

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

DONUTS INC.) ICDR Case No. 01-14-0001-6263
Claimant,)
v.)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
Respondent.)

**SUPPLEMENTAL MEMORANDUM OF CLAIMANT DONUTS INC.
IN FURTHER SUPPORT OF REQUEST FOR INDEPENDENT REVIEW PROCESS
RE NEW gTLD APPLICATIONS FOR .SPORTS and .RUGBY
(Pursuant to July 17, 2015 Procedural Order No. 1)**

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I. INTRODUCTION

1. As specifically directed by Proc. Ord. 1 ¶ 12, Donuts respectfully makes this supplemental submission to:

a. “respond[] to positions set forth in ICANN’s Consolidated Response of November 14, 2014” (“Response”) to Donuts’ October 8, 2014 IRP Request (“Request”); and

b. “acquaint the Tribunal with sources and precedent not previously examined in the Request.”

None of the points set forth by ICANN in its Response suffices to defeat the Request.¹ Indeed, developments since the time Donuts filed the Request, including the Board’s own actions and the results of other IRPs having precedential value, only strengthen Donuts’ right to relief in this proceeding.

2. As the first of three basic points in its Response, ICANN contends that its Board has no obligation to ensure that its appointed experts act without conflict of interest. However, appointment of an expert with conflict of interest is clearly a Board action in violation of ICANN’s Bylaws, which, as stated under Bylaws Art. IV § 3.4.a, makes that an express subject of IRP review. Specifically, the panelist challenged in this IRP had been removed from a community objection proceeding against a .SPORT string, confirming Donuts’ assertion that a conflict in fact existed. Allowing that panelist subsequently to rule on the same objector’s case against .SPORTS transgresses not only the anti-conflict provision of the Bylaws, but also its non-discrimination mandate at Art. II § 3.

3. Second, ICANN disclaims that its Board has any duty to ensure consistency in new gTLD objection rulings. Yet, the “core values” laid out in Bylaws Art. I § 2 require, among other things, “well-informed decisions based on expert advice” and “applying documented policies neutrally and objectively, with integrity and fairness.” The Board, which approved the

¹ Capitalized terms and abbreviations not otherwise defined herein have the meanings ascribed to them in the Request.

Guidebook that “documents” the specific “policies” applicable to community objections, did not exercise the authority it indisputably has to make sure that experts deciding new gTLD objections fully understood and applied only the standards set forth in the Guidebook for such objections. Donuts has requested documents reflecting training and other information about community objections provided to the ICC and the .SPORTS and .RUGBY panelists, but ICANN refuses to produce this directly relevant evidence.

4. Third, ICANN repudiates Donuts’ call for accountability on the part of the Board. After the earliest community objection rulings, but well before those in .SPORTS and .RUGBY, Donuts and other sizable new gTLD applicants petitioned the Board to create a mechanism to review objection rulings for consistency with Guidebook standards. After Donuts initiated this IRP in October 2014, the NGPC of the Board issued a resolution providing for review of *some* new gTLD objection rulings, but *not* those at issue here. This action reveals that the Board understands it has the power and obligation to act when its Bylaws and Articles are being violated. Donuts offers such evidence for that purpose – not, as ICANN exaggerates, to suggest that this Panel should require ICANN to implement a sweeping review process for all new gTLD objections. The accountability principle of ICANN’s Bylaws requires meaningful review of Board actions and omissions that violate the Bylaws, Articles and other governing documents. The Board’s failure to maintain its own accountability makes IRP “the only and ultimate ... remedy for an applicant,” as observed in the DCA Case (decided since the filing of this proceeding).

5. In the DCA Case, ICANN made many of the same types of arguments as it asserts here, all without success. The panel there properly made its determinations after reviewing the acts and omissions of ICANN on “a *de novo*, objective and independent” basis, without “any presumption of correctness,” to “ensure that ICANN acted in a manner consistent with ICANN’s Articles of Incorporation and Bylaws.” (Emphasis in original.) Indeed, *all* IRPs to have reached the merits – including *Booking.com*, also decided since the filing of this proceeding – *uniformly* have conducted such objective, *de novo* review. This Panel should follow such precedent, employ the same standard and find in favor of Donuts on its Request.

