

Request for the administration of Expert proceedings regarding the Final Review of the Community Objection against Corn Lake, LLC's application for .CHARITY.

With this letter, the Internet Corporation for Assigned Names and Numbers (ICANN) requests the International Centre for ADR (the Centre) of the International Chamber of Commerce (ICC) to appoint a panel of experts (the Panel) and administer the Final Review of the Community Objection against Corn Lake, LLC's application for .CHARITY accordance with the ICC Expert Rules for Administration of Expert Proceedings (the Rules).

Given the specificities of this Request the attention of the Centre and the Panel is drawn to Article 14(4) of the Rules.

The task of the Panel will be to review (Final Review) and possibly render a decision (Final Expert Determination) in accordance with the instructions provided herewith. The Final Expert Determination will be used by ICANN as part of the dispute resolution phase of the new gTLD application for the .CHARITY string.

ICANN requests that the Centre ensures through the administration of these proceedings that the conduct of the procedure and the Final Expert Determination rendered in these proceedings will be impartial and entirely independent from ICANN.

This Request is submitted to the ICC based on the ICANN Board's Resolutions 2016.11.08.16 – 2016.11.08.18 (the 8 November 2016 Board Resolution), rendered as a consequence of the Independent Review Process (IRP) Final Declaration of 17 October 2016 (Final Declaration) in the *Corn Lake, LLC v. ICANN IRP*. (See <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b> and <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>)

I. The Party

The sole party in these proceedings is:

Internet Corporation for Assigned Names and Numbers (ICANN)
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II. Related Entities and Persons

The following entities and persons are related to these proceedings:

- 1) Prof. Alain Pellet (France);
- 2) CORN LAKE, LLC (USA);
- 3) DOZEN DONUTS, LLC (USA);
- 4) DONUTS INC. (USA);
- 5) Mr. Daniel Schindler (USA);
- 6) Mr. Jon Nevett (USA);
- 7) Ms. Héloïse Bajer-Pellet (France);
- 8) Mr. Daniel Müller (France);
- 9) VAN DEN BIESEN KLOOSTRA ADVOCATEN (The Netherlands);
- 10) Mr. Sam Wordsworth from ESSEX COURT (UK);
- 11) THE IP & TECHNOLOGY LEGAL GROUP, P.C. (USA);
- 12) Mr. Don C. Moody (USA);
- 13) Mr. John M. Genga (USA);
- 14) Mr. Phon Van den Biesen (The Netherlands);
- 15) Mr. Tim Portwood (UK);
- 16) EXCELLENT FIRST LIMITED (Cayman Islands);
- 17) Mr. Pam Little (China);
- 18) ZODIAC HOLDINGS INC (Hong Kong);
- 19) SPRING REGISTRY LIMITED (Gibraltar);
- 20) FAMOUS FOUR MEDIA LIMITED (Gibraltar); and
- 21) DOMAIN VENTURE PARTNERS PCC LIMITED (Gibraltar)

III. Rules Applicable to the Proceedings

These proceedings will be conducted pursuant to the Rules.

Given that ICANN is the only party to these proceedings, ICANN recognizes that the Rules might need to be adapted to accommodate one-party proceedings only. In the event that such modifications to the Rules are necessary, ICANN expressly agrees and requests that the Centre carry them out in the spirit of the Rules as provided for in Article 14(4) of the Rules and without contacting ICANN.

Moreover, ICANN waves its right to be informed of the procedural considerations under the Rules (such as appointment of the Experts and possible replacements, transfer of the file or extensions of the time limits) and to comment on the procedural steps under the Rules (such as Experts' hourly rate and possible disclosures of the Experts). However, should the Centre deem it is necessary to seek ICANN's comments, it can do so.

IV. Background

In the framework of the New Generic Top Level Domain (New gTLD) Program, ICANN invited applications for the new registries of the top-level domain names. In order to protect certain existing interests and rights, ICANN put in place a dispute resolution procedure. The procedure provided a path for formal objections during the application evaluation process and allowed a party with

standing to have its objection considered before a panel of qualified experts. This procedure is governed by the New gTLD Applicant Guidebook, Module 3 (Guidebook), and its attachment, New gTLD Dispute Resolution Procedure (Procedure), as well as by the relevant rules of the dispute resolution service providers. In cases where ICC was such a provider, ICC Expertise Rules were applicable.

All the mentioned rules and procedures are accessible at the following website: <http://www.iccwbo.org/products-and-services/arbitration-and-adr/icann-new-gtld-dispute-resolution/documents/>.

ICANN also established a figure of the Independent Objector (the IO) in order to help ensure that the best interest of the public using the global Internet is preserved. The IO's role was to file objections on behalf of the Internet community independently from ICANN. Prof. Alain Pellet acted as the IO during the objection period.

