

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

CORN LAKE, LLC, ) ICDR CASE NO. 01-15-0002-9938  
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Claimant, )  
)  
v. )  
)  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
)  
)  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO THE SUPPLEMENTAL SUBMISSION  
OF CLAIMANT CORN LAKE, LLC CONCERNING THE  
FINAL DECLARATION IN *DOT REGISTRY v. ICANN***

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The Internet Corporation for Assigned Names and Numbers (“ICANN”) submits this response to the 15 August 2016 Supplemental Submission of Claimant Corn Lake, LLC Concerning The July 29, 2016 IRP Declaration In *Dot Registry v. ICANN* (“Supplemental Submission”).

**I. THE FACTS ASSOCIATED WITH THE *CORN LAKE* AND *DOT REGISTRY* IRP REQUESTS ARE COMPLETELY DIFFERENT.**

1. The facts at issue in the *Dot Registry, LLC v. ICANN* IRP (“*Dot Registry*”) are not even remotely similar to those present here, and for this reason, the *Dot Registry* Final Declaration has little relevance to the instant IRP. Pursuant to the terms of the Guidebook, Dot Registry submitted “community” applications for .INC, .LLC, and .LLP, and participated in a Community Priority Evaluation (“CPE”) for each.<sup>1</sup> If an application satisfies the criteria in section 4.2 of the Guidebook, that application prevails in CPE and achieves priority over all other applications for the same string, meaning the other applications will not be allowed to contend for the string. ICANN retained a third party, the Economic Intelligence Unit (“EIU”), to conduct the CPEs, and the EIU determined that Dot Registry’s applications for .INC, .LLC, and .LLP did not prevail in CPE, so they remained in contention.<sup>2</sup> Dot Registry submitted reconsideration requests challenging ICANN’s acceptance of the CPE reports, which the Board Governance Committee (“BGC”) denied.<sup>3</sup> Dot Registry then sought independent review of the BGC’s determinations.<sup>4</sup> The Panel majority in the *Dot Registry* IRP determined that the BGC’s “conduct of the reconsideration process” did not meet the standards set forth in the Articles and Bylaws, but refused to comment on the EIU or staff’s conduct, because that was not the Panel majority’s role.<sup>5</sup>

2. By contrast, Corn Lake applied to operate .CHARITY (the “Application”). Spring Registry Limited (“SRL”) also applied for .CHARITY, and Excellent First Limited (“EFL”) applied

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<sup>1</sup> *Dot Registry* Final Decl. ¶ 11.

<sup>2</sup> *Id.* ¶ 19.

<sup>3</sup> *Id.* ¶ 23.

<sup>4</sup> *Id.* ¶ 25.

<sup>5</sup> *Id.* ¶ 152; *see also id.* ¶¶ 87-88, 122, 125, 152.

for 慈善 (Chinese for “charity”). The Independent Objector (“IO”) filed community objections against all three applications.<sup>6</sup> The International Chamber of Commerce (“ICC”) expert panel presiding over the IO’s community objection to Corn Lake’s Application rendered a determination in favor of the IO (“Expert Determination”).<sup>7</sup> The same ICC expert panel overruled the IO’s community objections to SRL’s application and EFL’s application. ICANN staff played no role in the determinations, and there is no assertion by Corn Lake to the contrary. Corn Lake submitted a reconsideration request to the BGC, but does *not* seek independent review of the BGC’s treatment of it, and only seeks independent review of ICANN’s acceptance of the ICC’s Expert Determination.

## **II. THE *DOT REGISTRY* FINAL DECLARATION CONFIRMS THAT CORN LAKE’S IRP REQUEST SHOULD BE DENIED.**

3. The *Dot Registry* Final Declaration supports ICANN’s position in this IRP for five reasons. First, the *Dot Registry* Final Declaration rejects Corn Lake’s position and confirms the narrow scope of the IRP, which is only to compare the actions of ICANN’s Board with the Articles and Bylaws, and does not permit the IRP panel to “substitut[e] its judgment for that of the Board.”<sup>8</sup> The *Dot Registry* Final Declaration also “declin[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to community priority.”<sup>9</sup>

4. Second, Corn Lake’s strategic decision not to challenge the BGC’s determination on its reconsideration request renders the scope of this Panel’s review far narrower than was at issue in the *Dot Registry* IRP. In an attempt to argue that the Board violated the Bylaws or Articles here, Corn Lake quotes portions of the *Dot Registry* Final Declaration related to the BGC’s evaluation of Dot Registry’s reconsideration request, claiming “the Board performed no independent review of

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<sup>6</sup> The Independent Objector was given authority per section 3.2.5 of the Guidebook to consider asserting objections on specified grounds and in the public interest to gTLD applications when no other objectors did so.

<sup>7</sup> The ICC was appointed to “administer disputes brought pursuant to Limited Public Interest and Community Objections.” (Guidebook § 3.2.3.)

