

ICDR CASE NO. 01-15-0002-9938

BETWEEN

CORN LAKE, LLC

Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

FINAL DECLARATION

Independent Review Panel
Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

Dated 17 October 2016

TABLE OF CONTENTS

1.	OVERVIEW	1
2.	THE PARTIES AND THEIR LAWYERS.....	1
3.	THE PANEL	2
4.	PROCEDURAL HISTORY.....	3
5.	OVERVIEW OF THE ICANN NEW GTLD PROGRAM.....	5
	(i) ICANN’s New gTLD Program.....	5
	(ii) The New gTLD Program Application Process	6
	(iii) The New gTLD Program Dispute Resolution Procedure	8
	(iv) The GAC Beijing Communiqué and ICANN’s Response.....	11
	(v) ICANN’s New Inconsistent Determinations Review Process.....	12
6.	FACTUAL BACKGROUND TO THE .CHARITY EXPERT DETERMINATIONS.....	19
	(i) Claimant’s .CHARITY Application.....	19
	(ii) SRL and Excellent First’s .CHARITY Applications	20
	(iii) The .CHARITY Applications Independent Objections	20
	(iv) The .CHARITY Independent Expert Panels	21
	(v) The .CHARITY Applications Expert Determinations	25
	(vi) Claimant’s Board Governance Committee Reconsideration Request	27
	(vii) The Board Governance Committee’s Reconsideration Decision	28
	(viii) Office of the Ombudsman Review	30
	(ix) Claimant’s Cooperative Engagement Process Request.....	31
7.	IRP PANEL’S ANALYSIS OF ADMISSIBILITY	32
8.	IRP PANEL REVIEW OF THE BOARD’S “ACTION OR DECISION”.....	36
	(i) Summary of Alleged Grounds for Review	36
	(ii) Standard of Review	39
	(iii) Analysis.....	42
	ISSUE 1: Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification?	43
	(i) The Claimant’s Position.....	44
	(ii) The Respondent’s Position.....	50

(iii) The Panel's Decision.....	55
ISSUE 2: Defined Review Standard (Article IV, Section 3.4).....	62
ISSUE 3: Did the Board Act For the Benefit of the Internet Community as a Whole? (ICANN Articles of Incorporation, Section 4).....	64
(i) The Claimant's Position.....	64
(ii) The Respondent's Position.....	65
(iii) The Panel's Decision.....	65
ISSUE 4: Did the Board Action Abdicate Its Accountability Obligation?	66
(i) The Claimant's Position.....	67
(ii) The Respondent's Position.....	67
(iii) The Panel's Decision.....	68
IPR PANEL REVIEW CONCLUSION	68
9. COSTS.....	71
10. RELIEF REQUESTED	72
11. DISPOSITIVE	72

1. OVERVIEW

- 1.1 ICANN's Approved Board Resolutions, dated 12 October 2014 and 12 February 2014, established a new 'Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections' in the context of ICANN's New gTLD Program. Such perceived inconsistent Expert Determinations were not considered to be "in the best interest of the New gTLD Program and the Internet community". ICANN limited the scope of the new review mechanism to certain expert determinations concerning specifically designated string confusion objections. ICANN excluded from the new review mechanism the Claimant's .CHARITY Expert Determination concerning community objections.
- 1.2 The Claimant contends that the .CHARITY Expert Determinations "follow a pattern identical to the objection determinations for which the Board did order review." The Claimant asks the Panel in this Independent Review Process: to review the "decision or action by the Board" to exclude the Claimant's inconsistent .CHARITY Expert Determinations from the scope of the new review mechanism; to declare that "decision or action" to be "inconsistent with the Articles of Incorporation or Bylaws" of ICANN; and that this "materially affected" the Claimant. The Claimant appears also to seek review of the Expert Determination itself and/or its Request for Reconsideration of that Determination. This Final Declaration deals with the Claimant's requests for review.

2. THE PARTIES AND THEIR LAWYERS

- 2.1 The Claimant is Corn Lake, LLC, a limited liability company organised and existing under the laws of the State of Delaware.
- 2.2 The Claimant is represented by:

John Genga, Esq.
Genga & Associates P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

and

Don Moody Esq. and Khurram Nizami

The IP and Technology Legal Group P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

- 2.3 The Respondent is the Internet Corporation for Assigned Names and Numbers (“ICANN”), a non-profit public corporation organised and existing under the State of California with its principal place of business at:

12025 Waterfront Drive
Suite 300
Los Angeles, CA
90094-2536
USA

- 2.4 The Respondent is represented by:

Kate Wallace, Jeffrey LeVee and Eric Enson
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA
90071-2300
USA

3. THE PANEL

- 3.1 On 17 September 2015, the full Independent Review Process (“IRP”) Panel was confirmed in accordance with the International Centre for Dispute Resolution’s International Arbitration Rules (the “ICDR Rules”) and its Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the “Supplementary Rules”).

- 3.2 The members of the IRP Panel are:

Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

4. PROCEDURAL HISTORY

- 4.1 On 24 March 2015, the Claimant filed a Request for Independent Review Process (the “**Request**”) with the ICDR. The Claimant alleges that ICANN’s Board of Directors (the “**Board**”) divested the Claimant of its right to compete for the .CHARITY new generic top level domain (“**gTLD**”), on the basis that “a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string.”¹
- 4.2 On 15 May 2015, the Respondent filed ICANN’s Response to the Claimant’s Request for Independent Review Process (the “**Response to Request**”).
- 4.3 On 3 November 2015, the Parties and the Panel conducted by telephone the first procedural hearing.
- 4.4 On 9 November 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 (“**PO1**”) setting out the procedural stages and timetable for the proceedings and page limits for the Parties’ respective submissions.
- 4.5 On 17 November 2015, the Panel issued Procedural Order No. 2 (“**PO2**”) ruling on document production requests.
- 4.6 On 4 December 2015, the Parties produced documents as directed under PO2.
- 4.7 On 9 December 2015, the Claimant submitted its Reply (the “**Reply**”).
- 4.8 On 8 January 2016, the Respondent submitted its Sur-Reply (the “**Sur-Reply**”). In its Sur-Reply, the Respondent objected to the Claimant allegedly having exceeded the mandate for its Reply as set out by the Panel at PO1.²
- 4.9 On 20 January 2016, the Panel noted that certain aspects of the Claimant’s Reply did exceed the scope of PO1. The Panel notified the parties that it would take this into account when considering their respective written and oral submissions but that it was not inclined to

¹ Claimant’s Request for independent Review Process (“**Claimant Request**”), at page 1, para. 2.

² Respondent’s Sur-Reply (the “**ICANN Sur-Reply**”), at para. 1.

strike the Reply, instead reserving its position to take its scope into account in any costs decision.

- 4.10 Also on 20 January 2016, the Panel notified the parties that it had set time aside to meet together in London for the hearing and deliberations thereafter. It invited the parties' views as to whether or not this would be acceptable and whether they considered it necessary for the party representatives also to attend the hearing in person in London, or to join by videoconference.
- 4.11 On 20 January 2016, the Respondent informed the Panel that it had no objection to the Panel convening in London. It further proposed that, as all counsel were in Los Angeles, they could meet together at Jones Day's Los Angeles office, and the Panel could convene at Jones Day's London office to facilitate the video link.
- 4.12 On 8 February 2016, the Independent Review Process hearing proceeded by video link with the Panel convened in London and counsel convened in Los Angeles. Claimant and Respondent each submitted PowerPoint slides summarizing their hearing arguments. The Panel accepted the PowerPoint slides as part of the record.
- 4.13 On 17 February 2016, as requested by the Panel at the close of the hearing on 8 February 2016, the Claimant and Respondent each submitted a supplemental submission concerning the 3 February 2016 Board Resolution regarding .HOSPITAL (the "**Claimant Supplemental Submission**" and "**Respondent Supplemental Submission**", respectively).
- 4.14 Subsequently, on 16 May 2016, ICANN sent to the Panel the Final Declaration in the *Donuts v. ICANN* IRP proceeding issued 5 May 2016, involving the .SPORTS and .RUGBY strings. ICANN submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address **only** the *Donuts* Final Declaration and its relevance to these proceedings.
- 4.15 On 18 May 2016, the Claimant disagreed with the need for additional briefing regarding the IRP Final Declaration involving the strings .SPORTS and .RUGBY and set out its detailed reasons for disagreement.
- 4.16 On 19 May 2016, ICANN provided its response to the Claimant's reasons in the form of a further written submission. On 20 May 2016, the Panel directed that the Claimant provide

its response submission, not more than 4 pages, by 25 May 2016, which was submitted (and accepted) on 27 May 2016.

- 4.17 On 11 July 2016, the ICDR notified the parties that the Panel had determined that the record for this matter had been closed as of 27 June 2016 and that the Panel expected to have the determination issued by no later than 26 August 2016.
- 4.18 On 3 August 2016, the Claimant sent to the Panel the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding issued 29 July 2016. The Claimant submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address **only** the *Dot Registry* Final Declaration and its relevance to these proceedings.
- 4.19 On 10 August 2016, the Panel directed that the record for this matter be reopened for the limited purpose of each party providing a brief of no more than 4 pages to address the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding. On 15 August and 19 August, respectively, the Claimant and ICANN submitted further briefs accordingly.
- 4.20 On 26 August 2016, the Panel notified the parties that it had determined that the record for this matter had been reclosed as of 22 August 2016.

5. OVERVIEW OF THE ICANN NEW gTLD PROGRAM

- 5.1 This section sets out the relevant factual background to the ICANN Board's 12 October 2014 Resolutions, including a brief description of: (i) the ICANN New gTLD Program; (ii) the New gTLD Program application process; (iii) the New gTLD Program dispute resolution procedure; (iv) the GAC Beijing Communiqué and ICANN's response; and (v) the New Inconsistent Determinations Review Process.
 - (i) ICANN's New gTLD Program
- 5.2 ICANN is responsible for allocating Internet Protocol ("IP") address space, assigning protocol identifiers and Top-Level Domain names, and managing the Domain Name System. ICANN's Domain Name System ("DNS") centrally allocates Internet domain names for use in place of IP addresses. Top-Level Domains ("TLDs") exist at the top of the DNS naming hierarchy. These characters, which follow the rightmost dot in domain names, and are either generic TLDs ("gTLDs") or country code TLDs ("ccTLDs").

5.3 The main ICANN policy-making body for gTLDs is the Generic Names Supporting Organization (“**GNSO**”). In June 2008, the ICANN Board approved the GNSO recommendations for new gTLDs and adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. Based on the GNSO recommendations as adopted, in June 2011, ICANN's Board of Directors approved a new Applicant Guidebook (the “**Applicant Guidebook**”) and authorized the launch of the 2012 gTLD Program (the “**New gTLD Program**”).³

5.4 ICANN describes the New gTLD Program’s goals as:

“enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains.”⁴

(ii) The New gTLD Program Application Process

5.5 The three-month registration period for the New gTLD Program opened on 12 January 2012 and closed on 12 April 2012, with applications due by June 2013.⁵ The stages of the application process are as follows:⁶

³ In relation to the Dispute Resolution Procedure, the Applicant Guidebook states that: “[f]or a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure (“Procedure”) included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail”, Applicant Guidebook, **ICANN Appendix C**, page 3-11, para. 3.3.

⁴ ICANN Response, para. 18.

⁵ Applicant Guidebook, Module 1, **ICANN Appendix C**, pages 1-2 to 1-3.

⁶ Applicant Guidebook, **ICANN Appendix C**, page 1-4.

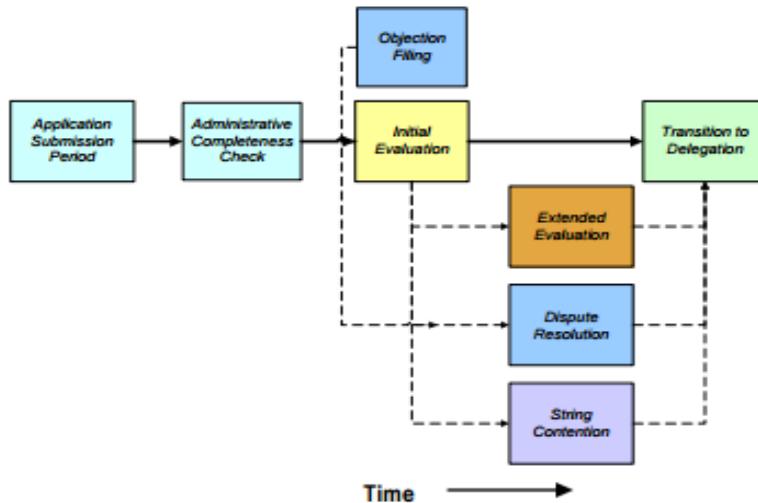


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

- 5.6 The application process allows for public comment and a formal objection procedure. The formal objection procedure is to allow full and fair consideration of objections based on certain limited grounds outside ICANN's evaluation of applications on their merits. Formal objections may be filed on four grounds:

"String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”⁷

- 5.7 Community objections – as in the current case – may be made by (i) “[e]stablished institutions associated with clearly delineated communities”; or (ii) the Independent Objector (“IO”).⁸ In both scenarios, “[t]he community named by the objector must be a

⁷ Claimant Request, para. 10. Applicant Guidebook, **ICANN Appendix C**, page 3-4, para. 3.2.1.

⁸ Applicant Guidebook, **ICANN Appendix C**, pages 3-7 to 3-8, para. 3.2.2.4, and pages 3-9 to 3-10, para. 3.2.5.

community strongly associated with the applied-for gTLD string in the application that is the subject of the objection".⁹

- 5.8 The IO's limited mandate and scope permit it to file objections against "highly objectionable' gTLD applications to which no objection has been filed."¹⁰ The Applicant Guidebook sets out that:¹¹

"The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest."

- 5.9 Following any formal objection (including a Community Objection), the applicant can (i) "work to reach a settlement with the objector, resulting in withdrawal of the objection or the application"; (ii) "file a response to the objection and enter the dispute resolution process" (within 30 days of notification); or (iii) "withdraw, in which case the objector will prevail by default and the application will not proceed further."¹²

(iii) The New gTLD Program Dispute Resolution Procedure

- 5.10 In the event that an applicant elects to file a response to an objection, the parties' dispute resolution process is governed by the Applicant Guidebook, Module 3, which sets out the New gTLD Dispute Resolution Procedure (the "**Procedure**"). The designated Dispute Resolution Service Provider ("DRSP") for disputes arising out of community objections in particular is the International Centre for Expertise of the International Chamber of Commerce (the "**ICC Centre for Expertise**").¹³

⁹ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5. See also ICANN Response, para. 21.

¹⁰ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.

¹¹ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.

¹² Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.4.

¹³ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 3.

