

**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 THE JULY 29, 2016 IRP DECLARATION IN *DOT REGISTRY v. ICANN***

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Key holdings in the recent *Dot Registry* IRP case apply strongly and support finding the Board in violation of its Bylaws in this IRP.¹ First, it reaffirms “objective and independent standard” of IRP review, “neither deferring to the views of the Board, nor substituting its judgment for that of the Board.” *DR* ¶ 68. An IRP is an accountability mechanism that does not accept the Board’s “business judgment” or “presume correctness” of its actions or inaction. *Id.*

Second, as Corn Lake has asserted and *Dot Registry* confirms, the ICANN Board cannot abdicate its accountability obligation. IRP Req. ¶¶ 4.d, 34, 54-57. “ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN’s obligations.” *DR* ¶ 89. The Board has “ultimate responsibility for the New gTLD Program,” and when presented with a case such as .CHARITY where apparent inconsistencies have been found, must “make the proper determinations as to compliance by ICANN staff and [vendors] with” its Bylaws. IRP Req. ¶ 35; *DR* ¶¶ 88-89, quoting AGB at 5-4. “The failure by the [Board] to undertake an examination of whether ICANN staff or the [ICC] in fact complied with [the Bylaws] is itself a failure by the Board to comply with its obligations under the ... Bylaws.” *Id.* ¶ 122.

Just as in *Dot Registry*, the NCPG and BGC here both failed to perform any due diligence regarding the inconsistent results involving .CHARITY. Instead, ICANN continually disavows its Board’s accountability for outside vendor acts, a position no longer tenable after *Dot Registry*.

The evidence of disparate treatment of the .CHARITY applications – in front of the BGC on reconsideration and the NGPC when providing for review of other “inconsistent and unreasonable” objection rulings (.CAM/.COM, .HOSPITAL) – at minimum required the Board to exercise “due diligence and care in having a reasonable amount of facts in front of them” and “independent judgment in taking the decision” *Id.* ¶ 110, quoting Bylaws Art. IV § 3.4. For those matters the Board was required to “employ[] the requisite diligence and independent judgment in determining whether ICANN staff and the [ICC] complied with” the Bylaws. *Id.* For

¹ By “Bylaws” we mean also the Articles and other governing documents – Articles, Guidebook, etc. The Panel has the *Dot Registry* decision, which has “precedential value.” Bylaws Art. IV § 3.21.

the Board to have acted properly, either on reconsideration or in connection with the NGPC resolution, it would:

... need only have compared what the ICANN staff and [ICC panelist] did with respect to the [objections] at issue to what they did with respect to the successful [matters] to determine whether [they] treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand.² Yet the [Board] chose not to test [the] allegations by reviewing those facts. [DR ¶ 125]

That did not occur in *Dot Registry*, which found the Board in breach of its obligations under the Bylaws, and did not occur here.

In fact, one cannot even *ascertain* if the Board had *attempted* to comply and exercise its independent judgment given the information provided by ICANN in this IRP. As in *Dot Registry*, Corn Lake served ICANN with a request for documents reflecting the Board's consideration of the divergent .CHARITY objection determinations on reconsideration, and any investigation of the objection ruling inconsistencies by the Board (including the NGPC) and ICANN staff.³ ICANN responded that it had no non-privileged documents responsive to the requests pertaining to reconsideration,⁴ agreed to produce non-privileged communications with the ICC, the objection panelist and the independent objector, and refused to produce a privilege log.⁵ Following up, Corn Lake specifically requested production of ICANN staff recommendations to the Board and, as in *Dot Registry*, encountered a privilege objection and received no such documents.⁶ As in *Dot Registry*, "ICANN has not submitted any *evidence*" – at least none not "shielded by ICANN's

² The *Dot Registry* panel identified numerous tools that the Board had at its disposal but did not use on reconsideration: to "conduct whatever factual investigation is deemed appropriate," to "request additional submissions," to "ask the ICANN staff for its views on the matter," and to "request information ... from third parties." DR ¶ 123, quoting Bylaws Art. IV §§ 2.3, 2.11, 2.13.

³ Corn Lake served the request on 6 Nov 2015 and provided a copy to the Panel on 16 Nov. See Ex. A hereto.