II. NEW MATTER AFFECTING REVIEW

6. A number of important developments have taken place since Donuts submitted its Request herein on October 8, 2014.

a. Final determinations have issued in two IRPs, *Booking.com* and the DCA Case, that support the relief sought by Donuts here.

b. SportAccord (“SA”), which prevailed in its community objection against Donuts for .SPORTS, has fallen into complete disarray, highlighting the consequences of the Board’s failures regarding that objection determination.

c. The Board has resolved to review certain new gTLD objection results, demonstrating that it understands its obligations in the context of the new gTLD program to maintain adherence to its Bylaws and other governing documents.

d. Finally, ICANN has refused to produce documents pertaining directly to the Board’s obligations under the Bylaws and Articles that it failed to follow in connection with the .SPORTS and .RUGBY objections at issue in this IRP.

Each of these new matters strengthens Donuts’ case for independent review.

A. IRP Panels Have Issued Final Declarations in *Booking.com* and the DCA Case.

7. By the time Donuts filed its Request, the ICM Case from 2010 stood as the only IRP to have reached full resolution on the merits. Since then, panels have decided *Booking.com* and the DCA Case. ICANN prevailed in the former but lost the latter. Both, however, affirm a more expansive standard of review than ICANN has urged this Panel to employ.

8. The two most recent IRP decisions follow the review framework established in the ICM Case but which ICANN thereafter attempted to narrow in Bylaws Art. IV § 3.4, which provides “a defined standard of review” that asks whether the Board (a) acted without conflict of interest, (b) exercised due diligence and care in having a reasonable amount of facts before taking or choosing not to take action, and (c) exercised independent judgment believed to be in the best interests of the ICANN “company.” As did the ICM Case before the Bylaws were

amended to so read, the DCA Case took a more expansive view of the IRP panel’s role because, among other reasons:

ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet’s ... identifier systems.²

Indeed, as the DCA Case panel correctly went on, “Article 4 of ICANN’s Articles of Incorporation require ICANN to ‘operate for the benefit of the Internet community as a whole’”³

9. Because the Bylaws “require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws,” an IRP panel must appraise the Board’s conduct “objectively” and “independently, and without any presumption of correctness.”⁴ Accordingly, this Panel must determine compliance (or not) with the Bylaws and Articles *de novo*;⁵ that is, it must decide whether the matter under review in fact conformed with ICANN governing principles – *not* whether the Board reasonably *believed* it did. Applying this standard, this Panel will find Board violations of the Bylaws and Articles just as the panel in the DCA Case did.

10. On the merits, the DCA Case most closely resembles this one. The requestor in that case argued that ICANN staff had acted in a number of ways inconsistent with the Bylaws and Articles, and also that the Board failed to investigate adequately, or at all, such conduct or the propriety of the GAC’s recommendation to ICANN not to accept the application of DCA for the .AFRICA gTLD. There, as here, ICANN argued that the panel had no Board action to review, and that the Board had no obligation to act so as to subject its inaction to IRP.⁶

² <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (“DCA Ruling”) ¶ 66.

³ *Id.* ¶ 67.

⁴ *Id.* ¶¶ 71, 75 (citing *Booking.com*) (emphasis in original text).

⁵ *Id.* ¶ 76.

⁶ *Id.* ¶¶ 86-91.

11. The DCA Case panel unanimously disagreed. In that case, like the one before this Panel, the Board itself had made none of the challenged determinations, and yet the decision properly stated that “the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before” allowing acceptance of the GAC advice to stand.⁷ Donuts likewise contends here that the Board, which has ultimate authority over the new gTLD program as the DCA Case panel noted, should not have accepted the ICC decision absent an investigation to ensure that the objection panel rulings happened fairly, without conflict and in a manner consistent with each other and with Guidebook standards. Its failure to do so constitutes Board inaction that falls short of the values, policies and directives in clear violation of the Bylaws and Articles, and cannot stand on this IRP.

B. SA Has Lost Much of the “Community” It Had Claimed to Represent.

12. As an example of the untoward consequences that can result from allowing the misconduct of the SPORTS panelist to go un-reviewed and unchecked by the Board as the specified overseer of the new gTLD program, the party that claimed the sole ability to operate a .SPORTS in the best interest of the alleged “community” has now lost much of its support. Nearly a third of its international sports organization members have explicitly suspended membership with or withdrawn from SA, and the International Olympic Committee similarly has cut ties with SA by ceasing to fund it.⁸

13. The Panel does not have as its task the responsibility of deciding who should operate a .SPORTS gTLD. Rather, Donuts has asked this Panel to determine that the objection panelist who ruled in SA’s favor had a conflict of interest, and misapplied “documented policies” for community objections set forth in the Guidebook, that the Board had the responsibility to investigate and correct. Donuts merely notes that the Board’s failure to act

⁷ *Id.* ¶ 113.