- 5.11 Following an initial administrative review by the ICC Centre for Expertise for procedural compliance, a response to an objection is deemed filed and the application will proceed.¹⁴ Consolidation of Objections is encouraged.¹⁵ Within 30 days after receiving the response to an objection, the ICC Centre for Expertise must appoint a panel comprising a single expert (the “**Expert Panel**”).¹⁶
- 5.12 The procedure is governed by the Rules for Expertise of the ICC, supplemented by the ICC as needed. In the event of any discrepancy, the Procedure prevails.¹⁷ The Expert Panel must remain impartial and independent of the parties.¹⁸ The ICC Centre for Expertise and the Expert Panel must make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the constitution of the Expert Panel. The Expert Panel is required to submit its Expert Determination in draft form to the ICC Centre for Expertise’s scrutiny as to form before it is signed. The ICC Centre for Expertise can make suggested modifications limited to the form of the Expert Determination only. The ICC Centre for Expertise communicates the Expert Determination to the parties and to ICANN.¹⁹
- 5.13 Substantively, the Expert Determination proceedings arising out of a Community Objection consider four tests to “enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.”²⁰ These four tests, based on the Applicant Guidebook, require objector to prove²¹:
- (a) “that the community expressing opposition can be regarded as a clearly delineated community”, taking into account various identified factors;
 - (b) “substantial opposition within the community it has identified itself as representing”, taking into account various identified factors;
 - (c) “a strong association between the applied-for gTLD string and the community represented by the objector”, taking into account various identified factors; and

¹⁴ Applicant Guidebook, **ICANN Appendix C**, page 3-14, para. 3.4.1.

¹⁵ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 12.

¹⁶ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.

¹⁷ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 4.

¹⁸ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.

¹⁹ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 21.

²⁰ Applicant Guidebook, **ICANN Appendix C**, page 3-22, para. 3.5.4.

²¹ Applicant Guidebook, **ICANN Appendix C**, pages 3-22 to 3-24, para. 3.5.4

- (d) “that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted”, taking into account the:
- (i) “nature and extent of damage to the reputation of the community . . . that would result from the applicant’s operation of the applied-for gTLD string”;
 - (ii) “evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely”;
 - (iii) “interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string”;
 - (iv) “dependence of the community represented on the DNS for its core activities”;
 - (v) “nature and extent of concrete or economic damage to the community that would result from the applicant’s operation of the applied-for gTLD string”; and
 - (vi) “level of certainty that alleged detrimental outcomes would occur”.²²

“The objector must meet all four tests in the standard for the objection to prevail”.²³

- 5.14 Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN's Board Governance Committee (the “**BGC**”) through a (“**Reconsideration Request**”); and/or (ii) independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws through an IRP.
- 5.15 ICANN has designated the International Centre for Dispute Resolution (“**ICDR**”) to operate the IRP for String Confusion, Existing Legal Rights, Morality and Public Order and Community Objections. The ICDR constitutes the panel of independent experts and

²² Applicant Guidebook, **ICANN Appendix C**, page 3-24, para. 3.5.4

²³ Applicant Guidebook, **ICANN Appendix C**, page 3-25, para. 3.5.4

administers the proceedings in accordance with ICANN's New gTLD Dispute Resolution Procedure, which incorporates by reference the ICDR's International Rules.²⁴

- 5.16 Every applicant in the New gTLD Application Process expressly agrees to the resolution of disputes arising from objections in accordance with the new gTLD Dispute Resolution Procedure (and, by reference, the relevant ICDR rules) when submitting an application to ICANN.

(iv) The GAC Beijing Communiqué and ICANN's Response

- 5.17 On 11 April 2013, the ICANN Board Governmental Advisory Committee ("GAC") proposed new safeguards for certain "sensitive strings" in sectors the GAC viewed as "regulated" or "highly regulated" (the "**Beijing GAC Communiqué**").²⁵ Specifically, the GAC recommended that ICANN adopt certain pre-registration eligibility restrictions in connection with the "sensitive strings" that it designated as "Category 1" and "Category 2." The GAC identified .CHARITY as a Category 1 sensitive string.²⁶ In this regard, the Beijing Communiqué contained important departures from the Applicant Guidebook. However, the Beijing GAC Communiqué was not binding on applicants until or unless it was adopted by the ICANN Board.
- 5.18 On 12 July 2013, ICANN sent to the gTLD Board a paper prepared for the New gTLD Program Committee (the "**NGPC**") setting out its concerns relating to the GAC Beijing Communiqué.²⁷ ICANN's cover email described the paper as having been "prepared for the NGPC dialogue with the GAC" taking place the following Sunday.²⁸
- 5.19 On 29 October 2013, ICANN wrote to the GAC to inform it that the NGPC intended "to accept the GAC Beijing Communiqué's advice concerning Category 1 and Category 2 Safeguards."²⁹ In relation to the proposed safeguards for Category 1, ICANN noted that:

²⁴ ICANN Bylaws, **ICANN Appendix A**, Article IV, Section 3(4) (See also:

https://www.icdr.org/icdr/faces/icdrservices/icann?_afrLoop=290874254740950&_afrWindowMode=0&_afrWindowId=n ull#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D290874254740950%26_afrWindowMode%3D0%26_adf.ctrl-state%3D108xg7by0c_22.

²⁵ <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

²⁶ Id., Annex I, page 9.

²⁷ NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

²⁸ NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

²⁹ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

“The text of the Category 1 Safeguards has been modified as appropriate to meet the spirit and intent of the advice in a manner that allows the requirements to be implemented as public interest commitments in Specification 11 of the New gTLD Registry Agreement (“PIC Spec”). The PIC Spec and a rationale explaining the modifications are attached.”³⁰

- 5.20 The effect of ICANN’s 29 October 2013 statement was publicly to announce that new, mandatory registration requirements would be imposed in any and all registration agreements for Category 1 and Category 2 strings. In the case of .CHARITY, a Category 1 string, this would mean the imposition of a mandatory registration requirement under any .CHARITY registry agreement requiring that any domain operators using the .CHARITY gTLD demonstrate that they were a registered charity.³¹ This requirement would be imposed in any registry agreement, irrespective of the content of any existing PIC or gTLD application content relating to .CHARITY. As discussed in further detail below, ICANN’s 29 October 2013 announcement came while the Expert Determination process arising out of the .CHARITY community objections were underway.³²
- 5.21 On 5 February 2014, the ICANN Board passed Resolution 2014.02.05.NG01, formally adopting the GAC’s Beijing Communiqué recommendation.³³ Annexed to that Resolution was a list of eight safeguards that would apply to certain Category 1 strings (including .CHARITY) and that would be included in Specification 11 of the New gTLD Registry Agreement.³⁴

(v) ICANN’s New Inconsistent Determinations Review Process

- 5.22 In the course of the New gTLD Program, in late 2013, concerns arose in respect of a small number of Expert Determinations involving the same or similar string confusion objections (“SCO”s) which resulted in different outcomes. These initially included:
- (a) three separate Expert Determinations arising out of SCOs by the registrants of .COM to applications to register .CAM, whereby two objections were overruled and one was upheld; and

³⁰ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

³¹ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**.

³² See paragraphs 6.24 to 6.25, below.

³³ **Claimant Exhibit 14**.

³⁴ **Claimant Exhibit 14**, Annex 2, pages 1 and 3.

- (b) three separate Expert Determination arising out of SCOs by the registrants of .CAR to applications to register .CARS, whereby two objections were overruled and one was upheld.³⁵
- 5.23 On 10 October 2013, as a result of these perceived inconsistent decisions, the BGC requested that:
- “staff draft a report for the NGPC on String Confusion Objections (SCOs) ‘setting out options for dealing with the situation raised within this [Reconsideration] 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’”.³⁶
- 5.24 The NGPC then:
- “considered potential paths forward to address perceived inconsistent Expert Determinations from the New gTLD Program SCO process, including possibly implementing a new review mechanism”.³⁷
- 5.25 On 5 February 2014, the NGPC published Approved Resolutions, which included discussion of the report prepared in response to the BGC’s 10 October 2013 request. The NGPC directed the ICANN President and CEO to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent SCO Expert Determinations. The NGPC stated that the review mechanism would be “limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM”.³⁸
- 5.26 On 11 February 2014, ICANN published its “Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles” (the “**Proposed Framework Principles**”).³⁹ The Proposed Framework Principles addressed two cases where SCOs were raised by the same objector against different applications for the same string, where the outcomes of the SCOs differed, namely .CAR/.CARS and .CAM/.COM.

³⁵ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

³⁶ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

³⁷ As set out in summary in NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 3.

³⁸ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

³⁹ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

- 5.27 The Proposed Framework Principles set out the proposed standard of review as being whether the Expert Panel could “have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules”.⁴⁰ The proposed review process would be conducted by a new three member panel constituted by the ICDR as a “Panel of Last Resort” (the “**Inconsistent Determinations Review Procedure**”).⁴¹
- 5.28 ICANN specifically noted in the Proposed Framework Principles that the proposed review procedure mechanism must be limited and that:
- “[t]he use of a strict definition for Inconsistent SCO Expert Determinations conversely means that all other SCO Expert Determinations are *not inconsistent*. As a result, the review mechanism, or Panel of Last Resort, shall not be applicable to those other determinations.”⁴²
- 5.29 ICANN defined the “strict definition” as “objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ.”⁴³
- 5.30 On 14 March 2014, as part of the public consultation process, the Claimant’s parent company, Donuts Inc., submitted that SCO Expert Determinations relating to .SHOP should also be included, as follows:
- “... this limited review should be extended to include a third contention set where there is an incongruent outcome. In the .SHOP vs. SHOPPING objection, the same panelist who found .SHOP to be confusing to a Japanese .IDN found in favor of the objector with regard to the Donuts’ .SHOPPING application.”⁴⁴
- 5.31 Donuts concluded: "Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections."
- 5.32 On 12 October 2014, the NGPC issued Approved Resolutions “to address perceived inconsistent and unreasonable Expert Determinations resulting from the New gTLD Program

⁴⁰ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2

⁴¹ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, pages 2 to 3.

⁴² ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

⁴³ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

⁴⁴ <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfJC5UktBBxf.pdf>

String Confusion Objections process.”⁴⁵ The NGPC directed ICANN’s President and CEO to establish a three-member panel to re-evaluate the materials presented in the two identified SCO Expert Determinations for .COM/.CAM and .SHOP/通販.⁴⁶

5.33 The 12 October 2014 Approved Resolutions set out in detail the scope of the New Inconsistent Determinations Review Procedure:

- (a) the NGPC took “action to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations by sending back to the ICDR for a three-member panel evaluation of certain Expert Determinations”,⁴⁷
- (b) the NGPC identified these Expert Determinations as “not in the best interest of the New gTLD Program and the Internet community”;⁴⁸
- (c) “the identified SCO Expert Determinations present exceptional circumstances warranting action by the NGPC because each of the Expert Determinations falls outside normal standards of what is perceived to be reasonable and just”;⁴⁹ and
- (d) the “record on review shall be limited to the transcript of the proceeding giving rise to the original Expert Determination, if any, expert reports, documentary evidence admitted into evidence during the original proceeding, or other evidence relevant to the review that was presented at the original proceeding”, and the “standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN’s New gTLD Program”.⁵⁰

⁴⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, pages 5 to 6.

⁴⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 5. The NGPC noted in relation to the SCO Expert Determinations for .CAR/.CARS that the parties “recently have resolved their contending applications” so “the NGPC is *not* taking action to send these SCO Expert Determinations back to the ICDR for re-evaluation to render a Final Expert Determination.” NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 10.

⁴⁷ The dispute with respect to .CAR/.CARS was resolved and the new Inconsistent Determinations Review Procedure went forward with respect to the .SHOP/.通販 and .CAM/.COM disputes. NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, pages 5-6.

⁴⁸ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

⁴⁹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 7.

5.34 The NGPC also set out in detail its reasons for limiting application of the new process to the identified SCO Expert Determinations and “particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not”:⁵¹

- (a) the Applicant Guidebook (Section 5.1) provides that 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”;⁵²
- (b) “[a]ddressing the perceived inconsistent and unreasonable String Confusion Objection Expert Determinations is part of the discretionary authority granted to the NGPC in its Charter regarding ‘approval of applications’ and ‘delegation of gTLDs,’ in addition to the authority reserved to the Board in the Guidebook to consider individual gTLD applications under exceptional circumstances”;⁵³
- (c) “[w]hile some community members may identify other Expert Determinations as inconsistent or unreasonable, the SCO Expert Determinations identified are the only ones that the NGPC has deemed appropriate for further review”;⁵⁴
- (d) “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”;⁵⁵
- (e) “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” and “[t]wo panels confronting identical issues could –

⁵¹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 10 to 11.

⁵² NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 9 to 10. (*See also:* Applicant Guidebook, **ICANN Appendix C**, page 5-1, para. 5.1.)

⁵³ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁴ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

and if appropriate should – reach different determinations, based on the strength of the materials presented”;⁵⁶

- (f) “on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in ‘inconsistent’ or ‘unreasonable’ results, presented nuanced distinctions relevant to the particular objection” which “should not be ignored simply because a party to the dispute disagrees with the end result”;⁵⁷
- (g) “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”;⁵⁸
- (h) “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 reasonable ‘discrepancies’ may exist” and “[t]o allow these Expert Determinations to stand would not be in the best interests of the Internet community”;⁵⁹
- (i) 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”;⁶⁰
- (j) the comments presented by various stakeholders “highlight the difficulty of the issue and the tension that exists between balancing concerns about perceived inconsistent Expert Determinations, and the processes set forth in the Guidebook that were the subject of multiple rounds of public comment over several years”;⁶¹
- (k) “[a]s highlighted in many of the public comments, adopting a review mechanism this far along in the process could potentially be unfair because applicants agreed to the

⁵⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁷ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁸ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁶⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

⁶¹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes”;⁶²

- (l) “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”;⁶³
- (m) “[a]llowing 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”;⁶⁴ and
- (n) 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”.⁶⁵

5.35 The NGPC summarized its conclusion by noting that, “while on balance, a review mechanism is not appropriate for the current round of the New gTLD Program, it is recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations”.⁶⁶

5.36 As a result of this analysis, the New Inconsistent Determinations Review Procedure was therefore introduced to provide an additional layer of review in the New gTLD Program Application Process for a very limited category of applications – i.e. two SCOs. The .CHARITY applications were not included.

⁶² NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁶³ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁴ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

6. FACTUAL BACKGROUND TO THE .CHARITY EXPERT DETERMINATIONS

6.1 A brief summary of the specific facts relating to the .CHARITY applications is below. The Panel has considered the Parties' written and oral submissions in full, even where not included in the below summary and subsequent analysis.

(i) Claimant's .CHARITY Application

6.2 On 13 June 2012, the Claimant filed application no. 1-1384-49318 to operate the new gTLD .CHARITY (the “**Application**”).⁶⁷ The Claimant purports to have invested \$185,000 for the application fee along with other significant resources in making the Application.⁶⁸

6.3 The Claimant’s .CHARITY Application was one of the 1,930 applications made in the New gTLD Application Process in 2015.

6.4 The Claimant applied for .CHARITY to “allow consumers to make use of the gTLD in accordance with the meanings they ascribe to that dictionary word.”⁶⁹ It described the “mission/purpose” of its proposed gTLD as follows:

“The CHARITY TLD will be of interest to the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need. This broad and diverse set includes organizations that collect and distribute funds and materials for charities, provide for individuals and groups with medical or other special needs, and raise awareness for issues and conditions that would benefit from additional resources. In addition, the term CHARITY, which connotes kindness toward others, is a means for expression for those devoted to compassion and good will. We would operate the .CHARITY TLD in the best interest of registrants who use the TLD in varied ways, and in a legitimate and secure manner.”⁷⁰

⁶⁷ Corn Lake, LLC June 2012 Application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**.