⁴ The predominance of document requests pertaining to reconsideration, made from the outset of this proceeding, belies ICANN's position that it somehow never understood that Corn Lake had directed its IRP to *that* Board action.

⁵ ICANN's 10 Nov 2015 response to Corn Lake and the Panel is attached as Ex. B.

⁶ The email string between counsel on this subject, from 24 Nov to 30 Nov 2015, is attached as Ex. C.

invocation of privilege” – “to allow the Panel to objectively and independently determine whether” the Board “did in fact exercise independent judgment” in taking its actions. *DR* ¶¶ 147-148. The lack of meaningful production, coupled with a reconsideration determination that relies only on a third-party ruling, should lead this Panel to the same negative inference drawn in *Dot Registry* – that the Board performed no independent review of the facts in front of it and therefore violated its Bylaws.

From the defense side, *Dot Registry* eviscerates ICANN’s oft-repeated positions. ICANN has staked its claim that the Board has no obligation to review decisions of third party experts, IRP Resp. ¶¶ 9, 13, and properly delegates to and need not second-guess them, *id.* ¶¶ 47-48. The BGC did have those obligations on reconsideration, however: “The ... processes for reconsideration and independent review of ICANN actions ... are intended to reinforce the various accountability mechanisms otherwise set forth in the [] Bylaws” *DR* ¶ 83 (emphasis in original), quoting Bylaws Art. IV § 1. “[I]n performing its duties of Reconsideration, the BGC must determine whether the [ICC] and ICANN staff respected the principles of fairness, transparency ... and non-discrimination ...,” and that using third party evaluators “does not vitiate the requirement to comply with ICANN’s Articles and Bylaws.” *Id.* ¶¶ 88-89. The BGC’s failure to make that determination, as stated above, itself ran afoul of the Bylaws. *Id.* ¶ 122.

Regarding the discriminatory NGPC resolution, ICANN insists that it has no obligation to implement a review mechanism. IRP Resp. ¶ 12. That position in the abstract does not hold categorically in practice, such that the failure of the NGPC to make review of “inconsistent and unreasonable objection rulings” available to Corn Lake “could not possibly constitute a violation of any Article or Bylaws provision,” as ICANN contends. *Id.* ¶ 62. *Dot Registry* holds that it can and does, where the decision is taken without diligently accessing a reasonable amount of facts or exercising independent judgment concerning “unjustified discrimination” or other potential violation of the Bylaws. *DR* ¶¶ 110-111.

The NGPC resolution began with an ICANN staff report ordered by the BGC in another reconsideration case. IRP Resp. ¶ 41. The NGPC proposal for a review mechanism for *certain*

“inconsistent and unreasonable” objection rulings, and *not* others, does not describe the staff recommendations.⁷ While ICANN asserts that the NGPC gave “careful consideration” to other “seemingly inconsistent objection determinations ... such as those relating to .CHARITY,” IRP Resp. ¶ 11, nowhere has ICANN shown what consideration it gave to other objections generally or to .CHARITY specifically, or how the NGPC arrived at its rationale to exclude .CHARITY or any other set of objection rulings, to enable this Panel to determine whether the Board discharged its obligation to exercise the independent judgment per Bylaws Art. IV § 3.4.c. ICANN has failed to produce any documents in this regard, despite having the opportunity to do so on multiple occasions. Absent such evidence, the Panel can only infer that the Board violated that essential Bylaw. *DR* ¶¶ 148-150.

The *Dot Registry* determination negates the “hands-off” justification of the Board’s conduct advanced by ICANN in its defense in this case. Rather, it supports a declaration by this Panel that the Board breached its due diligence and independent judgment obligations and allowed those under its authority to treat Corn Lake disparately in violation of the Bylaws. As such, the Panel should declare the Board in violation of the Bylaws in this IRP and, as did the panel in *Dot Registry*, award all costs to Corn Lake.⁸

DATED: August 15, 2016

Respectfully submitted,
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⁷ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.b>.

⁸ The *Dot Registry* panel did so notwithstanding that the claimant, while it prevailed, did not get all the relief it sought, and the Bylaws provide for an award of “up to” the full amount. *DR* ¶ 154, citing Bylaws Art. IV § 3.18.