the terms and spirit of the charter instruments upon which the Panel’s jurisdiction is based, and avoids conflating these two aspects of the Panel’s role.

131. The IRP Panel shares some of Vistaprint’s concerns about the efficacy of the IRP as an accountability mechanism if any affirmative relief that might be considered appropriate by the Panel is considered non-binding on ICANN’s Board (see discussion below); nevertheless, the Panel determines on the basis of the charter instruments, as well as the drafting history of those documents, that its declaration is binding only with respect to the finding of compliance or not with the Articles and Bylaws, and non-binding with respect to any measures that the Panel might recommend the Board take or refrain from taking. The Panel’s Declaration will have “precedential value” and will possibly be made publicly available on ICANN’s website.¹⁸⁶ Thus, the declaration of violation (or not), even without the ability to order binding relief vis-à-vis ICANN’s Board, will carry more weight than would be the case if the IRP was a confidential procedure with decisions that carried no precedential value.
132. To the extent that there is ambiguity on the nature of the IRP Panel’s declaration (which perhaps could have been avoided in the first place), it is because there is ambiguity and an apparent contradiction created by some of the key terms of the three charter instruments – the Bylaws, the Supplementary Procedures, and the ICDR Rules. In terms of a potential interpretive hierarchy for these documents – to the extent that such hierarchy is relevant – the Bylaws can be said to have created the IRP and its terms of reference: the IRP is established as an accountability mechanism pursuant to the Bylaws, Article IV, § 3 (Independent Review of Board Actions). Article IV, § 3.8 of the Bylaws, in turn, delegates to the “IRP Provider” the task of establishing rules and procedures that are supposed to be consistent with Article IV, § 3:

Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures,

¹⁸⁶ The Panel observes the final declarations in all previous IRPs that have gone to decision, as well as declarations concerning procedure and interim relief, have been posted on ICANN’s website. In this respect, Supplementary Procedures, Rule 10(c) provides that a “Declaration may be made public only with the consent of all parties or as required by law”. However, ICANN has also agreed in Rule 10(c) that subject to the redaction of confidential information or unforeseen circumstances, “ICANN will consent to publication of a Declaration if the other party so requests.”

which shall implement and be consistent with this Section 3.

[Underlining added]

133. Thus, the Supplementary Procedures and ICDR Rules were established pursuant to Article IV, § 3.8 of the Bylaws; however, the requirement of consistency as between the texts was imperfectly implemented, at least with respect to the ICDR Rules, as discussed below. As between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures will control, as provided in Supplementary Rule 2:

In the event there is any inconsistency between these Supplementary Procedures and the Rules, these Supplementary Procedures will govern.

134. The Bylaws in Article IV, § 3.4 provide that the Panel *shall* be charged with *comparing* contested actions of the Board to the Articles and Bylaws, and with “*declaring*” whether the Board has acted consistently with them. The IRP panel in the *ICM Registry Final Declaration* stressed that the IRP panel’s task is “to ‘declare’, not to ‘decide’ or to ‘determine’.”¹⁸⁷ However, the word “declare”, alone, does not conclusively answer the question of whether the IRP’s declaration (or any part of it) is binding or not. “To declare” means “*to announce or express something clearly and publicly, especially officially.*”¹⁸⁸ Declarations can and do serve as the predicate for binding or non-binding consequences in different contexts. For example, a declaratory relief action – in which a court resolves legal uncertainty by determining the rights of parties under a contract or statute without ordering anything be done or awarding damages – can have a binding result because it may later preclude a lawsuit by one of the parties to the declaratory lawsuit. Further, in a non-legal context, “declaring” a state of emergency in a particular state or country can have binding consequences. Thus, the word “declare,” in itself, does not answer the issue.

135. Moreover, nothing in the Bylaws, Supplementary Procedures or ICDR Rules suggests that the IRP Panel’s declaration is non-binding with respect to the Panel’s core task of deciding whether the Board did, or did not, comply the Articles or Bylaws. There is no provision that states the ICANN Board can reconsider this independent and important declaration. To the contrary, the ICDR Rules, which apply to the IRP proceedings, can be read to suggest that both the Panel’s finding of compliance (or not) by ICANN’s Board, and the Panel’s possible reference to any remedial measures, are binding on ICANN. As Vistaprint indicates, the preamble of the ICDR Rules provide that “[a] *dispute can be submitted to an arbitral tribunal for a final and binding decision,*” and Article 30(1) of those Rules specifies that “[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties” (*emphasis added*).

136. However, these terms in the ICDR Rules arguably contradict specific provisions of the Bylaws and Supplementary Procedures, at least to the extent that they are read to cover any measures that the IRP Panel would direct the ICANN Board to take or not take. In this way, if there is a contradiction between the texts, the Bylaws and Supplemental rules would govern. However, focusing on the relief that the Panel is authorized to grant

¹⁸⁷ *ICM Registry Final Declaration*, ¶ 133.

¹⁸⁸ Cambridge English Online Dictionary (United States version).

provides a decisive clue as to the question of whether the IRP declaration, or any part of it, is binding or non-binding, and produces a faithful and harmonized reading of all the texts. While the Bylaws and Supplementary Procedures say nothing to limit the binding effect of the IRP Panel’s “liability” declaration, they both contain provisions that expressly indicate the Panel may only “recommend” that the Board stay or take any action or decision. In particular, the Bylaws in Article IV, § 3.11 sets out the IRP Panel’s authority in terms of alternative actions that it may take once it has an IRP case before it:

The IRP Panel shall have the authority to:

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
- e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- f. determine the timing for each proceeding.

[Underlining added]¹⁸⁹

137. Article IV, § 3.11(a) provides that the Panel may summarily dismiss an IRP request in certain circumstances. A fair reading of this term is that an IRP panel’s dismissal of a case pursuant to § 3.11(a) would be a binding decision, both for the party who brought the IRP request and for ICANN. In other words, ICANN could not require that the IRP panel take-up the case again once it has been dismissed by the panel.¹⁹⁰ Further, the IRP panel can “request additional written submissions” from the parties (including the Board) or certain third parties. Here again, a fair reading of this term is that it is not subject to any review by ICANN Board before it can be implemented and is therefore binding on those who receive such a request.

138. By comparison, any form of relief whereby the IRP Panel *would direct the Board* to take, or refrain from taking, any action or decision, as specified in § 3.11(d), must be “recommend[ed]” to the Board, which then “reviews and acts upon the opinion of the IRP.”¹⁹¹ The Panel’s authority is thus limited (and in this sense non-binding) when it

¹⁸⁹ Bylaws, Art. IV, § 3.11.

¹⁹⁰ Supplementary Rule 6 provides similarly that:

An IRP Panel may summarily dismiss any request for Independent Review where the requestor has not demonstrated that it meets the standing requirements for initiating the Independent Review.

Summary dismissal of a request for Independent Review is also appropriate where a prior IRP on the same issue has concluded through Declaration.

An IRP Panel may also dismiss a querulous, frivolous or vexatious request for Independent Review.

¹⁹¹ Supplementary Rule 7 provides similarly (as regards interim measures of protection) that:

An IRP Panel may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP

(Continued...)

comes to providing ICANN's Board with potential courses of action or inaction in view of Board's non-compliance with the Articles or Bylaws.¹⁹²

139. Several other provisions of the Bylaws and Supplementary Procedures can be fairly read to relate to decisions of the IRP panel that would be considered binding, even as to ICANN's Board. Article IV, § 3.18 provides “[t]he IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party.” There is no mechanism for the Board to overrule the IRP panel's designation as to which party is the prevailing party. Article IV, § 3.20 provides “[t]he IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.” A fair reading of this provision is that the IRP panel's decision concerning such questions of confidentiality would be binding on all parties (including ICANN) in the IRP procedure. Consolidating IRP requests and determining the timing for each IRP proceeding are also decisions of the panel that are binding and not subject to review. Finally, Supplemental Procedures, Rule 11, directs that “[t]he IRP Panel shall fix costs in its Declaration.” Here too, this decision of the IRP panel can be fairly read to be binding on the parties, including the Board.
140. Thus, the IRP Panel's authority to render binding or non-binding decisions, orders or relief can be considered in relation to four basic areas:
- (i) summary dismissals by the IRP Panel (for different reasons as stated in the Bylaws and Supplementary Procedures) are final and binding on the parties. There is no mechanism for appeal of such dismissals and they have precedential value.
 - (ii) the designation of prevailing party, fixing costs for the IRP, and other orders in support of the IRP proceedings (e.g., timing of proceedings, confidentiality, requests for additional submissions, consolidation of IRP cases) are binding decisions of the IRP Panel, with no review by the Board or any other body.
 - (iii) the IRP Panel's declaration of whether or not the Board has acted consistently with the provisions of the Articles and Bylaws is final and binding, in the sense that there is no appeal on this point to ICANN's Board or any other body; it is a final determination and has precedential value.
 - (iv) any form of relief in which the IRP Panel would direct the Board to take, or refrain from taking, any action or decision is only a recommendation to the Board. In this sense,

Panel is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision

¹⁹² The word “recommend” is also not free of ambiguity. For example, Article 47 of the ICSID Convention (concerning investor-State arbitration) provides in relevant part that “the Tribunal may, if it considers that the circumstances so require, *recommend* any provisional measures which should be taken to preserve the respective rights of either party” (emphasis added). The use of the word “recommend” in this context may refer to an order of the Tribunal that is intended to be binding on the parties. Nevertheless, in the context of the IRP, the Panel considers that use of the word “recommend” conveys that the Panel's direction of any action or inaction on the part of the Board is a non-binding reference.

such a recommendation is not binding on the Board. The Bylaws and Supplementary Procedures provide specific and detailed guidance in this key area – i.e., relief that would require the Board to take or refraining from taking any action or decision – where the IRP Panel’s decisions would not be binding on the Board, but would serve only as a recommendation to be reviewed and acted upon by the Board.

141. The other decisions of the IRP panel, as outlined above and including the declaration of whether or not the Board violated the Articles and Bylaws, would be binding, consistent with the Bylaws, Supplementary Procedures and ICDR Rule Article 30(1). This approach provides a reading that harmonizes the terms of the three charter instruments. It also provides interpretive context for Article IV, § 3.21 of the Bylaws, providing that “[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting.” The IRP panel in the *ICM Registry Final Declaration* stated that “[t]his relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible’, emphasizes that it is not binding.”¹⁹³ However, consistent with the analysis above, the IRP Panel here reads this statement in the *ICM Registry Final Declaration* to relate only to an IRP panel’s decision to “recommend” that the Board take, or refrain from taking, any action or decision. It does not relate to the other decisions or duties of the IRP panel, as explained above.
142. Vistaprint contends that the second sentence in Article IV, § 3.21 – providing “[t]he declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value” – which was added in April 2013 after the issuance of *ICM Registry Final Declaration*, was a change that supports the view that the IRP panel’s outcome, including any references to remedial relief, is binding. However, the Panel agrees with ICANN’s view that “a declaration clearly can be both non-binding and also final and precedential.”¹⁹⁴ Further, the preparatory work and drafting history for the relevant provisions of the Bylaws relating to the IRP procedure indicate the intention for a non-binding procedure with respect to the Panel’s authority to advise the Board to take, or refrain from taking, any action or decision. As summarized in ICANN’s contentions above, ICANN has submitted evidence that those who were initially involved in establishing the IRP considered that it should be an advisory, non-binding procedure *in relation to any policies that the Board might be requested to consider and implement by the IRP panel*.¹⁹⁵
143. Thus, the Bylaws and the Supplementary Procedures draw a line: when the measures that an IRP panel might consider as a result of its core task require that the Board take or refrain from taking any action or decision, the panel may only “recommend” this course of action. On the other hand, if the IRP panel decides that the Board had violated its Articles or Bylaws, or if the panel decides to dismiss the IRP request, designate a prevailing party,

¹⁹³ *ICM Registry Final Declaration*, ¶ 133.

¹⁹⁴ ICANN’s First Additional Submission, ¶ 39.

¹⁹⁵ ICANN’s First Additional Submission, ¶ 38, n 53 (Vint Cerf, the former Chair of ICANN’s Board, testified in the *ICM IRP* that the independent review panel “is an advisory panel. It makes recommendations to the board but the board has the ultimate responsibility *for deciding policy for ICANN*” (*italics added*)). *ICM v. ICANN*, Hearing Transcript, September 23, 2009, at 592:7-11).

set conditions for confidentiality, consolidate IRP requests, request additional written submissions or fix costs, a fair reading of the Bylaws, Supplementary Procedures and ICDR Rules relevant to these determinations would be that the IRP panel's decisions on these matters are binding on both parties, including ICANN.

144. Finally, in view of Article IV, § 3.21 providing that the declarations of IRP panels are final and *have precedential value*, the IRP Panel here recognizes that, in addition to the *ICM Registry Final Declaration*, two other IRP panels have considered the question of the IRP panel's authority. In the *Booking.com Final Declaration*, the IRP panel focused on the independent and objective standard of review to be applied to the panel's core task of assessing whether the Board's actions were consistent with the Articles, Bylaws and Guidebook.¹⁹⁶ However, the IRP panel in *Booking.com*, as ICANN acknowledges in its Second Additional Response, did not directly address whether an IRP panel may issue a binding declaration (although ICANN contends that the panel implicitly acknowledged that it cannot).¹⁹⁷
145. In the *DCA Final Declaration*, the IRP panel addressed directly the question of whether or not the panel's declaration was binding. The panel ruled that its declarations, both as to the procedure and the merits of the case, were binding. The IRP panel in that case raised some of the same concerns that Vistaprint has raised here¹⁹⁸:

110. ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111. The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

[...]

115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process.

146. The IRP panel in the *DCA Final Declaration* also emphasized that, according to the terms of the Guidebook, applicants for a new gTLD string waive their right to resort to the courts

¹⁹⁶ *Booking.com Final Declaration*, ¶¶ 104-115.

¹⁹⁷ ICANN's Second Additional Response, ¶ 29.

¹⁹⁸ *DCA Final Declaration*, ¶ 23 (quoting *DCA Declaration on the IRP Procedure* (Aug. 14, 2014)).

and therefore the IRP serves as the ultimate accountability mechanism for them:¹⁹⁹

15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do not include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM."

Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.

147. The IRP Panel in this case considers that the IRP panel in the *DCA Final Declaration*, and Vistaprint, have made several forceful arguments in favor of why the outcome of the IRP should be considered binding, especially to ensure the efficacy of the IRP as an accountability mechanism. Vistaprint has also urged that the IRP, at least with respect to applicants for new gTLD strings, is not merely a corporate accountability mechanism aimed at *internal* stakeholders, but operates to assess ICANN's responsibilities in relation to *external* third parties. And the outcome of the IRP is binding on these third parties, even if it is not binding on ICANN and its Board. In similar circumstances, it would not be uncommon that individuals, companies or even governments, would agree to participate in dispute resolution processes with third parties that are binding, at least *inter partes*.
148. However, as explained above, the IRP Panel concludes that the distinction between a "binding" declaration on the violation/liability question (and certain other matters as discussed above), on the one hand, and a "non-binding" declaration when it comes to recommending that the Board take or refrain from taking any action or decision, on the other hand, is most faithful to the terms and spirit of the charter instruments upon which the Panel's jurisdiction is based. To the extent that there is any disagreement with this approach, it is for ICANN to consider additional steps to address any ambiguities that might remain concerning the authority of the IRP panel and the legal effect of the IRP declaration.
149. Authority to award affirmative relief: The IRP Panel's analysis on this issue is closely related to, and dependent upon, its analysis of the binding vs. non-binding issue

¹⁹⁹ *DCA Final Declaration*, ¶ 38 (quoting *DCA Third Declaration on IRP Procedure*).

immediately above. To the extent that the IRP Panel renders any form of relief whereby the Panel would direct the Board to take, or refrain from taking, any action or decision, that relief must be “recommend[ed]” to the Board, which then “reviews and acts upon the opinion of the IRP,” as specified in § 3.11(d) of the Bylaws. Relatedly, Supplementary Rule 7 provides that an “IRP Panel may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.” Consequently, the IRP Panel finds that it does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.

b. SCO Proceedings Claim

150. The IRP Panel has carefully reviewed Vistaprint’s arguments concerning ICANN’s alleged violation of its Articles and Bylaws in relation to this *SCO Proceedings Claim*. However, as stated above, the IRP Panel does not review the actions or inactions of ICANN’s staff or any third parties, such as the ICDR or SCO experts, who provided services to ICANN. Instead, the IRP Panel’s focus is on ICANN’s Board and the BGC, which was delegated responsibility from the full Board to consider Vistaprint’s Request for Reconsideration.²⁰⁰
151. The core of Vistaprint *SCO Proceedings Claim* is that ICANN’s Board improperly disregarded accumulated errors made by the ICDR and the SCO experts (especially the Third Expert) during the *Vistaprint SCO* proceedings, and in this way ICANN violated Article IV of the Articles of Incorporation and certain provisions of the Bylaws, as well as the Guidebook.
152. Vistaprint contends that ICANN’s Board must verify whether or not, by accepting the SCO expert determination, it is acting consistent with its obligations under its Articles, Bylaws and Affirmation of Commitments,²⁰¹ and that ICANN would be in violation of these obligations if it were to blindly accept an expert determination in circumstances where the ICDR and/or the expert had failed to comply with the Guidebook and the New gTLD Objections Procedure and/or the ICDR Rules for SCOs, or where a panel had failed to correctly apply the standard set by ICANN.²⁰²
153. The IRP Panel disagrees with Vistaprint’s contention on this point. Although the Guidebook provides in § 5.1 that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program, there is no affirmative duty stated in the Articles, Bylaws or

²⁰⁰ Article IV, §2.15 of ICANN’s Bylaws provides that:

For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee’s determination on staff action or inaction shall be posted on the Website. The Board Governance Committee’s determination is final and establishes precedential value.

²⁰¹ Request, ¶ 6.

²⁰² Request, ¶ 6.

Guidebook that the Board must to review the result in each and every SCO case. Instead, the Guidebook § 3.4.6 provides that:

*The findings of the [SCO] panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.*²⁰³

[Underlining added]

154. In the case of an adverse SCO determination, the applicant for a new gTLD string is not left without any recourse. Module 6.6 of the Guidebook provides that an 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*” (no emphasis added).²⁰⁴

155. The Reconsideration Request is an “accountability mechanism” that can be invoked by a gTLD applicant, as it was used by Vistaprint, to challenge the result in SCO proceedings. Article IV, § 2.2 of the Bylaws provides that:

Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by:

- a. *one or more staff actions or inactions that contradict established ICANN policy(ies); or*
- b. *one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or*
- c. *one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.*

156. In line with Article IV, § 2.2 of the Bylaws, Vistaprint submitted its Reconsideration Request to challenge actions of the ICDR and SCO experts, claiming their conduct contradicted ICANN policies. While Guidebook, § 5.1 permits ICANN’s Board to individually consider new gTLD applications, such as through the RFR mechanism, it does not require that the Board do so in each and every case, *sua sponte*. The Guidebook, § 5.1, provides in relevant part that:

*ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result ... the use of an ICANN accountability mechanism.*²⁰⁵

157. The IRP Panel determines that in the absence of a party’s recourse to an accountability

²⁰³ Guidebook, § 3.4.6. The New gTLD Objections Procedure further provides in Article 2(d) that:

The ‘Expert Determination’ is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

²⁰⁴ Guidebook, § 6.6.

²⁰⁵ Guidebook, § 5.1.

mechanism such as the RFR, the ICANN Board has no affirmative duty to review the result in any particular SCO case.

158. In this case, Vistaprint did submit a Reconsideration Request and the BGC did engage in a detailed review of the alleged errors in process and procedures raised by Vistaprint. The BGC explained what it considered to be the scope of its review, which is consistent with the mandate in Article IV, § 2.2 of the Bylaws for review of “staff actions or inactions that contradict established ICANN policies”:

*In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel’s substantive conclusion that the Requester’s applications for .WEBS are confusingly similar to the Requester’s application for .WEB. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that Determination.*²⁰⁶

159. In contrast to Vistaprint’s claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel’s lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC’s analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel’s own analysis.²⁰⁷

160. For example, in relation to Vistaprint’s contention that the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure, the BGC reasoned:

The only evidence the [Vistaprint] cites in support of its argument that Mr. Koh failed to maintain his independence during the proceeding is the ICDR’s statement that it had decided to remove Mr. Koh “due to a new conflict.” (Request, Section 10, Pgs. 9-10.) The ICDR did not provide any further information as to the nature of the conflict. Conflicts can take many forms, such as scheduling or personal conflicts unrelated to the proceedings. There is no evidence that the conflict that inflicted

²⁰⁶ BGC Determination, p. 7, Request, Annex 26.

²⁰⁷ Vistaprint also asserted that based on the Third Expert’s determination in the *Vistaprint SCO*, the Third Expert lacked impartiality and independence, or alternatively lacked qualification. On a complete review of the entire record in this case, including the SCO proceedings and the Reconsideration Request before the BGC, the IRP Panel has found no foundation for these allegations against the Third Expert, and no violation of ICANN’s Articles or Bylaws in the manner in which the BGC handled these assertions. The BGC found that these assertions were insufficient to merit reconsideration, as stated in its RFR decision, in footnote 10:

[Vistaprint] concludes with the following claim: “The cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the Panel show the lack of either the Panel’s independence and impartiality or the Panel’s appropriate qualifications.” (Request, Section 10, Pg. 23.) [Vistaprint’s] assertion is not accompanied by any discussion or further explanation for how ICANN processes were purportedly violated. [Vistaprint’s] summary conclusions are without merit and insufficient to warrant reconsideration. Furthermore, [Vistaprint’s] claim that the Determination was “cursory” and only contained “selective discussion of the parties’ arguments” is unsupported. The Determination was eighteen pages long and contained more than six pages of discussion of the parties’ arguments and evidence.

Mr. Koh was related to the instant proceedings or otherwise impacted Mr. Koh's ability to remain impartial and independent.

Furthermore, [Vistaprint] neither claims to have been, nor presents any evidence of being, materially and adversely affected by Mr. Koh's removal. Indeed, had [Vistaprint] successfully challenged Mr. Koh for lack of independence at the time he was removed, the remedy under the applicable ICDR procedures would have been the removal of Mr. Koh, which was the result here.²⁰⁸

161. The BGC concluded that Vistaprint provided no evidence of being materially and adversely affected by the First Expert's removal. Moreover, to the extent that there was an impact due to the First Expert stepping down, this conduct was attributable to the First Expert, not to the ICDR. As the BGC states, had there been a concern about the First Expert's lack of independence, the remedy under the applicable ICDR procedures would have been the removal of that expert, which is what actually occurred.

162. Vistaprint also argued that the BGC conducted no investigation as to the nature of the new conflict that confronted the First Expert and instead "developed baseless hypotheses for the other reasons that could have led to this Panel stepping down."²⁰⁹ In this respect, perhaps the BGC could have sought to develop evidence on this issue by inquiring with the ICDR about the circumstances concerning the First Expert. Article IV, § 2.13 of the Bylaws provides the BGC "may also request information relevant to the request from third parties," but it does not require that the BGC do so. However, it would not have changed the outcome, as noted above. It is also noteworthy that Article IV, § 2.2(b) of the Bylaws provides that a party may submit a Reconsideration Request to the extent that the party has been adversely affected by:

one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act.

163. Here, there was no showing that Vistaprint attempted to develop information concerning how the removal of the First Expert might have had a material and adverse impact on Vistaprint, or information concerning the reasons for the First Expert stepping down.

164. Vistaprint also alleged that the ICDR unjustifiably accepted a challenge to the Second Expert, or created the circumstances for such a challenge. As the BGC noted, the procedure governing challenges to experts is set forth in Article 2 § 3 of the ICDR's New gTLD Objections Procedure, which provides:

Upon review of the challenge the DRSP in its sole discretion shall make the decision on the challenge and advise the parties of its decision.

165. The BGC reasoned that while Vistaprint may disagree with the ICDR's decision to accept the challenge to the Second Expert, that decision was in the "sole discretion" of the ICDR and it was not the BGC's role to second guess the ICDR's discretion in this regard.²¹⁰ The IRP Panel finds that the BGC violated no Article, Bylaw or the Guidebook by taking this

²⁰⁸ BGC Determination, p. 12, Request, Annex 26.

²⁰⁹ Request, ¶ 77.

²¹⁰ BGC Determination, p. 12, Request, Annex 26.

view. However, it does appear that the ICDR might have avoided the challenge situation in the first place by appointing someone other than the Second Expert – who had served as the expert panel in previous SCO case administered by the ICDR – given that the basis for the challenge against him, which the ICDR accepted, was his involvement in the previous case.

166. Vistaprint also claimed that the Third Expert incorrectly applied both the burden of proof and the substantive criteria for evaluating the String Confusion Objection. The BGC rejected these contentions and the IRP Panel agrees. The BGC’s decision looked closely at the standard to be applied in String Confusion Objection proceedings, as well as how the Third Expert extensively detailed the support for his conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in meaning – that it is likely to cause confusion.²¹¹ In this respect, the BGC did not violate ICANN’s Articles or Bylaws by determining that the Third Expert properly applied the relevant Guidebook policy for String Confusion Objections. As the BGC noted,

*The Requester’s disagreement as to whether the standards should have resulted in a finding in favor of Requester’s application does not mean that the panel violated any policy or process in reaching the decision.*²¹²

167. The Guidebook provides that the following evaluation standard is to be applied in String Confusion Objection proceedings:

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

168. Vistaprint in its Request emphasized that ICANN has indicated that the SCO test sets a high bar²¹³:

22. *At various times, ICANN has indicated that the string confusion test sets a high bar:*

- “[T]he standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard.[...] Therefore, while the objection and dispute resolution process is intended to address all types of similarity, the process is not intended to hobble competition or reserve a broad set of string [sic] for a first mover.” (fn. omitted)

- “Policy discussions indicate that the most important reason to disallow similar strings as top-level domain names is to protect Internet users from the increased exposure to fraud and other risks that could ensue from confusion of one string for another. This reasoning must be balanced against unreasonable exclusion of top-level labels and denial of applications where considerable investment

²¹¹ BGC Recommendation, pp. 15-18, Request, Annex 26.

²¹² BGC Determination, p. 17, Request, Annex 26.

²¹³ Request, ¶¶ 22-23.

has already been made. As the top-level grows in number of registrations, drawing too large a circle of “similarity protection” around each existing string will quickly result in the unnecessary depletion of available names. The unnecessary exclusion of names would also tend to stifle the opportunity of community representation at the top-level and innovation.” (fn. omitted)

23. ICANN’s high standard for dealing with string confusion objections has been explicitly confirmed by the NGPC, which states that in the Applicant Guidebook ‘similar’ means:

“strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone. During the policy development and implementation design phases of the New gTLD Program, aural and conceptual string similarities were considered. These types of similarity were discussed at length, yet ultimately not agreed to be used as a basis for the analysis of the string similarity panels’ consideration because on balance, this could have unanticipated results in limiting the expansion of the DNS as well as the reach and utility of the Internet. [...] The NGPC reflected on existing string similarity in the DNS and considered the positive and negative impacts. The NGPC observed that numerous examples of similar strings, including singulars and plurals exist within the DNS at the second level. Many of these are not registered to or operated by the same registrant. There are thousands of examples [...]” (NGPC Resolution 2014.02.056. NG02).

169. The passages quoted by Vistaprint, referencing ICANN materials and a resolution of the NGPC, arguably provide useful context in applying the test for String Confusion Objections. After citing these passages, however, Vistaprint contends in its Request that

“[a]s a result, two strings should only be placed in a contention set if they are so similar that they would create a probability of user confusion were both to be delegated into the root zone, and the finding of confusing similarity must be balanced against the risk of unreasonable exclusion of top-level labels and the denial of applications” (no underlining added).²¹⁴

170. However, the problem with the test as posited by Vistaprint is that it would add a balancing element that is not in the Guidebook’s standard: according to Vistaprint the finding of confusing similarity must be balanced against the risk of unreasonable exclusion of top-level labels and the denial of applications. This part of the standard (as advanced by Vistaprint) is not in the Guidebook, although the concerns it represents were reflected in the other ICANN materials. The Guidebook standard is as follows:

String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

171. There is no reference in this standard to balancing the likelihood of confusion against the needs to promote competition and to guard against the unreasonable exclusion of top-level strings. While it might be advisable to consider whether the standard for String Confusion Objections should be revised to incorporate such a balancing test, these elements were not in the policy that was applied by the Third Expert. Nor was there a violation, by the BGC or the ICANN Board, of any Articles or Bylaws in formulating the SCO standard as it was formulated (based on community input), and in determining that the Third Expert properly applied this policy.

²¹⁴ Request, ¶ 24.

172. ICANN has argued that the time for Vistaprint to have objected to the Guidebook and its SCO policy has long since passed. Vistaprint has responded that it contests the *implementation* of the Guidebook and its *policies*, not just the policies themselves. Even assuming that the Guidebook's policies could be challenged at this point, the IRP Panel finds that the relevant policies, such as the standard for evaluating String Confusion Objections, do not violate any of ICANN's Articles or Bylaws reflecting principles such as good faith, fairness, transparency and accountability. However, the Panel does agree with ICANN that the time for challenging the Guidebook's standard for evaluating String Confusion Objections – which was developed in an open process and with extensive input – has passed.
173. Vistaprint has also complained that it was not provided with the opportunity to appeal the Third Expert's decision on the merits, such that the BGC or some other entity would re-evaluate the Expert's string confusion determination. As noted above, the BGC's review focused on whether the ICDR and the Third Expert properly applied the relevant rules and policies, not on whether the BGC, if it had considered the matter *de novo*, would have found string confusion as between the .WEBS and .WEB strings.
174. The IRP Panel finds that the lack of an appeal mechanism to contest the merits of the Third Expert's SCO determination is not, in itself, a violation of ICANN's Articles or Bylaws. ICANN's commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the SCO mechanism so that the result of a string confusion determination would be subject to a right of appeal. Other significant dispute resolution systems – such as the international legal regime for commercial arbitration regarding awards as final and binding²¹⁵ – do not normally provide for a right of appeal on the merits.
175. In respect of Vistaprint's *SCO Proceedings Claim*, the IRP Panel denies each of Vistaprint's claims concerning ICANN's alleged breaches of obligations under the Articles, Bylaws and Affirmation of Commitments, as follows:
- (1) Vistaprint claims that ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint's .WEBS applications.²¹⁶ The IRP Panel denies Vistaprint's claim that Vistaprint was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure.
 - (2) Vistaprint claims ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the

²¹⁵ See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*.

²¹⁶ Request, ¶¶ 69-71.

Guidebook and Bylaws.²¹⁷ As discussed above, the IRP Panel rejects Vistaprint's claim that the *Vistaprint SCO* determination – finding that the .WEBS and .WEB gTLD strings are confusingly similar – is contradictory to ICANN's policy for String Confusion Objections as established in the Guidebook.

- (3) Vistaprint claims ICANN failed to comply with its obligation to act fairly and with due diligence and independent judgment as called for under Article 4 of the Articles of Incorporation, Articles I § 2.8 and IV § 3.4 of the Bylaws by accepting the SCO determination made by the Third Expert, who was allegedly not independent and impartial.²¹⁸ As noted above, the IRP Panel finds that there was no failure of the BGC to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles, when it determined that Vistaprint's claim – that the Third Expert was not independent and impartial and/or was not appropriately qualified – did not merit reconsideration.
- (4) Vistaprint claims that ICANN failed to comply with its obligations under the Article 4 of the Articles, and Article I §§ 2.7 and 2.8 and Article III § 1 of the Bylaws (and Article 9.1 of the Affirmation of Commitments) to act fairly and transparently by failing to disclose/perform any efforts to optimize the service that the ICDR provides in the New gTLD Program.²¹⁹ The IRP Panel rejects Vistaprint's contention that the BGC's Reconsideration determination shows that the BGC made no investigation into Vistaprint's fundamental questions about the Third Expert's arbitrariness, lack of independence, partiality, inappropriate qualification, or that the BGC did not exercise due diligence in making its determination on this issue.
- (5) Vistaprint claims ICANN failed to comply with its obligation to remain accountable under Articles I § 2.10 and IV § 1 of the Bylaws (and Articles 3(a) and 9.1 of the Affirmation of Commitments) by failing to provide any remedy for its mistreatment of Vistaprint's gTLD applications.²²⁰ The IRP Panel disagrees with Vistaprint's claim that ICANN's Board and the BGC adopted the Third Expert's SCO determination without examining whether it was made in accordance with ICANN's policy and fundamental principles under its Articles and Bylaws. In particular, as described above, the IRP Panel rejects Vistaprint's claim that the *Vistaprint SCO* determination is contradictory to ICANN's policy as established in the Guidebook and agrees with the BGC's analysis on this issue. Regarding Vistaprint's contention that ICANN should have created a review mechanism for challenging the substance of SCO expert determinations, as discussed above, the IRP Panel finds that the lack of such a general appeal mechanism creates no inconsistency with ICANN's Articles or Bylaws.
- (6) Vistaprint claims ICANN failed to promote competition and innovation under Articles I § 2.2 (and Article 3(c) of the Affirmation of Commitments) by accepting the Third

²¹⁷ Request, ¶ 72.

²¹⁸ Request, ¶ 73.

²¹⁹ Request, ¶¶ 52 and 77.

²²⁰ Request, ¶¶ 78-79.

Expert's determination.²²¹ Finally, the IRP Panel disagrees with Vistaprint's contention that the Board's acceptance of the determination in the *Vistaprint SCO* was contrary to ICANN's Bylaws because it was contrary to the interests of competition and consumers.

c. Disparate Treatment Claim

176. Vistaprint's final claim is one that raises a close question for this IRP Panel. Vistaprint contends that ICANN's Board discriminated against Vistaprint through the Board's (and the BGC's) acceptance of the Third Expert's determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation²²², or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

177. The IRP Panel agrees with Vistaprint's statement that the "IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations."²²³ As discussed above, in the Guidebook, § 5.1, ICANN has reserved the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community:

*....The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application....*²²⁴

178. However, as a counterbalance against this reserved power to individually consider new gTLD applications, the ICANN Board must also comply with Article II, § 3 of ICANN's Bylaws, providing for non-discriminatory treatment:

Section 3 (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

179. As Vistaprint maintains in its First Additional Submission, "[w]hen the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants."²²⁵

180. As discussed above in relation to standard of review, the IRP Panel considers that the Board's actions or omissions in this area of alleged non-discriminatory treatment bear the scrutiny of independent and objective review, without any presumption of correctness. Moreover, ICANN's Bylaws in Article I, § 2 set out its core values that should guide the

²²¹ Request, ¶ 80.

²²² ICANN has permitted the delegation of the .car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the .fan and .fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and .news gTLDs and the .work and .works gTLDs.

²²³ Vistaprint's Second Additional Submission, ¶ 20.

²²⁴ Guidebook, § 5.1.

²²⁵ Vistaprint's First Additional Submission, ¶ 31.

decisions and actions of ICANN, including the requirement, when balancing among competing core values, to exercise judgment to determine which core values are the most relevant and how they apply to the specific circumstances at hand. Of particular relevance to Vistaprint's disparate treatment claim are the core values set out in §§ 2.8 and 2.9:

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

* * * *

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[Underlining added]

181. Vistaprint's disparate treatment claim is based on the following allegations:

- On June 25, 2013, the NGPC, a sub-committee of ICANN's Board, determined in Resolution 2013.06.25.NG07 that no changes were needed to the existing mechanisms in the Guidebook to address potential consumer confusion from allowing singular and plural versions of the same gTLD string. The NGPC had addressed this issue in response to advice from the ICANN's Government Advisory Committee ("GAC") that due to potential consumer confusion, the Board should "reconsider its decision to allow singular and plural version of the same strings."
- On February 5, 2014, the day before Vistaprint submitted its Reconsideration Request to the BGC on February 6, 2014, the NGPC approved Resolution 2014.02.05.NG02, which directed ICANN's President to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent String Confusion Objection expert determinations. The NGPC resolution provides in relevant part:

Whereas, on 10 October 2013 the Board Governance Committee (BGC) requested staff to draft a report for the NGPC on String Confusion Objections "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 Amazon's Applied-for String and TLDH's Applied-for String."

Whereas, the NGPC is considering potential paths forward to address the perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, including implementing a review mechanism. The review will be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.

Whereas, the proposed review mechanism, if implemented, would constitute a change to the current String Confusion Objection process in the New gTLD Applicant Guidebook.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the

Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG02), the NGPC directs the President and CEO, or his designee, to publish for public comment the proposed review mechanism for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process.

[Underlining added]

- Vistaprint emphasizes that ICANN's Board (through the NGPC) took this decision the day before Vistaprint filed its Reconsideration Request; however, this did not prevent the BGC from denying Vistaprint's RFR less than one month later without considering whether such a review mechanism might also be appropriate for dealing with the SCO determination involving .WEBS/.WEB.²²⁶
- Vistaprint's Reconsideration Request and the BGC's decision on that Request rendered on February 27, 2014 contain no reference to the concerns that had been raised both by the BGC (on October 10, 2013 in a prior RFR determination) and the NGPC in its February 5, 2014 resolution concerning inconsistent expert SCO determinations, some of which involved plural and singular versions of the same gTLD string. Neither Vistaprint nor the BGC raised any discussion of disparate treatment at that time. The BGC's determined that its decision on Vistaprint's Reconsideration Request "shall be final and does not require Board (or NGPC) consideration."²²⁷
- On October 12, 2014, approximately 8 months after the BGC's decision on Vistaprint's Reconsideration Request, and after Vistaprint had filed its Request in this IRP (in June 2014), the NGPC approved Resolution 2014.10.12.NG02, in which it identified certain SCO expert determinations "as not being in the best interest of the New gTLD Program and the Internet community," and directed ICANN's President to establish processes and procedures to re-evaluate certain previous SCO expert determinations. Resolution 2014.10.12.NG02 also stated in its rationale:

The NGPC also considered whether there was a reasonable basis for certain perceived inconsistent Expert Determinations to exist, and particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not. The NGPC notes that while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively.

First, on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting identical issues could – and if appropriate should – reach different determinations, based on the strength of the materials presented.

Second, on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in "inconsistent" or "unreasonable" results, presented nuanced distinctions

²²⁶ Request, ¶ 52.

²²⁷ BGC Recommendation, p. 19, Request, Annex 26.

relevant to the particular objection. These nuances should not be ignored simply because a party to the dispute disagrees with the end result. Further, the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion. However, for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonably "discrepancies" may exist. To allow these Expert Determinations to stand would not be in the best interests of the Internet community.

The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

It should also be noted that in response to advice from the Governmental Advisory Committee (GAC), the NGPC previously considered the question of whether consumer confusion may result from allowing singular and plural versions of the same strings. On 25 June 2013, the NGPC adopted a resolution resolving "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string" <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d>. The NGPC again notes that the topic of singular and plural versions of the same string also may be the subject of further community discussion as it relates to future rounds of the New gTLD Program.

The NGPC considered community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings. The concerns raised in the ICANN meetings and in correspondence have been factored into the deliberations on this matter.

- In view of the NGPC's Resolution 2014.10.12.NG02, Vistaprint describes its disparate treatment claim in its First Additional Submission as follows:

13 Since the filing of Vistaprint's request for IRP, the ICANN Board clarified how the string similarity standard must be applied. In its resolutions of 12 October 2014, the ICANN Board identified certain SCO determinations "as not being in the best interest of the New gTLD Program and the Internet community" and set out the rules for a re-evaluation of these SCO determinations (fn. omitted):

- A first SCO determination that needed re-evaluation is the SCO determination in which ICDR's expert accepted Verisign Inc.'s objection to United TLD Holdco Ltd. ('United TLD')'s application for .cam. We refer to this SCO determination as the 'United TLD Determination'. In the United TLD Determination, ICDR's appointed expert found United TLD's application for .cam confusingly similar to Verisign Inc. ('Verisign')'s .com gTLD (RM 23). The ICANN Board decided that (i) the United TLD Determination was not in the best interest of the New gTLD Program and the Internet community and (ii) a new three-member panel must be established to re-evaluate the United TLD Determination (fn. omitted).

Verisign had also raised a SCO on the basis of its .com gTLD against the application for .cam by Dot Agency Limited and the application for .cam by AC Webconnecting Holding B.V. In both cases, the appointed experts determined that no confusing similarity existed between the .cam and .com strings (fn. omitted). We refer to these SCO determinations as the 'Related .cam/.com Determinations'. The ICANN Board decided that the Related .cam/.com Determinations need no

re-evaluation. In addition, the ICANN Board recommended that the three-member panel charged with re-evaluating the United TLD Determination must review the Related .cam/.com Determinations as background (fn. omitted).

- *Another SCO determination that needed re-evaluation is the determination in which ICDR's appointed expert accepted Commercial Connect LLC's objection to Amazon EU S.à.r.l. ('Amazon')'s application for .通販 (which means .onlineshopping in Japanese) (fn. omitted). We refer to this SCO determination as the 'Onlineshopping Determination'. ICDR's appointed expert found in the Onlineshopping Determination that Amazon's application for .通販 was confusingly similar to Commercial Connect LLC's application for .shop. Commercial Connect LLC also invoked its application for .shop in a SCO against Top Level Domain Holdings Limited's application .购物 (which means 'shop' in Chinese). ICDR's appointed expert rejected the latter SCO (fn. omitted). We refer to this SCO determination as the 'Related shop/.shop Determination'. The ICANN Board decided that a three-member panel needs to re-evaluate the Onlineshopping Determination and that no re-evaluation is needed for the Related shop/.shop Determination. The ICANN Board decided that the Related shop/.shop Determination must be reviewed as background by the three-member panel that is charged with re-evaluating the Onlineshopping Determination (fn. omitted).*

14. The ICANN Board's recommendations to the three-member panels charged with the re-evaluation of the United TLD Determination and the Onlineshopping Determination are clear. Related determinations – involving the same gTLD string(s) and finding that there is no confusing similarity – will not be re-evaluated and must be taken into account in the re-evaluations.

15. Upon instigation of the ICANN Board, ICANN had developed the same process for re-evaluating the SCO determination in which ICDR's appointed expert accepted Charleston Road Registry Inc. ('CRR')'s objection to DERCars, LLC's application for .cars. We refer to this SCO determination as the 'DERCars Determination'. In the DERCars Determination, ICDR's appointed expert found DERCars, LLC's application for .cars confusingly similar to CRR's application for .car. CRR had also objected to the applications for .cars by Uniregistry, Corp. and Koko Castle, LLC, claiming confusing similarity with CRR's application for .car. The latter objections by CRR were not successful. ICANN decided that DERCars, LLC should be given the option of having the DERCars Determination reviewed. ICANN was not allowing a review of the other SCO determinations involving .car and .cars (fn. omitted).

16. The above shows that ICANN and its Board have always decided in favor of co-existence of 'similar' strings. The ICANN Board explicitly allowed singular and plural gTLD strings to co-exist (fn. omitted). To support this view, the ICANN Board referred to the existence of thousands of examples of singular and plurals within the DNS at second level, which are not registered to or operated by the same registrant. The ICANN Board inter alia referred to the co-existing car.com and cars.com (fn. omitted).

17. Why did the ICANN Board intervene in the DERCars determination – involving the strings .car and .cars – but refused to intervene in the SCO Determination involving .web and .webs? In view of the small number of SCO Determinations finding confusing similarity between two strings (fn. omitted), it is a true mystery why the ICANN Board intervened in some matters, but refused to do so in the SCO determinations on Vistaprint's applications for .webs.

18. If anything, the .webs/.web string pair is less similar than the .cars/.car string pair. Cars is commonly used as the plural for car. Web, however, commonly refers to the world wide web, and as such, it is not normally a word where the plural form would be used.

182. Vistaprint contends that ICANN cannot justify the disparate treatment described above. While Vistaprint recognizes that ICANN's Board intervened to address perceived inconsistent or otherwise unreasonable SCO expert determinations, ICANN failed to explain why the SCO determination on Vistaprint's .WEBS applications was not just as unreasonable as the SCO expert determinations involving .cars/.car, .cam/.com, and 通販

/.shop.

183. In response to Vistaprint's disparate treatment claim, ICANN contends that ICANN's Board only intervened with respect to certain SCO expert determinations because there had been several independent expert determinations regarding the same strings that were seemingly inconsistent with one another. ICANN states that is not the case with respect to Vistaprint's applications, as no other expert determinations were issued regarding the similarity of .WEB and .WEBS.²²⁸ ICANN further urges that the Board was justified in exercising its discretion to intervene with respect to the inconsistent SCO expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販, because the Board acted to bring certainty to differing SCO expert determinations regarding the same strings.²²⁹ However, this justification was not present with respect to the single *Vistaprint SCO*.
184. Finally, ICANN stated that "Vistaprint has identified no Articles or Bylaws provision violated by the ICANN Board *in exercising its independent judgment to intervene with respect to certain inconsistent expert determinations on string confusion objections unrelated to this matter, but not with respect to the single Expert Determination regarding .WEB/.WEBS*" (italics added).²³⁰
185. The IRP Panel has considered carefully the parties' contentions regarding Vistaprint's disparate treatment claim. The Panel finds that, contrary to what ICANN has stated above, ICANN's Board did not have an opportunity to "exercise its independent judgment" – in particular, in view of its decisions to implement an additional review mechanism for certain other inconsistent SCO expert determinations – to consider specifically whether it should intervene with respect to the adverse SCO expert determination involving Vistaprint's .WEBS applications.
186. It is clear that ICANN's Board, through the BGC and the NGPC, was aware of the concerns involving inconsistent decisions in SCO proceedings when it decided Vistaprint's Reconsideration Request in February 2014. The NGPC, on the day (February 5, 2014) before Vistaprint filed its Reconsideration Request and in response to a request from the BGC, initiated a public comment period on framework principles for a potential review mechanism to address perceived inconsistent SCO expert determinations. However, the BGC's decision on the Reconsideration Request rendered on February 27, 2014 made no mention of these issues.²³¹ By comparison, there is no evidence that

²²⁸ ICANN's First Additional Submission, ¶ 5.

²²⁹ ICANN's First Additional Submission, ¶ 18.

²³⁰ ICANN's Second Additional submission, ¶ 21.

²³¹ In this regard, the IRP panel in the *Booking.com final Declaration* (¶ 119) quoted Mr. Sadowsky, a member of the Board's NGPC committee, commenting on the Reconsideration process as follows:

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the...community and/or Internet users in general.

Vistaprint was aware of these issues at the time it filed its Reconsideration Request on February 6, 2014. Vistaprint has raised them for the first time in a timely manner during the pendency of this IRP.

187. In accordance with Article 1, § 2 of the Bylaws, the Board *shall* exercise its judgment to determine which competing core values are most relevant and how they apply to arrive at a defensible balance among those values in relation to the case at hand. Given the timing of Vistaprint’s Reconsideration Request, and the timing of ICANN’s consultation process for potential review mechanisms to address inconsistent SCO expert determinations, this exercise of judgment by the Board has not yet occurred in the case of Vistaprint’s .WEBS gTLD applications.
188. Here, ICANN is subject to the requirements of Article II, § 3 of its Bylaws regarding non-discriminatory treatment, providing that it shall not apply its “standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause.” ICANN has provided additional relief to certain gTLD applicants who were subject to adverse decisions in String Confusion Objection cases. In those cases, the differences in the gTLD strings at issue were not too dissimilar from the .WEBS/.WEB gTLD strings. One of the cases in which ICANN agreed to provide an additional mechanism for review involved a string confusion objection for the .CAR/.CARS strings, which involve the singular vs. plural of the same string. Meanwhile, many other singular and plural variations of the same gTLD strings have been permitted to proceed to delegation, including AUTO and .AUTOS; .ACCOUNTANT and ACCOUNTANTS; .FAN and .FANS; .GIFT and .GIFTS; .LOAN and .LOANS; .NEW and .NEWS; and .WORK and .WORKS.
189. This IRP Panel, among its three members, could not agree – in regards to the specific circumstances of Vistaprint’s gTLD applications – whether the reasons offered by ICANN in its Resolution 2014.10.12.NG02 for refusing the “to expand the scope of the proposed review mechanism to include other [SCO] Expert Determinations” would meet the standard of non-discrimination imposed by Article II, § 3 of the Bylaws, as well as the relevant core values in Article 1, § 2 of the Bylaws (e.g., applying documented policies neutrally and objectively, with integrity and fairness). For instance, one view is that limiting the additional review mechanism to only those SCO cases in which there were inconsistent decisions is a sufficient reason for intervening in these cases, but not in other SCO cases involving similar singular vs. plural gTLD strings where the applicant received an adverse decision. On the other hand, another view is that the real focus should be on the developments involving single vs. plural gTLDs strings, including the inconsistency of decisions and the offering of additional review mechanism in certain cases, and the delegation of so many other single/plural variations of the same gTLD strings, which are, at least in this way, similarly situated to the circumstances of the .WEBS/.WEB strings.²³²

²³² Regarding inconsistent decisions, Vistaprint quoted the statement dated October 8, 2014, of ICANN’s former Chief Strategy Officer and Senior Vice President of Stakeholders Relations, Kurt Pritz, who had apparently been leading the introduction of the New gTLD Program, concerning ICANN’s objection procedure:

(Continued...)

190. The IRP Panel is mindful that it should not substitute its judgment for that of ICANN's Board. The Board has not yet considered Vistaprint's claim of disparate treatment, and the arguments that ICANN makes through its counsel in this IRP do not serve as a substitute for the exercise of independent judgment by the Board. Without the exercise of judgment by ICANN's Board on this question of whether there is any inequitable or disparate treatment regarding Vistaprint's .WEBS gTLD applications, the Board would risk violating its Bylaws, including its core values. As the Emergency IRP Panel found in the *GCC Interim IRP Declaration*:

The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.

*This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgment.*²³³

191. Here, the IRP Panel finds that due to the timing and scope of Vistaprint's Reconsideration Request (and this IRP proceeding), and the timing of ICANN's consultation process and subsequent NGPC resolution authorizing an additional review mechanism for certain gTLD applications that were the subject of adverse SCO decisions, the ICANN Board has not had the opportunity to exercise its judgment on the question of whether, in view of ICANN's Bylaw concerning non-discriminatory treatment and based on the particular

There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. The fact is most easily demonstrated in the 'string confusion,' objections where challenges to exactly the same strings yielded different results. [...] With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanism put [sic] into place to rationalize or normalize the answers. [...] It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in the objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the new gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning on discrimination, application of document policies neutrally, objectively and fairly, promotion of competition, and accountability." (fn. omitted).

²³³ See *GCC Interim IRP Declaration*, ¶¶ 76-77 ("Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values" ¶ 90 (underlining added).

circumstances and developments noted above, such an additional review mechanism is appropriate following the SCO expert determination involving Vistaprint's .WEBS applications.²³⁴ Accordingly, it follows that in response to Vistaprint's contentions of disparate treatment in this IRP, ICANN's Board – and not this Panel – should exercise its independent judgment on this issue, in light of all of the foregoing considerations.

VI. Prevailing Party; Costs

192. Article IV, § 3.18 of ICANN's Bylaws requires that the IRP Panel "specifically designate the prevailing party." This designation is relevant to the allocation of costs, given that the same section of the Bylaws provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

193. Article IV, § 3.18 of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."

194. Similarly, the Supplementary Procedures provide in Rule 11:

The IRP Panel shall fix costs in its Declaration. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP Panel may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

195. Here, Vistaprint engaged in the Cooperative Engagement Process, although the process did not resolve the issues between the parties. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the

²³⁴ The IRP Panel observes that the NGPC, in its Resolution 2014.10.12.NG02, sought to address the issue of why certain SCO expert determinations should be sent back to the ICDR while others should not. In that resolution, the NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be appropriate as part of future rounds in the New gTLD Program. The NGPC stated that applicants may have already taken action in reliance on SCO expert determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. However, in this case Vistaprint does not fall within the category of applicants who have taken such actions in reliance. Instead, it is still asserting its claims in this IRP proceeding. In accordance with the Bylaws, Vistaprint is entitled to an exercise of the Board's independent judgment to determine, based on the facts of the case at hand and in view of ICANN's Bylaws concerning non-discriminatory treatment and core values, whether Vistaprint should be entitled to the additional review mechanism that was made available to certain other gTLD applicants.

Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the IRP Panel members and of the ICDR.

196. ICANN is the prevailing party in this IRP. This designation is confirmed by the Panel's decisions concerning Vistaprint's requests for relief in this IRP:

- Vistaprint requests that the Panel find ICANN breached its Articles, Bylaws, and the Guidebook. The Panel declares that ICANN's Board (including the BGC) did not violate the Articles, Bylaws and Guidebook.
- Vistaprint requests that the Panel require ICANN to reject the Third Expert's determination in the *Vistaprint SCO*, disregard the resulting "Contention Set", and allow Vistaprint's applications for .WEBS to proceed on their merits. The Panel determines that it does not have authority to order the relief requested by Vistaprint. In addition, the Panel declares that the Board (through the BGC) did not violate the Articles, Bylaws and Guidebook in regards to the BGC's handling of Vistaprint's Reconsideration Request.
- Vistaprint requests, in the alternative, that the Panel require ICANN to reject the *Vistaprint SCO* determination and organize a new procedure, in which a three-member panel would re-evaluate the Third Expert's decision taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs, as well as the Board's resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination, and (ii) ICANN's decisions to delegate the following gTLDs: .CAR and .CARS; .AUTO and .AUTOS; .ACCOUNTANT and ACCOUNTANTS; .FAN and .FANS; .GIFT and .GIFTS; .LOAN and .LOANS; .NEW and .NEWS; and .WORK and .WORKS. The Panel determines that it does not have authority to order the relief requested by Vistaprint. In addition, the Panel recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings.

197. The IRP Panel also recognizes that Vistaprint, through its Request and submissions, raised certain complex and significant issues and contributed to the "public interest" involving the New gTLD Program and the Independent Review Process. It is therefore appropriate and reasonable to divide the IRP costs over the parties in a 60% (Vistaprint) / 40% (ICANN) proportion.

FOR THE FOREGOING REASONS, the IRP Panel hereby:

- (1) Declares that Vistaprint's IRP Request is denied;
- (2) Designates ICANN as the prevailing party;

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US\$4,600.00 as well as the compensation and expenses of the Panelists totaling US\$229,167.70 are to be borne US\$140,260.62 by Vistaprint Limited and US\$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US\$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

(5) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Siegfried H. Elsing
Date:

Geert Glas
Date:



Christopher Gibson
Chair of the IRP Panel
Date: 9 Oct. 2015

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US\$4,600.00 as well as the compensation and expenses of the Panelists totaling US\$229,167.70 are to be borne US\$140,260.62 by Vistaprint Limited and US\$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US\$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

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Siegfried H. Elsing
Date: 9 October 2015

Geert Glas
Date:

Christopher Gibson
Chair of the IRP Panel
Date:

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US\$4,600.00 as well as the compensation and expenses of the Panelists totaling US\$229,167.70 are to be borne US\$140,260.62 by Vistaprint Limited and US\$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US\$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

(5) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Siegfried H. Elsing
Date:



Geert Glas
Date: 9 October 2015



Christopher Gibson
Chair of the IRP Panel
Date: 9 Oct. 2015

Resp. Ex. 5

RESPONDENT'S EXHIBIT

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PROCESS

Case No. 01-14-0000-9604

MERCK KGaA
(Claimant)

-v-

Internet Corporation for Assigned Names and Numbers
(Respondent)

**FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS
PANEL**

Section I – Procedural History

1. The Claimant, Merck KGaA (“Merck”), of Frankfurter Straße 250 64293 Darmstadt, Germany, is represented in this matter by Bettinger Schneider Schramm, Cuvilliesstraße 14, 81679 Munich, Germany.
2. The Respondent, Internet Corporation for Assigned Names and Numbers (“ICANN”), of Suite 300 12025 E. Waterfront Dr., Los Angeles, CA 90094, USA, is represented in this matter by Jones Day, 555 South Flower Street Fiftieth Floor Los Angeles, CA 90071, USA.
3. A Notice of Independent Review dated July 17, 2014 was filed by Merck with the International Centre for Dispute Resolution, together with its Request.
4. ICANN filed its Response on August 29, 2014.
5. The Panel held a preliminary hearing call on April 1, 2015 and issued the following direction by email thereafter:

Merck KGaA V. ICANN - Case 01-14-0000-9604

The Preliminary Hearing Call in this matter took place at 9am, Pacific Time, on April 1, 2015, and was duly notified and convened. Counsel (Bettinger, with Gray, for Merck KGaA; LeVee for ICANN) for both parties made observations on the procedure to be adopted in this Independent Review Process. At the conclusion of the Preliminary Hearing Call the parties were asked whether there was anything further they wished to raise, and the answer from each side was no.

*The Panel (Dinwoodie, Matz, and Reichert) now, bearing these observations in mind together with the materials already filed by the parties to date, **issues the following directions:***

- 1. Merck KGaA shall file its Reply Submission on May 20, 2015.*
- 2. ICANN shall file its Rejoinder Submission on July 8, 2015.*
- 3. A page limit of 20 pages applies to both Submissions (the page limit does not apply to matters such as tables of contents).*

4. The Submissions should only attach any additional evidentiary exhibit which is strictly necessary for the purpose of reply/rejoinder. Also, the parties must focus their Submissions on matters which are strictly for the purposes of reply/rejoinder, and not seek to reformulate the case as already presented.

5. If there is any dispute as to acronyms or other defined terms, the Submissions should clearly flag these in order that there is no misunderstanding.

6. As soon as possible after July 8, 2015, the Panel will communicate with the parties as to the next stages of this Independent Review Process.

As noted on the Preliminary Hearing Call by the ICDR representative, communications will now take place directly between the Panel and the parties, with a copy at all times to the ICDR.

For and on behalf of the Panel.

Klaus Reichert SC

6. On May 20, 2015, Merck filed its Reply.
7. On July 9, 2015, ICANN filed its Rejoinder.
8. On July 12, 2015, the Panel issued the following direction by email:

Dear Counsel,

The Panel has considered the submissions received.

Having considered the submissions made to date, do the parties wish to have an oral hearing? If the answer from a party is yes, we would like to know the likely duration of such a hearing, and whether there is a preference for it to be conducted in person, or by telephone.

Once we have received your responses to the foregoing we will consider the future conduct of this matter and revert to the parties.

We do not set a particular deadline for your responses, rather we ask that you reply as soon as possible.

Klaus Reichert

9. On July 14, 2015, ICANN indicated that it believed that a hearing by telephone would be useful.
10. On July 21, 2015, Merck indicated that a hearing would be unnecessary.
11. On July 21, 2015, the Panel issued the following direction by email:

Dear Counsel,

Noting Article 4 of the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("the Procedures"), the Panel has determined that a telephone hearing will not be necessary.

Noting Article 11 of the Procedures, we invite each side to submit their respective claims for costs by July 29, 2015. Thereafter an opportunity will be afforded to each side to comment on the claim for costs of the other.

Klaus Reichert

12. On July 28, 2015, Merck stated that ICANN should be held responsible for (a) the fees and expenses of the panelists, and, (b) the fees and expenses of the administrator, the ICDR.
13. On July 28, 2015, ICANN stated that Merck should be held responsible for costs (identifying the same headings as those identified by Merck).
14. On July 28, 2015, the Panel issued the following direction by email:

Dear Parties,

Thank you both for your letters on costs.

We now ask each side for any final observations they might wish to make on costs in light of the letters received today. The deadline is 4 August 2015.

Klaus Reichert

15. On July 31, 2015, Merck stated that it had no comment on ICANN's letter regarding costs. ICANN did not make any final observations on costs.

Section II – The Panel's Authority

16. The Panel's authority and mandate is as follows (from Article IV, Section 3.4 of ICANN's Articles of Incorporation and Bylaws):

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a did the Board act without conflict of interest in taking its decision?;*
 - b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
 - c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
17. The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action¹ of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for a comparison exercise requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN. The Panel, of course, does take careful note of the characterizations that are advanced by the Claimant and ICANN.
18. As regards the substantive object of the comparison exercise, namely, whether there was consistency as between the action and the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit

¹ The Panel is of the view that inaction, depending upon the circumstances, may constitute an action within the meaning of Article IV, Section 3.4.

in focusing on three specific elements. The phrase “defined standard of review” undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word “consistent” as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.

19. The parties dwell in various ways on whether the Panel’s approach is deferential or *de novo*. The Panel does not find this debate to be of assistance as it diverts attention from the precise parameters of its authority, namely, to do exactly what it is mandated to do by Article IV, Section 3.4.
20. Nothing in the language of Article IV, Section 3.4, suggests that there be any deference afforded to the contested action. Either the action was consistent with the Articles of Incorporation and Bylaws, or it was not.
21. Discussion as regards whether the Panel should engage in a *de novo* standard of review is also apt to mislead. However, it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.
22. In summary, the Independent Review Process is a bespoke process, precisely circumscribed. The precise language used in Article IV, Section 3.4 requires the party seeking to contest an action of the Board to identify exactly such action, and also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws. Thus, a panel is required to consider only the precise actions contested. Such a contesting party also bears the burden of persuasion.

Section III – Analysis

23. The **first contested action**, as characterized and raised by Merck in paragraph 46 of the Request is:

The ICANN Board has accepted three expert determinations which suffer from palpable mistakes and manifest disregard of its own LRO standards, without due diligence and care to prevent the acceptance of such determinations, resulting in fundamental unfairness and a failure of due process for the Claimant.

24. Merck says that this is a violation of ICANN’s Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

25. The Panel will first describe, based on its appreciation of the materials put before it, the background leading up to the initiation of this Independent Review Process.
26. Merck is a long-established pharmaceutical and chemical business in Germany. In 1917 its then American business (now Merck & Co., Inc. (“MSD”)) was separated from it by the Trading with the Enemy Act arising from the entry of the United States as a belligerent into World War I. The co-existence of Merck and MSD has been the subject of a number of formal agreements over the years, and also a number of disputes.
27. Merck and MSD each filed applications with ICANN for new gTLDs incorporating the word “Merck”. As a result, Merck and MSD then filed a number of Legal Rights Objections (“LROs”) against each other with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure. At the heart of Merck’s complaint was the point that MSD apparently was not intending to limit, through

geo-targeting, the potential global reach of its applied-for domains. In contrast, Merck made explicit its intention to use geo-targeting.

28. By Determinations issued in July and September 2013, the Sole Panel Expert rejected the LROs. The following extract from LRO2013-0068 is reflective of the reasoning common to all:

The starting point of this case is that Objector and Applicant are both bona fide users of the MERCK trademark, albeit for different territories.

The question is whether a bona fide trademark owner that owns trademark rights in certain countries but does not have rights to a certain trademark in all countries of the world, should for that reason be prevented from obtaining a gTLD. In the view of the Panel, such a proposition does not make sense. If the opposite view would be accepted, it would be expected from any trademark owner interested in a gTLD to have trademark registrations in all countries of the world as otherwise another party could register one trademark in an "uncovered" country and thus prevent the first trademark owner from applying for and using its own gTLD.

In essence there should not be a significant difference between the criteria for the legal rights objection as included in the Guidebook on the one hand and the provisions included in the Uniform Domain Name Dispute Resolution Policy ("UDRP"). If the applicant for a new gTLD is bona fide, it will not be likely that one of the three criteria will be met. It might be that advantage of the distinctive character or the reputation of the objector's registered trademark is taken, but it is then likely not unfair. It might be that the distinctive character or reputation of the objector's registered trademark is being impaired, but it is likely justified. It might be that a likelihood of confusion between the Disputed gTLD String and the objector's mark is created, but it is not necessarily impermissible.

Of course a rejection of the Objection does not preclude Objector from taking regular legal action should the use of the Disputed gTLD String by Applicant be infringing. It is, however, not for this Panel to anticipate on all the possible types of use Applicant could make of the Disputed gTLD.

It is also not for this Panel to interpret the existing coexistence agreements and arrangements between the Parties. Should the application of a new gTLD allegedly violate any such agreement or arrangement, it will be for the Parties to settle their dispute by means of the dispute resolution provisions of the contracts governing their relationship or as provided under applicable law.

For the aforementioned reasons the Panel rejects the Objection.

In reaching the above conclusion, the Panel has considered the following non-exclusive list of eight factors.

The Panel addresses each of them in turn:

i. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to Objector's existing mark.

[Sole Panel Expert analysis follows]

ii. Whether Objector's acquisition and use of rights in the mark has been bona fide.

[Sole Panel Expert analysis follows]

iii. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of Objector, of Applicant or of a third party.

[Sole Panel Expert analysis follows]

iv. Applicant's intent in applying for the gTLD, including whether Applicant, at the time of application for the gTLD, had knowledge of Objector's mark, or could not have reasonably been unaware of that mark, and including whether Applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

[Sole Panel Expert analysis follows]

v. Whether and to what extent Applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by Objector of its mark rights.