⁶⁸ Claimant Request, para. 9.

⁶⁹ Claimant Request, para. 9. See also ICANN Response, para. 2.

⁷⁰ Corn Lake, LLC June 2012 application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**, para. 18(a), 3. See also Claimant Request, para. 16.

(ii) SRL and Excellent First's .CHARITY Applications

- 6.5 Also on 13 June 2012, Spring Registry Limited ("SRL") filed a separate application, no. 1-1241-87032, also to operate the new gTLD called .CHARITY (the "SRL Application").⁷¹ In the SRL Application, SRL described the "mission/purpose" of its proposed gTLD as follows:

"... the aim of 'charity' is to create a blank canvas for online charity services set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space to access charity information and donation services. ... [T]here will be a ready marketplace specifically for charity-based enterprises to provide their goods and services."

- 6.6 Further, Excellent First Limited submitted an application for the Chinese character translation of .CHARITY.⁷²
- 6.7 By 5 March 2013, each applicant was required to submit a TLD-specific Public Interest Commitments Specification ("PIC").⁷³ Both the Claimant and SRL submitted PICs prior to 5 March 2013.⁷⁴ Neither the Claimant nor SRL, (nor, as far as the IPP Panel is aware Excellent First), addressed eligibility requirements in their original PICs.

(iii) The .CHARITY Applications Independent Objections

- 6.8 On 12 March 2013, Professor Alain Pellet, acting as IO, submitted a Community Objection to the ICC Centre for Expertise in relation to the Application by the Claimant.⁷⁵ The IO's objection was submitted on the basis that .CHARITY should be limited to "charities and charitable organizations".⁷⁶ In particular, the Claimant's IO stated that a "community objection" is warranted when "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly targeted."⁷⁷

⁷¹ Spring Registry Ltd. June 2012 application for .CHARITY, **Claimant Exhibit 10**.

⁷² ICANN Response, para. 6, <http://newgtlds.icann.org/en/program-status/odr/determination>

⁷³ <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>

⁷⁴ Donuts Public Interest Commitment (PIC), **Claimant Exhibit 9**. SRL's original PIC is not in evidence in the proceedings.

⁷⁵ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**.

⁷⁶ As per Claimant Request, para. 17. The Respondent explains the process in its Response, para. 2.

⁷⁷ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 6.

- 6.9 The IO worked through the four tests of a community objection and found these to be met, including the community test, substantial opposition, targeting and detriment. In relation to the detriment test in particular, the IO contended that the Claimant “has not addressed the specific needs of the charity community in its proposed management of the gTLD .Charity, and there are three key factors that demonstrate the likelihood of detriment to the charity community.”⁷⁸
- 6.10 The three key factors were that the Claimant’s Application: (i) “has not been framed by [the Claimant] and its subsidiary as a community based gTLD”,⁷⁹ (ii) “does not propose any eligibility criteria for the string”;⁸⁰ and (iii) proposes security mechanisms “aimed at reacting to abuse [that] are unlikely to meet the specific requirements and needs of the charity community” as well as making “no commitment concerning the specific content of the “Anti-Abuse Policy”.⁸¹
- 6.11 The IO also brought separate Community Objections against SRL and Excellent First Limited, the two other applicants for the .CHARITY gTLD in English and Chinese respectively, on similar grounds.⁸²
- 6.12 On 7 May 2013, the ICC Centre for Expertise notified the Claimant that it had decided to consolidate the IO’s objection to Claimant’s application with the two other proceedings relating to the applications by SRL and Excellent First Limited.

(iv) The .CHARITY Independent Expert Panels

- 6.13 On 6 June 2013, the Claimant submitted to the ICC Centre for Expertise a response to the IO’s objection (the “**Response to IO Objection**”).⁸³ The Claimant submitted that the IO lacked standing to make the objection and that the objection failed on its merits. It further submitted that the IO’s Community Objection constituted a restriction on “rights of free

⁷⁸ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 41.

⁷⁹ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 42.

⁸⁰ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 43.

⁸¹ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 45.

⁸² As per Claimant Request, para. 18. The Respondent provides further descriptions in its Response, para. 3.

<http://newgtlds.icann.org/en/program-status/odr/determination>

⁸³ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

expression”⁸⁴ which was contrary to the New gTLD program objective “to enhance choice, competition and expression in the namespace.”⁸⁵

- 6.14 On the merits, the Claimant submitted that the IO invoked no clearly delineated community, demonstrated no substantial opposition within the community he claims to represent, demonstrates no strong association between the community and applied for string and does not prove material detriment.⁸⁶
- 6.15 Specifically in response to the IO’s objection based on material detriment, the Claimant reiterated that it had:
- “clearly stated its opposition to such constraints on access, expression and innovation: ‘attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.’”⁸⁷
- 6.16 On 4 July 2013, the ICC Centre for Expertise appointed Mr. Tim Portwood of Bredin Prat as the Independent Expert Panel in the consolidated proceedings.
- 6.17 On 22 August 2013, the IO submitted to the ICC Centre for Expertise a reply (the “**IO Reply**”).⁸⁸ Among other things, the IO observed that the detriment test standard pursuant to the Applicant Guidebook is the “likelihood of detriment.”⁸⁹ The IO considered that he had “developed many elements establishing that there exists a likelihood of detriment, in particular because of the Applicant’s unwillingness to propose preventative security measures assuring the charitable nature, the integrity and the trustworthiness of the entities represented and the information provided under the gTLD.”⁹⁰
- 6.18 Specifically in relation to the GAC Beijing Communiqué, the IO noted that the Claimant:

⁸⁴ As per Claimant Request, para. 19.

⁸⁵ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 1.

⁸⁶ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

⁸⁷ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 13.

⁸⁸ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**.

⁸⁹ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 22.

⁹⁰ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24.

“continues to ignore the specificity of this string despite the fact that the GAC Beijing Communiqué of 11 April 2013 listed the .Charity gTLD within the ‘sensitive strings that merits particular safeguards’ because this string is ‘likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm’.”⁹¹

- 6.19 On 6 September 2013, the Claimant submitted to the ICC Centre for Expertise a further response (the “**Expert Panel Sur-Reply**”).⁹² In its Expert Panel Sur-Reply, the Claimant argued that the word charity does not clearly delineate any community, the separate targeting test was not satisfied, the IO demonstrates no substantial opposition and that the IO mischaracterizes the material detriment standard “in a misplaced effort to justify having failed to satisfy it.”⁹³ The Claimant further objected to the IO’s reliance on the GAC’s Beijing Communiqué,⁹⁴ submitting that it “has little (if any) bearing on the material detriment analysis” and that,

“[w]hatever measures ICANN enacts will require implementation by Applicant in the form of a PIC [Public Interest Commitment], then embodied in a formal registry agreement by which Applicant must bind itself to undertake those measures under penalty of losing the registry.”⁹⁵

- 6.20 On 6 September 2013, SRL also submitted to the ICC Centre for Expertise its further response (the “**SRL Sur-Reply**”).⁹⁶ In the SRL Sur-Reply, it specifically offered to amend its PIC to take into account the IO’s concerns. According to the Claimant, SRL’s amendment to its PIC:

“would impose eligibility criteria in a .CHARITY domain that would limit registration of second-level names to those who could ‘establish that they are a charity of a ‘not-for-profit’ enterprise with charitable purposes.’”⁹⁷

- 6.21 SRL’s amended PIC stated that SRL “appreciates the opportunity to restate and once again commit to the following operational measures, where those matters are within its control,

⁹¹ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24. See footnote 11: <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>, Annex 1, Category 1, p. 8 (annex 1).

⁹² Corn Lake 6 September 2013 sur-reply in further support of opposition to objection, **Claimant Exhibit 5**.

⁹³ Corn Lake Sur-Reply, p.5.

⁹⁴ Corn Lake Sur-Reply, p.7.

⁹⁵ Corn Lake Sur-Reply, pp.8-9.

⁹⁶ September 6, 2013 email from SRL to ICC w/attachments, **Claimant Exhibit 23**.

⁹⁷ Claimant Request, para. 22.

as outlined in our application.”⁹⁸ SRL further noted that “[w]e reserve the right to amend or change this PIC Spec once the details of the Program are finalized.”⁹⁹ Specifically in relation to eligibility, SRL stated in its amended PIC that:¹⁰⁰

“[o]nly incorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes will qualify to be a registrant of a .CHARITY domain name.”

- 6.22 On 25 October 2013, SRL notified the Expert Panel by email of its “amended PIC SPEC” and sent a link to the document on the ICANN website.¹⁰¹ In its cover email, SRL noted that it was making its unsolicited submission:

“merely to make you aware of independent evidence that our eligibility policy is progressing through the new gTLD application process, and in the interests of justice I hope you can consider this evidence. It merely confirms what was stated in our Rejoinder, and should only take a moment to consider.

Articles 17 and 18 of the Dispute Rules do provide the Panel with the power to admit additional material, and making this submission is the only way to draw it to your attention.”

- 6.23 There is no record of any objection to the 25 October 2013 communication by the IO or the Expert Panel and no record that it was rejected by the Expert Panel.
- 6.24 On 3 December 2013, the Claimant notified the Expert Panel and the IO by email of further information “to update the Panel regarding matters raised in the Objection and further submissions made by the Objector.”¹⁰²
- 6.25 Specifically, the Claimant notified the Expert Panel that “ICANN has formally announced its intention to adopt the “GAC’s Beijing Communiqué advice concerning Category 1 and Category 2 Safeguards””. The Claimant further explained that as a result, the:

⁹⁸ SRL PIC, **Claimant Exhibit 12**, page 1.

⁹⁹ SRL PIC, **Claimant Exhibit 12**, page 1.

¹⁰⁰ SRL PIC, Claimant Exhibit 12.

¹⁰¹ October 25, 2014 email from SRL to ICC, **Claimant Exhibit 24**.

¹⁰² Corn Lake 3 December 2013 further requested submission, **Claimant Exhibit 6**.

“... Applicant must implement the safeguards, if awarded the subject string, as a term of its registry agreement with ICANN for the string. Applicant therefore respectfully submits that, to the extent Objector claims material detriment based on Applicant’s alleged lack of GAC-recommended safeguards, ICANN’s recent action has rendered that portion of the Objection moot, and eliminates it as a basis for denying Applicant its presumptive right to compete for and, if awarded, operate the string.”

- 6.26 On 5 December 2013, the IO objected to the Claimant’s further submission on procedural and substantive grounds.
- 6.27 On 11 December 2013, the ICC Centre for Expertise wrote to the parties and Expert Panel reserving to the Expert Panel the decision as to whether to admit the Parties’ further submissions.
- 6.28 On 13 December 2013, the Expert Panel rejected the Claimant’s further submission on the grounds that (a) further submissions “were not contemplated by the procedural timetable” of 9 August 2013 and (b) “the Expert Determination in each of the consolidated cases was submitted in draft to the Centre within the 45 day time period provided for in Article 21(a) of the ICANN New gTLD Dispute Resolution Procedure (the “**Procedure**”) for scrutiny by the Centre pursuant to Article 21(b) of the Procedure and Article 12(6) of the ICC Rules for Expertise (the “**Rules**”).¹⁰³
- 6.29 There was no further correspondence between the Parties, the IO and/or the Expert Panel prior to the issuance of the Expert Determinations.

(v) The .CHARITY Applications Expert Determinations

- 6.30 On 9 January 2014, the Expert Panel issued its three separate Expert Determinations in respect of the applications by the Claimant and SRL, respectively, despite the proceedings having been consolidated.¹⁰⁴ The Expert Determination in relation to the IO in the Claimant’s Application had a different outcome to the SRL and Excellent First Expert

¹⁰³ Letter from Expert Panel to Parties, 13 December 2013, **Claimant Exhibit 7**, page 1. Article 21(a) provides that: “(a) *The DRSP 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. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed*”, Applicant Guidebook, **ICANN Appendix C**, Module 3, page P-10.

¹⁰⁴ Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8** and Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**. Expert Determination Excellent First is at:

<https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>.

Determinations. The reasoning sections in the Expert Panel Determinations for the Claimant and SRL community objections are virtually identical, and very similar for the Expert Determination for the Excellent First community objection, up to the determination concerning the detriment test.

- 6.31 The Expert Panel upheld the community objection against the Claimant, as set out by the IO on the basis that “there is a likelihood of material detriment to the charity sector community were the Application to proceed” and that:¹⁰⁵

“the targeted community ... would be harmed if access to the ‘.CHARITY’ string were not restricted to persons ... which can establish that they are a charity or a not-for-profit enterprise with charitable purposes”.¹⁰⁶

- 6.32 However, the Expert Panel rejected the IO’s identical community objections against both SRL and Excellent First.¹⁰⁷

- 6.33 In relation to SRL, the Expert Panel concluded that eligibility policy contained in its amended PIC “will be included in any registry agreement which Applicant would sign with ICANN if its Application is successful and which Applicant will therefore be contractually obliged to implement at the risk of legal action under the PIC Dispute Resolution Procedure in the event of breach.”¹⁰⁸ On that basis:

“the SRL Expert Panel found that SRL’s commitment set out its .CHARITY application to restrict registration ‘to members of the charity sector’ was sufficient to negate any concern of material detriment to the targeted community.”¹⁰⁹

- 6.34 In relation to Excellent First, the Expert concluded that its commitment in its application to limit registrations to: “charitable organizations or institutions which must represent and warrant that they are authorized to conduct charitable activities” was sufficient to negate concerns of material detriment.¹¹⁰

¹⁰⁵ Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8**. See As per ICANN Response, para. 4.

¹⁰⁶ As per Claimant Request, para. 24.

¹⁰⁷ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**. ICANN Response, para. 6.

¹⁰⁸ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 90.

¹⁰⁹ ICANN Response, para. 5.

¹¹⁰ ICANN Response, para. 6. See: <http://newgtlds.icann.org/en/program-status/odr/determination>

6.35 In both the SRL and Excellent First Expert Determinations, the Expert Panel included the following paragraph:

“Provided that Applicant’s undertaking [in respect of eligibility requirements] is honored, the Expert Panel considers therefore, that there would be no material detriment as identified by IO to the charity sector – registrants being limited to the members of that sector.”¹¹¹

6.36 In the preceding paragraph in the Excellent First Expert Determination (but not the SRL Expert Determination), the Expert Panel further noted that:

“... according to the Applicant the eligibility policy has been developed following and in response to the GAC Advice and will be further developed with ICANN.”¹¹²

6.37 The Expert Panel thus clearly relied on the differing PIC Specs as between SRL and Excellent First, on the one hand, and the Claimant on the other, in reaching differing results with respect to the identical community objections addressed to each application. The Expert Panel did not take into account ICANN’s 29 October 2013 announcement that it intended to adopt the Beijing Communiqué’s recommendation and the effect this would have on the three applications.