⁸ See <http://wtop.com/sports/2015/06/ioc-cuts-ties-and-funding-for-umbrella-body-sportaccord/>. SA’s defecting members include World Rugby (formerly known as IRB, the party that prevailed on the .RUGBY community objection that it the other subject of this IRP). <http://www.worldrugby.org/news/72351>; https://en.wikipedia.org/wiki/World_Rugby#cite_note-irb-name-wr-1.

with respect to the .SPORTS objection ruling has resulted in a situation in which the beneficiary of its omissions has lost much of the “community” support that it claimed – and which the biased panelist found – it represented.

C. The Board Has Chosen to Review Certain Objection Rulings But Not Others.

14. As referenced in the Request, Donuts and others had specifically urged the Board to implement a means for reviewing new gTLD objection rulings inconsistent with ICANN’s “documented policies” governing such procedures in the Guidebook. One of the first came after an ICC panel ruled in favor of SA on its community objection against another applicant for the .SPORT string.⁹

15. Several months after that and other exhortations to the Board for some sort of new gTLD objection review procedure, the NGPC proposed, on February 5, 2014, a mechanism for addressing perceived inconsistent results in certain new gTLD objection cases.¹⁰ The proposal, however, suggested limiting review only to matters involving a “string confusion” objection (“SCO”), and then only to two sets of inconsistent SCO rulings: those pertaining to .CAR and .CARS, and those involving .CAM and .COM.¹¹

16. ICANN published the proposal for public comment shortly thereafter. Certain responses expressed that the proposal did not go far enough, calling for ICANN to “widen” the review process “to include cases” where “the results were just as inconsistent,” including in other objection contexts. In a communication before this Panel,¹² Donuts itself urged “a similar review mechanism in cases of inconsistent outcomes with ... Community objections.”

17. By the time Donuts filed its Request herein, the Board had not decided what to do about any inconsistent new gTLD objection results. However, a few days later, the NGPC issued a resolution to “take all steps necessary to establish processes and procedures ...

⁹ Req. Ex. 52.

¹⁰ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

¹¹ *Id.* at 3.

¹² Req. Ex. 51.

pursuant to which the [ICDR] shall establish a three-member panel to re-evaluate the materials presented, and the Expert Determinations, in” two SCO proceedings as indicated in its February 5, 2014 proposal.¹³ The NGPC specifically cited, as authority for its determination, Guidebook section 5.1, which provides in part as follows:

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.

Id. The NGPC further considered, “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 ... Objections” However, even though it reasoned that doing so would “promote the goals of predictability and fairness,” the NGPC concluded that providing for broader review would be “more appropriate as part of ... subsequent rounds of the New gTLD Program.” *Id.* While Donuts does not seek by this IRP a sweeping review process for new gTLD objections, it does emphasize that the NGPC action demonstrates that the Board understands its authority and obligations where new gTLD objection processes violate ICANN Bylaws, Articles and other governing documents. Its failure to act in such circumstances, as here, makes its inactions reviewable by IRP.

D. ICANN Has Refused to Produce Documents That Could Help This Panel Determine Whether the Board Has Followed the Bylaws, Articles and Other Governing Documents.

18. The Panel will recall that ICANN has refused to produce documents responsive to three of the five categories sought by Donuts pursuant to ICDR Arb. R. 21. “The Tribunal shall defer any decision with respect to the disputed categories,” but “underscores that it has the

¹³ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en>.

power at any time ... to make targeted requests for disclosure ... [that] may ... replicate those made by Donuts” Proc. Ord. 3 ¶¶ 12-13. “The Tribunal further notes its power, under ICDR Rules Article 20(7), to ... draw adverse inferences.” *Id.* ¶ 14. As shown more fully below, the documents requested bear directly on key issues in this proceeding, and the Panel should exercise its power either to order production of the disputed documents, or draw adverse inferences from ICANN’s refusal to produce them.

III. ARGUMENT

19. The final declaration in the DCA Case largely eviscerates the positions taken by ICANN in its Response to Donuts’ IRP Request. This Panel should carefully consider that decision, as “declarations of [an] IRP Panel ... have precedential value.” App. A Art IV § 3.21.