Among other objections, the IO filed the three community objections (Article 2(e) of the Procedure) against the following applications for the string .CHARITY (collectively "the .CHARITY Community Objections"):

1. Corn Lake, LLC's (Corn Lake) application for .CHARITY;
2. Excellent First Limited's (Excellent First) application for 慈善 (the Chinese Internationalized Domain Name for .CHARITY); and
3. Spring Registry Limited's (SRL) application for .CHARITY.

The 8 November 2016 Board Resolution and the subject of the Final Review relates to the community objection filed by the IO against the Corn Lake application for .CHARITY (Application ID: 1-1384-49318).

The IO filed his objection to Corn Lake's application on 13 March 2013, along with his objections to SRL's and Excellent First's applications. The IO was concerned that, among other things, the lack of any policy restricting registrations in these gTLDs to charitable or not-for-profit organizations created a likelihood of detriment to the rights or legitimate interests of the charity community, to users, and to the general public. (See IO's Community Objection at Para. 46, pgs. 16-17, <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-corn-lake-llc/>).

The dispute resolution service provider of the community objection procedure in this case was the ICC. The ICC case number of the Corn Lake proceedings was EXP/395/ICANN/12. The ICC consolidated all three .CHARITY Community Objections and appointed the same Expert to preside over all three objections. On 9 January 2014, the Expert rendered his determinations for all three .CHARITY Community Objections in accordance with Article 21 of the Procedure.

With respect to the IO's objection against Corn Lake's application, the Expert upheld the objection and determined the IO to be the prevailing party. The

Expert rendered a determination (the Corn Lake .CHARITY Expert Determination) in favor of the IO because he determined that Corn Lake's application did not include registration restrictions to charitable organizations, "there is a likelihood of material detriment to the charity sector community were the Application to proceed." With respect to the other two .CHARITY Community Objections filed by the IO, the same Expert rendered determinations in favor of SRL and Excellent First, finding that the registration eligibility criteria set out in the Public Interest Commitment Specifications (PICs) submitted by Excellent First and SRL¹ restricted registrations in the applied-for string to charitable organizations. The Panel concluded that the PICs were sufficient to negate any concern of material detriment to the targeted community because the eligibility criteria will be included in any registry agreement that an applicant would sign with ICANN if its application is successful and the applicant would therefore be contractually obliged to implement the PICs.

Corn Lake sought reconsideration of the Expert Determination, which the Board Governance Committee (BGC) denied in February 2014.

Separately, in April 2013, the ICANN Governmental Advisory Committee (GAC) advised in the Beijing Communiqué that the Board adopt certain eligibility restrictions for "sensitive strings," including .CHARITY.

The Board adopted the GAC's recommendation by a 5 February 2014 resolution, effectively requiring Corn Lake, Excellent First, and SRL alike to restrict registrations in .CHARITY to charitable organizations.² At the same 5 February 2014 meeting, the Board directed the ICANN President and CEO to initiate a public comment period with respect to a proposed review mechanism to address certain perceived inconsistent or unreasonable objection determinations (Final Review Procedure).

The Final Review Procedure was limited the review of certain string confusion expert determinations for .CAR/.CARS,³ .CAM/.COM, and .SHOP and .ONLINESHOPPING (in Japanese characters). In March 2014, via the public comment process, Corn Lake's parent company, Donuts Inc., asked the Board to extend the Final Review Procedure to other objection proceedings including Community Objection determinations such as that concerning .CHARITY and to Limited Public Interest Objections, such as that brought with respect to .HOSPITAL, but the Board did not do so when the Final Review Procedure was implemented on 12 October 2014. In February 2016, the ICANN Board resolved to extend the Final Review Procedure to .HOSPITAL. See <https://features.icann.org/consideration-expert-determination-re-objection-application-hospital>.

¹ SRL submitted a PIC Specification on 5 March 2013 and a revised PIC on 25 October 2013. Although ICANN initially requested that applicants submit their PIC Specifications by 5 March 2013, ICANN accepted PICs that were submitted after 5 March 2013. See <https://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

² Excellent First entered into a Registry Agreement with ICANN on 12 June 2014. <https://www.icann.org/resources/agreement/xn--30rr7y-2014-06-12-en>

³ .CAR/.CARS was resolved prior to the implementation of the Final Review Procedure.

On 24 March 2015, Corn Lake filed the Independent Review Process (IRP) against ICANN challenging: (1) the Corn Lake .CHARITY Expert Determination; (2) the BGC's denial of Corn Lake's Reconsideration Request 14-3 challenging the Corn Lake .CHARITY Expert Determination; and (3) the Board's decision not to include the Corn Lake .CHARITY Expert Determination in the Final Review Procedure.

Corn Lake specifically pointed to the non-discrimination provision in ICANN's Bylaws providing that "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." See ICANN Bylaws Article II, Section 3.