(vi) Claimant’s Board Governance Committee Reconsideration Request

6.38 On 24 January 2014, the Claimant filed a Reconsideration Request to the ICANN Board Governance Committee (the “BGC”) regarding action by ICANN that the Claimant alleged was contrary to established ICANN policies pertaining to Community Objections to New gTLD Applications.¹¹³ The Claimant requested that the BGC reconsider the action by the ICC Centre for Expertise as DRSP for community objections and, in particular, the 9 January 2014 Expert Determination.

6.39 The Claimant submitted in relation to jurisdiction in respect of the Reconsideration Request that:

¹¹¹ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 132 and Expert Determination Excellent First is at: <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>, para. 131.

¹¹² <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>, para. 130.

¹¹³ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>.

"The [Expert Determination] Ruling fails to follow ICANN processes and policies concerning community objections as expressed in Sections 3.5 and 3.5.4 of the gTLD Applicant Guidebook.... ICANN has determined that the reconsideration process can properly be invoked for challenges of the third party DRSP's decisions as challenges of the staff action where it can be stated that ... the DRSP failed to follow the established policies or processes in reaching the decision"¹¹⁴

- 6.40 The Claimant submitted in relation to the merits of the Reconsideration Request that the Expert Panel contravened ICANN process and policy by reaching the opposite result in relation to two identical applications for the .CHARITY string. It pointed out that:

"In the SRL case, ... the Panel held that the alleged community would not likely incur material detriment because of obligations that SRL had indicated in a supplemental filing it would assume in its registry agreement with ICANN. The Panel in that case accepted SRL's additional evidence negating the IO's claim of material detriment, and denied the objection. Here, by contrast, the Panel refused to consider a proffered further submission showing that, by its proposed adoption of Government Advisory Council ("GAC") advice regarding the String, ICANN would require Corn Lake to employ stringent protection mechanisms of the type the Panel found sufficient in SRL."¹¹⁵

- 6.41 The Claimant submitted that reconsideration properly lies to remedy the Expert Determination as inconsistent with ICANN policy and process and with the Panel's own decision in consolidated cases.

(vii) The Board Governance Committee's Reconsideration Decision

- 6.42 On 27 February 2014, the BGC issued its determination in respect of the Claimant's Reconsideration Request. The BGC determined that the Expert Panel had adhered to the factors in the Applicant Guidebook in determining whether the community invoked by the IO (the charity sector) was a delineated community and properly determined that the charity sector indeed "constitutes a clearly delineated community".¹¹⁶

¹¹⁴ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>, para. ii.

¹¹⁵ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>, para. iv.

¹¹⁶ 27 February 2014 Determination, at page 8. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

- 6.43 The BCG further determined that the Expert Panel did not fail to apply the proper standard for evaluating the likelihood of material detriment. It noted that:

"[t]he lack of an eligibility policy in the Requestor's application ensuring that registration will be limited to members of the charity sector is precisely what distinguishes the Panel's determination in the instant proceeding from that in the SRL proceeding. In the SRL proceeding, the Panel articulated the same concerns present here, namely the need to clearly distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. ... In the SRL proceeding, however, the Panel found that SRL's proposed eligibility policy adequately assuaged the Panel's concerns: 'The eligibility criteria policy defined by Applicant and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by the Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel's view to the Detriment test concerns raised by IO.'

Specifically, SRL committed to an eligibility policy that defined the subset of the community to which registration will be limited as 'incorporated entities, unincorporated associations or entities, foundations or trusts which can establish that they are a charity or 'not for profit' enterprise with charitable purposes'.¹¹⁷

- 6.44 The BGC concluded that "[b]ecause the Requester presented no evidence that it intended to or was otherwise willing to adopt a similar eligibility policy, there is no support for the Requestor's claim that "nothing distinguishes the application of SRL from that of Corn Lake."¹¹⁸

- 6.45 As to the allegation of different treatment of the Claimant and SRL's respective additional submissions dealing with eligibility, the BGC noted that SRL's additional submission was "expressly requested and approved by the Expert Panel in the SRL proceeding before the close of evidence. Indeed, in the Panel's determination in the SRL proceeding, the Panel stated that 'on 9 August 2013, ... the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the

¹¹⁷ 27 February 2014 Determination, at page 11. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹¹⁸ 27 February 2014 Determination, at page 12. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

Parties each to submit an Additional Witness Statement”¹¹⁹ SRL did so on 6 September 2014.

- 6.46 The BGC noted that by contrast, the evidence closed on 6 September 2014 and only on 4 December did the Claimant proffer new information regarding the proposed implementation of the GAC’s Beijing Communiqué. The Expert Panel had rejected that additional submission. Based on all of those grounds, the BGC concluded that the Claimant had not stated proper grounds for reconsideration and denied the Reconsideration Request. The BGC noted that “[i]f the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.”¹²⁰

(viii) Office of the Ombudsman Review

- 6.47 On 8 July 2014, the Office of the Ombudsman issued a report relating to the dispute resolution process used for competing applicants to new gTLDs, initiated by the Claimant or a related entity.¹²¹ The Ombudsman determined that he did not have jurisdiction to look at any of the issues raised. He stated in his report that:

“In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determination. Accordingly, the BGC is not required to evaluate the Panel’s substantive conclusion that there is substantial opposition from a significant portion of the community to which the string may be targeted. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process.

“My jurisdiction is very similar, although I have a different approach, based on whether the way in which the expert processed the decisions was unfair, but like the BGC, I cannot review the substance of the determination. It is useful to refer to my bylaw which refers to unfairness and delay, but underlying this is the issue that there must be a failure of process. The comments from Donuts have looked to interpret the differences in the panel decisions as a failure of process, but that is not the correct interpretation of my jurisdiction.

Procedural fairness is very different from making an error of law in the decision itself. It is

¹¹⁹ 27 February 2014 Determination, at page 12. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹²⁰ 27 February 2014 Determination, at pages 14 to 15. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹²¹ Report from Ombudsman Case 14-00122 In a matter of a Complaint by Donuts, **Claimant Exhibit 25**.

not appropriate for me to enter into any discussion or evaluation of the decisions themselves however. If I were to undertake the exercise urged upon me by Donuts, then I would step well outside my jurisdiction, and have not done so accordingly.”¹²²

(ix) Claimant’s Cooperative Engagement Process Request

- 6.48 On 18 July 2014, the Claimant filed a Cooperative Engagement Process (“CEP”) Request pursuant to Article 5.1 of the Bylaws. Article 5.1 provides that:

“[b]efore either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.”

- 6.49 The Cooperative Engagement Process description further provides that:

“prior to initiating an independent review process, 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. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review.”¹²³

- 6.50 On 20 March 2015, in accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended to 24 March 2015.¹²⁴

- 6.51 On 24 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.

- 6.52 In its Notice and Request for IRP, the Claimant seeks, or potentially seeks, review of the following:

- (a) the ICANN Board’s 27 February 2014 decision to permit inconsistent Expert Determinations from the Corn Lake and SRL applications for .CHARITY to continue by denying the Claimant’s Reconsideration Request;

¹²² July 8, 2014 Ombudsman letter, **Claimant Exhibit 25**, page 2.

¹²³ ICANN Cooperative Engagement Process description, **ICANN Appendix H**.

¹²⁴ Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

- (b) the ICANN Board’s 12 October 2014 decision to treat the Expert Determinations for .CHARITY differently to those for .COM/.CAM and/or .CAR/.CARS and/or .SHOP/ .通販 in respect of the new Inconsistent Determinations Review Procedure recorded in its Approved Resolutions;¹²⁵ and/or
- (c) “somewhat alternatively” (as characterized by ICANN),¹²⁶ the ICANN Board’s action to establish a new standard for review of all “inconsistent and unreasonable” decisions and decision not to apply that standard to .CHARITY, even though, in Claimant’s view, “the decisions on the .CHARITY objections, and no others [that were excluded], come within the realm of review established by the NGPC”.¹²⁷

7. IRP PANEL’S ANALYSIS OF ADMISSIBILITY

- 7.1 This IRP is the final stage in the ICANN New gTLD Application dispute resolution procedure. The process is governed by the ICANN Bylaws, Articles and “Core Values”.
- 7.2 In the course of its written and oral submissions, the Claimant invites the IRP Panel to review certain ICANN Board “actions or decisions” arising out of or relating to the Expert Determination upholding the community objection in the Claimant’s .CHARITY Application. The IRP Panel appears to be invited to review some or all of the following alleged “actions or decisions”:
 - (a) the Claimant’s Expert Determination dated 9 January 2014;
 - (b) the Board’s Denial of the Claimant’s Reconsideration Request dated 27 February 2014 and published in the Board Minutes of 27 February 2014, which were posted to the ICANN website on 13 March 2014, arising out of the Claimant’s Expert Determination;
 - (c) the NGPC Approved Resolutions, 5 February 2014, proposing the new Inconsistent Determinations Review Procedure and the ensuing consultation (the “**5 February 2014 Decision and Action**

¹²⁵ Claimant Request at para. 47.

¹²⁶ ICANN Response at para 52.

¹²⁷ Claimant Request at para. 42.

- (d) the NGPC Approved Resolutions, 12 October 2014, adopting the new Inconsistent Determinations Review Procedure and omitting .CHARITY from its purview (the “**12 October 2014 Decision and Action**”).
- 7.3 The requirements for an IRP are that: (a) the Claimant was materially affected by a decision or action of the Board; (b) the decision or action is inconsistent with the Articles of Incorporation or Bylaws; and (c) the request for the IRP was made within 30 days of the posting of the Board minutes recording that decision or action.¹²⁸ The issues of material effect and inconsistency with the Articles of Incorporation or Bylaws are integral to the exercise of substantive review, and are dealt with in Section 8 below. The question of timeliness, by contrast, may be disposed of as a threshold admissibility issue.
- 7.4 As to the threshold issue of timeliness of the request to review the 12 October 2014 Decision (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action), there is no dispute between the Parties. ICANN has not asserted any timeliness objection in relation to the IRP Panel’s review of these decisions and actions and proceeds on the basis that review is not precluded on timing grounds.¹²⁹ On that basis, this IRP Panel accepts that it has jurisdiction in respect of the 12 October 2014 Decision and Action (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action). The IRP Panel’s review of those “decisions and actions” is set out below, including in relation to material effect and inconsistency.
- 7.5 As to the threshold issue of timeliness of the request to review the Expert Determination and/or Denial of the Reconsideration Request, there is a dispute between the Parties as to admissibility.
- 7.6 The Claimant’s primary position is that its request that the IRP Panel review the Expert Determination and the BCG’s Denial of the Reconsideration Request is timely despite its failure to file its IRP request within the time period specified in Article IV, Section 3.3 of the

¹²⁸ The Claimant’s Request for IRP was submitted on 24 March 2015, the filing deadline previously agreed by the parties. Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

¹²⁹ Claimant Request, para. 31 and fn 26. ICANN and Claimant agreed to toll until 24 March 2015 the deadline for Claimant to file an IRP in relation to the 12 October 2014 action while Claimant pursued the CEP.

Bylaws. In particular, the Claimant contended at the hearing that the filing deadline provided in the Bylaws is “not a statute of limitations” and “lacks the rationale.”¹³⁰

- 7.7 ICANN, in response, denies that the Claimant’s request for IRP in relation to the Denial of the Reconsideration Request is timely. It refers to the posting on 13 March 2014 of the 27 February 2014 minutes of the meeting at which the BCG denied Claimant’s Reconsideration Request. According to ICANN, the Claimant’s right to file an IRP Request in relation to that decision expired on 28 March 2014.¹³¹ In support of that position, ICANN specifically relies on the Bylaws, which provide that:

“[a] request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation.”¹³²

- 7.8 There is no suggestion by either party that the deadline for an IPR application concerning the Reconsideration Request (or Expert Determination) has been tolled.
- 7.9 Having carefully considered the submissions of both Parties in relation to admissibility, the IRP Panel has determined that the Claimant’s application for review of the Expert Determination Denial of the Reconsideration Request is out of time. The Panel considers that ICANN is entitled and indeed required to establish reasonable procedural rules in its Bylaws, including in respect of filing deadlines, in order to provide for orderly management of its review processes.
- 7.10 Article IV, Section 3.3 of ICANN’s Bylaws clearly states that:

“[a] request for independent review must be filed ***within thirty days of the posting of the minutes*** of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation.”¹³³

¹³⁰ Claimant’s Hearing Slides at 5.2

¹³¹ ICANN Sur-Reply, para. 40; The Panel notes that the date 30 days after the 13 March 2014 posting of the 27 February minutes was 12 April 2014, a Saturday.

¹³² ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3.

¹³³ ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3. (Emphasis added.)

- 7.11 The Claimant failed to file its request for independent review within 30 days of the posting of the 27 February 2014 Minutes of the Board meeting in respect of the 27 February 2014 Denial of Request for Reconsideration concerning the .CHARITY Expert Determination of 9 January 2014. Claimant did not file the IRP request at issue here until 24 March 2015 and, arguably, did not raise the 27 February 2014 denial of its Reconsideration Request until its Reply Memorandum in this IRP, filed on 10 December 2015.¹³⁴
- 7.12 Moreover, the Claimant did not file its CEP request, which would have extended the independent review filing period, until 18 July 2014.¹³⁵ By that time, the 30 day period following publication of the Denial of the Reconsideration Request had already expired, i.e., on 28 March 2014, or, at latest, in mid-April 2014.
- 7.13 Although the CEP rules contemplate a process that will take place prior to initiating an IRP, the record before this Panel is insufficient to conclude that Claimant's CEP request operated to revive the already-expired time to file an IRP as to the denial of Claimant's Reconsideration Request or that ICANN waived that deadline.¹³⁶ Accordingly, the Panel has not considered the Denial of the Reconsideration Request (or indeed the underlying Expert Determination) in this IRP proceeding, except as background.
- 7.14 In summary, the Panel has determined that Claimant's only timely claim in this IRP is its application for relief from the Board's specific action to omit .CHARITY from the purview of its Resolution of 12 October 2014, and, to the extent related thereto, the 5 February 2014 Decision or Action.¹³⁷ Therefore, the Panel proceeds on the basis that the other "actions or decisions" discussed at length in the parties' submissions are background to the specific "action or decision" recorded in the 12 October 2014 Approved Resolutions.
- 7.15 The Parties further addressed the threshold question whether or not an Expert Determination was a "board decision" capable of review within the IRP process. As the Panel has already rejected any invitation to review the Expert Determination on the basis of timeliness, it is not required to address this further threshold issue.

¹³⁴ See ICANN Sur-Reply at para. 38-40; Corn Lake Reply at fn. 60.

¹³⁵ Witness Statement of Jonathon Nevett at para. 15

¹³⁶ Claimant Request, **Appendix H**.

¹³⁷ Claimant Request, para. 31.