[Sole Panel Expert stated that this factor would be discussed together with the factor mentioned under vi.]

vi. Whether Applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by Applicant is consistent with such acquisition or use.

[Sole Panel Expert analysis follows]

vii. *Whether and to what extent Applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by Applicant is consistent therewith and bona fide.*

[Sole Panel Expert analysis follows]

viii. *Whether Applicant's intended use of the gTLD would create a likelihood of confusion with Objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.*

[Sole Panel Expert analysis follows]

29. On September 23, 2013, Merck raised with WIPO a number of points of its concern with the contents of three of the Determinations. First, Merck noted that the Sole Panel Expert referenced intended geo-targeting by MSD, when in fact it was Merck which was intending to do so. Secondly, Merck stated that the Sole Panel Expert did not consider the three elements of the LRO Policy but rather those contained in the UDRP. In addition, Merck stated the following:

There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel. No court can review these decisions, and indeed even ICANN likely has limited powers to overturn a decision, even where it has been entered based on a wholly erroneous review of the submitted facts and evidence.

30. The Sole Panel Expert issued an Addendum dated September 24, 2013. As regards geo-targeting, he stated:

It is correct that the Expert Determinations under 6. (Discussion and Findings) under the heading Trademark Infringement, under non-exclusive factor viii, should not have included the following sentence:

"Applicant has made it clear that it will take all necessary measures, including geo-targeting, to avoid that Internet users in the territories in which Objector has trademark rights, will be able to visit websites that use the Disputed gTLD String."

.....

Having noted this, the Panelist should make clear that, in reviewing LRO2013-0009, LRO2013-0010 and LRO2013-0011, he was in fact aware of the distinction in this regard, as reflected in the pleadings as cited and summarized in the Expert Determinations, between the latter three cases and cases LRO2013-0068 and LRO2013-0069 in relation to the competing applications at stake.

In any event, the Panelist considers it important to confirm that the above-mentioned sentence as such is immaterial to the conclusion which the Panelist reached in rejecting the Objections.

31. As regards his application of UDRP or LRO Policy, the Sole Panel Expert was of the view that, UDRP comparisons notwithstanding, he had applied the specific LRO criteria.
32. On February 27, 2014, ICANN informed Merck that it had updated the LRO Determinations together with the Sole Panel Expert's Addenda.
33. On March 13, 2014, Merck filed a Request for Reconsideration. It requested ICANN to reject the advice recorded in the Sole Panel Expert's Determinations, and "instruct a panel to make an expert determination that applies the standards defined by ICANN".
34. Merck's grounds for its Request for Reconsideration were summarized as follows:

In this case, the Expert Panel failed to take reasonable care in evaluating the parties' respective evidence and to make a correct application of the LRO standard developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its three LRO disputes.

35. On April 29, 2014, the Board Governance Committee of ICANN ("BGC") made its Determination dismissing the Request for Reconsideration. The initial part of that Determination summarized the reasons:

Merck Registry Holdings, Inc. applied for .MERCK and MSD Registry Holdings, Inc. applied for .MERCKMSD. The Requester, who also applied for .MERCK, objected to these applications and lost. The Requester claims that the Panel failed to comply with ICANN policies

and processes in reaching its determinations. Specifically, the Requester contends that the Panel:

(i) improperly interpreted the factors governing legal rights objections in light of “wholly inapplicable” Uniform Domain Name Dispute Resolution Policy (“UDRP”) standards; and

(ii) failed to “accurately assess critical facts concerning the Parties’ pleadings, leading to mis-attribution of party intent [concerning geo-targeting commitments] and a material misrepresentation of the parties’ respective positions.” (Request, §§ 6, 8, Pgs. 6, 18.)

With respect to the claims submitted by the Requester, there is no evidence that the Panel either applied the improper standard or failed to properly evaluate the parties’ evidence. First, the Panel correctly referenced and analyzed the eight factors set out in the Applicant Guidebook relevant to legal rights objections and considered the UDRP only as a means to further provide context to one of the eight factors. The Requester does not identify any policy or process that was violated in this regard. Second, after the Requester brought the Panel’s mis-attribution of geo-targeting commitments to the attention of WIPO, the Panel issued an Addendum to the Determinations, confirming that the misstatement was “inadvertent,” that the Panel “was in fact aware of the distinction,” and that the misstatement was not material to the Determinations in all events. Because the Requester has failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC concludes that Request 14-9 be denied.

36. On April 29, 2014, the BGC held a meeting and the minutes note the following:

Reconsideration Request 14-9– Ram Mohan abstained from participation of this matter noting conflicts. Staff briefed the BGC regarding Merck KGaA’s Request seeking reconsideration of the Expert Determinations, and ICANN’s acceptance of those Determinations, dismissing Merck KGaA’s legal rights objections to Merck Registry Holdings, Inc.’s application for .MERCCK and MSD Registry Holdings, Inc.’s application for .MERCCKMSD. After discussion and consideration of the Request, the BGC concluded that the Requester has not stated proper grounds for reconsideration because the Request failed to demonstrate that the expert panel acted in contravention of established policy or procedure. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction; the BGC still has the discretion, but is not required, to recommend the matter to the Board for consideration. Accordingly, the BGC concluded that its determination on Request 14-9 is final; no consideration by the NGPC is warranted. □

37. In light of the foregoing, this Panel now analyses the first contested action for the purposes of the comparison exercise. Although in paragraph 48 of its Request Merck characterizes the challenged action as the “acceptance” of by the Board of the BGC determination, it is clear from the Request as a whole that the focus of the complaint is the decision of the BGC. While this Panel’s focus is on the first contested action precisely as advanced by Merck (namely, “acceptance”), concomitant with that exercise will be an analysis (within the confines of this Panel’s jurisdiction) of the BGC’s Determination (noting ICANN’s Articles of Incorporation and Bylaws, Article I, Section 2.3(f)).
38. The question now arises as to whether the first contested action was consistent with Article I, Section 2.8, namely, was there a neutral and objective application, with integrity and fairness, by the Board of documented policies.
39. Assistance for this Panel is derived from the three elements defining the focus of the review in Article IV, Section 3.4, namely:
- a did the Board act without conflict of interest in taking its decision?;*
 - b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
 - c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
40. The Panel takes each of the three factors, a-c, in turn.
41. Factor (a): Did the Board act without conflict of interest in taking its decision? The Panel finds that there is no evidence whatsoever to suggest that there was any conflict of interest. Merck suggests that ICANN had a conflict of interest due to the potential for a financial windfall in the event of there being an Auction of Last Resort. This is a submission made without evidence, is speculative, and is unfounded. Moreover, this Panel

does not consider that this Independent Review was initiated (or capable of being initiated) to challenge, in substance, the policy decision of ICANN in 2012 to include the Auction of Last Resort.

42. The Panel finds that the answer to question “a” is yes.
43. Factor (b): Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them? In the Panel’s assessment of the materials and arguments put before it, this appears to be at the heart of Merck’s complaints.
44. Merck criticizes severely the manner by which the Sole Panel Expert dealt with the issue of geo-targeting. Merck also takes particular issue with the application (or otherwise, as it suggests) by the Sole Panel Expert of LRO standards. It claims that these failings caused a denial of due process. Put another way, Merck is contending that the Sole Panel Expert got it so badly wrong, the process should be run again.
45. Merck’s criticisms of the Sole Panel Expert flow through into its complaints directed at the BGC.
46. Merck wanted the BGC to “reject the advice set forth in the Decisions, and instruct a panel to make an expert determination that applies the standards defined by ICANN”. Merck effectively wanted the BGC to overturn the Sole Panel Expert’s decisions and have the process re-run (which is what it, in substance, wants from this Panel). Its reasons for making that request of the BGC were that the Sole Panel Expert failed to decide the case on the basis of the correct and applicable LRO Standard, and moreover failed to decide the case on the basis of the true and accurate factual record which was presented to him in the course of the dispute. Merck then concludes from those points that it had “been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the panel’s deliberations, and the panel elected to decide the case on inapplicable grounds”.

47. However, this basis for requesting relief does not sit easily with Merck's own stated position on September 23, 2013, noted above, and repeated here for emphasis:

There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel....

Merck plainly recognized that the sole recourse was by means of the Request for Reconsideration process (which Merck itself invoked). That process is of limited scope, with Article IV, Section 2.2, delineating that jurisdiction:

Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

- a. one or more staff actions or inactions that contradict established ICANN policy(ies); or*
- b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or*
- c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.*

None of these three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits.

48. The BGC recognized in its Determination that the Sole Panel Expert, in his Addenda, specifically noted the correct position as regards geo-targeting, and also that he further considered that his conclusions remained the same. In light of the Addenda, there is nothing to suggest that the Sole Panel Expert made his decision on the basis of incorrect facts. More importantly

for the purposes of this Review, the BGC analyzed whether he had done so.

49. Moreover, Merck's complaints about the Sole Panel Expert's application, or in its view, non-application of the LRO Standards lack merit. The BGC determined that the Sole Panel Expert did not apply the wrong standards. That is a determination which this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess. Rather, the critical question for this Panel is whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them. Merck complains that the BGC did not have "sufficient and accurate facts", and that Merck was thus deprived of an "accurate review of its complaints". These formulations miss the point, and indeed misstate the applicable test in proceedings such as these. The BGC had to have a reasonable amount of facts in front of it, and to exercise due diligence and care in ensuring that it did so. There is no evidence that the BGC did not have a reasonable amount of facts in front of it or consider them fully. It plainly had everything which was before the Sole Panel Expert. Nothing seems to have been withheld from the BGC.
50. Merck's complaints are, in short, not focused upon the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert. Because this is not a basis for action by this Panel, the Panel answers question "b" with "yes".
51. Factor (c): Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? The Panel does not see that Merck has mounted any attack through this route other than inferentially by vague references to the auction process. As regards that particular decision, there is no evidence (or indeed any concrete allegation) that the BGC or Board members did not exercise independent judgment.

52. In summary, therefore, the Claimant's first contested action complaint is dismissed.

53. The **second contested action** as characterized and raised by the Claimant in paragraph 46 of the Request is:

The ICANN Board improperly disposed of the Claimant's RFR as the BGC violated its competency and independence in its evaluation of the application of the LRO standard. Further, its assessment was incorrect and failed to take into account the global use of the gTLD by Merck & Co. Additionally, the ICANN Board has provided the possibility for third-party review of some prima facie erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant. This results in discrimination and unfairness to, and failure of due process for, the Claimant.

54. The Claimant says that this is a violation of ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

55. The action of the Board, as precisely contested by Merck, is set out in paragraph 53 above. This particular action of the Board is developed by Merck as follows at paragraph 79 of the Request:

The BGC did not address the Claimant's concerns (i) competently, (ii) independently, and (iii) substantively on the basis of the Claimant's legal argument.

56. **Incompetence**: Merck asserts, at paragraph 82 of the Request that the BGC was incompetent because it had no alternative but to engage "in impermissible substantive analysis and interpretation". Merck then states that the BGC should have taken steps to address its concerns by, citing prior ICANN examples, appointing an independent legal advisor, or "recommending that the ICANN Board take appropriate measures that the

BGC is incompetent to make”. Drawing on these, Merck criticizes the fact that in some instances where there has been a prima facie erroneous determination ICANN provides for a review, whereas in others it does not. It says that this is a violation of the requirements of neutrality and fairness.

57. The Panel’s attention is drawn by Merck to a document recording the Resolutions of the Meeting of the New gTLD Program Committee (“NGPC”) on March 22, 2014, which notes that:

...the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.

58. A professor of law in Paris was commissioned to provide advice, and this was incorporated into the decision of the NGPC.
59. The Panel’s attention is also drawn to the Recommendation in relation to the Reconsideration Request 13-9 of October 10, 2013, made by the BGC. At the end of the Recommendation, the following is stated:

Though there are no grounds for reconsideration presented in this matter, following additional discussion of the matter the BGC recommended that staff provide a report to the NGPC, for delivery in 30 days, 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 Amazon’s Applied-for String and TLDH’s Applied-for String. In addition, the BGC suggested that the strings not proceed to contracting prior to staff’s report being produced and considered by the NGPC.

A proposed review mechanism is outlined thereafter.

60. Merck’s arguments are unavailing. If this Panel were to find that the BGC and Board are incompetent to assess the propriety of a Panel determination under the LRO this would effectively require a referral or appeal process for LRO decisions. Such a mechanism was not included in the delegation,

challenge and dispute resolution process adopted by ICANN and it is not open to this Panel to create it.

61. As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board, once the Sole Expert had revised his original determination to reflect his complete basis for the decision, to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.
62. In conclusion, Merck was not discriminated against. These two examples, properly and fairly assessed, do not provide it with support for an allegation of discrimination.
63. Independence: Merck's complaint as to the lack of independence relies on the "Auction of Last Resort" argument which imputes to ICANN a financial interest, insinuating something improper. This is the same point, in substance, which was rejected by this Panel in paragraph 42 above. It is an argument which is speculative, and made without evidence to support it. In light of its dismissal above, it is also dismissed at this point.
64. Mischaracterization: Merck complains that the BGC mischaracterized its arguments. Merck describes its core concern as presented to the BGC as follows (paragraph 89 of the Request):
- ...did the LRO Panel fail to decide the case on the basis of the correct and applicable LRO Standard, which requires it to consider the potential use of the applied-for gTLD*
65. This complaint is identical in substance to the matters already addressed by the Panel in paragraphs 43-50 above. In effect, Merck is running the same argument here as before, and it is therefore dismissed.

66. In summary, therefore, the Claimant's challenge to the second contested action complaint is dismissed.

67. The third contested action raised by Merck in paragraph 46 of the Request:

As the result of the prior two violations, the ICANN Board has accepted without due diligence and care, a dysfunctional expert determination procedure within the New gTLD Program which has not provided for the possibility to review or overturn determinations on the basis of substantial errors or manifest disregard of the LRO Standards, despite the foreseeable and forewarned possibility of such, resulting in fundamental unfairness and a failure of due process for the Claimant.

68. In light of the resolution of the first two contested actions against Merck, the Panel finds that this third contested action must also be dismissed. It is predicated for success upon the first two by use of the language “[A]s the result of the prior two violations”.

Section IV – Costs

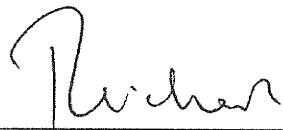
69. As ICANN is the prevailing party, Merck is held responsible for costs. Therefore the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$3,350.00 shall be borne by entirely by Merck KGaA, and the compensation and expenses of the Panelists totaling US\$97,177.08 shall be borne by entirely by Merck KGaA. Therefore, Merck KGaA shall reimburse ICANN the sum of US\$48,588.54, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN.

Section V – Declaration

1. Merck has not succeeded in this Independent Review Process. ICANN is the prevailing party. As per paragraph 69, Merck must pay ICANN costs in the amount of USD \$48,588.54.

This Final Declaration of the Independent Review Process Panel may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

December 10, 2015
Date



Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

Date

Graeme Dinwoodie, Panelist

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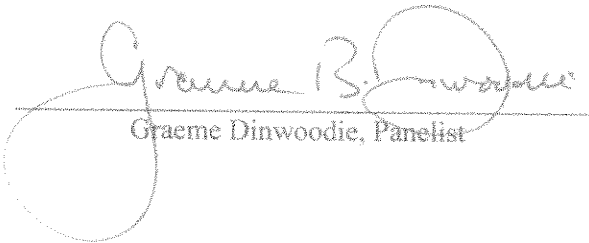
Date

Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

December 10, 2015
Date



Graeme Dinwoodie, Panelist

Resp. Ex. 6

RESPONDENT'S EXHIBIT

INDEPENDENT REVIEW PROCESS (IRP)
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-15-0002-8061

Despegar Online SRL

Donuts, Inc.

Famous Four Media Limited

Fegistry, LLC

Radix FZC

-vs-

ICANN

-vs-

Little Birch, LLC

Minds + Machines Group Limited

Final Declaration

IRP Panel

Thomas H. Webster

Dirk P. Tirez

Peter J. Rees QC (Chair)

Table of Contents

	Page
A. Introduction and Procedural History.....	3
B. Factual Background – General.....	4
C. Factual Background – Specific.....	6
D. Relief Requested.....	8
E. Claimants’ Submissions.....	9
F. ICANN’s Submissions.....	12
G. The Issues.....	14
H. Analysis – General.....	15
I. Analysis – Specific.....	19
1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.....	19
2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.....	25
3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.....	31
4. The continued upholding of HTLD’s application for .hotel in the light of the matters raised in Crowell & Moring’s letter of 5 June 2015.....	33
5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP	36
J. Conclusion.....	36
K. The Prevailing Party and Costs.....	39

A. Introduction and Procedural History

1. This Final Declaration is issued by this Independent Review Process (“IRP”) Panel pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”). This IRP has been administered under the International Centre for Dispute Resolution (“ICDR”) International Dispute Resolution Procedures as amended and in effect as of 1 June 2014 along with ICANN’s Supplementary Procedures.
2. On 4 March 2015, following a failed Cooperative Engagement Process with ICANN, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC submitted a Request for IRP in relation to ICANN’s treatment of the generic top-level domain (“gTLD”) string .hotel (“the .hotel IRP”).
3. On 17 April 2015, ICANN submitted its Response to this Request.
4. On 15 March 2015, following a failed Cooperative Engagement Process with ICANN, Little Birch, LLC and Minds + Machines Group Limited submitted a Request for IRP in relation to ICANN’s treatment of the gTLD string .eco (“the .eco IRP”).
5. On 27 April 2015, ICANN submitted its Response to this Request.
6. On 12 May 2015, the ICDR confirmed to the parties that the cases regarding .hotel IRP and .eco IRP would be merged and the parties agreed to keep written submissions separate but recognized that the issues presented by the two cases were closely linked and that the parties’ interests in the proceedings were so similar that both should be dealt with during a single hearing.
7. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds + Machines Group Limited are all represented by Flip Petillion and Jan Janssen of Crowell & Moring LLP and ICANN is represented by Jeffrey A. LeVee and Rachel Zernik of Jones Day.
8. The IRP Panel consisting of Thomas H. Webster, Dirk P. Tirez and Peter J. Rees QC (Chair) (“Panel”), having been duly constituted to consider these two Requests, conducted a preparatory conference with the party representatives on 25 August 2015 at which, and following consultation with the party representatives, the procedure was fixed by the Panel for the further conduct of the IRP.

9. On 7 October 2015, the Panel received a letter from Fasken Martineau seeking to make submissions to the Panel on behalf of Big Room Inc. (“Big Room”) whilst acknowledging that Big Room was not a party to the IRP.
10. On 19 October 2015, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .hotel IRP matter, and Little Birch, LLC and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .eco IRP matter.
11. On 10 November 2015, ICANN submitted its Sur-Replies in both the .hotel IRP and the .eco IRP matters.
12. On 20 November 2015, the Panel received an e-mail from HOTREC seeking to make submissions to the Panel whilst acknowledging that HOTREC was not a party to the IRP.
13. On 2 December 2015, in advance of the telephone hearing due to take place on 7 December 2015, the Panel sent an e-mail to the representatives of the parties asking a number of questions.
14. On 4 December 2015, the parties responded in writing to the Panel’s questions.
15. On 7 December 2015, a telephone hearing took place at which the representatives of all the parties made their submissions to the Panel.

B. Factual Background - General

16. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”) began a policy development process to consider the introduction of new gTLDs. As part of this process the New gTLD Applicant Guidebook (“Guidebook”) was developed and was approved by the Board of ICANN in June 2011 and the New gTLD Program was launched.
17. The final version of the Guidebook was published on 4 June 2012. It provides detailed instructions to gTLD applicants and sets out the procedures for evaluating new gTLD applications. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community based, the latter to be “operated for the benefit of a clearly delineated community” (Guidebook § 1.2.3.1).
18. If more than one standard application was made for the same gTLD applicants were asked to try and achieve an amicable agreement under which one or more

of them withdrew their applications. If no amicable solution could be found, applicants in contention for the same gTLD would be invited to participate in an auction for the gTLD.

19. If a community based application was made for a gTLD for which other applicants had made standard applications, the community based applicant was invited to elect to proceed to Community Priority Evaluation (“CPE”) whereby its application would be evaluated by a CPE Panel in order to establish whether the application met the CPE criteria. The CPE Panel could award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).
20. If an applicant prevails in CPE, it will proceed to the next stage of evaluation and other standard applications for the same gTLD will not proceed because the community based application will be considered to have achieved priority (Guidebook § 4.2.2).
21. ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”) to constitute the CPE Panel.
22. ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control”.
23. ICANN also has in place a process by which any person or entity, materially affected by an action of ICANN, may request review or reconsideration of that action by the Board of ICANN (“Reconsideration Request”) (Art IV.2 of ICANN’s Bylaws).
24. ICANN also has in place a process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws of ICANN (Art IV.3 of ICANN’s Bylaws), namely the IRP Process.
25. Article IV.3.4 of ICANN’s Bylaws provides:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws,

and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"*

C. Factual Background - Specific

- 26. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC each submitted standard applications for .hotel. HOTEL Top-Level-Domain s.a.r.l. ("HTLD") submitted a community based application for .hotel.
- 27. Little Birch, LLC and Minds + Machines Group Limited each submitted standard applications for .eco. Big Room submitted a community based application for .eco.
- 28. On 19 February 2014, HTLD was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
- 29. On 12 March 2014, Big Room was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
- 30. On 11 June 2014, the CPE Panel from EIU issued its report, which determined that HTLD's application should receive 15 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .hotel would not proceed.
- 31. On 28 June 2014, Despegar Online SRL, DotHotel Inc., dot Hotel Limited, Fegistry LLC, Spring McCook LLC and Top Level Domain Holdings Limited submitted a Reconsideration Request "*to have that decision by the Community Priority Evaluation panel reconsidered*", and, on 4 August 2014, Donuts Inc., Fair Winds Partners, LLC, Famous Four Media Limited, Minds + Machines Group Limited and Radix FZC submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
- 32. On 22 August 2014, the Board Governance Committee ("BGC") of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered and, on 3 September 2014, ICANN responded to the DIDP request

by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.

33. On 22 September 2014, Despegar Online SRL, Radix FZC, Famous Four Media Limited, Fegistry LLC, Donuts Inc., and Minds + Machines Group Limited submitted a Reconsideration Request to “*seek reconsideration of ICANN staff’s response to the Requesters’ request for documents pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”)*”, and, on 11 October 2014, the BGC of ICANN denied that Reconsideration Request.
34. On 6 October 2014, the CPE Panel from EIU issued its report, which determined that Big Room’s application should receive 14 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .eco would not proceed.
35. On 22 October 2014, Little Birch, LLC and Minds + Machines Group Limited submitted a Reconsideration Request seeking “*the reconsideration of ICANN’s Community Priority Evaluation Panel’s determination whereby [Big Room’s application] prevailed in Community Priority Evaluation*”, They also submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
36. On 31 October 2014, ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request, and, on 18 November 2014, the BGC of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered.
37. On 27 February 2015, ICANN staff became aware of a configuration issue with ICANN’s online New gTLD Applicant and Global Domains Division (“GDD”) portals. It appears that, between 17 March 2014 and 27 February 2015, user credentials were used to obtain sensitive and confidential business information concerning several of the .hotel applicants.
38. On 5 June 2015, Crowell & Moring LLP wrote to the ICANN Board and the President of ICANN’s GDD “*on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel limited), Fegistry LLC, Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.)*”. The letter requested “*full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties*” and set out a list of information sought.

39. On 5 July 2015, ICANN responded to the letter of 5 June 2015 under the heading “*Response to Documentary Information Disclosure Policy Request*”. ICANN provided further information concerning the issue and referred to certain information that was publicly available, but did not provide any other documentation.
40. Neither the Board of ICANN nor the President of ICANN’s GDD has responded to the letter of 5 June 2015.

D. Relief Requested

41. The relief requested by the Claimants in both the .hotel and .eco Requests for IRP was, essentially, the same, namely:
- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and or the gTLD Guidebook;
 - Declare that ICANN must reject the determination that HTLD’s application for .hotel and Big Room’s application for .eco be granted community priority;
 - Award Claimants their costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.
42. In the Reply to ICANN’s Response in the .hotel IRP a further request for relief was added, namely:
- Declare that ICANN must reject HTLD’s application for .hotel.
43. In response to the questions raised by the Panel on 2 December 2015, the Claimants’ representative also asked for the following relief:
- i. That the Panel consider declaring that ICANN continues to act inconsistently with its Articles of Incorporation, its Bylaws, and or the Guidebook by:
 - upholding the determination that HTLD’s application for .hotel be granted community priority;
 - upholding HTLD’s application for .hotel; and
 - upholding the determination that Big Room’s application for .eco be granted community priority.
 - ii. That the Panel declare that ICANN has breached and continues to breach its Articles of Incorporation and/or Bylaws by upholding the

provisions of the gTLD Applicant Guidebook or of the new gTLD policy which are in violation of the Articles of Incorporation and/or Bylaws.

- iii. That the Panel examine the consistency with ICANN's Articles of Incorporation and Bylaws of;
- the contents of the Guidebook
 - the CPE process itself
 - the selection and appointment process of the EIU as the CPE Panel, and
 - the implementation of the CPE process that has led to ICANN accepting community priority for .hotel and .eco.

E. Claimants' Submissions

44. In their submissions, the Claimants, in both the .hotel and .eco IRPs matters, criticise the CPE process as a whole and complain that the ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel. They also complain that the CPE process is unfair, non-transparent and discriminatory due to the use of anonymous evaluators, and that no quality review process exists for CPE Panel decisions.
45. In relation to the CPE process as a whole, the Claimants also argue that, as no opportunity is given for applicants to be heard on the substance of a CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), CPE determinations are made without due process.
46. However, relief in respect of these wider issues was not requested by the Claimants in either the .hotel or .eco Requests, and, although such relief was referred to by the Claimants in their response to the Panel's questions of 2 December 2015, it was confirmed by the Claimants at the hearing on 7 December 2015 that the Claimants were not, in fact, asking the Panel to make a declaration as to the selection process of the CPE Panel by ICANN, nor any declaration as to the CPE process as a whole, nor whether that process breaches ICANN's Articles of Incorporation or Bylaws, nor whether the Guidebook breaches ICANN's Articles of Incorporation or Bylaws.
47. Accordingly, for the purposes of this IRP, it is the submissions made by the Claimants which address the specific relief sought by the Claimants in relation to the granting of CPE in the .hotel and .eco applications that are relevant for the Panel.
48. In the .hotel and .eco Requests and Replies, the Claimants make the following submissions in relation to the CPE Panel's determinations on CPE:

- i. *“By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment” (.hotel Request § 9, .eco Request § 9)*
- ii. *“The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE” (.eco Request § 48)*
- iii. *“If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met” (.hotel Request § 52, .eco Request § 50)*
- iv. *“The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy” (.hotel Request § 53, .eco Request § 51)*
- v. *“the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.hotel Request § 53)*
- vi. *“the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.eco Request § 51)*
- vii. *“The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel” (.eco Request § 53)*
- viii. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts” (.hotel Request § 55)*
- ix. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts” (.eco Request § 56)*
- x. *“However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE Panel’s findings on organization and nexus between the proposed string and the ‘community.’” (.hotel Request § 56)*
- xi. *“the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED.....Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.” (.eco Request § 58)*
- xii. *“The CPE Panel has never considered the appropriateness of [Big Room’s] appeal process. In contrast, however, the CPE Panel did investigate the*

- appropriateness of proposed appeal processes in other CPEs requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement.” (.eco Request § 59)*
- xiii. *“The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism...such as a Request for Reconsideration” (.hotel Request § 64, .eco Request § 67) NB the Panel notes that this is not actually what the Guidebook says. It says that the “Board reserves the right to individually consider an application for a new gTLD....under exceptional circumstances”*
- xiv. *“Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation” (.eco Request § 69)*
- xv. *“Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process” (.hotel Request § 66, .eco Request § 69)*
- xvi. *“The IRP Panel’s task is to look at whether ICANN’s unquestioning acceptance of the CPE Panel’s advice and ICANN’s refusal to review the issue raised by Claimants are compatible with ICANN’s fundamental obligations” (.hotel Reply § 4, .eco Reply § 3)*
- xvii. *“ICANN’s reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be” (.hotel Reply § 4, .eco Reply § 8)*
- xviii. *“the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with principles of fairness, transparency, avoiding conflicts of interest and non-discrimination.” (.hotel Reply § 34, .eco Reply § 33)*
- xix. *“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner” (.hotel Reply § 39, .eco Reply § 38)*
- xx. *“As the IRP Panel’s task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases” (.hotel Reply § 45, .eco Reply § 44)*

49. In the .hotel Reply, the Claimants also make the following submissions in relation to the declaration they are seeking that ICANN must reject HTLD’s application for .hotel:

- i. *“The IRP Panel is also requested to assess ICANN’s refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the*

- relevant information that was available to ICANN in relation to the question of taking action” (.hotel Reply § 4)*
- ii. *“ICANN never showed any willingness to take appropriate measures” (.hotel Reply § 49)*
 - iii. *“In this case a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible....It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials” (.hotel Reply § 50)*

50. Also in the .hotel Reply the Claimants submit:

“Second Claimant in the .eco case, Minds + Machines Group Limited (Minds + Machines), also applied for the .hotel gTLD. Minds + Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds + Machines join the proceedings is accepted by all Claimants” (.hotel Reply § 2)

F. ICANN’s Submissions

51. In the .hotel and .eco Responses and Sur-Replies, ICANN makes the following submissions in relation to the CPE Panel’s determinations on CPE:

- i. *“Claimants did not state a proper basis for reconsideration as defined in ICANN’s Bylaws” (.hotel Response § 4, .eco Response § 4)*
- ii. *“ICANN’s Board....has no obligation to review (substantively or otherwise) any such report” (.hotel Response § 9, .eco Response § 9)*
- iii. *“nothing in the Articles or Bylaws requires the Board [to conduct a substantive review” (.hotel Response § 9, .eco Response § 10)*
- iv. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding HTLD’s Application for .HOTEL constitutes Board action” (.hotel Response § 12)*
- v. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding Big Room’s Application for .ECO constitutes Board action” (.eco Response § 13)*
- vi. *“in making those decisions [acceptance of the Guidebook and the decisions by the Board to reject Claimants’ Reconsideration Request], the Board followed ICANN’s Articles and Bylaws” (.hotel Response § 13, .eco Response § 14)*
- vii. *“BGC denied Claimants’ Reconsideration Request finding that Claimants had ‘failed to demonstrate that the CPE Panel acted in contravention of*

- established policy or procedure' in rendering the Report" (.eco Response § 29)*
- viii. *"BGC denied Claimants' Reconsideration Request [in respect of the DIDP Request] finding that the Claimants had 'failed to demonstrate that ICANN staff acted in contravention of established policy or procedure' in responding to the DIDP Request" (.hotel Response § 28)*
 - ix. *"the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports" (.hotel Response § 49, .eco Response § 49)*
 - x. *"Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their Reconsideration Request" (.hotel Response § 51, .eco Response § 50)*
 - xi. *"It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators." (.hotel Response § 53, .eco Response § 52)*
 - xii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE then .HOTEL TLD's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding .HOTEL TLD's Application" (.hotel Response § 55)*
 - xiii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE, Big Room's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding Big Room's Application" (.eco Response § 54)*
 - xiv. *"there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determinationover the guidance of an expert panel formed for that particular purpose" (.hotel Sur-Reply § 11, .eco Sur-Reply § 10)*

52. In the .hotel Sur-Reply, ICANN also makes the following submissions in relation to the declaration the Claimants are seeking that ICANN must reject HTLD's application for .hotel:

- i. *"Claimants argue that the Portal Configuration is relevant to this IRP, but they have not identified any Board action or inaction with respect to this issue that violates ICANN's Articles or Bylaws such that it is subject to independent review, now or ever" (.hotel Sur-Reply § 23)*

- ii. *“The ICANN Board took no action (and was not required to take action under either the ICANN Articles or Bylaws) with respect to Claimant’s letter and DIDP request” (.hotel Sur-Reply § 24)*
- iii. *“Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants’ belief as to what the Board should do. Again Claimants have also failed to show that the Board’s conduct in this regard has in any way violated ICANN’s Articles or Bylaws” (.hotel Sur-Reply § 25)*

53. Also in the .hotel Sur-Reply ICANN submits:

*“Minds + Machines Limited (“Minds + Machines”) is not a Claimant in this proceeding but, nevertheless signed the Reply and now seeks to join as an additional claimant. Article 7 of the International Center for Dispute Resolution’s International Dispute Resolution Procedures explicitly provides that “[n]o additional party may be joined after the appointment of any [neutral], unless **all parties**, including the additional party, otherwise agree” (ICDR International Dispute Resolution Procedures, Art. VII (emphasis added)). ICANN does not consent to the joinder of Minds + Machines because any claims Minds + Machines may have with respect to the CPE Report or ICANN’s response to that Report are time-barred (Bylaws, Art. IV, § 3.3 (30 day deadline to file IRP request)” (.hotel Sur-Reply § 35)*

G. The Issues

54. As has already been stated, Article IV.3.4 of ICANN’s Bylaws provides:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?”*

55. Given that the wider issues of the CPE process as a whole, the appointment of EIU and the provisions of Guidebook are not being pursued, the Panel has concluded that the contested actions of the Board of ICANN in this IRP are:
- i. The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - ii. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - iii. The denial by the BGC on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.
 - iv. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.
56. In addition, the Panel has the procedural issue to deal with of the attempt by Minds + Machines Group Limited to join the .hotel IRP.

H. Analysis - General

57. Before turning to the specific analysis of each of the issues stated above, there are some general points which the Panel wishes to highlight, which have application to one or more of the issues in question.
58. The analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel has identified the following relevant provisions of the Articles of Incorporation and Bylaws against which the actions, or inactions, of the Board should be compared.

Articles of Incorporation

Article 4

The Corporation shall operate 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 and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

Bylaws

Article I.2

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice,

situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

Article II.3

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

Article III.1

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

Article IV.1

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Article IV.3

The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

- a. evaluate requests for review or reconsideration;*
- b. summarily dismiss insufficient requests;*
- c. evaluate requests for urgent consideration;*
- d. conduct whatever factual investigation is deemed appropriate;*
- e. request additional written submissions from the affected party, or from other parties;*
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and*
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.*

- 59.** In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows:
- i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
 - ii. ICANN has an obligation to adhere to all of its obligations under its Articles of Incorporation and its Bylaws.
 - iii. The Bylaws, and the BGC's determinations on prior Reconsideration Requests, have established a specific standard for when it is appropriate to reconsider CPE determinations (i.e., when the CPE Panel violated established policy or procedure).
 - iv. When considering the Reconsideration Requests in the .eco and .hotel matters, the BGC had before it the EIU's determination and the "facts" that the Claimants had submitted with their Reconsideration Requests. The BGC also considered the Guidebook as well as other published CPE procedures. This was all the information required for the BGC to determine that the EIU had followed established policy and procedure in rendering the CPE determinations.
 - v. The Board is not aware (whether through the BGC or otherwise) as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.
- 60.** During the hearing on 7 December 2015, ICANN further confirmed its position as follows:
- i. The Claimants (save for Minds + Machines Group Limited in the .hotel IRP) are not time-barred from seeking IRP of:
 - a. The denial by the BGC on 22 August 2014 of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - b. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - c. The denial by the BGC on 18 November 2014 of the Reconsideration Request to have the CPE Panel decision in the .eco matter reconsidered.
 - ii. There is no ICANN quality review or control process, which compares the determinations of the EIU on the various CPE applications.

- iii. The core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.
- iv. The CPE process operated by the EIU involves 5 core EIU staff and 2 independent evaluators. The independent evaluators separately score each CPE application and submit their separate scores to the EIU core staff. The independent evaluators do not confer on the scoring. The independent evaluators are not the same for each CPE application; sometimes both are different and sometimes one is different.
- v. ICANN considers there is nothing in its Articles of Incorporation or Bylaws, which requires ICANN to comply with due process.
- vi. ICANN does not believe that it is subject to any general international law principle requiring it to comply with due process.
- vii. Upon receipt of a Reconsideration Request, ICANN expects the BGC to carry out a procedural review of the CPE determination, not a substantive review and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

61. In the light of the relevant provisions of the Articles of Incorporation and Bylaws identified above, and the clarifications provided by ICANN as to its position in relation to CPE applications and Reconsideration Requests made in respect of them, the Panel will now consider each of the contested actions of the Board of ICANN in this IRP. In doing so, the Panel has taken into account, where relevant, all the submissions of the parties, including, without limitation, those specifically set out in sections E. and F. above.

62. Given the confirmation by ICANN, that a time bar is not being raised in relation to the substantive issues in this IRP, the Panel does not have to discuss this question save for when it considers Minds + Machines Group Limited's attempt to join in the .hotel IRP.

I. Analysis – Specific

1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.

63. In conducting this analysis, the Panel have carefully considered the CPE report dated 11 June 2014, which determined that HTLD's community based application had prevailed, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration Request dated 22 August 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

64. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

65. No allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

66. As to the requirements of due diligence and care, and the exercise of independent judgment, ICANN's position is that the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

67. That appears to the Panel to be correct, but what is of critical importance is the manner in which the review of whether the EIU has followed the correct procedure and has correctly applied ICANN's policies is conducted.

68. In their Reply in the .hotel IRP at §39 the Claimants submit:

“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied....The ICANN Board instead limited its review to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one.”

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

70. This is particularly so given that the EIU is not subject to ICANN's core values, the EIU independent evaluators are not the same for each CPE application, there is no ICANN quality review or control process which compares the

determinations of the EIU on the various CPE applications and ICANN is not aware as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

71. In their Reconsideration Request of 28 June 2014, at page 5, the Claimants say:

“In this case, however, there are 3 instances where the Panel has not followed the [Guidebook] policy and processes for conducting CPE. Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE.”

72. The three instances of failure to follow the Guidebook policy alleged by the Claimants are:

1. Failure to identify a “Community”;
2. Failure to consider self-awareness and recognition of the community; and
3. Failure to apply the test for Uniqueness.

73. In their Reconsideration Request, the Claimants then go into significant detail as to the ways in which they allege the EIU failed to follow the Guidebook policy. However, in the BGC denial of 22 August 2014, the BGC state:

“...while the Request is couched in terms of the Panel’s purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel’s Report, which is not a basis for reconsideration”

74. The BGC’s comment quoted above is plainly wrong as any detailed reading of the Reconsideration Request shows. It is unfortunate that the BGC should have included such comments in its determination as, in the Panel’s view, this has contributed to this IRP and the clear feeling, on the part of the Claimants, that their Reconsideration Request was not treated appropriately by the BGC.

75. In their Reconsideration Request, the Claimants argue that the first question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there is a community that meets the definition of a community under the Guidebook. They say:

“The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.... This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for “community” required.... Had it

considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion.”

76. In dealing with this allegation the BGC gave consideration to the definition of community in the Guidebook and stated:

“However, the Requesters point to no obligation to conduct any inquiry as to the definition of community other than those expressed in section 4.2.3 of the Guidebook.....As such, the Requesters fault the Panel for adhering to the Guidebook’s definition of a “community” when evaluating the Application. Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant’s proposed community, i.e., the “Hotel Community” does not qualify as a community for CPE purposes because “rather than showing cohesion, [it] depend[s] on coercion....But the Panel reached the contrary conclusion... As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel’s conclusions, but only its adherence to the applicable policies and procedures”

77. In their Reconsideration Request, the Claimants argue that the second question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure to consider self-awareness and recognition of the community. They say:

“...the Panel has imported the test for determining whether there is a “community” – self-awareness that the group is a community- into the test for “delineation”. With respect, that is an error of process that further invalidates the findings.

Even if it were not, and self-awareness and recognition are considered with Delineation, the actual response given under that enquiry about “self-awareness and recognition” shows that the Panel does not understand the test that is to be applied....

What is required is a showing by evidence that the members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community.

It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of “hotel”, and because every hotel is a member of the alleged community....

The Panel then proceeds through the proper requirements of delineation, which it names accurately – organisation and existence before 2007.”

78. In dealing with this allegation, the BGC gave consideration to the definition of delineation in the Guidebook and stated:

“The Panel began its assessment of the test for delineation by noting: “Two conditions must be met to fulfil the requirements for delineation; there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members” (Report, Pg. 1.) As the Requesters admit, the Panel then “proceeds through the proper requirements of Delineation, which it names accurately....The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the “proper requirements” of the test for delineation.

Again the Requesters dispute the Panel’s allusion to the “awareness and recognition” of the Hotel Community’s members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community’s members.....Disagreement with the Panel’s substantive conclusions, however, is not a proper basis for reconsideration”

79. In their Reconsideration Request, the Claimants argue that the third question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure properly to apply the test for Uniqueness. They say:

“The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has “no other significant meaning beyond identifying the community” because it has itself cited a significant other meaning and relied on that other meaning (that the word means “an establishment with services and additional facilities where accommodation and in most cases meals are available”) in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of “hotel” under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is “no other significant meaning” for the purpose of finding Uniqueness....

The word “hotel” means to most of the world what the ISO definition says it means – a place for lodging and meals. To assert that it means to most

people the association of business enterprises that run the hotels is unsubstantiated and absurd.”

- 80.** In dealing with this allegation the BGC gave consideration to the definition of uniqueness in the Guidebook and stated:

“The Requesters have identified no procedural deficiency in the Panel’s determination that the uniqueness requirement was met. The Requesters concede that “HOTEL” has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel’s substantive conclusion, that is not a proper basis for reconsideration.

- 81.** As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE, the Claimants refer to Article 7 of ICANN’s Affirmation of Commitments and Articles I.2.8, III.1 and IV.2.20 of ICANN’s Bylaws and say:

“Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions...there are a number of features which are prejudicial to standard applicants, including:

(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications....

(b) There is no publication of materials to be examined by the Panel....

(c) Insufficient analysis and reasons were given on how the Panelist reached their CPE report....”

- 82.** In dealing with this allegation the BGC stated:

“None of these concerns represent a policy or procedure violation for the purposes of reconsideration under ICANN’s Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook’s CPE provisions do not include Requester’s “wish list” of procedural requirements, the Panel’s adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN’s foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request.”

- 83.** In considering the original CPE report of 11 June 2014, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration request dated 22 August 2014, the Panel have looked closely at whether the BGC simply undertook an administrative “box ticking” exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 84.** Taking, first of all, the three instances of failure to follow the Guidebook policy alleged by the Claimants, it is clear from the BGC determination document of 22 August 2014 as a whole and, particularly, from those extracts quoted above that each one was carefully considered by the BGC in its determination, and that the BGC did properly consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 85.** In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.
- 86.** As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE claimed by the Claimants in the Reconsideration Request, it is clear from the face of these allegations that these are complaints about the CPE process as a whole and are not specific to the .hotel CPE. In consequence of the Claimants’ confirmation at the hearing on 2 December 2015, that relief in respect of the CPE process as a whole is not being pursued, it is not strictly necessary for the Panel to consider this further. However, the Panel wishes to put on record that it considers that the BGC, in denying the Claimants’ Reconsideration Request, acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants’ complaints in this regard are also not made out.

2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.

- 87.** In conducting this analysis, the Panel has carefully considered the DIDP Request dated 4 August 2014, the Response from ICANN of 3 September 2014, the Reconsideration Request dated 19 September 2014 and the BGC denial of the Reconsideration Request dated 11 October 2014. In doing so, the Panel has

considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

- 88.** The Panel knows that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:
- a. whether the BGC acted without conflict of interest in taking its decision?
 - b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?
- 89.** As with the previous issue, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.
- 90.** In line with the approach taken in the previous issue, the Panel consider that the review undertaken by the BGC should look at whether the ICANN staff, in responding to the DIDP Request, followed the correct procedure and correctly applied ICANN policies, and that, in doing so, the BGC needs to look into how the procedure was followed and how policy was applied so that the BGC has a reasonable degree of assurance that the ICANN staff correctly followed the requisite procedure and correctly applied ICANN policies.
- 91.** In their DIDP Request of 4 August 2014, the Claimants asked for four categories of documents, namely:
- 1) *“All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (“Communications”) between individual member of ICANN’s Board or any member of ICANN Staff and the [EIU] or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;*
 - 2) *The curriculum vitae (“CVs”) of the members appointed to the CPE Panel;*
 - 3) *All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and*
 - 4) *All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report.”*

92. In ICANN's Response of 3 September 2014 it was explained that ICANN, whether at Board or staff level, is not involved with the selection to the CPE Panel of the two individual evaluators that perform the scoring in the CPE process and that ICANN is not provided with information about who the evaluators on any individual CPE Panel may be. As this is all done within the EIU, ICANN, it was stated, did neither have the documentation sought in numbered request 1) above, nor did it have the CVs sought in numbered request 2) above. These are clear statements that no such documentation exists.
93. However, the Response goes on to say that to *"the extent that ICANN has documentation with the EIU for the performance of its role as the coordinating firm as it relates to the .HOTEL CPE, those documents are subject to certain of the Defined Conditions of Non-Disclosure set forth in the DIDP."* It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Five separate Conditions for Nondisclosure are listed.
94. The Response does not give any more detail as to what documents it actually has *"for the performance of its role as the coordinating firm"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has, and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.
95. In dealing with the documentation sought in numbered request 3) above, the Response states *"Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring for any individual CPE. As a result, ICANN does not have documents of this type."* That is a clear and comprehensive statement that such documentation does not exist.
96. However, the Response goes on to say that to *"the extent that ICANN has communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE, (as anticipated in the CPE Panel Process Document), those documents are subject to the following Defined Conditions of Nondisclosure set forth in the DIDP"*. It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Four separate Conditions for Nondisclosure are listed.
97. The Response does not give any more detail as to what *"communications with persons from EIU who are not involved in the scoring of a CPE"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

- 98.** In dealing with the documentation sought in numbered request 4) above, the Response states:

“In order to maintain the independence and neutrality of the CPE Panels as coordinated by the EIU, ICANN has limited the ability for requesters or other interested parties to initiate direct contact with the panels – the CPE Panel goes through a validation process regarding letters of support or opposition (as described in the CPE Panel Process document) but that is the extent of direct communications that the CPE Panel is expected to have. For process control purposes, from time to time ICANN is cc’d on the CPE Panel’s verification emails. These emails are not appropriate for disclosure pursuant to the following Defined Conditions of Nondisclosure set forth in the DIDP”.

It then goes on to state the single defined Condition for Nondisclosure upon which ICANN is relying to justify nondisclosure.

- 99.** In this instance, unlike those for numbered requests 1), 2) and 3) above, ICANN has described a single category of documents and the single Condition for Nondisclosure upon which it relies, thus making it possible to judge whether the policy for nondisclosure has been correctly applied.
- 100.** In the Panel’s view, it is unfortunate that the ICANN staff did not adopt the same approach to dealing with documents which ICANN was not prepared to disclose when responding to numbered requests 1), 2) and 3) as was adopted with numbered request 4). Simply to say that “*to the extent*” ICANN has documents which fall within the categories requested in numbered requests 1), 2) and 3) such documents are not disclosable, for a variety of reasons, without making any attempt to link categories of document to particular Conditions for Nondisclosure, gives the impression of a process not properly conducted.
- 101.** Such an approach does not provide the confidence that those requesting disclosure of documents are entitled to have, namely that a collection of potentially responsive documents has taken place and a review has actually been conducted by the ICANN staff as to whether any of the documents identified as responsive to the request are subject to any of the Conditions of Nondisclosure, as is required by ICANN’s published policy for responding to DIDP requests. If the ICANN staff had made this clear in the response it could well have provided the Claimants with the reassurance that both procedure and policy had been followed and applied.
- 102.** In the Reconsideration Request of 19 September 2014, the Claimants say:

“ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. At

minimum, the BGC should review the asserted protections and independently determine if they have any supportable grounds”.

- 103.** Such a request is understandable in the circumstances. Article 4 of ICANN’s Articles of Incorporation require it to carry out its activities “*through open and transparent processes*”. Its Core Values include:

“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”, its Bylaws include the requirement to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.

- 104.** The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.

- 105.** Although the Reconsideration Request said that “*the BGC should review the asserted protections and independently determine if they have any supportable grounds*”, it is the view of the Panel that this should not have been the starting point for the BGC in looking at the actions of the ICANN staff in dealing with the DIDP Request. As has already been said, the BGC does need to have a reasonable degree of assurance that the ICANN staff has correctly followed the requisite procedure and correctly applied ICANN policies. If the BGC considers it has that assurance, the Panel does not consider the BGC is required to conduct any form of independent determination as to the decisions made by the ICANN staff. The BGC would only need to go that far if it came to the conclusion that the ICANN staff had not followed the requisite procedure and/or had not correctly applied ICANN policies.

- 106.** It is obvious, from the face of the denial of the Reconsideration Request issued by the BGC on 11 October 2014, that such an independent determination did not take place, and it appears that the BGC were satisfied that the ICANN staff had correctly followed procedure and applied policy. In the denial the BGC quite correctly state:

“It is ICANN’s responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]...Here, in finding that certain requested

documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process.

- 107.** Whilst the BGC does not explicitly say that a collection process occurred, it is implicit in the BGC denial that the BGC does believe that process was followed. In dealing specifically with numbered requests 1), 2) and 3), the denial says:

“Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to “documentation with the EIU for the performance of its role” and “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analysed the Requesters’ requests in view of the DIDP Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes” and “confidential business information and/or internal policies and procedures.”

- 108.** The denial quotes from the DIDP response as follows:

“ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply”

The denial then goes on to say:

In conformance with the publicly posted DIDP process.... ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN’s determination that certain Nondisclosure Conditions apply here, the requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters’ substantive disagreement with that determination is not a basis for reconsideration.”

- 109.** The denial also reaches a similar conclusion as to the adherence by the ICANN staff to the DIDP process in determining that the potential harm caused by disclosure outweighed the public interest in disclosure.

- 110.** Whilst the Panel considers that the ICANN staff could, and should, have been more explicit as to the process they had followed in refusing disclosure, the BGC determination document of 11 October 2014 provides the requisite degree of confirmation that the correct procedure was actually followed, that the BGC did, properly, consider whether the relevant policy or procedure was actually applied by the ICANN staff and whether, in doing so, the BGC could have a reasonable degree of assurance that the ICANN staff had correctly the applied the policy or procedure.

111. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.

112. In conducting this analysis, the Panel has carefully considered the CPE report dated 6 October 2014, which determined that Big Room's community based application had prevailed, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration request dated 18 November 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

113. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

114. As with the previous two issues, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

115. As it did in considering the first issue, and for the reasons stated there, the Panel considers that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

116. In their Reconsideration Request of 22 October 2014, at page 10, the Claimants say:

“Requester therefore requests ICANN in accordance with its Reconsideration Request process to:

- *Reconsider the Determination, and in particular not award a passing score in view of the [CPE] criteria set out in the [Guidebook] for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;*
- *Reconsider ICANN’s decision that the Requester’s application for the .eco gTLD “Will not Proceed” to contracting; and*
- *Restore the “Application Status” of the Requester’s application and the Application submitted by the Applicant to “Evaluation Complete”, their respective “Contention Resolution Statuses” to “Active”, and their “Contention Resolution Result” to “In Contention”.*”

117. Earlier in the Reconsideration Request (at pages 2 and 3), the Claimants argue that the concept “eco” is much broader than the community definition provided by Big Room in its community based application and say:

“the community definition contained in the Application...- in Requester’s opinion – does not meet the criteria for community-based gTLDs that have been set out in ICANN’s Applicant Guidebook”

118. The Reconsideration Request goes on to give the reasons for this assertion, which can be summarised as:

- there is no clear and unambiguous definition of the community that Big Room’s community based application is intended to serve;
- the string .eco does not closely describe the community or the community members and over-reaches substantially beyond the community referred to in the application;
- the term .eco has various meanings that are completely unrelated to the community determined in Big Room’s application; and
- the CPE Panel failed to detail the letters of opposition received.

119. The BGC’s denial states:

“The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report. Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the [Guidebook].

Substantive disagreement with the CPE Panel's Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that [the Reconsideration Request] be denied"

120. The BGC denial then goes on to examine whether the EIU properly applied the Guidebook scoring guidelines and CPE Guidelines in respect of each of the items raised by the Claimants and concludes, in respect of each one, that *"the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines"*.
121. In considering the original CPE report of 6 October 2014, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration Request dated 18 November 2014, the Panel has looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
122. Unlike the Reconsideration Request in respect of the .hotel CPE determination, this Reconsideration Request does not raise questions as to whether the EIU followed ICANN policy and procedure. It is, indeed, correctly categorised by the BGC in its denial as a statement of substantive disagreement with the EIU's determination. Nevertheless, it is clear from the BGC determination document of 18 November 2014 as a whole that the BGC did, properly, consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
123. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

4. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

124. Crowell & Moring's letter of 5 June 2015 is addressed for the attention of the Members of the ICANN Board and to Mr Akram Atallah, the President of ICANN's GDD. It makes a number of serious allegations arising from a portal

configuration issue, which ICANN has admitted occurred, and which can be summarised as follows:

- The user credentials of someone called D. Krischenowski were used to conduct over 60 searches resulting in over 200 unauthorized access incidents across an unknown number of gTLDs;
- these searches resulted in the obtaining of sensitive and confidential business information concerning several of the .hotel applicants;
- D. Krischenowski is associated with HTLD; and
- the user of those credentials was deliberately looking for sensitive and confidential business information concerning competing applicants.

125. The letter then goes on to ask for certain information in relation to the portal configuration issue.

126. The letter is clearly addressed to the Members of the Board of ICANN and its President of GDD and asks, largely, for information and not documentation. It appears that the letter was also submitted through ICANN's DIDP and, in consequence, ICANN appears solely to have treated the letter as a DIDP request. Accordingly, on 5 July 2015, the ICANN staff responded in a document entitled "*Response to Documentary Information Disclosure Policy Request*" and stated:

"ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests".

127. As is clear from the face of the letter itself, it is not simply a DIDP request. The attempt by ICANN to treat it solely as such represents, at best, a basic error on its part and, at worst, an attempt by the Board to avoid dealing with what is clearly a serious and sensitive issue, which goes to the integrity of the application process for the .hotel gTLD.

128. To be fair, the DIDP Response goes on to provide much detail as to what ICANN has done in the way of forensic investigation and what that has revealed. It does not, however, state whether any consideration has been given as to the impact on the integrity of the application process for the .hotel gTLD.

129. In the Reply in the .hotel IRP, the Claimants have argued that, in the circumstances, HTLD's application for .hotel must be denied and have asked the Panel to declare that ICANN must reject HTLD's application.

130. In its Sur-Reply, ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN’s Articles of Incorporation or Bylaws. ICANN states in the Sur-Reply that:

“The only Board action (or inaction) that the Claimants vaguely allude to in their Reply is that the Board did not directly respond to a letter addressed to both ICANN Board and staff requesting disclosure of information regarding the Portal Configuration issue. But, it was not the Board’s responsibility to do so, and ICANN’s Articles and Bylaws do not mandate that the Board reply to every letter it receives”.

131. In the context of the clear problems caused by ICANN’s portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

132. In its Sur-Reply, ICANN goes on to say:

“Although Claimants Argue that [HTLD] “is closely linked with individuals who have misused, or have permitted the misuse of, their user credentials...this argument is unsupported and asserts no conduct by the ICANN Board. Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants’ beliefs as to what the Board should do.”

133. Article III.1 of ICANN’s Bylaws provides that *“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”*

134. The approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with this Bylaw. It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN’s representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board

of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

137. This issue was raised after this IRP process had commenced and has only been the subject of relatively brief argument by the Claimants in their Reply and by ICANN in its Sur-Reply. At the hearing, not only did ICANN's representative inform the Panel that the issue was still under consideration by the Board of ICANN, but he also gave an undertaking on behalf of ICANN that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.

138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.

5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP.

139. As has already been stated, in the Claimants' Reply in the .hotel IRP, Minds + Machines Group Limited stated it wished to join in the proceedings and, in its Sur-Reply, ICANN objected, relying on Article 7 of the ICDR International Dispute Resolution Procedures.

140. Article 7 provides that "[n]o *additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*". There is nothing in the ICANN Supplementary Procedures that is inconsistent with this provision and, accordingly, it governs the procedure of this IRP.

141. Minds + Machines Group Limited applied for the .hotel gTLD and there does not appear to be any reason why, should it have so wished, it could not have joined with the Claimants in bringing the .hotel IRP. It did not do so and no reason has been given for its failure to do so. Accordingly, pursuant to Article IV.3.3 of ICANN's Bylaws, it is now time-barred from doing so.

142. In all the circumstances, the Panel rejects the request of Minds + Machines Group Limited to join this IRP.

J. Conclusion

143. Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by

EIU in considering community based applications, and the provisions of the Guidebook. However, the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.

144. Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.
145. At the hearing, ICANN submitted that it was not subject to a due process obligation neither pursuant to its Articles of Incorporation and Bylaws, nor pursuant to general international legal principles, notwithstanding Article 4 of its Articles of Incorporation. If this was intended as a general statement, the Panel finds this most surprising in the context of the role ICANN fulfils and the language of Article 4 itself. ICANN is a California non-profit corporation but Article 4 of the Articles of Incorporation refers to the principles of international law and local law and to the use of open and transparent processes to enable competition and open entry in Internet markets. The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable.
146. Also, at the hearing, ICANN confirmed that, notwithstanding that different individual evaluators can be used to consider different CPE applications, the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.
147. The CPE process for this round of gTLDs is almost at an end, so there is little or nothing that ICANN can do now, but the Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in

place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.

148. Further, as has already been stated:

- In its letter of 4 December 2015, ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- At the hearing on 7 December 2015, ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.

149. The combination of these statements gives cause for concern to the Panel. As has already been noted, Article I.2 of the Bylaws states:

“Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

150. The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.

151. Having expressed the Panel's concern at these general issues, the Panel now turns to the specific issues which, ultimately, it was asked to consider in this IRP. The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws, and that the Claimants' complaints have not been made out.

152. In consequence, the Panel will not be making any of the declarations sought by the Claimants.

K. The Prevailing Party and Costs

153. Article IV.3.18 of the Bylaws states:

“The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all the costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances including a consideration of the reasonableness of the parties positions and their contribution to the public interest. Each party to the IRP shall bear its own expenses.”

154. The Panel confirms that it makes its declaration based solely on the documentation, supporting materials and arguments submitted by the parties and that on the basis of that documentation, supporting material and arguments, has concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.

155. Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the Claimants’ DIDP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.

156. As for the .eco IRP, it is clear that the Reconsideration Request was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.

157. Finally, although the letter from Crowell & Moring of 5 June 2015 raises some very serious issues, which the Panel considers the ICANN Board needs to address, in the end, the Panel has not had to adjudicate on this issue.

158. In conclusion, therefore, whilst the Panel has declared ICANN to be the prevailing party, the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address. In the circumstances, the Panel considers that the Claimants’

contribution to the public interest merits ICANN bearing half of the costs of the IRP Provider, which is the ICDR.


159. Article IV.3.18 provides that “[e]ach party to the IRP shall bear its own expenses”. Rule 11 of ICANN’s Supplementary Procedures provides:

“In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the Requestor is not successful in the Independent Review, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees”

160. ICANN has not sought to argue that any of the Claimants failed to enter into the Cooperative Engagement Process in good faith, and there is no evidence of this in the materials before the Panel. In consequence, the panel considers that, in accordance with Article IV.3.18 of the Bylaws, each side shall bear their own expenses including legal fees.

FOR THE FORGOING REASONS, the Panel hereby:

- (1) Declares that the IRP Request made in relation to the .hotel gTLD by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC is denied;
- (2) Designates ICANN as the prevailing party in the .hotel IRP;
- (3) Declares that the IRP Request made in relation to .eco gTLD by Little Birch, LLC and Minds + Machines Group Limited is denied;
- (4) Designates ICANN as the prevailing party in the .eco IRP;
- (5) Declares that the fees and expenses of the IRP Panel members, totalling US\$113,351.52, and the fees and expenses of the ICDR, totalling US\$11,500.00, shall be born as to half by ICANN, and as to the other half collectively by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds +Machines Group Limited (“Applicants”). Therefore, ICANN shall reimburse the Applicants collectively the sum of \$5,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Applicants; and
- (6) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.



Dirk P. Tirez
Date: 11 FEBRUARY 2016



Thomas H. Webster
Date: 11 FEBRUARY 2016



Peter J. Rees QC
Chair of the IRP Panel
Date: 11 FEBRUARY 2016

Resp. Ex. 7

RESPONDENT'S EXHIBIT



Applicants' Corner

Applicant Guidebook

Applicant Support
Program

Auctions

**Community Priority
Evaluation (CPE)** →

Contracting & the Registry
Agreement

Global Support

Pre-Delegation Testing

COMMUNITY PRIORITY EVALUATION (CPE)

CPE Page Menu

- [News & Views](#)
- [Understanding CPE](#)
- [CPE Eligibility](#)
- [CPE Status](#)
- [News & Views \(Archive\)](#)
- [CPE Resources \(Archive\)](#)

News & Views

10 February 2016 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results](#)

Understanding CPE

Overview

Community Priority Evaluation (CPE) is a method to resolve string contention, described in full detail in section 4.2 of the [Applicant Guidebook \(AGB\)](#). It will only occur if a community application is both in contention and elects to pursue CPE. The evaluation itself is an independent analysis conducted by a panel from 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.

As part of its process, the EIU reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 points to prevail in a community priority evaluation, a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. For details regarding the EIU's work with ICANN as well as its evaluation process, please see the resources below:

- [CPE Panel Process Document](#) [PDF, 314 KB] (also available under CPE Resources below)
- [EIU Contract and SOW Information](#)

CPE Eligibility

Fulfillment of the CPE Eligibility criteria explained below permits an applicant to begin the CPE process and ensures that applications as well as contention sets are in stable, viable states, i.e., are not at risk of an open matter affecting whether they will proceed.

Eligibility Requirements for Standard CPE Invitation

Once an application is eligible for CPE, it will be invited to CPE and have up to 21 days to accept the invitation and pay the CPE fees. The invitations will be posted to this page in the CPE Status section. The evaluation will begin no sooner than 14 days after the invitation to allow for final submission of application comments and correspondence to ICANN regarding the application.

To be eligible to begin Standard CPE Processing, an application must:

- be a self-designated Community Application per section 1.2.3 of the AGB
- have an application status of "Active"
- be in an unresolved contention set (contention set status is either "Active" or "On-Hold" and at least one other application in the set has a status of either "Active or On-Hold"
- not have a pending change request
- not be in an active comment window for a recently approved changed request

Additionally, as per section 4.2 of the AGB, all remaining members of the contention set must have completed all previous stages of the process. All remaining applications in the contention set must:

- have completed evaluation
- have no pending objections
- have addressed all applicable GAC Advice
- not be classified in the "High Risk" category of the Name Collision Occurrence Management Framework

Eligibility Requirements for Accelerated Invitation to CPE

Once a community application has met the requirements listed below, ICANN will notify them of the option to request an Accelerated Invitation to CPE. An applicant is able to request an Accelerated Invitation to CPE when outstanding eligibility criteria do not have the potential to impact the community applicant's membership in a contention set and/or when the contention set as a whole may not have met all eligibility requirements for the standard CPE Invitation process.

After an Applicant has requested the Accelerated Invitation, the standard CPE Invitation process will commence, including posting on this web page.

To be eligible for an Accelerated Invitation to CPE, an application must:

- be a self-designated Community Application per section 1.2.3 of the AGB
- have a status of "Active" or "On-Hold"
- be in an unresolved contention set (contention set status is either "Active" or "On-Hold" and at least one other application in the set has a status of either "Active or On-Hold")
- not have a pending change request
- not be in an active application comment window for an approved changed request
- have addressed all applicable GAC Advice

Additionally, as per section 4.2 of the AGB, all remaining members of the contention set must have completed all previous stages of the process. All remaining applications in the contention

set must:

- have completed evaluation
- have no pending objections
- not be classified in the "High Risk" category of the Name Collision Occurrence Management Framework

CPE Resources

- [CPE Panel Process Document](#) [PDF, 314 KB] {06 August 2014}

The Economist Intelligence Unit's Process documentation for Community Priority Evaluation is posted for informational purposes to provide transparency of the panel's evaluation process.

- [CPE Guidelines](#) [PDF 1.85 MB] {27 September 2013}

ICANN has published the CPE Guidelines produced by the Economist Intelligence Unit after considering ICANN community feedback on the first draft. The Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the scoring principles outlined in the AGB. The Guidelines are intended to increase transparency, fairness and consistency in the evaluation process.

- [Updated CPE Frequently Asked Questions \(FAQs\)](#) [PDF, 377 KB] (10 SEPT 2014)

This document contains answers to common questions about CPE from applicants and other interested community members. The update from 19 September 2014 includes revisions to existing answers based on changes put forth in the "[Update on Application Status and Contention Sets](#)" Advisory.