A. The .SPORTS Ruling Resulted from a Conflict of Interest Reviewable by IRP.

20. Donuts claims that the community objection ruling as to .SPORTS resulted from the objection panelist’s conflict of interest, reviewable in this proceeding. Req. ¶¶ 62-69.¹⁴ Attempting to deflect this point, ICANN contends that its Board had no obligation to involve itself in assessing the potential bias of, or propriety of disqualifying, the .SPORTS panelist. Resp. ¶¶ 44, 48-49. That position, however, runs directly contrary to express provisions of the Bylaws, the Guidebook and the precedential determination in the DCA Case.

21. By their very terms, the Bylaws make reviewable by IRP a decision taken with a conflict of interest. Bylaws Art. IV § 3.4.a. ICANN’s attempt to disassociate the Board from that conflict cannot succeed, as the Board-approved Guidebook itself assigns it the “ultimate responsibility for the New gTLD Program,” including “the right to individually consider an application for a new gTLD” AGB § 5.1.

22. ICANN made a similar (and unsuccessful) argument in the DCA Case. It tried to insulate the Board from responsibility for the GAC’s unfavorable advice on applicant DCA

¹⁴ Donuts objected to the same expert’s service as a .SKI community objection panelist, and the Request initially challenged the failure to disqualify him from that panel. *Id.* As this IRP Panel knows, Donuts has settled its issues regarding .SKI outside this proceeding, and this case no longer involves those issues. Proc. Ord. 1 ¶ 10.

Trust's fitness to run the .AFRICA domain; according to ICANN, allowing the Board to second-guess a recommendation made by the GAC in accordance with the Guidebook would improperly encroach upon the discretion given to the GAC in the Guidebook.¹⁵ In other words, ICANN viewed that the responsibility for ensuring that the GAC arrived at its recommendation fairly and without conflict rested with the GAC itself, not ICANN or its Board. The panel in the DCA Case flatly rejected this argument, holding ICANN and its Board "bound by its Bylaws to *conduct adequate diligence* to ensure that it was applying its procedures fairly."¹⁶

23. Also as in the DCA Case, ICANN argues here that no "Board action" has been identified that calls for IRP review. Resp. ¶ 49. However, the Bylaws explicitly task an IRP panel to "declare whether an action *or inaction* of the Board was inconsistent with the Articles of Incorporation or Bylaws" Bylaws Art. IV § 3.11.c (emphasis added). ICANN has unambiguously admitted the reviewability of Board inaction: "the Bylaws are very clear. Independent Review Proceedings are for the purpose of testing conduct *or inaction* of the ICANN Board." DCA Ruling at 42 (emphasis added). Similarly, the DCA Case panel found directly reviewable the Board's lack of action, including its failure to "conduct adequate diligence" into the GAC's decision-making. *Id.* ¶ 106.

24. The Panel here should note that "GAC Advice," such as that considered in the DCA Case, acts as another form of "objection" to new gTLD delegation, similar to those in the Guidebook based on "community" and other grounds. The primary difference between "GAC Advice" and an "objection" focuses primarily on the identity of the originator. The effects, however, are identical: absent Board intervention, the GAC or a community objector can prevent an applicant from entering into a registry contract with ICANN. AGB §§ 1.1.2.9, 3.1, 3.4.6, 3.5.4.

¹⁵ DCA Ruling at 34-35.

¹⁶ *Id.* ¶ 105 (emphasis added). See also *id.* ¶ 113 (Board should have investigated propriety of GAC advice before following it and rejecting the DCA Trust application).

25. This context becomes especially important when considering ICANN’s attempt to limit the scope of IRP review to exclude the “substance” of the underlying ICC decision.¹⁷ In particular, ICANN tries to argue in its Response that Donuts’ “real” concern stems not from any conduct of the Board, but rather with the substantive outcome of community objections at issue.¹⁸ The requestor in the DCA Case obviously disputed the substantive “outcome” of its application – *i.e.*, ICANN’s refusal to accept its application. The panel in the DCA Case determined that the Board had an obligation to ensure absence of conflicts and neutral and fair application of its governing principles, including non-discrimination, and that the Board’s failure to act on an “outcome” that transgressed these tenets itself constituted a violation thereof. This Panel should reach the same conclusion.

