

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

CORN LAKE, LLC,)	ICDR Case No. 01-15-0002-9938
)	
Claimant,)	
)	
v.)	
)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS,)	
)	
Respondent.)	

**SUPPLEMENTAL SUBMISSION OF CLAIMANT CORN LAKE, LLC
CONCERNING FEBRUARY 3, 2016 BOARD RESOLUTION RE .HOSPITAL
(As Requested by Panel at February 8, 2016 Hearing)**

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The Board resolution concerning .HOSPITAL (the “Resolution”)¹ is noteworthy for both how it resembles the .CHARITY situation as well as how it does not. Through this Resolution, the Board ordered review of yet another inconsistent and/or unreasonable objection ruling that is actually more *dissimilar* from the .COM/.CAM and .SHOP/.通販 objection sets than the .CHARITY objection rulings. *A fortiori*, the Board should have done likewise with .CHARITY, and its failure to do so resulted in disparate treatment in violation of ICANN’s Bylaws.

Background on .HOSPITAL: The Independent Objector brought a Limited Public Interest (“LPI”) objection against a Donuts subsidiary (“Ruby Pike”), asserting that harm could result from .HOSPITAL absent extraordinary protections not required of other TLDs.² Of the nine LPI objections brought against health-related new gTLDs (*e.g.*, .HEALTH, .HEALTHCARE, .MEDICAL, .MED), *only* the objection against .HOSPITAL prevailed, but *not* unanimously. In a written dissent, one panelist observed that the majority had overstepped the Guidebook by imposing standards not found therein.³

Actions following the .HOSPITAL objection ruling: Like Corn Lake in .CHARITY, Ruby Pike filed a Reconsideration Request (“RR”) in .HOSPITAL, which the Board denied. As with the .CHARITY RR, the BGC suggested that Ruby Pike enlist the help of the Ombudsman.⁴ After several months, the Ombudsman concluded that he lacked jurisdiction to act on the .HOSPITAL and .CHARITY objection determinations. Days later, Donuts initiated a cooperative engagement process (“CEP”) with ICANN under Bylaws Art. IV § 3.14. The process eventually terminated as to .CHARITY and led to this IRP, but continued with .HOSPITAL and resulted in the Resolution.

¹ <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>.

² See <https://newgtlds.icann.org/sites/default/files/drsp/16dec13/determination-3-1-1505-15195-en.pdf> ¶¶ 20-26. LPI objections have different standards from “community” objections, such as that asserted against .CHARITY, which appear at AGB §§ 3.5.3 and 3.5.4, respectively.

³ Unlike community objections, LPI cases have 3 panelists. AGB Mod. 3 Attmt. § 13(b). See dissent at <https://newgtlds.icann.org/sites/default/files/drsp/16dec13/determination-4-1-1505-15195-en.pdf> ¶¶ 10, 15, 22-24, 28, 29, 33-35.

⁴ <https://www.icann.org/en/groups/board/governance/reconsideration/13-23/determination-ruby-pike-05feb14-en.pdf> at 15; <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf> at 14-15.

The .HOSPITAL Resolution and its impact on these proceedings: The Resolution extends to .HOSPITAL and LPI objections the process the Board had established in October 2014 when it authorized further review of the .COM/.CAM and .SHOP/.通販 string confusion objection sets but excluded other objection types.⁵ It finds the .HOSPITAL ruling “inconsistent and/or unreasonable” as compared to the other health-related LPI decisions,⁶ and “not ... in the best interest of the New gTLD Program and the Internet community.” Ex. 30 at 4-5. Thus, it sets up the same 3-member panel review for .HOSPITAL as it had done for the .CAM and .SHOP sets,⁷ with the identical standard of review: “whether the original Expert Panel could have reasonably come to the decision reached in the underlying ... objection proceeding through an appropriate application of the standard of review as set forth in the Guidebook.” *Id.* at 8, Ex. 16 at 7.

The Board saw itself as taking action “consistent with the manner in which the Board had addressed previous inconsistent or unreasonable expert determinations” However, it again failed to correct its past actions with regard to .CHARITY – the *only* set of objection rulings of *any* type that existed at the time of the resolution as to .CAM and .SHOP and which followed their *identical* pattern: the *same* objector bringing the *same* objection against at least two *different* applicants for the *same* TLD that somehow reached *different* results. The latest Resolution goes even *further* by setting up review for inconsistent results as to *different* strings, but still leaves .CHARITY behind.

The Board’s action regarding .HOSPITAL reveals the fallacy of the position that ICANN has taken in this IRP – namely, that Board action on new gTLD objections would compromise the “independent” nature of the outsourced dispute resolution process.⁸ As with the .CAM and .SHOP sets, the Board in considering .HOSPITAL asserted its “ultimate responsibility” for the

⁵ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.

⁶ Because both the recent and previous resolutions use “and,” “or” and “and/or” at various points between “inconsistent” and “unreasonable,” we use the combined term.

⁷ ICDR Panels have completed their review and reversed the inconsistent rulings in both cases. See *Verisign, Inc. v. United TLD Holdco, Ltd.* [.CAM] and *Commercial Connect, LLC v. Amazon E.U. S.á.r.l.* [.SHOP], at <https://www.icdr.org/icdr/faces/icdrservices/icann> under “Documents.”

⁸ See, e.g., ICANN Resp. ¶ 47 and 8 Feb. 2016 Hrg. Presentation, slide 4.

new gTLD program and its power to “consider any application for a new gTLD to determine whether approval would be in the best interest of the Internet community.” AGB § 5.1.

While the Board repeatedly disclaims any *duty* to act on objection determinations, the Board *has* acted, several times now, on similarly inconsistent and/or unreasonable rulings. As discussed at hearing, when the Board *does* act it may not discriminate “unless justified by substantial and reasonable cause,” such as the advancement of other Core Values. Bylaws Art. II § 3. ICANN has shown no such “cause” to discriminate against Corn Lake and .CHARITY.

To the contrary, the Board has taken *new* action and *expanded* objection review to include contrary results for *different* TLDs, *and* in objection categories *beyond* string confusion. In doing so, but still not providing for the same review in .CHARITY, the Board treats .CHARITY disparately even though it is *more* similarly situated to .CAM and .SHOP than is .HOSPITAL.

Further, the “nuanced distinctions” and practical considerations that the Board cited for *not* extending review to LPI and community objection rulings in October 2014 cannot stand. Having now acknowledged no basis to treat .HOSPITAL (LPI) any differently than .CAM or .SHOP, the Board must deal with .CHARITY (community) equally.

The Board rightly took responsibility to correct disparate and/or unreasonable treatment in the cases of .CAM, .SHOP and now .HOSPITAL. It has discriminated against .CHARITY by not ordering a review of its clearly inconsistent rulings despite their identical or “lesser included” posture as the others. This Panel has the task of holding the Board accountable and ensuring that it acts consistently with the Bylaws, Articles and Guidebook. The Panel should do so here by ruling in favor of Corn Lake and declaring the Board in violation.

Corn Lake has addressed only that which the Panel has instructed it to do. It remains available to discuss any other issues that may arise.

DATED: February 16, 2016

Respectfully submitted,

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