- [CPE Processing Timeline](#) [PDF, 54 KB] {10 SEPT 2014}

The timeline has been updated to reflect changes made in the FAQ revision from 13 Aug 2014.

CPE Status

ICANN began inviting **eligible** applicants to elect the CPE process on 9 October 2013. The invitation date and evaluation results are represented in the table below. **Important:** application comments and letters of support or opposition must be submitted within 14 days of the CPE Invitation Date in order to be considered by the CPE Panel. [Access the Application Comments page.](#)

Application ID	String	Contention Set Number	Applicant	CPE Invitation Date	Elected	Status
1-1000-62742	IMMO	99	STARTING DOT LIMITED	09 October 2013	Yes	Evaluation Complete (17 March 2014)

1-1025-18840	TAXI	225	Taxi Pay GmbH	09 October 2013	Yes	Evaluation Complete (17 March 2014)
1-901-9391	OSAKA	130	Interlink Co., Ltd.	06 Novembe r 2013	Yes	Evaluation Complete (30 July 2014)
1-1723-69677	TENNIS	136	TENNIS AUSTRALIA LTD	06 Novembe r 2013	Yes	Evaluation Complete (17 March 2014)
1-1888-47714	MLS	144	The Canadian Real Estate Association	11 Decembe r 2013	Yes	Evaluation Complete (17 March 2014)
1-1273-63351	GMBH	30	TLDDOT GmbH	19 February 2014	Yes	Evaluation Complete (12 June 2014)
1-880-17627	LLC	81	Dot Registry LLC	19 February 2014	Yes	Evaluation Complete (12 June 2014)
1-880-35979	INC	102	Dot Registry LLC	19 February 2014	Yes	Evaluation Complete (12 June 2014)

1-880-35508	LLP	45	Dot Registry LLC	19 February 2014	Yes	Evaluation Complete (12 June 2014)
1-1083-39123	RADIO	33	European Broadcasting Union (EBU)	19 February 2014	Yes	Evaluation Complete (10 September 2014)
1-1032-95136	HOTEL	51	HOTEL Top-Level-Domain S.a.r.l	19 February 2014	Yes	Evaluation Complete (12 June 2014)
1-1675-51302	ART	72	EFLUX.ART, LLC	19 February 2014	Yes	Evaluation Complete (10 September 2014)
1-1097-20833	ART	72	Dadotart, Inc.	20 February 2014	Yes	Evaluation Complete (10 September 2014)
1-912-59314	ECO	22	Big Room Inc.	12 March 2014	Yes	Evaluation Complete (7 October 2014)
1-1309-46695	KIDS	1,330	DotKids Foundation Limited	27 October 2015	Yes	Evaluation in Progress
						Evaluation

Resp. Ex. 7

1-1713-23699	GAY	179	dotgay llc	23 April 2014	Yes	Complete (7 October 2014)
1-1713-23699	GAY	179	dotgay llc	26 January 2015	RR 14-44	Re-Evaluation Complete (8 October 2015)
1-959-51046	MUSIC	106	.music LLC	18 June 2014	Yes	Evaluation Complete (7 October 2014)
1-890-52063	SHOP	1,593	GMO Registry, Inc.	8 October 2014	Yes	Evaluation Complete (13 March 2015)
1-1830-1672	SHOP	649	Commercial Connect LLC	26 November 2014	Yes	Evaluation Complete (21 May 2015)
1-1192-28569	MED	1,732	HEXAP SAS	3 February 2015	No	Not elected
1-1309-81322	SPA	524	Asia Spa and Wellness Promotion Council Limited	3 February 2015	Yes	Evaluation Complete (22 July 2015)
			American			Evaluation Complete

1-1911-56672	CPA	974	Institute of Certified Public Accountants	8 April 2015	Yes	(3 September 2015)
1-1744-1971	CPA	1,609	CPA AUSTRALIA LTD	8 April 2015	Yes	Evaluation Complete (3 September 2015)
1-1115-14110	MUSIC	448	DotMusic Limited	29 July 2015	Yes	Evaluation Complete (10 February 2016)

CPE Archive

News & Views Archive

Below find archival materials documenting milestones in the formation and implementation of Community Priority Evaluation, listed in reverse chronological order.

8 October 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results](#)

3 September 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 2 applications, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

22 July 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results](#)

- [View Contention Set Status](#)

21 May 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

13 March 2015 – Additional CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

7 October 2014 – CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 3 applications, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

10 September 2014 – CPE Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 3 applications, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

10 September 2014 – CPE Eligibility Criteria, FAQs and Timeline Updated

ICANN has made minor revisions to the CPE eligibility criteria for both a standard invitation and an accelerated invitation to align with recent changes put forth in the "[Update on Application Status and Contention Sets](#)" Advisory. These revisions reflect the current definitions of "active" and "on-hold" for both applications and contention sets. For more details, please see the updated [eligibility criteria](#) below. The corresponding questions and answers on the [FAQ page](#) [PDF, 377 KB] have also been updated, and the timeline has also been updated to reflect changes made in the last FAQ revision.

13 August 2014 – CPE Frequently Asked Questions (FAQs) Updated

ICANN has updated the CPE FAQs. The update includes revisions to existing answers based on lessons learned over the past nine months of CPE operations as well as the addition of answers to questions regarding Accelerated Invitation to CPE.

- [View CPE FAQs](#) [PDF, 119 KB]

7 August 2014 – Community Priority Evaluation (CPE) Panel Process Document Released

ICANN has published the Economist Intelligence Unit's (EIU) process documents for Community Priority Evaluation (CPE). This document provides detail of the process the EIU employs to perform the CPE.

- [View CPE Panel Process Document](#) [PDF, 314 KB]

30 July 2014 – Additional Community Priority Evaluation (CPE) Result Released

ICANN has published the Community Priority Evaluation (CPE) Results for 1 application, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

12 June 2014 – Additional Community Priority Evaluation (CPE) Results Released

ICANN has published the Community Priority Evaluation (CPE) Results for 5 applications, and updated application and contention set statuses accordingly.

- [View CPE results](#)
- [View Contention Set Status](#)

28 May 2014 – Accelerated Invitation to Elect CPE

In effort to maintain program momentum, ICANN has enhanced the CPE invitation process to allow for community applicants to begin the CPE process earlier. The new process provides the community applicant the ability to Opt-In to a CPE invite sooner than the standard Eligibility Criteria. If they qualify, the community applicant can request an invitation to elect CPE. This would allow them to initiate the CPE process sooner than current requirements allow. Select the following link for more information about the process

- [View Eligibility Criteria for Accelerated Invitation to Elect CPE](#)

18 March 2014 – First Community Priority Evaluation (CPE) Results Released

ICANN has published the first four results of the Community Priority Evaluation (CPE) process.

- [View CPE results](#)

25 October 2013 – Additional Community Priority Evaluation Resources Available

Community Priority Evaluation FAQs and a CPE processing timeline are now available.

- [View Resources](#)

09 October 2013 – CPE Invitations Sent to Eligible Applicants

Find out which applicants have been invited and where their applications are in the process. This information will be updated regularly as invitations are sent and evaluations are performed and completed.

- [Read the Announcement](#)
- [View CPE Invitations](#)

27 September 2013 – Final Community Priority Evaluation Guidelines Published

The Economist Intelligence Unit finalized its CPE Guidelines after considering ICANN community feedback. The Guidelines have been made public to ensure quality, consistency and transparency in the evaluation process.

- [Read the Announcement](#)
- [Download the CPE Guidelines](#) [PDF, 1.85 MB]

10 September 2013 – CPE Teleconference Content Available

ICANN holds a teleconference to discuss the details of Community Priority Evaluation with applicants.

- [Teleconference Recording](#) [MP3, 15.2 MB]
- [Additional Questions & Answers](#) [PDF, 546 KB]

09 September 2013 – Feedback on Draft CPE Guidelines

Applicants respond to ICANN's call for input on the Community Priority Evaluation Guidelines created by panel firm EIU.

- [Draft CPE Guidelines](#)
- [Community Feedback](#)

16 August 2013 – CPE Draft Guidelines & Community Review

EIU, the CPE panel firm, develops a set of guidelines based on the criteria in the Applicant Guidebook to be used in the evaluation process. Applicants and community members are invited to provide feedback.

- [Announcement: Community Priority Evaluation Guidelines Posted for Community Review and Input](#)
- [Community Priority Evaluation \(CPE\) Guidelines](#) [PDF, 803 KB]

16 August 2013 – CPE Resources

ICANN publishes a set of resources to guide eligible applicants through the Community Priority Evaluation process.

- [Community Priority Evaluation Resources](#)

14 June 2013 – Community Priority Evaluation Early Election

ICANN offers a means for applicants to indicate their intent to elect for Community Priority Evaluation prior to the launch of CPE operations.

- [Community Priority Evaluation: Now Open for Early Election](#)

CPE Resources Archive

- [Draft CPE Guidelines](#) [PDF, 803 KB] (Published 16 August 2013)
Economist Intelligence Unit (EIU), the firm selected to manage Community Priority Evaluation, published a set of draft Guidelines that panelists will use to score Community applicants. Before finalizing, applicants and the community were invited to review and provide feedback.
- Community Feedback on Draft CPE Guidelines is available for review below:
 - [At-Large Advisory Committee \(ALAC\)](#) [PDF, 252 KB]
 - [Big Room Inc.](#) [PDF, 267 KB]
 - [Community TLD Applicant Group \(CTAG\)](#) [PDF, 315 KB]
 - [Donuts Inc.](#) [PDF, 41 KB]
 - [Donuts Inc.](#) [PDF, 394 KB]
 - [DotMusic Limited](#) [PDF, 581 KB]
 - [Dot Registry, LLC](#) [PDF, 390 KB]
 - [.music llc](#) [PDF, 155 KB]

- [Radix, Top Level Domain Holdings / Minds & Machines, Famous Four Media, Fegistry, LLC \[PDF, 108 KB\]](#)
- [Radix, Top Level Domain Holdings / Minds & Machines, Famous Four Media, Fegistry, LLC \[PDF, 316 KB\]](#)
- [Ray Fassett \[PDF, 760 KB\]](#)
- [TLDDOT GmbH \(.GmbH Top-Level-Domain\) \[PDF, 48 KB\]](#)

Resp. Ex. 8

RESPONDENT'S EXHIBIT



COMMUNITY PRIORITY EVALUATION PANEL AND ITS PROCESSES

Overview

At the time of submitting the new gTLD application, applicants had the opportunity to designate themselves as a community-based application, as prescribed in the section 1.2.3 of the Applicant Guidebook (AGB).

Community Priority Evaluation (CPE) is defined in section 4.2 of the AGB, and allows a community based-application to undergo an evaluation against the criteria as defined in section 4.2.3 of the AGB, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus win the contention set.

Only community-based applicants are eligible to participate in a community priority evaluation. A determination by a community priority panel, appointed by ICANN, must be made before a community name is awarded to an applicant. This determination will be based on the string and the completeness and validity of supporting documentation.

There are two possible outcomes to a Community Priority Evaluation:

- Determination that the application met the CPE requirements specified in the Applicant Guidebook (Section 4.2.2) to receive priority over other applications for the same or confusingly similar string = Prevailed.
- Determination that the application did not meet the CPE requirements specified in the Applicant Guidebook (Section 4.2.2) to receive priority over other applications for the same or confusingly similar string = Did not prevail.

Section 4.2.2 of the AGB prescribes that the Community Priority Evaluations will be conducted by an independent panel. ICANN selected the Economist Intelligence Unit (EIU) as the panel firm for Community Priority Evaluations.

The Economist Intelligence Unit

The Economist Intelligence Unit (EIU) was selected as a Panel Firm for the gTLD evaluation process. The EIU is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 500 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. Consistency of approach in scoring applications is of particular importance. In this regard, the Economist Intelligence Unit has more than six decades of experience building evaluative frameworks and benchmarking models for its clients, including governments, corporations, academic institutions and NGOs. Applying scoring systems to complex questions is a core competence.

EIU evaluators and core team

The Community Priority Evaluation panel comprises a core team, in addition to several independent¹ evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit's Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.
- All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.
- EIU evaluators are highly qualified, they speak several languages and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.
- Language skills and knowledge of specific regions are also considered in the selection of evaluators and the assignment of specific applications.

CPE Evaluation Process

The EIU evaluates applications for gTLDs once they become eligible for review under CPE.

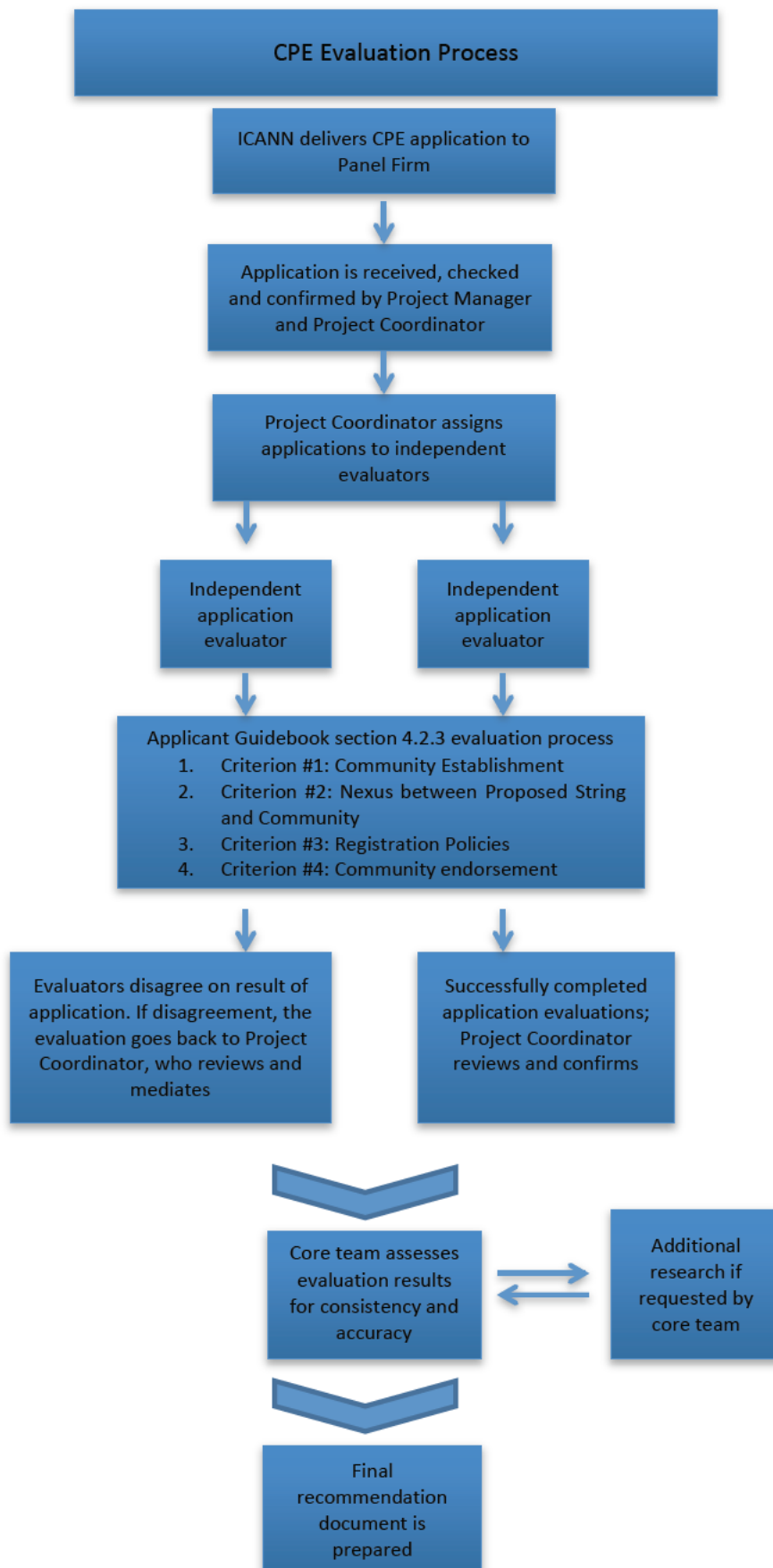
The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:

- The Panel Firm's Project Manager is notified by ICANN that an application for a gTLD is ready for CPE, and the application ID and public comments are delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website. The EIU Project Manager reviews the application and associated materials, in conjunction with the EIU Project Coordinator. The Project Coordinator assigns the application to each of two evaluators, who work independently to assess and score the application.
- Each evaluator reviews the application and accompanying documentation, such as letter(s) of support and opposition. Based on this information and additional independent research, the evaluators assign scores to the four CPE criteria as defined in the Applicant Guidebook.
- As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see "Verification of letter(s) of support and opposition" section for further details.)
- When evaluating an application the CPE Panel also considers the public application comments. The public comments are provided to EIU by ICANN following the close of the 14-day window associated with the CPE invitation. For every comment of support/opposition received, the designated evaluator assesses the relevance of the organization of the poster along with the content of the comment. A separate verification of the comment author is not performed as the Application Comments

¹ The term "independent" means that the evaluators do not have any conflict of interest with CPE applicants. It also means that the evaluators sit outside the core EIU team; they provide individual evaluation results based on their assessment of the AGB criteria, application materials, and secondary research without any influence from core team members.

system requires that users register themselves with an active email account before they are allowed to post any comments. However, the evaluator will check the affiliated website to ascertain if the person sending the comment(s) is at that entity/organization named, unless the comment has been sent in an individual capacity.

- Once the two evaluators have completed this process, the evaluation results are reviewed by the Project Coordinator, who checks them for completeness and consistency with the procedures of the Applicant Guidebook.
- If the two evaluators disagree on one or more of the scores, the Project Coordinator mediates and works to achieve consensus, where possible.
- The Project Director and Project Coordinator, along with other members of the core team, meet to discuss the evaluators' results and to verify compliance with the Applicant Guidebook. Justifications for the scores are further refined and articulated in this phase.
- If the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures.
- If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified.
- When the core team achieves consensus on the scores for each application, an explanation, or justification, for each score is prepared. A final document with all scores and justifications for a given application, including a determination of whether the application earned the requisite 14 points for prevailing, is presented to ICANN.
- The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.
- The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.



Verification of letter(s) of support and opposition

As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:

- On a regular basis, the EIU reviews ICANN's public correspondence page (<http://newgtlds.icann.org/en/program-status/correspondence>) for recently received correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the public correspondence is provided to the evaluators assigned to the evaluation for review.
- For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter verification process.
- With few exceptions, verification emails are sent to every entity that has sent a letter(s) of support or opposition to validate their identity and authority.
- The exceptions noted above regarding sending verification letter(s) include but may not be limited to:
 - If there are no contact details included in the letter(s). However, the evaluator will attempt to obtain this information through independent research.
 - If the person sending the letters(s) does not represent an organization. However, if the content of the letter(s) suggests that the individual sending a letter has sent this letter(s) on behalf of an organization/entity the evaluator will attempt to validate this affiliation.
- The verification email for letter(s) of support/opposition requests the following information from the author of the letter:
 - Confirmation of the authenticity of the organization(s) letter.
 - Confirmation that the sender of the letter has the authority to indicate the organization(s) support/opposition for the application.
 - In instances where the letter(s) of support do not clearly and explicitly endorse the applicant, the verification email asks for confirmation as to whether or not the organization(s) explicitly supports the community based application.
- To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.
- A verbal acknowledgement is not sufficient. The contacted individual must send an email to the EIU acknowledging that the letter is authentic.

Resp. Ex. 9

RESPONDENT'S EXHIBIT



Announcements

Blog Posts

Dawn of a New Internet Era

First New gTLDs Get the Green Light for Delegation

What the Recent NGPC's Resolutions Regarding GAC Category 2 Advice and Name Collision Mean to the Contracting Process

ICANN Accredited Registrars Can Now Begin to Prepare for Trademark Clearinghouse Services

Trademark Clearinghouse Update

Building a Secure and Reliable Trademark Clearinghouse

Carefully Constructed New gTLD Program Moves Forward

EBERO Plan Moving Forward Rapidly

ICANN Stands Ready for New gTLD Launch

March 29 Registration Deadline Q&A with Michael Salazar and Robb Antrobus

New gTLD Roadshows

Predicting the Future

TLD Application System Q&A with Robb Antrobus

PREPARING EVALUATORS FOR THE NEW GTLD APPLICATION PROCESS

by *Michael Salazar* | 22 November 2011

The names of the global firms that will serve as the evaluation panels for new generic Top Level Domain (gTLD) applications were recently announced during the ICANN 42 Dakar meeting.

As Program Director for the [New gTLD Program](#) responsible for the design and deployment of the New gTLD Application Processing Program and managing the process as it takes flight, I am extremely proud of the selections we have made. All of the organizations chosen are highly qualified, global, and are respected experts in the areas for which they have been selected.

Whom did we select?

We followed a thorough, fair, detailed process to select the evaluation panels. The process, which is described on our website under "[Call for Applicant Evaluation Panel Expressions of Interest](#)" began in February of 2009. When I came on board in July 2009 I quickly understood the heightened level of interest in providing services for this relatively new Program. In all, twelve global firms formally submitted responses. Out of that pool, we selected: [The Economist Intelligence Unit](#), [Ernst & Young](#), [InterConnect Communications](#) (partnering with the [University College London](#)), [Interisle Consulting Group](#), [JAS Global Advisors](#), and [KPMG](#).

These firms will work together in various combinations to evaluate applications during the process as follows:

String Reviews

- **String Similarity** - InterConnect Communications/University College London
- **DNS Stability** - Interisle Consulting Group
- **Geographic Names** - The Economist Intelligence Unit and InterConnect Communications/University College London

Applicant Reviews

- **Technical and Operational** - Ernst & Young, JAS Global Advisors, and KPMG
- **Financial Capability** - Ernst & Young, JAS Global Advisors, and KPMG
- **Registry Services** - Interisle Consulting Group
- **Community Priority** - The Economist Intelligence Unit and InterConnect Communications

Why is there more than one firm for each of the evaluation types? Three reasons:

- To provide sufficient bandwidth to conduct the number of necessary evaluations,
- To provide an alternate channel to avoid conflicts of interest,
- To provide for continued competition among service providers to ensure quality and value going forward.

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for the New gTLD →
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All of the firms exhibit characteristics that are important to the integrity of this process. For example, KPMG and Ernst & Young both have large global footprints and can effectively scale to ensure timely and culturally sensitive processing of applications. Their strong and long history in providing audit, tax, and advisory services makes them well suited to serve as the panels for financial and technical/operational evaluations. JAS Global Advisors has a decade of experience in due diligence, Internet security, and global IT operations as well as an intimate knowledge of ICANN. The Economist Intelligence Unit, the sister organization of *The Economist*, incorporates a solid understanding of global corporate and government processes. InterConnect Communications, in conjunction with the University College London brings an internationally recognized and diverse linguistics resources offering an abundance of subject matter expertise. And finally, Interisle Consulting Group has a very specific, excellent subject matter expertise in the DNS.

How are we ensuring an effective and efficient evaluation effort?

Ensuring that we have an effective and efficient evaluation effort is one of the most important aspects of building this program - and this starts with how we are preparing the evaluation panels.

The first step begins with simulation exercises. Currently, my team is conducting simulation exercises using mock applications. The simulation exercises have been instrumental in testing the evaluation process, understanding the level of effort to review an application, and equally as important, to calibrate the analysis across the firms.

The next step is building and implementing a robust training program. We are finalizing a training program that all evaluators are required to complete before performing an evaluation. Any individual serving on a panel will need to complete the training program prior to starting. The training program seeks to ensure consistency across all processes and scoring methods so that all applications are evaluated equally.

Finally, we are implementing a Quality Control program to ensure that applications have followed the same evaluation process and have been evaluated consistently. I strongly believe that the Quality Control function is a paramount component of the Program. In addition to performing the critical task of ensuring consistency, Quality Control will enable us to identify areas for improvement. These will in turn create initiatives that will bring enhanced effectiveness to the overall program as well as improvements in costs as we consider future rounds.

How will ICANN address any conflicts of interest?

Conflict of interest is an area that ICANN takes very seriously as it impacts the integrity of the Program. In fact, our processes are built to avoid and adequately deal with potential conflicts of interest. For example, where feasible, we have multiple firms providing services making sure that no evaluators have a conflict with a particular application.

I helped craft applicable language in the Applicant Guidebook and have made the topic the subject of contract negotiations with each firm reinforcing the importance of avoiding conflict of interest (inherent or perceived). There is also a code of conduct that we have asked each firm to abide. Some of the guidelines under the code of conduct restrict the evaluators from speaking at meetings or conferences on the topic of New gTLDs and interacting with entities or individuals that have identified themselves as potential applicants of the New gTLD Program. See [Module 2 of the Applicant Guidebook](#) (Section 2.4.3 Code of Conduct Guidelines for Panelists) for more information on the Code of Conduct and Conflict of Interest guidelines.

The New gTLD Application Program is a major undertaking for ICANN and the global Internet community. We are very excited to get this program underway. Stay tuned for additional announcements as we continue to prepare for launch on 12 January 2012.

If you have any questions about the gTLD Program, the evaluation process or the evaluation firms selected, please send your questions to:

newgtld@icann.org

[Michael Salazar's blog](#)

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Resp. Ex. 10

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SSR\)](#)

Minutes | New gTLD Program Committee

18 May 2013

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at <http://www.icann.org/en/groups/board/new-gTLD>.

A Regular Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held in Amsterdam, The Netherlands on 18 May 2013 at 17:00 local time.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Fadi Chehadé (President and CEO), Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Gonzalo Navarro, Ray Pizak, George Sadowsky, Mike Silber, Judith Vazquez, and Kuo-Wei Wu.

Thomas Narten, IETF Liaison and Francisco da Silva, TLG Liaison, were in attendance as non-voting liaisons to the committee. Heather Dryden,

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1. **Consent Agenda**

- a. [Approval of Board Meeting Minutes](#)
- b. [BGC Recommendation on Reconsideration Request 13-1 Rationale for Resolutions 2013.05.18.NG02 – 2013.05.18.NG03](#)
- c. [BGC Recommendation on Reconsideration Request 13-2 Rationale for Resolution 2013.05.18.NG04](#)

2. **Main Agenda**

- a. [Addressing GAC Advice from Beijing Communiqué](#)

The Chair introduced the agenda, noting that there are items on the consent agenda and then the Committee would be discussing the GAC advice received in Beijing.

1. **Consent Agenda**

The Chair introduced the items on the consent agenda and called for a vote. The Committee then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

a. **Approval of Board Meeting Minutes**

Resolved (2013.05.18.NG01), the New gTLD Program Committee approves the minutes of the 26 March 2013, 5 April 2013 and 11 April 2013 Meetings of the New gTLD Program Committee.

b. **BGC Recommendation on Reconsideration Request 13-1**

Whereas, Ummah's Digital, Ltd.'s ("Ummah") Reconsideration Request, Request 13-1, sought reconsideration of the staff conclusion that the Ummah gTLD application "is ineligible for further review under the New gTLD Program," which was based on the Support Applicant Review Panel (SARP) determination that Ummah's application did not meet the criteria for financial assistance.

Whereas, the BGC recommended that Reconsideration Request 13-1 be denied because Ummah has not stated proper grounds for reconsideration, and Ummah's stay request fails to satisfy the Bylaws' requirements for a stay.

Whereas, the BGC noted that "Ummah raises some interesting issues in its Request and suggests that the Board direct that the concerns raised in Ummah's Request be included in a review of the Applicant Support Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round."

Resolved (2013.05.18.NG02), the New gTLD Program Committee adopts the recommendation of the BGC that Reconsideration Request 13-1 be denied on the basis that Ummah has not stated proper grounds for reconsideration and that Ummah's stay request fails to satisfy the Bylaws' requirements for a stay.

Resolved (2013.05.18.NG03), the Board directs the President and CEO to include the concerns raised in Ummah's Reconsideration Request in the review of the Applicant Support Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.

Rationale for Resolutions 2013.05.18.NG02 – 2013.05.18.NG03

In July 2009, as part of the comprehensive [GNSO Improvements](#) program, the [ICANN Board](#) approved the formal Charters of four new [GNSO Stakeholder Groups](#) (see [ICANN Board Resolution 2009.30.07.09](#)).

[ICANN's Bylaws](#) at the time Reconsideration Request 13-1 was filed, called for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC's recommendation with respect to Reconsideration Request 13-1 and finds the analysis sound. The full BGC Recommendation, which includes the reasons for

recommending that the Reconsideration Request be denied
can be found at:

<http://www.icann.org/en/groups/board/governance/reconsideration>

Having a Reconsideration process set out in ICANN's Bylaws positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

To assure that ICANN continues to serve the global public interest by ensuring worldwide accessibility to the Internet and opportunities for operating a registry, ICANN will include the issues raised in Ummah's Request in its review of the Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

c. BGC Recommendation on Reconsideration Request 13-2

Whereas, Reconsideration Request 13-2, sought reconsideration of: (1) Staff and Board inaction on the consideration of Nameshop's letter of "appeal" sent after denial of Nameshop's change request to change its applied-for string in the New gTLD Program from .IDN to .INTERNET (the "Change Request"); and (ii) the decision of the Support Applicant Review Panel ("SARP") that Nameshop did not meet the criteria to be eligible for financial assistance under ICANN's Applicant Support Program.

Whereas, the BGC recommended that Reconsideration Request 13-2 be denied because Nameshop has not stated proper grounds for reconsideration.

Whereas, the BGC concluded that the Reconsideration Request 13-2 challenges: (i) an "appeal" process that does not exist; and (i) the substantive decisions taken within the New gTLD

Program on a specific application, not the processes by which those decisions were taken and that the reconsideration process is not, and has never been, a tool for requestors to seek the reevaluation of decisions.

Resolved (2013.05.18.NG04), the New gTLD Program Committee adopts the BGC's recommendation that Reconsideration Request 13-2 be denied on the basis that Nameshop has not stated proper ground for reconsideration.

Rationale for Resolution 2013.05.18.NG04

ICANN's Bylaws at the time Reconsideration Request 13-2 was filed, called for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC's recommendation with respect to Reconsideration Request 13-2 and finds the analysis sound. The full BGC Recommendation, which includes the reasons for recommending that the Reconsideration Request be denied can be found at:

<http://www.icann.org/en/groups/board/governance/reconsideration>.

Having a Reconsideration process set out in ICANN's Bylaws positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

Request 13-2 challenges an "appeal" process that does not exist, and challenges the substantive decisions taken in implementation of the New gTLD Program on a specific application and not the processes by which those decisions were taken. Reconsideration is not, and has never been, a tool for requestors to seek the reevaluation of substantive decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in itself, in contravention of established processes and policies within ICANN.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

All members of the Committee voted in favor of Resolutions 2013.05.18.NG01, 2013.05.18.NG02, 2013.05.18.NG03, and 2013.05.18.NG04. The Resolutions carried.

2. Main Agenda

a. Addressing GAC Advice from Beijing Communiqué

Chris Disspain led the Committee in a discussion regarding the GAC Advice from the Beijing Communiqué, stressing that the Committee is not being asked to take any decisions today. Rather, there are goals to understand the timing of decisions to be taken in the future, with particular focus on those items that the Committee is likely to accept.

Akram Atallah provided an overview of a timeline for proposed action, focusing on those items of advice that are applicable across all strings, and noting that it is a priority to deal with those items first. The next in priority are the items that affect strings in related categories. The public comment is still open on the safeguard advice, and there will be time needed to provide the Board with a summary of those comments. A decision will be needed soon after to keep the Program on track.

The Chair summarized his understanding of the items that needed to be ready for decision soon after the close of the comment period: The safeguards applicable to all new gTLDs; IGO protections; the Registry Agreement; the GAC WHOIS principle; IOC/RC protections; and the category of safeguards for restricted access policies. While many on the Committee are eager to discuss the singular/plural issue and .Africa and .GCC, those decisions are not essential for moving forward with the Program.

Chris confirmed that there is a plan to deal with the individual

issues as well as the general issues. For the .Africa and .GCC pieces of advice, the Committee first has to consider the applicant input, as well as for .Islam and .Halal. Applicant comments also have to be considered on the groups of strings identified in the Communiqué. The advice on singular/plural and IGO protections are on track to be dealt with separately, and there is ongoing work for all other portions of the advice.

Thomas Narten pointed out that there could be a need for further public comment in the even that the NGPC takes a decision that requires further input.

Olga Madruga-Forti and Tarek Kamel both noted that it is important for the Committee to take the GAC Advice seriously and respond in a timely manner, and not to solely focus on the process that is not as well understood among all of the governments of the world. In addition, some of the focus on the issues raised in the Communiqué has gone beyond the governments.

Gonzalo Navarro agreed and urged the Committee to be proactive in its responses.

Heather Dryden confirmed that the members of the GAC worked carefully to create this Communiqué.

The President and CEO urged the Committee that, when appropriate, even if formal action or decision is not ripe, the Committee should indicate the direction in which it is leaning on some of the more sensitive areas of advice.

Chris confirmed that particularly in regards to the portion of Communiqué where the GAC indicated it needed further time for discussion, the progress on this will in part be based upon the outcomes of that further discussion. However, for some of the names identified, there are already objection processes underway and so the results of those objections may remove the need for GAC action. However, it is possible for the Committee to telegraph how it anticipates acting in regards to these items, particularly when provided along with a clear statement of the Committee's understanding of the GAC's position.

Olga agreed with Chris' suggestion.

Heather stressed the import of being responsive to the GAC while still allowing the objection processes to run.

Gonzalo Navarro shared his expectation that we will see heightened government participation at the Durban meeting as a result of the Communiqué, and the messaging within the GAC and the Committee will be very important.

Bill Graham agreed with Heather that it is important to proceed with caution, and to not signal potential action by the Committee that may not be feasible if the GAC or objection process leads to a change in course.

Chris then walked the Committee through proposed responses for inclusion in Scorecard and the Committee suggested modifications throughout the document. While discussing the Scorecard, Chris confirmed that the Committee would have further discussion on the singular/plural issue at a future call of the Committee, as a decision on this point could have great impact regarding future rounds of the program. For the IGOs, the Committee will be going into consultation with the GAC, and a letter will be sent to the GAC thanking it for its willingness to engage. The Committee had previously stated to the GAC that the deadline for addressing the IGO acronym issue is in Durban, to allow the Committee to take a resolution as soon after Durban as possible. Chris also noted that addressing the GAC advice on RAA, the GAC Whois Principles and the IOC/Red Cross should be very straightforward. For the safeguard advice applicable to all strings, Chris briefly led the Committee through some proposed Scorecard language, and requested that staff provide the Committee with additional information and explanations for the proposed suggestions of how to address the GAC Advice. As it related to the safeguard advice for particular categories of strings, Chris noted that due to lack of time, it made sense to postpone a review of these items.

Chris then confirmed that the topic for the Committee's next call should be to address those areas that will have a 1A on the Scorecard, so that the Committee can take further action. He also agreed that the staff should provide an update to the community on the Committee's progress.

The Chair then called the meeting to a close.

Published on 19 June 2013



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- [Accountability Mechanisms](#)
- [Independent Review Process](#)
- [Request for Reconsideration](#)
- [Ombudsman](#)

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- [Documents](#)
- [Agreements](#)
- [AOC Review](#)
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Resp. Ex. 11

RESPONDENT'S EXHIBIT



TLD Application Process: Information for Applicants

At its [16 July 2000 meeting in Yokohama](#), the ICANN Board of Directors adopted a policy for the introduction of new top-level domains (TLDs) in a measured and responsible manner. It is anticipated that this policy will lead to new TLDs coming into operation early in the year 2001. The policy involves a process in which those interested in operating or sponsoring new TLDs may apply to ICANN. After reviewing the applications, ICANN will select applications that will enter a negotiation process with ICANN.

This web page collects the principal resource materials for those seeking to apply to sponsor or operate a new TLD.

- 1. [ICANN Board Action in Yokohama](#).** The policy action of the Board is set out in a [series of resolutions](#). These resolutions authorize the President (and the ICANN staff, which acts under his direction) to proceed with a program to invite applications, to evaluate them, and to establish guidelines for selection from among applications.
- 2. [ICANN-Staff-Prepared Overview of Process](#).** On 3 August 2000, the ICANN staff published an [overview of the process](#), to assist those considering applying to prepare to meet the requirements.
- 3. [New TLD Application Forms](#).** This web page has links from which you can access and print out the the application forms. Be sure to read and follow the "[Detailed Instructions for Filling Out the Application](#)" ([item #4 below](#)) carefully. Applications are to be submitted between 5 September and 2 October 2000.
- 4. [New TLD Application Instructions](#).** Please carefully review these instructions before preparing your application.
- 5. [Statement of Criteria for Assessing TLD Proposals](#).** Consistent with the [Board resolutions in Yokohama](#), this document describes the factors the ICANN staff intends to consider in evaluating applications for recommendation to the ICANN Board.
- 6. [Answers to Questions](#).** Until the close of the application period on 2 October 2000, questions concerning the application process may be sent to tld-applications@icann.org. To help provide all applicants with equitable access to information about the process as they prepare their applications, until the application deadline all requests to ICANN for information about the process or issues arising in preparation of an application must be submitted in written form (preferably by e-mail). During this period, requests for personal or telephone consultations regarding these matters will not be granted. Ordinarily, substantive responses to written questions submitted during this period will be posted. Those sending questions should take this into account in framing their questions.

IMPORTANT NOTE: Those seeking information about the possibility of registering domain names

within an existing or to-be-created TLD should direct their questions to icann@icann.org. **Questions of this character should not be sent to the tld-applications mailbox.**

Comments concerning the layout, construction and functionality of this site should be sent to webmaster@icann.org.

Page Updated 15-August-2000

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Resp. Ex. 12

RESPONDENT'S EXHIBIT



TLD Application: Un-sponsored TLD Application
Transmittal Form
15 August 2000

Un-sponsored TLD Application Transmittal Form

An application is hereby made to operate the registry for an un-sponsored top-level domain within the Internet Domain Name System (DNS).

B1. This application is made by:

Commercial Connect, LLC
Contact Information
Redacted

Contact Information Redacted

Contact Information Redacted

B2. The person signing below certifies that he has full authority to make this application on behalf of the applicant and to make all agreements, representations, waivers, and undertakings stated in this transmittal form and accompanying materials. Copies of the documents demonstrating the authority are attached.

◆B3. All documents linked directly or indirectly from "[TLD Application Process: Information for Applicants](http://www.icann.org/tlds/tld-application-process.htm)," posted at <<http://www.icann.org/tlds/tld-application-process.htm>> have been thoroughly reviewed on behalf of applicant. In particular, the following documents have been reviewed:

B3.1. [New TLD Application Process Overview](http://www.icann.org/tlds/application-process-03aug00.htm), posted at <<http://www.icann.org/tlds/application-process-03aug00.htm>>.

B3.2. [New TLD Application Instructions](http://www.icann.org/tlds/application-instructions-15aug00.htm), posted at <<http://www.icann.org/tlds/application-instructions-15aug00.htm>>.

B3.3. [Criteria for Assessing TLD Proposals](http://www.icann.org/tlds/tld-criteria-15aug00.htm), posted at <<http://www.icann.org/tlds/tld-criteria-15aug00.htm>>.

The applicant understands that failure fully to follow instructions included in these documents will be a factor negatively affecting consideration of this application.

B4. This application consists of the following, in addition to this transmittal form:

B4.1. The [Registry Operator's Proposal](#), with cover sheet and attachments and accompanying materials.

B4.2. A [Description of TLD Policies](#), with cover sheet and attachments and accompanying materials.

B4.3. A [Statement of Requested Confidential Treatment of Materials Submitted](#).

B4.4. [Fitness Disclosure of Registry Operator](#).

B5. This application is accompanied by one or more 3 1/2" floppy diskettes (IBM high density) or a CD-ROM containing files with items [B4.1](#) and [B4.2](#) above. Each item is provided in a common word-processing format and in HTML format.

B6. Check one:

(X) This application is accompanied by a check, drawn on a United States bank and payable to the Internet Corporation for Assigned Names and Numbers (ICANN), in the amount of 50,000 United States dollars.

() At least five business days before submitting this application, the applicant has sent 50,000 United States dollars by wire transfer according to [item 18.2 of the New TLD Application Instructions](#). This application is accompanied by a wire transfer receipt or other document identifying the wire transfer.

The applicant understands and agrees that this \$50,000 is only an application fee to obtain consideration of this application; that the fee will not be refunded or returned in any circumstances (except if this application is not considered due to failure to reach agreement on terms for confidential treatment); that there is no understanding, assurance, or agreement that this application will be selected for negotiations toward entry of an agreement with a registry operator; or that, if this application is selected, the negotiations will lead to entry of such an agreement or establishment of a TLD as sought in this application. The applicant understands and acknowledges that ICANN has the right to reject all applications for new top-level domains that it receives and that there is no assurance that any additional top-level domain will ever be created in the future.

B7. In the event multiple TLD strings are proposed in this application, the applicant understands (a) that all parts of the application must apply, without significant variation, to all of the strings and (b) that, if ICANN determines in its sole discretion that one or more parts (such as the [Business Capabilities and Plan](#) or the [Description of TLD Policies](#)) apply to different proposed TLD strings in a significantly different manner, the applicant may be required to elect which of the strings to pursue in this application.

B8. The applicant hereby authorizes ICANN to:

B8.1. contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to this application,

B8.2. take any other steps to verify, elaborate on, supplement, analyze, assess, investigate, or otherwise evaluate the information contained in this application or other information that, in ICANN's sole judgment, may be pertinent to this application,

B8.3. consult with persons of ICANN's choosing regarding the information in this application or

otherwise coming into ICANN's possession.

B9. The applicant understands that difficulties encountered by ICANN in verifying, elaborating on, supplementing, analyzing, assessing, investigating, or otherwise evaluating any aspect within or related to this application may reflect negatively on the application. In consideration of ICANN's review of the application, the applicant hereby waives liability on the part of ICANN (including its officers, directors, employees, consultants, attorneys, and agents) for its (or their) actions or inaction in verifying the information provided in this application or in conducting any other aspect of its (or their) evaluation of this application. The applicant further waives liability on the part of any third parties who provide information to ICANN or its officers, directors, employees, consultants, attorneys, and agents in connection with the application.

B10. The applicant hereby authorizes ICANN (and its officers, directors, employees, consultants, attorneys, and agents) to publish on ICANN's web site, and to disclose or publicize in any other manner, all materials submitted to, or obtained or generated by, ICANN (or its officers, directors, employees, consultants, attorneys, and agents) in connection with the application, including ICANN's (or their) evaluations and analyses in connection with the application or ICANN's investigation or evaluation of the application, except to the extent set forth in a written and duly signed agreement between ICANN and the applicant on the terms for confidential treatment of particular materials or information submitted by applicant. The applicant grants ICANN and its officers, directors, employees, consultants, attorneys, and agents a license to use any copyright or other intellectual property that applicant may have in any portion of the application for this purpose.

B11. The applicant hereby gives ICANN permission to use the applicant's name and/or logo in ICANN's public announcements (including informational web pages) relating to top-level domain space expansion.

B12. The applicant hereby agrees, acknowledges, and represents that it has no legally enforceable right to acceptance or any other treatment of this application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root. It further agrees, acknowledges, and represents that it has no legally enforceable rights in, to, or in connection with any top-level domain by virtue of its preparation or submission of this application or by virtue of ICANN's receipt of this application, ICANN's acceptance of the application fee, ICANN's consideration or other handling of this application, or statements made in connection with this or other applications ICANN receives.

B13. The applicant understands and agrees that it will acquire rights in connection with a top-level domain only in the event that it enters one or more written, duly signed agreements with ICANN, and that applicant's rights in connection with that top-level domain will be limited to those expressly stated in the written, duly signed agreements.

B14. In consideration of ICANN's review of the application:

B14.1. the applicant, for itself and each of its officers, directors, employees, consultants, attorneys, agents, partners, and joint venturers, hereby agrees that neither ICANN, nor any of its officers, directors, employees, consultants, attorneys, and agents, shall have any liability for its/his/her receipt, consideration, evaluation, analysis, or other activities in any way connected with this application; and

B14.2. the applicant hereby releases and forever discharges ICANN and each of its officers, directors, employees, consultants, attorneys, and agents from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.

B15. Please send an e-mail to the following address acknowledging receipt of this application:

Contact Information Redacted

By signing this transmittal form, the undersigned certifies, on his or her own behalf and on behalf of the applicant, that all information contained in this application, and all supporting documents included with this application, is true and accurate to the best of his/her/its knowledge and information. The undersigned and the applicant understand that any material misstatement or misrepresentation will reflect negatively on this application and may cause cancellation of any delegation of a top-level domain based on this application.

Signature

Jeffrey S. Smith

Name (please print)

President/CEO

Title

Commercial Connect, LLC.

Name of Applicant

September 29, 2000

Date

Resp. Ex. 13

RESPONDENT'S EXHIBIT

New gTLD Application 2000 Round Credit Request

I, **Jeffrey Smith**, am the registered Primary Contact for Application number **1-1830-1672** applied for on behalf of the Applicant entity named **Commercial Connect LLC**. As Primary Contact, I request the refund for the 2000 proof-of-concept round credit, in the amount of 86000 USD.

I confirm that **Commercial Connect LLC** is the same entity that applied for **.SHOP** in the 2000 Proof of Concept Round.

I confirm that **Commercial Connect LLC** was not awarded any string pursuant to the 2000 proof-of-concept round and that **Commercial Connect LLC** has no legal claims arising from the 2000 proof-of-concept process.

Primary Contact Email	Contact Information Redacted
CSC Case #	20405
Refund Amount	86000 USD

Beneficiary Name	Commercial Connect LLC
SWIFT/ABA/ACH/IBAN Number	Contact Information Redacted
Beneficiary Account Number	
Bank Name	Chase Bank NA
Bank Address 1	416 W Jefferson St
Bank Address 2	
Bank City	Louisville
Bank State/Province	KY
Bank Postal Code	40202
Bank Country	U.S.



 Signature

Jeffrey Smith

 Print Name

CEO

 Title

Commercial Connect LLC

 Company/Organization

6/12/12

 Date

Resp. Ex. 14

RESPONDENT'S EXHIBIT



New gTLD Program
Community Priority Evaluation Report
 Report Date: 21 May 2015

Application ID:	1-1830-1672
Applied-for String:	SHOP
Applicant Name:	Commercial Connect LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	5 Point(s)																		
<table border="1" style="width: 100%;"> <thead> <tr> <th style="text-align: left;">Criteria</th> <th style="text-align: center;">Earned</th> <th style="text-align: center;">Achievable</th> </tr> </thead> <tbody> <tr> <td>#1: Community Establishment</td> <td style="text-align: center;">0</td> <td style="text-align: center;">4</td> </tr> <tr> <td>#2: Nexus between Proposed String and Community</td> <td style="text-align: center;">0</td> <td style="text-align: center;">4</td> </tr> <tr> <td>#3: Registration Policies</td> <td style="text-align: center;">3</td> <td style="text-align: center;">4</td> </tr> <tr> <td>#4: Community Endorsement</td> <td style="text-align: center;">2</td> <td style="text-align: center;">4</td> </tr> <tr> <td>Total</td> <td style="text-align: center;">5</td> <td style="text-align: center;">16</td> </tr> </tbody> </table>	Criteria	Earned	Achievable	#1: Community Establishment	0	4	#2: Nexus between Proposed String and Community	0	4	#3: Registration Policies	3	4	#4: Community Endorsement	2	4	Total	5	16	
Criteria	Earned	Achievable																	
#1: Community Establishment	0	4																	
#2: Nexus between Proposed String and Community	0	4																	
#3: Registration Policies	3	4																	
#4: Community Endorsement	2	4																	
Total	5	16																	
<p>Minimum Required Total Score to Pass <u>14</u></p>																			

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p>	

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition¹ and there must be awareness and recognition of a community (as defined by the application) among its members.

The applicant defines its community as follows:

The community for the .SHOP will be for eCommerce Operators - For the purpose of this application we are defining our community as eCommerce operators that directly sell to the general public on the internet. This community is basically a B2C site that utilizes credit card processing requiring them to abide by PCI DSS (Payment Card Industry Data Security Standards) to operate.

The application further delineates its users from the general public with the following:

This community is easily identified as websites that have shopping cart programs that utilize SSL (Secured Socket Layer) certificates (required under PCI DSS) to process their transactions. Studies have been performed to help identify these website operators and we have a 95% confidence that we have a clear and defined subset of the internet.

According to the AGB, “Delineation relates to the membership of a community, where a clear and straightforward membership definition scores high, while an unclear, dispersed or unbound definition scores low.” Given the applicant’s restriction of its proposed community to online businesses that require use of SSL certificates, the Panel has determined that the application provides a clear and straight-forward membership definition and thus meets the first of the AGB’s two criteria for Delineation.

According to the AGB’s second Delineation criterion, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries). The proposed community encompasses a very large and growing field of diverse and geographically dispersed online retailers. While the application’s reliance on SSL certificates delineates a subset of retailers, SSL is simply one of several necessary tools for conducting online business. Use of SSL, however, is not sufficient to ensure that all entities using it are aware of one another as a community, and that the proposed community coheres as per the AGB. Furthermore, based on the Panel’s research, various entities in the proposed community do not show an awareness or recognition of other segments of the applicant’s proposed community, whether by way of interaction or an explicit statement of cohesion.²

The Panel determined that the community as defined in the application satisfies only one of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” Based on information provided in the application materials and the Panel’s research, there is no entity that is mainly dedicated to the community defined in the application.

¹ According to the AGB, “an unclear, dispersed, or unbound definition scores low” (ICANN Applicant Guidebook 4.2.3)

² The Panel acknowledges that an exhaustive review of all proposed community member entities is not possible and has reviewed a number of representative examples to determine awareness and recognition among proposed community members.

The community as defined in the application is dispersed geographically and across a wide array of business types and activities, including all business entities or organizations that sell to consumers using websites that have shopping cart programs that utilize SSL certificates to process their transactions. According to the application:

Initially, since there was no clear community representation, we worked on establishing some form of a member trade association. The result was the creation of ECWR.net (eCommerce World Retailers). This was formed in March, 2004 and clearly predates the 2007 requirement in the Applicant Guidebook.

The applicant acknowledges that the proposed community was not organized, and that it has sought to organize the proposed community members through ECWR.net, which provides information and resources to the e-commerce community. The application states that the ECWR has “in excess of 1,000 members representing a substantial amount of eCommerce,” though evidence of these retailers’ participation or of the group’s activity generally is not significant. Additionally, recent estimates put the number of US-based e-commerce retailers at over 102,000³; this figure does not include e-commerce retailers from other major global markets that the applicant also includes in its proposed community. Therefore, the ECWR is only dedicated to a subset of the community defined by the application. The applicant states that its members “represent an equivalent [*sic*] in excess of \$866 trillion in annual sales.” However, estimates of the total retail market (both online and in-store) for 2014 show total sales of around US\$22.5 trillion.⁴ Another entity to which the application makes reference, the National Retail Federation⁵, and a subsidiary organization, Shop.org, are committed to the retail (including e-commerce) community defined by the applicant, but its advocacy and policy activities are largely limited to US policy issues.⁶ Therefore, the Panel has determined that there is no entity mainly dedicated to the community in all the breadth and geographic range defined in the application.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string, and that the application is attempting to organize the entities described in the application materials through a gTLD. The proposed community therefore could not have been active prior to the above date (although many of its constituent parts were active).

The application refers to several organizations that existed prior to 2007, including organizations that have endorsed its application and others that represent parts of the defined community. However, the fact that

³ See <http://www.forbes.com/sites/mikalbelicove/2013/09/18/how-many-u-s-based-online-retail-stores-are-on-the-internet/>

⁴ See “Retail Sales Worldwide Will Top \$22 Trillion This Year,” <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>

⁵ According to its website, the National Retail Federation “is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries.”

⁶ See <https://nrf.com/advocacy/policy-agenda>; also see <https://nrf.com/membership/committees/shoporg-policy-advisory-group>;

these organizations were active prior to 2007 does not mean that these organizations were active as part of the larger community as defined in the application prior to 2007, as required by the AGB.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension 0/2 Point(s)

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. According to the application, “We currently have in excess of 1,000 members representing a substantial amount of eCommerce (these members represent an equivalent [sic] in excess of \$866 trillion in annual sales).”⁷ The community for .SHOP as defined in the application, therefore, is large both in terms of geographical reach and number of members globally. However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.⁸ Therefore, it fails the second criterion for Size. The Panel determined that the community as defined in the application meets only one of the two criteria required.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB's requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community 0/4 Point(s)

2-A Nexus 0/3 Point(s)

The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

⁷ See footnote 4, regarding the implicit errors here; nevertheless, the size of the community as defined is substantial.
⁸As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest...There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus (of 2 out of 3 points; 1 point is not possible), the applied-for string must identify the community. “Identify means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.”

The application for .SHOP defines the community as “eCommerce operators that directly sell to the general public on the internet.” According to the application documentation, “.SHOP matches the name of the community and is well known in many languages” and “.SHOP has no other significant meaning than eCommerce.” Elsewhere in its application, however, the applicant states a more commonly understood definition for the string: “.Shop is globally recognized and exists in excess of twenty different languages all with the same meaning: a building or room stocked with merchandise for sale: a store.”

The applied-for string does not *match* the name of the community as defined in the application. According to the AGB, a string is a “match” if it is “the established name by which the community is commonly known by others” – i.e., that the applied-for string is the same as the one name that is most commonly understood to refer to the community. However, in addition to making reference to the “SHOP” community in its application, the applicant also refers to its commitment to the “e-commerce community” in its mission statement and uses “e-commerce” throughout its application to refer to the community defined in the application. It is evident, therefore, that “SHOP” is not the *established* name as required for a string to be considered a match and that it does not meet the AGB requirements for a full score.

The applied-for string does not *identify* the defined community, as the AGB requires for a partial score. The string .SHOP over-reaches substantially beyond the applicant’s proposed community. This is because the string .SHOP identifies both online (i.e. e-commerce) as well as brick-and-mortar entities⁹ that sell goods and services. The latter represent a significant portion of overall global retail¹⁰ sales, but are not included in the applicant’s proposed community, which is “eCommerce operators that directly sell to the general public on the internet” only and not brick-and-mortar stores. Indeed, in 2014 an estimated 94.1% of global retail sales were accounted for by brick-and-mortar establishments.¹¹ Thus the string significantly overreaches beyond the proposed community.

The Panel determined that the applied-for string does not match or identify the community or the community members as defined in the application. It therefore does not meet the requirements for Nexus.

2-B Uniqueness

0/1 Point(s)

The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel’s determination that the applied-for string “.SHOP” does not identify the community defined by the application according to AGB standards. Therefore, since the string does not identify the community, it cannot be said to “have no other significant meaning *beyond identifying the community*” (emphasis added, AGB). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

⁹ The applicant itself notes that “.Shop is globally recognized and exists in excess of twenty different languages all with the same meaning: a building or room stocked with merchandise for sale...”

¹⁰ The Panel acknowledges that the word “shop” may also identify establishments outside of the retail industry.

¹¹ <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>

Criterion #3: Registration Policies	3/4 Point(s)
3-A Eligibility	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the application:</p> <p style="padding-left: 40px;">The .SHOP domain name is intended for eCommerce purposes. This means that a website using .SHOP must have eCommerce-enabled ability to provide a direct conduit to making transaction on the web. In other words, it is expected that a .SHOP website will have items or services available for sale on that site and that there is an easy path to purchasing these items. These transaction [<i>sic</i>] must also use secure communications when processing said transactions.</p> <p>The application therefore demonstrates adherence to the AGB's requirement by restricting domain registration to individuals who are members of the community defined by the application. The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
3-B Name Selection	0/1 Point(s)
<p>The Panel determined that the application did not meet the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are not consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 0 out of 1 point under criterion 3-B: Name Selection.</p> <p>According to the application:</p> <p style="padding-left: 40px;">In order for an applicant to be considered “qualified” to purchase a .SHOP top-level domain name, they must go through a strict verification process where Commercial Connect researches the identity of that applicant and his business using semi-automated process patent pending processes. Once the registrant is “verified,” they are assigned a contact ID which will, then, allow them to register a .SHOP domain name. ...</p> <p style="padding-left: 40px;">The minimum character length for a domain name is one character, excluding the .SHOP extension. The maximum character length for a domain name is 63 characters excluding the extension. A domain name must not begin with a dash “-” or dot “.” and must not begin with the following sequence: “alphanumeric_alphanumeric_dash (“-“)_dash (“-“”).</p> <p style="padding-left: 40px;">Each character in the domain name, excluding the dots (“.”)s must be a letter, digit, or dash (“-“). The last character must be a digit or letter. It cannot be a dash (“-“).</p> <p>The application does not directly refer to its community-based purpose in discussion of name selection rules, nor are they implicitly based on the community-based purpose of the applied for TLD, which is to “aid in the the [<i>sic</i>] development of a safer, cheaper, and more secure platform for eCommerce, providing for a better online shopping experience.” Furthermore, the above mentioned technical requirements are the same as the minimum requirements for any second level domain in a gTLD, Therefore, the Panel determined that the application did not satisfy the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application provides evidence that the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:</p>	

Requirements for the applicant initially will be an agreement that the website will be offering goods and/or services under a secured socket layer (SSL) trusted connection. [...] There may be additional circumstances whereby it will not be required for the registrant of a .SHOP domain name have a functioning eCommerce site. [...] Generic .SHOP domain names should be eCommerce site-enabled and not forwarded to other sites. [...] property.

The application therefore demonstrates adherence to the AGB’s requirement of content and use rules that are consistent with the application’s community-based purpose, which is to “aid in the the [sic] development of a safer, cheaper, and more secure platform for eCommerce, providing for a better online shopping experience.”

3-D Enforcement 1/1 Point(s)

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and outlines a coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. According to the application:

Commercial Connect, LLC may, in its sole discretion, suspend or terminate a user’s service for violation of any of the requirements or provisions of the United States government on receipt of a complaint if Commercial Connect LLC believes suspension or termination is necessary to comply with the law, protect the public interest, prevent unlawful activity or protect the health, safety, or privacy of an individual.

If immediate action is not required, Commercial Connect, LLC will work with registrants and a complainant to remedy violations. [...] Disputes arising under or in connection with this Agreement, including requests for specific performance shall be resolved through binding arbitration conducted as provided in this Section pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce (“ICC”). [...] Mechanisms will be in place for the notification [sic] and eventual suspension of domain regstrants [sic] that either do not qualify to operate a .SHOP TLD or are operating it inconsistently with its intended use. Two Warning [sic] will be sent and an appeal process will be available before action is taken to suspend a .SHOP TLD.

The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names and refers to an appeals process available to registrants. The Panel determined that the application satisfies both of the two conditions to fulfill the requirements for Enforcement and therefore scores 1 point.

Criterion #4: Community Endorsement 2/4 Point(s)

Support for or opposition to a CPE gTLD application may come by way of an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and as applicable attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support for and opposition to the Commercial Connect LLC application for the string .SHOP.

Summary of Review & Verification of Support/Opposition Materials

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	7	2	2	1
Attachments to 20(f)	17	3	3	2
Correspondence	6 ¹²	3	3	2
Grand Total	30	8	8	5

4-A Support

1/2 Point(s)

The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or must have documented support from the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means that the institution(s)/organization(s), through membership or otherwise, are clearly recognized by the community members as representative of the community as a whole. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application (in all its breadth of categories as described in Delineation), but is also (2) recognized by the same community as its representative. No such organization among the applicant’s supporters demonstrates the kind of structure required to be a “recognized” organization, as per AGB guidelines, and the Panel has determined that no such organization exists. However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support, as required by the AGB. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is relevant opposition to the application from a group of non-negligible size, from an entity within the community explicitly addressed by the

¹² Five pieces of correspondence were received by 4/17/15, one of which included two letters.

application. The entity is a multinational company. The grounds for the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the applicant's right to regulate a namespace in which the opponent has a place. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Resp. Ex. 15

RESPONDENT'S EXHIBIT



New gTLD Program
Community Priority Evaluation Report
 Report Date: 13 March 2015

Application ID:	1-890-52063
Applied-for String:	SHOP
Applicant Name:	GMO Registry, Inc.

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	6 Point(s)	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	3	4
#4: Community Endorsement	3	4
Total	6	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p>	

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition¹ and there must be awareness and recognition of a community (as defined by the application) among its members.

The membership definition articulated in the application is as follows:

The target community for .SHOP is business entities or organizations that deploy commercial activities in an online or offline environment or provide information in relation thereto over the Internet. Their common goal is to sell products and services to third parties, using the Internet as a direct or indirect sales channel.

Under .SHOP, only those who engage or intend to engage in commercial activities qualify to register domain names, if they meet requirements that – once finalized – will be laid down by the Applicant.

The application states that the community it is committing to serve “is a broad and heterogeneous community not defined by any geographical borders, limited to certain cultures or form of trade,” but states that the “community can be delineated more specifically” by the following parameters:

- community members deploy commercial activities with a certain continuity, whereas most Internet users only sporadically engage in commercial transactions, mainly as buyers (demand side);
- in some countries, to deploy commercial activities, registration with an official register is required prior to or shortly after engaging in such activities; and, in some countries, a VAT or sales tax number, or equivalent thereof is also required;
- those engaging in ecommerce related activities have 1 or more websites on which they offer products or services etc. Internet users in general do not usually have transactional websites, and use the Internet only for trading in their own name and for their own purpose. Also, generally, Internet users are not engaged in marketing activities or promotional campaigns for products or services;
- in some countries, specific commercial activities are regulated by an official or non-official body.

According to the AGB, “Delineation relates to the membership of a community, where a clear and straightforward membership definition scores high, while an unclear, dispersed or unbound definition scores low.” The membership definition for the proposed .SHOP community is dispersed and unbound. The application states that, “members must deploy commercial activities with a certain continuity,” but what qualifies as “certain continuity”, a key element of the community’s delineation, is insufficiently detailed in the application. Moreover, the applicant seeks to delineate some of its members by way of their “commercial activities” being “regulated by an official or non-official body” but this proposed delineating measure lacks the clarity and specificity that would adequately delimit any subset of entities. This unclear requirement furthermore only applies “in some countries” and in others it is unclear whether any “official” or “non-official” regulation would help to delineate membership at all. In sum, the application fails to articulate with adequate precision attributes that clearly and straight-forwardly define the membership of the proposed community. Instead, the application materials demonstrate that the membership of the community is unbound and dispersed.

According to the AGB’s second Delineation criterion, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

The application cites a “common goal” of community members “to sell products and services... using the Internet” but this does not meet the AGB’s standard of cohesion. While any person or organization engaged

¹ According to the AGB, “an unclear, dispersed, or unbound definition scores low” (ICANN Applicant Guidebook 4.2.3)

in business has an implicit goal to sell a good or service, this goal – or this “commonality of interest” – does not constitute participation in, awareness of or recognition of a community among its members. The lack of required cohesion stems from the defined community’s breadth, encompassing all entities that engage or intend to engage in online commercial activities as sellers. This definition is (1) too broad a delineating measure and (2) does not ensure that the various entities defined cohere in any way with one another, despite their engaging in commercial activities. The community as defined in the application, according to its own estimates, includes from hundreds of thousands to millions of retailers and service providers. However, the application provides no information regarding awareness and recognition among the proposed community’s members. Furthermore, based on the Panel’s research, various representative entities in this cohort do not show an awareness or recognition of the several other parts of the applicant’s proposed community, whether by way of interaction or an explicit statement of cohesion.²

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” There must exist, therefore, at least one organization that encompasses entities in all the fields of business included in the application’s membership definition, including but not limited to the examples cited in the previous section. That entity must also have documented evidence of community activities. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application, in all the breadth of categories explicitly and implicitly defined.

The community as defined in the application is dispersed geographically and across a wide array of business types and activities, including all business entities or organizations that deploy commercial activities in an online or offline environment. According to the application:

There is no worldwide coordinating body representing the entire community, though there are organizations and associations related to the industry at regional, national, state, and city levels, such as Chambers of Commerce, professional employer organizations, etc. The targeted community members are globally distributed, with organized activities undertaken by various organizations, stakeholder groups, etc.

Globally, various organizations represent the interests of businesses, including the International Chamber of Commerce (ICC), Business Europe, the International Fair Trade Association, etc. On a national or regional level, community members are organizing themselves in an attempt to promote use of the Internet in commercial activities, and establish trust in ecommerce.

The application therefore acknowledges that there is no entity mainly dedicated to the community as defined by the application. The ICC, for example, although it represents businesses of all sizes in more than 120 countries, has a remit to work with and represent entities which themselves conduct international or cross-border business and/or have an active involvement in international economic and business issues. The ICC with its members aims to “shape rules and policies that stimulate international trade and investment”³. This mission does not represent, for example, the many entities included in the application’s community definition that have no ties to international business, including individually owned and operated businesses that are not members of the ICC and whose business is not served by the work of the ICC. Other organizations with a large geographic remit, those cited in the application and others in the Panel’s review, are similarly limited in

² The Panel acknowledges that an exhaustive review of all proposed community member entities is not possible and has reviewed a number of representative examples to determine awareness and recognition among proposed community members.