B. The Bylaws Oblige the Board to Provide for Fair Application of Documented Policies and Non-Discriminatory Treatment of New gTLD Applicants.

26. The facts and reasoning of the DCA Case similarly apply to the second primary point of Donuts’ Request – namely, that the Board had an obligation to see to it that experts designated to hear new gTLD objections were “well informed,” applied the “documented policies” of the Guidebook concerning such objections “neutrally and objectively, with integrity and fairness,” and did not apply such standards so as to single out Donuts (or any applicant) for disparate treatment. Req. ¶¶ 19, 70-80, citing Bylaws Art. I §§ 2.7, 2.8 and Art. II § 3. Again, ICANN argues that “no ICANN Board Action was the cause” of the violations of which Donuts complains. Resp. ¶ 54.

27. ICANN ignores the Bylaws’ plain language regarding Board “inaction” and the Board’s duty, as found in the DCA Case, to ensure that ICANN processes adhere to its Bylaws, Articles and other governing documents. ICANN is not “an ordinary California nonprofit corporation,” but rather one with a “large international purpose and responsibility to coordinate and ensure the stable and secure” operation of the Internet for the benefit of its

¹⁷ See Response at 21-22.

¹⁸ *Id.* at 17.

users. DCA Ruling ¶ 66. This unique role of global public trust requires the Board, at the absolute *minimum*, to “conduct adequate diligence” to assure application of its procedures fairly for all, including aggrieved new gTLD applicants. *Id.* ¶¶ 105-109.

28. Significantly, the DCA Case held the Board responsible for oversight of the acts of ICANN’s “constituent bodies,” such as the GAC, that share ICANN’s obligation to adhere to its Bylaws and other governing documents. *Id.* ¶¶ 96, 101-109. GAC “advice” amounts to nothing unless and until ICANN acts upon it. *Id.* ¶ 101, citing Bylaws Art. XI § 1. *See also* AGB § 3.1. Similarly, the determinations of new gTLD objection panels constitute “expert advice” that have no effect until accepted by ICANN. AGB § 3.4.6. Only the Board has the power to appoint or provide for the appointment of such experts. Bylaws. Art. XI-A § 2.a. It also has ultimate authority over the new gTLD program. AGB § 5.1. As such, the Board has an obligation to assure compliance with ICANN policies and procedures by DRSPs and experts ruling upon new gTLD objections.

29. ICANN’s argument to the contrary ignores the obligations of the Board and advisory bodies such as the DRSPs and their objection panelists. It further overlooks basic principles of causation and agency. ICANN may not view the Board itself as having actually *caused* Donuts’ injury, and instead prefers to hide behind the ICC and the expert panelists who rendered the decisions that Donuts contends failed to comply with “documented policies” and other governing principles. Certainly, the Board could reasonably foresee that panels may not follow the sole grounds established by the Guidebook for sustaining community objections, AGB § 3.5.4, or may not apply them consistently.

30. Donuts therefore asserts that the Board should have provided for training to “inform” DRSPs and experts retained by ICANN regarding the application of the standards for new gTLD objections, as well as requirements of the Bylaws and other governing documents pertaining to conflicts of interest and non-discrimination. Req. ¶ 71. Failing to do so would

make the Board, under rudimentary legal principles, a proximate cause of harm to Donuts.¹⁹ For this reason, Donuts has requested from ICANN documentation reflecting the training given, if any, to DRSPs and the .SPORTS and .RUGBY panelists concerning determination of community objections. ICANN refuses to produce responsive documents, or even to state under oath whether it has any. The existence and content of such documents would evidence ICANN's views as to its own (and its Board's) obligations to promote compliance by the ICC and its panelists with Guidebook and other governing principles, in the face of arguments it currently makes that it and its Board have no such obligations.

31. Such evidence revealed in the DCA Case appears to have had a material effect on its outcome. *See, e.g.*, DCA Ruling ¶ 80 (evidence that ICANN staff helped draft application materials for DCA Trust's competitor, to whom ICANN awarded the .AFRICA string). This Panel should order production of these key documents and draw inferences adverse to ICANN if it fails to comply. In either case, Donuts reserves the right to offer additional arguments based on what such documents, or ICANN's failure to produce any, may divulge.