8. IRP PANEL REVIEW OF THE BOARD'S "ACTION OR DECISION"

- 8.1 The IRP of ICANN Board's 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Process and omit .CHARITY from its purview is set out below.
- (i) Summary of Alleged Grounds for Review
- 8.2 The Claimant has raised four separate grounds for review. *First*, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3, provides that:¹³⁸
- "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."
- 8.3 The Claimant stated in its submissions to the Panel and at the hearing that "discrimination is the primary basis for Corn Lake's IRP... ."¹³⁹
- 8.4 *Second*, the Claimant relies on ICANN's "Core Values" set out in the ICANN Bylaws, Article I, Section 2, together with ICANN's mission statement. Specifically, the 11 core values that the ICANN Bylaws, Article I, Section 2 states "should guide the decisions and actions of ICANN" when it is "performing its mission" include to:
- (a) preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;¹⁴⁰
- (a) respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters within ICANN's mission;¹⁴¹
- (b) to the extent feasible and appropriate, delegate coordination functions;¹⁴²

¹³⁸ ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. See Claimant Request para. 4(a).

¹³⁹ Claimant's hearing slides at 1.1 ("Framing the Issues").

¹⁴⁰ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.1.

¹⁴¹ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.2.

¹⁴² ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.3.

- (c) seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;¹⁴³
- (d) *where feasible and appropriate, to promote and sustain a competitive environment;*¹⁴⁴
- (e) *introduce and promote competition in the registration of domain names;*¹⁴⁵
- (f) employ open and transparent policy development mechanisms;¹⁴⁶
- (g) make decisions by applying documented policies neutrally and objectively, with integrity and fairness;¹⁴⁷
- (h) act with a speed that is responsive to the needs of the Internet;¹⁴⁸
- (i) *remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness;*¹⁴⁹ and
- (j) recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.¹⁵⁰

- 8.5 The Claimant relies in particular on core values at Article I, Sections 2.5, 2.6 and 2.10, as italicized above.¹⁵¹
- 8.6 Article I of the Bylaws further provides that the 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.” The Bylaws state that:

¹⁴³ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.4.

¹⁴⁴ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.5.

¹⁴⁵ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.6.

¹⁴⁶ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.7.

¹⁴⁷ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.8.

¹⁴⁸ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.9.

¹⁴⁹ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10.

¹⁵⁰ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.11.

¹⁵¹ ICANN Bylaws, **ICANN Appendix A**, Article I, Sections 2.5 and 2.6. See Claimant Request para. 4(b). ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10. See Claimant Request para. 4(d).

“[a]ny 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.”¹⁵²

- 8.7 **Third**, the Claimant relies on the ICANN Articles of Incorporation, Article 4, which requires that ICANN operate for the benefit of the Internet community as a whole:¹⁵³

“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. ...”

- 8.8 **Fourth**, and anticipating the IRP Standard of Review provided in Article IV, Section 3.4, the Claimant asserts that the:

“Board simply failed to ‘exercise due diligence and care in having a reasonable amount of facts in front of them’ regarding the .CHARITY objection decisions when it refused to provide for their review as similarly ‘inconsistent and unreasonable’ as the determinations for which it did order review.”¹⁵⁴

- 8.9 As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions asserted by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.¹⁵⁵ In particular, Article IV, Section 3.2 provides that:

“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

¹⁵² ICANN Bylaws, **ICANN Appendix A**, Article I.

¹⁵³ ICANN Articles of Incorporation, **ICANN Appendix B**, Article 4. See Claimant Request para. 4(c).

¹⁵⁴ Claimant Request, para. 47.

¹⁵⁵ ICANN Bylaws, **ICANN Appendix A**, Article IV (3) (1).

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."

- 8.10 For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being "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." It is described in the IRP Final Declaration in *Booking.com v ICANN* as "the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."¹⁵⁶

(ii) Standard of Review

- 8.11 Both Parties accept that the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplemental Procedures.

- 8.12 Article IV, Section 3.4 of the Bylaws provides 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. 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?"

- 8.13 Article 8 of the Supplementary Rules reiterates those three questions and further provides as follows:

"8. Standard of Review

¹⁵⁶ *Booking.com v ICANN* IRP Final Declaration, 3 March 2015, **ICANN Appendix I**, at para. 54.

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.”

- 8.14 The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the defined standard quoted above does not constitute the exclusive basis for an IRP of ICANN’s Board action or inaction. Rather, they described this business judgement rule standard as “the 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.”¹⁵⁷ Where, as here, the Board’s action or inaction may be compared against relevant provisions of ICANN’s governing documents, the IRP Panel’s task is to *compare* the Board’s action or inaction to the governing documents and to *declare* whether they are consistent.¹⁵⁸
- 8.15 The IRP in *Booking.com v ICANN* further elaborated the standard at paragraphs 108 to 110 and 115 of its Final Declaration:

108. “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.”

¹⁵⁷ *ICM Registry v ICANN* Final Declaration, 19 February 2010, **ICANN Appendix K**, para. 123.

¹⁵⁸ *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 123 to 124.

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. ...”

...

115. “[I]t 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 ... but merely to apply them to the facts.”¹⁵⁹

- 8.16 Taking into account the Board’s broad authority as described above, IRP Panels nonetheless consistently have declined to adopt a deferential review standard. As the IRP Panel in *Vistaprint v ICANN* stated:

“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... .”¹⁶⁰

- 8.17 The IRP Panel in *Booking.com v ICANN* concurred, noting:

“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, ... the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s

¹⁵⁹ *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 108 to 110 and 115.

¹⁶⁰ *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 124.

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.”¹⁶¹

- 8.18 Having reviewed the IRP Final Declarations in the *Vistaprint v ICANN*, *ICM Registry v ICANN* and *Booking.com v ICANN*, this Panel concludes that it is now well established that:

“... 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.”¹⁶²

- 8.19 While it is in no way bound by these earlier decisions, this IRP Panel agrees with those conclusions and sees no reason to depart from the standard of review set out in *Booking.com v ICANN*, which in turn relied on the Final Declaration in *ICM Registry LLC v ICANN*, dated 19 February 2010. That the Panel is not called upon to revisit or vary the substance of the Articles, Bylaws or Guidebook generally does not lessen its charge to analyse the specific Board action or inaction at issue here objectively against the standards contained in those instruments.

- 8.20 The current IRP Request raises a direct and concededly timely challenge to an ICANN “action or decision”, namely the Board’s 12 October 2014 establishment of the new Inconsistent Determinations Process and specifically, the Board’s determination to limit that process to String Confusion Objections and not to extend it to inconsistent Community and Limited Public Interest Objections, such as .CHARITY.

(iii) Analysis

- 8.21 In accordance with the standard adopted by the IRP Panels in the *Booking.com v ICANN* and *ICM Registry v ICANN*, this Panel considers below whether the Board acted consistently with ICANN’s Articles of Incorporation, Bylaws and the procedures established in the Applicant Guidebook. We initially compare the Board’s action to Article II, Section 3 of the Bylaws. In addition, we compare the Board’s action to the standard set out in Article IV, Section 3.4 of

¹⁶¹ *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

¹⁶² *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

the Bylaws and Article 8 of the Supplementary Rules and consider other relevant Bylaws and ICANN governing documents, including the Guidebook and ICANN's Core Values.

8.22 The issues addressed in turn are:

- (a) Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification? (Bylaws Article II, Section 3)
- (b) As to the Defined Review Standard (Bylaws Article IV, Section 3.4):
 - i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?
 - ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?
 - iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?
- (c) Did the Board Act in the Best Interests of the Internet Community? (Articles of Incorporation, Article 4)
- (d) Did the Board Abdicate Its Accountability Responsibility? (Bylaws, Article I, Section 2.10)

8.23 Each of these issues is considered in relation to the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Procedure which omitted .CHARITY from its purview of the new Inconsistent Determinations Review Procedure.

ISSUE 1: Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification?

- 8.24 The first ground for review is whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment. The applicable Bylaw is Article II, Section 3, set out above.¹⁶³
- 8.25 This IRP Panel is required to determine whether or not the ICANN Board, in its 12 October 2014 Approved Resolutions “action or decision” not to extend the new Inconsistent Determination Review Procedure to the Claimant’s .CHARITY Expert Determination, accorded the Claimant unfair or disparate treatment without substantial and reasonable cause as compared to other unsuccessful applicants who had received perceived inconsistent Expert Determinations, i.e., the unsuccessful applicants for the gTLDs for .CAM and .通販 (and originally .CARS).

(i) The Claimant’s Position

- 8.26 First, the Claimant contends that the Board’s decision to establish a review process for “inconsistent and unreasonable” determinations whilst at the same time excluding .CHARITY from that review process materially affected the Claimant. In this regard, the Claimant refers, among other things, to:
- (a) the NGPC’s 5 February 2014 proposed review mechanism “for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process”, established for public comment;¹⁶⁴
 - (b) community criticism at the time that the review proposal was not sufficiently expansive and that the review process should be widened;
 - (c) the Board decision to encompass the .CAM and .COM decisions as “inconsistent or otherwise unreasonable” and “not in the best interest of the Internet community” in relation to “objections raised by the same objector against different applications for the same string, where the outcomes of the [objections] differ”,¹⁶⁵ in circumstances where the description of the problem arising out of inconsistent decisions on .CAM

¹⁶³ ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. See Claimant Request para. 4(a).

¹⁶⁴ Claimant Request, para. 28.

¹⁶⁵ Claimant Request, para. 30.

and .COM applies to the .CHARITY situation, according to the Claimant, “*exactly*”;¹⁶⁶ and

- (d) ICANN’s characterization of the “strict definition” of “inconsistency” contained in the NGPC 12 October 2014 Resolution as extending to “objections raised by the same objector against different applications for the same string, where the outcome of the [objections] differ”.¹⁶⁷
- 8.27 Based on those factors, the Claimant submits that the Board’s decision to not include .CHARITY (as a Community Objection determination) has resulted in the Claimant being “materially affected by a decision or action by the Board”.¹⁶⁸ According to the Claimant, it was materially affected because it was deprived of an opportunity for review of an objection where another party subject to the identical circumstances was granted an opportunity for review.
- 8.28 The Claimant further submits that those same factors render that decision “inconsistent with the Articles of Incorporation or Bylaws”.¹⁶⁹ In the Claimant’s submission, the Board established a process for handling inconsistent and unreasonable objection decisions and then consciously disregarded that process in the case of .CHARITY.¹⁷⁰
- 8.29 The Claimant submits that it “does not challenge the Board’s decision not to extend review beyond only ‘inconsistent and unreasonable’ objection determinations.”¹⁷¹ Rather, it submits that its complaint arises out of “the Board’s stated rationale for limiting its review only to one type of objection, SCO”, which the Claimant submitted “raises at least three critical issues that the Board appears to have overlooked.”¹⁷² Essentially addressing the question of whether there was “substantial and reasonable cause” for the limitation, the Claimant notes, in particular:
- (a) the Board did not identify any action taken by anyone in reliance on an inconsistent objection determination of any type and, in particular, in relation to .CHARITY,

¹⁶⁶ Claimant Request, para. 31 (emphasis in original); see also Claimant Request, para. 42.

¹⁶⁷ Claimant Request, para. 31; 11 February 2014 Proposed Review Mechanism, **Claimants Exhibit 15**, at page 2.

¹⁶⁸ Claimant Request, para. 32.

¹⁶⁹ Claimant Request, para. 32.

¹⁷⁰ Claimant Request, para. 37.

¹⁷¹ Claimant Request, para. 39.

¹⁷² Claimant Request, para. 39.

nothing indicates that SRL has done anything to pursue its application further after the objection ruling in its favor;¹⁷³

- (b) the Board's concern about actions taken in reliance on the Applicant Guidebook ignores those applications for new gTLDs made in reliance upon the Applicant Guidebook's strict criteria and made in the expectation that experts would apply those criteria properly;¹⁷⁴ and
 - (c) the Board's conclusion that to expand the review would unfairly impact a number of participants without reasonably considering the available facts ignores the fact that "*only* the decisions on the .CHARITY community objections, and *no others*, come within the realm of review established by the NGPC."¹⁷⁵
- 8.30 The Claimant further relies on recent decisions in which Final Review Panels established pursuant to the October 2014 Resolution have overturned "inconsistent and unreasonable" new gTLD objection determinations.¹⁷⁶ In particular, the Claimant relies on Final Review Determinations issued by both of the three member Final Review Panels convened as a result of the Board's October 2014 Resolution to re-review two specifically identified string confusion objection expert determinations.
- 8.31 The Claimant argues that each of these Final Expert Determinations reversed the SCO challenged determinations and provide evidence that the Panel "cannot reasonably uphold the disparate treatment that Corn Lake has suffered." The Panel is asked to correct this situation.¹⁷⁷
- 8.32 The Claimant submits that:
- "[a]t minimum, it [ICANN] can and should defer to the same review mechanism provided for in the Resolution: a 3-member review panel, examining only the materials offered in the original proceedings, asking solely 'whether the original Expert Panel could have reasonably

¹⁷³ Claimant Request, para. 40.

¹⁷⁴ Claimant Request, para. 41.

¹⁷⁵ Claimant Request, para. 42.

¹⁷⁶ Reply, paras. 21 to 28.

¹⁷⁷ Reply, para. 23.

come to the decision reached ... through an *appropriate* application of the standard review *as set forth in the Applicant Guidebook.*”¹⁷⁸

- 8.33 In the course of its written and oral submissions in this IRP, the Claimant put forward its substantive concerns as to the content of the original Expert Determination and Denial of the Reconsideration Request in support of its position for further review.¹⁷⁹ In particular, it submitted that:
- (a) “a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string”¹⁸⁰ and such differing determinations are “inconsistent and unreasonable” in the same sense the Board applied those terms to the SCO determinations to which it extended the new review mechanism;
 - (b) in “[r]eviewing the decision against Corn Lake and the ruling in favor [of] SRL together, it becomes clear that the PIC offered by SRL formed the sole basis for the differing outcomes. The analyses on the other three community objection criteria track closely, and often verbatim, in the two rulings”;¹⁸¹
 - (c) “[n]o legitimate basis exists ... to distinguish the two applications” because “[b]oth the IO’s objection and the panel’s ruling against Corn Lake turn entirely on its perceived lack of the type of protections to which the panel found SRL had acceded in its PIC”;¹⁸²
 - (d) “[b]ecause Corn Lake must in fact implement such protections as a contractual condition to an award of the TLD, and because SRL has the unilateral right to change its PIC language, the applicants should not be subject to disparate treatment”;¹⁸³

¹⁷⁸ Claimant Request, para. 45 (emphasis in original). See also, Reply, para. 15 (“Corn Lake does not, as ICANN contends, seek substantive review of the Ruling. Rather, it claims that the Ruling improperly discriminates against Corn Lake. The Board acted by failing to rectify the Ruling despite the requirement that the Board ensure the integrity of its processes, which include consistency, fairness and non-discriminatory treatment of similarly situated applicants.”)

¹⁷⁹ Claimant Request, para. 27.

¹⁸⁰ Claimant Request, Introduction. See also, Reply, para. 12.

¹⁸¹ Claimant Request, para. 26.

¹⁸² Claimant Request, para. 27.

¹⁸³ Claimant Request, para. 27.