³ <http://www.iccwbo.org/worldwide-membership/members/members/>

the type of businesses to which they cater.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string, and that the application is attempting to organize the various groups mentioned in the documentation through a gTLD. The proposed community therefore could not have been active prior to the above date (although many of its constituent parts were active).

According to the application,

Community activities include, but are not limited to, buying, selling, exchanging, trading and leasing of goods, services, information, or any other property on the Internet, or activities of a similar nature. Since the community is not represented by a single organization, there is no one establishment date.

The application refers to several organizations that existed prior to 2007, including organizations that have endorsed its application and others that represent parts of the defined community. However, the fact that these organizations were active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

0/2 Point(s)

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The community for .SHOP as defined in the application is large both in terms of geographical reach and number of members. According to the applicant:

Given its nature, it is difficult to demonstrate community size: statistics vary from hundreds of thousands to millions of entities who sell products and services using the Internet. On a daily basis, new businesses appear, and existing merchants go out of business...

According to a recent report by EURid, the registry operator for .EU, 26.5% of domain names in their sample pointed to websites used for business purposes...

If we extrapolate this result to the total number of domain names registered in the world, and

conservatively estimate the number of community members, the result is that currently about 40-50 million websites exist with commercial characteristics.

However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.⁴ Therefore, it fails the second criterion for Size. The Panel determined that the community as defined in the application meets only one of the two criteria required.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. Moreover, the applicant appears to be attempting to use the gTLD to organize the various groups noted in the application documentation, as opposed to applying on behalf of an already organized and cohesive community. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB's requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	0/4 Point(s)
2-A Nexus	0/3 Point(s)
<p>The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.</p> <p>To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus (of 2 out of 3 points; 1 point not possible), the applied-for string must identify the community. “Identify” means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.</p> <p>The application for .SHOP defines the community as “business entities or organizations that deploy commercial activities in an online or offline environment... using the Internet as a direct or indirect sales channel.” According to the application documentation:</p> <p style="padding-left: 40px;">The target community does not have one “name”, members have several common characteristics and features, and their activities (and industry) are generally referred to as “online shopping”, “ecommerce”, “ebusiness”, etc...</p> <p>[SHOP] is a commonplace word for a location – in the real or virtual world – where commercial</p>	

⁴As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest... There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

activities are deployed, products or services are offered for sale and can be bought...

The applied-for string does not match the name of the community as defined in the application and the application itself cites several other names (“online shopping,” “ecommerce,” and “ebusiness”) that are applied to the proposed community members as defined in its application. According to the AGB, match means “the established name by which the community is commonly known by others.” The application’s reference to several other names by which its proposed community members are known indicates, therefore, the applied-for string “SHOP” does not *match* the name of the community as the AGB requires for a full score.

The applied-for string furthermore does not *identify* the defined community, as the AGB requires for a partial score, because the applicant is over-reaching in its use of the applied-for string “SHOP” in its reference to all the members of the community it describes. The applied-for string does identify some entities that the application intends to include in its proposed community. For example, the application cites as an example of a community member The Body Shop “retail business”, an international chain of over 2,000 stores. However, the application does not offer any other examples that are identified by the applied-for string “SHOP”. In particular, it does not cite any examples of “organizations that deploy commercial activities” but whose names do not include the word “shop” or whose places of business are not physical storefronts where “retail business” occurs, as in the case of The Body Shop. The application similarly does not offer any reason why such entities, even in the absence of any examples, might be considered to be identified by the string.

The Panel’s research has included a broad review of publicly available information related to sellers of services, including legal, media, consulting, and financial⁵. Many of these entities are not identified by the word “SHOP”, which, as the application acknowledges, “is a commonplace word for a location – in the real or virtual world – where commercial activities are deployed, products or services are offered for sale and can be bought.” For example, a commercial bank is a business entity that deploys commercial activities (e.g. banking services, insurance services, retirement investments, etc.) in an online and offline environment, and also provides information in relation thereto over the Internet. A commercial bank sells services to third parties, using the Internet as a direct or indirect sales channel, thereby placing it within the community proposed by the application⁶. However, the string “SHOP” does not identify a commercial bank. According to the AGB, in order for the string “SHOP” to *identify* a commercial bank, the string must “closely describe” it. However, following the Panel’s review of online and other documented usages of the word “shop”, neither the word “bank” nor any of the unique functions of a commercial bank are described by “shop”. Furthermore, the websites of commercial banks, and the mission statements of associations of commercial banks that were reviewed by the Panel do not use the word “shop” to describe their business. Therefore, the applied-for string “SHOP” does not identify this sub-set of proposed community members. Given the size of the commercial banking sector⁷, this sub-set of entities not identified by the applied-for string is substantial.

The Panel determined that while “SHOP” does identify some businesses providing goods and services, the applied-for string does not match or identify the community or the community members as defined in the application. It therefore does not meet the requirements for Nexus.

⁵ The application states, “The target community for .SHOP is business entities or organizations that deploy commercial activities in an online or offline environment or provide information in relation thereto over the Internet. Their common goal is to sell products and services to third parties, using the Internet as a direct or indirect sales channel.” Thus entities such as those included in the Panel’s research are presumed to fall within the proposed community membership.

⁶ As discussed above, the parameters for inclusion in this proposed community fail the AGB’s requirements for a clearly delineated community (see section 1: Delineation). For the purposes of evaluating Nexus, however, and so that a score of 0 in one section does not preclude the objective scoring of another section, the Panel proceeds as though some basic cohort of membership is delineated, even if, as is the case with this application, the bounds are unclear.

⁷ In the US alone there are 5,705 commercial banks each with assets totaling US\$13.5 trillion. See: <https://www.fdic.gov/bank/statistical/stats/>

2-B Uniqueness	0/1 Point(s)
<p>The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.</p> <p>To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel’s determination that the applied-for string “.SHOP” does not identify the community defined by the application according to AGB standards. Therefore, since the string does not identify the community, it cannot be said to “have no other significant meaning <i>beyond identifying the community</i>” (emphasis added, AGB). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.</p>	

Criterion #3: Registration Policies	3/4 Point(s)
3-A Eligibility	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the application:</p> <p style="padding-left: 40px;">The Applicant intends to put in place the following eligibility requirements for registrants in .SHOP: In order to qualify for registering a domain name in the .SHOP TLD, the registrant must be a business entity or organization that deploys commercial activities in an online or offline environment, i.e. offering for sale and selling products or services on a more than occasional basis, or provide information in relation thereto over the Internet.</p> <p style="padding-left: 40px;">.SHOP domain name registrations will also be made available to business entities or organizations that currently do not deploy commercial activities, but that have expressed intention to engage in the activities within one year following the registration of a .SHOP domain name.</p> <p>The application therefore demonstrates adherence to the AGB’s requirement by restricting domain registration to individuals who are members of the community defined by the application. The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
3-B Name Selection	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application provides evidence that the name selection rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:</p> <p style="padding-left: 40px;">Registrants will be entitled to register domain names that are identical or similar to their current or future trademark, business name, trade name, business identifier, name of business entity or organization, names under which they are commonly known, slogans, acronyms, etc., including combinations thereof, in the .SHOP gTLD.</p> <p>The application therefore demonstrates adherence to the AGB’s requirement of name selection rules that are consistent with the application’s community-based purpose, which “is to establish a clear, unambiguous and easy to remember online identity for the community and promote a defined, meaningful, and secure</p>	

namespace in order to contribute to the further development of the community and the (commercial) activities of its members.”	
3-C Content and Use	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application provides evidence that the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:</p> <ul style="list-style-type: none"> a. Registered .SHOP domain names must be used for commercial activities in an online or offline environment or to provide information in relation thereto over the internet; or b. Registered .SHOP domain names must be intended to be used for commercial activities in an online or offline environment or to provide information in relation thereto over the internet. <p>Registering a .SHOP domain name solely for the purpose of selling, exchanging, trading, or leasing such domain name shall be deemed as inappropriate use or intent, and will be prohibited by the registry operator.</p> <p>The application therefore demonstrates adherence to the AGB’s requirement of content and use rules that are consistent with the application’s community-based purpose, which “is to establish a clear, unambiguous and easy to remember online identity for the community and promote a defined, meaningful, and secure namespace in order to contribute to the further development of the community and the (commercial) activities of its members.”</p>	
3-D Enforcement	0/1 Point(s)
<p>The Panel determined that the application does not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures but does not include a coherent and appropriate appeals mechanisms. The application received a score of 0 points under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application does not, however, make reference to an appeals process. It refers to “a grace period within which the registrant needs to demonstrate that registration and/or use of the domain name is compliant with” the policies that have allegedly been violated, but not an appeals mechanism. The Panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement and therefore scores 0 points.</p>	

Criterion #4: Community Endorsement		3/4 Point(s)
4-A Support		1/2 Point(s)
<p>The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or must have documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means that the institution(s)/organization(s), through membership or otherwise, are clearly recognized by the community members as representative of the community as a whole. To receive a partial score for Support, the applicant must have documented support from at least one</p>		

group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application (in all its breadth of categories as described in Delineation), but is also (2) recognized by the same community as its representative. No such organization among the applicant’s supporters demonstrates the kind of structure required to be a “recognized” organization, as per AGB guidelines, and the Panel has determined that no such organization exists. However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support, as required by the AGB. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support. See also the table in the following subsection for a summary of all pieces of support and opposition.

4-B Opposition 2/2 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received one letter of opposition, determined not to be relevant, as it was (1) not from communities either explicitly mentioned in the application nor from those with an implicit association to such communities, and/or (2) made for a purpose incompatible with competition objectives. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Opposition. The table below summarizes the review and verification results for all pieces of support and opposition related to this application for the applied-for string “SHOP”:⁸

	Total	Total Valid for Verification	Verification Attempted	Successfully Verified
Comments	1 (not support or opposition)	0	0	0
Attachments to 20(f)	5 (all support)	5	5	2
Correspondence	1 (opposition)	0	0	0
Grand Total	7	5	5	2

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

⁸ Details and procedures regarding the review and verification of pieces of support and opposition can be found on the ICANN CPE website: <http://newgtlds.icann.org/en/applicants/cpe>

Resp. Ex. 16

RESPONDENT'S EXHIBIT

Request for Reconsideration and Assistance

1. Name:

Commercial Connect, LLC.

Jeffrey Smith

Contact Information Redacted

2. Request for Reconsideration based on

Board Inaction even though Board Action as well as Staff Action and Staff Inaction also apply

3. Description of specific inaction we are seeking for reconsideration.

This motion for reconsideration and request for assistance will encompass a multitude of issues and wrong-doings throughout this new gTLD application process. It is being request based on Staff action as well as inaction along with Board action as well as inaction.

As far as dates are concerned – when the actions have occurred are noted in the particular area of the complaint and inactions have no date as there has been no actions taken to resolve the deficiency.

Since the BCG is part of ICANN’s board we are requesting assistance in order to get a Board reaction and/or decision since ICANN’s legal department has insisted that its Board has not made any decisions on new gTLD’s on which we can formally object.

As a member of the ICANN community since its inception I have been following areas of significant public concern but have been focusing on commerce and new GTLD’s since the mid 1990’s.

From what I have read on various responses from ICANN’s Board Governance Committee (BGC) the purpose for this method of objection is to ask for assistance and/or consideration on ICANN’s Staff/Board Action/Inaction and it must be based on established ICANN policies/procedures, documented guidance and/or mission. For this reason I think it is imperative to assist the BGC in understanding the history and significance of our complaint which is focuses on the entire process of new gTLDs.

If there are questions, concerns or requests for verification or any information contained in this request, please contact us and allow us the opportunity to provide clear and concise evidence to support our position. Communication is paramount in reaching mutual goals and we hope that ICANN will do its part in cooperating in this instance.

We followed every step ICANN gave us for 15+ years and we were promised publically by ICANN's board that we would be give first consideration for .shop.

We were an original applicant in 2000 for the .shop TLD. We have been told after our application completed and passed all vetting that our application was neither approved nor denied but in limbo. Initially it was told to us that it was in limbo until the next round of TLD's were release then in 2004 when it was determined that we had no significant community sponsor for our TLD so we were told again that we would have to wait until yet the next round expected in 2006.

Now 15 years after our initial application, we have followed each end every instruction provided by ICANN with dedication and the belief that if we did what ICANN asked then they would keep their word when they announced in a public meeting in 2000 that we would be given first consideration when the gTLD was to be released.

For the new gTLD round in 2012 almost 8 years was devoted to studying and coming up with how and why new gTLDs would be released.

This intense research and findings were finally published in August 8, 2007 by the Generic Names Supporting Organization entitled the Final Report – Introduction of New Generic Top-Level Domains (Final Report). This crucial report helped to summarize over seven (7) years of research, study, analysis and work by hundreds of members which represented hundreds if not thousands of hours or work. In this study they did a fantastic job of stating the Principles, Recommendations and Implementation Guidelines that should be followed when processing new GTLD applications.

The GNSO gave clear indication of what should be expected and why and even went as far as linking ICANN's Mission and Core Values to their reasoning. By utilizing this report, it would assist most of the BGC's consideration pertaining to the new gTLD process as this report reaches the core issues and provides simple resolutions, it is what the AGB was based on and can help to clarify many of the vague or unmentioned procedures missing from the AGB.

From this key document (located at <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>) a group was charged to develop the Applicant Guidebook which was to serve as **BASIC guidelines** for the new gTLD application process. For detailed guidelines the GNSO provided the TLD Final Report. It is an important distinction to understand that the Applicant Guidebook is just a guide which should always refer back to the report from the GNSO which in turn references ICANN's mission, core values, policies and procedures as well as the years of accumulated knowledge earned in past ICANN research and ICANN group meetings.

The document published by the GMSO was accepted and became ICANN's rules and regulations for the new gTLD process. This along with public statement from ICANN promising to assist applicants with the new gTLD process to ensure that everyone that applied and qualified would receive a new gTLD, barred the competition issue which was promised to be resolved fairly.

There has been several references in BGC's decisions that state "*the Guidebook (AGB) was extensively vetted by the ICANN stakeholder community over a course of years and included tens of versions with multiple notice and public comments....*" What the BGC may not fully

comprehend is that the GNSO's Final Report was what was vetted over the years. The AGB was developed based on the principals, procedures and recommendations of the Final Report.

The Applicant Guidebook has been maliciously manipulated where **words and sentences were changed without approval** between drafts which purposely distorted and fogged the procedures to allow for gaming by certain biased parties. You can review different versions of the AGB and look at the minutes and records of what was to be changed and easily identify the unauthorized changes. Therefore, again, it is essential to look at ICANN's Mission, Core Values, Policies and Procedures as well as the GNSO recommendations to consider the expected, proper and agreed upon procedures that the gTLD process should have followed.

Another important fact is that the **AGB does not supersede the GNSO's final report in any way**. The GNSO's final report consists of accumulated statements, rules and regulations that reflect ICANN's Mission, Core Values, Policies and Procedures which are the foundation of the structure, safety and security of the internet. It is also important to note that none of the Mission nor Core Values have been changed or altered which support's the GNSO's Final Report as a true and considerable reference which was what was presented to the applicants as enticement to apply for a new gTLDs. Again, many changes in the AGB occurred without the GNSO's knowledge and consent.

Please do not respond with Time Barred, Not in the Applicant Guidebook (as it is not required to be) or CPE Evaluation substantive issues as excuses to ignore or dismiss this request.

This request which should be backed up by the GNSO's Final Report as well as a multitude of letters to ICANN concerning issues including name similarity, name similarity disputes community consideration and preference as well as CPE evaluations. In other words, it is clearly spelled out how ICANN should treat and consider these requests. Responses such as Time Barred, not in the Applicant Guidebook and using the substantive disagreement with the CPE should be the furthest from the BGC's response. Instead we are urging the BCG to look at consider the fundamental issues this request is pointing out and requesting assistance with. It is very easy for the BCG to dismiss the issues raised with such responses – a fair, equitable and transparent course of action and open communication between parties prior to quick close ended decisions is in everyone's best interest.

It may be easily to say that the AGB replaced the Final Report but this simply is untrue. The Final Report is a representation of ICANN's mission and Core Values, these have not changed and are an active part of how ICANN should function and was published as to what was would be provided with the new gTLD application process.

Our History

As we have stated previously, we have done everything ICANN has instructed us to. We can provide any and all proof of the 15 years of work on this project while attending in excess of 30 ICANN meetings and paying whatever extreme amount of fees all because ICANN promised to make good on their commitment if we did. ICANN also publically announced that if an applicant did not qualify for any portion of this TLD round then they would provide assistance to help the applicant succeed, we need assistance, please help!

As we ask for assistance in the request, so it is also imperative to point out that we are not the only ones having issues and the internet's structure, security, and overall health is at stake.

If the BCG feels that it is not in their scope to assist us and the many others, then please provide an acceptable conduit on which these concerns can be raised and provide us with the information and reasonable time-frame to seek such actions.

ICANN now has the budget, staff and availability to ensure a fair and positive gTLD launch process.

4. Date of Inaction:

7/10/2015 – This is today's date since the inaction is still ongoing

5. On what date did you become aware of the inaction?

7/2/2015 through 7/10/2015 – When we were notified that there is no dispute resolution nor challenge processes for Community Priority Evaluation

6. Describe how you were materially affected by the inaction:

Issues where the GNSO's Final Report has not been followed

Commercial Connect, LLC's dotShop application has faced the following roadblocks which we are requesting assistance with. We have identified basic guidelines that should have been followed to award the .shop TLD to Commercial Connect and where ICANN has failed us. Commercial Connect, LLC has been denied revenue from ICANN's continual delays and imposing new and financially challenging obstacles all with the promise of awarding delegation to operate the .SHOP gTLD. Each and every delay causes substantial material financial harm.

1. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. M1-3 & CV1-11.

Transparency and predictable criteria is lost when ICANN makes applicants pay \$22,000 to unknown CPE evaluators and refuses to provide their identity, their qualifications and rationale behind their choice. Then when inconsistent decisions are made they continue to refuse to provide details on the communications that have taken place with these secretive vendors which makes it practically impossible to provide defense. Since Vendors are to be considered an extension of ICANN and as previously suggested by other motions for reconsideration, the CPE panel is subject to the same transparency and disclosure as ICANN – it is imperative that the credentials of the panel members be made known along with the communications between ICANN and the panel so that

reasonable vetting and knowledge can be obtained if a dispute proceeding is necessitated.

The CPE panel established certain criteria early in the CPE determinations which later, in direct, opposition to those standards (created with .eco decision) scored other applicants such as .gay .music and .shop in the opposite manner. Inconsistency became apparent which proves that objective and measureable criteria was not used in direct conflict with M3 and CV6-9.

2. A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. IG D

In order to be fair, transparent and non-discriminatory the 2000 application by Commercial Connect LLC for .shop should be honored. Since this application was stated by ICANN's legal department that it was neither approved nor denied and it passed all requirements in 2000, then it is still active and should hold priority in the TLD Application process. This along with the 2000 Board promising priority along with the 2008 GNSO report stating "first come, first served," are all affirmative reasons for granting Commercial Connect, LLC the .shop TLD application. Loss of operating income since 2000 (15 years) along with continued operating and legal expense that Commercial Connect, LLC has endured for the past 15 years are a unreasonable and simply unfair.

3. Community priority processed first IG F

ICANN's commitment to Community Priority has been integral since the 2004 gTLD rounds – this commitment was conveyed in the GNSO Final report mentioned above. This priority simply states that the community application are paramount to representing internet owners and communities and preference should be given to those applicants. This priority was meant to not only provide a mechanism for resolving contention but was also meant to provide these application preference in evaluation and processing.

The opposite has occurred – the community applications will be the last ones approved and ICANN's failure to follow the proper procedures especially in the statement "***Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, THAT CLAIM WILL BE TAKEN ON TRUST***" see statement 9 below.

By ICANN ignoring the string similarity issue they are allowing non-community gTLDs to be created which can and probably will mimic similar community based gTLDs adding immense confusion to all parties as to which string provide which services and representation. This has caused great harm to the Community Applicants as well as the internet as a whole.

4. Strings must not be confusingly similar. M1-3, CV1-6-11 & RFC 1519

In RFC 1591 it clearly discusses the concept of name space. **“Each of the generic TLDs was created for a general category of organizations.”**

<http://www.ietf.org/rfc/rfc1591.txt>

This issue has still not been address – with the continuing launch of gTLD’s and proof showing that the number of registrations being dismally low, it supports the condition stated in RFC 1591 that gTLD’s must be made for a category of organizations.

The name similarity issue which is to require scrutiny for TLDs which make look the same, sound the same, means the same or can be confused in any way with one another must be grouped together and only one gTLD would be allowed to exist.

Proof has been provided to this fact by multiple and significant ICANN community members including the GNSO urging ICANN and the gTLD committee to rectify this issue as issuing multiple random and similar gTLDs will only yield very small registrations which in turn would make sustainability unfeasible unless they become acquired by the much larger registries which is what we are seeing and which is the opposite of the previously bragged diversity that many promised the new gTLDs would yield. Not only does the issue of smaller registrations and threatened sustainability issues arise but the issue of confusion from the internet public on which gTLD is used for what purpose which has a significant impact on the structure, security and stability of the internet.

gTLDs that were intended add security and/or functional value will be contended with others with no such assurances and the general public will be clueless on which string to use.

It is not too late to clean up this debacle and we urge some serious consideration to this issue. At the same point while we are requesting ICANN’s to fix these issues we are also urging them to be responsive and do this in a quick and practical manner that will not delay applications that have been in process for over 15 years.

Ignoring this issue will not make it go away but make it exponentially worse – ICANN please step up and help the internet and its end users by addressing this issue sooner rather than later. It should not need to be stated that ICANN is charged with protecting the structure, security and stability of the internet.

5. There must be a clear and pre-published application process using objective and measurable criteria. M3 & CV6-9

We have clear and pre-published application process with clear and measureable criteria for the introduction of new gTLD when considering name similarity. All gTLDs would be evaluated by a linguistic panel who was to consider whether or not the strings were similar by asking if they looked the same, sounded the same, had the same or similar meaning, and/or could be confused in anyway by the average internet end user. This simply did not occur – the linguistic panel received incorrect instructions and ICANN made it impossible to object by significantly shortening the time to respond and/or object.

We simply were railroaded into accepting this huge blunder and **ICANN has received more letters on this concern that any other single issue** and they still have continued to ignore the issue and refuse to realize the implications this can have on the registry industry and the confusion it will continue to cause to the internet end-users.

Again we can provide details on this issue as well as copies of these letters if requested.

The string similarity dispute process was also flawed – they were provided no objective and measureable criteria to base their decisions on – the process was flawed and nothing was clear nor pre-published and it failed miserably. Inconsistent results and requesting only certain outcomes be evaluated instead of the entire process lends to discrimination and is simply not fair.

Finally the CPE Process should have never existed. It was clearly stated and committed to the public and applicants through the GNSO Final Report that Community Applicants would be “taken on trust.” Even with this ICANN demanded smaller funded community applicants would have to pay a substantial fee to go through a Community Panel Evaluation to try to pass criteria that in no way were objective and measureable.

The BCG states in multiple Motions for Reconsideration that “It is expected that different panels will come to different conclusions with respect to different applicants.” This simply is NOT acceptable – if the proper procedures were lined out, properly documented and above all properly understood, then the outcomes would be consistent between all experts on any given panel, nothing was to be left to chance. This flawed thinking is what adds to the confusion and frustration of the entire process. We see this same error in logic with the Similar String Objection process.

While it is not our place to instill rogue logic we do feel it pertinent to point out that no objective criteria should be left to speculation or opinion and most dangerously ignorance – it simply contradicts the term OBJECTIVE and leads to apparent and blatant biases as displayed in the myriad of inconsistent decisions that have been made by the CPE.

As outlined in the GNSO recommendation #9 - ***There must be a clear and pre-published process using objective and measurable criteria. M3 & CV6-9***

If such a clear process that involved objective and measureable criteria existed, then we would expect all panels with any member to come up with similar if not exact results.

In the next section of this request I will detail my issues with our CPE results which the BCG may feel is substantive but what is important here is the lack of objective and easily measureable criteria, inconsistent decisions, some based on untrue statements, and not having a challenge process to refute the findings.

6. Dispute resolution and challenge processes must be established prior to the start of the process. CV7-9.

Just because there is no appeal process for the CPE evaluation doesn't mean that there should not be one.

There is no clear dispute resolution process with the gTLD committee not following the AGB by giving the Linguistic panel incorrect instructions

There is no clear dispute resolution process for inconsistent results from the name similarity dispute panel

There is no dispute resolution process for the CPE panel.

All of these require dispute resolution and challenge processes to be developed and implemented. They also must contain objective and measurable reviews completed by industry experts that fully understand the issues being decided upon.

- 7. An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.**

*Commercial Connect, LLC has not received any community objection from a substantial portion of the eCommerce community for neither of our two .shop applications and thus should not be mentioned or considered in any CPE process nor should be a rationale to reduce scoring in the CPE process.

- 8. If there is contention for strings, applicants may[29]:**
- a. **i) resolve contention between them within a pre-established timeframe**
 - b. **ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;**
 - c. **iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.**

Commercial Connect, LLC. should be awarded community priority in our applications based on trust as provided for in the GNSO Final Report.

- 9. Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:**
- a. **(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and**
 - b. **(ii) a formal objection process is initiated.**

A distinction must be made between defining the term "Community" and determining whether or not an applicant belongs to and/or represents that community.

When discussing the term community it is important to understand the definition of what the definition of a community is. Simply put, ***a community is an identifiable group sharing common characteristics or interests and perceives itself as distinct in some respect from larger society within which it exists.***

Any group can be considered a community if it is identifiable, countable and the members of that community consider themselves part of said community. For the most part, membership this is self-acknowledgement.

As a whole the community applicants did an excellent job of defining their community. Once this is accomplished, the rest is to be taken on trust with a few restrictions as per the Final Report.

7. Describe how others may be adversely affected by the inaction

If left unchecked, similar TLD's will result in much lower registrations which will subject the new registry operators to sustainability issues which could allow the larger registry to absorb the smaller ones and become even larger thus defeating the initial intent of diversity and fairness.

It will cause the internet end users more confused and as to which gTLDs are community and represented gTLDs and which gTLD may be used to mimic and/or act like verified and secure gTLDs.

At least 84% of the community applicants have failed the CPE process and there is no way to find out what information was being considered and who made the determination. The applicants have no way to supplement, correct or provide additional information to the CPE panel to ensure accuracy and fairness and there is no appeal procedure as promised and guaranteed by Core Values 7 through 9.

8. Detail of Board Inaction

The BCG has seen numerous motions for reconsideration and have responded with various decision that did not consider the primary guidelines of the GNSO. In addition the Board has received countless letters asking for action to be taken to correct the similar string issue and no action has been taken. Finally the board is aware that the GNSO has committed to providing fair, transparent and non-discriminatory action, community priority, community applicant determination, String Similarity will not exist in the root, pre-published processes using objective and measureable criteria, dispute resolution and challenge processes.

When the GNSO, the group that ICANN has charged to research, define and set up policies and procedures for new gTLDs has to write letter to ICANN Board asking them to honor what was created and the Board refuses not only to react but also opted to not even respond to the issues, then the Board, who may not be aware of the far reaching impacts of the inaction, needs to become education, informed from non-biased parties and act quickly and with severity they deserve instead of ignoring the issues until another board or leader is in place or hope that they fade into obscurity.

CPE Issues with the .SHOP Application

While we feel that we should not have to be held to CPE panel decisions based on prior statements by ICANN in their GNSO Final Report on new gTLDs item 9, if ICANN allows the CPE panel to remain then ICANN must change the CPE Evaluation mechanisms to be based on easily clear cut objective and measureable criteria. Since these clear cut objective and measureable criteria are not in place prior to the application process, ICANN will have clearly failed on this process but can take steps to rectify this issue but the first step is admitting there is an issue.

Again, I wish to point out that no policies, procedure, mission, nor core values were changed for the Applicant Guidebook. Nothing replaced the GNSO Final Report – this the wording Final. This is the report that the AGB is based upon and what is contained in this report is binding and what was published to the world as what the new TLD process would base its principals and procedure upon. If procedures were to change than this report would have to have been modified but the GNSO did not change this report, they did not update it nor make it obsolete. In fact they wrote letters to ICANN’s Board begging them to remember the conditions of this report since the GNSO was charged by ICANN to create the policies and procedures for the new gTLD program. Some of these letters urged ICANN to rectifying the name similarity issue.

Actions of the gTLD committee since that time also have not altered, changed or modified these guidelines. The new gTLD committee also has not replaced the GNSO nor should it be allowed to circumvent their highly researched and committed procedures.

As per ICANN policies it was stated that Community applicants would be “taken on trust” unless there was objections from a substantial portion of that community and that those substantial members had to be verified as to weed out for false objections – this the objection has to be identified and it has to be determined as to their standing and credibility in the community first and then the reason for objection to be considered second. Since no such formal objections existed for .shop, .music nor .gay then none of the corresponding CPE’s should have included statements indicating that objections existed.

Additionally and simply put, **there is no need for our CPE based on item 9 in the GNSO Final Report.**

If it is found that a CPE is required, then a formal dispute and challenge process is required and needs to be established.

If the CPE panel is given consideration, it must be pointed out that many of the procedures, hiring and scoring mechanisms have developed after the pre-published application process began thus conflicting with Final Report Item #9, M3 & CV6-9 including the decision to keep the CPE panel and communication anonymous.

If the CPE panel is given consideration then we must object that clear cut objective and measureable criteria was not used. This is clearly evidenced by the BCG stating that they expected varying results simply because there were different panelists. This would not be expected and should not occur if objective and measureable criteria was established.

The CPE questions are not objective nor measureable – more importantly most communities that exist today including ICANN’s community would not be able to prevail. This statement is supported by the

CPE Failures on strings such as .SHOP, .GAY and .MUSIC. In fact, ICANN's Community that has been active since the mid 90's would not get close to obtaining a passing score no matter what string ICANN should choose. Presently out of 24 CPE applicants – one did not elect to go through the process, three are still in process and one is pending which leaves 19 left of those 19 applicants only .ECO, .HOTEL and .OSAKA prevailed. 16 out of 19 failed the CPE – **How can the promise of trust to community applicants result in denying 84% of all applicants that applied?**

Finally if the CPE panel is given consideration then there must be a dispute resolution and challenge process which there is none as per GNSO Final Report Item 12, CV7-9.

Specific allegations of inappropriate conclusions

In our CPE Evaluation we scored a 5 out of 16 – however if you compare our responses to those of the .ECO CPE the exact same rational that was used for given points to .ECO was used for not giving points to .SHOP, .GAY and .MUSIC. Inconsistency is abound which explains the number of Motion for Reconsiderations received by the BCG on CPE evaluations.

The four basic criteria for the Community Priority Evaluation are as follows:

- **Community Establishment we scored 0 out of 5**
- **Nexus between the string and Community we scored 0 out of 4**
- **Registration Policies we scored 3 out of 4, and**
- **Community Endorsement we scored 2 out of 4**

Community Establishment

In short is there an established community that utilizes PCI for sale of good over the internet? We scored a zero even though we spent over a decade helping define, unite and providing education and assistance to such a community.

The CPE stated that it did not demonstrate sufficient delineation even though we provided a detailed way to actually count the number of eCommerce sites that are set up for PCI compliance and credit card acceptance which allows for a clear and certain count of the community who we claim to have represented. If we can count them, identify them and they support and agree with us in our endeavor then this community is certainly clear and a straight-forward. Second, these members all utilize and are aware of PCI compliance – they actually have to provide proof of such compliance so there is no question that the community member are aware of this fact and thus a cohesion of continuing to meet these obligations along with is a most certain awareness that they are members. The CPE actually states that based upon their research various entities in the proposed community do not show an awareness of being PCI compliant – If they asked someone whether or not they were PCI compliant and they responded that they did not know, then they certainly are not PCI compliant and not a member of our community. We hope you see the absurdity of these remarks as this is akin to asking someone if they have a drivers' license – if they don't know then almost certainly they are not a part of the driver's licensed community.

The CPE stated that we were not organized even though we provided physical proof including video, pictures, and proof of over 1000 supporters where we actually conducted in-person, face to face meetings with members of this community whereby we explained our concept for .shop – we made appearances at multiple internet conventions, developed support web sites, have formal boards are very organized. The only way a CPE panelist would state otherwise was if they were completely unaware

of our efforts and accomplishments which apparently is the case and they made no effort to become educated. In addition the CPE states that there is no entity that is mainly dedicated to the community – well in fact both Commercial Connect, LLC and eCommerce World Retailers, Inc. are both dedicated to the community and the existence of both can easily be proved for a substantial period exceeding all ICANN’s requirements for pre-existence and both have been instrumental world-wide in supporting eCommerce.

The CPE Panel claimed that we had no prior existence but we all know that we were an original applicant since 2000 and partially due to us not having an adequate community sponsor for the 2004 round we have worked with all know eCommerce trade Unions, etc. to help ensure that this community is well defined and understood. We have accomplished this over the past 11+ years and just because a certain panelist which we are not allowed the name us is unaware of our efforts is by no means indication that we have not existed for the past 15 years. We can easily provide tax returns to dispute this obvious misconception as well as a world published application for .SHOP in 2000.

The CPE panel concluded that the size of our community which has over \$866 in revenues and represents over 80% of the world’s economy was not considerable in size. The also felt that these entities had no knowledge that they were PCI Complaint Internet eCommerce operators. The CPE panel also determined that eCommerce and PCI community has not existed since 2007 and that they are not aware of others in eCommerce which were PCI complaint.

Nexus

Trying to argue the fact that the word SHOP is connected to people buying items seems absurd but the .SHOP CPE says that there is no relation whatsoever. While the BCG may argue that this is a substantive issue, it is far more than this. What this does is prove how non-objective this question is. Everyone should agree whether or not shop a verb that means “to visit shops and stores for purchasing or examining goods” but we scored a zero on nexus.

This scoring does nothing to explain the amount of research spent on determining the best string for eCommerce. We spent years examining difference in languages, meanings utilizing various internet, language and eCommerce industry experts to determine the best string for the internet and there was a resounding conclusion that SHOP is the best universal word that had direct connotation to the actual act of eCommerce. Words such as store, buy, sell, sale, service simply did not translate well or have same meanings in multiple languages. Much research was perform by experts and it was determined that SHOP was word with the best NEXUS for eCommerce.

The use of word .SHOP to represent a community of shoppers who will be operating online “Shops” should be an acceptable use and correlation. We are simply astonished as the CPE giving us a 0 out of 4 for nexus relation between the TLD string .SHOP and the online Shopping community. This statement may surpass our String Similarity Dispute decision that found that .SHOP in Chinese did NOT have the same meaning as .SHOP in English. Was the CPE panelist and the ICDR Mediator the same person?

The CPE Panel stated that .SHOP does not match the name of the shoppers online nor is it a well-known term for Shoppers who have shops on the internet. If Shop is not a shorter form of Shoppers and the same as the action people perform as well as the actual site offered to provide goods and services, then a lot of significant supporters are in the same situation and that is just simply astounded by this finding.

The CPE panel did not ask for clarifying questions on items that received less than perfect even though ICANN committed to assist in resolving defects in our applications. The clarifying questions that I was asked for ignored my response and made no attempt to explain as to why.

Registration Policies

The CPE panel goes on to state that the name selection rules are not consistent with the articulated community – In other words they feel that the People offering SHOPS on the Internet are not consistent with strings meaning of SHOP.

A pertinent example is when the CPE panel concluded that the eCommerce (PCI) community simply did not exist. Then in another section they indicated that they had received an objection from a considerable portion of my community (which does not exist?). How can there be a member of a non-existent community? In addition, there was no substantial objection as defined by ICANN and the Final Report. How can the CPE state such an untruth and based their scoring on it? See Part IG P of the Final Report.

Relevant objection was not filed as required but CPE went against established guidelines by considering such a non-qualifying objection.

Community Endorsement

The CPE gives a 2 out of 4 for community endorsement. We provided third party verifiable proof of over 1000 separate in-person and face-to-face obtained support which is considerably more than any other applicant for a new gTLD. Not only is the count of supporters more than any other applicant but the representation of over 80% of the gross financial influence was also obtained. If this is not proof of community endorsement, please provide an application that passed the CPE and had better statistics.

CPE ignored our community support whereby a neutral third party documented and provided the documentation of over 1,000 supporters all representing their companies – no verifications were performed and our review ignores them all.

In the CPE it show that there were 7 comments, 17 attachments, 6 pieces of correspondence were all that was received and verified even they asked a clarifying question and evidence of the 1,000+ supporters which we did provide and they decided not to count these essential community members and supporters which we assume is out of sheer laziness and refusal to confirm the vast number.

The CPE mentioned one opposition and reduced our score by 1 for this letter. No qualified and formal entity that represented a substantial portion of our community filed any formal objections therefore no objection should be consider as per the Final Report and thus the one point deducted is completely inappropriate. We have not been provided any such objection and are not aware of any objections since we filed our first application in 2000 – There has been plenty of time for objections to be presented and they simply do not exist.

A proper CPE panel must:

Understand the criteria which have to be objective and measurable and not open to interpretation, speculation or opinion.

Must have knowledge of the domain name industry and its evolution of community throughout the gTLD process as well as thoroughly understand the GNSO's Final Report and rationale for its Policies, Procedures and Guidelines

Understand ICANN's and the GNSO's stipulations on what a community is and how objection to that community will be handled

Ask for clarification and assist in success of the application as per GNSO and ICANN's policies and procedures

Procedural things the CPE did wrong

- Wrote letters of verification with expired dates of when to reply.
- Ignored over 1,000 community supporters and members even though we provided independent proof of their support.
- Stated in their denial that a substantial community objection had been received when no such objection was ever file or existed.
- Made several false statements in regard to who our community was, who belonged to our community and interviewed people not included in our community thinking that they were community members which clearly shows their lack of understanding and comprehension of the definition of our community.

9. What we are asking ICANN to do

- a. Award the .shop application to CC based on their original application which is still active and should have precedence on any other newer application and is immune to the newest gTLD processes.
- b. Award the .shop application to CC based on the 2000 and 2008 application – understanding that it has claimed community standing and should have been trusted as a community applicant that has a clearly delineated community that does exist.
- c. Review and fix the issue with name similarity especially with any and all similar and confusing eCommerce strings which include
- d. The board should place into a procedure to review the substantive findings of the CPE.
- e. The board should have a challenge and/or review process for the CPE findings.
- f. The board should set in place a formal objection and/or appeal mechanism for the CPE determinations.
- g. The board should direct how a community applicant can proceed to delegation without passing CPE as stated in the AGB.

10. Please state the grounds under which you have the standing and right to assert this Request.

We are an applicant for a gTLD both in 2000 and under ICANN's new gTLD program. We have applied on the basis that .SHOP is a "community" application as defined in the program.

11. Are you bringing this Request on behalf of multiple persons or entities?

NO

Appendix

- A. Summary of CPE Letter to ICANN and Panel 20150325
- B. CPE Response Pics of Community Involvement
- C. CPE Letter to ICANN and Panel – Addl Letters of Support
- D. CPE Letter to ICANN and Panel 20150313
- E. Supporters Provided to CPE Panel 20150325 redacted

Appendix A



Commercial Connect, LLC.

Contact Information Redacted

<http://www.dotShop.com>

March 25, 2015

New GLTD Panel and Economist Intelligence Unit
c/o ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Summary for Clarifying Question on .shop Application 1-1830-1672

Dear ICANN & Economist Intelligence Union Reviewers:

Paragraph 1

We do have documented support from the community itself – evidenced by the data download file containing 1087 contacts that actively support our application and representation of eCommerce – These were obtained at Internet Retailer Convention and Expositions whereby attendees representing their companies attended, listened to our plans for the new .shop TLD and they allowed us to scan their ID Cards acknowledging that they did in fact understand what we are proposing, that we do represent eCommerce industry and that they supported our plans.

In addition, eCommerce Word Retailers, established in 2004 also has submitted a letter (Recognized membership and recognized by government entities to represent eCommerce)

And Commercial Connect's supports itself as a representative of eCommerce (both recognized by the supporters provided and by governmental entities)

Both last groups have relevance as membership in ECWR has members that represents over 85% of ecommerce transactions and Commercial Connect has received scans which signified support from at 80% of these members.

Please feel free to view my profile at LinkedIn for various connections – it is www.linkedin.com/in/jeffysmith/en as quite a bit of information is also contained on our website at <http://www.dotshop.com>.

Paragraph 2 - For clarification:

If you are requesting current details for Macy's it is

Terry Lungren, CEO / Jeri Ciule, Assistant

Contact Information Redacted

Old Contact was

Ronald W Tysoe, ex-Vice Chairman of Federated Department Stores

c/o Hauser Private Equity

Contact Information Redacted

Again, we have requested a new letter of support from Mr. Lungren but have yet to receive it and so we are providing contact information as requested.

Paragraph 3

The letter of support received in 2000 are published and help to prove our longevity and commitment to eCommerce. At least one of these supporters have passed (G. William Miller) and other have long since retired and are now out of public view (including Ronald Tysoe) Asking for renewed letters from these individuals seems unfair since ICANN (not the CPE Panel) has had these names now for over 15 years for verification. We feel that the age of these letter should in no way diminish their influence as none have revoked their letters nor have asked them to be removed from our support page on our web.

Per your request, we have researched and contacted all providers of letters of support for all 2000 letters with the exception of G. William Miller who passed away and are providing you with their updated information below:

Richard Lugar, ex-US Senator 1977-2013

c/o The Lugar Center

Contact Information Redacted

Fredrick W. Petri, President Housing Capital Company – Now merged with US Bank (has retired and is reported very ill)

Contact Information Redacted

<http://www.bloomberg.com/research/stocks/private/person.asp?personId=657198&privcapId=4325722&previousCapId=102270665&previousTitle=MH%20Holdings,%20Inc.>

Greater Louisville, Inc – The Metro Chamber of Commerce
Original Letter was from
Steven Higdon, former President and CEO of Greater Louisville, Inc. - now with
Private Client Services, LLC
Contact Information Redacted

Now it is
Kent W. Olyer, President & CEO Greater Louisville, Inc.
Contact Information Redacted

Assistant Debra Eberle

Ronald W Tysoe, former Vice Chairman of Federated Department Stores – now
Hauser Private Equity
Contact Information Redacted

<http://www.bloomberg.com/research/stocks/private/person.asp?personId=318095&privcapId=36032904&previousCapId=295624&previousTitle=J.C.%20PENNEY%20CO%20INC>

New Contact for Federated Department Stores which is now Macy's Inc.
Terry Lungren, CEO / Jeri Ciule, Assistant
Contact Information Redacted

Peter E. Baccile, former managing Director Chase Securities, now with UBS AG -
UBS Securities
Contact Information Redacted

<http://www.bloomberg.com/research/stocks/people/person.asp?personId=2081628&ticker=JPM&previousCapId=280420&previousTitle=ENBRIDGE%2520INC> and
<https://www.reit.com/news/videos/banker-sees-ipo-demand-reits-large-portfolios>

Martin J. Cicco, Former Managing Director Merrill Lynch now with Evercore
Partners, Inc.

Assistant is Margie Ash Contact Information Redacted

<http://www.bloomberg.com/research/stocks/people/person.asp?personId=2102921&ticker=EVR&previousCapId=5410768&previousTitle=Real%20Estate%20Roundtable%2C%20The>

We have had 3 Louisville Mayors since 2000 they and each had written a support letter

David Armstrong, Former Mayor City of Louisville
Contact Information Redacted

http://en.wikipedia.org/wiki/David_L._Armstrong

Jerry E. Abramson, Former Mayor City of Louisville & Lieutenant Governor for the State of Kentucky – Now Director of Intergovernmental Affairs under President Obama
Contact Information Redacted

http://en.wikipedia.org/wiki/Jerry_Abramson

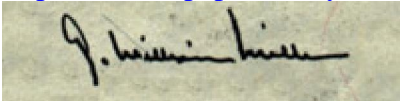
Greg Fischer, Mayor City of Louisville
Contact Information Redacted

http://en.wikipedia.org/wiki/Greg_Fischer

G. William Miller, former Secretary of US Treasury and Chairman of the Federal Reserve

As mentioned previously, G. William Miller passed away on March, 17, 2006
His signature appears on the US Currency and the Dollar Bill 1979-1981 – see

<http://www.uspapermoney.info/sign/>



http://en.wikipedia.org/wiki/G._William_Miller

Hoke Slaughter, Managing Director Morgan Stanley Dean Witter
1585 Broadway

Assistant – Amy

<http://financial-advisors.credio.com/1/258266/J-Slaughter>

Birch Bayh, former US Senator & Partner Oppenheimer Wolf & Donnelly, LLP now a partner with Venable, LLP

Contact Information Redacted

<http://www.birchbayh.com/index.html>

If you need additional information or if we forgot anything, please do not hesitate to contact us and thank you for your consideration

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Smith". The signature is stylized with a large initial "J" and a long horizontal stroke extending to the right.

Jeffrey Smith

JSS:dwr

Appendix B



Commercial Connect, LLC.

Contact Information Redacted

<http://www.dotShop.com>

March 25, 2015

**New GLTD Panel and Economist Intelligence Unit
c/o ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536**

Re: Photos of Community Involvement

Dear ICANN & Economist Intelligence Union Reviewers:

Below please find some pictures of how we interact with the eCommerce Community at the IREC (Internet Retailers Conference and Exhibition) show.









Appendix C



Commercial Connect, LLC.

Contact Information Redacted

<http://www.dotShop.com>

March 13, 2015

**New GLTD Panel and Economist Intelligence Unit
c/o ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536**

Re: Additional Letters of Support and Listing of Supporters

Dear ICANN & Economist Intelligence Union Reviewers:

Attached please find our comments to the CPE Application 1-1830-1672 for .shop.

We will also submit via email to newgtlds@icann.org.

Please confirm receipt and transmit to the CPE provider for consideration.

Thank you for your time, attention and consideration on our Community Review.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Smith". The signature is stylized with a large, sweeping initial "J" and a long horizontal line extending to the right.

Jeffrey Smith

JSS:dwr

Appendix D



Commercial Connect, LLC.

Contact Information Redacted

(502) 636-3091 – (502) 634-1484

<http://www.dotShop.com>

March 13, 2015

**New GLTD Panel and Economist Intelligence Unit
c/o ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536**

Re: Reaffirmation and Response to Clarifying Question on Community Support.

Dear Economist Intelligence Union Reviewers:

Thank you for the opportunity to clarify and respond to your questions about our community application.

We have actually had in-person meetings with over 1,000 individuals who were representing their companies over the past 15 years to discuss our representation of eCommerce and plans for operating a new eCommerce centric gTLD. While we were not 100% successful in getting a physical affirmation of support from each and every individual, we did get a physical acknowledgement and support from over 99% and received no objections from anyone nor any company ever.

In this response and with attachments we are prepared to provide this panel with the names, email addresses, titles and companies whereby we received the aforementioned support. Also we are attaching a file which is one physical item provided by the supporters which actively gave their support and actual proof of their engaged consent is contained herein. This is not to be considered a general consent but an active consent since each person had to physically present and actively allow and consent to support us and to provide information as proof thereof.

In addition we have spent multitudes of time working with governmental agencies, entities as well as technology groups educating them about our plans and efforts to help aid in the betterment of eCommerce over the internet.

Our application and what we plan for do for eCommerce is clearly a significant step above what exists now and what has been promised by other non-community applications.

To directly address your concern about older support letters, we think it is important to show how long we have been seeking support and gathering intelligence on how to protect consumers and by having support letters up to 15 years old is an incredible accomplishment especially when no one has withdrawn their support during that time. These older letters have been published on our website for years and if the authors of these letters had withdrawn support, they would have requested that we remove these letter but no such requests have been received.

We have requested an updated letter from support from Terry Lungren, CEO of Macy's Inc formerly Federated Department Stores to enhance Ronald Tysoe's previous letter and await his response. We will attach our request hereto.

As for the Louisville Metro Chamber of Commerce, we have had a number of directors and have received letters from each one. These also are attached. We also have been informed that they have already sent the renewed replacement vis US Postal mail to your organization.

Since it has been a while since we updated our take on the Community Evaluation Process, we also wanted to take the opportunity to provide more detailed information on the responses to the different areas of the evaluation with some emphasis on comments posted by other applicants and entities.

We also reviewed other applications that completed the CPE and tried to align the Panel's views with our application. Where the panel made statements in the affirmative and it pertained to our application, we tried to point that out in the statements below.

1-A Delineation

Delineation:

Clearly Delineated

A community is defined as "a group of people living in the same place or having a particular characteristic in common."

How is one to define a community of eCommerce whereby it was clearly delineated and did not overlap?

In order to define a community for eCommerce you must first identify what characteristics this group has in common in one another. In our case it is the process of selling a product and/or service.

One key element in commerce and eCommerce is that payment is exchanged for a product and/or service. This payment is what we determined could easily and irrefutably delineate our community. Since payment has to be received in one form or another, the majority of online eCommerce transactions required payment by credit card (about 97% in quantity, the rest were terms, wires, etc.). Since there are strict guidelines on how a

website can collect credit card payments, we have an easy way to actually count the number of merchants online that process credit cards thus identifying and counting our community.

In the issue of delineation, the Economist Intelligence Unit, (EIU) set a precedence for what constitutes a passing score of 4pts. The EIU states that .ECO's application should receive a 4/4 based on **“Membership is determined through formal membership, certification, accreditation and/or a clearly defined mission, a transparent and verifiable membership structure”**.

The EIU followed this precedence was continued with the .MLS string. The EIU found the .MLS string to be clearly delineated by stating the following: **“All members of CREA must adhere to the standards set out in its Bylaws, Rules, and Regulations...”**

We invite the EIU to follow in its own precedence in its evaluation of the .SHOP application. The precedence that has been stated by the EIU is that organizations that are structured around a set of discrete guidelines are clearly delineated. Commercial Connect LLC. welcomes this conclusion. Commercial Connect LLC.'s is identical to these two applications for .Shop. Like .Eco and .Mls, Commercial Connect LLC.'s application for .Shop is clearly delineated from typical internet users by the precedence of online credit card transactions. This means that members must adhere to the PCI DSS guidelines.

We can clearly count our community. It excludes no one and it at its heart is intrinsically and completely the definition of shop and eCommerce. We know who our members are and we can easily identify the stakeholders. While it was our intent on being a transparent and community based applicant from 2004 forward, our business plan and application that has evolved over the past 15 years has ensured that we do qualify as the true community applicant that we are today.

Please keep in mind that during all of the constant changes at ICANN and meetings of the various organizations and groups that worked so diligently on community definition and how we should work with our community, it was not by accident that we filed as a community applicant. This was our charter, when new suggestions and scoring was introduced, we did not object as our application, at face value met all the scoring definitions without manipulations or modifications to be what it is today, a true and fundamental community application.

Exclusive to Shops processing credit cards but open to all

For clarity and to weed out possible duplicate numbers, we only included merchants in this community that accepted credit cards as potential .shop applicants. This was done for three reasons. The first was to give us a clear count and requirements on what you had to do to become a .shop TLD owner. **This makes a clearly delineated community but at the same time do not exclude anyone. If you want a .shop TLD all you have to do is become PCI Compliant and choose a credit card processor. This way no Shop is excluded and all members of the eCommerce community, in all definitions, can obtain a .shop TLD.** Because of this we are delineated (we can actually activate web robots to count the number of merchants online that accept credit cards and come up

with a delineated count – study similar to <http://www.netcraft.com/internet-data-mining/ssl-survey>) and a closed community but open to any and all wishing to join us.

If you wish to have a .shop you merely have to qualify for credit card processing, you can still choose to have another processor like Paypal do your processing but you have to meet our guidelines in order for us to be able to verify you and be counted. In addition, there are also a few concessions whereby companies with trademarks, etc. can obtain a .shop TLD as documented and required by ICANN.

Membership in this community becomes automatic by participating in it. Companies that accept credit card processing via the internet are very much aware that they participate in eCommerce. As for a representative body such as eCommerce World Retailers, it does has members and they sign up through its website. At present eCWR has over 4,000 active members.

Organization

Pre-existence and Recognition

History

With over 15 years of working with the internet and eCommerce to gather support for our mission and hope of developing a safe, secure and commerce driven namespace, we feel we have met, if not exceeded each and every aspect of a community string.

When we were told that our .shop application would be placed on hold in 2000 and that we needed to wait for the next round we immediately began to analyze, diagnose, plan, and build a structure that would not only represent the eCommerce community but enhance it and assist its growth and stability.

When the next TLD applications opened in 2004 we were surprised to find that our application was forgotten along with the promises of allowing us to be considered in that round because there was no formal body that represented eCommerce at that time to “sponsor” our application. Again we were told that we would have to wait until the next round of TLD openings which was expected in 2006.

At this point, mid 2004, we decided it was important to clearly define eCommerce, what it was and how it impacts businesses and consumers worldwide. We began searching for entities that could be neutral while not discounting biased parties to build a community that was clearly defined, represented and supportive.

It was very evident in 2002-2004 that eCommerce existed, in fact the number of eCommerce site were growing exponentially. So our task was to help organize and define this every-changing community into something real and relevant.

What made this task even more difficult was the fact that ICANN was active in changing the rules of what a community was and how it was defined on at least four (4) different occasions and in the Applicant Guidebook it was manipulated by and for certain special interest groups to make the community standard an elusive, if not impossible definition to meet.

One thing we feel that is imperative to point out is that opponents of our community string now only exist due to their own biased interest in this string. Letters received from these organizations urge everyone that they must “Adhere strictly to the Applicant Guidebook” which is where a certain few of these opponents went against GNSO documentation and advice and inserted their own wording to better their chances and ensure true applicant failures. So we take issue with that statement. **The Applicant Guidebook was created as a reference to already existing ICANN policies and procedures and to help better illuminate the path to gaining a new TLD** – it is NOT the reference material but merely and text that was supposed to contain policies and procedures that were developed and agreed to that included existing ICANN Policies and Procedures. It is not the reference here, it is merely a “Guidebook” for the true and significant issue we must review ICANN’s mission, bylaws, policies and procedures and look at the countless hours spent by the groups, in this case the GNSO, and take their advice and follow what was truly decided, not what biased partied para-phrased in a Guidebook. With that said we are not aware of any wording that would be in direct conflict with our community application. While we appreciate the lengths and efforts of the Economist Intelligence Unit we still maintain that our community is present, well defined and delineated and supportive of our goals and mission and our application is in the best interests of all involved whether they are members of the web site owners, registry operators, registrars or the end users.

In addition to site owners, operators, customers and affiliated companies, we have also worked the past years in contacting and educating ICANN, governmental bodies worldwide along with technology groups and councils on eCommerce and our plans for the new .shop gTLD.

1-B Extension

Definitions of Community

In the beginning we were told by ICANN and it was documented that if you designate yourself as a community, then you were indeed a community. The only issue would come up if a substantial number of other community members objected. We have had no substantial objection to any member of the eCommerce community at any time.

We were involved in the formation and on the board of eCommerce World Retailers, a non-profit group founded in 2004 that helps to educate and assist anyone interested in building and supporting eCommerce web sites, classes, webinars and the like. The eCommerce community has existed since the 1970’s but organization and structure was not apparent until the late 1990’s.

As stated by the International Chamber of Commerce in regards to .shop community they stated **“The Community for <.shop> is difficult to define. It would include not only shop owners, retailers, manufacturers, suppliers of goods and services, nut also consumers, chambers of commerce, governmental entities which supervise and which may tax such goods and services, etc. Such an alalgam of interests could not serve as a delineated community.”**

It has been stated in multiple Community Priority Examination Reports that “many affiliate business and sectors would have only a tangential relationship with the core communities and therefore would not associate with being a part of the community.” Therefore for the purpose of a Community Review’s definition of community, we have to exclude entities that are not directly involved in the transactions and make special concern to not include a member more than once unless they are acting as a separate transaction and/or in a different capacity.

The community does not have to include all stakeholders of eCommerce, it just has to be a certain subset that all interact with. Just like .eco, if we required all stakeholders to be included in .eco then the whole world would have to have been represented, just like with most community TLD’s.

While defining our community may be difficult it was not an impossible task. It took us years to pinpoint what the community needed to focus on for the .shop registry and to be considered in the eCommerce community. The community clearly included the web site owners or the ones operating a website that sold goods and/or services. We then had to ask “what each of these websites had in common?” The answer was a monetary transaction would exist especially in eCommerce since barter and alternatives were virtually impossible to complete electronically.

We then focused on how the monetary transactions would be conducted. What methods were available to process a payment or send funds from one individual/entity to another? The answer included bank drafts, wires, accounts receivable, and payment processors. So to stay true to the .shop nexus drafts, wires and A/R was removed as they are a true method of eventual payment they were not truly conducive to eCommerce and buying from a shop. This left the only electronic method of payment to be that of payment processors. Finally it was decided to eliminate duplicates and individuals with singular transactions that may be considered personal transactions from this community then we must also eliminate companies that were personal payment processors. So anyone using a service such as Paypal, while vital to our community is not considered a business and/or an eCommerce shop owner so they would be represented by the business that was in this example, Paypal.

Again, members of the eCommerce community are the merchants providing (the customers would not consider themselves part of this community) the goods and/or services and for eCommerce to be performed electronically payment must be made electronically and this is accomplished via card payment processors. Also by considering only business merchants, it solves issues associated with world personal privacy issues since we are to publish all owner information.

While this group was organizing, Commercial Connect LLC developed a process of refining its business plan for the new .shop TLD whereby it would provide an asset to all involved. This business plan ensured that there was special in-person screening each owner of a .shop TLD to verify their identity and business associations. It was determined that this information of who owned the .shop site and their complete address and/or company would be displayed in the WHOIS and available on the website so that everyone would know who they were doing business with. This along with providing an extended SSL certificate with the site would ensure security and full disclosure. While this may only deter bad business practices, it would not prevent all malicious business practices. It would, however, provide the injured party full details on who caused the

injury complete with sufficient information including company name and legal and real mailing address. Therefore the injured party could easily take legal action against the owner.

Commitment to Community and Education

Another longstanding mission of Commercial Connect was to establish significant ties to eCommerce merchants worldwide. Our employees and associates have traveled the world since 2000 to educate merchants on how Commercial Connect plans to operate the much sought after .shop TLD Registry.

As part of the communication plan, we have been dedicated to speaking with significant parties face-to-face. While this is practically unheard of in a planning campaign, we felt it was essential to educate and answer any questions in person so we could obtain feedback and make adequate modifications if necessary to make our registry a win-win proposition to all involved.

There have been some letters written to indicate that they large number of supporters that we educated are most likely insignificant associates of the companies we claim to have support from. Because of this we are including a full list of the people, the company they represented along with their title to this committee at the end of this document. While this will not be an exhausted list it should clearly show that practically 98% of all eCommerce funds are represented in this list.

So simply stated, Donuts, Inc. is wrong. It is now very likely that eCommerce Operators have awareness and recognition of this community as we have sat down with most of them, in person, and received their overwhelming support for the past decade.

Also built into our application is a charitable component that no other application on any gTLD has. In an effort to give back to the community at least \$1 USD of every TLD registered will be given as charity to a world cause, at the same token we are requesting from ICANN to match such donations for similar charities.

Longevity

For the past 11 years (2004 through 2015) we have been continually working to support and clearly define the eCommerce and .shop community and have gained thousands of supporters to champion our cause. With this said, it is also important to state that the community was not invented for a TLD Registry to exist. The eCommerce community has existed since electronic processing was invented, while we may have assisted in getting it organized and identified, it was in no way created so that we could have a .shop TLD registry, the two are symbiotic or mutually beneficial to one another. **.Eco** is a good example of a community that helped in the structure of its community. It is difficult to describe the activities and cohesion that the eCommerce community has developed over the past 11 years but we are able to provide activities, events, seminars, webinars, and statistics to show its growth and organization over the past decade if so requested. This does not mean that there is no cohesion as this community is bound by PCI Compliance and regulations required for credit card or monetary processing over the internet. With this they share a bond that directly impacts their revenues and bottom line.

Open to Community

Another significant mission of Commercial Connect was to remain open and receptive to all parties in and supporting the eCommerce Community. Not only did we approach potential .shop web owners, we addressed customers using the sites and vendors that would benefit from the registry. While we strived to make a corporation that was free from influence from major eCommerce players and refused financial support from what could be considered biased parties, we have at the same time approached the members of our current contention set to invite them to participate in the operations and minority ownership as a group. While this would not work unless all parties involved agreed to join together or at least the majority join together and buy out the disinterested parties, to date we have not been able to come up with an agreed solution. We remain open to collaboration from all interested parties.

Transparency

We are a transparent organization and expect to remain that way. We want the community as a whole to be represented and are continuing to work to get as much input and cooperation from a very diverse and competitive community. We are working to build avenues to accept input into the workings and details of the .shop registry to better assist in providing a fair, safe, secure and structurally stable eCommerce solution for the internet.

At Least one entity mainly dedicated to the community.

Ecommerce World Retailers, Inc. is a not for profit 501©6 organization focused on organizing, educating and assisting the development of the eCommerce community worldwide. It has been recognized and has made presentation to multiple US senators, heads and their assistants of various countries, heads and appointed spokespeople of hundreds of eCommerce companies both small and large. It has had its presence on the internet since 2004, has had a Facebook, Twitter and linked in pages and continues to support eCommerce bulletin boards across the globe.

As members of eCommerce World Retailers (ECWR) we discovered a few organizations that existed that helped organize and define the eCommerce community. We approached these membership groups and asked them to join us. We received no replies from one entity and after six (6) attempts, 4 emails, one linked-in and one phone call we decided that the other entity was not active. The other entity was eCommerce Merchants Trade Association (<http://www.ecmta.org>) that appeared to have membership and some activity in 2009 and nothing more. We contacted the owner of the site and asked him to consider joining us. He indicated that his site was not active any longer so we then asked about purchasing his member list and/or site so we could include them in our newsletters, etc. He declined on both offers then much later apparently sold his site to Donuts, Inc. and/or its owners. We also noticed that another Japanese community representative entity had issues being recognized as a representative body so eCWR attempted to contact this organization to ask to join with eCWR as a unified body but received no response.

Besides eCWR, Commercial Connect, LLC has also been active since 2000 in supporting, organizing, educating, and assisting the eCommerce community. In fact, most of our time between TLD applications was involved in structuring, bringing

awareness of the community to the community and gathering support for the impressive individuals at ECWR who have devoted a significant amount of time to help any and all eCommerce stakeholders.

We feel Commercial Connect and eCommerce World Retailers both meet the requirements of community entities whose focus is to represent and supports the eCommerce community. Both are companies are also well recognized through governments, corporations and stakeholders of this community.

2-A Nexus

Nexus

Shop does mean buy, purchase or transact. The primary and singular purpose of a Shop is a place to buy, purchase or transact goods and/or services.

eCommerce is buying, purchasing or transacting online - .shop is singularity the most recognized and interchangeable word associated for this purpose. It was researched in the late nineties, before ICANN was formed as to what word best meant eCommerce and shop was chosen. This word was chosen over similar strings including store, ecommerce, ecom, buy, sell, sale, service, services, shopping, supply, and market because it was contained and understood in the majority of languages across the world.