C. The Board Knows but Has Shirked Its Accountability Obligations.

32. Donuts contends in its Request (and above) that the obligation of ICANN and its Board to maintain accountability to the Internet community, Bylaws Art. I § 2.10, requires affirmative action by the Board to assure compliance with ICANN's "core values" and governing principles on the "front end" by training and the like. It also had suggested to ICANN long before this proceeding that it could act on the "back end" by measures to rectify transgressions committed by objection panelists. Req. Exs. 51, 52.

33. ICANN again responds that its Board has no such obligation, arguing that imposing one on it would "create[] a logistical nightmare for the Board" Resp. ¶ 57. However, the lack of such a mechanism has engendered its own nightmare for applicants facing

¹⁹ *See, e.g.*, *Weaver v. Bank of America Nat'l Trust & Sav. Assoc.*, 59 Cal. 2d 428, 434 (1963), *citing* Rest. Torts §§ 447-449: "[T]he intervening act of a third party will not terminate the defendant's liability for negligence if that act was reasonably foreseeable." *See also Stewart v. Cox*, 55 Cal.2d 857, 864 (1961), *citing* Rest. Torts § 452.

an uncertain delegation process due to objection determinations inconsistent with Guidebook rules and with each other.

34. Indeed, these precise concerns led the NGPC to propose, and ultimately adopt, a “review mechanism to address perceived inconsistent” objection results in two string groups. Certainly in that case, as much as here, the Board’s obligation to ensure equal treatment of similarly situated applicants outweighed concern for any potential “logistical nightmare.”

35. Donuts and other applicants have invested substantial sums and countless other resources toward operation of new top-level domains in reliance on predictable application of clear objection standards documented after years of ICANN stakeholder input. Indeed, the NGPC acknowledged that a process to review objection determinations other than in the two cases for which it ultimately provided would “promote the goals of predictability and fairness” for all applicants.²⁰

36. The Board knew how to take and could have taken such action – because it did with respect to other objection rulings. Donuts does not seek by this IRP to have ICANN institute such a review process. Rather, Donuts offers evidence of what ICANN did in the case of certain SCO rulings as demonstrating that ICANN’s Board understands its powers and obligations. The Board had the power to assure freedom from conflicts and disparate treatment, and that DRSPs and their experts apply “documented policies” for new gTLD objections on an “informed” basis, but failed to do so. Such inaction by the Board entitles Donuts to IRP relief.

IV. CONCLUSION and RELIEF REQUESTED

37. In the absence of any alternative, reliable means to ensure fairness and predictability, “[t]he 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.” DCA Ruling ¶ 72. In fact, “the only and ultimate ‘accountability’ remedy for an applicant is the IRP.” *Id.* ¶ 73.

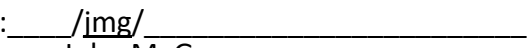
²⁰ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

This Panel should hold the Board accountable for its inaction in violation of ICANN's Bylaws that resulted in the Board's failure to ensure equal treatment of and fairness to all applicants. Accordingly, this Panel should, similar to DCA, recommend that ICANN reject the objections and to refrain from delegation of the TLDs at issue while permitting Donuts' applications to proceed through the remainder of the new gTLD application process. In the alternative, the Panel could recommend a review of the .SPORTS and .RUGBY community objections in a manner that applies the proper substantive standards and burden of proof requirements as specifically spelled out in Guidebook sections 3.5 and 3.5.4.

DATED: August 20, 2015

Respectfully submitted,

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APPENDIX

SCHEDULE OF “COMMON GROUND” MATTERS BY CLAIMAINT DONUTS INC.

Claimant Donuts Inc. (“Donuts”) hereby submits, pursuant to Panel’s Procedural Order No. 3, dated August 14, 2015, the following “schedule of matters, factual and legal, it considers to be common ground.” As discussed in its Supplemental Written Submission,¹ propounded concurrently with this Schedule, Donuts does not currently have all of the documents and information that it has requested from ICANN pursuant to Article 21 of the ICDR Rules, as some requests have been contested by ICANN and the Panel has yet to rule on these Requests.

Only a limited subset of documents has been produced, and this production occurred *less than twenty-four hours* of Donuts’ submission deadline. As such, Donuts certainly has not had a meaningful opportunity to review or consider them. The Parties are scheduled to meet-and-confer on discovery-related issues within the coming days and may be able to resolve some of these discrepancies, as well as agree on additional topics that can be added to the list below.

In light of the foregoing, this Schedule should be considered as simply a *partial* and *non-exhaustive* selection (in no particular order) of items that Donuts would consider *at this stage* to be unlikely to garner any significant dispute between the Parties.