On 19 October 2015, the IRP Panel issued its Final Declaration, denying in part and granting in part Corn Lake's IRP request. First, the IRP Panel ruled in ICANN's favor and declared that the portion of Corn Lake's IRP request related to the Corn Lake .CHARITY Expert Determination and the BGC's denial of the reconsideration request was untimely under the Bylaws. It did not rule on the substance of the claims asserted in the .CHARITY Community Objection proceeding. Second, the Panel determined that Corn Lake timely sought relief from the Board's decision in October 2014 to create the Final Review Procedure. The Panel determined that not expanding the Final Review Procedure to the Corn Lake .CHARITY Expert Determination was inconsistent with the non-discrimination provisions in the Bylaws as well as certain other provisions in the Bylaws and Articles (including the Bylaws requirement that the Board consider all material facts).

The Corn Lake .CHARITY Expert Determination was largely based on the fact that in its .CHARITY application, Corn Lake did not commit to restrict registrations to charitable organizations, while Excellent First and SRL included such restrictions in their PICs, and SRL offered to amend its PIC to include such a restriction, subject to the following reservation -- "[w]e reserve the right to amend or change this PIC Spec once the details of the Program are finalized."

After the Board's acceptance of the Beijing Communiqué, however, whichever applicant ultimately operates .CHARITY will need to impose such registration restrictions. The IRP Panel felt that because the Board did not sufficiently consider the "leveling" impact of accepting the GAC advice and SRL's reservation in its PIC, the Board similarly did not sufficiently appreciate that the Corn Lake .CHARITY Expert Determination was equally inconsistent to those included in the 12 October 2014 resolution, and therefore should have been included in the Final Review Procedure.

The IRP Panel also noted that its finding "is further supported by the ICANN Board's [later] decision to include the .HOSPITAL Expert Determinations [in the Final Review Procedure], despite those Determinations appearing to have been

less clearly within the criteria tha[n] the .CHARITY Determinations.” (Final Declaration at ¶ 8.101.)

On 8 November 2016, the ICANN Board accepted the findings in the IRP Final Declaration and directed the President and CEO, or his designee(s), to take all steps necessary to implement the Panel’s recommendation that “the Board extend the [Final Review Procedure] to include review of Corn Lake’s .CHARITY Expert Determination.” (<https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>)

V. Language of the Proceedings

ICANN requests that the language of these proceedings is English.

VI. Place of the Proceedings

There shall be no meetings, site visits nor hearings in this matter.

The place of the present proceedings shall be Paris, France.

VII. Timing of the Proceedings

The draft Final Expert Determination shall be rendered within 45 days from the transfer of the file to the Panel or as soon thereafter as feasible.

ICC will take the necessary measures to monitor the above-mentions time-limit.

In exceptional circumstances in which the Panel would ask for an extension of this time limit, it will be in the Centre’s discretion whether to grant it.

VIII. Panel

The Panel shall consist of three experts. One member shall act as the Chair of the Panel.

IX. Appointment of the Panel

The Centre shall appoint the Panel in accordance with Article 3 of the Rules.

As noted above, ICANN waives its right to comment on any aspects of the appointment process, including a disclosure and replacement procedure. In case of any disclosures the Centre has the authority and full discretion to make the decision as to whether the panelist(s) shall serve or whether another panelist(s) shall be appointed by the Centre. The Centre is authorized to appoint another panelist(s) if the appointed panelist(s) is unable to serve promptly.

If a member of the Panel shall become unwilling or unable to serve, the Centre shall administratively appoint a substitute panelist and/or a new Chair, if applicable.

X. Attributes of the Experts

The Experts shall be recognized as eminent jurists of international reputation, at least one of the Experts should have knowledge of ICANN or the Domain Name System.

They shall not be of French or US nationality.

All Experts shall be impartial and independent from the parties and the related entities.

The Experts shall not be the same as panelist who acted in the proceedings EXP/395/ICANN/12, EXP/400/ICANN/17, and EXP/399/ICANN/16.

XI. Expert Mission and Form of the Panel's Work

The Panel shall render a written and reasoned decision (Final Expert Determination). The purpose of the Final Expert Determination is to establish whether the underlying .CHARITY Expert Determination (EXP/395/ICANN/12) was reasonable in light of its decisions in the other two consolidated matters through an appropriate application of the standard of review as set forth in Module 3 of the Applicant Guidebook and in light of ICANN's adoption of the GAC's Beijing Communique requiring each successful applicant to impose registration restrictions.