SHOP ±establishment that sells goods

Select targeted languages

- | | |
|---|--|
| <ul style="list-style-type: none"> • Afrikaans: winkel • Albanian: dyqan m • Arabic: دكان m (dukkān), م تجر m (mátjar), محل (ar) m (maḥall), مخزن m (makzan), حذوت m (ḥānūt) Egyptian Arabic: محل m (maḥal), دكان m (dukaan), دكانة f (dukaana) • Armenian: խանութ (xanut^o) • Asturian: tienda f • Azeri: mağaza (az), dükan • Basque: denda (eu), saltoki (eu) • Belarusian: крэма f (kráma), магазін m (mahazín) • Bengali: দোকান (dokan) • Breton: stal (br) f, staliou (br) pl • Bulgarian: магазін (bg) m (magazín) • Burmese: စတိုးဆိုင် (my) (hcuing) • Catalan: botiga f, tenda (ca) f • Chinese: | <ul style="list-style-type: none"> • Kurdish: Sorani: دوکان • Kyrgyz: магазин (magazin), дукөн (dükön) • Lao: ຫ້າງ (hāng), ຮ້ານ (hān), ຮ້ານຄ້າ (hān khā) • Latin: taberna f • Latvian: veikals • Lithuanian: parduotuvė f • Luhya: liduka • Macedonian: продавница f (prodávnicā), дуќан m (dúkan) • Malay: kedai • Maltese: hanut, negozju • Manx: shapp • Mongolian: нөөт (nööts), нөөтлөх (nöötslöh) • Ngazidja Comorian: duka • North Frisian: (Mooring) bood n • Northern Sami: gávpi • Norwegian: butikk (no) m, forretning m |
|---|--|

Cantonese: *please add this translation if you can*

Mandarin: 商店 (zh) (shāngdiàn),

店鋪 (zh), 店舖 (zh) (diànpù)

Min Nan: *please add this translation if you can*

- Cornish: [shoppa](#) m, [gwerthji](#) m
- Czech: [obchod](#) (cs) m, [prodejna](#) (cs) f
- Dalmatian: [stasaun](#)
- Danish: [butik](#) (da)
- Dutch: [winkel](#) (nl) m
- Esperanto: [butiko](#) (eo), [vendejo](#)
- Estonian: [pood](#), [kauplus](#)
- Finnish: [myymälä](#) (fi), [kauppa](#) (fi)
- French: [boutique](#) (fr) f, [magasin](#) (fr) m
- Friulian: [negozi](#) m, [buteghe](#) f
- Galician: [tenda](#) (gl) f
- Georgian: [მაგაზია](#) (maḡazia)
- German: [Laden](#) (de) m, [Geschäft](#) (de) n
- Greek: [μαγαζί](#) (el) n (magazí), [κατάστημα](#) (el) n (katástima)
- Greenlandic: [pisiniarfik](#)
- Haitian Creole: [magazen](#)
- Hebrew: [חנות](#) (he) (khanút)
- Hindi: [दुकान](#) f (dukān), [दुकान](#) f (dūkān)
- Hungarian: [bolt](#) (hu), [üzlet](#) (hu)
- Icelandic: [verslun](#) (is) f, [búð](#) (is) f
- Ido: [butiko](#) (io)
- Indonesian: [toko](#) (id)
- Interlingua: [boteca](#)
- Irish: [siopa](#) (ga) m
- Italian: [magazzino](#) (it) m, [negozi](#) (it) m
- Japanese: [店](#) (ja) (みせ, mise), [商店](#) (ja) (shōten)
- Jèrriais: [boutique](#) f
- Kamba: [ndukani](#)
- Kannada: [ಅಂಗಡಿ](#) (kn) (aṃgaḍi)
- Kazakh: [дүкен](#) (kk) (düken)
- Khmer: [ហាង](#) (km) (hāng), [ផ្ទះ](#) (km) (phteāh)
- Kikuyu: [nduka](#)

- Persian: [دکان](#) (fa) (dokān), [مغازه](#) (fa) (maḡāze)
- Polish: [sklep](#) (pl) m, [skład](#) (pl) m
- Portuguese: [loja](#) (pt) f
- Quechua: [tinda](#)
- Romanian: [magazin](#) (ro) n
- Russian: [магазин](#) (ru) m (magazín), [лавка](#) (ru) f (lávka) (*antiquated.*)
- Santali: [ᱫᱷᱟᱱᱵᱟ](#) (dokan)
- Scottish Gaelic: [bùth](#) m
- Serbo-Croatian: [prodavaonica](#) (sh) f, [trgovina](#) (sh) f

Cyrillic: [пролавница](#) f, [дућан](#) m

Roman: [prodavnica](#) f, [dućan](#) (sh) m

- Slovene: [trgovina](#) (sl) f
- Sorbian:

Lower Sorbian: [loda](#) f,

[pśedawarnja](#) f

- Sotho: [lebenkele](#)
- Spanish: [tienda](#) (es) f, [negocio](#) (es) m, [comercio](#) (es) m
- Swahili: [duka](#) (sw)
- Swedish: [magasin](#) (sv), [affär](#) (sv) c, [butik](#) (sv) c, [kiosk](#) (sv) c
- Tagalog: [tindahan](#)
- Tajik: [мағоза](#) (maḡoza), [дӯкон](#) (dūkōn), [дуқон](#) (dukōn)
- Tamil: [கடை](#) (ta) (kaṭai)
- Taos: [tjendo'óna](#)
- Tatar: [кибет](#) (tt) (kibet)
- Telugu: [షాప](#) (šāp)
- Tetum: [loja](#), [toko](#)
- Thai: [ร้าน](#) (th) (ráan)
- Turkish: [dükkan](#) (tr), [dükân](#) (tr), [mağaza](#) (tr)
- Turkmen: [dükan](#), [magazin](#)
- Ukrainian: [крамніця](#) f (kramnýcja), [магазин](#) (uk) m (mahazýn)
- Urdu: [دکان](#) f (dukān), [دوکان](#) f (dūkān)
- Uyghur: [ماگى زىن](#) (magizin)
- Uzbek: [magazin](#), [do'kon](#)
- Vietnamese: [cửa hàng](#) (vi)

- Korean: [가게 \(ko\)](#) (gage) (假家)

- Volapük: [selidöp \(vo\)](#)
- Welsh: [siop \(cy\)](#) f
- Yiddish: [קראם \(krom\)](#), [געשעפט \(gesheft\)](#), [געוועלב \(gevalb\)](#), [קלייט \(kleyt\)](#)

There are many words for shop in many languages, it is estimated that the **English word *shop* has become a part of at least 57 languages where the word *shop* is clearly understood** to mean a place to buy, purchase or transact goods and/or services.

The EIU marked a thoughtful precedence for nexus in their evaluation of .Radio, when they stated

“Radio means the operators, services and technologies defined here as the Radio community. Radio also means, and is, audio broadcasting. The Station broadcasting or streaming that audio content is radio, and the company performing the audio broadcasting is radio. A radio is the receiver used by the listener. Radio is the name everybody uses to refer to the entire industry, and the whole community.”

eCommerce is a lot of things, but it is also all summarized by shop. The Oxford dictionary defines shop as “A building or part of a building where goods or services are sold”. In its noun form “SHOP” is exactly what the retailers are using it for; a place for goods or services. The Oxford dictionary goes on to define shop in its verb tense “An act of going shopping”. In this regard shop is the essence of what the consumer is doing online.

2-B Uniqueness

[shop \(n.\)](#)

c.1300, "booth or shed for trade or work," perhaps from Old English scoppa, a rare word of uncertain meaning, apparently related to scypen "cowshed," from Proto-Germanic *skoppan "small additional structure" (cognates: Old High German scopf "building without walls, porch," German dialectal Scopf "porch, cart-shed, barn," German Schuppen "a shed"), from root *skupp-. Or the Middle English word was acquired from Old French eschoppe "booth, stall" (Modern French échoppe), which is a Germanic loan-word from the same root.

Meaning "building or room set aside for sale of merchandise" is from mid-14c. Meaning "schoolroom equipped for teaching vocational arts" is from 1914, American English. Sense of "matters pertaining to one's trade" is from 1814 (as in talk shop (v.), 1860).

[shop \(v.\)](#)

1680s, "to bring something to a shop, to expose for sale," from [shop](#) (n.). The meaning "to visit shops for the purpose of examining or purchasing goods" is first attested 1764. Related: Shopped; [shopping](#). Shop around is from 1922. Shopping cart is recorded from 1956; shopping list first attested 1913; transferred and figurative use is from 1959.

4-A Support

Community Awareness and Recognition

With over physical and active 1200 supporters and over 4800 members representing over 75% of the global eCommerce members we have support and recognition. We have had in-face meetings with excess of 1200 eCommerce centric personnel representing the company they work for and received their support for what we are proposing in regards to representation of eCommerce and operation of gTLD .shop string.

No Objections to our Business Model

What is even more important is that most all of the other applicants have endorsed our application at some point in the past and to date **there has not been one company that we spoke to about our application that had any opposition whatsoever to how we plan to run the .shop TLD registry.** This include Donuts who has now filed a letter objecting to our delineation and nexus but not the business plan and protection that only our application will provide.

Verification of .shop Owners

We are providing a substantial number of our supporters via attachment of electronic data file which contains key components to substantiate physical contact and approval from these members that we did speak with them in person and they acknowledged our representation, understood our plans for the new delegation of a .shop gTLD and gave their consent and support for our efforts.

Overall as a commerce, eCommerce and credit card processing communities intertwined, we have significant contact, acknowledgement of representation and support from in excess of 75% of the physical number of all community members listed and supporting our application and in excess of 95% of the financial transactions included in our list of supporters.

Does .eco mean and represent everything their community members and the stakeholders do? No it does not – It is a close semblance of a unique and diverse community all coming together to accomplish one goal – much like visitors to an online shop.

The community defined in the application (“SHOP”) is, as follows:

Members of the community are delineated from internet users generally by their requirement to abide by PCI DSS (Payment Card Industry Data Security Standards).

Community Membership would include those ecommerce organizations which seek to conduct trustworthy, legal B2B trade over the internet.

While members have a number of ways to conduct their ecommerce business, our members have the awareness and recognition that adhering to the PCI DSS standards are not only in the best interest of our community but in the best interest of the ecommerce community in larger.

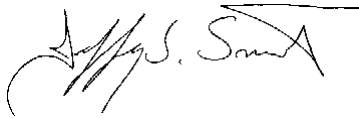
In this manner commercial Connect's application for the gTLD ("SHOP") shows both Clear straightforward membership definition and awareness and recognition of a community among its

While is apparent that no matter how much support, lack of opposition, transparency, dedication and structure we attempt to convey in this letter, there may be others including .shop applicants that feel the need to object to our community standing. We offer any and all objections as a chance to help us improve on our application. We openly solicit input from every aspect of the eCommerce community.

We feel that each and every co-applicant knew about our community status and expected our application to most likely prevail simply due to the 12+ years spent on its development. We tried to create a company that would be an asset to the internet, the eCommerce community and all involved stakeholders and we feel that we are the only .shop application that has accomplished this.

Thank you for your time, attention and consideration on our Community Review.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Smith". The signature is stylized with a large initial "J" and a long horizontal stroke extending to the right.

Jeffrey Smith

JSS:dwr

Appendix E

	A	B	C	G
1	Last Name	First Name	Company	Title
2	briggs	michael	@Website Publicity, Inc.	VP
3	MacKay	Patrick	004 Technologies USA	Chairman/CEO/President/COO
4	Stanley	Brad	7Search.com	Business Development
6	Stevanov	Alex	A1 Package Co.	Chairman/CEO/President/COO
7	Hafeez	Usman	Abook, LLC	CIO/CTO
8	Vahle	Rod	Accent on Animals, Inc.	Chairman/CEO/President/COO
9	Brown	Matthew	Accertify	Direct Sales
10	Katz	Steve	Accertify, Inc.	SVP Strategic Partnerships
11	McAlear	Bob	Accertify, Inc.	EVP/SVP
12	Wigstone	David	Accurate Industries	IT/Web
13	Ziemba	Lynda	Accurate Industries	Director/Department Manager
16	dettling	jay	acquity group	EVP/SVP
17	Hauca	Chris	Acquity Group	VP
18	Valentine	Jeff	ad:tech	Sales Manager
19	Belmonti	Jeffrey	AdBean LLC	VP
20	Gagne	Jean-Martin	Adship.com LLC	Account Executive
21	Oliver	Adam	Adship.com LLC	Account Executive
22	Russell	Josh	Affinia Group / Raybestos Brakes & Chassis	Director/Department Manager
23	SADIGHPOUR	MICHAEL	AFFORDABLELAMPS.COM	Chairman/CEO/President/COO
24	Ondekyo	Ronald	AG Interactive	Director/Department Manager
25	Calega	Gary	Agilone	Chairman/CEO/President/COO
27	Nye	Jeremy	Akamai	Major Account Executive
28	Gordon	Scott	alaTest	Country Manager
29	Siddiqui	Eraj	alaTest, Inc.	Director/Department Manager
30	Ney	Jerry	Aldersgate Village	Chairman/CEO/President/COO
31	Gagnon	Denis	Aldo Group inc.	Director/Department Manager
32	Sullinger	Darla	Alibaba.com	Marketing Assistance
33	Heffernan	Tom	Allied Trade Group	Speaker
34	Wenc	John	Alpine Consulting, Inc	eCommerce Specialist
35	Wokwicz	Peter	Alpine Consulting, Inc.	CIO/CTO
36	Deri	Sascha	ALTE	Chairman/CEO/President/COO
37	Sahourieh	Jay	Amadesa, Inc.	Director/Department Manager
38	Wike	Joseph	AmyAdele.com	Chairman/CEO/President/COO
40	Albanese	Carolyn	Annin & Co.	Director/Department Manager
41	Casasanta	Lauryn	Antique Jewelry Mall, Inc.	Director/Department Manager
42	Hayes	Susan	Antique JewelryMall, Inc.	Chairman/CEO/President/COO
43	DiObilda	Paul	Applica Consumer Products	Director/Department Manager
44	Kotkin	Adam	Apps Genius Corporation	Chairman/CEO/President/COO
45	Debbas	Bob	ArabAd	Sr. Foreign Correspondent
46	Rishchynski	Lou	Aramex	SAE
47	Smith	Don	Aramex	Chairman/CEO/President/COO
48	Urban	Teresa	Ariva	VP
49	Alovis	Ryan	ArkNet Media	Chairman/CEO/President/COO
50	Contractor	Shahezzad	ArkNet Media	Director/Department Manager
51	Stofko	Mark	Arvato Digital Services LLC	Account Manager
52	Minnick	Howard	ASI	Chairman/CEO/President/COO
53	Rabie	Kris	Association Health Care	Director/Department Manager
54	Eshbaugh	Antonia	ATG	Business Development Representative
55	Hiscock	J. Neal	Atlantic.Net	Chairman/CEO/President/COO
56	Walker	Jaima	Atlantic.Net	SAE
57	Valvano	Frank	Atrinsic	Senior Account Executive
58	Lemas	Noah	AudetteMedia	Director/Department Manager
59	Freund	Sam	audiosavings.com	Chairman/CEO/President/COO
60	Tourgee	John	Auric Systems International	Director of Business Development
62	Dant	Michael	Autodemo, LLC.	Director/Department Manager
63	Pixler	Jim	Automated Packaging Systems	Sales
64	Goren	Tuncer	Autopia.org	Chairman/CEO/President/COO
65	Odell	Nate	Avalara	Exhibit Manager
66	Chaplin	Scott	AvantLink.com	Director/Department Manager
67	Balas	Dave	Axiom 33	Director/Department Manager
69	Harman	Thomas	Balsam Hill	Chairman/CEO/President/COO
70	Winter	Carl	Balsam Hill	Director/Department Manager

	A	B	C	G
73	Brooks	Jay	Barnes Healthcare Services	Director of Online Sales
74	Richards	Lynn	Bathhouse Naturals	Director/Department Manager
75	Rogers	Dan	Baudville Inc.	Director/Department Manager
76	Rodamaker	Martin	Bazaarvoice	Director/Department Manager
78	McHugh	Gavin	Belson Outdoors Inc	Director/Department Manager
79	Munro	Geoffrey	Belson Outdoors Inc	Creative Director
80	Eskapa	Daniel	BestBuyEyeglasses	Chairman/CEO/President/COO
81	Diller	Patrick	Better World Books	Product Manager
82	Daley	Dan	Big 3 Consulting	Partner
83	Robinson	Scott	Big 3 Consulting	EVP/SVP
84	Machaalani	Eddie	Big Commerce	Chairman/CEO/President/COO
85	Knutson	Brenda	Big Dot of Happiness, LLC	Director/Department Manager
86	Squire	Scott	BloomingBulb.com	Director/Department Manager
87	Kopischke	Angie	Blue Hue Interactive	Chairman/CEO/President/COO
88	Bartlett	Zachary	Blue Package Delivery, LLC.	Delivery Services Manager
89	Bowen	Chris	Blue Raven Technology	Director/Department Manager
90	Bray	Greg	Blue Tangerine Solutions	Chairman/CEO/President/COO
91	Friess	Jeff	BlueSky Technology Partners	Director of Sales
92	Koepsel	Erika	BlueSky Technology Partners	Sales Associate
93	Shuman	Andy	BlueSky Technology Partners	Marketing Associate
94	Benson	Travis	Bob Ward & Sons	Director/Department Manager
95	Ward	Chad	Bob Ward & Sons	VP
96	Prieto	Percy	BOLIVIAMALL.COM	Chairman/CEO/President/COO
98	Morrison	Jenlean	Bongo International	Director/Department Manager
99	Goldner	Fred Joseph	BorderJump	Partner
100	Emanuele	Ann	Bosch Thermotechnology	National Account Manager
101	Bostic	Jim	Bostic Publishing Company	CIO/CTO
102	Gomez-Bostic	Estella	Bostic Publishing Company	Chairman/CEO/President/COO
103	Shanas	Josh	BowlingShirts.com	Speaker
104	Bowman	Bill	Bowman Design, Inc.	Chairman/CEO/President/COO
105	Lefever	Laurie	Brady People ID	Mgr., Electronic Marketing & Corp. Communications
106	Schachne	David	Brand Magnet	EVP/SVP
107	McLaughlin	Craig	Bridge2 Solutions	Chairman/CEO/President/COO
108	Smith	Jarod	Bridge2 Solutions	Director of Merchandising
109	Pietrocola	Tony	Bridgeline Digital	EVP/SVP
110	Zucker	Brett	Bridgeline Digital	CIO/CTO
112	Kangas	Cindy	Briggs and Stratton	Customer Solutions Team Leader III
113	Pierce	Darren	Bronto Software	Director/Department Manager
114	Groves	Mike	Brown Printing Company	Sales Representative
115	Simmons	Kevin	BSG Clearing Solutions	Director/Department Manager
116	Calabrese	Charles	buy.at Affiliate Network	Director/Department Manager
117	Schoen	Don	BuyerCompass	Chairman/CEO/President/COO
118	Dardis	Tim	buySAFE, Inc.	Director/Department Manager
119	Snapper	Mike	C&H Distributors	CMO
120	Haynie	Christin	CablesAndKits.com	CFO
121	McCoy	Chris	CablesAndKits.com	Director/Department Manager
122	Potts	Chad	CablesAndKits.com	Director/Department Manager
123	Remillard	Donna	Cactus Commerce	Director/Department Manager
124	Stevenson	Cam	Cactus Commerce Inc.	VP
125	Azarov	Andriy	CanaFlora	Chairman/CEO/President/COO
126	Pratt	Christopher	CandyWarehouse.com, Inc.	Chairman/CEO/President/COO
128	Pavan	Gary	Canon USA	Director/Department Manager
129	Clarke	Steve	Canu	Director/Department Manager
130	Poole	Brad	CardinalCommerce	Account Manager
131	Nguyen	Hoi	CarMD	Website Designer
132	Schafer-Junger	Karl	CashStar	VP
133	Hall	Aimee	CCH, a Wolters Kluwer Business	Marketing Promotions Manager, Software
134	Cohen	Anthea	CD Wow.com Ltd	Director/Department Manager
136	McBain	James	CDC eCommerce	Director, Account Management
137	Rushforth	Jason	CDC eCommerce	Chairman/CEO/President/COO
138	Schultz	Tim	CDC eCommerce	Marketing
139	Schieffer	Tim	CDS Global	Product Manager
142	Rombach	Mike	Channel Intelligence	Speaker

	A	B	C	G
143	Hayes	Dennis	ChannelAdvisor	Account Manager
144	Hochstrasser	Bryan	ChannelAdvisor	Account Manager
146	Mooney	Marilyn	Chase Paymentech	VP National Accounts
147	Paradis	Jim	Chase Paymentech	National Accounts Manager
148	DuBois	Christopher	Checkgateway	Director/Department Manager
150	Littleton	Timothy	CHEFS Catalog	Chairman/CEO/President/COO
151	Richard	Kyle	Chicago Architecture Foundation	On-line Shop Supervisor
152	Shelton	Robert	Chicago Architecture Foundation	Director/Department Manager
153	Schonwald	Al	Chilcutt Direct Marketing	VP
154	Castillo	Edgar	Chrome	Online Merchandiser
155	Bennett	Catherine	Cima International	Global Director
156	Hilyard	Brittin	CitizenHawk	Director/Department Manager
157	munir	sufian	clary business machines	Chairman/CEO/President/COO
158	Hundley	Andrea	Clean Air Gardening	CFO
159	Friedman	Alla	ClearCommerce / Certegy	Sales Solution Consultant
160	Prochnow	Tyler	ClickSpeed	Partner
162	Bills	Don	CM Retail Management	Director/Department Manager
163	Senft	Daniel	Coatue	Analyst
164	shaw	Laurie	coffee beanery	Director/Department Manager
165	Ciperski	Zachary	CoffeeForLess.com	VP
166	Krishnan	Vidyanand	Cognizant	Consulting Manager
167	Mishra	Shawn	Cognizant	Principal Architect
168	Weaver	Scott	CoLinear Systems, Inc.	Chairman/CEO/President/COO
169	Roa	John	Colman Brohan Davis	Director/Department Manager
170	PEREZ	VICTOR	COMERCIO ELECTRONICO	Chairman/CEO/President/COO
171	Hogan	Dylan	CommerceHub	Director Strategic Accounts
172	Bolton	Alex	Commercial Connect, LLC	Director/Department Manager
173	Bolton	Larry	Commercial Connect, LLC	Director/Department Manager
174	Bolton	Max	Commercial Connect, LLC	CMO
175	Dicken	Ken	Commercial Connect, LLC	Director/Department Manager
176	Guarino	Adele	Commercial Connect, LLC	Director/Department Manager
177	Model	Christy	Commercial Connect, LLC	Assistant
178	Paternoster	James	Commercial Connect, LLC	Director/Department Manager
179	Smith	Jeffrey	Commercial Connect, LLC	Chairman/CEO/President/COO
180	Watson	Kevan	Commercial Connect, LLC	Director/Department Manager
181	Dittrich	Josh	CommercialWaterDistributing.com	Director/Department Manager
182	Joyce	Kevin	Commission Junction	Director, Advertiser Development
185	Poirot	Romuald	Compario SA	CIO/CTO
186	Cerreta	Scott	Competitive Computing	Program Manager
187	Cronin	William	Competitive Computing	Sr. Technical Lead
188	Driscoll	Bernie	CompNation	Director/Department Manager
189	Lakhani	Al	Computer Brain	Chairman/CEO/President/COO
190	Lakhani	Altaf	Computer Brain	Chairman/CEO/President/COO
191	Broderick	Tim	Concepts & Design Studio Inc	VP
193	kennedy	ray	Conormara Investments, LLC	Chairman/CEO/President/COO
194	Carrano	Michael	Converge Direct	VP
195	Morgan	Alex	Conversys Inc.	Director/Department Manager
196	lee	jennifer	Cooking.com	Director/Department Manager
197	clement	jorn	cooper & clement inc	Chairman/CEO/President/COO
199	Dimmitt	Barbara	Copper Daisy Company, Inc.	Chairman/CEO/President/COO
200	Perry	Lyle	Core Health Innovations	Chairman/CEO/President/COO
201	Nangle	Paul	Coremetrics, Inc.	Client Executive
202	Maeso	Michel	Cotendo	VP
203	Killeen	Kristen	Covario	Director/Department Manager
204	McLain	Scott	Crafts, Etc!	VP
205	Fuller	Michael	CRE Secure Payments, LLC	Chairman/CEO/President/COO
206	Kee	Jerry	Creative Automation	Vice President, Client Development
207	Bryant	Jeff	Creative Direct Marketing	Principal
208	Klein	Jay	Creative Fulfillment Solutions	Chairman/CEO/President/COO
209	Moore	Chris	Criteo	Sr. Sales Manager
210	Brunner	Ike	CRM Metrix, Inc.	Director/Department Manager
211	Shirley	Russ	CRM Metrix, Inc.	EVP/SVP
212	Brinkman	Gary	CrossView	Vice President of Business Development

	A	B	C	G
213	Jadhav	Pawan	CSS Corp	Director/Department Manager
214	Weltken	Cary	CSS Corporation	Sr. Director
215	Rosen	Bradley	CubWorld.com	Chairman/CEO/President/COO
216	Chhatwal	Gurvinder	Cybage	Director/Department Manager
217	Gyanani	Deepak	Cybage	Director/Department Manager
218	Marshall	Bob	Cynergy Data	Director/Department Manager
219	Addington	Kevin	D.M.Insite	Director/Department Manager
220	Schloemer	Annette	D.M.Insite	Director/Department Manager
221	Dedeaux	Terry	Dart Entities	Chairman/CEO/President/COO
222	Canavan	Bryan	Dartmouth Capital	Chairman/CEO/President/COO
223	Tewari	Krishna	Datamatics Global Services Ltd.	EVP/SVP
224	Haukas	Sally	DaySpring	Director/Department Manager
225	Lane	Jesse	DaySpring	Director/Department Manager
226	Robles	Saul	DaySpring	Director/Department Manager
227	Younger	Brenda	DaySpring	Director/Department Manager
228	Coogan	Jim	Daystar Data Group, Inc	Director/Department Manager
229	spurgeon	Terry	Daystar Data Group, Inc	EVP/SVP
230	Beloney	Tim	DCL	Director/Department Manager
231	Tsai	Edward	DCM	Associate
232	Scott	Tanya	DealsDirect	Director/Department Manager
233	Biles	Robert	Dealtree, a Best Buy Brand	Ecommerce Merchandising Manager
234	Fletcher	Paul	Dealtree, a Best Buy Brand	VP
235	Hall	Larisa	Dealtree, a Best Buy Brand	General Manager
236	Hume	Katharine	Dealtree, a Best Buy Brand	Sr. Analyst
237	Nguyen	Jack	Dealtree, a Best Buy Brand	SEM/SEO/Email Marketing Analyst
238	Shevock	Dave	DecisionStep, Inc.	EVP/SVP
239	Castic	Ray	Defined Logistics Services	Director/Department Manager
240	Engelhardt	Tracey	Deluxe Corporation	Director/Department Manager
241	Larson	Kelly	Deluxe Corporation	VP
242	Mitzel	Sherria	Deluxe Corporation	Director/Department Manager
243	Sather	Todd	Deluxe Corporation	Director/Department Manager
244	Selvig	Rich	Deluxe Corporation	Director/Department Manager
245	Sweet	Craig	Deluxe Corporation	Director/Department Manager
246	Wilson	Mikki	Deluxe Corporation	Director/Department Manager
247	Griffin	Tom	Demandware	VP
248	Surles	Bryan	Demandware	Director/Department Manager
249	Tommy	Lizbeth	Dematic Corp	Director/Department Manager
250	Uhe	Shushanna	Dematic Corp	Marketing Operations Specialist
251	Horner	David	DeviceAnywhere	Marketing Manager
253	Pench	Phil	DHL Global Mail	CFO
254	Armour	Bruce	DiCentral	Director/Department Manager
255	Heavner	Wade	Digby	Director/Department Manager
256	Lowden	Dan	Digby	VP
257	Kim	Ji	DijiPOP	Chairman/CEO/President/COO
258	Stevens	Jeff	Direct Response Technologies	Director/Department Manager
259	Olden	Gary	DirectTrack	Director/Department Manager
260	CHO	ADRIAN	dirtcheapLNG.com	Director/Department Manager
261	Lederhause	Joel	Discount Ramps	Chairman/CEO/President/COO
262	Osburn	Dawnee	Discount Ramps	Executive Assistant
263	Christel	David	Discoverhelp, Inc.	Director/Department Manager
264	Schmidt	Jessica	DMNews	Account Executive
265	Hanks	Jeremy	Doba	Chairman/CEO/President/COO
266	Kokoska	Megan	Dollar Tree, Inc.	Director/Department Manager
268	Rubio	Mauricio	Dr. Jay's	Director/Department Manager
269	Bishop	Jeff	Dreamway Trading, LLC	Chairman/CEO/President/COO
270	Parker	Gracie	Dreamway Trading, LLC	Director/Department Manager
272	Etgen	Michelle	DSW, Inc	Director/Department Manager
273	McClung	Michael	Dungarees	Chairman/CEO/President/COO
274	Bruno	Charles	Dynamex, Inc.	National Sales Executive
275	Johnston	Connie	Dynamex, Inc.	VP
276	Price	Durk	eAccountableOPM	Chairman/CEO/President/COO
277	Sorrels	Stephanie	eAccountableOPM	Sr. Account Mgr
278	Andrews	Kelly	Early-Pregnancy-Tests.com	VP

	A	B	C	G
279	Schnabolk	Marc	EasyAsk	VP
281	Chaudhary	Hyaat	eBrands, Inc.	Chairman/CEO/President/COO
282	Morgante	Steve	eBridge Software	Account Representative
283	Mizrachi	Nir	eBulb, Inc.	VP
284	McNeil	Greg	E-Business Express	Director/Department Manager
285	Weickert	Chris	EC Weickert, Inc	Chairman/CEO/President/COO
286	Schoen	Justin	eComegy	Chairman/CEO/President/COO
287	Salvador	Mauricio	Ecommerce School	Chairman/CEO/President/COO
288	Garvin	David	Ecommerce Superstores	Director/Department Manager
289	Hamilton	Brian	e-Connector	Chairman/CEO/President/COO
290	Cortes	Eddie	ecWorld Enterprises, Inc.	Chairman/CEO/President/COO
291	Cortes	Jay	ecWorld Enterprises, Inc.	Director/Department Manager
292	Levitan	Itai	Edge.BI	CEO & Co-Founder
293	Chanman	Omar	Edgecast Networks	National Account Executive
294	Nevas	David	Edison Venture Fund	Associate
295	Loumpouridis	B	EDL Consulting (CloudCraze)	Chairman/CEO/President/COO
296	Shen	Duncan	eHealth, Inc.	Product Management
297	Howell	Eric	eHealthInsurance	VP
298	Patterson	David	Elbrus Consulting	Chairman/CEO/President/COO
299	Baun	Roger	ELC Online	VP
300	Moorehead	Russ	ELC Online	VP
301	Kirshner	Ben	Elite SEM Inc	Chairman/CEO/President/COO
302	Payne	Jeff	Ellsworth Corporation	CMO
303	Jose	Kathryn	eMarketer	Manager, Business Development
304	vonBirgelen	Cathy	eMarketing Learning Center	Director/Department Manager
305	giza	brett	EmbroideryDesigns.com	Director/Department Manager
306	mengarelli	lisa	EmbroideryDesigns.com	marketing
307	Burdsall	Scott	Encyclopaedia Britannica	Marketing Manager
308	Sinclair	Aimee	Encyclopaedia Britannica	Sr Mgr of Consumer Campaign Mgmt & Database Mktg
309	Sampson	Pat	Endeca	SE
310	Krulik	Laurence	Endeca Technologies	Director/Department Manager
311	Epstein	jerry	Engaged Nation	Chairman/CEO/President/COO
312	O'Leary	Jennie	Entertainment Publications, LLC.	Director/Department Manager
313	Lowry	Chris	EPI Marketing Services	Business Development Manager
314	Weaver	Gene	Escalate, Inc	Director/Department Manager
316	Dermer	Simon	eSEENTIAL Accessibility Inc.	Exhibit Manager
317	Clark	Stuart	EstarOnline Limited	Chairman/CEO/President/COO
319	Anderson	Michael	Etail Solutions, LLC	Chairman/CEO/President/COO
320	Litchfield	Kristin	Euro-Pro	Director/Department Manager
321	Haseloff	Luke	eWayDirect	Sales
322	Becker	Adam	ExactTarget, Inc.	Partner Manager
323	Morgan	Chris	Experian Hitwise	Vice President, US Business Development
324	Drazek	Chris	ExpertSender.com	Chairman/CEO/President/COO
325	Gantman	Adam	Eyeglasses123	Director/Department Manager
326	Pauls	Brett	facilitywebsource.com	CIO/CTO
327	Parekh	Mehul	FactoryOutletStore	Director/Department Manager
328	Carrick	Scott	Family Direct, Inc.	Chairman/CEO/President/COO
329	Dantuono	Luke	Fantasy Diamond	EVP/SVP
330	Jagisch	Richard	Fantasy Diamond	Director/Department Manager
331	Sawyer	Brooke	Fantasy Diamond	Director/Department Manager
332	Mason	Alex	Fanzz Sports Apparel	Director/Department Manager
333	Trujillo	Matthew	Fanzz Sports Apparel	Head Web Developer
334	Rosales	Ruben	Fashion Imex LLC	Director/Department Manager
335	Walker	Chad	Fauntleroy Supply Inc	Director/Department Manager
336	Feehan	Amy	FedEx	Marketing
337	Jackson	Jackie	FedEx	eCommerce Channel Manager
338	Carrier	Kevin	FedEx Services	Director/Department Manager
339	Callahan	Lynn	Fellowes Incorporated	Director/Department Manager
340	Brown	Christopher	Fence Supply Inc	Chairman/CEO/President/COO
341	French	Adam	Fence Supply Inc	Director/Department Manager
342	Silverstein	Stuart	Fetch! Creative Marketing	Chairman/CEO/President/COO
343	Gurreri	Toni	FetchBack	Retargeting Sales Executive
344	Groff	Chad	Fibre Glast Developments	Director/Department Manager

	A	B	C	G
345	DeSimone	Michael	FiftyOne Global Ecommerce	Chairman/CEO/President/COO
346	Griffin	Michael	FiftyOne Global Ecommerce	Director/Department Manager
347	Kharazmi	Som	FiftyOne Global Ecommerce	Director/Department Manager
348	Rattigan	Justin	FindAPro.com	Chairman/CEO/President/COO
349	Griffiths	Andrew	FindWAtt	Chairman/CEO/President/COO
350	Bachir	Louay	First Data	Marketing Specialist
351	Schwieger	Rolf	First Data	Director, Product Marketing
352	Brock	Tim	First Flight Solutions	Director of Sales
353	Brown	Steven	FIS Global	Director/Department Manager
354	Leale	AJ	FitForCommerce	Staff
355	Hajj	Audra	Flashecom Inc	Director/Department Manager
356	Hajj	George	Flashecom Inc	Chairman/CEO/President/COO
357	Forst	Gina	FLOR	Director/Department Manager
358	McDaniel	Laura	FLOR	Director/Department Manager
359	Lailey	Christopher	Flowers.ca Inc.	VP
360	Mindel	Seth	Fluid, Inc	Director/Department Manager
361	Ostrom	Ryan	Fluid, Inc	Director/Department Manager
362	Gaffney	Steve	Follett Higher Education Group	VP
363	Scherer	Al	Follett Higher Education Group	Director/Department Manager
364	Koechel	Ryan	FontanaSports.com	CIO/CTO
365	Johnson	Jessica	Footlocker.com, Inc.	Director/Department Manager
366	Kassnel	Stephen	Footlocker.com, Inc.	Director/Department Manager
367	Wietrzykowski	Lee	Footlocker.com, Inc.	Internet Merchandising Planner
368	Shores	Justin	Fort Western Stores	Director/Department Manager
369	tobias	alan	fortune wigs inc	Chairman/CEO/President/COO
370	Giannini	Adrian	FORTUNE3	CIO/CTO
371	Farache	David	Fortune3, Inc.	VP
372	Jones	Nancy	Foster-Stephens, inc	Chairman/CEO/President/COO
373	Apfel	Jason	FragranceNet.com	Chairman/CEO/President/COO
374	Nadboy	Michael	FragranceNet.com	VP
375	Yakuel	Ron	FragranceX.com Inc.	Chairman/CEO/President/COO
376	Gorske	Pete	Frank's Great Outdoors	Director/Department Manager
377	Peistrack	Alyssa	Frank's Great Outdoors	Director/Department Manager
378	Jedrzejewski	CJ	FreeShipping.com	Director/Department Manager
379	Naster	Rachel	Freightquote.com	Account Manager
380	Steward	CariAnn	Freightquote.com	Association Specialist
381	Smith	Amber	Fresh Force International	Market Research Analyst
382	Shaughnessy	Suzanne	FreshAddress	Senior Account Executive
383	Kelso	Donna	FromTheFarm.com	VP
384	Kelso	Tyler	FromTheFarm.com	Director/Department Manager
385	Comella	John	Fry, Inc.	Account Director
386	Gardner	Laurie	Fry, Inc.	Business Development Director
387	Hamilton	Jamie	Fry, Inc.	Technical Director
388	DELDUCA	BEN	FSA Logistics	MGT
389	WIPF	BOB	FSA Logistics	SALES MANAGER
390	Hoopas	Jake	Funding Universe	VP
391	Adams	Arch	FunSpot	Chairman/CEO/President/COO
392	Patil	Vinay	FunSpot	Director/Department Manager
393	Bott	Ryan	Fusion-io	Director/Department Manager
394	Foss	Jonathan	G&L Clothing	Director/Department Manager
395	Marques	Daniel	Gemvara	Director/Department Manager
396	Reilly	Joe	GENCO Marketplace	Director/Department Manager
397	Sigg	Stephen	General Motors	Director/Department Manager
398	Lewis	Mike	Giant Tiger	CIO/CTO
399	Clabo	Ron	GiftOasis LLC	Chairman/CEO/President/COO
400	Cervelli	Paul	GiftsForYouNow.com	Director/Department Manager
401	Grebel	Dan	GiftsForYouNow.com	VP
402	Tuchler	Jim	GiftsForYouNow.com	Chairman/CEO/President/COO
403	Schwartz	Jonathan	Gigya	VP
404	Quinlan	Michele	Global Infomercial Services	Director/Department Manager
405	Majeski	Steve	Global Response	Director/Department Manager
406	Betts	Peter	Globalization Partners International	EVP/SVP
407	Pascual	Federico	Globalization Partners International	Global SEM Specialist

	A	B	C	G
408	Grosman	Rotem	GoDataFeed	Chairman/CEO/President/COO
409	Zabow	Kieron	GoDataFeed	Director/Department Manager
410	Patel	Deep	GoGreenSolar.com	Speaker
411	Pasquale	Christina	Gomez, Inc.	Marketing Programs
413	Levich	Lindsey	Google	Account Executive - Retail
414	Robinson	Jim	Google	Head of Affiliate Sales
415	Monson	Chad	Gopher Sport	Director/Department Manager
416	Platovsky	jan	GovGroup	Chairman/CEO/President/COO
417	Colla	Mario	Gproxy Design Inc	Chairman/CEO/President/COO
418	Pico	Gerardo	Gproxy Design Inc	Director/Department Manager
419	Ferguson	Robert	Gravity Defyer	Director/Department Manager
420	Buonanno	Alicia	Gregory FCA	PR Account Supervisor
421	Justice	Adam	Grid Connect	Sales/Marketing
422	Fox	Allison	GSI Commerce	Director/Department Manager
423	Somers	Steven	GSI Commerce	Director/Department Manager
424	Kiley	Rick	gThankYou, LLC	Chairman/CEO/President/COO
425	Wyman	Kristen	GTJD Enterprise	Director/Department Manager
426	Hill	Mike	Guidance	EVP/SVP
427	Shoemaker	Jani	HaberVision LLC	VP
428	Shoemaker	Mike	HaberVision LLC	VP
429	Goodman	Dan	Hanley Wood	Director/Department Manager
430	Rook	Dave	Hanley Wood LLC	EVP/SVP
431	Perez	Richard	Harland Clarke	Director/Department Manager
432	Vyas	Zankhana	Harland Clarke	Director/Department Manager
434	Nelson	Chris	Harley-Davidson	Director/Department Manager
435	Rozsa	Joe	Harley-Davidson	Director/Department Manager
436	Weston	Doug	Harley-Davidson	Director/Department Manager
437	scanlan	mark	Harmony Ventures	Chairman/CEO/President/COO
438	Bieler	Marek	Harvey Norman	Director/Department Manager
439	Nugent	Gordon	Harvey Norman	Director/Department Manager
440	kubicek	angela	hayneedle	marketing
441	Burford	Ivy	HeadRoom Corporation	Director/Department Manager
442	Griffith	Matt	HeadRoom Corporation	Director/Department Manager
443	Waller	Travis	HeadRoom Corporation	Chairman/CEO/President/COO
444	Parham	Ian	Headsets.com	Director/Department Manager
445	Sharp	Phil	Headsets.com	Director/Department Manager
446	Reid	Bethany	Health Care Logistics	Chairman/CEO/President/COO
447	Little	Mark	Health International, Inc.	Consultant
448	Axelson	Mark	HEALTHandMED.com	Chairman/CEO/President/COO
449	Mitchell	Shayne	Heartland America	Director/Department Manager
450	McCoy	Eric	Heels.com	Chairman/CEO/President/COO
451	Ricketts	Todd	Higher Gear	Chairman/CEO/President/COO
452	Van Stralen	Ryan	Home Hardware / Home Furniture Stores	Director/Department Manager
453	Barna	Dan	House of Brides	Director/Department Manager
454	ABRAHAM	THOMAS	IAM ENTERPRISES LLC	Chairman/CEO/President/COO
455	GONZALEZ	HENRY	IAM ENTERPRISES LLC	CIO/CTO
456	Hedstrom	Charley	i-Behavior	Director/Department Manager
458	Gniwisch	Pinny	Ice.com	Speaker
459	Hummel	Kelly	Iciniti Corporation	Chairman/CEO/President/COO
460	McGuire	Holly	Iciniti Corporation	Sales Manager
461	Parkinson	Bill	Iciniti Corporation	Chairman/CEO/President/COO
462	Lankford	Kate	iContact	Account Manager
463	Ackerman	Rob	Ideosity, Inc.	EVP/SVP
464	Cooper	Sean	Ideosity, Inc.	Director/Department Manager
465	Dase	Rich	Ideosity, Inc.	Chairman/CEO/President/COO
466	Laverentz	Jonathan	Ideosity, Inc.	Director/Department Manager
467	Edwards	Jason	iGo, Inc.	Speaker
468	Crasto	Brendan	Iksula Services Pvt Ltd	Chairman/CEO/President/COO
469	Greenwell	Kent	Impak Retail Packaging	IT Manager
470	Brady	Kelly	Inceptor	Exhibit Manager
471	Conquest	Jason	Inceptor	National Sales Manager
472	Hassan	Alaa	iNetVideo.com	Chairman/CEO/President/COO
473	Rawlings	Gary	Infinity Resources Inc. DeepDiscount.com	EVP/SVP

	A	B	C	G
474	mader	randy	Infogroup	Sales Director
475	Cucu	Alex	Infogroup Interactive	Director/Department Manager
476	Dublin	Peter	Infogroup Interactive	Director/Department Manager
477	Lewis	Randy	Infogroup Interactive	Sales Executive
478	Williams	Justin	Infopia	Sales Executive
479	Chipman	Debra	Informa	Chairman/CEO/President/COO
480	John	Rosanne	Informa	Director/Department Manager
481	Lewandowski	Kristina	Infusion E-Business	Director/Department Manager
482	Sheehy	Christopher	Infusion E-Business	Chairman/CEO/President/COO
483	Bowen	Berkley	InMarkit	Chairman/CEO/President/COO
484	Bonatti	Silvia	Innovative Contact Solutions	Business Development
485	Liles	Jack	Insource Spend Management Group	VP
486	Hainey	Lori	Inspire Technologies	VP
487	Whyte	John	Interactive Business Systems	VP
488	Horn	Gregory	Interlink	Chairman/CEO/President/COO
489	Carlson	Erik	Internap	Director/Department Manager
490	GUZMAN	JOHN	INTERNAP	SALES
491	Carter	Mark	International E-Z UP, Inc.	Chairman/CEO/President/COO
492	Grove	Karl	International E-Z UP, Inc.	Director/Department Manager
493	Hernandez	Eric	International E-Z UP, Inc.	Director/Department Manager
494	Proctor	Brent	International E-Z UP, Inc.	Director/Department Manager
495	Semenov	Alexander	Internet Retail Solution Ltd	Chairman/CEO/President/COO
496	Love	Jack	Internet Retailer	Staff
497	Jindal	Ian	Internet Retailing	Director/Department Manager
498	Pigou	Mark	Internet Retailing	Director/Department Manager
499	Prevett	Rob	Internet Retailing	Director/Department Manager
500	Asquith	Michael	Interpro Translation Solutions	Business Development Manager
501	Aldea	George	Invesp Conversion Optimization	Solutions Executive
502	Taras	Daniel	iPerceptions Inc.	VP
503	Kovach	Nick	Iron Pony Motorsports	Director/Department Manager
504	Burns	Josh	J & J Commerce, Inc.	IT Manager
505	Oakley	John	J & J Commerce, Inc.	Chairman/CEO/President/COO
506	Barcz	Tim	J&P Cycles	Director/Department Manager
507	Upton	Trevor	Janus Capital Group	Research Associate
508	Labadie	Layne	JCB International Credit Card Co., LTD	VP
509	Skaling	Dan	JCB International Credit Card Co., LTD	EVP/SVP
510	Kiley	Christopher	Jeppesen, Boeing Company	Director/Department Manager
511	Schol	Becky	Jeppesen, Boeing Company	Director/Department Manager
512	Chester	Dave	JetPay	Exhibit Manager
513	Helsely	Alison	JetPay	Account Executive
514	Schuchman	Corey	Jildor Shoes Inc	Director/Department Manager
515	Greenberg	David	JMI Equity	VP
516	Knell	Kory	JMI Equity	Associate
517	Fila	Bob	John Kringas Photography	Chairman/CEO/President/COO
518	Kringas	John	John Kringas Photography	Chairman/CEO/President/COO
519	Cassidy	Suzanne	Johnson & Johnson	Director/Department Manager
520	Mercer	Bryan	Just Health Shops	Chairman/CEO/President/COO
521	Mercer	Renee	Just Health Shops	Chairman/CEO/President/COO
522	Sockloff	Brad	Kalan Test Prep	VP
523	Isaacsohn	Daniel	Kampyle Ltd.	Product Consultant
524	Savir	Eran	Kampyle Ltd.	VP
525	McManus	Thomas	KegWorks	Chairman/CEO/President/COO
526	Craig	Judy	Kenco Logistic Services	Exhibit Manager
527	Kelley	Bobbie	Kenco Logistic Services	Sales Manager
528	McCloskey	Angie	Kenshoo Inc.	East Coast Sales Manager
529	Grahn	Sarah	K-Log, Inc.	Catalog Production Supervisor
530	Klebe	Gary	K-Log, Inc.	VP
531	Lester	Linda	K-Log, Inc.	Systems Analyst
532	Brown	Adam	Koeppel Direct	EVP/SVP
533	Trumbull	Shawn	Koeppel Direct	Director/Department Manager
534	Johnson	Aaron	Kohls	Director/Department Manager
536	Dellemann	Julie	Kohls Dept Stores	IS Business Solutions Architect
537	Ploeger	Becky	Kohls Dept Stores	Director/Department Manager

	A	B	C	G
538	Gosserand	James	Kool Krowd Ventures	Director/Department Manager
539	Garcia	Javier	Koongah	EVP/SVP
540	Walker	David	Kount Inc.	VP
541	Wadan	Veerinder	KPIT Infosystems Inc	Director/Department Manager
542	Lyne	Gil	Kryptonite Collectibles Inc.	Chairman/CEO/President/COO
543	Lyne	Jeff	Kryptonite Collectibles Inc.	Director/Department Manager
544	Tuckman	Brad	KSC Kreate	Chairman/CEO/President/COO
545	Lagarde	Jay	Lagarde	Chairman/CEO/President/COO
546	Cormier	David	Lagasse Sweet Inc.	Director/Department Manager
547	Forsythe	Linda	Lawson Products, Inc.	Director/Department Manager
548	Roth	Eric	Lazard Middle Market	Director/Department Manager
549	Black	Lea	Legendary Whitetails	Marketing Specialist
550	Derfus	Nancy	Legendary Whitetails	Director/Department Manager
551	Huffman	Greg	Legendary Whitetails	Chairman/CEO/President/COO
552	Kaiser	Mark	Legendary Whitetails	Director/Department Manager
553	Urrea	Fernando	Leonisa	VP
554	chehebar	joey	Lesportsac	EVP/SVP
556	d'Ambrosio	Rick	Lexar Media/Crucial Technology	Director/Department Manager
557	Walker	Ed	Lexar Media/Crucial Technology	Director/Department Manager
558	Wentzell	Steve	Lids	Director/Department Manager
559	Gdovic	Ronald	Linkstar Interactive	Chairman/CEO/President/COO
560	Eames	Doug	LiquidPixels, Inc.	Account Executive
561	Elliott	Matt	Listrak	Director/Department Manager
562	Osborne	Dan	Listrak	Director/Department Manager
563	Batio	Nancy	Lobster Gram	Director/Department Manager
564	Culp	Nathan	LocalPages	Sales Representative
565	Landrum	James	Lokion Interactive	VP
566	Long	Amy	Longview Capital	Owner
567	Halverson	Ben	Lorman Education	Director/Department Manager
568	Kiefer	Joe	Lorman Education	Director/Department Manager
569	Benesh	Carolyn	Lyons Consulting Group	Sales Engineer
570	Cohen	David	M&J Trimming	Speaker
571	Ming	Dara	M&J Trimming	Director/Department Manager
572	Maher	larry	MACH Software	VP
573	Corchia	Alfred	MAETVA	Director/Department Manager
574	Chua	Fred	Magellan Solutions Outsourcing, Inc.	Chairman/CEO/President/COO
575	McGurran	Paul	Magico.ie	Director of eCommerce
576	Strama	Mike	Magid Glove & Safety	Director/Department Manager
577	Berger	Steve	MailExpress, Inc	Director, Sales
578	Manning	Michael	MailExpress, Inc	Marketing Specialist
579	Noah	Holly	MailExpress, Inc	Marketing Director
580	von Melville	Christopher	MailExpress, Inc	Manager, Strategic Accounts
581	Mansilla	Nick	Manna Distribution Services	National Accounts Manager
582	Black	Kelly	Mardel	Director/Department Manager
583	Steiner	Robert	Market Warehouse Inc.	COO
584	Larkin	Beth	Marketing Support Network	Director/Department Manager
585	Lukauskas	Dobi	Marketing-that-Delivers.com	Chairman/CEO/President/COO
586	Aleccia	Steve	MarketLive	Director/Department Manager
587	Kelly	Maren	MarketLive	Marketing Coordinator
588	VonSosen	Ralf	MarketLive	VP, Product Management
589	Kennedy	Kevin	Marketpath, Inc.	CMO
590	Crowley	Brian	Mars Direct	Director/Department Manager
591	Earl	Kris	Mars IS	Director/Department Manager
592	Geissler	Reggie	Mason Companies, Inc.	Director/Department Manager
593	Schemenauer	Darin	Mason Companies, Inc.	Director/Department Manager
594	Brenner	Kathleen	Materialogic	VP
595	Le Berrigaud	Yoann	MATHON	Director/Department Manager
596	Porter	RJ	MBM Company, Inc./Limoges Jewelry	Chairman/CEO/President/COO
598	Narayan	Jagath	McCombs-University of Texas	Director/Department Manager
599	Schlenker	Naruby	McCombs-University of Texas	Director/Department Manager
600	McNally	Dave	McNally Partners	Chairman/CEO/President/COO
601	Lentz	Daniel	MeadWestvaco	Director/Department Manager
602	McKee	Jennifer	MeadWestvaco	Director/Department Manager

	A	B	C	G
604	Nemastil	Erin	Meijer.com	Content Specialist
605	Patterson	Regina	Meijer.com	Content Specialist
606	Hayes	Nicki	Memolink.com	Director/Department Manager
607	Behl	Nikhil	Mercantila	Chairman/CEO/President/COO
608	Rausch	Kelly	Mercantila	VP
609	Galan	Rick	Mercent	Senior Marketing Manager
610	Bergner	Mark	Merchant e-Solutions	VP
611	Lambert	Michael	MerchantAdvantage, LLC	CIO/CTO
612	Iga	Luis	MerchantAdvantage.com	Director/Department Manager
613	Joyce	Andrew	MeritDirect	VP
614	Devin	Erin	MeritDirect, LL	Director/Department Manager
615	Teitelbaum	Joel	Messeger for you	Chairman/CEO/President/COO
616	Gluck	Joel	Messenger for you	Director/Department Manager
617	Pinsonneault	Josh	Metropark	Sr Manager of Ecommerce
619	Fortson	Steve	Miles Kimball	Speaker
620	Broitman	Jeff	Milos America, Inc.	Chairman/CEO/President/COO
621	Zykan	Frantisek	Milos s.r.o.	Chairman/CEO/President/COO
622	Jones	Chip	Minton Jones Company	Chairman/CEO/President/COO
623	Rodriguez	Philippe	Mix Commerce	Chairman/CEO/President/COO
624	Bradshaw	Jeffery	MJR International Inc.	Chairman/CEO/President/COO
625	Easton	Lindsay	MJR International Inc.	Director/Department Manager
626	Zendejas	Raul	MJR International Inc.	CIO/CTO
627	Sweis	Chris	Mobile Media Solutions Inc	Chairman/CEO/President/COO
628	Bulliam	Marilyn	Mobius Knowledge Service	Director/Department Manager
629	Kannan	Shriharish	Mobius Knowledge Service	Director/Department Manager
630	Canterbury	Drema	Moneta Corporation	Director/Department Manager
631	Swamy	Bala	Moonjee Corporation	Chairman/CEO/President/COO
632	Kanduri	Syam	Motif, Inc	VP
633	Patterson	Kristi	MSI Worldwide Mail	Director/Department Manager
634	Rapp	Kimberly	MTD Products, Inc.	Ecommerce Business Manager
635	Chun	Ross	MultiAd	Business Development Manager
636	Bernloeber	Jason	Murals Your Way	Director/Department Manager
637	Imholte	Todd	Murals Your Way	Chairman/CEO/President/COO
638	Koppel	Lidia	Murdoch's Ranch & Home Supply	Advertising Studio Manager
639	Aicher	Bill	Musicnotes Inc.	Speaker
640	Olaniran	Moses	MWP Industrial Supply	VP
641	Hord	Fred	My Glass Slipper	Owner
642	Randall	Bruce	My Store Solutions	Chairman/CEO/President/COO
643	Torrey	Ian	My Store Solutions	Director/Department Manager
644	Miller	Mark	MyBuys	Account Executive
645	O'Leary	Marc	MyCart.net	Chairman/CEO/President/COO
646	Cortazzo	Shauna	MyCoupons.com	Senior Account Manager
647	Flynn	Kevin	MyCoupons.com	Director/Department Manager
648	Urey	Brian	MyCoupons.com	Business Development Manager
649	Gonzales	Rachel	Nambe LLC	Ecommerce and Retail Manager
650	Cohen	Adina	National Packaging	VP
651	Karnen	Nechama	National Packaging	Director/Department Manager
652	kornfeld	gregg	National Pen Company	EVP/SVP
653	Grimes	Jim	National Trailer Supply	Director/Department Manager
654	Seitz	Craig	National Trailer Supply	Chairman/CEO/President/COO
655	odonnell	jim	NationwideSafes.com	Chairman/CEO/President/COO
656	Dunnwind	Scott	Navarre Distribution Services	Exhibit Manager
657	Joyce	Shannon	Navarre Distribution Services	Director/Department Manager
658	Douglas	Jeff	Nebraska Furniture Mart	Internet Marketing Manager
659	Gregorich	Chuck	Net Health Shops LLC	Chairman/CEO/President/COO
660	Windsor	Randy	Network Solutions	Online Marketing Coach
662	Haan	Douglas	Network.tc	Chairman/CEO/President/COO
664	Dunagan	Jesse	Neustar	Sales Engineer
665	Lyons	Dan	Neustar	Account Executive
666	Maciariello	Kim	Neustar	Marketing
667	El-Ezaby	Omar	Neustar, Inc.	Mobile Products
668	Maters	Jeff	New World Ventures	CFO
669	Barnhart	Allison	Newark	Email Analyst

	A	B	C	G
670	Holloway	Jerome	Newark	Director/Department Manager
671	Neirick	Mitchell	Newark	Director/Department Manager
672	Woods	Shakenna	Newark	SEM Analyst
673	Dreese	Mike	Newbury Comics, Inc.	Chairman/CEO/President/COO
674	Feil	Kristy	Newbury Comics, Inc.	Special Asst. to CEO-Web Development
675	Clark	James Ty""	Newgistics, Inc.	Director, Business Development
676	Pietrzykowski	Natalie	NextDayFlyers.com	Director/Department Manager
677	Mishra	Pravin	Nexvu APM, LLC	Chairman/CEO/President/COO
678	Nagar	Sachin	Nexvu APM, LLC	VP
679	Nath	Aditya	Nexvu APM, LLC	Chairman/CEO/President/COO
680	Parke	Joe	Niche Retail	Director/Department Manager
681	Besharat	Nicole	Nike	Director/Department Manager
682	Burrows	Jeff	Nike, Inc	Director/Department Manager
684	Laidlaw	Melanie	Northern Reflections	Director/Department Manager
685	Savvaidis	Ted	Northern Reflections	Director/Department Manager
686	Aceto	April	NRG Software	Director/Department Manager
687	Mashaal	Natalie	Nvitations.com	Chairman/CEO/President/COO
688	oberry	patrick	oberry capital	Chairman/CEO/President/COO
689	Schaffer	Steve	Offers.com	Founder & CEO
690	Peterseim	Bob	Old Time Candy Company	CIO/CTO
691	Anderson	Scott	OMEGA Processing Solutions LLC	Chairman/CEO/President/COO
692	Campion	Jeff	OMEGA Processing Solutions LLC	VP
693	Hamilton	B	Omni Works inc	VP
694	Calandra	Max	omniONE USA Inc.	CMO
695	Drews	Ron	omniONE USA Inc.	BDM
696	Lombardi	Davide	omniONE USA Inc.	Chairman/CEO/President/COO
697	Nazeer	Nadirah	omniONE USA Inc.	BDM
698	Rangoni Preatoni	Roberto	omniONE USA Inc.	Director/Department Manager
699	Giles	Julie	Omniture An Adobe Company	Sr. Corporate Events Manager
700	Tedeski	Kirk	Onestop Internet	Director/Department Manager
701	Tomich	John	Onestop Internet	CFO
702	Dupsky	Brandon	OnFair, Inc.	Chairman/CEO/President/COO
703	Hickey	Kevin	OnlineStores.com	Speaker
704	Love	Rob	OpinionLab Inc.	Senior Consultant
705	Edgett	Jim	Optaros	Director/Department Manager
706	Meany	Greg	Optaros, Inc.	Director/Department Manager
707	Caputo	Chris	Optiem, LLC	VP
708	Murphy	Jason	Optiem, LLC	Business Development Manager
709	Duval	Bernard	Orchestra	VP
710	St-Andre	Michel	Orchestra	Director/Department Manager
711	Benadiba	Michael	OrderDynamics Corp.	Chairman/CEO/President/COO
712	Berkovitz	Steven	OrderDynamics Corp.	VP
713	Rykova	Masha	OrderDynamics Corp.	Brand Ambassador
714	Walsh	Paul	OrderMotion, Inc.	Sales Executive
716	Nylen	Chris	Organizelt.com	Chairman/CEO/President/COO
717	Moulton	Donal	Origo	Director/Department Manager
718	Bolton	Cory	Our World Shops, Inc.	Web Designer
719	Horn	Ben	Our World Shops, Inc.	Chairman/CEO/President/COO
720	Loube	Brian	Our365	Director/Department Manager
722	Gargano	Shawn	Ozone Billiards	Chairman/CEO/President/COO
723	Bushnell	Howard	Packsize	Area Manager
724	griffis	michael	panador hats	VP
725	Zeigler	Judah	Panasonic	Director/Department Manager
726	Empfield	John	Panel Processing, Inc	Director/Department Manager
727	O'Brien	James	Partners Marketing Group	Chairman/CEO/President/COO
728	Fattal	George	PayLeap	VP of Sales
729	Miller	Scott	PayLeap	Chairman/CEO/President/COO
730	Minor	John	PayNearMe	VP
731	Zinick	Laurie	Peapod	Director/Department Manager
732	Johnson	Amanda	Pepperjam Network	Senior Account Executive
733	O'Reilly	Pete	Performance, Inc.	Director/Department Manager
734	Orleans	Danny	Permuto, Inc.	Director/Department Manager
735	Shroff	Rajat	Permuto, Inc.	EVP/SVP

	A	B	C	G
736	Swartz	Deanne	Permutto, Inc.	Director/Department Manager
737	Camacho	Diana	PersonalizationMall.com	Search Engine Acct Manager
738	Chun	Jeff	PersonalizationMall.com	Director/Department Manager
739	Ferrero	Dain	PersonalizationMall.com	Search Engine Acct Manager
740	Wessels	Zachary	Photoscramble.com	Sales and Marketing
741	Taylor	Jeff	Pilot Freight Services	Director/Department Manager
742	Lash	Lisa	PIP	Director/Department Manager
743	Daly	Dan	PIP Insurance	EVP/SVP
744	MacDonald	CJ	Pixazza	VP
745	Pedley	Rick	PK Safety Supply	Chairman/CEO/President/COO
746	Sojka	Curtis	PK Safety Supply	EVP/SVP
747	Torres	Xavier	Planet Payment, Inc.	VP
748	Cohen	Jeffrey	PM Digital	CIO/CTO
749	Vanecko	Justin	PM Digital	Director of Business Development
750	Dodds	Diane	Porters	VP
751	Dodds	Joe	Porters	Chairman/CEO/President/COO
752	DelGallego	Armando	Post Central, Inc.	VP
753	Fisher	Andy	Post Central, Inc.	Director/Department Manager
754	Silverman	David	PowerReviews	Director of Partnerships
755	Kennedy	Justin	preCharge Risk Management Solutions	Exhibit Manager
756	Potratz	Stan	Premier Sheep Supplies, Ltd	Chairman/CEO/President/COO
757	Cohen	Jeff	Price Network	Chairman/CEO/President/COO
758	Currimbhoy	Sadrudin	Prime Communications, LP	VP
759	Conserva	Max	Prime Source Direct Inc.	Chairman/CEO/President/COO
760	Mouty	Rick	ProFill Holdings / wearport.com	Chairman/CEO/President/COO
761	Ingemi	David	ProMax Commerce	Chairman/CEO/President/COO
762	Doese	Jason	Pure Fishing	Director/Department Manager
763	Hall	Karin	QCSS, Inc.	CSO
764	Scheinfeld	Hillel	Qoof	Chairman/CEO/President/COO
765	Ignotz	Parker	Quality Auto Parts	Manager
766	Carr	Eric	Quill	Program Analyst
767	Mallampati	Ganesh	Quill	Data Architect
768	Mehrotra	Prashant	Quill	App. Development Mgr.
769	Thiagarajan	Ashok	Quill	Programmer Analyst
770	Venkata	Umesh	Quill	Project Manager
771	Wilbert	Travis	Quill	Programmer Analyst
773	Feeney	Pat	Quill.com	Product Manager
774	Monroe	Megan	Quill.com	Associate Manger
775	Patula	Chris	Quill.com	Sr. Manager
776	Pecore	Court	Quill.com	Director/Department Manager
777	Taylor	Anna	R.W. Smith & Co.	Director/Department Manager
779	Moore	Brian	Rackspace Hosting	Solution Architect
780	Berger	Jason	Radio Systems	Sales Manager
781	DeJonge	Kristin	Radio Systems	Search Engine Marketer
782	Puckett	James	Radio Systems	Director/Department Manager
783	PuissÃ©gur	Jean-FranÃ§ois	RAMEL COMMUNICATION	Director/Department Manager
784	Randolph	Randy	Randolph & Associates	Chairman/CEO/President/COO
785	Gaudette	Yvonne	RatePoint	Director of Marketing
786	Holstein	David	RaveFloors.com	Chairman/CEO/President/COO
787	Samuels	Chris	RaveFloors.com	Director/Department Manager
788	Walker	Renee	RC Bigelow	Director/Department Manager
789	Sorensen	Bryan	Readers Digest - Milwaukee	Director/Department Manager
790	Yeary	Chet	ReadingGlasses.com	Director/Department Manager
791	Dhelin	Gauthier	Redcats USA	EVP/SVP
792	Randon	Emmanuel	Redcats USA	Director/Department Manager
793	Bingham	Roy	RenewLife Formulas	EVP/SVP
794	Chandler	Kreta	Retail Brand Strategies International, LLC	Chairman/CEO/President/COO
795	Harper	Chris	Retail Decisions	Director/Department Manager
796	Sawhney	Jasmeet	Retail Spokes	Chairman/CEO/President/COO
797	Potter	Tia	RetailConnections	EVP/SVP
798	Loera	Anthony	RevGenetics	Chairman/CEO/President/COO
799	Roman	Peter	Revman International	Internet Channel Manager
800	Condyles	Cady	Rimm-Kaufman Group	Director/Department Manager