1. ICANN created the new gTLD Program to greatly expand the scope of the Domain Name System, promote competition and increase consumer choice.
2. New gTLD applications were submitted for both .SPORT and .SPORTS, by dotSport Limited and Donuts Inc., respectively.
3. Each new gTLD application was subject to extensive pre-delegation examination that could include evaluation by an independent “String Similarity Panel.”

¹ Defined terms retain any meanings applied to them in either the Claimant’s Supplemental Written Submission or its Opening Brief.

4. ICANN maintains a “Government Advisory Committee” (“GAC”) that is made up of representatives of national governments, and that provides advice and consultation to ICANN and the Board on a variety of different matters, including new gTLD applications.
5. The dispute involving the .SKI domain has been amicably resolved.
6. Donuts’ request for Emergency Relief in this case has also been amicably resolved.
7. The panelist that considered the Parties’ arguments for Emergency Relief in this case was Thomas J. Klitgaard.
8. The ICC was selected by ICANN to hear “community” and “limited public interest” objections for new gTLDs, pursuant to the Guidebook.
9. The ICDR was selected by ICANN to hear “string confusion” objections for new gTLDs pursuant to the Guidebook.
10. Donuts applied for 307 new gTLDs, which included .SPORTS, .RUGBY and .SKI.
11. Donuts’ application for .SPORTS was made via its designee, Steel Edge, LLC (Application No. 1-1614-27785).
12. All of Donuts’ applications were “standard” (*i.e.*, non-community) applications.
13. SportAccord applied for .SPORT (Application No. 1-1012-71460), and designated itself as a “community-based” applicant.
14. The International Rugby Board (a/k/a “World Rugby”) applied for .RUGBY (Application No. 1-994-63638) as a “community” based application, via the entity “IRB Strategic Developments Limited.”
15. SportAccord filed community objections against both Donuts application for .SPORTS and dotSport Limited’s application for .SPORT, both of which prevailed.
16. Donuts applied for .RUGBY via its designee, Atomic Cross, LLC (Application No. 1-1612-2805).
17. Another “standard” application was submitted for .RUGBY by applicant dot Rugby Limited (Application No. 1-1206-66762).

18. The IRB (a/k/a “World Rugby”) filed community objections pertaining to .RUGBY against both Donuts and dot Rugby Limited, both of which prevailed.
19. ICANN maintains a “Board Governance Committee” (“BGC”) that provides consultative advice and assistance to the Board and ICANN on a variety of matters, including new gTLD applications.
20. A Community Objection, as laid out in Module 3 of the Guidebook, is made up of four basic elements: (i) Clear Delineation; (ii) Substantial Opposition; (iii) Targeting; and (iv) Material Detriment.
21. Pursuant to Module 3 of the Guidebook, the GAC can choose to issue “advice” on certain new gTLD applications, and this “advice” may include a recommendation that a particular string not proceed to delegation.
22. Jonathan Peter Taylor was selected as panelist by the ICC to hear the community objections brought by SportAccord involving Donuts’ applications for .SKI and .SPORTS.
23. Mr. Taylor was also originally appointed panelist brought by SportAccord for the community objection concerning dot Sport Limited’s application for .SPORT. He was removed on July 25, 2013 after a challenge to his appointment was raised by dot Sport Limited based on his historical dealings with the objector, SportAccord, that represented a conflict of interest.
24. Mr. Taylor issued his decision upholding the objection by SportAccord against Donuts’ application for .SPORTS on January 11, 2014.
25. Mark Kantor was selected as panelist by the ICC to hear the community objections involving Donuts’ applications for .RUGBY.
26. Mr. Kantor issued his decision upholding the objection by the IRB (a/k/a “World Rugby) against Donuts’ application for .RUGBY on January 31, 2014.
27. Donuts engaged in “Cooperative Engagement” with ICANN prior to filing this IRP, but attempts to resolve the dispute were not successful.

28. ICANN has an “Ombudsman,” named Chris LaHatte, who *inter alia* assists with mediating disputes between new gTLD applicants and ICANN.
29. ICANN posted the final version of the Guidebook on June 4, 2012.
30. Objection procedures, including those pertaining to community objections, can be found in Module 3 of the Guidebook.

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Respectfully submitted,
THE IP and TECHNOLOGY LEGAL GROUP,
P.C.

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