<sup>8</sup> *Id.* ¶ 68. The final declaration issued in the *Booking.com v. ICANN* IRP similarly concluded that IRP panels are “neither asked to, nor allowed to, substitute [their] judgment for that of the Board.” (*Booking.com* Final Decl. ¶¶ 110, 115, available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.)

<sup>9</sup> *Dot Registry* Final Decl. ¶ 153.

the facts in front of it . . .” regarding the Expert Determination.<sup>10</sup> But, since Corn Lake has not challenged the BGC’s conduct in denying Corn Lake’s reconsideration request, the *Dot Registry* Panel majority’s conclusions regarding the evaluation of reconsideration requests are irrelevant.

5. Third, contrary to Corn Lake’s assertions, the *Dot Registry* Final Declaration does not speak to Corn Lake’s argument that the differing results at issue in the various .CHARITY objections were inconsistent and therefore unreasonable.<sup>11</sup> The *Dot Registry* Final Declaration concluded that *if* there is evidence of differential (*i.e.*, inconsistent) treatment, the Board must investigate those allegations.<sup>12</sup> Here, the variation between the objection determinations on the .CHARITY applications does not suggest differential treatment. Here, the *same expert panelist* decided all three determinations, and therefore had access to all arguments and evidence submitted by the parties in each proceeding; that panelist made a fully informed determination that there was a rational basis to reach different conclusions based upon the evidence and arguments presented by the parties in each proceeding. Where the Board has determined that objection determinations should be sent back for re-evaluation by the third party dispute resolution provider have involved different panels reaching different results on the same or substantially similar issues in a manner perceived to be unreasonable and inconsistent.<sup>13</sup>

6. Fourth, the *Dot Registry* Panel majority was concerned about the fact that certain documents indicated that ICANN staff was involved in the review of drafts of the EIU’s reports: “[t]he EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process . . . . The ICANN staff supplied continuing and

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<sup>10</sup> Supplemental Submission at 3.

<sup>11</sup> *See id.* at 3-4; Corn Lake’s 16 February 2016 Post-Hearing Submission at Pg. 3. The *Donuts* Final Declaration rejected this proposition: “[I]t would be surprising if among the corpus of reasoned objections [determinations] to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected.” (*Donuts* Final Decl. ¶ 176.)

<sup>12</sup> *Dot Registry* Final Decl. ¶¶ 107-11.

<sup>13</sup> *See, e.g.*, ICANN’s 16 February 2016 Post-Hearing Submission at 2-3; ICANN’s Response to Corn Lake’s IRP Request ¶¶ 46-51; ICANN’s Sur-Reply To Corn Lake’s Reply ¶¶ 31-35.

important input on the CPE reports.”<sup>14</sup> By contrast, there is no suggestion by Corn Lake, and certainly no evidence that ICANN staff (or the Board) played any role in preparing the Expert Determination. Further, the *Dot Registry* Final Declaration found it meaningful that the “CPEs themselves were issued on the letterhead of ICANN, not that of the EIU[.]”<sup>15</sup> In contrast, the Expert Determination was published on ICC letterhead.<sup>16</sup> The *Donuts, Inc. v. ICANN* IRP is directly on point, as it did not involve any allegations that ICANN was involved in preparing the challenged ICC expert determination, and the final declaration confirms that “the relationship between ICANN and the ICC” precludes an IRP panel from reviewing the ICC’s actions[.]”<sup>17</sup>

7. Fifth, contrary to Corn Lake’s mischaracterization of the *Dot Registry* Final Declaration, nothing therein indicated that it is *per se* improper for ICANN to assert a privilege objection over documents that ICANN legal counsel sends to the Board; to the contrary, it expressly stated that “ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding[.]”<sup>18</sup> To be sure, the *Dot Registry* Final Declaration noted that the BGC must comply with the Bylaws’ transparency requirements in considering Dot Registry’s reconsideration requests, but no reconsideration request is at issue here, and ICANN produced all non-privileged documents responsive to Corn Lake’s requests in this IRP.

Respectfully submitted,

JONES DAY

Dated: August 19, 2016

By: /s/ Jeffrey A. LeVee  
Jeffrey A. LeVee  
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<sup>14</sup> *Dot Registry* Final Decl. ¶ 92; see also *id.* ¶¶ 94, 96 115.

<sup>15</sup> *Id.* ¶ 88.

<sup>16</sup> C-Exs. 8, 11. The *Booking.com* IRP panel also noted that the Guidebook provides the third party objection resolution providers with “discretion,” and that the “determination is entirely a matter of ‘the [third party expert]’s judgment.” (*Booking.com* Final Decl. ¶¶ 124, 125 (quoting Guidebook § 2.2.1.1.2).)

<sup>17</sup> *Donuts* Final Decl. ¶ 159, available at <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf>. Donuts is the parent company of Corn Lake. (Corn Lake’s IRP Request ¶ 15.)

<sup>18</sup> *Dot Registry* Final Decl. ¶ 149.