- (e) the Claimant “made clear to the IO that it would fully comply with more stringent safeguard requirements (or PICs) should they be adopted by ICANN”¹⁸⁴ and, as a result, the disparate treatment between the Claimant’s and SRL’s eligibility criteria, which it alleges was effectively the same, was inconsistent and unreasonable;
- (f) the procedure by which SRL was permitted to make additional submissions was inconsistent with the procedure afforded to the Claimant and unreasonable. In particular, despite ICANN’s publicly stated commitment to transparency and accountability, it failed to make public the substance of SRL’s proposed amendment for almost two months – during a critical phase in the application process. Moreover, ICANN published the new mandatory PICs applicable to .CHARITY only for comment. According to the Claimant, this effectively left it in the dark;¹⁸⁵
- (g) “even though the panel had accepted SRL’s late submission, it rejected Corn Lake’s identical attempt to support its own application” to alert the Expert Panel that ICANN had accepted the GAC’s Beijing Communiqué recommendations, thereby mooted the IO’s objection;¹⁸⁶
- (h) the Expert Panel based the decision to deny the IO’s objection against SRL’s .CHARITY application entirely on the amended PIC that was the subject of SRL’s late submission and “[t]he panel’s decision to deny the objection against SRL’s application allowed SRL’s .CHARITY application to move forward in the process,” whereas Claimant’s application was disqualified and removed from contention altogether;¹⁸⁷ and
- (i) as a result, the Board’s actions have materially affected the Claimant in that it has now seemingly lost the right to the .CHARITY domain, by refusing to allow Corn Lake to provide evidence of the PIC it would have to adopt.¹⁸⁸

8.34 In relation to this position, as set out in Section 7 above, the IRP Panel has determined that, irrespective of whether or not the Expert Determination and/or Denial of the Reconsideration Request were subject to review, the current IRP application as applied to those actions is out of time. Therefore, in its analysis below the IRP Panel takes the

¹⁸⁴ Reply, para. 5.

¹⁸⁵ Reply, para. 7.

¹⁸⁶ Reply, para. 8.

¹⁸⁷ Reply, para. 9-10.

¹⁸⁸ Reply, para. 10.

aforementioned factors into account by way of background only, and does not review the merits of the Expert Determination or the Denial of the Reconsideration Request. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel addresses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.

- 8.35 The Claimant made further post-hearing submissions regarding the ICANN Board's 3 February 2016 Resolution¹⁸⁹ to address the "perceived inconsistency and unreasonableness" of the .HOSPITAL Limited Public Interest objection Expert Determination by referring the objection proceeding to the Inconsistent Determinations Review Procedure. The .HOSPITAL Expert Determination was found to have been the only Limited Public Interest objection out of nine "health-related" Limited Public Interest objections that resulted in a determination in favor of the objector rather than the applicant. As a consequence, the Board invoked the Inconsistent Determinations Review Procedure for the third time – this time beyond the original string confusion objections scope referred to in the 12 October 2014 Approved Resolutions. In the .HOSPITAL: case, identical objections were lodged by the same objector, not to the same string, but to strings related by subject matter.
- 8.36 The Claimant contended that the Board's action with respect to .HOSPITAL provides additional evidence of the disparate treatment of .CHARITY in that the .CHARITY situation is "more similarly situated to .CAM and .SHOP than is .HOSPITAL."¹⁹⁰
- 8.37 The Claimant relies on the Final Declaration in *Dot Registry v. ICANN* to urge that ICANN must establish that it complied with its Bylaw obligations regarding accountability, diligence and independent judgment based on affirmative proof of the record on which the Board relied in denying Claimant's Reconsideration Request and in excluding the .CHARITY expert determinations from the new review mechanism.

¹⁸⁹ Claimant Post-Hearing Submission dated 16 February 2016.

¹⁹⁰ Claimant Post-Hearing Submission dated 16 February 2016.

(ii) The Respondent's Position

8.38 ICANN rejects the Claimant's arguments: (a) that the .CHARITY Expert Determinations should have been included in the 12 October 2014 Approved Resolutions relating to the limited review mechanism for expert determinations from specifically identified sets of String Confusion Objections; and (b) that the Board should have expanded the limited review process and implemented a similar review to cover the .CHARITY Expert Determinations.¹⁹¹

8.39 ICANN denies that the Claimant was materially affected by the Board establishing a review process for "inconsistent and unreasonable" determinations whilst excluding .CHARITY from that review process. It submits that the NGPC identified several bases to distinguish inconsistent Expert Determinations between specifically identified sets of objections to string confusion and other Expert Determinations which were not included in the new process. In particular:

"the NGPC identified several bases to distinguish the seemingly inconsistent determinations resulting from specifically identified sets of String Confusion Objections on the one hand, and the expert determinations resulting from Community Objections, such as those relating to .CHARITY or .慈善, on the other. Based upon these differences, the NGPC concluded that permitting the specifically identified sets of String Confusion Objections to stand 'would not be in the best interests of the Internet community,' but that 'reasonable explanations' existed for the seeming discrepancies concerning determinations on Community Objections, such as for .CHARITY."¹⁹²

8.40 ICANN further submits that the 12 October 2014 Approved Resolutions were deliberately narrow and consciously limited to only the String Confusion Objection Expert Determinations relating to .COM/.CAM and .SHOP/通販.¹⁹³ The Respondent submits therefore that the NGPC did not establish a new standard for review of all "inconsistent and unreasonable" Expert Determinations and was under no obligation to provide such a review mechanism.¹⁹⁴

¹⁹¹ ICANN Response, para. 52. See also ICANN Sur-Reply, para. 9.

¹⁹² ICANN Response, para. 11.

¹⁹³ ICANN Response, para. 53.

¹⁹⁴ ICANN Response, para. 62.

8.41 ICANN argues that in limiting the review to two specifically identified sets of String Confusion Objection Expert Determinations, the NGPC did not breach its obligations under the Bylaws or Articles of Incorporation.¹⁹⁵ It cites two recent IRP Final Declarations (claiming that such decisions have “precedential value”¹⁹⁶) that it submits contradict the Claimant’s arguments, and rejects the Claimant’s reliance on the third case.¹⁹⁷

(a) *Vistaprint v ICANN*: ICANN relies on the following findings:

- (i) “the Panel is not tasked with reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN”;¹⁹⁸ and
- (ii) “the ICANN Board has no affirmative duty to review the result in any particular SCO [string confusion objection] case”;¹⁹⁹ and has no duty to establish an appeals process to challenge Expert Determinations in objection proceedings²⁰⁰ and “had properly limited its consideration to whether the contested actions comported with established policies and procedures.”²⁰¹

(b) *Merck v ICANN*: ICANN relies on the IRP Final Declaration findings that:

- (i) “the claimant’s disagreement with the outcome of the Merck Expert Determination cannot form the basis for an IRP”;²⁰² and
- (ii) “the Guidebook does not include any appeals process for determinations on objection proceedings.”²⁰³

(c) *DCA v ICANN*: ICANN argues that this determination is not applicable because “[t]he DCA Panel premised its declaration on the GAC’s status as an ICANN constituent

¹⁹⁵ ICANN Response, para. 11.

¹⁹⁶ ICANN Sur-Reply, para. 7. See also, ICANN Bylaws, as amended 30 Jul 2014, **ICANN Appendix A**, Art. IV, para. 3.21.

¹⁹⁷ ICANN Sur-Reply, paras. 3-6.

¹⁹⁸ ICANN Sur-Reply, para. 15, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 127.

¹⁹⁹ ICANN Sur-Reply, para. 16, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 157.

²⁰⁰ ICANN Sur-Reply, para. 17.

²⁰¹ ICANN Sur-Reply, para. 18.

²⁰² ICANN Sur-Reply, para. 20.

²⁰³ ICANN Sur-Reply, para. 20.

- body, but here neither the ICC nor the expert panels it established to preside over the two objection proceedings at issue are constituent bodies of ICANN.”²⁰⁴
- 8.42 In addition, ICANN argues that the review mechanism which was approved was “a very narrow review mechanism to be applied only to specifically identified Expert Determinations arising out of the String Confusion Objection process. The NGPC explicitly decided not extend the review to any Community Objection expert determinations. Moreover, the NGPC was not obligated to create or implement a broader review mechanism.”²⁰⁵ There is no appellate mechanism in the Bylaws, the Articles or the Guidebook “for objection proceedings that are conducted as part of the New gTLD Programme.”²⁰⁶
- 8.43 ICANN rejects the Claimant’s reliance on the Final Determinations (as exhibited to the Reply) by IRP Panels convened as a result of the Board’s October 2014 Resolution to re-review two specific SCO Expert Determinations. ICANN submits that the Claimant’s reliance on these is inapplicable because: (i) the NGPC was explicit that the New Inconsistent Determination Review Process would encompass only the SCOs addressed in the October 2014 Approved Resolutions; (ii) these findings have no bearing on community objection Expert Determinations; (iii) the New Inconsistent Determination Review Process involved different Expert Panels; and (iv) the Claimant is incorrect to presuppose that the Board has an affirmative duty to intervene with respect to the Corn Lake Expert Determination.²⁰⁷
- 8.44 Finally in response to the Claimant’s submissions regarding the content of the Expert Determination and Denial of the Reconsideration Request, ICANN noted that:²⁰⁸
- (a) “[e]valuation of a Community Objection necessarily goes far beyond a review of the string, and instead requires careful consideration of the application materials and an applicant’s proposed commitments, which (and likely do, as here) vary among applicants. As a result, one could reasonably expect that Community Objections

²⁰⁴ ICANN Sur-Reply, para. 24.

²⁰⁵ ICANN Response, para. 12.

²⁰⁶ ICANN Response, para. 12.

²⁰⁷ ICANN Sur-Reply, para. 10.

²⁰⁸ ICANN Response, para. 24. See also Applicant Guidebook, **ICANN Appendix C**, para. 3.5.4.

filed against different applications, even applications for the same string, may be resolved differently”,²⁰⁹

- (b) the IO found that the “various comments in opposition” to Claimant’s .CHARITY Application had “mainly focused on the views that the string should be administered by a not for profit organization and/or that there are insufficient protection mechanisms in place such that non-bona fide organizations may adopt the .CHARITY gTLD, and create confusion in the mind of the public over what is in fact a charity”²¹⁰ and, as such, the IO concluded that in the absence of preventative security measures assuring the charitable nature of the applicant i.e. Corn Lake, adopting .CHARITY as a gTLD would create “likelihood of detriment to the rights or legitimate interests of the charity community, to users and to the general public”;²¹¹
- (c) the Expert Determination further found that the public opposition statements “point out the absence of any limitation in the Application of the ‘.CHARITY’ string to not-for-profit or charitable organizations ... and emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law”;²¹²
- (d) the IO and the Expert Panel clearly considered that harm would occur if .CHARITY gTLD was not limited to persons or entities who could clearly establish that they were charities or not-for-profit organizations and that the IO had established the likelihood of material detriment;²¹³
- (e) the IO had raised the same concerns in respect of the Claimant’s and SRL’s applications but the SRL Expert Panel considered that: “[t]he eligibility policy defined by the Applicant [SRL] and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by Applicant

²⁰⁹ ICANN Response, para. 25.

²¹⁰ As per ICANN Response, para. 28. See also IO 12 March 2013 Community Objection to Corn Lake’s Application, **Claimant Exhibit 2**, para. 4.

²¹¹ ICANN Response, para. 28.

²¹² ICANN Response, para. 32. See also Panel 9 January 2014 objection determination against Corn Lake, **Claimant Exhibit 8**, paras. 150-151.

²¹³ ICANN Response, para. 33.

with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO”;²¹⁴

- (f) unlike the Claimant, SRL had committed to an eligibility policy that indicated registration would be limited to entities that could establish that they were a charity or a not-for-profit entity with charitable purposes,²¹⁵
- (g) “it is not the role of the Board (or, for that matter, this IRP Panel) to second-guess the substantive determination of independent, third-party experts”²¹⁶ or inject itself into the objection process and it was not for the Board to reverse the Corn Lake Expert Determination;²¹⁷ and
- (h) the Applicant Guidebook contains no suggestion – and certainly no requirement – that the Board should conduct substantive reviews of expert panel determinations.²¹⁸

8.45 As to ICANN’s post-hearing submission concerning .HOSPITAL, ICANN relied primarily on the argument that different panels assessed the nine health-related applications and only the .HOSPITAL panel sustained an objection. It also argued that the .HOSPITAL situation confirms that the Board has, and may exercise, discretion to act where it believes there has been an unjust result.

8.46 In its .HOSPITAL post-hearing submission, ICANN confirmed that it did not dispute Claimant’s position that “.CHARITY was the only other TLD ... where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”²¹⁹ Nonetheless, ICANN argued that other applicants also have complained that the results in their Expert Determinations were “unreasonable” and to give credence to Claimant’s arguments here “would risk opening a floodgate of “appeals” for other objection determinations.

²¹⁴ ICANN Response, para. 34, as per Panel 9 January 2014 objection determination in favor of SRL; **Claimant Exhibit 11**, para. 129.

²¹⁵ ICANN Response, para. 35.

²¹⁶ ICANN Response, para. 48.

²¹⁷ ICANN Response, para. 49.

²¹⁸ ICANN Sur-Reply, para. 2.

²¹⁹ ICANN letter 2 February 2016 at fn 5.

8.47 ICANN contends that the facts at issue in the *Dot Registry v. ICANN* IRP are not remotely similar to those present here and the *Dot Registry* Final Declaration has little relevance to the instant IRP.

(iii) The Panel's Decision

- 8.48 As stated above, this IRP Panel is not reviewing the Expert Determination or the Denial of the Reconsideration Request, as any application in respect of either is out of time. The Panel's analysis does not end there, however. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel has before it a separate and timely challenge to the Board's Decisions and Actions of 12 October 2014 and 5 February 2014. The Panel therefore analyses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.
- 8.49 In its consideration as to whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment, this IRP Panel specifically examines the Board's "decision or action" in determining "whether it was appropriate ... to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections".²²⁰
- 8.50 In that specific context, the IRP Panel considers whether or not the Board "singled out" the Claimant for "disparate treatment" without substantial and reasonable cause, in contravention of Article II, Section 3 of the Bylaws, by excluding the .CHARITY Expert Determination, being the only community objection where the same objection from the same objector led to a different determination, from its consideration. The Panel further considers whether or not the Board's decision was based on an exercise of due diligence and care in having a reasonable amount of facts in front of it.
- 8.51 The IRP Panel accepts that, subject to its duty to act in the best interests of the community as discussed below at Issue 3, ICANN was under no obligation to create the new Inconsistent Determinations Review Procedure. However, once it had done so, this IRP

²²⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

Panel considers that the Bylaws required ICANN to ensure that it did not single out a similarly situated applicant for disparate treatment in relation to the application of the new Inconsistent Determinations Review Procedure without “substantial and reasonable cause”.