	A	B	C	G
801	Banks	Nicole	Rise Interactive	Business Development
802	Diamond	Howard	Rise Interactive	Director/Department Manager
803	Anderson	Michael	Roberts Arts and Crafts	Director/Department Manager
804	kouzmanoff	catherine	Robo-Mail.com	Chairman/CEO/President/COO
805	Kouzmanoff	Keith	Robo-Mail.com	Director/Department Manager
806	Schwank	Brian	RockBottomGolf.com	Director/Department Manager
807	zuzanski	daniel	Rocket Clicks	Internet Marketing
808	Rockett	Mark	Rockett Interactive	Chairman/CEO/President/COO
809	Biehn	Brad	Rockler Companies	Director/Department Manager
810	Seward	Brandon	ROI Revolution, Inc.	other
811	Hebrard	Tony	Royal AV	Staff
812	Ravain	Mona	Royal AV	Staff
813	Robinson	Craig	Royal AV	Staff
814	Moriarty	Frank	RSM McGladrey	Director/Department Manager
815	conderino	paul	S&S Worldwide	web marketing manager
816	coy	carrie	S&S Worldwide	Director/Department Manager
817	ellal	greg	S&S Worldwide	Director/Department Manager
818	BenBassett	Richard	Sally Beauty Supply	Director/Department Manager
819	Sattler	Pamela	Santa's Letters and Gifts	Chairman/CEO/President/COO
820	Gregorich	Earl	SBDC at Wright State University	CBA
821	Oksiuta	Pam	SC Johnson	Sr. Manager
822	Wyner	Howard	Scentiments	Speaker
823	Bradford	Mark	Schawk Digital Solutions	Director/Department Manager
824	Fisher	Patricia	SeaBear Company	VP
825	Kennard	John	Searchandise Commerce	Director/Department Manager
826	Puopolo	John	Searchandise Commerce	CIO/CTO
827	Dismore	Gareth	SearchSpring	CIO/CTO
828	Zielinski	Scott	SearchSpring	VP
829	Daniel	Andrew	Sears Holdings	VP
830	Nothnagel	Glen	Sell Back Your Book	Chairman/CEO/President/COO
831	Kozusko	Paul	SellPoint	Director/Department Manager
832	Yeats	Dave	Sentier Strategic Resources	Partner
833	Mistofsky	David	SEOWhat.com Inc	Sr Account Manager
834	Seven	Catherine	SEOWhat.com Inc	Chairman/CEO/President/COO
835	Pallai	Megan	Shambhala Publications	Director/Department Manager
836	Sander	Jessica	ShareASale	Exhibit Manager
837	Tang	Carolyn	ShareASale	Director/Department Manager
838	Corcia	Hannah	SharkStores	Director/Department Manager
839	Petrosillo	Jeff	SharkStores	VP
840	Bansemer	Keith	Shindigz	Director/Department Manager
841	Frye	Jeff	Shindigz	Ecommerce marketing specialist
842	Ford	Gil	Shop Big Now LLC	Chairman/CEO/President/COO
843	Salzmann	Suzanne	Shop The Gift Basket Store	Director/Department Manager
844	Rasay	Daniel	ShopIgniter	Speaker
845	Ellison	Tony	Shoplet.com	Speaker
846	Lyttle	David	ShopNational.com	Director/Department Manager
847	Tate	Mike	ShopNational.com	EVP/SVP
848	Steinberg	Carol	ShopNBC	Speaker
849	Angelico	Brian	Shore Power Inc	Director/Department Manager
850	Brain	David	Show Data Solutions	Staff
851	Miles	Andre	Show Data Solutions	Staff
852	Kien	Johnny	Silver Jeans	E-Commerce Marketing Coordinator
853	Nicoll	Brennan	Silver Jeans	Online Store Manager
854	Piche	Dan	Sitebrand	Director/Department Manager
855	Ghahtani	Sultan	Sitecore	Director/Department Manager
856	Alexander	Sam	SkinCareRx.com	CMO
857	Pope	Mike	SkinCareRx.com	CFO
858	Graham	Robert	SKO Brenner American	EVP/SVP
859	Rossi	Hank	SKO Brenner American	Director/Department Manager
860	Larson	Mark	Skybridge Marketing Group	Director/Department Manager
861	Forsythe	Fiona	SLI Systems	Engineer
862	Faulise	Anthony	Snackable Media	VP
863	Golsorkhi	Andre	Snipi Inc	Chairman/CEO/President/COO

	A	B	C	G
864	Crabtree	Erika	Sobongo	Director/Department Manager
865	Udeshi	Raj	Social Amp	Director/Department Manager
866	Ritter	Emily	SoftwareMedia.com	CMO
867	Strauss	Lisa	SoftwareMedia.com	Marketing Coordinator
868	Heming	Peter	Solid Cactus Web.Com	VP
869	Kiva	Gregg	Specialty Store Services	Web Developer
870	weinstein	eric	Specialty Store Services	Chairman/CEO/President/COO
871	SWAIN	JULIE	SPECTRUM ALLIANCE	Chairman/CEO/President/COO
872	Duffy	Chris	SPEED FC	VP
873	Blackman	Graham	SpeedTax	Account Manager
874	Bianco	Jeff	SpellChecker.net	Chairman/CEO/President/COO
875	Alexander	Nick	Sportsman's Market, Inc.	catalog manager
876	Hearon	Jason	Sprinkler Warehouse	Director/Department Manager
877	Okelberry	Steven	Sprinkler Warehouse	Chairman/CEO/President/COO
878	Perillo	Scott	Statistics	Senior Account Executive
879	Renelt	Karl	Statistics	Senior Account Executive
880	chen	Chris	Steel House Media	Director/Department Manager
881	Frank	Cody	Steel House Media	CIO/CTO
882	Ernsberger	John	STELLAService	Chairman/CEO/President/COO
883	Earlenbaugh	Karen	Sterling, Inc.	Director/Department Manager
884	Yen	Lynn	StickerYou Inc.	Product Manager
885	Thomas	Bill	Straight North	Director/Department Manager
886	Foster	Douglas	Strapworks	Chairman/CEO/President/COO
887	Hooton	Matthew	Strapworks	Director/Department Manager
888	Colvin	Anne	Stuart Weitzman	EVP/SVP
889	Arshad	Shergul	StyleFeeder (Division of Time Inc.)	VP
890	Hornstein	David	StylePath	Chairman/CEO/President/COO
891	Martini	Justin	Summit Partners	Associate
892	nahigian	thomas	Summit Partners	associate
893	Rickard	Jenna	Summit Sports Inc	Director/Department Manager
894	Blair	Scott	Sun & Ski Sports	Director/Department Manager
895	Bossley	John	Sun & Ski Sports	Webmaster
896	Goldware	Barry	Sun & Ski Sports	Chairman/CEO/President/COO
897	Axen	Yaniv	SundaySky Inc.	CIO/CTO
898	Ahler	Patrick	Superb Internet	Director/Department Manager
899	Cory	Tom	Superb Internet	Sales Manager
900	Song	Will	Superb Internet	Product Manager
901	Harris	Ben	Supplies Network	Director/Department Manager
902	Reinkemeyer	David	Supplies Network	Director/Department Manager
903	Welchans	Greg	Supplies Network	Director/Department Manager
904	Davies	Malindi	Susquehanna	Analyst
905	Pfeifer	Tesa	Swanson Health Products	Web
906	Rice	Rachel	Swanson Health Products	Director/Department Manager
907	Hong	Steven	Sylvane	Chairman/CEO/President/COO
908	illies	fred	T4G Limited	Account Manager
909	Frenchu	Thomas	Tabcom LLC fka PetsUnited LLC	Chairman/CEO/President/COO
910	Vogel	Jake	Tabcom LLC fka PetsUnited LLC	VP
911	Lode	Bruce	TAM Retail	EVP/SVP
912	Rubin	Howard	Target Marketing Group	National Accounts Manager
913	Boxer	David	TBD Media LLC	Chairman/CEO/President/COO
914	Underwood	Simon	Teamcolours.com.au	-
915	Burba	Denis	Teavana	Director/Department Manager
916	Shannon	Ellen	Techmedia	Associate
917	Hill	Marcie	Technology Access TV	Technical Editor
918	Disraeli	Ryan	TeleSign Corporation	Chairman/CEO/President/COO
919	Kuhlendahl	Herman	Tension Packaging	Western Regional Sales Manager
920	Clevenger	Linda	Textrix Solutions	Chairman/CEO/President/COO
921	Macleod	Matt	Thanx Gifts	Director/Department Manager
922	Matker	Paul	Thanx Gifts	VP
923	Prenner	Sue	The Ben Silver Corp.	Chairman/CEO/President/COO
924	Prenner	Robert	The Ben Silver Corporation	Chairman/CEO/President/COO
925	White	Vicki	The Boeing Company	Designer
926	McKinvn	John	The Bradford Group	VP

	A	B	C	G
927	Belsky	Zev	The Chair Factory LTD	Chairman/CEO/President/COO
928	Brummond	Ryan	The Connection - Call Center	Director/Department Manager
929	Stone	Randolph T.	The Custom Company	Chairman/CEO/President/COO
930	Carver	Robin	The DelFin Project, Inc.	Account Manager
931	Rumsey	Scot	The DelFin Project, Inc.	TeamSalesAgent Reseller
932	Stearns	Tricia	The Douglas Stewart Company	Web Designer
933	Capinski	Nick	The Eastwood Company	Director/Department Manager
934	Huck	Brian	The Eastwood Company	CMO
935	Hanson	Darrin	The Felt Store	Chairman/CEO/President/COO
936	Harris	Chad	The Garden Gate	Chairman/CEO/President/COO
938	Shady	Michael	The Home Depot	VP
939	Johnsen	Debbie	The Leading Hotels of the World	Director/Department Manager
940	Koetter	Kristine	The Occasions Group	Director/Department Manager
942	Baxter	Steve	The Pond Guy	Web Developer
943	Quinlan	Tim	The Reunion Group, Inc.	EVP/SVP
945	Monson	Dale	The Sportsman's Guide, Inc.	CIO/CTO
946	Ben-Shmuel	Izac	The SWI Group	Chairman/CEO/President/COO
947	Grey	Darin	The SWI Group	CIO/CTO
948	Marks	Jethro	TheNile.com.au	Chairman/CEO/President/COO
949	Taylor	Mark	TheNile.com.au	Chairman/CEO/President/COO
950	Emery	Kenny	ThighGlider	Chairman/CEO/President/COO
952	Leedy	Justin	Things Remembered, Inc.	Director/Department Manager
953	Sih	Herb	Think Big Partners	Partner
954	Pennington	Sharon	Thompson & Co of Tampa, Inc.	Director/Department Manager
955	Kasantseva	Anastasia	Thomson Reuters	Director/Department Manager
956	Kasperek	Toni	Thomson Reuters	Director/Department Manager
957	Eityvydas	James	Tom's Foreign Auto Parts	Chairman/CEO/President/COO
958	Tole	Daniel	Tom's Foreign Auto Parts	Director/Department Manager
959	Owens	John	Tonerworld.com	Ecommerce Business Analyst
960	Pereira	Ron	Top Right, Inc	Chairman/CEO/President/COO
961	Devore	Melissa	Total Wine & More	Director/Department Manager
962	Traff	Gabrielle	Total Wine & More	Director/Department Manager
963	McMillan	Ryan	Trademark Global	VP
964	Sustar	Dan	Trademark Global	Chairman/CEO/President/COO
965	Sustar	Jim	Trademark Global	EVP/SVP
966	Spiegel	Sascha	Transcend People, Limited	Project Manager
967	Lin	Johnny	TravelSmith	Speaker
968	Stevenson	Clark	Treadmill Doctor	Chairman/CEO/President/COO
969	Cash	Chris	Trinity Road, LLC	Director/Department Manager
970	Gallucci	Michael	Triton Web Properties, Inc.	VP
971	Tesoriero	Stefan	Triton Web Properties, Inc.	EVP/SVP
972	DaRosa	Rose	True Value Company	Sr. Web Designer
973	Molk	Christopher	TSI Accessory Group	Director/Department Manager
974	Salama Pico	Jaime D.	Tuol	Consultant
975	Nettle	Brian	TurnTo Networks	Business Development
976	Lyman	Michael	Two Little Hands Productions	VP
977	Schoenfeld	David	Ugam Interactive	VP
978	Wagner	Mike	Uline	Director/Department Manager
979	Berman	Ray	UnbeatableSale	VP
980	Fisher	Eli	UnbeatableSale	Director/Department Manager
981	Goerke	Morgan	Under Armour	New Business Development Analyst
982	Greenblatt	Michael A	United Fulfillment Solutions, Inc	Chairman/CEO/President/COO
983	Sleater	Sonny	United Shipping Solutions	VP
984	Lacovell	Teri	United States Postal Service	Sales
985	Wightman	Doug	United Stationers	Sr. Merchandising Analyst
986	Jewell	Brian	University Cooperative Society	VP
987	Swain	Hulan	University Cooperative Society	Executive Assistant
988	Moscoso	Walt	U-PIC Insurance Services	Director/Department Manager
990	Miller	Rich	UPS	Director/Department Manager
991	Pagley	Nancy	UPS	Director/Department Manager
992	Sand	Brad	UPS	Director/Department Manager
993	Walls	Jill	UPS	Director/Department Manager
994	LaBatt	David	USA 800, Inc.	Exhibit Manager

	A	B	C	G
995	Beggs	Ben	Usablenet	Business Development Team Leader
996	Maass	Paul	Usablenet	Business Development Team Leader
997	Huth	Sara	USI Technologies	Account Executive
998	Pirayesh	Sohrab	Uxer Design	Executive Creative Director
999	Michael	Brian	V3RGE	CIO/CTO
1000	Wicker	Steve	V3RGE	Chairman/CEO/President/COO
1001	Bongiovanni	Katie	Vans	Director/Department Manager
1002	Zorr	Bill	Vans	eCom Marketing & Merchandising
1003	Burman	Jeffrey	VantageAmerica Solutions, Inc.	Chairman/CEO/President/COO
1004	Root	Karen	VaxServe	Director/Department Manager
1005	JAFFER	SUZANNE	VaxServe / sanofi pasteur	Project Leader
1006	Levine	Ilan	Venda	EVP/SVP
1007	Valenzuela	Emiliano	Venda	Brand Marketing Associate
1008	Klinge	Nicole	Ventura Web Design	Director/Department Manager
1010	Noel	Jeremy	Verbatim Americas, LLC.	Digital Marketing Manager
1011	Little	Joe	Verifi, Inc.	VP, Sales
1012	Bengal	Joseph	VeriShow.com	Director/Department Manager
1014	Noakes	Geoff	VeriSign	Director of Business Development
1015	Siverd	John	VeriSign	Partner Recruitment Executives
1016	Spang-Hanssen	Katrine	VeriSign	Manager
1017	Averbook	Chas	Vero Entertainment, Inc.	Chairman/CEO/President/COO
1018	Arenson	Andrew	Vertical Rail	Chairman/CEO/President/COO
1019	Bateman	Linda	Vertical Rail	CMO
1020	Conley	Colleen	Vertical Web Media	Staff
1021	Johnson	Brian	Veruta	VP
1022	Song	Paxton	Veruta	Chairman/CEO/President/COO
1023	Gaughan	Jay	Victoria's Secret Direct	Senior Analyst
1024	Kern	Bill	Virid, Inc.	Director/Department Manager
1025	Prinsloo	Nick	Virid, Inc.	VP
1026	Eng	Robert	Visa Inc	Director/Department Manager
1027	Cohen	Brian	Visiture	Chairman/CEO/President/COO
1028	Phillips	Adam	Visiture	Chairman/CEO/President/COO
1029	Canto	Karl	Vitacost	Director/Department Manager
1030	Myers	Christopher	vitacost.com	Director/Department Manager
1031	Haley	Lisa	Wakefern Food Corp	Director/Department Manager
1032	Iangan	Don	Wakefern Food Corp	Director/Department Manager
1034	Lesperance	Rich	Walgreen Co	Director/Department Manager
1035	Pandey	Deepika	Walgreens	Speaker
1036	Wanjari	Harshal	Walgreens	Platform Architect
1037	Shykofsky	Andrew	Walker Sands	VP
1039	Gondouin	Sylvie	Waters Corporation	Marketing Communications
1040	Franklin	Dakota	Wave Rave	Director/Department Manager
1041	Rice	Cory	Wave Rave	Director/Department Manager
1042	Lee	Warb	Web Stores America Inc.	Chairman/CEO/President/COO
1043	Bristow	Lisa	Web Stores and More	Director/Department Manager
1044	Main	Bob	Web Vision Centers	Chairman/CEO/President/COO
1045	Boults	Justin	Webgains USA	Sales Executive
1046	Fennell	Shawna	WebmasterRadio	Director/Department Manager
1047	LaBarre	Bryan	WEBS - America's Yarn Store	Director/Department Manager
1048	Pickett	Troy	Website Magazine	Director/Department Manager
1049	Wonham	Linc	Website Magazine	Reporter
1050	Springer	Kelly	Website Magazine	BUbusiness Development
1051	Benjamin	Eric	Weil Lifestyle, LLC	VP
1052	Tree II	Laurence	Weil Lifestyle, LLC	Chairman/CEO/President/COO
1053	DePaoli	Thomas	Weissman Designs for Dance / Dancewear Solutions	Director/Department Manager
1054	West	Ryan	West Music Company	EVP/SVP
1055	Windham	Jonathan	West Music Company	Director/Department Manager
1056	Bickford	Micah	Westminster Bookstore	Assistant Manager
1057	Raniere Zimmerman	Liz	White Flower Farm	Director/Department Manager
1058	Brown	David	Wiland Direct	VP
1059	Prolman	Gerald	Wildlife Works Retail Inc	Chairman/CEO/President/COO
1060	Flake	Nate	WinBuyer Ltd.	Sr. Account Executive
1061	Mankovsky	Irene	WinBuyer Ltd.	Exhibit Manager

	A	B	C	G
1062	Hume	Emmett	WineAccess	Chairman/CEO/President/COO
1063	Mittal	Saurabh	Wipro Technologies	Director/Department Manager
1064	Pagnotta	Randy	Wipro Technologies	Director/Department Manager
1065	Pradhan	Abhijeet	Wipro Technologies	Director/Department Manager
1066	Sethi	Ridhima	Wipro Technologies	Exhibit Manager
1067	Jesko	Katie	Wisconsinmade.com	Marketing Specialist
1068	spilkin	reuben	wizsupportusa.com	VP
1069	Ellsworth	Aaron	WMI Shops	VP
1070	Patel	Sammy	Women's Wear Daily	Director/Department Manager
1071	Vroustouris	George	Woodfield Media Inc	CEO
1073	Rydl	Darold	Woot Wholesale, LLC	President
1074	Olague	Jorge	World Food Programme	Head of Corporate Partnerships
1075	Wielezynski	Pierre	World Food Programme	Head of Web
1076	CIARAVINO	TJ	WORLDWIDE SPORT SUPPLY	EVP/SVP
1077	DEAMER	PAUL	WORLDWIDE SPORT SUPPLY	CMO
1078	PONNWITZ	BRYAN	WORLDWIDE SPORT SUPPLY	CIO/CTO
1079	Larson	Matt	wpsantennas.com	Director/Department Manager
1080	Graham	Hillary	WWD	Account Manager
1082	Coupe	Rahmon	YourAmigo	Chairman/CEO/President/COO
1083	Feig	Ze'ev	Zensah	Chairman/CEO/President/COO
1084	Van Pelt	Ben	Z-Firm, LLC / ShipRush	ShipRush Guru
1085	Baker	Shizuka	Zoovy Inc.	Director/Department Manager
1086	DiViesti	Rick	Zoovy Inc.	VP
1087	Dixon	Christy	Zoovy Inc.	Marketing Specialist

Resp. Ex. 17

RESPONDENT'S EXHIBIT

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28 Sep 2015

1. Consent Agenda:

a. Approval of Minutes

2. Main Agenda:

a. Reconsideration Request 15-13: Commercial Connect, LLC
*Rationale for Resolution 2015.09.28.NG02*b. Discussion of possible dissolution of the New gTLD
Program Committee.c. Review GDD efforts on Trust Marks and Public Interest
Commitments (PIC) Repository

1. Consent Agenda:

a. Approval of Minutes

Resolved (2015.09.28.NG01), the Board New gTLD Program
Committee (NGPC) approves the minutes of its 21 August 2015

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Connect, LLC

Whereas, Commercial Connect, LLC ("Requester") filed Reconsideration Request 15-13 seeking reconsideration of the Community Priority Evaluation ("CPE") panel's report, and ICANN's acceptance of that report, finding that the Requester did not prevail in CPE for the .SHOP string ("CPE Report"), and also challenging various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for the Requester's application.

Whereas, the Board Governance Committee ("BGC") thoroughly considered the issues raised in Reconsideration Request 15-13 and all related materials.

Whereas, the BGC recommended that Reconsideration Request 15-13 be denied because the Requester has not stated proper grounds for reconsideration, and the New gTLD Program Committee ("NGPC") agrees.

Resolved (2015.09.28.NG02), the NGPC adopts the BGC Recommendation on Reconsideration Request 15-13, which can be found at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB].

Rationale for Resolution 2015.09.28.NG02

I. Brief Summary

The Requester submitted a community-based application for the .SHOP gTLD ("Application"). The Requester's Application was placed into a contention set with eight other applications for .SHOP, two applications for .SHOPPING, and one application for 通販 (Japanese for "online shopping") (".SHOP/SHOPPING Contention Set"). Since the Requester's Application is community-based, the Requester was invited to, and did, participate in CPE. The Application did not prevail in CPE. As a result, the Application was placed back into the contention set.

The Requester claims that the CPE panel considering its Application ("CPE Panel"): (i) violated established policy or procedure in its consideration of the expressions of support for and opposition to the Requester's Application; and (ii) improperly applied the CPE criteria. The Requester also challenges various procedures governing the New gTLD Program including, among other things, the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the composition of the .SHOP/.SHOPPING Contention Set.

The Requester's claims are unsupported. First, all of the issues raised by the Requester are time-barred. Second, as to the Requester's challenge to the CPE Report, the Requester has not demonstrated that the CPE Panel acted in contravention of any established policy or procedure in rendering the CPE Report. The CPE Panel evaluated and applied the CPE criteria in accordance with all applicable policies and procedures, including but not limited to its consideration of the expressions of support for and opposition to the Requester's Application. The Requester presents only its substantive disagreement with the CPE Report, which is not a basis for reconsideration. Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding: (a) the procedures set forth in the Guidebook; (b) the outcome of the String Similarity Review; and (c) the outcome of its string confusion objections. The BGC therefore recommends that Request 15-13 be denied.

II. Facts

The BGC Recommendation on Reconsideration Request 15-13, which sets forth in detail the facts relevant to this matter, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Request 15-13 is available at

<https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB], and is attached as Exhibit B to the Reference Materials.

III. Issues

In view of the claims set forth in Request 15-13, the issues for reconsideration seem to be: (1) whether the CPE Panel violated established policy or procedure by failing to properly apply the CPE criteria in evaluating the Requester's Application; (2) whether the Board failed to consider material information or relied on false or inaccurate material information before approving the New gTLD Program and the Guidebook, specifically the application review procedures set forth in the Guidebook; and (3) whether the third-party experts that ruled on the Requester's 21 string confusion objections violated any established policy or procedure in rendering their determinations.

IV. The Relevant Standards for Evaluating Reconsideration Requests

The BGC Recommendation on Reconsideration Request 15-13, which sets forth the relevant standards for evaluating reconsideration requests and CPE, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Request 15-13 is available at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB], and is attached as Exhibit B to the Reference Materials.

V. Analysis and Rationale

The Requester challenges the "correctness" of the CPE Report, as well as various procedures governing the New gTLD Program, the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for the Requester's Application. As the BGC explains in detail in its Recommendation, all of the issues raised by the Requester are time-barred. Further, insofar as the Requester is challenging the CPE Report, the Requester has not demonstrated any misapplication of any policy or procedure by the CPE Panel in rendering the CPE Report. The Requester instead only presents its

substantive disagreement with the scoring and analysis in the CPE Report, which is not a basis for reconsideration.

Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding the procedures set forth in the Guidebook or the processing of its Application. The Requester argues, among other things, that: (a) CPE should not be required at all; (b) the Guidebook improperly fails to provide an appeals mechanism for CPE panel determinations; and (c) the Guidebook does not conform to the recommendations of ICANN's Generic Names Supporting Organization ("GNSO"). As discussed above, any challenge to the procedures set forth in the Guidebook are time-barred. Furthermore, in challenging the approval of the Guidebook, the Requester seeks reconsideration of Board action but does not demonstrate, as it must, that the Board either failed to consider material information or relied on false or inaccurate material information before approving the New gTLD Program and the Guidebook.

The Requester also asks that the Board "[r]eview and fix the issue with name similarity especially with any and all similar and confusing eCommerce strings." The Requester appears to claim that applications for various strings other than .SHOP should be included in the Requester's contention set because, in the Requester's view, "issuing multiple random and similar gTLDs will only yield very small registrations [on each gTLD] which in turn would make sustainability unfeasible." Although Request 15-13 is unclear, the Requester seems to make two different challenges in this respect. First, the Requester appears to challenge the Board's adoption of the String Similarity Review and string confusion objections procedures. Second, the Requester appears to challenge the actions of third-party evaluators and the Board with respect to: (1) the String Similarity Review performed for the Requester's .SHOP Application; and (2) the adjudication of the Requester's string confusion objections. Neither challenge warrants reconsideration. With respect to the Requester's first argument—not only is it long since time-barred, but the Requester has not

identified any material information the Board failed to consider, or any false or inaccurate material information that the Board relied upon, in adopting the procedures governing String Similarity Review or string confusion objections. With respect to the Requester's second argument—not only is it also long since time-barred, but the Requester does not identify any policy or process violation in the String Similarity Review Panel's determination, nor has the Requester identified any violation of established policy or procedure by the third-party experts who ruled on the Requester's myriad string confusion objections.

The full BGC Recommendation on Reconsideration Request 15-13, which sets forth the analysis and rationale in detail and with which the NGPC agrees, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Request 15-13 is available at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB], and is attached as Exhibit B to the Reference Materials.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Reconsideration Request 15-13. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Reconsideration Request 15-13 (<https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf> [PDF, 241 KB]), which shall be deemed a part of this Rationale and is attached as Exhibit B to the Reference Materials to the NGPC Paper on this matter.

Adopting the BGC's recommendation has no direct financial impact on ICANN and will not impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. Discussion of possible dissolution of the New gTLD Program Committee

No resolution taken.

c. Review GDD efforts on Trust Marks and Public Interest Commitments (PIC) Repository

No resolution taken.

Published on 30 September 2015

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Resp. Ex. 18

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 1:57:51 PM Pacific Standard Time

Subject: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review
Date: Tuesday, November 17, 2015 at 9:18:02 PM Pacific Standard Time
From: Jeff Smith
To: independentreview@icann.org

From: Jeffrey S. Smith [mailto:Contact Information Redacted]
Sent: Tuesday, November 17, 2015 11:37 PM
To: independantreview@icann.org; Christine Willett <christine.willett@icann.org>
Cc: McPherson, Patrick D. <Contact Information Redacted >; Mark C. Comtois <Contact Information Redacted >; 'Jen Wolfe' <Contact Information Redacted >; 'Jen Wolfe' <Contact Information Redacted >
Subject: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear Christine and new gTLD Team:

We are reaching out to ICANN to ask for assistance in cooperation in determining the best route for Commercial Connect, LLC to proceed in the .shop application.

We were waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be.

We anticipated to begin the Cooperative Engagement Process again but noticed on multiple ICANN documents that it still showed us in CEP.

Jen Wolfe then informed us on Nov 3, 2015 that the minutes were actually included and approved in the actual meeting which reduced our expected and already very short timeline to zero days to request CEP and only two weeks to get our legal team to finalize the IRP.

We literally worked all weekend and last night only to find all of the links to the ICDR as being invalid – We have no idea what we would be agreeing to and at what costs. I have attached screenshots for your review.

Other issue include material concerns with utilizing the ICDR based on prior experiences. They have not fully reimbursed us for the name similarity reviews we won. It also seems redundant to start an independent review request when so many other such requests have been filed expressing similar concerns and requesting that ICANN re-evaluate their actions on multiple issues where ICANN failed to follow their own policies, mission, core values and follow through on their promises, especially name similarity inconsistencies, biases and unfair treatments, community applications, CPE along with the many issues

addressed in our previous requests for reconsideration.

The purpose of this communication is to provide ICANN with notification of our intent to continue to object to all issues mentioned in our requests for reconsideration, inform ICANN that there are significant flaws with their Independent review procedures which prevent us from following ICANN's guidelines, especially if the ICDR site referenced is not available which make the details, terms and conditions and even the pricing details not available. We also do not have the ability to choose a different Independent Review facilitator when instances where it has been made abundantly clear that previous experiences yielded inconsistent, possibly biased and unstable results. In our opinion, the ICDR did not follow the documented guidelines on setting fees and providing complete refunds as well as not providing neutral experts as required in previous dispute issues. We simply feel they have proven themselves to be unreliable, inconsistent and not trustworthy. In addition, it is virtually impossible to bring them into legal actions without significant conflicts of interest.

Because of this, we feel that it would be prudent for ICANN to offer more than one choice on all issues regarding disputes and mediations. The ICDR has profited significantly with this new gTLD round awarded by ICANN. With ICANN being a party in the Independent review process it would make sense to have a neutral entity overseeing the process not a partner of ICANN.

In the interim we are requesting that ICANN suggest any alternatives using the ICDR and assist in providing us with terms and conditions for the independent review process and allow Commercial Connect, LLC an additional 30 days to submit our Independent review as we have also filed a DIDP and will need information contained therein to complete the request.

We will continue to work with our community and the other .shop applicants to see if there is some resolution to the this gTLD contention set and will work to keep ICANN informed on our progress.

Thank you for your continued support and consideration.

Jeffrey Smith



Jeffrey Smith

President, Commercial Connect, LLC.

Contact Information Redacted

Contact Information Redacted

<http://www.dotShop.com>

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Resp. Ex. 19

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 1:55:41 PM Pacific Standard Time

Subject: [Independent Review] FW: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Date: Wednesday, November 18, 2015 at 4:11:26 PM Pacific Standard Time

From: Independent Review (sent by Elizabeth Le <elizabeth.le@icann.org>)

To: Jeff Smith

CC: Independent Review

Dear Mr. Smith,

Thank you for your email. You stated in your email that you "were waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be" and that "Jen Wolfe then informed us on Nov 3, 2015 that the minutes were actually included and approved in the actual meeting which reduced our expected and already very short timeline to zero days to request CEP and only two weeks to get our legal team to finalize the IRP." We are unclear as to which minutes of which Board meeting in October 2015 you are seeking. We note that the Board Governance Committee (BGC) considered your Reconsideration Request 15-13 on 24 August 2015 and the NGPC considered it on 28 September 2015. Minutes from both of those meetings have been published. You can find the relevant BGC meeting minutes at <https://www.icann.org/resources/board-material/minutes-bgc-2015-08-24-en> (published on 3 September) and the NGPC relevant meeting minutes <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en> (published on 19 October). There was a BGC meeting on 18 October 2015, an NGPC meeting on 18 October 2015, and three Board meetings on 21 October and 22 October 2015, however, none of the agenda items for those meetings related to Commercial Connect's application for .SHOP. Those minutes have not been approved, and will be published promptly upon their approval.

You also state in your email that you "anticipated to begin the Cooperative Engagement Process again but noticed on multiple ICANN documents that it still showed us in CEP." We are uncertain to which documents you refer that show you as actively being engaged in the CEP. The most updated CEP/IRP Status Chart, published at <https://www.icann.org/en/system/files/files/irp-cep-status-10nov15-en.pdf>, does not identify Commercial Connect as being in active CEP.

With respect to the issues referenced in your email relating to the International Centre for Dispute Resolution's (ICDR) website, it is unclear from your email and the screenshot attachments as to what pages/information you were trying to access. Your email indicated that you "have no idea what we would be agreeing to and at what costs." Please note that the ICDR and ADR websites are working for us, including the pages containing information on filing fees, forms, guides, and case filing services. (See

With respect your request "that ICANN suggest any alternatives using the ICDR and assist in providing us with terms and conditions for the independent review process", the ICDR is the only Board appointed independent review provider. (See <http://www.icann.org/en/minutes/resolutions-19apr04.htm>) As such, we are unable to use a different provider for IRPs.

As to your request that ICANN grant Commercial Connect an additional 30 days in which to submit its IRP request,

the IRP filing deadline is a date mandated by the ICANN Bylaws. (See Bylaws, Art. IV, Sec. 3.) Therefore, ICANN cannot grant you the requested extension because to do so would be a violation of the Bylaws. Please note that the 30-day deadline in which to initiate an IRP on the Board's action relating to Reconsideration Request 15-13 expires at 11:59 pm PST today, 18 November 2015. Please further note that pursuant to the Cooperative Engagement Process (CEP), available at <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>, the deadline to initiate CEP on the Board's action relating to Reconsideration Request 15-13 is 15 days from the day of the posting of the Board minutes, which was 3 November 2015. We note that you attached a Notice of IRP to your email. Please advise whether you are initiating an IRP and if so, please let us know the basis of your claims, so that we can have a better understanding of what Board action or inaction you are challenging. Further, in order to formally initiate an IRP, you will need to sign the Notice of IRP and file 2 copies of the Notice with the ICDR with the filing fee and a description of the claim and of facts supporting it, as well as there relief and remedy sought, as provided for in the form Notice and the International Arbitration Rules of the ICDR Rules (available at http://www.icdr.org/icdr/faces/j_search/j_rule/j_rule_detail?doc=ADRSTAGE2025301&_afLoop=432831062749180&_afWindowMode=0&_afWindowId=zmn01v3z3_750#%40%3F_afWindowId%3Dzmn01v3z3_750%26_afLoop%3D432831062749180%26doc%3DADRSTAGE2025301%26_afWindowMode%3D0%26_adf.ctrl-state%3Dzmn01v3z3_810) if you have not already done so.

Finally, we are in receipt of your DIDP request, which will be responded to within the 30-day deadline.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

From: Jeff Smith Contact Information Redacted
Date: Tuesday, November 17, 2015 at 9:18 PM
To: "independentreview@icann.org" <independentreview@icann.org>
Subject: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

From: Jeffrey S. Smith [<mailto:>Contact Information Redacted]
Sent: Tuesday, November 17, 2015 11:37 PM
To: independantreview@icann.org; Christine Willett <christine.willett@icann.org>
Cc: McPherson, Patrick D. <Contact Information Redacted>; Mark C. Comtois <Contact Information Redacted>; 'Jen Wolfe' <Contact Information Redacted>; 'Jen Wolfe' <Contact Information Redacted>
Subject: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear Christine and new gTLD Team:

We are reaching out to ICANN to ask for assistance in cooperation in determining the best route for Commercial Connect, LLC to proceed in the .shop application.

We were waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be.

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We literally worked all weekend and last night only to find all of the links to the ICDR as being invalid – We have no idea what we would be agreeing to and at what costs. I have attached screenshots for your review.

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The purpose of this communication is to provide ICANN with notification of our intent to continue to object to all issues mentioned in our requests for reconsideration, inform ICANN that there are significant flaws with their Independent review procedures which prevent us from following ICANN's guidelines, especially if the ICDR site referenced is not available which make the details, terms and conditions and even the pricing details not available. We also do not have the ability to choose a different Independent Review facilitator when instances where it has been made abundantly clear that previous experiences yielded inconsistent, possibly biased and unstable results. In our opinion, the ICDR did not follow the documented guidelines on setting fees and providing complete refunds as well as not providing neutral experts as required in previous dispute issues. We simply feel they have proven themselves to be unreliable, inconsistent and not trustworthy. In addition, it is virtually impossible to bring them into legal actions without significant conflicts of interest.

Because of this, we feel that it would be prudent for ICANN to offer more than one choice on all issues regarding disputes and mediations. The ICDR has profited significantly with this new gTLD round awarded by ICANN. With ICANN being a party in the Independent review process it would make sense to have a neutral entity overseeing the process not a partner of ICANN.

In the interim we are requesting that ICANN suggest any alternatives using the ICDR and assist in providing us

with terms and conditions for the independent review process and allow Commercial Connect, LLC an additional 30 days to submit our Independent review as we have also filed a DIDP and will need information contained therein to complete the request.

We will continue to work with our community and the other .shop applicants to see if there is some resolution to the this gTLD contention set and will work to keep ICANN informed on our progress.

Thank you for your continued support and consideration.

Jeffrey Smith



Jeffrey Smith

President, Commercial Connect, LLC.

Contact Information Redacted

<http://www.dotShop.com>

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Resp. Ex. 20

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 2:12:17 PM Pacific Standard Time

Subject: RE: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Date: Thursday, December 3, 2015 at 3:47:20 AM Pacific Standard Time

From: Jeffrey Smith

To: 'Independent Review'

CC: casefiling@adr.org, Jeffrey Smith, Elizabeth Le

Dear ICANN Independent Review Team and Ms. Le:

It was and still is our intent to file the request for Independent Review as provided by the notice sent on Nov. 17th but still are unclear on what is needed and how to proceed.

If you could please assist us a bit more, we would appreciate it.

The link you provided to the adr.org does not seem to have any indications as to how to file or what is expected to file with the ICDR for an ICANN Independent review. It brings us to the general page for the American Arbitration Association page and our searches still do not result in any documented procedures and/or costs related to ICANN's Independent Review Process.

To be specific – the link contained below takes us to the home page of the American Arbitration Association

On the ICANN Page located at <https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-and-review> - Under Independent Review the link to the rules and procedures does not work.

For more information on the ICDR's International Arbitration rules and procedures, click [here](#).

In addition, the ICDR notice states the following:

To begin proceedings, please send two copies of this notice of independent review, with the filing fee as the ICDR. Send the original notice to the respondent.

But there is no link or reference as to where to find out what the filing fee is and/or what the rules are for this procedure.

We have also included a screen shot of the error received from the ICDR below:

The only reference to procedures, costs, etc. on the ICANN website that we can find send us to non-existent links.

We have also searched the adr.org website for ICANN and Independent Review but still only find Supplementary information and past decisions on String Similarity – nothing on the Rules, Procedures and costs.

Can you please assist us in understanding what needs to be done, what we can expect, how much it will cost and how to continue this process?

I hope that we have provided enough detailed information on the links that you understand we are at a loss as to how to proceed and expect ICANN to have significant documentation and information on their Independent Review process to allow us to be able to complete the request.

Thank you for your time and attention to this matter.

Sincerely,

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
1418 South Third Street
Contact Information Redacted

<http://www.dotShop.com> - Twitter: @dotShop_TLD

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From: Elizabeth Le [mailto:elizabeth.le@icann.org] **On Behalf Of** Independent Review
Sent: Wednesday, November 18, 2015 7:11 PM
To: Jeff Smith <Contact Information Redacted >
Cc: Independent Review <IndependentReview@icann.org>
Subject: FW: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear Mr. Smith,

Thank you for your email. You stated in your email that you "were waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be" and that "Jen Wolfe then informed us on Nov 3, 2015 that the minutes were actually included and approved in the actual meeting which reduced our expected and already very short timeline to zero days to request CEP and only two weeks to get our legal team to finalize the IRP." We are unclear as to which minutes of which Board meeting in October 2015 you are seeking. We note that the Board Governance Committee (BGC) considered your Reconsideration Request 15-13 on 24 August 2015 and the NGPC considered it on 28 September 2015. Minutes from both of those meetings have been published. You can find the relevant BGC meeting minutes at <https://www.icann.org/resources/board-material/minutes-bgc-2015-08-24-en> (published on 3 September) and the NGPC relevant meeting minutes <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en> (published on 19 October). There was a BGC meeting on 18 October 2015, an NGPC meeting on 18 October 2015, and three Board meetings on 21 October and 22 October 2015, however, none of the agenda items for those meetings related to Commercial Connect's application for .SHOP. Those minutes have not been approved, and will be published promptly upon their approval.

You also state in your email that you "anticipated to begin the Cooperative Engagement Process again but noticed on multiple ICANN documents that it still showed us in CEP." We are uncertain to which documents you refer that show you as actively being engaged in the CEP. The most updated CEP/IRP Status Chart, published at <https://www.icann.org/en/system/files/files/irp-cep-status-10nov15-en.pdf>, does not identify Commercial Connect as being in active CEP.

With respect to the issues referenced in your email relating to the International Centre for Dispute Resolution's (ICDR) website, it is unclear from your email and the screenshot attachments as to what pages/information you were trying to access. Your email indicated that you "have no idea what we would be agreeing to and at what costs." Please note that the ICDR and ADR websites are working for us, including the pages containing information on filing fees, forms, guides, and case filing services.

(See https://www.adr.org/aaa/faces/services/fileacase?authn_try_count=0&contextType=external&username=string&contextValue=%2Ffoam&password=sercure_string&challenge_url=https%3A%2F%2Fwww.adr.org%2Faaa%2Ffaces%2Fservices%2Ffileacase&request_id=-8368521219374246032&OAM_REQ=&locale=en_US&resource_url=https%253A%252F%252Fwww.adr.org%252Fwebfile%252Ffaces%252Fhome&_afLoop=3634834453843668&_afWindowMode=0&_afWindowId=hkui7pr3z_233#%40%3FOAM_REQ%3D%26_afWindowId%3Dhkui7pr3z_233%26locale%3Den_US%26_afLoop%26)

[3D3634834453843668%26contextValue%3D%252Foam%26challenge_url%3Dhttps%253A%252F%252Fwww.adr.org%252Faa%252Ffaces%252Fservices%252Ffileacase%26password%3Dsecure_string%26contextType%3Dexternal%26username%3Dstring%26request_id%3D-8368521219374246032%26authn_try_count%3D0%26resource_url%3Dhttps%25253A%25252F%25252Fwww.adr.org%25252Fwebfile%25252Ffaces%25252Fhome%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dhkui7pr3z_310.\)](https://www.adr.org/252Faa%252Ffaces%252Fservices%252Ffileacase%26password%3Dsecure_string%26contextType%3Dexternal%26username%3Dstring%26request_id%3D-8368521219374246032%26authn_try_count%3D0%26resource_url%3Dhttps%25253A%25252F%25252Fwww.adr.org%25252Fwebfile%25252Ffaces%25252Fhome%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dhkui7pr3z_310.)

With respect your request "that ICANN suggest any alternatives using the ICDR and assist in providing us with terms and conditions for the independent review process", the ICDR is the only Board appointed independent review provider. (See <http://www.icann.org/en/minutes/resolutions-19apr04.htm>) As such, we are unable to use a different provider for IRPs.

As to your request that ICANN grant Commercial Connect an additional 30 days in which to submit its IRP request, the IRP filing deadline is a date mandated by the ICANN Bylaws. (See Bylaws, Art. IV, Sec. 3.) Therefore, ICANN cannot grant you the requested extension because to do so would be a violation of the Bylaws. Please note that the 30-day deadline in which to initiate an IRP on the Board's action relating to Reconsideration Request 15-13 expires at 11:59 pm PST today, 18 November 2015. Please further note that pursuant to the Cooperative Engagement Process (CEP), available at <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>, the deadline to initiate CEP on the Board's action relating to Reconsideration Request 15-13 is 15 days from the day of the posting of the Board minutes, which was 3 November 2015. We note that you attached a Notice of IRP to your email.

Please advise whether you are initiating an IRP and if so, please let us know the basis of your claims, so that we can have a better understanding of what Board action or inaction you are challenging. Further, in order to formally initiate an IRP, you will need to sign the Notice of IRP and file 2 copies of the Notice with the ICDR with the filing fee and a description of the claim and of facts supporting it, as well as there relief and remedy sought, as provided for in the form Notice and the International Arbitration Rules of the ICDR Rules (available at http://www.icdr.org/icdr/faces/j_search/j_rule/j_rule_detail?doc=ADRSTAGE2025301&_afLoop=432831062749180&_afrWindowMode=0&_afrWindowId=zmn01v3z3_750#%40%3F_afrWindowId%3Dzmn01v3z3_750%26_afLoop%3D432831062749180%26doc%3DADRSTAGE2025301%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dzmn01v3z3_810) if you have not already done so.

Finally, we are in receipt of your DIDP request, which will be responded to within the 30-day deadline.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

From: Jeff Smith <Contact Information Redacted >

Date: Tuesday, November 17, 2015 at 9:18 PM

To: "independentreview@icann.org" <independentreview@icann.org>

Subject: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

From: Jeffrey S. Smith [<mailto:Contact Information Redacted>]

Sent: Tuesday, November 17, 2015 11:37 PM

To: independantreview@icann.org; Christine Willett <christine.willett@icann.org>

Cc: McPherson, Patrick D. <Contact Information Redacted>; Mark C. Comtois <Contact Information Redacted>; 'Jen Wolfe' <Contact Information Redacted>; 'Jen Wolfe' <Contact Information Redacted>

Subject: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear Christine and new gTLD Team:

We are reaching out to ICANN to ask for assistance in cooperation in determining the best route for Commercial Connect, LLC to proceed in the .shop application.

We were waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be.

We anticipated to begin the Cooperative Engagement Process again but noticed on multiple ICANN documents that it still showed us in CEP.

Jen Wolfe then informed us on Nov 3, 2015 that the minutes were actually included and approved in the actual meeting which reduced our expected and already very short timeline to zero days to request CEP and only two weeks to get our legal team to finalize the IRP.

We literally worked all weekend and last night only to find all of the links to the ICDR as being invalid – We have no idea what we would be agreeing to and at what costs. I have attached screenshots for your review.

Other issue include material concerns with utilizing the ICDR based on prior experiences. They have not fully reimbursed us for the name similarity reviews we won. It also seems redundant to start an independent review request when so many other such requests have been filed expressing similar concerns and requesting that ICANN re-evaluate their actions on multiple issues where ICANN failed to follow their own policies, mission, core values and follow through on their promises, especially name similarity inconsistencies, biases and unfair treatments, community applications, CPE along with the many issues addressed in our previous requests for reconsideration.

The purpose of this communication is to provide ICANN with notification of our intent to continue to object to all issues mentioned in our requests for reconsideration, inform ICANN that there are significant flaws with their Independent review procedures which prevent us from following ICANN's guidelines, especially if the ICDR site referenced is not available which make the details, terms and conditions and even the pricing details not available. We also do not have the ability to choose a different Independent Review facilitator when instances where is has been made abundantly clear that previous experiences yielded inconsistent, possibly biased and unstable results. In our opinion, the ICDR did not follow the documented guidelines on setting fees and providing complete refunds as well as not providing neutral experts as required in previous

dispute issues. We simply feel they have proven themselves to be unreliable, inconsistent and not trustworthy. In addition, it is virtually impossible to bring them into legal actions without significant conflicts of interest.

Because of this, we feel that it would be prudent for ICANN to offer more than one choice on all issues regarding disputes and mediations. The ICDR has profited significantly with this new gTLD round awarded by ICANN. With ICANN being a party in the Independent review process it would make sense to have a neutral entity overseeing the process not a partner of ICANN.

In the interim we are requesting that ICANN suggest any alternatives using the ICDR and assist in providing us with terms and conditions for the independent review process and allow Commercial Connect, LLC an additional 30 days to submit our Independent review as we have also filed a DIDP and will need information contained therein to complete the request.

We will continue to work with our community and the other .shop applicants to see if there is some resolution to the this gTLD contention set and will work to keep ICANN informed on our progress.

Thank you for your continued support and consideration.

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
Contact Information Redacted

<http://www.dotShop.com>

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Resp. Ex. 21

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 2:10:51 PM Pacific Standard Time

Subject: RE: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Date: Friday, December 4, 2015 at 1:07:24 PM Pacific Standard Time

From: Jeffrey Smith

To: Elizabeth Le

Thank you for your assistance as well – Not sure who might want to correct some links on ICANN's site as it may help others as well.

Sincerely,

Jeffrey Smith

From: Elizabeth Le [mailto:elizabeth.le@icann.org]

Sent: Thursday, December 3, 2015 3:35 PM

To: Jeffrey Smith Contact Information Redacted >

Cc: Jeffrey Smith Contact Information Redacted >; 'Independent Review' <IndependentReview@icann.org>

Subject: Re: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear Mr. Smith,

We note that the International Centre for Dispute Resolution has provided you with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know.

Best regards,

Liz Le

Senior Counsel

Internet Corporation for Assigned Names and Numbers (ICANN)

Direct: Contact Information Redacted

Email: elizabeth.le@icann.org

Skype: Contact Information Redacted

From: Jeffrey Smith Contact Information Redacted >

Date: Thursday, December 3, 2015 at 3:47 AM

To: 'Independent Review' <IndependentReview@icann.org>

Cc: "casefiling@adr.org" <casefiling@adr.org>, Jeffrey Smith Contact Information Redacted, Elizabeth Le

<elizabeth.le@icann.org>

Subject: RE: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear ICANN Independent Review Team and Ms. Le:

It was and still is our intent to file the request for Independent Review as provided by the notice sent on Nov. 17th but still are unclear on what is needed and how to proceed.

If you could please assist us a bit more, we would appreciate it.

The link you provided to the adr.org does not seem to have any indications as to how to file or what is expected to file with the ICDR for an ICANN Independent review. It brings us to the general page for the American Arbitration Association page and our searches still do not result in any documented procedures and/or costs related to ICANN's Independent Review Process.

To be specific – the link contained below takes us to the home page of the American Arbitration Association

On the ICANN Page located at <https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-and-review> - Under Independent Review the link to the rules and procedures does not work.

For more information on the ICDR's International Arbitration rules and procedures, click [here](#).

In addition, the ICDR notice states the following:

To begin proceedings, please send two copies of this notice of independent review, with the filing fee as the ICDR. Send the original notice to the respondent.

But there is no link or reference as to where to find out what the filing fee is and/or what the rules are for this procedure.

We have also included a screen shot of the error received from the ICDR below:

The only reference to procedures, costs, etc. on the ICANN website that we can find send us to non-existent links.

We have also searched the adr.org website for ICANN and Independent Review but still only find Supplementary information and past decisions on String Similarity – nothing on the Rules, Procedures and costs.

Can you please assist us in understanding what needs to be done, what we can expect, how much it will cost and how to continue this process?

I hope that we have provided enough detailed information on the links that you understand we are at a loss as to how to proceed and expect ICANN to have significant documentation and information on their Independent Review process to allow us to be able to complete the request.

Thank you for your time and attention to this matter.

Sincerely,

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
Contact Information Redacted

<http://www.dotShop.com> - Twitter: [@dotShop_TLD](https://twitter.com/dotShop_TLD)

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Sent: Wednesday, November 18, 2015 7:11 PM
To: Jeff Smith <Contact Information Redacted >
Cc: Independent Review <IndependentReview@icann.org>
Subject: FW: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

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With respect to the issues referenced in your email relating to the International Centre for Dispute Resolution's (ICDR) website, it is unclear from your email and the screenshot attachments as to what pages/information you were trying to access. Your email indicated that you "have no idea what we would be agreeing to and at what costs." Please note that the ICDR and ADR websites are working for us, including the pages containing information on filing fees, forms, guides, and case filing services.

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[3D3634834453843668%26contextValue%3D%252Foam%26challenge_url%3Dhttps%253A%252F%252Fwww.adr.org%252Faa%252Ffaces%252Fservices%252Ffileacase%26password%3Dsecure_string%26contextType%3Dexternal%26username%3Dstring%26request_id%3D-8368521219374246032%26authn_try_count%3D0%26resource_url%3Dhttps%25253A%25252F%25252Fwww.adr.org%25252Fwebfile%25252Ffaces%25252Fhome%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dhkui7pr3z_310.\)](https://www.adr.org/252Faa%252Ffaces%252Fservices%252Ffileacase%26password%3Dsecure_string%26contextType%3Dexternal%26username%3Dstring%26request_id%3D-8368521219374246032%26authn_try_count%3D0%26resource_url%3Dhttps%25253A%25252F%25252Fwww.adr.org%25252Fwebfile%25252Ffaces%25252Fhome%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dhkui7pr3z_310.)

With respect your request "that ICANN suggest any alternatives using the ICDR and assist in providing us with terms and conditions for the independent review process", the ICDR is the only Board appointed independent review provider. (See <http://www.icann.org/en/minutes/resolutions-19apr04.htm>) As such, we are unable to use a different provider for IRPs.

As to your request that ICANN grant Commercial Connect an additional 30 days in which to submit its IRP request, the IRP filing deadline is a date mandated by the ICANN Bylaws. (See Bylaws, Art. IV, Sec. 3.) Therefore, ICANN cannot grant you the requested extension because to do so would be a violation of the Bylaws. Please note that the 30-day deadline in which to initiate an IRP on the Board's action relating to Reconsideration Request 15-13 expires at 11:59 pm PST today, 18 November 2015. Please further note that pursuant to the Cooperative Engagement Process (CEP), available at <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>, the deadline to initiate CEP on the Board's action relating to Reconsideration Request 15-13 is 15 days from the day of the posting of the Board minutes, which was 3 November 2015. We note that you attached a Notice of IRP to your email.

Please advise whether you are initiating an IRP and if so, please let us know the basis of your claims, so that we can have a better understanding of what Board action or inaction you are challenging. Further, in order to formally initiate an IRP, you will need to sign the Notice of IRP and file 2 copies of the Notice with the ICDR with the filing fee and a description of the claim and of facts supporting it, as well as there relief and remedy sought, as provided for in the form Notice and the International Arbitration Rules of the ICDR Rules (available at http://www.icdr.org/icdr/faces/j_search/j_rule/j_rule_detail?doc=ADRSTAGE2025301&_afrLoop=432831062749180&_afrWindowMode=0&_afrWindowId=zmn01v3z3_750#%40%3F_afrWindowId%3Dzmn01v3z3_750%26_afrLoop%3D432831062749180%26doc%3DADRSTAGE2025301%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dzmn01v3z3_810) if you have not already done SO.

Finally, we are in receipt of your DIDP request, which will be responded to within the 30-day deadline.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

From: Jeff Smith <Contact Information Redacted >

Date: Tuesday, November 17, 2015 at 9:18 PM

To: "independentreview@icann.org" <independentreview@icann.org>

Subject: [Independent Review] FW: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

From: Jeffrey S. Smith [<mailto:Contact Information Redacted>]

Sent: Tuesday, November 17, 2015 11:37 PM

To: independantreview@icann.org; Christine Willett <christine.willett@icann.org>

Cc: McPherson, Patrick D. <Contact Information Redacted>; Mark C. Comtois <Contact Information Redacted>; 'Jen Wolfe' <Contact Information Redacted>; 'Jen Wolfe' <Contact Information Redacted>

Subject: ICANN and .shop Application Notice of CEP and request for assistance for Independent Review

Dear Christine and new gTLD Team:

We are reaching out to ICANN to ask for assistance in cooperation in determining the best route for Commercial Connect, LLC to proceed in the .shop application.

We were waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be.

We anticipated to begin the Cooperative Engagement Process again but noticed on multiple ICANN documents that it still showed us in CEP.

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We will continue to work with our community and the other .shop applicants to see if there is some resolution to the this gTLD contention set and will work to keep ICANN informed on our progress.

Thank you for your continued support and consideration.

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
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Resp. Ex. 22

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 2:18:06 PM Pacific Standard Time

Subject: Re: Board action regarding Commercial Connect request 15-13
Date: Saturday, December 12, 2015 at 10:38:57 PM Pacific Standard Time
From: Elizabeth Le
To: Brittany McKenna

Dear Ms. McKenna,

Thank you for your email. As we advised Mr. Smith in the attached email on 18 November 2015, the Board has already taken action on Reconsideration Request 15-13. Specifically, the Board New gTLD Program Committee (NGPC), established by the Board on 10 April 2012 with all the legal and decision making authority of the Board relating to the New gTLD Program for the current round (<https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>), considered the Board Governance Committee's (BGC) Recommendation on Reconsideration Request 15-13 at the NGPC's meeting on 28 September 2015 (See Resolution 2015 09 28 NG02, <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>.) The NGPC's decision was published on both the Board meetings page at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en> and the Reconsideration Request page at <https://www.icann.org/resources/pages/reconsideration-15-13-commercial-connect-2015-07-14-en>. The Minutes and briefing materials of the NGPC's 28 September 2015 meeting were published on 19 October 2015. (See <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en>, and <https://www.icann.org/resources/pages/briefing-materials-2014-03-24-en>.)

As we advised Mr. Smith in our 18 November 2015 email, the 30-day Bylaws-mandated deadline in which to initiate an Independent Review Process (IRP) on the Board's action relating to Reconsideration Request 15-13, which is calculated from "the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation" expired at 11:59 pm PST on 18 November 2015. (ICANN Bylaws, Art. IV, Section 3.3, available at <https://www.icann.org/resources/pages/governance/bylaws-en#IV>.)

We note that your client recognized the expiration of this deadline, as indicated in his email of 17 November 2015, when he wrote:

Jen Wolfe then informed us on Nov 3, 2015 that the minutes were actually included and approved in the actual meeting which reduced our expected and already very short timeline to zero days to request CEP and only two weeks to get our legal team to finalize the IRP.

We literally worked all weekend and last night only to find all of the links to the ICDR as being invalid – We have no idea what we would be agreeing to and at what costs. I have attached screenshots for your review.

A copy of Mr. Smith's 17 November 2015 is attached. In my 18 November 2015 response, I provided him with all the ICDR resources in which to complete his filing. I also advised him that:

in order to formally initiate an IRP, you will need to sign the Notice of IRP and file 2 copies of the Notice with the ICDR with the filing fee and a description of the claim and of facts supporting it, as well as there [sic] relief and remedy sought, as provided for in the form Notice and the International Arbitration Rules of the ICDR Rules (available at http://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTAGE2025301&_afLoop=432831062749180&_afWindowMode=0&_afWindowId=zmn01v3z3_750#%40%3F_afWindowId%3Dzmn01v3z3_750%26_afLoop%3D432831062749180%26doc%3DADRSTAGE2025301%26_afWindowMode%3D0%26_adf.ctrl-state%3Dzmn01v3z3_810) if you have not already done so.

We did not hear from Mr. Smith and he took no further action or make any further statements with respect to the IRP until 15 days later, when he penned the attached email on 3 December 2015 stating, "It was and

still is our intent to file the request for Independent Review as provided by the notice sent on Nov. 17th but still are unclear on what is needed and how to proceed.” The ICDR was also copied on this email. That same day, the ICDR responded to Mr. Smith’s 3 December 2015 email, copying ICANN, and again provided him with all the resources necessary to file an IRP. A copy of the ICDR’s 3 December 2015 email is attached. That same day, I also followed up with Mr. Smith, stating, “We note that the International Centre for Dispute Resolution has provided you with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know.” A copy of my 3 December 2015 email is attached.

In separate communications with ICANN, Mr. Smith has indicated that he “feel[s] that we have been promised the right to operate the .shop TLD but following ICANN's procedures and have met all requirements as outlined by ICANN, the gNSO and our community but now are being forced to sign an agreement stating that we give permission to ICANN to Auction the delegation”. (See Case Comment from Jeffrey Smith dated 4 December 2015 attached hereto.) This belief is mistaken and contrary to the facts, as ICANN has not promised Mr. Smith or any other party “the right to operate the .SHOP TLD.”

To the extent Mr. Smith may feel that he was promised the right to operate .SHOP because of Commercial Connect’s application in 2000, he is mistaken. As has previously been explained to Mr. Smith, upon submitting an application for the current new gTLD round and accepting a credit toward the evaluation fee (based on Commercial Connect’s participation in the 2000 proof-of-concept round), Commercial Connect accepted the terms and conditions of the current round, including the guidelines of the Applicant Guidebook (AGB). Module 1.5.1 of the AGB specifically states that the credit “[...] is subject to [...] a confirmation that the applicant was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the applicant has no legal claims arising from the 2000 proof-of-concept process”. (AGB, Module 1, <http://newgtlds.icann.org/en/applicants/agb/intro-04jun12-en.pdf>.) By agreeing to the terms and conditions of the current new gTLD round, which includes the terms and conditions set forth in the AGB, Commercial Connect confirmed that it had no legal claims to the .SHOP TLD.

We further note that ICANN has also reached out to Mr. Smith several times regarding the auction that has been scheduled for the .SHOP/.SHOPPING contention set. Specifically, ICANN has advised Mr. Smith on several occasions that the Bidder Documents must be submitted by 26 November 2015 in order to participate in the auction, otherwise the planning process for the auction could move forward without him.

I hope you find this information helpful. Please let me know if you have any additional questions.

Best regards,
Liz Le
Senior Counsel
Internet Corporation for Assigned Names and Numbers (ICANN)

Direct: Contact Information Redacted
Email: elizabeth.le@icann.org
Skype: Contact Information Redacted

From: Brittany McKenna <Contact Information Redacted >
Date: Thursday, December 10, 2015 at 8:14 AM
To: Elizabeth Le <elizabeth.le@icann.org>

Subject: Board action regarding Commercial Connect request 15-13

Ms. Le,

My name is Brittany McKenna, and I've been retained by Commercial Connect, LLC. My client is currently weighing its options concerning its current ICANN application. At present, we are considering pursuing the Independent Review Process as provided in Section 3 of the ICANN Bylaws.

It's my understanding, based on the Board agendas published on the ICANN website, that the Board **has not yet rendered** its final decision as to the Board Governance Committee's recommendation to deny my client's Reconsideration Request (15-13). The BGC published its recommendation on August 24, 2015. Since that time, it is my understanding that the Board **has not taken action on the BGC's August 24th recommendation** (per Section 2:17 of the ICANN Bylaws).

Please advise if this information is correct. Given the time limitations attendant to the IRP, I must build a very precise timeline of Board and Committee actions before my client can move forward.

Your attention to this matter is greatly appreciated. Thank you!

Brittany Bailey McKenna
Attorney
Avery & Schurman
115 N. Watterson Trail
Louisville, Kentucky 40243-1381
P: 502-244-8099
F: 502-244-9743

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Resp. Ex. 23

RESPONDENT'S EXHIBIT

Intent to Auction Notification for 1-1830-1672

Your application for [SHOP: App ID # 1-1830-1672] is currently in a string contention set with at least one other application and meets the eligibility requirements to receive this notice of Intent to Auction to resolve string contention. As stated in section 4.3 of the Applicant Guidebook, Auctions are the Mechanism of Last Resort to resolve string contention.

This case serves as your notice to participate in an Auction to resolve string contention for your application 1-1830-1672.

For detail regarding Auction scheduling, please see the Auction Schedule available on the Auction Resources section of the New gTLD Auction landing page:

<http://newgtlds.icann.org/en/applicants/auctions#resources>.

To ensure this application is ready to participate in the Auction, the completion of several forms and the execution of a Bidder Agreement is required within twenty-eight (28) days of this notice.

Please click on the link below to complete the specified forms. You will then be prompted to download, execute and submit the necessary forms to participate in the Auction.

<https://c.na14.visual.force.com/apex/AuctionInviteConfirmation?id=a07d000000LcvvHAAR>

Completion of the forms does not prohibit the members of the contention set from continuing efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement.

The forms will provide the opportunity to request a postponement to the Auction. Completion of the web form by the deadline specified above is required even if requesting a postponement, to ensure that if postponement is not granted the applicant is prepared for an Auction should it be necessary.

Failure to return the specified forms within twenty-eight (28) days of this Intent to Auction notification may result in the rejection of your application. ICANN reserves the right not to delegate a gTLD if none of the applications in an active contention set completes the forms necessary to participate in the Auction by such deadline.

If you have questions, please respond by adding a comment to this case.

Resp. Ex. 24

RESPONDENT'S EXHIBIT

Comment**Created By: Jared Erwin (1/25/2016 3:27 PM)**

Dear Jeffrey Smith,

Thank you for your inquiry. If you have any questions about the purported Independent Review Process that Commercial Connect has filed, please have your attorney send a note to independentreview@icann.org

Best regards,

New gTLD Operations

Created By: Jeffrey Smith (1/25/2016 12:54 PM)

We have invoked a formal request for Independent Review accountability mechanism - Because of such we would expect all related eCommerce Applications to be subject to this review process.

Would you please provide us with an acknowledgement that is aware of this accountability mechanism being in place and they will abide by their own procedures which includes stopping any and all resolution mechanisms including the action scheduled for January 27.

Created By: Grant Nakata (1/15/2016 3:50 PM)

Dear Jeffrey Smith,

This is a notification that an update has been made to the .SHOP/.SHOPPING contention set. These updates can be seen on the Contention Set Status page: <https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus>. Because of the withdrawal of application 1-1631-16988 (Sea Tigers, LLC), application 1-845-21316 (Uniregistry, Corp.) has prevailed and indirect contention has been removed from the contention set. As shown in the diagram on Slide 3 of the presentation found here:

<http://newgtlds.icann.org/en/applicants/auctions/indirect-contention-08dec15-en.pdf>), indirect contention no longer exists within the set, and the auction will proceed as any other direct contention auction. The New gTLD Auctions Rules now take precedence; these rules are available on the auctions microsite here: <http://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf>.

As a reminder, the deposit deadline is 20 January 2016, and the auction will proceed as scheduled on 27 January 2016.

Should you have any additional questions about the auction, please do not hesitate to contact us. You may respond directly to this case.