Accordingly, the Expert's mission is to either:

- Conclude that the underlying expert determination rendered in the proceedings EXP/395/ICANN/12 is supported by the standard of review and adopt the underlying expert determination as the Final Expert Determination; or
 - Reverse the underlying expert determination rendered in the proceedings EXP/395/ICANN/12 and render a new Final Expert Determination that shall replace and supersede the underlying expert determination;
 - The Panel may not order a new Community Objection proceeding or send the matter back to the original panelist for consideration or further review.
- a) **Standard for deciding whether the underlying expert determination rendered in the proceedings EXP/395/ICANN/12 was reasonable in light of the inconsistent .CHARITY Community Objection Determinations**

The Panel will make its decision on whether the underlying expert determination rendered in the proceedings EXP/395/ICANN/12 should have reasonably come to the decision reached on the underlying community objection through an appropriate application of the standard of review as set forth in the Applicant Guidebook in light of ICANN's adoption of the GAC's Beijing Advice requiring

each successful applicant to impose registration restrictions. The Panel should also review as background (1) the underlying case file and expert determination for the proceedings EXP/395/ICANN/12; (2) the underlying case file and expert determination for the proceedings EXP/399/ICANN/16; (3) the underlying case file and expert determination for the proceedings EXP/400/ICANN/17; and (4) the IRP Final Declaration. It is recommended that Panel also review as background the three Final Review Procedures Expert Determinations identified in Annex A.

b) Standard for deciding on the merits of the Objection (if applicable) in light of the inconsistent .CHARITY Community Objection Determinations

The Panel will render (if applicable) the Final Expert Determination upon the merits of the IO's Objection in applying the standards as identified by ICANN in the gTLD Applicant Guidebook Module 3 (version of 4 June 2012) relevant to the Community Objection and in light of ICANN's adoption of the GAC's Beijing Advice requiring each successful applicant to impose registration restrictions.

c) Records for the Final Expert Determination

Pursuant to the 8 November 2016 Board Resolution, the Panel shall make its decision taking into account the following documents, all of which are attached to this letter:

- The underlying case file and expert determination for the proceedings EXP/395/ICANN/12;
- The underlying case file and expert determination for the proceedings EXP/399/ICANN/16;
- The underlying case file and expert determination for the proceedings EXP/400/ICANN/17;
- The Final Declaration from the IRP Panel in the matter of Corn Lake, LLC v. ICANN; and
- The 8 November 2016 Board Resolution, available at <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>.

It is recommended that Panel review as background the three Final Review Procedures Expert Determinations identified in Annex A.

No party in the proceedings EXP/395/ICANN/12 or any third party shall be entitled to submit any additional materials for consideration during these proceedings.

In addition, for rendering the Final Expert Determination (if applicable) the Panel may apply any rules or principles that it determines to be applicable.

The decision shall be made by the majority of the Experts.

d) Form of the Final Expert Determination

The Panel shall render a written Final Expert Determination. The Panel shall state the reasons for its decision.

e) Expert Mission and Procedural Timetable

ICANN, the only party in these proceedings, waives the obligation of the Panel to prepare an Expert Mission in accordance with Article 6 of the Rules as well as the Procedural Timetable in accordance with Article 7 of the Rules.

f) Procedural Issues During the Proceedings

The Panel will not contact ICANN, IO or the Applicant. All guidance and decisions on procedural questions will be taken either by the Panel or the Centre on the basis of the Rules.

g) Scrutiny

The Panel shall submit its Final Expert Determination in draft form to the Centre for scrutiny in accordance with Article 9 of the Rules.

XII. Notification of the Final Expert Determination

Upon completing the scrutiny procedure and finalization of the Final Expert Determination, the Centre shall promptly notify the Final Expert Determination to ICANN to the above-mentioned email address in the electronic form only.

Further, the Centre will publish the Final Expert Determination on its website dedicated to ICANN procedures.

XIII. Costs

ICANN will bear the total of the costs of the proceedings.

XIV. Filing Fee

The proof of payment of the filing fee of USD 3000 is attached herewith.

Date 27 July 2017

Signature



Attachments:

1. IRP Panel Final Declaration in the matter of *Corn Lake LLC v. ICANN*.
2. Proof of payment of filing fee.
3. The underlying case file and expert determination for the proceedings EXP/395/ICANN/12.

4. The underlying case file and expert determination for the proceedings EXP/399/ICANN/16.
5. The underlying case file and expert determination for the proceedings EXP/400/ICANN/17.

ANNEX A: FINAL REVIEW PROCEDURE EXPERT DETERMINATIONS

Final Review Procedure Expert Determination	String
<u>VeriSign Inc. v. United TLD Holdco Ltd. String Confusion Objection Final Review Determination</u>	.CAM
<u>Commercial Connect LLC v. Amazon EU S.à r.l. String Confusion Objection Final Review Determination</u>	通販
<u>Independent Objector v. Ruby Pike, LLC Limited Public Interest Objection Final Review Determination</u>	.HOSPITAL