- 8.52 It is central to this Panel’s analysis that ICANN has admitted that “.CHARITY was the only other TLD ... where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”²²¹ In other words, ICANN has accepted that the Expert Determination at issue here fits within the “strict definition” of inconsistent Expert Determinations that the ICANN Board used to determine the scope of the new review procedure.
- 8.53 Ultimately, the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) was not to extend the scope of the new review mechanism to apparently inconsistent Expert Determinations made as to objections other than certain designated Expert Determinations based on string confusion objections. Rather, the Board’s decision was to limit the new Inconsistent Determinations Review Procedure to a hand-picked subset of inconsistent SCO Expert Determinations.²²² ICANN accepted that “to promote the goals of predictability and fairness” a broader review mechanism “may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program,” but declined to extend the new review mechanism at the time it acted because:
- (a) “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”;
 - (b) “[a]llowing 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”;

²²¹ ICANN letter 2 February 2016 at fn 5.

²²² Notably, the Board did not refer the full suite of inconsistent SCO determinations to the new review process to reconcile the differing outcomes. Rather, the Board selected only one determination from each set for review in the new process. Reply, fn. 10. The basis on which the Board made this selection was not disclosed, other than to state that each “falls outside normal standards of what is perceived to be reasonable and just.” Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**. This Panel’s review of whether the Board had a reasonable basis to distinguish the selected string contention objection Expert Determinations, which were subjected to the new process, from the community objections to .CHARITY, which were excluded, is limited by this non-disclosure.

- (c) while on their face other SCO Expert Determinations and Expert Determinations of the Limited Public Interest and Community Objections might appear inconsistent, there were “reasonable explanations for these seeming discrepancies, both procedurally and substantively”;²²³ and
 - (d) those “reasonable explanations” lay in the “materials presented,” i.e. the applications and the parties’ responses to the IO’s objection and in “nuanced distinctions” between the Expert Determinations relevant to the particular objection.”²²⁴
- 8.54 These factors may have explained the different treatment in respect of other perceived inconsistent Expert Determinations, but in relation to the .CHARITY Expert Determinations they are problematic for the reasons explained below.
- 8.55 **First**, as acknowledged by ICANN, pending the outcome of this IRP Final Determination, the .CHARITY applicant SRL has taken no action in reliance on the Expert Determination overruling the IO’s Community Objection to its application, including but not limited to signing Registry Agreements, transitioning to delegation, withdrawing its application or requesting refunds.
- 8.56 **Second**, as a consequence, there are no actions in respect of the .CHARITY applications to be undone such as to delay consideration of all applications, were the new review mechanism to apply. As to issues of unfairness for those that have already acted in reliance on the Applicant Guidebook, there is no evidence in the carefully documented record that the Board considered the fact that ICANN Board’s October 2013 decision that it would adopt the Beijing Communiqué recommendations – some three months prior to the .CHARITY Expert Determinations – materially changed the Applicant Guidebook requirements in respect of the .CHARITY registration eligibility requirements, equally affecting *all* applicants and potentially eliminating any meaningful distinction between the pending applications.
- 8.57 **Third**, given ICANN’s admission that on their face the .CHARITY Expert Determinations appear “inconsistent” within the same “strict definition” the Board relied upon in considering the new review mechanism, and in light of the Board’s October 2013

²²³ Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

²²⁴ Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

announcement that it would adopt the Beijing Communiqué recommendations, there do not appear to be “reasonable explanations for these seeming discrepancies, both procedurally and substantively”.

- 8.58 ***Fourth***, as to the existence of “reasonable explanations” that the perceived inconsistency in the .CHARITY Expert Determinations could be explained by the “materials presented” or “nuanced distinctions” between the different applications, the carefully documented record of the Board’s 5 February 2014 and 12 October 2014 consideration of the new process contains no consideration of the potentially levelling impact of the October 2013 announcement that the Board intended to adopt of the GAC Beijing Communiqué recommendations – three months before the Expert Determinations were issued.²²⁵
- 8.59 The IRP Panel recognizes and has carefully considered the fact that the Expert Panel had rejected as untimely the Claimant’s attempt to introduce evidence of the October 2013 announcement in the Expert Determination proceeding. The IRP Panel takes no position as to the correctness of that procedural decision, as the IRP Panel has concluded that the Claimant’s IRP claims as to the Expert Determination itself are untimely. In any event, it is doubtful that such a procedural decision would in any case have been subject to an IRP, even if timely.
- 8.60 Nevertheless, situating this IRP Panel’s review at the time that the Board took its decision not to extend the new review procedure to the inconsistent .CHARITY determinations, nothing in the record indicates that the Board took into account the following:
- (a) that the decision that ICANN would adopt the GAC Beijing Communiqué recommendations was a major policy development for ICANN, announced in October 2013, that would lead to the establishment of new undertakings in its registry agreements, which would be mandatory and applicable across-the-board to all Category I and Category II gTLD’s, including but not limited to .CHARITY, providing an important change to the Applicant Guidebook;

²²⁵ This is despite the fact that the Claimant’s Reconsideration Request was pending at the time the NGPC first published framework principles of a potential review mechanism that would be limited only to “perceived Inconsistent String Confusion Expert Determinations.” The Claimant filed its Reconsideration Request on 24 January 2014 and the NGPC published Approved Resolutions formally adopting the recommendations of the Beijing Communiqué and describing the new review mechanism, which would be limited to identified SCO Expert Determinations, on 5 February 2014. Approved Resolutions, 5 February 2014 resolutions, **Claimant Exhibit 14**, page 3.

- (b) that the Board indicated publicly that it planned to adopt the GAC Beijing Communiqué recommendations relating to .CHARITY three months prior to the issuance of the inconsistent .CHARITY Expert Determinations;
 - (c) that the effect of that decision was to render the eligibility requirements in respect of all applicants for the .CHARITY gTLD identical, including those proposed by the Claimant;
 - (d) that all .CHARITY gTLD applicants originally elected to protect their positions in respect to any future action relating to the Beijing Communiqué by clearly stating in their application materials that they would comply with any ICANN registration requirements, including in the submission of their final PICs for approval;
 - (e) that the IO had lodged identical objections in March 2013 to the .CHARITY applications based on the initial lack of a commitment to operate a limited registry, but the Expert Panel nevertheless overruled the IO community objection for the SRL and Excellent First applications based on their amended commitment to limit the eligibility requirements in a manner that was consistent with the GAC Beijing Communiqué recommendations and, in the case of Excellent First's amended commitment, explicitly referred to the recommendation; and
 - (f) that the Expert Panel upheld the IO community objection to the Claimant's application despite the practical effect of ICANN's announcement in October 2013 that it intended to adopt the GAC Beijing Communiqué's recommendations concerning Category I and Category II safeguards, coupled with the Claimant's (and SRL and Excellent First's) advance undertakings to comply with such safeguards being to level all applications for the .CHARITY gTLD, to put all three applications on a level playing field and rendering them functionally indistinguishable in respect of eligibility requirements.
- 8.61 Given the procedural and substantive effect of the announcement that the Board would adopt the GAC Beijing Communiqué recommendations, at the time the Board determined the scope of the new Inconsistent Determination Review Process, any practical differences in the "materials presented", as well as any "nuanced distinctions" perceived to have existed between the .CHARITY applications in relation to eligibility requirements prior to October 2013, had ceased to have any material effect prior to the .CHARITY Expert Determinations.

- 8.62 For the same reasons, any “reasonable explanations” for perceived inconsistencies between the .CHARITY Expert Determinations based on the different eligibility requirement undertakings prior to October 2013 were eliminated by the ICANN Board’s announcement that it would adopt the GAC Beijing Communiqué recommendations. The effect of that decision, coupled with *all* applicants’ undertakings to follow any GAC Beijing Communiqué recommendations adopted by ICANN, was to render the applicants’ eligibility requirements criteria identical across all three applications.
- 8.63 The Panel concludes that the Board’s decision not to expand the scope of the proposed mechanism to include other Expert Determinations, and in particular the .CHARITY Expert Determinations, failed to take into account the following factors:
- (a) the .CHARITY Expert Determinations were the only other set of inconsistent Expert Determinations dealing with the same objection by same objector to identical strings that was outstanding at the time that the ICANN Board determined the scope of the process, making them the only other non-SCO Expert Determinations to fit the “strict definition” of “inconsistent” the NGPC set forth in the 5 February 2014 Approved Resolution;²²⁶
 - (b) the Claimant, SRL and Excellent First were the only applicants for the .CHARITY gTLD and at the time of the Expert Determinations and the Claimant’s application was distinguished only by the absence of a separately proffered amended public interest commitment to operate a limited registry in response to the IO’s objection;
 - (c) as at 12 October 2014, SRL had not taken any action in reliance on the Expert Determination, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds; and
 - (d) the effect of ICANN’s action in determining it would implement new mandatory registration requirements applicable to all Category I and Category II gTLDs was to eliminate any practical distinction between the competing .CHARITY applications, including the basis on which the Expert Panel had distinguished the Claimant’s applications by upholding the community objection in relation to it.

²²⁶ As far as the IRP Panel is aware, any other inconsistent Expert Determinations did not involve identical objections to identical strings, including .Vistaprint and .HOSPITAL. In the circumstances, there is no support in the record for ICANN’s contention that extending review to Claimant risks opening floodgates.

- 8.64 As a result of these factors, the impact on “predictability and fairness” in the application process of including this additional set of similarly situated Expert Determinations in the new Inconsistent Determination Review would be limited.
- 8.65 The fact that the inconsistent Expert Determinations in the .CHARITY applications were the only other inconsistent determinations of identical objections by the same objector to the same gTLD string that existed at the time the Board determined the scope of the new review process, and the fact that the Claimant was the only party prejudiced by such an inconsistent Expert Determination that was not entitled to participate in the new review process, strongly suggests that it was an inequitable action and did single out the Claimant. The requirement for discrimination is not that it was malicious or even intentional, and this Panel has not been presented with any evidence that ICANN acted maliciously or intentionally to single out the Claimant. Rather, the requirement for discrimination is that a party was treated differently from others in its situation without “substantial and reasonable” justification. The IRP Panel does find that this standard was met.
- 8.66 For the reasons discussed above, the Panel finds the reasons ICANN advanced for limiting the scope of the new process to the designated SCO determinations insufficient to constitute “substantial and reasonable cause” to subject Claimant to the disparate treatment of being denied access to the new process.
- 8.67 Although the Panel believes that it is appropriate to determine whether the Board acted in conformance with the Articles, Bylaws and Guidebook primarily based on the record of the Board’s contemporaneously stated rationale for its actions, the Panel also has considered two further arguments that ICANN advanced in the IRP proceeding as follows.
- (a) ICANN submitted that community and limited public interest objections differ from string contention objections in that the latter can be judged on the face of competing strings, while the two former categories of objection require recourse to the underlying applications for determination. The Panel finds this argument inconsistent, however, with the Board’s contemporaneously stated rationale in its 12 October 2014 Decision and Action to exclude apparently inconsistent Expert Determinations other than the ones referred to the new process, *including other SCO Expert Determinations*, on the basis that “reasonable explanations” of the

apparent inconsistencies in differing Expert Determinations were found in the “materials presented” and the existence of other “nuanced distinctions.”²²⁷

- (b) ICANN submitted that there was less need for an additional process to review the apparently inconsistent Expert Determinations of the competing .CHARITY applications because they were determined by a single expert panelist “who therefore had all of the evidence for both objection proceedings in hand.” ICANN contrasts this situation to the SCO determinations the Board designated for review, which were determined by different panels.²²⁸ Although ICANN at the hearing characterized the new process as a “re-evaluation” in which “a single expert panel was tasked with re-evaluating the determinations,”²²⁹ the Inconsistent Determination Review Process ICANN actually adopted did not involve reconciliation of the differing results of “both [SCO] objection proceedings”, but rather independent review of a single SCO expert determination from each of the two sets which the NGPC designated, for reasons it chose not to state. The Panel finds ICANN’s distinction on the basis that different panels issued the inconsistent SCO determinations insufficient to constitute “substantial and reasonable cause” for disparate treatment of the .CHARITY inconsistent determinations as compared to the SCO determinations that were accorded access to the new process.

- 8.68 The Panel therefore determines that the Board’s action in excluding the Claimant from the new Inconsistent Determinations Review Procedure was inconsistent with the non-discrimination provision of Article II, Section 3 of ICANN’s Bylaws.

ISSUE 2: Defined Review Standard (Article IV, Section 3.4)

- 8.69 The IRP Panel’s findings as to the Defined Review Standard (Bylaws Article IV, Section 3.4) are set out below.

- i. *Did the Board act without conflict of interest in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?*

²²⁷ The distinction between open and limited registries may also be relevant to the resolution of string contention objections where the objection alleges a likelihood of confusion in relevant markets. The commitment to a limited registry, or lack thereof, appears in application materials and is not apparent from the face of the gTLD string. Report of Final Review Panel, *Verisign, Inc. v. United TLD Holdco Ltd.*, ICDR No. 01-15-0003-3822, **ICANN Appendix L**.

²²⁸ ICANN Sur-Reply at para. 49; ICANN’s hearing slides at 21.

²²⁹ ICANN hearing slides at 21.

8.70 There is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict.

ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?

8.71 As to the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action), the research, analysis, investigation and consultation process undertaken by the ICANN Board in establishing its new Inconsistent Determination Review Process is carefully documented. The Approved Resolutions of 12 October 2014 appear comprehensively to summarize the matter on which the Board relied in determining to limit the scope of application of the new process to selected inconsistent SCO Expert Determinations.

8.72 The carefully documented record does not reflect, however, that the Board considered the effect of its then-recent adoption of the GAC Beijing Communiqué recommendations in determining the scope of application of the new review mechanism. In particular, the Board does not appear to have considered the levelling effect on the pending .CHARITY applications of its decision to adopt the new PIC requirement.

8.73 The Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations was a fact known to ICANN. ICANN, in exercising due diligence and care in deciding whether or not to include the perceived inconsistent .CHARITY Expert Determinations in the new Inconsistent Determinations Review Procedure at minimum should have taken that into account. Absent such consideration, in light of the circumstances outlined above, the IRP Panel must conclude that Bylaw standard of due diligence and care was not met on this occasion. Again, we make no finding that the Board's failure to consider the impact of its adoption of the Beijing Communiqué recommendations was malicious or intentional. We find simply that the levelling effect on the eligibility requirements in the pending applications of the new PIC requirement was a material fact that should have been considered, and apparently it was not.

iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?

8.74 There is no indication that the Board members were acting in any way other than in good faith and exercising independent judgment, with the subjective belief that they were acting in the best interests of the community. The IRP Panel finds that the Board members exercised independent judgment, believed to be in the best interests of the community.

ISSUE 3: Did the Board Act For the Benefit of the Internet Community as a Whole? (ICANN Articles of Incorporation, Section 4)

(i) The Claimant's Position

- 8.75 The Claimant further submits that ICANN's Articles state that the Board must act "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."²³⁰ The Claimant considers that the Board has failed to do so in relation to its .CHARITY Application. By failing to reconcile differing outcomes for the same objection, at least in respect to the differing .CHARITY Expert Determinations, which Claimant contends fit the same definition of "inconsistent determinations" the Board applied to .COM and .CAM, the Board has failed to act in the best interests of the Internet community.
- 8.76 ICANN adopted its new gTLD programme "to enhance choice and competition in domain names and promote free expression online."²³¹ The Claimant argues that the Board must remain "faithful to 'the public interest' and 'accountable to the Internet community'."²³² Furthermore, the Claimant considers that the Board has not acted in the best interests of the Internet community in its decision in relation to the Claimant and should have granted a review for "inconsistent and unreasonable" objection rulings.²³³
- 8.77 The Claimant also argues that the Bylaws and Articles compel the Board to remain accountable to the Internet community, as well as acting in the best interests of the Internet community. The Claimant further argues that the Board has conceded that it has not acted in the best interests of the Internet community: "[t]he Board fails the Bylaw directive of 'remaining accountable to the Internet community' by refusing to employ the

²³⁰ Claimant Request, para. 48.