Thank you and best regards,

New gTLD Operations

Created By: Jared Erwin (1/15/2016 9:01 AM)

Dear Jeffrey Smith,

This is a final reminder that today is the deadline to submit the auction documents if you wish to participate in the auction. If we do not receive the forms by today close-of-business, the auction will still proceed as scheduled and you will

be unable to participate.

Please let me know if you have any questions about the forms as soon as possible.

Thank you and best regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (1/7/2016 4:01 PM)

Dear Jeffrey Smith,

Thank you for taking the time to speak on the phone with us today. I just want to summarize what we discussed regarding the auction:

- The auction has not been postponed and is still scheduled for 27 January 2016
- To participate in the auction, the remaining bidder forms (Bidder Agreement/Supplement) must be submitted. You may still do this at the link to the Auction Invite above. These forms must be submitted no later than 15 January 2016 if you wish to participate in the auction. If we do not receive the forms by this date, the Auction will still proceed as scheduled and you will be unable to participate.
- Please also note that the later the forms are submitted, the less amount of time is available to participate in Power Auctions preparation activities, such as Mini-Mocks or Mock auctions. For that reason, we suggest submitting the documents as soon as possible and not wait until 15 January 2016.
- The Deposit Deadline is 20 January 2016. After this date, a "quiet period" will begin. However, to reiterate, if we do not receive the bidder forms by 15 January 2016, you will still be unable to access the Power Auctions Auction Management System and you will be unable to submit a deposit or participate in the auction.

Thank you again for your time, and please do not hesitate to contact us with any questions.

Best regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (12/23/2015 2:49 PM)

Dear Jeffrey Smith,

I would like to clarify something from my last message. As you will note, the deadline for the Bidder Agreement is 15 January 2016. As a reminder, this Bidder Agreement is with ICANN's Auction Service Provider, Power Auctions LLC ("Power Auctions"). Power Auctions requires this Bidder Agreement for conducting their preparation of the Auction event and of the Auction Management System (AMS) (for more information, see bidder training videos: <http://newgtlds.icann.org/en/announcements-and-media/video/tutorials/auctions>; and the rules: <http://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>).

Participation in all Auction preparation activities and events is contingent upon receipt of the Bidder Agreement. Should the Bidder Agreement not be submitted by the deadline (15 January 2016) you will be unable to participate in the mini-mock or mock auctions, and more importantly, the Auction event on 27 January 2016.

Finally, so that you are aware, in order to move forward with the Auction preparation, Power Auctions will set up a bidder account for Commercial Connect LLC. However, this account will be considered inactive until receipt of the Bidder Agreement.

Again, please let us know if you have specific questions. We are happy to discuss over the phone.

Thank you and best regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (12/22/2015 3:46 PM)

Dear Jeffrey Smith,

This message is a reminder that as of today we are not aware of any accountability mechanisms that have been invoked impacting the .SHOP/.SHOPPING contention set. In light of that, the auction is still scheduled for 27 January 2016. Below is the timeline of events as we approach the auction date. Your participation in the auction is contingent upon your submission of the required documents and meeting the deadlines below. While participation in the mini-mock and mock auctions is not required, it is highly encouraged as they are conducted so applicants/bidders may have any questions about the bidding process answered ahead of the auction event.

15 January 2016 – Bidder Agreement due (deadline cannot be extended)

Week of 18 January 2016 – Mini-Mock auction(s)

20 January 2016 – Deposit Deadline (deadline cannot be extended)

26 January 2016 – Mock auction

27 January 2016 – Auction event

If you have specific questions about this process or the documents, please let us know. We are happy to set up a call to discuss those with you.

Thank you and best regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (12/18/2015 8:55 AM)

Dear Jeffrey Smith,

This message is a reminder that as of today we are not aware of any accountability mechanisms that have been invoked impacting the .SHOP/.SHOPPING contention set. In light of that, the auction is still scheduled for 27 January 2016. Please submit the required documentation as soon as possible. If you have specific questions about this process or the documents, please let us know. We are happy to set up a call to discuss those with you.

Thank you and best regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (12/15/2015 11:19 AM)

Dear Jeffrey Smith,

Thank you again for providing the postponement request in Case 191488. At this time no postponement has been granted because not all members of the Contention Set submitted a postponement request. The Auction is expected to be conducted as planned per the Auction Schedule.

Confirmation of your Auction Date will be issued by ICANN through a case in the Customer Portal at least 21 days in advance of your Auction.

Best Regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (12/11/2015 3:43 PM)

Dear Jeffrey Smith,

Thank you for your comments of 4 December 2015. We have reviewed them and address the issues raised in your case comment below.

With respect to your comment that “[w]e have received no information on the process whatsoever other than what is contained in the applicant guidebook”, the Auction webpage on the New gTLD microsite contains auction resources, including, but not limited to, the following documents:

- Auction Rules for Indirect Contention (<http://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>)
- Indirect Contention Deck for how the auction will proceed (<http://newgtlds.icann.org/en/applicants/auctions/indirect-contention-03dec14-en.pdf>)
- Including an updated version from 8 December 2015 (<http://newgtlds.icann.org/en/applicants/auctions/indirect-contention-08dec15-en.pdf>).

Additionally, ICANN has held several Webinars on the Auction process and rules and how the auctions would be handled:

- See Web Conference Recording, available at <https://icann.adobeconnect.com/p16l6uyzrkj/>;
- Teleconference Recording, available at <http://audio.icann.org/new-gtlds/webinar-auction-rules-indirect-contention-03dec14-en.mp3>;
- Presentation Materials, available at <http://newgtlds.icann.org/en/applicants/auctions/indirect-contention-03dec14-en.pdf>.

As we previously advised you in our communications and as provided for in the Auction Rules for New gTLDs: Indirect Contentions Edition (link above), the auction process requires that the Bidder Documents be submitted by certain deadlines in order for the auction to proceed. Because the .SHOP/.SHOPPING auction has been scheduled for 27 January 2016, the Bidder Documents must be submitted by 26 November 2015 in order for any party to participate in this auction. We are happy to assist you in answering any questions you may have, especially regarding the auction process and in completing the Bidder Documents.

With respect to the issues that you raised regarding pending accountability mechanisms, as noted in the Indirect Auction

Rules (link above), in order for a Contention Set to be eligible for an auction, all active applications in the Contention Set must have, among other criteria, no pending ICANN Accountability Mechanisms. (See Auction Rules: Indirect Contentions Edition at para. 8.) To date, we are not aware of any accountability mechanisms that have been invoked impacting the .SHOP/.SHOPPING contention set.

With respect to your statement that “[w]e feel that we have been promised the right to operate the .shop TLD”, upon submitting an application for the current New gTLD round and accepting a credit toward the evaluation fee (based on your participation in the 2000 proof-of-concept round), you accepted the terms and conditions of the current round, including the guidelines of the Applicant Guidebook (AGB). Module 1.5.1 of the AGB specifically states that the credit “[...] is subject to [...] a confirmation that the applicant was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the applicant has no legal claims arising from the 2000 proof-of-concept process” (<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>). By agreeing to the terms and conditions of the current New gTLD round, which includes the terms and conditions set forth in the AGB, you confirmed that you have no legal claims to the .SHOP TLD.

We hope this information has been helpful to you, and we again wish to express our desire to assist in any way we can. As stated previously, it is important that you complete the Bidder Documents and submit as soon as possible. If you do wish to discuss any questions you have, please provide those specific questions to us and we can set up a call to discuss with you. You may respond directly to this case.

Thank you and best regards,

New gTLD Operations

Created By: Jared Erwin (12/8/2015 4:01 PM) | Last Modified By: Jared Erwin (12/8/2015 4:01 PM)

Dear Jeffrey Smith,

Attached to this case, you will find an updated Indirect Contention PowerPoint Deck with additional examples for the Complex Set scenario. It will also soon be posted to the Auctions microsite here:
<http://newgtlds.icann.org/en/applicants/auctions>.

You may also find information on the Rules for Indirect Contention on the Auctions microsite here:
<http://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>.

Should you have any questions, please do not hesitate to contact us.

Thank you and best regards,

New gTLD Operations

Created By: Jared Erwin (12/4/2015 5:04 PM)

Dear Jeffrey Smith,

Thank you for your comments. We are reviewing them and will get back to you. However, I'd like to remind you that the deadline to submit the auction documentation by today (4 December 2015) still stands.

Best regards,

Jared Erwin
New gTLD Operations

Created By: Jeffrey Smith (12/4/2015 2:21 PM)

Dear ICANN,

At this time we do have issues that are preventing us from agreeing to your Auction Bidding Agreement and your supplementary provisions. Not only have we submitted a notice of Independent Review but we also have submitted a DIDR to inquire as to exactly how the contention set is to be handled. We have received no information on the process whatsoever other than what is contained in the applicant guidebook. From what was explained to us at the Los Angeles ICANN Meeting which occurred before the decision was made on how to proceed ICANN was asking for comments which we supplied but have received nothing on the decision of ICANN on how they will progress.

We feel that ICANN is trying to force us to sign an auction agreement under duress while asking us to agree with terms and conditions that are unclear and almost impossible to determine. We also feel that ICANN is imposing unrealistic timelines on multiple issues designed to make it impossible to object, get clear understanding and provide threats, such as "you will not be allowed to participate in the auction if you do not sign this agreement," if we have questions or want clarity.

As we stated previously we are trying to complete the Request for Independent Review at exactly the same time as you are demanding this agreement and we simply are unable to abide by your request until such time as we get the documents and information we requested.

We feel that we have been promised the right to operate the .shop TLD but following ICANN's procedures and have met all requirements as outlined by ICANN, the gNSO and our community but now are being forced to sign an agreement stating that we give permission to ICANN to Auction the delegation.

The threat is either to sign an auction agreement consenting that the auction is the proper method for resolution (and lose the delegation) or not sign the agreement and not be allowed to participate in an auction that will determine delegation when we are still trying to find out why ICANN thinks the auction is the only option.

We have been trying to work with all other contention set parties to try to arrive at an agreeable resolution to the situation that has been created and we have also supplied an authorization for the delay of the auction. From what we understand all but one party (Amazon) has agreed to the delay of this auction but again we need time to find out if everyone has submitted their appropriate requests.

We are asking ICANN to assist us in coming to a compromise in ICANN's deadline for signing the bidder agreement such as postponing this requirement until the return of the DIDR and after finding the results of the Independent review.

Your communication stated that if we had problems or issues whereby we needed additional time to notify you which is one of the intentions contained in this Comment.

Thank you

Created By: Jeffrey Smith (12/2/2015 10:48 AM)

Hey Jared,

Thanks for following up. We have sent in a timely formal request to invoke the Independent Review Process and are

working on completing a response to Elizabeth Le today to answer her questions.

In addition we are formally requesting a delay in the auction process as well.

Thanks
Jeffrey Smith

Created By: Jared Erwin (12/2/2015 8:41 AM)

Dear Jeffrey Smith,

We still have not received the auction documentation. As you know, we provided you an extended deadline of 1 December 2015. Please contact us as soon as possible with the status of the documentation. Failure to provide the documentation may result in rejection of your application.

Thank you and best regards,

Jared Erwin
New gTLD Operations

Created By: Jared Erwin (12/1/2015 4:07 PM)

Dear Jeffrey Smith,

As indicated to you yesterday, you were given an extended deadline of today, 1 December 2015, to submit the auction information. At this time, we have not yet received the documentation. Should you need additional time to complete the forms, please let us know. Failure to provide the documentation may result in the rejection of your application.

Thank you and best regards,

Jared Erwin
New gTLD Operations

Created By: Grant Nakata (11/30/2015 3:41 PM)

Dear Jeffrey Smith,

Thank you for feedback. ICANN will accommodate an extension to the response to the Intent to Auction Notification to Dec. 1, 2015. Please work to provide the required information/bidder documentation (Bidder Agreement / Supplement to the Bidder Agreement / Bidder Form / Designated Bidder Form) by the deadline specified. Failure to provide the required information may result in the rejection of your application.

Please let me know if you have any questions.

Best Regards,

Grant Nakata
New gTLD Operations Team

Created By: Jeffrey Smith (11/25/2015 2:44 PM)

We are requesting additional time to provide requested material. Our legal counsel have been working on CEP and Independent review requests and these additional requirements require legal review.

We checked with Grant Nakata and he suggested we use TAS to request an extension until Dec. 1, 2015 due to the holidays since our legal counsel and ICANN's offices will both be closed until Monday, Nov. 30

Thank you,

Jeffrey Smith
Commercial Connect, LLC

Created By: Grant Nakata (11/20/2015 2:47 PM)

Dear Jeffrey Smith,

I hope you are well. I am following-up regarding the pending response to the Intent to Auction Notification for .SHOP. We have yet to receive the bidder documents required to be submitted by 26 November 2015. Please let me know if you have any questions or concerns meeting this deadline.

Best Regards,

Grant Nakata
New gTLD Operations

Created By: Jared Erwin (11/2/2015 4:19 PM)

You may also find out more information regarding Indirect Contention Auctions at the following links:

- Indirect Contention Rules: <http://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>

- Indirect Contention Webinar: <https://icann.adobeconnect.com/p16l6uyzrkj/>

- Indirect Contention Webinar Presentation: <http://newgtlds.icann.org/en/applicants/auctions/indirect-contention-03dec14-en.pdf>

Again, please respond to this case with any questions regarding the auction process.

Best regards,
New gTLD Operations Team

Created By: Jared Erwin (11/2/2015 4:01 PM)

Please note, this contention set is preliminary scheduled for Auction on 27 January 2016 at 16:00 UTC.

You may view the Auction Date within the Contention Set Status page: <https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus>.

In addition to the Bidder documents required to be submitted via the web form link, please execute the attached Supplement to the New gTLD Auctions Bidder Agreement (for Indirect Contention Sets) and attach herein.

Please respond to this case with any questions regarding the auction process.

Best Regards,
New gTLD Operations Team

Resp. Ex. 25

RESPONDENT'S EXHIBIT

JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2300
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Contact Information Redacted

January 11, 2016

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Paul R. Schurman, Jr.
Avery & Schurman, P.L.C.
115 N. Watterson Trail
Louisville, KY 40243

Re: Commercial Connect, LLC v. Internet Corporation for Assigned Names and Numbers, et al. – Case No. 3:16-cv-00012-JHM

Dear Mr. Schurman:

I represent the Internet Corporation for Assigned Names and Numbers (“ICANN”), which your client Commercial Connect, LLC (“Commercial Connect”) has named as a defendant in the above-entitled lawsuit (“Lawsuit”). Although ICANN has not been served with process in the Lawsuit, and ICANN expressly reserves its rights to challenge the jurisdiction and claims asserted in the Lawsuit, pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, I am writing to provide you and your client with an opportunity to dismiss the Lawsuit.

Beyond the numerous deficiencies in the allegations asserted by Commercial Connect, Commercial Connect’s entire Lawsuit is barred by the release accepted and acknowledged by Commercial Connect as part of its application in the 2012 New gTLD Program to operate the .SHOP gTLD (“Application”). Specifically, the Terms and Conditions of the Application – available in Module 6 of the New gTLD Applicant Guidebook (“Guidebook”), which is enclosed with this letter for your convenience – provide that:

By submitting this application through ICANN’s online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

...

NAI-1500756972v1

JONES DAY

Paul R. Schurman, Jr.
January 11, 2016
Page 2

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e., ICANN's affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents] from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT 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. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

And in the New gTLD Application 2000 Round Credit Request form ("Credit Request Form") executed by Jeff Smith on behalf of Commercial Connect, a copy of which is also enclosed, Commercial Connect confirmed that "Commercial Connect LLC was not awarded any string pursuant to the 2000 proof-of-concept round and that Commercial Connect has no legal claims arising from the 2000 proof-of-concept process."

There is no question that Commercial Connect's Lawsuit arises out of ICANN's and ICANN's Affiliated Parties' evaluation of Commercial Connect's Application, as well as its application in the 2000 proof-of-concept round, and the Lawsuit is therefore barred by the releases contained in the Guidebook and the Credit Request Form. In addition, Commercial Connect's filing of this Lawsuit constitutes a breach of the Terms and Conditions of its

JONES DAY

Paul R. Schurman, Jr.
January 11, 2016
Page 3

Application as well as the terms of the Credit Request Form and reflects a failure to conduct the good faith pre-suit investigation required by Rule 11 of the Federal Rules of Civil Procedure. In the event the Lawsuit is not immediately dismissed and ICANN is forced to defend the Lawsuit, ICANN will seek sanctions pursuant to Rule 11, and ICANN will deem Commercial Connect in material breach of the Terms and Conditions of its Application as well as the terms of the Credit Request Form, which may lead to the cancellation of Commercial Connect's Application and a claim by ICANN for the refund provided to Commercial Connect in connection with the Credit Request Form.

I look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric P. Enson", with a long, sweeping horizontal flourish extending to the right.

Eric P. Enson

Enclosures



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012

Module 6

Top-Level Domain Application – Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

*Module 6
Top-Level Domain Application
Terms and Conditions*

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

Module 6
Top-Level Domain Application
Terms and Conditions

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT 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. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.
7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

Module 6
Top-Level Domain Application
Terms and Conditions

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement <http://newgtlds.icann.org/en/applicants/agb/program-privacy>, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:
 - a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;
 - b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;
 - c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

*Module 6
Top-Level Domain Application
Terms and Conditions*

- d. Applicant may be requested to supply certain information in the original language as well as in English.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
 - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
 - b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.
13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.
14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

*Module 6
Top-Level Domain Application
Terms and Conditions*

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

New gTLD Application 2000 Round Credit Request

I, **Jeffrey Smith**, am the registered Primary Contact for Application number **1-1830-1672** applied for on behalf of the Applicant entity named **Commercial Connect LLC**. As Primary Contact, I request the refund for the 2000 proof-of-concept round credit, in the amount of 86000 USD.

I confirm that **Commercial Connect LLC** is the **same entity** that applied for **.SHOP** in the 2000 Proof of Concept Round.

I confirm that **Commercial Connect LLC** was not awarded any string pursuant to the 2000 proof-of-concept round and that **Commercial Connect LLC** has no legal claims arising from the 2000 proof-of-concept process.

Primary Contact Email	Contact Information Redacted
CSC Case #	20405
Refund Amount	86000 USD

Beneficiary Name	Commercial Connect LLC
SWIFT/ABA/ACH/IBAN Number	Contact Information Redacted
Beneficiary Account Number	
Bank Name	Chase Bank NA
Bank Address 1	416 W Jefferson St
Bank Address 2	
Bank City	Louisville
Bank State/Province	KY
Bank Postal Code	40202
Bank Country	U.S.

Signature

Jeffrey Smith

Print Name

CEO

Title

Commercial Connect LLC

Company/Organization

Date

6/12/12

TRANSMISSION VERIFICATION REPORT

TIME : 06/12/2012 11:24
NAME : COMMERCIAL CONNECT
FAX : Contact Information Redacted
TEL :
SER.# : U62513J1J223530

DATE, TIME	06/12 11:23
FAX NO./NAME	9-13109572347
DURATION	00:00:45
PAGE(S)	01
RESULT	OK*
MODE	PHOTO ECM

* :COLOR FAX NOT AVAILABLE

Resp. Ex. 26

RESPONDENT'S EXHIBIT

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

CIVIL ACTION NO. 3:16CV-00012-JHM

COMMERICAL CONNECT, LLC

PLAINTIFF

V.

**INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS AND INTERNATIONAL
CENTRE FOR DISPUTE RESOLUTION**

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion by Plaintiff, Commercial Connect, LLC, for an injunction seeking to preliminarily enjoin Defendant, Internet Corporation for Assigned Names and Numbers (“ICANN”), from proceeding with the January 27, 2016 auction of the gTLD “.shop” [DN 3] and a motion by Plaintiff’s counsel to withdraw as attorney of record [DN 7]. The Court conducted a telephonic conference January 22, 2016. The Defendant, ICANN, filed a response to the motion for preliminary injunction [DN 10]. Fully briefed, these matters are ripe for decision.

I. MOTION TO WITHDRAW AS COUNSEL

On January 18, 2016, Paul R. Schurman, Jr., counsel for Plaintiff, filed a motion to permit him to withdraw as counsel of record pursuant to Local Rule 83.6. Counsel represents that since the filing of the complaint, Commercial Connect has expressed a desire to pursue a legal course of action with which counsel fundamentally disagrees. Counsel argues that this course of action has rendered continued representation unreasonably difficult. Specifically, counsel cites a 2012 release/waiver executed by Commercial Connect in connection with this

case. At the telephonic conference on January 22, 2016, corporate representative Jeffrey Smith objected to the withdrawal of counsel. The Court provided Smith the opportunity to file a written objection to the motion to withdraw. On Monday, Smith informed the Court that he would not file any written objections.

“[The] Court has broad discretion to determine whether and under what terms to allow an attorney to withdraw as counsel of record.” McGraw-Hill Global Education, LLC v. Griffin, 2015 WL 9165965, *1 (W.D. Ky. Dec. 16, 2015). See also Wiggins v. Daymar Colleges Grp., LLC, 2015 WL 9480472, *2 (W.D. Ky. Dec. 29, 2015); Brandon v. Blech, 560 F.3d 536 (6th Cir. 2009). Local Rule 83.6(b) provides that an attorney of record may withdraw from a case if “[t]he attorney files a motion, certifies the motion was served on the client, makes a showing of good cause, and the Court consents to the withdrawal on whatever terms the Court chooses to impose.” After hearing the argument of counsel, the Court finds that Plaintiff’s counsel has made an adequate showing of good cause for withdrawal. Good cause exists where an attorney’s continued representation of a client could subject counsel to Rule 11 sanctions. See Model Rules of Professional Conduct 1.16(b)(3)(withdrawal proper where client “insists upon pursuing an objective that the lawyer considers . . . imprudent.”). Accordingly, counsel’s motion to withdraw is granted. Plaintiff shall have thirty (30) days in which to secure replacement counsel. It is settled law that a corporation must appear in federal court through licensed counsel. Rowland v. California Men’s Colony, 506 U.S. 194, 202 (1993); see also State Auto Ins. Co. v. Thomas Landscaping & Constr., Inc., 494 Fed. Appx. 550, 2012 WL 3326310, *5 (6th Cir. 2012).

II. MOTION FOR PRELIMINARY INJUNCTION

A. BACKGROUND

Plaintiff, Commercial Connect, offers domain name registry services to the e-commerce

market. In 2000, Commercial Connect began the application process to operate a top-level domain (“TLD”) name registry, “.shop.” Defendant, ICANN, is a California non-profit public benefit corporation tasked with administering the internet’s Domain Name System (“DNS”). ICANN manages key aspects of internet infrastructure, including the coordination of domain names, internet protocol addresses, protocol port, and parameter numbers. Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS. According to Plaintiff, ICANN expanded the DNS from the original six gTLDs (“.com”; “.org”; “.net”; “.edu”; “.gov”; and “.mil”) to 22 gTLDs and approximately 250 country-code TLDs.

In 2000, ICANN opened an application process for the “.shop” gTLD. Commercial Connect submitted its application. According to Plaintiff, ICANN never approved nor rejected Commercial Connect’s application. Instead, ICANN informed Commercial Connect that its original application would be held until the next round of consideration for the TLD applications to be held in 2004. Plaintiff alleges that ICANN did not consider Commercial Connect’s application in 2004.

In 2012, ICANN launched the “New gTLD Program” which resulted in nearly 2,000 applications for new gTLDs, such as the “.shop” gTLD. Commercial Connect submitted its application to ICANN to operate the “.shop” gTLD and actively participated in the procedures set forth in the Application Guidebook. Pursuant to these procedures, Commercial Connect filed string confusion objections against 21 applications that Plaintiff claimed to be confusingly similar to its application for “.shop.” Under the Application Guidelines, in the event that such a dispute could not be resolved through dispute resolution, the right to operate the gTLD in question proceeds to an ICANN-facilitated auction. Plaintiff’s 2012 Application, along with eight other applications for “.shop,” is currently in a contention set that is set to be resolved in a

January 27, 2016 auction.

Plaintiff filed suit on January 6, 2016, alleging breach of contract, fraudulent misrepresentation, and breach of the covenant of good faith and fair dealing. Plaintiff contends that due to ICANN's missteps in the application process, ICANN never awarded the promised registry-operator agreement to any of the applicants, instead designating the ".shop" gTLD rights be sold at auction on January 27, 2016. In an effort to prevent the auction, Plaintiff filed the motion for a preliminary injunction.

B. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is an extraordinary remedy that is generally used to preserve the status quo between the parties pending a final determination of the merits of the action. In determining whether to issue a preliminary injunction, the Court considers four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2007) (quoting Tumblebus Inc. v. Cranmer, 399 F.3d 754, 760 (6th Cir. 2005)). It is unnecessary for the Court to make findings regarding each factor if "fewer are dispositive of the issue." In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985) (citing United States v. School Dist. of Ferndale, Mich., 577 F.2d 1339, 1352 (6th Cir. 1978)); "The party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success." McNeilly v. Land, 684 F.3d 611, 615 (6th Cir. 2012)(internal quotation marks omitted).

C. DISCUSSION

The Court must first consider whether the Plaintiff has demonstrated a strong likelihood of success on the merits. Tenke, 511 F.3d at 543. To satisfy this burden, a plaintiff must show “more than a mere possibility of success” on the merits; he must raise “questions . . . so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” Id. (quotations omitted).

Plaintiff alleges three claims against ICANN for fraudulent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. First, Plaintiff claims that ICANN fraudulently misrepresented its gTLD application process in order to induce registry operators to partake in the process and then failed to honor its explicit and implicit obligations. Second, with respect to its breach of contract claim, Plaintiff argues that ICANN developed a contractual relationship with Commercial Connect whereby Commercial Connect paid valuable consideration to ICANN in exchange for the right to participate in ICANN’s new gTLD Application Process. Plaintiff maintains that ICANN breached its contractual obligations set forth in its Application Guidebook when it failed to comply with the pre-published application process. Third, Plaintiff alleges that ICANN breached its implied covenant of good faith and fair dealing when it acted in a way that deprived Commercial Connect of the benefits of the agreement as set forth in the Applicant Guidebook, namely, a gTLD application, evaluation, and selection process founded on the principles of fairness, transparency, and non-discrimination. Defendant maintains that Plaintiff failed to establish a likelihood of success on the merits because all of Plaintiff’s claims are barred by the releases Plaintiff accepted in connection with both its 2012 and 2000 Applications.

“A release is a discharge of a claim or obligation and surrender of a claimant’s right to

prosecute a cause of action, statutory or otherwise.” PNC Bank, Nat. Ass’n v. Seminary Woods, LLC, 2015 WL 4068380, *21 (W.D. Ky. July 2, 2015)(citing Humana, Inc. v. Blose, 247 S.W.3d 892, 896 (Ky. 2008)). The interpretation of a release is governed by the same rules of construction as contracts. 3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., 174 S.W.3d 440, 448 (Ky. 2005). Under Kentucky law, “[t]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court.” Dynalectric Co. v. Whittenberg Constr. Co., 2010 WL 4062787 (W.D. Ky. Oct. 15, 2010) (quoting Frear v. P.T.A. Indus. Inc., 103 S.W.3d 99, 105 (Ky. 2003)).

The record reflects that in pursuing its application for the “.shop” gTLD, Plaintiff accepted and agreed to several releases discharging ICANN from all liability arising out of Plaintiff’s application and/or ICANN’s evaluation of that application. Most recently, by submitting its 2012 Application, Plaintiff agreed to the terms and conditions set forth in Module 6 of the Application Guidebook:

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . .

(Oyler Decl. Ex. C, Module 6, ¶ 6.) The release is clear and comprehensive. All of Plaintiff's claims arise out of ICANN's review of Plaintiff's 2012 Application and the decision by ICANN to not recommend the approval of the applicant's gTLD application. Accordingly, Plaintiff's claims appear to be barred by the release set forth in the 2012 Application. Plaintiff has neither challenged the language of the release, nor made any allegations that Commercial Connect was fraudulently induced into executing the release. In fact, Plaintiff currently lacks counsel to address the implications of the release on Plaintiff's claims.

Additionally, in as much as Plaintiff asserts claims based on its 2000 Application, Plaintiff's claims also appear to be barred by the terms and conditions of both the 2000 Application and the 2012 Application. Specifically, the 2000 Application provided that the applicant agreed to "release[] and forever discharge[] ICANN . . . from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD." (Oyler Decl. Ex. A, 2000 Application, ¶B14.2.) Additionally, upon Plaintiff's request that ICANN apply a credit to Plaintiff's 2012 Application, Plaintiff confirmed that it "has no legal claims arising from the 2000 proof-of-concept process." (Oyler Decl. Ex. B.)


For these reasons, the Court finds that Plaintiff has not demonstrated a likelihood of success on the merits of its claims. Plaintiff's failure to meet its burden on this factor is dispositive. Even if the Court were to find in favor of Plaintiff on the remaining factors, such findings would not overcome Plaintiff's failure to show a likelihood of success on the merits. See Gonzales v. National Bd. of Med. Exam'rs, 225 F.3d 620, 625 (6th Cir. 2000) (finding it unnecessary to analyze the other factors because "a finding that there is simply no likelihood of success on the merits is usually fatal"); see also Mich. State AFL-CIO v. Miller, 103 F.3d 1240,

1249 (6th Cir. 1997) (“[W]hile, as a general matter, none of [the] four factors are given controlling weight, a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed.”). Accordingly, Plaintiff’s motion for preliminary injunction is denied.

III. CONCLUSION

IT IS HEREBY ORDERED that the motion by Paul R. Schurman, Jr., to withdraw as counsel of record on behalf of Commercial Connect, LLC [DN 7] is **GRANTED**. Plaintiff shall have thirty (30) days in which to secure replacement counsel.

IT IS FURTHER ORDERED that the motion by Plaintiff for preliminary injunction [DN 3] is **DENIED**.


Joseph H. McKinle
United States I

cc: counsel of record
Jeffrey Smith via e-mail

January 26 2016

Resp. Ex. 27

RESPONDENT'S EXHIBIT



International Centre
for Dispute Resolution

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
The International Division of the American Arbitration Association

NOTICE OF INDEPENDENT REVIEW

Date: January 22, 2016

To: Name (of the party on which this Notice is to be served): ICANN Nationality: USA

Address: 12025 Waterfront Dr, Ste 300

City: Los Angeles State/Province: CA Country: US Post Code: 90094-2538

Telephone: +1.3103015800 Facsimile: +1.3108238649 Email: independentreview@icann.org

Name of Representative: (if known) Mr. John Jeffrey Name of Firm: (if applicable) _____

Address: ICANN, 12025 Waterfront Dr, Ste 300

City: Los Angeles State/Province: CA Country: US Post Code: 90094-2538

Telephone: +1.3103015800 Facsimile: +1.3108238649 Email: John.Jeffrey@ICANN.org

The named claimant seeks this independent review in accordance with Article IV, Section 3 of the ICANN Bylaws. The claimant agrees that such Independent Review shall be conducted pursuant to the International Arbitration Rules ("Rules") of the International Dispute Resolution Procedures as supplemented per ICANN's Bylaws.

Nature of the Dispute: (attach additional sheets, if necessary) Experience in ICANN's accountability mechanisms, ICANN's New gTLD program, the Applicant Guidebook

The Claim or Relief Sought: (the amount, if any) Recognition of previous IRP filing and of the Claimant's application's community-based status - application # 1-1830-1672

Type of Business: Claimant New gTLD Applicant

Place of Review Requested: Los Angeles, CA USA

You are hereby notified that copies of this NOTICE are being filed with the INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION at Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043 email: casefiling@adr.org, with a request that it commence administration of an independent review. Under the rules, you may file a Statement of Defense within the time specified in the rules after notice from the administrator.

Name of Claimant: Commercial Connect, LLC Nationality: US

Address: (to be used in connection with this case) Contact Information Redacted

City: Contact Information Redacted State/Province: KY Country: US Post Code: Contact Information Redacted

Telephone: Contact Information Redacted Facsimile: Contact Information Redacted Email: Contact Information Redacted

Name of Representative: (if known) Jeffrey Smith Name of Firm: (if applicable) _____

Address: Contact Information Redacted

City: Contact Information Redacted State/Province: KY Country: US Post Code: Contact Information Redacted

Telephone: Contact Information Redacted Facsimile: Contact Information Redacted Email: Contact Information Redacted

To begin proceedings, please send two copies of this notice of independent review, with the filing fee as provided for in the Rules, to the ICDR. Send the original notice to the respondent.

Signature (may be signed by a representative)  Title: CEO Date: 01/22/2016

If you have any questions, please contact the International Centre for Dispute Resolution at 1.888.855.9575 or +1.212.484.4181 or visit our website at www.icdr.org.

NOTICE OF INDEPENDENT REVIEW - Cont'd

Cooperative Engagement Completed? [Y/N] N

Is this a representational complaint brought on behalf of others? [Y/N] N

If yes, claimant must demonstrate that the claimant itself has been directly impacted and materially harmed by the alleged violation of the Bylaws or Articles of Incorporation giving rise to the request.

Number of Panelists Requested? 3

Are there any areas of particular expertise that claimant recommends a Panelist to have?

Experience in ICANN's accountability mechanisms, ICANN's New gTLD program, the Applicant Guidebook
and international law

In the submission, state specifically the grounds under which the claimant has the standing and the right to assert this claim. For the purposes of the Independent Review Process (IRP), demonstration of standing requires the claimant to, in specific and particular details, identify how it has been directly impacted and materially harmed by an ICANN Board decision, and not by the actions of third parties. Material harm requires that there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board violation of the Bylaws or Articles of Incorporation on which the complaint is based. The decision of the IRP Panel (as reviewed and acted upon by the Board) must be able to stop the harm. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for Independent Review. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for an Independent Review.

By submitting this Notice, Claimant acknowledges the following:

Written submissions of argument to the IRP Panel are limited to 25 pages, double-spaced and in 12-point font.

The Chair of the standing panel for the IRP retains the ability to decide on what the appropriate size of the panel will be, based upon issues such as the complexity of the matter alleged. The Chair may also make recommendations of whether any particular expertise is desired on the Panel. In the event the standing panel is not yet comprised, the ICDR will assist in determining the appropriate size of the panel and the particular expertise that is recommended for the panel.

The IRP Panel shall have the power to dismiss the request summarily in the event the claimant cannot demonstrate standing to initiate the proceeding. The IRP Panel shall also have the power to dismiss frivolous or vexatious requests.

If the claimant has not availed itself, in good faith, of the cooperative engagement or conciliation process and ICANN is the prevailing party in the IRP, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

The ICANN Board's decision following on from the Declaration of the IRP Panel is final and creates precedent for future IRP proceedings. If the subject matter of the request is on the same issue as a prior IRP Proceeding, the ICANN Board's decision on the prior IRP Panel is binding and serves as grounds for summary dismissal of the request for Independent Review.

Resp. Ex. 28

RESPONDENT'S EXHIBIT

From: Tom Simotas Contact Information Redacted
To: "Eric P. Enson" Contact Information Redacted

Date: 01/26/2016 10:53 AM
Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Mr. Lieben:

After further review of your submission, and Mr. Enson's communication of this date, we believe it is necessary to advise you of the deficiencies within your filing. At this time the only items submitted thus were the two-page Notice of Independent Review. Article 5 of the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, states that "All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission." This is also in line with Article 2.3 of the underlying International Arbitration Rules which require that a description of the claim and facts

supporting it along with the relief being sought be submitted at the time of filing. In accordance with these governing rules the filing, as submitted, is not sufficient In order to proceed with administration of this matter and should be rectified as soon as practicable. Please provide your comments in this regard no later than February 1, 2016.

Thank you,
Tom Simotas



Tom Simotas
Supervisor

American Arbitration Association
International Centre for Dispute
Resolution
120 Broadway, 21st Floor
New York, NY 10271
www.icdr.org

Contact Information Redacted

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From: Tom Simotas
Sent: Tuesday, January 26, 2016 11:29 AM
To: 'Eric P. Enson'
Cc: Contact Information Redacted
Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Parties,

This will acknowledge receipt of ICANN's comments below. The Applicant is requested to submit its reply by no later than February 1, 2015.

Best,

Tom Simotas

From: Eric P. Enson [<mailto:Contact Information Redacted>]
Sent: Monday, January 25, 2016 8:09 PM
To: Tom Simotas
Cc: Contact Information Redacted
Subject: Re: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Mr. Simotas,

I am writing in response to the documents contained in this email, and an earlier email you sent Ms. Wallace forwarding the documents filed by Commercial Connect with the ICDR. We have not seen any written brief or statement from Commercial Connect in support of its Notice of IRP. The second page of

the Notice of IRP form makes clear that a written submission must accompany the form and must "state specifically the grounds under which the claimant has the standing and the right to assert this claim. For the purposes of the Independent Review Process (IRP), demonstration of standing requires the claimant to, in specific and particular details, identify how it has been directly impacted and materially harmed by an ICANN Board decision, and not by the actions of third parties." Likewise, Section 5 of ICANN's Supplementary Procedures states that all "necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial] submission."

As far as I can tell, Commercial Connect has not complied with the procedures and its Notice of IRP is currently unsupported. There is no way for ICANN to participate in the administrative call about this matter or file a response to the Notice of IRP without a written statement supporting the Notice of IRP. Accordingly, I request that the ICDR withdraw its statement identifying the date of commencement of this IRP. The IRP cannot commence until Commercial Connect has complied with the relevant procedures and has filed a written statement, with evidence, supporting its Notice of IRP.

Please let me know if you would like to discuss. Thank you.

Eric

Eric P. Enson

[JONES DAY® - One Firm Worldwide](#)

555 S. Flower St., 50th Floor

Los Angeles, CA. 90071

Contact Information Redacted

From: Contact Information Redacted

To: Contact Information Redacted

Date: 01/25/2016 02:06 PM

Subject: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Attached please find correspondence related to the captioned matter.

Thank you.

Tom Simotas

Supervisor

American Arbitration Association

International Centre for Dispute Resolution

120 Broadway, 21st Floor

New York, NY 10271

<http://www.icdr.org>

Contact Information Redacted

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you have received this transmittal in error, please notify me immediately by reply email and destroy all copies of the transmittal. Thank you.

[attachment "Independent Review information worksheet.pdf" deleted by Eric P. Enson/JonesDay] [attachment "IRP Checklist for Conflicts.pdf" deleted by Eric P. Enson/JonesDay] [attachment "INT034.pdf" deleted by Eric P. Enson/JonesDay]

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Resp. Ex. 29

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 2:20:32 PM Pacific Standard Time

Subject: [Independent Review] RE: Request for Cooperative Engagement Process

Date: Tuesday, January 26, 2016 at 12:57:33 PM Pacific Standard Time

From: JeffySmith

To: 'Independent Review'

CC: 'Bart Lieben', Chris LaHatte, Contact Information Redacted

Priority: High

We did in fact timely file this request and even made several calls and requests to get this matter filed – your argument in the legal action is that we did not utilize the Independent Review Mechanism when all we have been doing is to determine the correct method of filing which we did.

Your legal staff indicated that they had received a timely notification and we also contacted the ICDR to ensure that it was done correctly and that they would indeed accept it as timely and they too agreed.

We called multiple times over the last couple of days to determine whether or not we would have to ask the courts to intervene with an injunction and all factors showed that ICANN had everything is needed to begin the accountability review process – now the simple want to ignore another official and procedural request for accountability.

This should make it very evident of ICANN's continual disdain in treating our application in a fair and impartial manner.

We are now and again formally requesting that you recognize the Request for Independent Review as well as the other mechanisms used including the Request for Cooperative Engagement and a Motion for Reconsideration which will be filed shortly.

By ICANN intentionally denying these requests can only further demonstrate an apparent corruptness in this process as there would be no harm to any party by delaying this auction and following the guidelines set in ICANN's procedures.

Sincerely,

Jeffrey Smith
President
Commercial Connect, LLC.

From: Independent Review [mailto:IndependentReview@icann.org]

Sent: Tuesday, January 26, 2016 3:45 PM

To: JeffySmith Contact Information Redacted

Cc: 'Bart Lieben' Contact Information Redacted ; Independent Review <IndependentReview@icann.org>

Subject: Request for Cooperative Engagement Process

Dear Mr. Smith,

ICANN is in receipt of your email below seeking to initiate a Cooperative Engagement Process (CEP) on the New gTLD Program Committee's (NGPC) action on Reconsideration Request 15-13.

As ICANN previously advised you on 18 November 2015, pursuant to the CEP, available at <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>, the deadline to initiate CEP on the NGPC's action relating to Reconsideration Request 15-13 is 15 days from the date of the posting of the minutes of the NGPC meeting during which Request 15-13 was considered. The NGPC considered and took action on Request 15-13 on 28 September 2015. The minutes of the 28 September 2015 NGPC meeting were published on 19 October 2015. (<https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en>.) Accordingly, Commercial Connect's deadline to initiate a CEP on this matter expired on 3 November 2015. A copy of our 18 November 2015 email to you is attached.

Given that the deadline to initiate a CEP on the NGPC's action on Reconsideration Request 15-13 expired 84 days ago, this CEP is not valid and ICANN cannot proceed with your request.

Best regards,

ICANN

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094

From: JeffySmith <Contact Information Redacted >

Date: Tuesday, January 26, 2016 at 6:02 AM

To: 'Independent Review' <IndependentReview@icann.org>

Cc: 'Bart Lieben' Contact Information Redacted >

Subject: [Independent Review] Request for Cooperative Engagement Process

January 26, 2016

ICANN

12025 Waterfront Drive

Suite 300 Los Angeles

CA 90094-2536

USA

Dear Madam,
Dear Sir,

**Initiation of Cooperative Engagement Process
.SHOP Community-Based Evaluation Reconsideration Request
ICANN's Accountability and Transparency Mechanisms**

I am contacting you in my capacity of President of Commercial Connect, LLC, applicant for the .SHOP top-level domain in the context of ICANN's first "trial round" for new gTLDs, organized in 2000; furthermore, Commercial Connect, LLC applied for the same string in the context of the New gTLD Program, as a community-based application.

Commercial Connect, LLC hereby initiates the Cooperative Engagement Process in relation to the adoption by the NGPC of BGC Recommendation on Reconsideration Request 15-13 which can be found at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf>. The NGPC's resolution can be found at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>.

Facts

On May 21, 2015, the ICANN's Community Priority Evaluation ("CPE Panel") issued the New gTLD Program Community Priority Evaluation Report, which can be found at <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf> ("CPE Report").

On July 10, 2015, Commercial Connect, LLC filed a Reconsideration Request in relation to this CPE Report and the fact that ICANN, on the basis of such CPE Report, has accepted the findings contained therein, and has changed the status of Requester's application for the community-based .SHOP TLD to "In Contention".

Commercial Connect, LLC's Reconsideration Request can be found at <https://www.icann.org/en/system/files/files/reconsideration-request-15-13-commercial-connect-with-appendices-10jul15-en.pdf>.

Arguments

Commercial Connect, LLC is of the opinion that:

- 1) The CPE Report was unclear and imprecise in various ways (use of vague language, providing a limited number of examples, brief arguments and assumptions, ...) on how the scoring mechanisms provided for in the Applicant Guidebook had been applied by the CPE Panel.

- 2) As Commercial Connect, LLC has pointed out in its initial Reconsideration Request, the CPE Panel has, in drawing up the CPE Report and the decisions taken by ICANN as a result thereof (including the Determination by the BGC), not applied documented policies neutrally and objectively, as required by ICANN's Bylaws.

Indeed, when comparing the CPE Report for the .SHOP gTLD with other reports drawn up by the Economist Intelligence Unit, it is obvious that different standards have been used by the different CPE Panels. These proven inconsistencies underline the fact that the CPE Panel in this case has not applied ICANN policies neutrally, objectively, and in a transparent manner.

- 3) In its Recommendation, 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 9, 10, 12, 14, 15 and 16) (emphasis added).

The CPE Panel, in drawing up the CPE Report, also referred to the fact that the CPE was conducted (even exclusively) in accordance with these Guidelines (CPE Report, pp. 7 and 8).

Commercial Connect, LLC 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". Requester 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. Reference is made to <http://newgtlds.icann.org/en/applicants/cpe> - CPE Resources.

In defining these "CPE Guidelines" or allowing the Economist Intelligence Unit to do so, ICANN has not followed the ICANN policy development processes. At least, these CPE Guidelines have not been made available to Requester prior to submitting its application to ICANN in Q1 / Q2 of 2012 as set forth in Recommendation 9 of the GNSO's "Principles, Recommendations and Implementation Guidelines" for new gTLDs.

This means that Commercial Connect, LLC simply could not have anticipated that its application for the community-based .SHOP gTLD would have been scored against criteria that were considered unclear or intransparent by ICANN, since – apparently – additional CPE Guidelines had to be published to bring these criteria in line with the GNSO's "Principles, Recommendations and Implementation Guidelines" for new gTLDs.

And even if these CPE Guidelines are to be considered as a binding policy document for the EIU and ICANN, the latter should have at least provided Requester with the opportunity to change its Application following the implementation of such CPE Guidelines or to clarify the information in its Application in the context of the CPE process (e.g., by submitting Clarifying Questions if – initially – the application did not qualify for a passing score).

These opportunities have not been given. To the contrary: as a rule, ICANN does not accept any Change Requests for community-based applications.

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; and
- the CPE Panel and ICANN have treated Requester unfairly by not providing the opportunity to amend or clarify the answers provided in the Application.

Therefore, Commercial Connect, LLC is of the opinion that ICANN has not applied documented policies neutrally and objectively, with integrity and fairness when making decisions:

- based on the CPE Report;
- in the context of the Recommendation of the BGC dated August 24, 2015; and
- in the context of the NGPC's resolution of September 29, 2015 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>)

as required by Article 4 of ICANN's Articles of Incorporation, as well as Article I, Section 2 and Article III of ICANN's Bylaws.

For these reasons, and other reasons to be added in the context of this Process, Requester hereby initiates the Cooperative Engagement Process in relation to the Determination referred to above.

ICANN's Accountability and Transparency Mechanisms

Requester points out to the fact that it has submitted to ICANN on November 17, 2015:

- a Request under ICANN's Documentary Information Disclosure Policy;
- a Request for initiating the Cooperative Engagement Process, which was included in the Notice of Independent Review submitted to ICANN on the same day;
- a Request for Independent Review, which apparently has not been properly received by the ICDR due to technical issues.

According to ICANN, as per the email sent by Ms Elizabeth Le on behalf of "Independent Review", "*the BGC meeting minutes at <https://www.icann.org/resources/board-material/minutes-bgc-2015-08-24-en> (published on 3 September) and the NGPC relevant meeting minutes <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en> (published on 19 October).*"

The fact that Commercial Connect, LLC was only informed by the ICDR on January 14, 2016 that the ICDR had “no record of an IRP request being filed with [them] in November by Commercial Connect”, entitles Commercial Connect, LLC to initiate this Cooperative Engagement Process and – if no arrangement can be found – Independent Review.

For the sake of completeness, Commercial Connect, LLC refers to Article 6 of ICANN’s Top-Level Domain Application Terms and Conditions, available at <https://newgtlds.icann.org/en/applicants/agb/terms>, which state that:

“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.”

In the meantime, Commercial Connect, LLC requests ICANN to set the CPE Report and the NGPC’s resolution referred to above aside or at least suspend the ICANN determination and the resolution of the .SHOP contention set.

In any case, Commercial Connect, LLC is fully committed to cooperate with ICANN in order to find an appropriate solution.

Commercial Connect, LLC hereby wishes to appoint Mr Jeffrey Smith (jsmith@dotshop.com) as its designated representative for this CEP.

Respectfully Submitted,

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
Contact Information Redacted

|
<http://www.dotShop.com> - Twitter: @dotShop_TLD

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Resp. Ex. 30

RESPONDENT'S EXHIBIT

Thursday, February 18, 2016 at 2:23:18 PM Pacific Standard Time

Subject: [Independent Review] RE: Request for Cooperative Engagement Process - .shop lawsuit filed Jan 6, 2016 US District Court Western District of KY Case 3:16-CV-00012-JHM
Date: Wednesday, January 27, 2016 at 6:34:16 AM Pacific Standard Time
From: JeffySmith
To: 'Rosette, Kristina'
CC: 'Bart Lieben', 'Independent Review'

Kristina,

I apologize as I thought I removed you from the list. I will make sure you are no longer included.

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
Contact Information Redacted

<http://www.dotShop.com> - Twitter: @dotShop_TLD

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From: Rosette, Kristina [mailto:Contact Information Redacted]
Sent: Wednesday, January 27, 2016 3:25 AM

To: JeffySmith <Contact Information Redacted >

Cc: 'Bart Lieben' <Contact Information Redacted 'Independent Review' <IndependentReview@icann.org>

Subject: RE: Request for Cooperative Engagement Process - .shop lawsuit filed Jan 6, 2016 US District Court Western District of KY Case 3:16-CV-00012-JHM

As a courtesy, we have not copied the other bidders.

I write on behalf of Amazon Registry Services, Inc. and repeat below our statement of earlier today:

Amazon Registry Services does not wish to receive any communications about tomorrow's scheduled auction from any bidder. The fact pattern presented by Commercial Connect's message below does not appear to be contemplated by the Auction Blackout Period. Nonetheless, Amazon Registry Services will not engage in this discussion.

*

Please do not send us any further communications.

Kristina Rosette

Sr. Corp Counsel – IP, Domains | Amazon | Contact Information Redacted

Contact Information Redacted

From: JeffySmith [<mailto:Contact Information Redacted>]

Sent: Wednesday, January 27, 2016 12:07 AM

To: 'Independent Review'

Cc: 'Bart Lieben'; 'Jon Nevett'; frank schilling; 'Bret Fausett'; 'jing dong'; Rosette, Kristina; 'Shweta Asher'; 'Stephanie Duchesneau'; 'Oliver Smith'; Contact Information Redacted; 'Hiro Tsukahara'; 'Geir Rasmussen'; 'Conrad Goldstein'; 'Sandeep Ramchandani'; Contact Information Redacted

Subject: RE: Request for Cooperative Engagement Process - .shop lawsuit filed Jan 6, 2016 US District Court Western District of KY Case 3:16-CV-00012-JHM

As we have informed ICANN in the multiple communications as well as via phone conference you referenced, we did not sign the auction agreement because it states that we agree that the auction is an acceptable resolution to the contention for .shop which ICANN is aware which we do not.

In addition, we have had to involve 6 attorneys in the last 3 months just to try to interpret what ICANN needs in order to begin an independent review and still are lacking the knowledge as to what ICANN needs in order to treat us fairly and impartially by allowing our timely requests to be honored.

The activity in the last 48 hours is all in response to ICANN continually telling us different requirements that they need in order to accomplish the simple goal of requesting an Independent Review.

Just because ICANN may feel that we may be stalling does not mean that this is a fact. In addition, even if these are stalling tactics, it does not give ICANN permission to ignore their own policies and refuse to invoke these appeal procedures that they set and which we have followed in each and every way.

We did provide ICANN with timely notification for the Independent Review Process but ICANN's links were down and ICANN was notified of this as well – We have worked since November to determine what needed to be done to complete the Independent Review process. Due to ICANN's continued vague answers we had to file a lawsuit in January. We paid our fee for the Independent Review and the ICDR accepted it as a timely and legitimate filing. Why is ICANN now going against us and the ICDR as well?

In addition, are you notifying the Auction participants that there are legal proceedings in connection with the auction?

If a bidder wins the auction and has to pay ICANN for a gTLD that will be held up in the legal process and ICANN is aware of this and refuses to inform the bidders, isn't this breaking with the openness and transparency that ICANN claims to try to always provide?

This email is additional proof of how ICANN can make demands, we following their instructions, pay thousand and now millions of dollars pursuing this namespace which had been publically promised to them and then continue to ignore their own processes and procedures and refuse to act legitimately.

We have even asked that these emails be signed by the person writing them instead of ICANN in general. We need to know if these emails are being generated from the legal team and who on this team as opposed to the gTLD committee – This also is not a complicated nor difficult task that ICANN refuses to provide.

If ICANN's decides to continue with the auction, this does not mean this the lawsuit will end and it will not decide a contention set winner. One of ICANN's responses to our request for the injunction was the false statement that said that we failed to follow the accountability mechanisms when in reality as ICANN's email below proves, ICANN is refuses to allow us to use their accountability mechanisms.

We will continue to provide ICANN and their multiple legal teams all of the documents, submissions and forms they have requested in a timely manner so you will continue to see emails and filings (yes more emails since these are email requested by ICANN) to ensure you have everything you have requested so that ICANN cannot claim that we neglected something – we continue to do everything we are asked to do and ICANN continues to get more and more reluctant to follow their own procedures – all which proves our claim of malice.

We do not accept ICANN's claim that by filing a lawsuit it removes us from the contention set since we did everything we could within ICANN's processes and ICANN refuses to comply – ICANN is who forced us to ask

for assistance from the US Courts because of emails sent just like this one below.

ICANN did acknowledge our requests for reconsideration and our request for independent review which per the AGB it is a prerequisite to an ICANN auction that no accountability mechanisms are pending so refusing to act on them does not make them go away and without a board decision, these mechanisms are still active. (link: <https://newgtlds.icann.org/en/applicants/auctions>)

Sincerely

Jeffrey Smith

From: Independent Review [<mailto:IndependentReview@icann.org>]
Sent: Wednesday, January 27, 2016 1:57 AM
To: JeffySmith <Contact Information Redacted >
Cc: 'Bart Lieben' <Contact Information Redacted >; Independent Review <IndependentReview@icann.org>
Subject: Request for Cooperative Engagement Process

Dear Mr. Smith,

As you know, the .SHOP auction is scheduled for tomorrow, 27 January 2016, commencing at 8:00 a.m. PST. As detailed below, ICANN has provided Commercial Connect with every opportunity to participate in this auction, but Commercial Connect elected not to do so. ICANN has also previously provided Commercial Connect with every opportunity to properly invoke one or more accountability mechanisms to the extent that Commercial Connect satisfied the standing requirements, the timing requirements, and the criteria necessary to invoke such mechanisms under the ICANN Bylaws. Notwithstanding these efforts, Commercial Connect elected not to invoke these accountability mechanisms until long after the time expired for Commercial Connect to do so.

Commercial Connect also chose to file a lawsuit against ICANN, which included a Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction (PI) to stop the auction. As you know, filing such a lawsuit is a breach of, among other things, the Terms and Conditions of its 2012 New gTLD Application, as well as the New gTLD Application 2000 Round Credit Request form. Having lost the Motion for TRO/PI, Commercial Connect has very recently attempted to again invoke every possible accountability mechanism, most in the last twenty-four hours, in an attempt to stop the auction from proceeding. However, as ICANN has repeatedly advised you, Commercial Connect's deadline to invoke the majority of these accountability mechanisms has long since expired, and therefore, Commercial Connect's invocation of such mechanisms are not valid. In light of the foregoing and in accordance with our process and procedures, the .SHOP auction will proceed as scheduled.

The following details some (but is not intended to be a comprehensive list) of the continuous efforts by ICANN staff to engage Commercial Connect regarding the auction and ICANN's accountability mechanisms.

Timeline of events relating to Commercial Connect's participation in the .SHOP Auction:

- On 29 October 2015, auction invitations were issued to the .SHOP contention set, including Commercial Connect. Applicants were given deadline of 26 November 2015 in which to elect to participate in the auction.
- On 20 November 2015, ICANN sent Commercial Connect a reminder regarding the 26 November 2015 auction election deadline.
- On 25 November 2015, Commercial Connect requested and ICANN granted an extension from 26 November 2015 to 1 December 2015 in which to respond to the auction invitation.
- On 1 December 2015, ICANN reminded Commercial Connect of the deadline to respond to the auction invitation via a case comment and phone call.
- On 2 December 2015, Commercial Connect responded to ICANN's outreach efforts regarding the auction by advising that it has submitted a request to invoke an Independent Review Process (IRP). ICANN advised Commercial Connect that the final deadline to respond to the auction invite and submit the bidder documents is 4 December 2015.
- On 4 December 2015, you advised the New gTLD Operations team that the Commercial Connect bidder documents would be submitted for the auction. Later that day, you submitted a case comment indicating that Commercial Connect felt that it was being forced to respond to the auction invitation while trying to determine a way forward with the IRP. You also indicated that Commercial Connect did not have sufficient information regarding the auction.
- On 11 December 2015, ICANN responded to your 4 December 2015 case comment and provided additional information about the auction process. ICANN further advised you that there were no current accountability mechanisms impacting the .SHOP contention set and that auction will take place on 27 January 2016 as scheduled.
- On 15 December 2015, ICANN sent you another case comment advising "no postponement [of the auction] has been granted because not all members of the Contention Set submitted a postponement request. The Auction is expected to be conducted as planned per the Auction Schedule."
- On 18 December 2015, ICANN sent you another case comment advising, "This message is a reminder that as of today we are not aware of any accountability mechanisms that have been invoked impacting the .SHOP/.SHOPPING contention set. In light of that, the auction is still scheduled for 27 January 2016. Please submit the required documentation as soon as possible. If you have specific questions about this process or the documents, please let us know. We are happy to set up a call to discuss those with you."
- On 22 December 2015, ICANN sent you another reminder via case comment of the upcoming auction deadlines.

On 23 December 2015, ICANN sent you another case comment advising that in order to participate in the auction, Commercial Connect would need to submit its bidder agreement. ICANN further advised that failure to submit the bidder agreement by 15 January 2016 will result in Commercial Connect not being able to participate in the auction.

On 7 January 2016, ICANN conducted a telephonic conference with you regarding the upcoming auction, wherein ICANN advised you that final deadline for Commercial Connect to submit the bidder agreement in order to participate in the auction is 15 January 2016, and that the deadline to deposit the auction fees is 20 January 2016. ICANN followed up the call with a case comment setting forth the deadlines discussed in writing.

On 15 January 2016, ICANN sent you a final reminder of the deadline to submit the bidder agreement. No such documents were received from Commercial Connect.

On 20 January 2016, the auction deposit deadline passed without Commercial Connect submitting a deposit.

Timeline of events relating to accountability mechanisms and litigation:

On 17 November 2015, Commercial Connect filed a request under the ICANN Documentary Information Disclosure Policy (DIDP) and also indicated that Commercial Connect anticipates on initiating a Cooperative Engagement Process (CEP) or Independent Review Process (IRP) “but are waiting to see the minutes of the October, 2015 Board meeting to post in order for our time schedule to begin with what was our next action would be.” Commercial Connect also stated: “Jen Wolfe then informed us on Nov 3, 2015 that the minutes were actually included and approved in the actual meeting which reduced our expected and already very short timeline to zero days to request CEP and only two weeks to get our legal team to finalize the IRP....We literally worked all weekend and last night only to find all of the links to the ICDR as being invalid...” Commercial Connect requested a thirty-day extension on its deadline to file an IRP.

On 18 November 2015, ICANN responded to Commercial Connect’s 17 November 2015 email, advising Commercial Connect that the Board Governance Committee (BGC) considered Commercial Connect’s Reconsideration Request 15-13 on 24 August 2015 and that the New gTLD Program Committee (NGPC) considered Request 15-13 on 28 September 2015. ICANN further advised Commercial Connect that the minutes from the 24 August 2015 BGC meeting were published on 3 September and

that the minutes from the 28 September 2015 NGPC meeting during which the NGPC adopted the BGC's recommendation were published on 19 October 2015. ICANN also advised Commercial Connect that the deadline to initiate a CEP expired on 3 November 2015, and the deadline to file an IRP expired on 18 November 2015. Notwithstanding, ICANN provided links to the ICDR Rules on how to file an IRP. With respect to Commercial Connect's request for a thirty-day extension on its deadline to file an IRP, ICANN noted that the IRP filing deadline is a date mandated by the ICANN Bylaws. (See Bylaws, Art. IV, Sec. 3.) Therefore, ICANN cannot grant Commercial Connect the requested extension because to do so would be a violation of the Bylaws. However, ICANN continued to provide Commercial Connect with information to, at a minimum help you resolve any technical difficulties Commercial Connect had in filing an IRP, if that was the basis for a late filing.

On 3 December 2015, in an email to ICANN, you advised that "[i]t was and still is our intent to file the request for Independent Review as provided by the notice sent on Nov. 17th but still are unclear on what is needed and how to proceed....If you could please assist us a bit more, we would appreciate it." The International Centre for Dispute Resolution (ICDR), the provider for IRP, was copied on the email.

On 3 December 2015, in an email to you, copying ICANN, the ICDR provided you with all the relevant information for initiating an IRP.

On 3 December 2015, ICANN sent you a follow up email to the ICDR's email, continuing to try to help Commercial Connect file an IRP, stating: "We note that the International Centre for Dispute Resolution has provided you with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know."

On 4 December 2015, in an email to ICANN, you thanked ICANN for its assistance regarding the IRP filing.

On 10 December 2015, ICANN is contacted by attorney Brittany McKenna of Avery & Shurman, advising that she had been retained by Commercial Connect to consider pursuing an IRP regarding Reconsideration Request 15-13, and seeking additional information about Request 15-13.

On 12 December 2015, ICANN responded to Ms. McKenna, setting forth the information that was provided to you in our 18 November 2015 email.

On 6 January 2016, Commercial Connect filed a lawsuit against ICANN and the ICDR in the Western District of Kentucky. ICANN was not (and still has not been) served with a Summons or the Complaint. Commercial Connect also filed a motion for Temporary Restraining Order (TRO) and preliminary injunction (PI).

On 11 January 2016, ICANN's outside counsel sent Commercial Connect's lawyer a letter advising that the lawsuit is in breach of the Commercial Connect's 2012 New gTLD Application and 2000 Round Credit Form, and demanding that the lawsuit be withdrawn.

- On 18 January 2016, Commercial Connect's lawyer filed a motion to withdraw as counsel.
- On 22 January 2016, a representative for Commercial Connect sent ICANN a Notice of IRP filing but did not provide the sufficient supporting documents to complete its filing.
- On 26 January 2016, at 6:02 a.m. PST, Commercial Connect attempted to initiate a second CEP regarding the Board's denial of Reconsideration Request 15-13.
- On 26 January 2016, the Court denied Commercial Connect's motion for TRO/PI and granted Commercial Connect's then counsel's motion to withdraw as counsel.
- On 26 January 2016, at 10:53 a.m. PST, the ICDR advised Commercial Connect's representative who submitted the IRP notice to the ICDR that Commercial Connect's IRP filing was deficient.
- On 26 January 2016, at 12:52 p.m. PST, ICANN advised Commercial Connect that the CEP it attempted to invoke on 26 January 2016 was 84 days beyond the deadline to initiate a CEP, and is therefore time barred and invalid.
- On 26 January 2016, at 12:57 p.m. PST, you responded to ICANN's email regarding the second CEP that Commercial Connect attempted to initiate, referencing mistaken facts regarding correspondence with ICANN staff and the timeliness of Commercial Connect's CEP request. You also requested that ICANN recognize the IRP as well as the other mechanisms used including the CEP request and a Reconsideration Request that Commercial Connected indicated would be filed shortly.
- On 26 January 2016, at 2:32 p.m. PST, Commercial Connect sent a complaint to the Ombudsman.
- On 26 January 2016, at 3:59 p.m. PST, Commercial Connect submitted a Reconsideration Request relating to ICANN staff's action of 26 January 2016 informing Commercial Connect's that its attempt to invoke a second CEP regarding the Board's denial of Reconsideration Request 15-13 was untimely and therefore not valid. This Reconsideration Request will be considered in due course by the BGC in accordance Article IV, Section 2 of the Bylaws.
- On 26 January 2016, the ICANN Ombudsman advised ICANN that he has informed Commercial Connect that he does not have jurisdiction and therefore there was no active Ombudsman complaint.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

From: JeffySmith Contact Information Redacted >

Date: Tuesday, January 26, 2016 at 12:57 PM

To: 'Independent Review' <IndependentReview@icann.org>

Cc: 'Bart Lieben' Contact Information Redacted >, Chris LaHatte <chris.lahatte@icann.org>, "Contact Information Redacted " <Contact Information Redacted >

Subject: [Independent Review] RE: Request for Cooperative Engagement Process

We did in fact timely file this request and even made several calls and requests to get this matter filed – your argument in the legal action is that we did not utilize the Independent Review Mechanism when all we have been doing is to determine the correct method of filing which we did.

Your legal staff indicated that they had received a timely notification and we also contacted the ICDR to ensure that it was done correctly and that they would indeed accept it as timely and they too agreed.

We called multiple times over the last couple of days to determine whether or not we would have to ask the courts to intervene with an injunction and all factors showed that ICANN had everything is needed to begin the accountability review process – now the simple want to ignore another official and procedural request for accountability.

This should make it very evident of ICANN's continual disdain in treating our application in a fair and impartial manner.

We are now and again formally requesting that you recognize the Request for Independent Review as well as the other mechanisms used including the Request for Cooperative Engagement and a Motion for Reconsideration which will be filed shortly.