²³¹ Claimant Request, para. 9.

²³² Claimant Request, para. 7

²³³ Claimant Request, para. 8.

very ‘mechanism’ it created to right the wrong perpetrated by the types of conflicting objection rulings that include those made regarding .CHARITY”.²³⁴

- 8.78 The Claimant relies on *Booking.com v ICANN* to show that “even where the Board acts reasonably and in what it believes to be the best interests of ICANN, a panel must still independently determine whether the Board acted or chose not to act in a manner ‘consistent with the Articles, Bylaws, and ... the policies and procedures of the Guidebook.’”²³⁵

(ii) The Respondent’s Position

- 8.79 ICANN takes the position that the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) are purposefully narrow and limited specifically to SCOs.²³⁶ It expressly distinguished the objection decisions rendered in the context of other objection proceedings, such as those relating to Community Objections. The NGPC’s procedural rationale was that “[t]wo panels confronting identical issues could – and if appropriate should – reach different determinations based on the strength of the material presented.”
- 8.80 ICANN goes on to conclude that the materials presented to the two Expert Panels in .CHARITY were not the same and, in particular:

“SRL presented evidence demonstrating its commitment to limit registration in .CHARITY to members of the charity sector, while Corn Lake did not and instead maintained that .CHARITY would be ‘open to all consumers.’”²³⁷

- 8.81 According to ICANN, SRL’s proposed registration eligibility requirements for the .CHARITY gTLD were in the best interests of the community and the Claimant’s open registration was not.

(iii) The Panel’s Decision

- 8.82 The ICANN Articles of Incorporation, Article 4, require that ICANN act:

²³⁴ Claimant Request, Introduction.

²³⁵ Reply, para. 37.

²³⁶ ICANN Response, at para. 53.

²³⁷ ICANN Response, at para. 56.

"for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and ... local law."

- 8.83 It is plainly in the best interests of the Internet community as a whole that ICANN maintains a procedurally fair system with the highest levels of consistency and integrity. The Panel is of the view that well-reasoned, non-discriminatory application of the new Inconsistent Review Procedure would be in the best interests of the Internet community.
- 8.84 Prior to the issuance of the .CHARITY Expert Determinations, ICANN had announced that it would adopt the GAC Beijing Communiqué. As a consequence, *all* applicants were committed to the same registration limitations, both because the recommendations became mandatory and, importantly, because all had indicated in their applications a commitment to comply with any adopted recommendations. The impact of the decision to adopt the GAC Beijing Communiqué recommendations was a material factor in determining whether or not there were reasonable explanations for the perceived inconsistencies in the .CHARITY Expert Determinations.
- 8.85 ICANN's failure to take the impact of its decision to adopt the GAC Beijing Communiqué recommendations into account was not in conformity with its own Bylaws or generally accepted standards of natural justice and due process reflected in its Core Values and other governing documents. Accordingly, the Panel finds that in this instance, ICANN cannot be found to have acted for the benefit of the Internet community as a whole.
- 8.86 It is not suggested by the Claimant that ICANN was motivated by anything other than the best interests of the Internet community. However, assessing its actions from an objective standard, failure to take into account material factors in its decision-making results in a procedural unfairness and disparate treatment that is not in the interests of that community as a whole.
- 8.87 For the reasons discussed above, we find the reasons the Board advanced at the time of its action to exclude .CHARITY insufficient to meet this standard. We likewise, for the reasons discussed, find ICANN's *post hoc* justification based on the fact that the .CHARITY applications were decided by a single Expert Panelist also insufficient.

ISSUE 4: Did the Board Action Abdicate Its Accountability Obligation?

(i) The Claimant's Position

8.88 The Claimant submits that one of ICANN's core values is for the Board to remain accountable to the Internet community through mechanisms that can enhance ICANN's effectiveness.²³⁸ It submits that:

"[t]he Board had an opportunity to bring such accountability to all of the inconsistent objection results reached on common TLDs, but excluded the sole community objection situation that fell within the ambit of what it did."²³⁹

8.89 The Claimant appears to argue that by deciding not to review all inconsistent Expert Determinations, the Board somehow abdicated its accountability obligation to uphold a certain standard in all Expert Determinations rendered pursuant to its procedures.²⁴⁰

(ii) The Respondent's Position

8.90 The Respondent submits that the Reconsideration Request is the only way for it to be involved in review of the Expert Determination of the objection to Claimant's Application because:

"[r]econsideration is an accountability mechanism available under ICANN's Bylaws and involves a review by ICANN's Board Governance Committee ("BGC"). The BGC's consideration of reconsideration requests is limited to assessing whether the challenged action (or inaction) violated established policies or procedures."²⁴¹

8.91 The Respondent also argues that the Claimant's challenge of the BGC's denial of Request 14-3 is time-barred because the Claimant did not assert any such claim in its IRP Request and waited until its Reply to raise the argument.²⁴² The Bylaws provide that such a claim should be submitted within thirty days of the posting of the Board meeting contested by the

²³⁸ Claimant Request, para. 54.

²³⁹ Claimant Request, para. 55.

²⁴⁰ Claimant Request, para. 57.

²⁴¹ ICANN Sur-Reply, para. 8.

²⁴² ICANN Sur-Reply, para. 39.

prospective applicant.²⁴³ On 27 February 2014, the BGC denied the Claimant's Request 14-3. The Claimant's right to file an IRP Request on this issue expired on 28 March 2014.²⁴⁴

- 8.92 The Respondent argues in favor of dismissal of the Claimant's claims in this respective on time-barred grounds alone.
- 8.93 The Respondent also argues that the Claimant's claims fail substantively too because the Claimant has been unable to identify any Bylaws or Articles which have been allegedly breached by the BGC.²⁴⁵

(iii) The Panel's Decision

- 8.94 The Panel has carefully considered the parties' respective positions concerning the allegation of ICANN's abdication of its accountability responsibilities and finds there to be no basis for those claims. We do not fault ICANN for its attempt to enhance its accountability through the creation of the new process. Rather, we have found that having created the process, ICANN's Core Values and Bylaws required that it be extended on a non-discriminatory basis to similarly situated applicants and that such distinctions as were to be made regarding the scope of the process were required to be determined based on a reasonable factual record.
- 8.95 As to any suggestion that ICANN abdicated obligations by its Denial of the Reconsideration Request, as set out above in Section 7, any application to review to Reconsideration Request is out of time.

IPR PANEL REVIEW CONCLUSION

- 8.96 In conclusion, the IRP Panel determines that the ICANN Board's 12 October 2014 Decision and Action (as preceded by its February 2014 Decision and Action) is a "decision or action by the Board" that is "inconsistent with the Articles of Incorporation of Bylaws" of ICANN and "materially affected" the Claimant.
- 8.97 This Panel stresses that this is a unique situation and peculiar to its own unique and unprecedented facts. The facts were rendered particularly complicated and unusual by a

²⁴³ ICANN Sur-Reply, para. 40.

²⁴⁴ ICANN Sur-Reply, para. 40.

²⁴⁵ ICANN Sur-Reply, para. 41.

combination of (i) the Claimant’s insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had decided not to permit that to occur, and (ii) the exceedingly unlikely and difficult timing of the Board’s announcement that it would adopt the GAC’s Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made.²⁴⁶ This unique set of circumstances created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process, but it does not relieve ICANN from its ultimate responsibility to act in accordance with its Bylaws and Articles of Incorporation.

- 8.98 This IRP Panel does not suggest that ICANN lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interests of the Internet community as a whole.
- 8.99 In reaching this conclusion, the Panel carefully considered other relevant IRP Final Determinations and considers its approach to be consistent with these. In particular, the IRP Panels in *Booking.com v ICANN*, *Vistaprint v ICANN* and *ICM Registry v ICANN* were asked to review underlying Expert Determinations, which had been, or might have been, subject to Reconsideration Requests. Each considered that Reconsideration Review provides for procedural review and is not a substantive appeal (and that ICANN’s Board was under no obligation to create a different appeal mechanism). For example:
- (a) *Booking.com v ICANN* found it “crucial” to its decision that the Claimant there was not challenging the validity or fairness of the process and that no such challenge would have been timely;

²⁴⁶ These circumstances, in which ICANN agreed to adopt the Beijing Communiqué recommendations while the .CHARITY Expert Determinations were still underway but after the record was closed led to a circumstance in which the Expert upheld a community objection that the Claimant could legitimately have considered moot. As noted already, however, it is outside the scope of this Panel’s mission to determine whether the Expert rightly or wrongly excluded the Claimant’s late submission regarding the Beijing Communiqué. It is also beyond this Panel’s mission to express a view as to whether review of that Expert Determination under the Inconsistent Determinations Review Procedure, applying the standard of review determined by ICANN, should or will lead to a reversal of that Expert Determination. The sole issue before this Panel is whether the Board properly or improperly excluded the .CHARITY Expert Determinations from the Inconsistent Determinations Review Procedure in the first place.

- (b) *ICM Registry v ICANN* found the “fundamental obstacle” to the Claimant’s assertions to be that the established process had been followed in all respects and the time “long had passed” to challenge the processes themselves;²⁴⁷
- (c) *Donuts v ICANN*²⁴⁸ considered whether the Board should have extended the Inconsistent Determinations Review Procedure “to correct and prevent community objection rulings exceeding or failing to apply documented Guidebook standards”²⁴⁹ and found that “the only differences in treatment that implicate Bylaws Article II, Section 3 are those which occur in like circumstances” and thus held that the record did not allow it to conclude that the “considerable consistency issues” raised in connection with string similarity cases were present in “community objection cases as a whole...”; and
- (d) *VistaPrint v ICANN* characterized the claim as arising from “similarly situated” strings, as compared to the “inconsistent determinations” the NGPC addressed in the 12 October 2014 Resolution, (i.e. .WEB./WEBS being similar to .CAR/.CARS) and the claim of disparate treatment “a close question”,²⁵⁰ recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged.

8.100 The Panel considers the Final Determination in *Dot Registry v ICANN*, which addressed primarily issues of adequacy and burden of proof in respect to the BCG’s denial of a Reconsideration Request, to be of little relevance here. The Panel has found the instant IRP request untimely in respect to the denial of Claimant’s Reconsideration Request. In reaching its findings in respect of the basis on which the NGPC acted in determining the scope of the new review mechanism, the Panel here has relied on a record it considered carefully documented and apparently comprehensive.

8.101 The current IRP is not a review of a Reconsideration Request or Expert Determination but, rather, of a decision not to extend the scope of the new Inconsistent Determinations Review Procedure to the .CHARITY Expert Determinations, despite those Determinations meeting the strict criteria for inclusion. This is further supported by the ICANN Board’s

²⁴⁷ ICM Registry v ICANN, para. 129.

²⁴⁸ As addressed in post hearing submissions.

²⁴⁹ Final Declaration of the Independent Review Panel in Donuts, Inc. and ICANN at para. 73.

²⁵⁰ Final Declaration, *VistaPrint Ltd. v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, at para. 176

subsequent decision to include the .HOSPTIAL Expert Determinations, despite those Determinations appearing to have been less clearly within the criteria that the .CHARITY Determinations.

9. COSTS

9.1 The Supplementary Rules provide, at Article 11 that:

“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.”

9.2 The ICDR Rules, Article 34, define costs to include the fees and expenses of the arbitrators and Administrator as well as the reasonable legal and other costs incurred by the parties.

9.3 The IRP Panel considers that these IRP proceedings involve extraordinary circumstances. The relevant factors, which go to the reasonableness of the parties’ positions and their contribution to the public interest, include as follows:

- (a) the exceedingly unlikely and difficult timing of the Board’s announcement that it would adopt the GAC’s Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made;
- (b) the unique impact of the Beijing Communiqué recommendations on the .CHARITY applications and the nuances thereof;
- (c) the Claimant’s insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had agreed not to permit that to occur;
- (d) the lack of any deliberate disparate treatment of the Claimant by ICANN;
- (e) the Panel’s 20 January 2016 determination that the Claimant’s Reply exceeded the scope of PO1; and
- (f) the fact that the new Inconsistent Determination Review Process is to be funded by ICANN.

- 9.4 These factors created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process. Although they do not relieve ICANN from its ultimate responsibility to do so in accordance with its Bylaws and Articles of Incorporation, they do influence the IRP Panel's costs determination.
- 9.5 The IRP Panel accordingly determines that, although ICANN is not the prevailing party in the IRP, due to the extraordinary circumstances described above, ICANN shall not be responsible for bearing all costs of the proceedings. Instead, pursuant to Article 11 of the Supplementary Rules, the IRP Panel determines that no costs shall be allocated to the Claimant as the prevailing party. Consequently, each Party shall bear its own costs in respect of this IRP Panel proceeding.

10. RELIEF REQUESTED

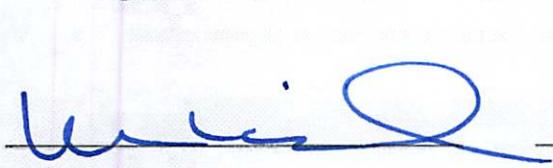
- 10.1 The Claimant seeks:
 - (a) a direction from the Panel to ICANN's Board of Directors to reverse the .CHARITY objection ruling against CORN LAKE, LLC;
 - (b) a direction from the Panel to ICANN's Board of Directors to subject that ruling to the same review as provided in the Resolution for the .COM and .CAM decisional conflicts; or
 - (c) a direction from the Panel to ICANN's Board of Directors to reinstate CORN LAKE, LLC's application conditioned upon its acceptance of the PIC, agreed to by SRL; and
 - (d) an order from the Panel [to ICANN's Board of Directors] to place all .CHARITY applications on hold during the course of these proceedings and for ICANN to refrain from engaging in any contracting or delegation processes related to the same.

11. DISPOSITIVE

- 11.1 In Accordance with Article IV, Section 3.11 of the Bylaws, the Panel:
 - (a) Declares that the Claimant, Corn Lake, is the prevailing party;
 - (b) Declares that the action of the Board in omitting .CHARITY from the new Inconsistent Determinations Review Procedure was inconsistent with the Articles of Incorporation and Bylaws;

- (c) Recommends that the Board extend the new Inconsistent Determinations Review Procedure to include a review of Corn Lake's .CHARITY Expert Determination;
- (d) Recommends that the Board continue to stay any action or decision in relation to SRL's .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel; and
- (e) Determines that no costs shall be allocated to the prevailing party.

Signed:



Mark Morril

Michael Ostrove

Date: 17 October 2016

Date: 17 October 2016



Wendy Miles QC

Date: 17 October 2016