By ICANN intentionally denying these requests can only further demonstrate an apparent corruptness in this process as there would be no harm to any party by delaying this auction and following the guidelines set in ICANN's procedures.

Sincerely,

Jeffrey Smith
President
Commercial Connect, LLC.

From: Independent Review [<mailto:IndependentReview@icann.org>]

Sent: Tuesday, January 26, 2016 3:45 PM

To: JeffySmith Contact Information Redacted

Cc: 'Bart Lieben' Contact Information Redacted >; Independent Review <IndependentReview@icann.org>

Subject: Request for Cooperative Engagement Process

Dear Mr. Smith,

ICANN is in receipt of your email below seeking to initiate a Cooperative Engagement Process (CEP) on the New gTLD Program Committee's (NGPC) action on Reconsideration Request 15-13.

As ICANN previously advised you on 18 November 2015, pursuant to the CEP, available at <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>, the deadline to initiate CEP on the NGPC's action relating to Reconsideration Request 15-13 is 15 days from the date of the posting of the minutes of the NGPC meeting during which Request 15-13 was considered. The NGPC considered and took action on Request 15-13 on 28 September 2015. The minutes of the 28 September 2015 NGPC meeting were published on 19 October 2015. (<https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en>.) Accordingly, Commercial Connect's deadline to initiate a CEP on this matter expired on 3 November 2015. A copy of our 18 November 2015 email to you is attached.

Given that the deadline to initiate a CEP on the NGPC's action on Reconsideration Request 15-13 expired 84 days ago, this CEP is not valid and ICANN cannot proceed with your request.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

From: JeffySmith <Contact Information Redacted >
Date: Tuesday, January 26, 2016 at 6:02 AM
To: 'Independent Review' <Contact Information Redacted >
Cc: 'Bart Lieben' <Contact Information Redacted >
Subject: [Independent Review] Request for Cooperative Engagement Process

January 26, 2016

ICANN
12025 Waterfront Drive
Suite 300 Los Angeles
CA 90094-2536
USA

Dear Madam,
Dear Sir,

**Initiation of Cooperative Engagement Process
.SHOP Community-Based Evaluation Reconsideration Request
ICANN's Accountability and Transparency Mechanisms**

I am contacting you in my capacity of President of Commercial Connect, LLC, applicant for the .SHOP top-level domain in the context of ICANN's first "trial round" for new gTLDs, organized in 2000; furthermore, Commercial Connect, LLC applied for the same string in the context of the New gTLD Program, as a community-based application.

Commercial Connect, LLC hereby initiates the Cooperative Engagement Process in relation to the adoption by the NGPC of BGC Recommendation on Reconsideration Request 15-13 which can be found at <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf>. The NGPC's resolution can be found at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>.

Facts

On May 21, 2015, the ICANN's Community Priority Evaluation ("CPE Panel") issued the New gTLD Program Community Priority Evaluation Report, which can be found at <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf> ("CPE Report").

On July 10, 2015, Commercial Connect, LLC filed a Reconsideration Request in relation to this CPE Report and the fact that ICANN, on the basis of such CPE Report, has accepted the findings contained therein, and has changed the status of Requester's application for the community-based .SHOP TLD to "In Contention".

Commercial Connect, LLC's Reconsideration Request can be found at <https://www.icann.org/en/system/files/files/reconsideration-request-15-13-commercial-connect-with-appendices-10jul15-en.pdf>.

Arguments

Commercial Connect, LLC is of the opinion that:

- 1) The CPE Report was unclear and imprecise in various ways (use of vague language, providing a limited number of examples, brief arguments and assumptions, ...) on how the scoring mechanisms provided for in the Applicant Guidebook had been applied by the CPE Panel.
- 2) As Commercial Connect, LLC has pointed out in its initial Reconsideration Request, the CPE Panel has, in drawing up the CPE Report and the decisions taken by ICANN as a result thereof (including the Determination by the BGC), not applied documented policies neutrally and objectively, as required by ICANN's Bylaws.

Indeed, when comparing the CPE Report for the .SHOP gTLD with other reports drawn up by the Economist Intelligence Unit, it is obvious that different standards have been used by the different CPE Panels. These proven inconsistencies underline the fact that the CPE Panel in this case has not applied ICANN policies neutrally, objectively, and in a transparent manner.

- 3) In its Recommendation, 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 9, 10, 12, 14, 15 and 16) (emphasis added).

The CPE Panel, in drawing up the CPE Report, also referred to the fact that the CPE was conducted (even exclusively) in accordance with these Guidelines (CPE Report, pp. 7 and 8).

Commercial Connect, LLC 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". Requester 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. Reference is made to <http://newgtlds.icann.org/en/applicants/cpe> - CPE Resources.

In defining these "CPE Guidelines" or allowing the Economist Intelligence Unit to do so, ICANN has not followed the ICANN policy development processes. At least, these CPE Guidelines have not been made available to Requester prior to submitting its application to ICANN in Q1 / Q2 of 2012 as set forth in Recommendation 9 of the GNSO's "Principles, Recommendations and Implementation Guidelines" for new gTLDs.

This means that Commercial Connect, LLC simply could not have anticipated that its application for the community-based .SHOP gTLD would have been scored against criteria that were considered unclear or intransparent by ICANN, since – apparently – additional CPE Guidelines had to be published to bring these criteria in line with the GNSO's "Principles, Recommendations and Implementation Guidelines" for new gTLDs.

And even if these CPE Guidelines are to be considered as a binding policy document for the EIU and ICANN, the latter should have at least provided Requester with the opportunity to change its Application following the implementation of such CPE Guidelines or to clarify the information in its Application in the context of the CPE process (e.g., by submitting Clarifying Questions if – initially – the application did not qualify for a passing score).

These opportunities have not been given. To the contrary: as a rule, ICANN does not accept any Change Requests for community-based applications.

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; and
- the CPE Panel and ICANN have treated Requester unfairly by not providing the opportunity to amend or clarify the answers provided in the Application.

Therefore, Commercial Connect, LLC is of the opinion that ICANN has not applied documented policies neutrally and objectively, with integrity and fairness when making decisions:

- based on the CPE Report;
- in the context of the Recommendation of the BGC dated August 24, 2015; and
- in the context of the NGPC's resolution of September 29, 2015
(<https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>)

as required by Article 4 of ICANN's Articles of Incorporation, as well as Article I, Section 2 and Article III of ICANN's Bylaws.

For these reasons, and other reasons to be added in the context of this Process, Requester hereby initiates the Cooperative Engagement Process in relation to the Determination referred to above.

ICANN's Accountability and Transparency Mechanisms

Requester points out to the fact that it has submitted to ICANN on November 17, 2015:

- a Request under ICANN's Documentary Information Disclosure Policy;
- a Request for initiating the Cooperative Engagement Process, which was included in the Notice of Independent Review submitted to ICANN on the same day;
- a Request for Independent Review, which apparently has not been properly received by the ICDR due to technical issues.

According to ICANN, as per the email sent by Ms Elizabeth Le on behalf of "Independent Review", "*the BGC*

meeting minutes at <https://www.icann.org/resources/board-material/minutes-bgc-2015-08-24-en> (published on 3 September) and the NGPC relevant meeting minutes <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en> (published on 19 October).”

The fact that Commercial Connect, LLC was only informed by the ICDR on January 14, 2016 that the ICDR had “no record of an IRP request being filed with [them] in November by Commercial Connect”, entitles Commercial Connect, LLC to initiate this Cooperative Engagement Process and – if no arrangement can be found – Independent Review.

For the sake of completeness, Commercial Connect, LLC refers to Article 6 of ICANN’s Top-Level Domain Application Terms and Conditions, available at <https://newgtlds.icann.org/en/applicants/agb/terms>, which state that:

“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.”

In the meantime, Commercial Connect, LLC requests ICANN to set the CPE Report and the NGPC’s resolution referred to above aside or at least suspend the ICANN determination and the resolution of the .SHOP contention set.

In any case, Commercial Connect, LLC is fully committed to cooperate with ICANN in order to find an appropriate solution.

Commercial Connect, LLC hereby wishes to appoint Mr Jeffrey Smith ^{Contact Information Redacted} as its designated representative for this CEP.

Respectfully Submitted,

Jeffrey Smith



Jeffrey Smith
President, Commercial Connect, LLC.
Contact Information Redacted

Contact Information Redacted

<http://www.dotShop.com> - Twitter: @dotShop_TLD

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DISCLAIMER REGARDING UNIFORM ELECTRONIC TRANSACTIONS ACT ("UETA") (FLORIDA STATUTES SECTION 668.50): If this communication concerns negotiation of a contract or agreement, UETA does not apply to this communication. Contract formation in this matter shall occur only with manually affixed original signatures on original documents.

Resp. Ex. 31

RESPONDENT'S EXHIBIT

From: Eric P. Enson/JonesDay
To: Tom Simotas Contact Information Redacted
Cc: Contact Information Redacted
Date: 01/27/2016 01:51 PM
Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Tom,

Thank you. As the ICDR is aware from previous IRPs, ICANN has waived Rule 12 of the Supplementary Procedures in order to permit claimants to seek emergency relief under the ICDR Rules and the ICDR has agreed to that waiver. With respect to this IRP, like the others, ICANN waives Rule 12 of the Supplementary Procedures. Therefore, claimant is entitled to seek emergency relief pursuant to Article 6 (which superseded Article 37) of the ICDR Rules in connection with this IRP. Please let me know if you have any questions. Thank you.

Eric

Eric P. Enson

JONES DAY® - One Firm Worldwide

555 S. Flower St., 50th Floor
 Los Angeles, CA. 90071
 Contact Information Redacted

Tom Simotas

Dear Parties, This will acknowledge receipt of Co...

01/27/2016 08:20:53 AM

From: Tom Simotas <Contact Information Redacted >
 To: "Eric P. Enson" Contact Information Redacted

Date: 01/27/2016 08:20 AM
 Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Parties,

This will acknowledge receipt of Commercial Connect, LLC's submission of a Request for Emergency Arbitrator And Interim Measures Of Protection In View Of Independent Review Process. A copy of the email containing the motion received by the ICDR has been attached for your reference. The remaining annexes will be sent separately due to their size. We note that a copy of this request was sent to ICANN. Please be advised that as per Rule 12 of the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, Article 6 (formerly Article 37) of the RULES will not apply.

Best Regards,
 Tom Simotas



Tom Simotas
Supervisor

American Arbitration Association
 International Centre for Dispute
 Resolution
 120 Broadway, 21st Floor
 New York, NY 10271
www.icdr.org

Contact Information Redacted

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----- Message from Bart Lieben Contact Information Redacted on Wed, 27 Jan 2016 14:40:57 +0000 -----

<Tom Simotas Contact Information Redacted >:To

Independent Review <independentreview@icann.org>, JeffySmith
 <Contact Information Redacted >:cc

Fwd: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245 **Subject**
 :

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

=====

Resp. Ex. 32

RESPONDENT'S EXHIBIT

From: Rachel Zernik/JonesDay
To: Tom Simotas <Contact Information Redacted >,
Cc: 'Bart Lieben' <Contact Information Redacted >
Date: 02/05/2016 03:00 PM
Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Tom,

As you know, on 25 January 2016, Commercial Connect filed a Notice of IRP without a supporting written submission. On 26 January 2016, the ICDR informed Commercial Connect of this deficiency and that its filing was not sufficient to proceed with the administration of this matter. Rather than complying with the rules, on 27 January 2016, Commercial Connect filed an Emergency Request with the ICDR, which it has since withdrawn. The same day, Commercial Connect filed another Notice of IRP, but again failed to file any written submission supporting that notice, as required by the Notice of IRP form and the rules governing Independent Review proceedings. See ICANN Bylaws, Art. IV, § 3.3; Supplementary Procedures ¶ 5.

Because Commercial Connect's Notice of IRP remains deficient, no Independent Review proceeding is currently pending. As such, it is ICANN's view that neither the ICDR's nor ICANN's consent is required for Commercial Connect to file an IRP, and nothing herein shall be considered ICANN's waiver of its rights to object to any filing by Commercial Connect for any reason ICANN deems appropriate.

Regards,

Rachel Zernik
Associate
[JONES DAY® - One Firm WorldwideSM](#)
555 South Flower Street
Los Angeles, CA 90071
Contact Information Redacted

Tom Simotas

Dear Parties, We received a request from Applic...

02/05/2016 02:28:57 PM

From: Tom Simotas <Contact Information Redacted >
To: 'Bart Lieben' <Contact Information Redacted >
Date: 02/05/2016 02:28 PM

Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Parties,

We received a request from Applicant this morning for an extension until February 10, 2016 to submit its supplemental brief and complete its underlying IRP request. No objections were received by ICANN.

Please note that the extension request of Applicant has been granted.

In addition, please be advised that the Emergency Relief Proceedings for this matter have been terminated at this time. A new application for emergency relief may be requested at any time subject to the requirements of Article 6 and the parties' consent to its applicability.

Best,

Tom



Tom Simotas
Supervisor

American Arbitration Association
International Centre for Dispute
Resolution
120 Broadway, 21st Floor
New York, NY 10271
www.icdr.org

Contact Information Redacted

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From: Tom Simotas
Sent: Wednesday, February 03, 2016 4:08 PM
To: 'Bart Lieben'; Contact Information Redacted

Cc: Jeffrey Smith
Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Parties,

This will acknowledge receipt of Mr. Lieben's email dated February 1, 2016. Please remember to copy the other side with these communications.

Please be advised that the ICDR will not be appointing an Emergency Panelist at this time.

Please note that the Applicant's request to supplement and complete its original IRP request has been granted and the submission is due by no later than February 5, 2016.

Best,

Tom Simotas

From: Bart Lieben [<mailto:Contact Information Redacted>]
Sent: Monday, February 01, 2016 5:40 PMA
To: Tom Simotas
Cc: Jeffrey Smith
Subject: Re: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245

Dear Mr Simotas,

Thank you for your email below.

My client has noted the fact that ICANN has proceeded with and finalised the auction process for resolving the .SHOP string contention set:

<https://www.icann.org/news/announcement-2-2016-01-27-en>.

According to ICANN's processes for resolving string contentions through auction, as published on its website (<https://newgtlds.icann.org/en/applicants/auctions>), a string contention set will be eligible to enter into a New gTLD Program Auction under the following circumstances only:

- Passed evaluation
- Resolved any applicable GAC advice
- Resolved any objections
- No pending ICANN Accountability Mechanisms

Therefore, it is clear that ICANN has proceeded with and resolved the auction notwithstanding the fact that there were at least two Accountability Mechanisms pending (being a Reconsideration Request which is available at

<https://www.icann.org/resources/pages/reconsideration-16-1-commercial-connect-request-2016-01-27-en> and the present IRP proceedings), which is a clear violation of its own processes and rules.

Notwithstanding the fact that my client would like to keep its request to stay (i) the execution of the Registry Agreement and (ii) the delegation of the .SHOP extension to the prevailing applicant following the outcome of the auction, my client is requesting the suspension of the appointment of the Emergency Arbitration until further notice. However, my client reserves the right to continue with the appointment of the Emergency Arbitrator if ICANN would proceed with (i) or (ii) above.

Therefore, my client requests the ICDR to supplement its claim within the next few days (at the latest by [February 5](#)) in order to proceed with the actual IRP as set out in the Notice.

Please let me know if you would need anything further.

Best regards,

Bart

Sent from my iPhone

On 01 Feb 2016, at 22:23, Tom Simotas <Contact Information Redacted> wrote:

Dear Mr. Lieben,

Please provide us with the Applicant's position as to this matter. Will we be proceeding?

Best,

Tom Simotas

Tom Simotas
Supervisor
American Arbitration Association
International Centre for Dispute Resolution
120 Broadway, 21st Floor
New York, NY 10271
<http://www.icdr.org>
Contact Information Redacted

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-----Original Message-----

From: Tom Simotas
Sent: Thursday, January 28, 2016 5:20 PM
To: Tom Simotas; Contact Information Redacted

Subject: RE: Commercial Connect, LLC V. ICANN - Case 01-16-0000-2245
Importance: High

Dear Parties,

Mr. Lieben has requested a short stay of the proceedings pending further instructions from his

client as to whether or not the Applicant will proceed with the request for emergency relief.

ICANN's counsel has agreed to this request and the ICDR will suspend the appointment of an Emergency Panelist pending further notice.

Thank you,

Tom Simotas

=====

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

=====

Resp. Ex. 33

RESPONDENT'S EXHIBIT

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUESTS 16-1 AND 16-2**

25 FEBRUARY 2016

Commercial Connect, LLC (Requester) filed two Reconsideration Requests—Requests 16-1 and 16-2 (collectively, Requests)—regarding the same subject matter.¹ In Request 16-2, the Requester seeks reconsideration of ICANN staff’s determination to proceed with the scheduled 27 January 2016 auction for .SHOP (Auction). In Request 16-1, the Requester seeks reconsideration of ICANN’s staff’s determination that the Requester’s time to invoke the Cooperative Engagement Process (CEP) regarding the Board’s denial of Reconsideration Request 15-13 (Request 15-13) had passed, and argues that ICANN staff “prevented” it from filing a valid Request for Independent Review Process (IRP). The Requester also renews the challenges that it raised in Request 15-13 to a Community Priority Evaluation (CPE) panel’s report finding that the Requester’s application for .SHOP did not achieve priority through CPE (CPE Report), and ICANN’s acceptance of that report.

I. Brief Summary.

The Requester submitted a community-based application for .SHOP (Application). Eight other applications were also submitted for .SHOP. The Requester’s Application did not prevail in CPE and therefore remained in contention with the eight other applications.

Requests 16-1 and 16-2 represent the *fifth and sixth* reconsideration requests that the Requester has filed related to its Application. In Request 16-2, the Requester seeks to somehow undo the results of the .SHOP Auction that occurred on 27 January 2016 – an auction in which the Requester previously had chosen not to participate. In Request 16-1, the Requester renews

¹ Because the Requests are made by the same Requester and raise sufficiently similar issues, they will be addressed in the same proceeding. Bylaws, Art. IV, § 2.8

its time-barred challenge to the CPE Report finding that its Application was not entitled to community priority. The Requester also challenges ICANN staff's determination that the Requester had missed the Bylaws-mandated deadline to initiate CEP regarding the Board's denial of Request 15-13. The Requester likewise claims that ICANN staff acted to prevent it from initiating an IRP regarding the Board's denial of Request 15-13.

The Requester's claims are unsupported and are the latest in a long line of frivolous abuses of ICANN's accountability mechanisms by the Requester. The Requester's renewed attempt to challenge the CPE Report is improper and time-barred. The Requester has not raised any new arguments or evidence since its previous challenge to the CPE report in Request 15-13, which was denied. As to the other issues raised by the Requester, the facts demonstrate that ICANN staff adhered to established policy and procedure with respect to the Auction, took unprecedented steps to keep the Requester apprised of, and involved in, the Auction, and properly responded to the Requester's many incomplete, aborted, and/or improper attempts to invoke ICANN's accountability mechanisms. The BGC therefore denies Requests 16-1 and 16-2.

The BGC is also deeply concerned by the Requester's repeated abuses of ICANN's accountability mechanisms and New gTLD Program processes, all of which appear to be last ditch delay tactics. These include, but certainly are not limited to, the Requester's filing of a frivolous lawsuit and a vacuous motion for temporary restraining order against ICANN in federal court in violation of the Terms and Conditions of the Applicant Guidebook (Guidebook), as well as the Requester's invocation of essentially *every* accountability mechanism within a 24-hour period before the Auction, after the Requester affirmatively decided to not participate in the Auction. ICANN has expended and diverted significant resources and funds engaging with the Requester and responding to its numerous, last-minute attempts to stop the .SHOP Auction.

Although providing fair, open, and transparent access to ICANN’s accountability mechanisms is critical to ICANN’s mandate, there is no justification for ICANN and members of its community having to suffer repeated baseless invocations of those mechanisms.

II. Facts.

A. Background Facts.

1. The Requester’s Application

In 2000, the ICANN Board adopted a measured and responsible application process for the introduction of new gTLDs.² The Requester submitted an application for .SHOP during this “proof-of-concept” round (2000 Application). In its 2000 Application, the Requester acknowledged that it had “no legally enforceable right to acceptance or any other treatment of [its] application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root.”³ The Requester also expressly agreed in its 2000 Application to “*release[] and forever discharge[] ICANN . . . from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.*”⁴ The Requester’s 2000 Application was not approved by ICANN.

In 2012, as part of the New gTLD Program, the Requester submitted a community-based application for .SHOP. As provided for in the Guidebook, because the Requester had applied for .SHOP in its 2000 Application but was not awarded the string, the Requester received an US\$86,000 offset for its .SHOP Application.⁵ In accepting this credit, the Requester signed a

² ICANN TLD Application Process: Information for Applicants, *available at* <http://www.icann.org/en/tlds/tld-application-process.htm>

³ 2000 Application, *available at* https://archive.icann.org/en/tlds/mall1/_2_I6.1_AppTrans.htm, ¶ B12; *see also id.* ¶ B6 (“there is no understanding, assurance, or agreement that this application will be selected for negotiations toward entry of an agreement with a registry operator”).)

⁴ *Id.* ¶ B14.2 (emphasis added.)

⁵ Guidebook, § 1.5.1.

credit request form (2000 Credit Request Form) confirming that it “was not awarded any string pursuant to the 2000 proof-of-concept round and [] has no legal claims arising from the 2000 proof-of-concept process.”⁶

In addition, the Requester, like all others submitting applications in connection with the 2012 New gTLD Program, acknowledged and agreed to the Terms and Conditions set forth in Module 6 of the Guidebook. Among those Terms and Conditions is a waiver and release barring all actions in court or other judicial fora against ICANN or its Affiliated Parties (as defined in Guidebook Module 6) arising out of ICANN’s or those Affiliated Parties’ evaluation of any new gTLD application:

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents] from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . .⁷

Following the results of a String Similarity Review (SSR) process and the determinations on various string confusion objections, the Requester’s Application was placed into a contention set with eight other applications for .SHOP.

The Requester filed twenty-one string confusion objections against applicants for strings like .BUY, .ECOM, .SALE, .SHOPYOURWAY, and for strings representing words such as

⁶ New gTLD Application 2000 Round Credit Request, *available at* <https://www.icann.org/en/system/files/files/cc-v-icann-oyler-declaration-exhibits-a-f-25jan16-en.pdf>.

⁷ Guidebook, Module 6, ¶ 6.

“web shop” in languages such as Chinese, Japanese, and Arabic.⁸ All but two of the Requester’s twenty-one objections were overruled, and one of the two objections in which the Requester prevailed was later overturned.⁹

In 2013 and 2014, the Requester also filed *three* separate Reconsideration Requests relating to its Application.¹⁰ All three Reconsideration Requests were denied.¹¹

Because the Requester submitted a community application, it was invited to participate in CPE. The Requester elected to participate in CPE, and on 21 May 2105, the CPE Panel issued the CPE Report, determining that the Requester’s Application scored only five out of 16 possible points on the CPE criteria—11 points less than the minimum required to achieve priority—and therefore did not prevail in CPE.¹²

On 10 July 2015, the Requester filed its *fourth* reconsideration request, Reconsideration Request 15-13, seeking reconsideration of the CPE Report, and challenging various procedures

⁸ See <http://newgtlds.icann.org/en/program-status/odr/determination>.

⁹ *Id.* One of the determinations finding that the Requester prevailed (Determination) was perceived as inconsistent with another string similarity objection determination. The NGPC resolved that the Determination should be re-evaluated, and the dispute resolution service provider that conducted the re-evaluation of the objection proceeding later overturned the Determination as unreasonable. NGPC Resolutions 2014.10.12.NG02-03, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>; Final Determination on Case No. 0115 0003 3821, *available at* <https://newgtlds.icann.org/sites/default/files/drsp/21aug15/determination-2-1-1318-15593-en.pdf>.

¹⁰ Reconsideration Request 13-10, *available at* <https://www.icann.org/en/system/files/files/request-commercial-connect-05sep13-en.pdf>; Reconsideration Request 13-15, *available at* <https://www.icann.org/en/system/files/files/request-commercial-connect-25oct13-en.pdf>; Reconsideration Request 14-11, *available at* <https://www.icann.org/en/system/files/files/request-commercial-connect-02apr14-en.pdf>.

¹¹ BGC Recommendation on Request 13-10, *available at* <https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf>; NGPC Resolution 2014.11.07.NG02, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-11-07-en>; BGC Determination on Request 13-15, *available at* <https://www.icann.org/en/system/files/files/determination-commercial-connect-12dec13-en.pdf>; BGC Determination on Request 14-11, *available at* <https://www.icann.org/en/system/files/files/determination-commercial-connect-29apr14-en.pdf>.

¹² CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>.

governing the New gTLD Program, as well as the SSR process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application.¹³

On 24 August 2015, the BGC recommended that Request 15-13 be denied, determining that the Requester's claims were time-barred, and in any event, the Requester had not demonstrated a basis for reconsideration with respect to the CPE Report or otherwise.¹⁴

On 28 September 2015, the New gTLD Program Committee (NGPC) accepted the BGC's recommendation to deny Request 15-13 (28 September 2015 Resolution).¹⁵ The minutes of that meeting were published on 19 October 2015.¹⁶

On 3 November 2015, the deadline for the Requester to invoke CEP relating to the 28 September 2015 Resolution expired.¹⁷

2. The Requester's Attempts to Delay the Resolution of the .SHOP Contention Set.

Following the denial of Request 15-13, rather than timely invoking the accountability mechanisms available to it, the Requester began to engage in months-long pattern of dilatory tactics aimed at preventing ICANN staff from facilitating resolution of the .SHOP contention set. On 17 November 2015, the day before a Request for IRP relating to the 28 September 2015 Resolution would have been due, the Requester filed a request pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), seeking additional information regarding

¹³ Request 15-13, *available at* <https://www.icann.org/en/system/files/files/reconsideration-request-15-13-commercial-connect-with-appendices-10jul15-en.pdf>

¹⁴ BGC Recommendation on Request 15-13, *available at* <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf>.

¹⁵ Resolution 2015.09.28.NG02, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en>.

¹⁶ *See* <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en>.

¹⁷ Cooperative Engagement Process, ¶ 2, *available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>; Bylaws, Art. IV, § 3.14.

SSRs, auctions, and other issues.¹⁸ The same day, the Requester appeared to make a request for CEP and stated that it anticipated initiating an IRP relating to the 28 September 2015 Resolution. The Requester claimed that it had delayed doing so on the mistaken impression that the minutes of that meeting had not yet been published, and then had been unable to submit a Request for IRP due to alleged issues with the International Centre for Dispute Resolution's (ICDR) website. The Requester attached a two-page Notice of IRP form (without any of the supporting documentation required to initiate an IRP) and requested a 30-day extension to initiate an IRP.¹⁹

On 18 November 2015, ICANN advised the Requester that minutes of the NGPC's 28 September 2015 meeting had been published on 19 October 2015 and directed the Requester to the link for the published minutes.²⁰ ICANN also advised the Requester that the deadline to initiate a CEP related to the 28 September 2015 Resolution had been 3 November 2015, and that the Bylaws-mandated deadline to file an IRP Request was 18 November 2015.²¹ Additionally, ICANN provided the Requester with links to pages on the ICDR's website with information about the requirements for filing IRP Requests to help assist the Requester with its attempts to initiate an IRP.²² With respect to the request for a 30-day extension, ICANN informed the Requester that because the deadline is mandated by ICANN's Bylaws, ICANN could not grant the requested extension.²³ In this time frame, the Requester never properly initiated CEP or an IRP, notwithstanding ICANN and the ICDR's attempt to assist the Requester.

On 29 October 2015, all applications in the .SHOP contention set were invited to enter into the auction process. Applicants were given a deadline of 26 November 2015 to elect to

¹⁸ DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20151117-1-smith-request-17nov15-en.pdf>.

¹⁹ Exhibit A, Pgs. 1-2.

²⁰ Exhibit B, Pgs. 6-7, 8.

²¹ *Id.*, Pg. 9

²² *Id.*, Pgs. 8-9.

²³ *Id.*

enter into the auction process and participate in the auction.²⁴ On 20 November 2015, ICANN sent the Requester a reminder regarding the 26 November 2015 deadline.²⁵ On 25 November 2015, the Requester asked for and received an extension to 1 December 2015 to respond to the auction invitation.²⁶ Despite repeated reminders by ICANN, the Requester did not respond to the auction request, as it had stated that it would do.²⁷ Instead, it informed ICANN on 4 December 2015 that it felt it should not have to respond while trying to determine a way forward with its IRP, and that it did not have sufficient information regarding the Auction.²⁸

On 3 December 2015, the Requester informed ICANN that it was “still [its] intent to file [a] request for Independent Review . . . but [was] still unclear on what is needed and how to proceed.”²⁹ The ICDR, which was copied on the Requester’s email, responded providing the Requester with all the relevant information for initiating an IRP. ICANN followed up, continuing to try to help the Requester, stating that ICANN understood that the ICDR had “provided [the Requester] with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know.”³⁰

On 10 December 2015, ICANN was contacted by [an](#) attorney retained by the Requester. She stated that the Requester was considering pursuing an IRP relating to Request 15-13 and sought additional information regarding when that request would be considered by the NGPC.³¹ On 12 December 2015, ICANN responded to the attorney, setting forth the information it had

²⁴ Exhibit K, Pg. 130.

²⁵ Exhibit L, Pg. 138.

²⁶ *Id.*, Pgs. 137-38.

²⁷ *Id.*, Pg. 137.

²⁸ *Id.*, Pg. 136.

²⁹ Exhibit D, Pgs. 67-68.

³⁰ Exhibit E, Pg. 73.

³¹ Exhibit F, Pgs. 81-82.

previously provided the Requester by email on 18 November 2015 (including that the NGPC had considered Request 15-13 on 28 September 2015, and that the minutes of that meeting had been published on 19 October 2015).³²

On 11 December 2015, ICANN provided the Requester with further information regarding the auction process.³³ ICANN also specifically advised the Requester that at that time there were no accountability mechanisms affecting the .SHOP contention set and that the Auction was still scheduled for 27 January 2016.³⁴ ICANN repeated these reminders on 15, 18, and 22 December 2015.³⁵ On 23 December 2015, ICANN sent the Requester yet another reminder, further advising the Requester that if it wished to participate in the Auction it would need to submit a bidder agreement by 15 January 2016.³⁶

On 6 January 2016, the Requester filed a lawsuit regarding the Requester's Application and 2000 Application against ICANN and the ICDR in the United States District Court for the Western District of Kentucky, together with a motion for Temporary Restraining Order and Preliminary Injunction (Motion for TRO/PI).³⁷ Despite the Requester's claims of exigent circumstances in the lawsuit and Motion for TRO/PI, the Requester never served ICANN with a copy of the summons, complaint, or motion papers.

Despite the filing of the Requester's lawsuit, on 7 January 2016, ICANN participated in a telephone conference with the Requester, again advising the Requester of the 15 January 2016 deadline for submitting a bidder agreement and also advising it that the deadline to deposit

³² *Id.*, Pgs. 80-81.

³³ Exhibit L, Pgs. 134-35.

³⁴ *Id.*

³⁵ *Id.*, Pgs. 133-34.

³⁶ *Id.*, Pgs. 132-33.

³⁷ See <https://www.icann.org/en/system/files/files/cc-v-icann-complaint-06jan16-en.pdf>.

auction fees was 20 January 2016.³⁸ ICANN sent the Requester a final reminder on 15 January 2016.³⁹ The Requester did not submit a bidder agreement.

On 11 January 2016, after ICANN through its own means had learned of the Requester's lawsuit, ICANN's outside counsel sent the Requester's counsel a letter advising that the Requester's lawsuit was barred by the waivers and releases accepted by Requester in Module 6, Requester's 2000 Application and the 2000 Round Credit Form, and that the lawsuit was a breach of Requester's Application.⁴⁰ For these reasons, and others, ICANN's counsel demanded that the Requester withdraw the lawsuit or risk ICANN pursuing sanctions against the Requester and its counsel for filing a frivolous lawsuit as well as the risk of ICANN terminating the Requester's Application for breach of the Guidebook's terms and conditions.⁴¹

Knowing of these risks, the Requester proceeded with its lawsuit. However, on 18 January 2016, the Requester's counsel filed a motion to withdraw as counsel, stating that he had not been aware of the waivers and releases when the suit was filed and had a "fundamental disagreement" with the Requester's decision to proceed with the suit.⁴² On 25 January 2016, despite not having been served in the case, ICANN made a special appearance to oppose the Requester's Motion for TRO/PI based on an order from the court.⁴³ On 26 January 2016, the court denied the Requester's Motion for TRO/PI, finding that the Requester had failed to show a likelihood of success on the merits of its claims because the releases agreed to by Requester were "clear and comprehensive."⁴⁴ The court also granted the Requester's counsel's motion to

³⁸ Exhibit L, Pg. 132.

³⁹ *Id.*, Pgs. 131-32.

⁴⁰ Exhibit M.

⁴¹ *Id.*

⁴² See <https://www.icann.org/en/system/files/files/cc-v-icann-plaintiff-motion-withdraw-counsel-18jan16-en.pdf>.

⁴³ See <https://www.icann.org/en/system/files/files/cc-v-icann-special-appearance-atallah-declaration-25jan16-en.pdf>.

⁴⁴ See <https://www.icann.org/en/system/files/files/cc-v-icann-court-order-prelim-injunction-withdraw-counsel-26jan16-en.pdf>.

withdraw, finding that “[g]ood cause exists where an attorney’s continued representation of a client could subject counsel to [] sanctions.”⁴⁵

On 22 January 2016, and while the Requester’s Motion for TRO/PI was pending, a representative for the Requester sent ICANN a Notice of IRP filing, but did not provide the supporting documents required to complete its filing.⁴⁶ On 26 January 2016, the ICDR informed the Requester’s representative by email that its attempt to initiate an IRP was defective and “not sufficient in order to proceed with administration of this matter,” under the ICDR Rules and the Supplementary Procedures for IRPs, because it was not accompanied by the requisite supporting documentation.⁴⁷

Then, less than 24 hours before the Auction was scheduled to take place, the Requester attempted to invoke *all* of ICANN’s accountability mechanisms in a late and last-ditch effort to stop the Auction, in which it had previously and affirmatively chosen not to participate. First, on the morning of 26 January 2016, the Requester attempted to initiate a CEP regarding the 28 September 2015 Resolution.⁴⁸ ICANN staff promptly informed the Requester, as it had previously done on two other occasions, that the deadline to initiate a CEP relating to that Board action was 3 November 2015, nearly three months earlier.⁴⁹

Second, later that afternoon the Requester filed a complaint with the Ombudsman, which the Ombudsman declined for lack of jurisdiction in light of the Requester’s lawsuit.⁵⁰

Third, on the same day, the Requester filed Request 16-1, its *fifth* reconsideration request related to its .SHOP Application, seeking reconsideration of ICANN staff’s determination that

⁴⁵ *Id.*, Pg. 2.

⁴⁶ Exhibit S, Pgs. 171-72.

⁴⁷ Exhibit N, Pgs. 153-54.

⁴⁸ Exhibit G, Pgs. 84-88.

⁴⁹ *Id.*, Pg. 84.

⁵⁰ Exhibit J, Pg. 123.

the time to initiate a CEP had passed, arguing that staff had somehow prevented it from initiating an IRP, and renewing the various challenges raised in Request 15-13.⁵¹ The Requester included other applicants in the .SHOP contention set on many of these communications, despite requests that he not do so and in violation of ICANN's auction rules.⁵²

Finally, on the morning of 27 January 2016, less than two hours before the scheduled Auction, the Requester submitted a Request for Emergency Arbitrator to the ICDR (Emergency Request).⁵³ Without conceding the Requester's claims or the appropriateness and merit of the Emergency Request, ICANN immediately informed the ICDR that it would not challenge the Requester's pursuit of its Emergency Request.⁵⁴ Accordingly, the ICDR moved forward with the Emergency Request.

The .SHOP Auction was conducted on 27 January 2016, as had been scheduled to do since 29 October 2015.

On 28 January 2016, ICANN received an email from the ICDR stating that the Requester was seeking a short stay of the Emergency Request.⁵⁵ On 1 February 2016, the Requester's counsel notified the ICDR that the Requester was suspending its Emergency Request.⁵⁶ On 2 February 2016, the ICDR informed the Requester and ICANN that, based on the Requester's

⁵¹ Request 16-1.

⁵² Exhibit J, Pgs. 115-16. The auction rules provide that from the time auction deposits are submitted until after an auction concludes, applicants within the relevant contention set are not allowed to communicate with each other regarding the contention set. *See* New gTLD Auction Rules, Pg. 12, *available at* <https://newgtlds.icann.org/en/applicants/auctions>. The Blackout Period for the .SHOP Auction began on 20 January 2016.

⁵³ Exhibit O, Pgs. 158-59.

⁵⁴ *Id.*, Pgs. 157-58.

⁵⁵ Exhibit P, Pg. 161.

⁵⁶ Exhibit Q, Pgs. 163-64.

suspension, the ICDR was terminating the appointment of an emergency panelist to hear the Emergency Request.⁵⁷

Then, the Requester sought from the ICDR an extension to 5 February 2016 to submit papers supporting an IRP Request, which the ICDR permitted without consulting ICANN.⁵⁸ On 5 February 2016, the Requester sought another extension from the ICDR to submit papers supporting an IRP Request.⁵⁹ ICANN's counsel responded to the ICDR and the Requester that since the Requester had not yet filed any written submissions supporting an IRP Request, as required by ICANN's Bylaws and the Supplementary Procedures, the Requester had not yet initiated an IRP, and in ICANN's view extensions were not relevant.⁶⁰

On 10 February 2016, the Requester filed Reconsideration Request 16-2, its *sixth* reconsideration request, seeking reconsideration of ICANN staff's decision to go ahead with the 27 January 2016 Auction.⁶¹ On 10 February 2016, the Requester filed another IRP Request with the ICDR. The ICDR is in the process of administering the Requester's latest IRP Request. On 19 February 2016, however, the Requester's counsel failed to appear at a scheduled administrative hearing for that IRP.

B. Relief Requested.

In Request 16-1, the Requester asks that ICANN

1. “[I]dentify and correct[] process and policy errors that have been made by the EIU and ICANN” with respect to the issues raised by the Requester (relating to the CPE);⁶²

⁵⁷ *Id.*, Pg. 162.

⁵⁸ Exhibit R, Pgs. 167-68.

⁵⁹ *Id.*, Pgs. 166-67.

⁶⁰ *Id.*, Pg. 166.

⁶¹ Request 16-2.

⁶² Request 16-1, § 9, Pg. 4.

2. “[A]ccept the Requester’s Notice of Independent Review submitted on 17 November 2015 and the initiation of the Cooperative Engagement Process by the Requester on the same date;”⁶³
3. “[S]uspend the process for string contention resolution in relation to the .SHOP gTLD.”⁶⁴
4. Appoint a third party to perform a new CPE for the Requester’s Application or “[d]etermine that the [Requester] meets the Community standards . . . and allow [the Requester] to proceed to delegation.”⁶⁵

In Request 16-2, the Requester asks that ICANN

1. “[P]rovide a full explanation of why ICANN has not approved Requester’s application in the context of the 2000 round, in light of ICANN’s Mission and Core Values;”⁶⁶
2. Explain why ICANN “ignored Requester’s initial application in making determinations in the context of the 2000 round and the New gTLD Program, and more in particular the CPE and auction processes;”⁶⁷
3. “[S]et aside the results of the New gTLD Program Auction for the .SHOP contention set . . . pending the outcome of Reconsideration Request 16-1 and any Accountability Mechanisms Requester may invoke following the determination by ICANN;”⁶⁸
4. “[S]uspend the process for entering into an agreement with any party having participated in the auction process for the .SHOP gTLD before any pending or future Accountability Mechanisms relating to applications for the .SHOP gTLD have been completed.”⁶⁹

⁶³ *Id.*, § 9, Pg. 5.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Request 16-2, § 9, Pg. 5.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

III. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.⁷⁰ The Requester challenges the actions of staff and of a third party service provider. Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. The reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.⁷¹

IV. Analysis and Rationale.

A. ICANN Staff Complied with Established Policy in Proceeding with the Scheduled Action for .SHOP.

In Request 16-2, the Requester argues that ICANN staff violated established policy by proceeding with the scheduled 27 January 2016 .SHOP Auction despite the fact that the Requester had submitted a reconsideration request—Request 16-1—on 26 January 2016.⁷²

ICANN's website states that “a string contention set will be eligible to enter into the New gTLD

⁷⁰ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

⁷¹ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

⁷² Request 16-2, § 8, Pgs. 3-4.

Program Auction” only where “[a]ll active applications in the contention set have . . . [n]o pending ICANN Accountability Mechanisms.”⁷³ The Requester argues that Request 16-1, filed a day before the .SHOP Auction, represented a pending accountability mechanism that should have stayed the scheduled action.

However, contrary to what the Requester argues, there were no pending accountability mechanisms when the .SHOP contention set entered into the auction process. Specifically, the invitations for the .SHOP Auction were sent on 29 October 2015, three months before the scheduled auction date and at a time when no accountability mechanisms were pending. The Requester received an invitation, as well as numerous reminders from ICANN staff about deadlines related to the Auction. The Requester never accepted the invitation (despite having received multiple extensions of time to do so). The Requester also failed to invoke any accountability mechanisms, despite repeated reminders from ICANN staff (on 11, 25, 18, and 22 December 2015) that there were no pending accountability mechanisms affecting the .SHOP contention set and that the Auction was still scheduled for 27 January 2016. Meanwhile, the technical and financial preparations for the Auction went forward.

On 22 January 2016, the Requester filed a Notice of IRP, but did not properly invoke an ICANN accountability mechanism because the filing did not comport with the ICDR’s Rules and Supplementary Procedures. As the ICDR informed the Requester, on 26 January 2016, the Notice of IRP was defective and “not sufficient in order to proceed with administration of this matter,” because it was not accompanied by a supporting, written submission.

Finally, Request 16-1, filed by the Requester the day before the .SHOP Auction, and the Emergency Request, filed two hours before the Auction was set to begin, were not proper

⁷³ See <https://newgtlds.icann.org/en/applicants/auctions>.

methods to stay the scheduled Auction and ICANN received no “order” or any other direction from the ICDR to stay the auction. The Requester’s belated attempt to invoke an accountability mechanism represented a meritless and improper eleventh hour attempt to delay the scheduled Auction, when the Requester could have taken numerous actions long before to try to do so. Delaying the Auction at such a late date would have caused further significant delays to the other members of the .SHOP contention set, all of which had suffered from earlier delays caused by the Requester’s conduct in initiating earlier accountability mechanisms, and had already placed significant amounts of money in escrow in reliance on the Auction going ahead as scheduled. As such, ICANN staff properly determined that it would not violate established policy to proceed with the .SHOP Auction despite the Requester’s belatedly filed reconsideration request.

B. ICANN Staff Complied with Established Policy in Declining to Extend the Bylaws-Mandated Deadline for CEP.

In Request 16-1, the Requester argues that it attempted to initiate CEP on 17 November 2015 and again 26 January 2016, but was informed that the deadline to initiate CEP had already expired and could not be extended.⁷⁴ The Rules for CEP, which are incorporated into the Bylaws, provide that CEP must be initiated within 15 days of the posting of Board minutes that the requesting party contends demonstrate that the Board violated its Bylaws or Articles of Incorporation.⁷⁵ As ICANN staff repeatedly informed the Requester (which it did for the first time in November 2015), because the minutes relating to the 28 September 2015 Resolution the Requester seeks to challenge were posted on 19 October 2015, the deadline to initiate CEP expired on 3 November 2015. For ICANN staff to have extended this deadline could itself have been a violation of ICANN’s Bylaws. As such, staff did not violate any established policy in

⁷⁴ Request 16-1, § 8, Pg. 8.

⁷⁵ Cooperative Engagement Process, ¶ 2, available at <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>; Bylaws, Art. IV, § 3.14.

determining that it could not extend the Bylaws-mandated deadline for the Requester to initiate CEP.

The BGC notes that CEP is a voluntary process and is not a prerequisite to file an IRP. The BGC also notes that the Requester was well aware of the 3 November 2015 deadline when it again attempted to initiate CEP on 26 January 2016, almost three months late and the day before the scheduled .SHOP Auction. ICANN had specifically informed the Requester on 18 November 2015 of the CEP deadline. The Requester then improperly used ICANN's denial of its time-barred CEP request as a pretext to file a "timely" Request 16-1. As discussed further below, Request 16-1 raises numerous time-barred arguments unrelated to the Requester's CEP request.

C. The Requester Never Properly Initiated an IRP.

In Request 16-1, the Requester also appears to argue that ICANN somehow prevented the Requester from initiating an IRP relating to the 28 September 2015 Resolution.⁷⁶ To the contrary, ICANN staff repeatedly attempted to assist the Requester to initiate an IRP.

As demonstrated by the 18 November 2016 email from ICANN attached to Request 16-1, when the Requester sought assistance filing an IRP Request with the ICDR, ICANN provided the Requester with all the information necessary to initiate an IRP, including links to the pages on ICDR's website containing information on filing fees, forms, and guides.⁷⁷ ICANN also reminded the Requester that it had not properly filed an IRP Request, and that the deadline to do so was that day.⁷⁸

⁷⁶ Request 16-1, § 8, Pg. 9.

⁷⁷ Exhibits to Request 16-1 (18 November 2015 email from E. Le to J. Smith, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-1-commercial-connect-attachments-redacted-26jan16-en.pdf>.

⁷⁸ *Id.*

Despite having all the relevant information, the Requester did not file an IRP Request. Instead, weeks later, on 3 December 2015, the Requester informed ICANN that it was “still [its] intent to file [a] request for Independent Review . . .but [was] still unclear on what is needed and how to proceed.” The ICDR, which was copied on the Requester’s email, responded providing the Requester with all the relevant information for initiating an IRP. ICANN followed up—still attempting to help and not to prevent the Requester from initiating an IRP—stating that it appeared the ICDR had “provided [the Requester] with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know.” ICANN did not receive a response from the Requester.

On 22 January 2016, a representative for the Requester sent ICANN a two-page Notice of IRP filing, but again did not provide the supporting documents required to initiate an IRP. On 10 February 2016—almost three months after the 30-day deadline mandated by the Bylaws—the Requester finally submitted to the ICDR the documents required to initiate an IRP regarding the 28 September 2015 Resolution.

As this history reflects, at no time did ICANN staff prevent the Requester from initiating an IRP. To the contrary, ICANN staff repeatedly informed the Requester of the relevant deadlines and provided the Requester with all the relevant information required to initiate an IRP, even after the deadline to properly do so had long since passed. The Requester’s months-long delay in initiating an IRP was not caused by ICANN, but rather is consistent with the Requester’s other delayed invocations of ICANN’s accountability mechanisms.

D. The Requester's Renewed Argument of Issues Raised in Request 15-13 Is Improper and Time-Barred.

Finally, in Request 16-1 the Requester renews the same argument it raised in Request 15-13—challenging the results of the CPE Report finding its Application did not prevail in CPE.⁷⁹ The BGC issued its recommendation on Request 15-13 on 24 August 2015, and the NGPC accepted that recommendation on 28 September 2015. The 28 September 2015 Resolution and accompanying rationale were posted on 30 September 2015. The deadline to seek reconsideration of the 28 September 2015 Resolution was therefore 13 October 2015—over two months before the Requester submitted Request 16-1. The Requester gives no reason for its delay in seeking reconsideration of the 28 September 2015 Resolution.⁸⁰ Its Request is time-barred, and for this reason alone, its request is denied.

The BGC also notes that the Requester does not raise any new arguments or facts besides those already raised in Request 15-13. ICANN is charged with using its resources in the public benefit; responding to repeated reconsideration requests, when they are based on the same circumstances and do not assert any grounds for reconsideration, is not an appropriate use of those resources. For the reasons discussed in the BGC's Recommendation on Request 15-13, the Requester has not stated a basis for reconsideration of the CPE Report.⁸¹

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Requests 16-1 and 16-2. In addition, the BGC notes that it is also deeply concerned by the Requester's repeated abuses of ICANN's

⁷⁹ Request 16-1, § 8, Pgs. 3-9.

⁸⁰ Notably, Request 15-13 was itself time-barred by over a month. The CPE Report was published on 21 May 2015. Thus, any reconsideration request challenging the CPE Report must have been filed by 5 June 2015. Bylaws, Art. IV, § 2.5. The Requester, however, did not file Request 15-13 until 10 July 2015, over a month after the filing deadline.

⁸¹ BGC Recommendation on Request 15-13, Pgs. 8-20.

accountability mechanisms and New gTLD Program processes, as described above and as explained further below.

First, the Requester filed suit against ICANN in a United States District Court, despite having accepted multiple releases—in its 2000 Application, its Credit Request Form and its New gTLD Application—barring it from bringing any claims against ICANN related to the Requester’s applications. On 11 January 2016, ICANN’s outside counsel informed the Requester of these releases and stated that if the lawsuit was not immediately dismissed, ICANN would “deem [the Requester] in material breach of the Terms and Conditions of its Application as well as the terms of the Credit Request Form, which may lead to the cancellation of [the Requester’s] Application.” Despite this, the Requester did not withdraw its lawsuit and proceeded with its Motion for TRO/PI. Thus, ICANN was required to expend considerable resources responding to the Requester’s frivolous Motion for TRO/PI. The Requester’s Motion for TRO/PI was denied by the court based on its finding that the Requester had failed to show a likelihood of success on the merits of its claims, and that the releases agreed to by the Requester were “clear and comprehensive.”

Next, as detailed above, the Requester has repeatedly and improperly invoked ICANN’s accountability mechanisms in an attempt to delay the resolution of the .SHOP contention set without any even arguably proper basis to do so. The Requester has filed six reconsideration requests relating to its Application, two of which, Request 15-13 and Request 16-1, raised arguments that were plainly time-barred. Further, Request 16-1 improperly raised the same arguments raised in Request 15-13. The Requester also repeatedly attempted to initiate CEP despite being informed that the Bylaws-mandated deadline for doing so had expired. Finally, despite repeatedly claiming that it was invoking the independent review process, the Requester

failed to actually file an IRP Request that even attempted to conform with the rules until 10 February 2016, almost three months past the Bylaws-mandated deadline.

Within 24 hours before the .SHOP Auction was set to go forward, the Requester made numerous frivolous attempts to invoke every ICANN accountability mechanism in a blatant attempt to halt the scheduled Auction. The Requester invoked CEP (despite knowing that it was time-barred by months), filed Request 16-1 (also raising time-barred arguments), and filed a complaint with the Ombudsman (which was declined for lack of jurisdiction). The day of the Auction, the Requester filed with the ICDR an Emergency Request for relief from an IRP emergency panel that (although time-barred) could have been filed well in advance of the Auction and which was ultimately abandoned by the Requester.

As discussed, ICANN is a nonprofit public benefit corporation charged with ensuring the stable and secure operation of the domain name system and remaining accountable to the Internet community while also using its resources in the public benefit.⁸² ICANN has expended significant resources engaging with the Requester and responding to the many (and mostly improper) filings described above. Although it is critical that all within the ICANN community have fair access to ICANN's accountability mechanisms, there is no justification for ICANN and members of its community having to suffer repeated baseless invocations of those mechanisms. .

⁸² Bylaws, Art. I, §§ 1, 2.10.

Resp. Ex. 34

RESPONDENT'S EXHIBIT

Community Priority Evaluation (CPE) Guidelines

Prepared by The Economist Intelligence Unit

Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.

Criterion #1: Community Establishment

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not considered here, but taken into account when scoring Criterion #2, “Nexus between Proposed String and Community.”)

Measured by

1-A Delineation

1-B Extension

A maximum of 4 points is possible on the Community Establishment criterion, and each sub-criterion has a maximum of 2 possible points.

1-A Delineation

AGB Criteria	Evaluation Guidelines
Scoring	
<p>2= Clearly delineated, organized, and pre-existing community.</p> <p>1= Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.</p> <p>0= Insufficient delineation and pre-existence for a score of 1.</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the community clearly delineated?</i></p> <p><i>Is there at least one entity mainly dedicated to the community?</i></p> <p><i>Does the entity (referred to above) have documented evidence of community activities?</i></p> <p><i>Has the community been active since at least September 2007?</i></p>
Definitions	
<p>“Community” - Usage of the expression “community” has evolved considerably from its Latin origin – “communitas” meaning “fellowship” – while still implying more of cohesion than a mere commonality of interest. Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some</p>	<p>The “community,” as it relates to Criterion #1, refers to the stated community in the application.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Was the entity established to administer the community?</i> • <i>Does the entity’s mission statement clearly identify the community?</i>

<p>understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.</p>	<p>Additional research may need to be performed to establish that there is documented evidence of community activities. Research may include reviewing the entity’s web site, including mission statements, charters, reviewing websites of community members (pertaining to groups), if applicable, etc.</p>
<p>"Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.</p>	<p>“Delineation” also refers to the extent to which a community has the requisite awareness and recognition from its members.</p> <p>The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.</p>
<p>"Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.</p>	
<p>"Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.</p>	<p>“Mainly” could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Was the entity established to administer the community?</i> • <i>Does the entity’s mission statement clearly identify the community?</i>
<p>Criterion 1-A guidelines</p>	
<p>With respect to “Delineation” and “Extension,” it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the</p>	<p>With respect to the Community, consider the following:</p> <ul style="list-style-type: none"> • <i>Are community members aware of the existence of the community as defined by the applicant?</i> • <i>Do community members recognize the community as defined by the applicant?</i>

<p>community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both “Delineation” and “Extension.”</p> <p>With respect to “Delineation,” if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.</p>	<ul style="list-style-type: none"> • <i>Is there clear evidence of such awareness and recognition?</i>
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1-B Extension

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Extension:</p> <p>2=Community of considerable size and longevity</p> <p>1=Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.</p> <p>0=Community of neither considerable size nor longevity</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the community of considerable size?</i></p> <p><i>Does the community demonstrate longevity?</i></p>
Definitions	
<p>“Extension” relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.</p>	
<p>"Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Is the designated community large in terms of membership and/or geographic dispersion?</i>

<p>"Longevity" means that the pursuits of a community are of a lasting, non-transient nature.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Is the community a relatively short-lived congregation (e.g. a group that forms to represent a one-off event)?</i> • <i>Is the community forward-looking (i.e. will it continue to exist in the future)?</i>
<p>Criterion 1-B Guidelines</p>	
<p>With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."</p> <p>With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.</p>	

Criterion #2: Nexus between Proposed String and Community

This section evaluates the relevance of the string to the specific community that it claims to represent.

Measured by

2-A Nexus

2-B Uniqueness

A maximum of 4 points is possible on the Nexus criterion, and with the Nexus sub-criterion having a maximum of 3 possible points, and the Uniqueness sub-criterion having a maximum of 1 possible point.

2-A Nexus

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Nexus:</p> <p>3= The string matches the name of the community or is a well-known short-form or abbreviation of the community</p> <p>2= String identifies the community, but does not qualify for a score of 3</p> <p>0= String nexus does not fulfill the requirements for a score of 2</p>	<p>The following question must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.</i></p>
Definitions	
<p>“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.</p>	<p>“Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.</p>
<p>“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.</p>	<p>“Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’.</p> <p>“Identify” does not simply mean ‘describe’, but means ‘closely describes the community’.</p> <p>“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.</p>

	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?</i> • <i>Does the string capture a wider geographical/thematic remit than the community has? The “community” refers to the community as defined by the applicant.</i> • <i>An Internet search should be utilized to help understand whether the string identifies the community and is known by others.</i> • <i>Consider whether the application mission statement, community responses, and websites align.</i>
<p>Criterion 2-A Guidelines</p>	
<p>With respect to “Nexus,” for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.</p> <p>With respect to “Nexus,” for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.</p>	

2-B Uniqueness

<p>AGB Criteria</p>	<p>Evaluation Guidelines</p>
<p>Scoring</p>	
<p>Uniqueness: 1=String has no other significant meaning beyond</p>	<p>The following question must be scored when evaluating the application:</p>

<p>identifying the community described in the application. 0=String does not fulfill the requirement for a score of 1.</p>	<p><i>Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?</i></p>
<p>Definitions</p>	
<p>“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.</p>	<p>“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.</p>
<p>“Significant meaning” relates to the public in general, with consideration of the community language context added</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Will the public in general immediately think of the applying community when thinking of the applied-for string?</i> • <i>If the string is unfamiliar to the public in general, it may be an indicator of uniqueness.</i> • <i>Is the geography or activity implied by the string?</i> • <i>Is the size and delineation of the community inconsistent with the string?</i> • <i>An internet search should be utilized to find out whether there are repeated and frequent references to legal entities or communities other than the community referenced in the application.</i>
<p>Criterion 2-B Guidelines</p>	
<p>"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores</p>	

2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the meaning of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies

This section evaluates the applicant’s registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Measured by

3-A Eligibility

3-B Name Selection

3-C Content and Use

3-D Enforcement

A maximum of 4 points is possible on the Registration Policies criterion and each sub-criterion has a maximum of 1 possible point.

3-A Eligibility

AGB Criteria	Evaluation Guidelines
Scoring	
Eligibility: 1= Eligibility restricted to community members 0= Largely unrestricted approach to eligibility	The following question must be scored when evaluating the application: <i>Is eligibility for being allowed as a registrant restricted?</i>
Definitions	
“Eligibility” means the qualifications that organizations or individuals must have in order to be allowed as registrants by the registry.	
Criterion 3-A Guidelines	
With respect to “eligibility” the limitation to community “members” can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant’s physical address be within the boundaries of the location.	

3-B Name Selection

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Name selection: 1= Policies include name selection rules consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Do the applicant’s policies include name selection rules?</i></p> <p style="text-align: center;"><i>Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?</i></p>
Definitions	
<p>“Name selection” means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Are the name selection rules consistent with the entity’s mission statement?</i>
Criterion 3-B Guidelines	
<p>With respect to “Name selection,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	

3-C Content and Use

AGB Criteria	Evaluation Guidelines
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Scoring	
<p>Content and use: 1= Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Do the applicant’s policies include content and use rules?</i></p> <p><i>If yes, are content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?</i></p>
Definitions	
<p>“Content and use” means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> <i>Are the content and use rules consistent with the applicant’s mission statement?</i>
Criterion 3-C Guidelines	
<p>With respect to “Content and Use,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	

3-D Enforcement

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Enforcement 1= Policies include specific enforcement measures</p>	<p>The following question must be scored when evaluating the application:</p>

<p>(e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms 0= Policies do not fulfill the requirements for a score of 1</p>	<p><i>Do the policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?</i></p>
<p>Definitions</p>	
<p>“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.</p>	<p>“Coherent set” refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.</p> <p>Consider the following: Do the enforcement measures include:</p> <ul style="list-style-type: none"> • <i>Investigation practices</i> • <i>Penalties</i> • <i>Takedown procedures (e.g., removing the string)</i> • <i>Whether such measures are aligned with the community-based purpose of the TLD</i> • <i>Whether such measures demonstrate continuing accountability to the community named in the application</i>
<p>Criterion 3-D Guidelines</p>	
<p>With respect to “Enforcement,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement</p>	

<p>mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	
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Criterion #4: Community Endorsement

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed in the application, with due regard for communities implicitly addressed by the string.

Measured by

4-A Support

4-B Opposition

A maximum of 4 points is possible on the Community Endorsement criterion and each sub-criterion (Support and Opposition) has a maximum of 2 possible points.

4-A Support

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Support:</p> <p>2= Applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community</p> <p>1= Documented support from at least one group with relevance, but insufficient support for a score of 2</p> <p>0= Insufficient proof of support for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the applicant the recognized community institution or member organization?</i></p> <p>To assess this question please consider the following:</p> <p><i>a. Consider whether the community institution or member organization is the clearly recognized representative of the community.</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If it does not, or if there is more than one recognized community institution or member organization (and the applicant is one of them), consider the following:</p> <p><i>Does the applicant have documented</i></p>

	<p><i>support from the recognized community institution(s)/member organization(s) to represent the community?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:</p> <p><i>Does the applicant have documented authority to represent the community?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:</p> <p><i>Does the applicant have support from at least one group with relevance?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification.</p> <p>➤ Instructions on letter(s) of support requirements are located below, in Letter(s) of support and their verification</p>
<p>Definitions</p>	
<p>“Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of that community.</p>	
<p>“Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</p>	<p>The institution(s)/organization(s) could be deemed relevant when not identified in the application but has an association to the applied-for string.</p>
<p>Criterion 4-A Guidelines</p>	
<p>With respect to “Support,” it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.</p>	<p>Letter(s) of support and their verification: Letter(s) of support must be evaluated to determine both the relevance of the organization and the validity of the documentation and must meet the criteria spelled out below. The letter(s) of support is an input used to determine the relevance of the organization and the validity of</p>

<p>Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.</p> <p>The applicant will score a 1 for “Support” if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on “Support” if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.</p> <p>To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.</p>	<p>the documentation.</p> <p>Consider the following:</p> <p>Are there multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?</p> <p>Does the applicant have support from the majority of the recognized community institution/member organizations?</p> <p>Has the applicant provided full documentation that it has authority to represent the community with its application?</p> <p>A majority of the overall community may be determined by, but not restricted to, considerations such as headcount, the geographic reach of the organizations, or other features such as the degree of power of the organizations.</p> <p><u>Determining relevance and recognition</u></p> <p><i>Is the organization relevant and/or recognized as per the definitions above?</i></p> <p><u>Letter requirements & validity</u></p> <p><i>Does the letter clearly express the organization’s support for the community-based application?</i></p> <p><i>Does the letter demonstrate the organization’s understanding of the string being requested?</i></p> <p><i>Is the documentation submitted by the applicant valid (i.e. the organization exists and the letter is authentic)?</i></p> <p>To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or</p>
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	expressions of support received.
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4-B Opposition

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Opposition: 2= No opposition of relevance 1= Relevant opposition from one group of non-negligible size 0= Relevant opposition from two or more groups of non-negligible size</p>	<p>The following question must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Does the application have any opposition that is deemed relevant?</i></p>
Definitions	
<p>“Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</p>	<p>Consider the following: For “non-negligible” size, “relevant” and “relevance” consider:</p> <ul style="list-style-type: none"> • <i>If the application has opposition from communities that are deemed to be relevant.</i> • <i>If a web search may help determine relevance and size of the objecting organization(s).</i> • <i>If there is opposition by some other reputable organization(s), such as a quasi-official, publicly recognized organization(s) or a peer organization(s)?</i> • <i>If there is opposition from a part of the community explicitly or implicitly addressed?</i>
Criterion 4-B Guidelines	
<p>When scoring “Opposition,” previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for “Opposition.” To be taken into account as relevant opposition, such objections or</p>	<p>Letter(s) of opposition and their verification: Letter(s) of opposition should be evaluated to determine both the relevance of the organization and the validity of the documentation and should meet the criteria spelled out below.</p> <p><u>Determining relevance and recognition</u> <i>Is the organization relevant and/or</i></p>

<p>comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.</p>	<p><i>recognized as per the definitions above?</i></p> <p><u>Letter requirements & validity</u></p> <p><i>Does the letter clearly express the organization's opposition to the applicant's application?</i></p> <p><i>Does the letter demonstrate the organization's understanding of the string being requested?</i></p> <p><i>Is the documentation submitted by the organization valid (i.e. the organization exists and the letter is authentic)?</i></p> <p>To be considered relevant opposition, such documentation should contain a description of the process and rationale used in arriving at the expression of opposition. Consideration of opposition is not based merely on the number of comments or expressions of opposition received.</p>
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Verification of letter(s) of support and opposition

Additional information on the verification of letter(s) of support and opposition:

- Changes in governments may result in new leadership at government agencies. As such, the signatory need only have held the position as of the date the letter was signed or sealed.
- A contact name should be provided in the letter(s) of support or opposition.
- The contact must send an email acknowledging that the letter is authentic, as a verbal acknowledgement is not sufficient.
- In cases where the letter was signed or sealed by an individual who is not currently holding that office or a position of authority, the letter is valid only if the individual was the appropriate authority at the time that the letter was signed or sealed.

About the Community Priority Evaluation Panel and its Processes

The Economist Intelligence Unit (EIU) is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 900 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including:

- The panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role.
- The provider must be able to convene a linguistically and culturally diverse panel capable, in the aggregate, of evaluating Applications from a wide variety of different communities.
- The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and
- The panel must be able to document the way in which it has done so in each case.

The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators must ensure that no conflicts of interest exist.
- All EIU evaluators must undergo training and be fully cognizant of all CPE requirements as listed in the Applicant Guidebook. This process will include a pilot testing process.
- EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications.
- Language skills will also be considered in the selection of evaluators and the assignment of specific Applications.
- All applications will be evaluated and scored, in the first instance by two evaluators, working independently.
- All Applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.

- The EIU will work closely with ICANN when questions arise and when additional information may be required to evaluate an application.
- The EIU will fully cooperate with ICANN's quality control process.