



## I. INTRODUCTION

1. This IRP seeks review of ICANN Board action, which resulted in the discriminatory treatment of similarly situated applicants for the .CHARITY gTLD: a direct violation of ICANN's bylaws and operating core principles.<sup>1</sup>

2. Here, both Corn Lake and SRL applied for the .CHARITY TLD, and each filed with ICANN a Public Interest Commitment ("PIC") that enhanced the safeguards that ICANN required of all New gTLD applicants.

3. In response to both applications, the Independent Objector ("IO") raised identical objections on community grounds. Specifically, he asserted that neither Corn Lake nor SRL provided sufficient protection to the alleged charity community because neither application limited registrations in the .CHARITY TLD only to "charities and charitable organizations."

4. While both applications and the identical objections to them were pending, the ICANN Governmental Advisory Committee (GAC) was considering and developing a list of recommended safeguards for certain "sensitive" strings, including .CHARITY. In April 2013, the GAC issued its recommendations in the form of the Beijing Communiqué, which suggested additional safeguards that might be applied to sensitive strings such as .CHARITY, including the potential of restricting the TLD to only operating charitable organizations.<sup>2</sup>

5. In light of this development, Corn Lake made clear to the IO that it would fully comply with more stringent safeguard requirements (or PICs) should they be adopted by ICANN based on the GAC Communiqué.

6. After the GAC issued its advisory Communiqué, but before ICANN made any decision about whether to accept that guidance, SRL apparently approached ICANN staff about amending its PICs so it would conform to the Communiqué, should it become effective. After its *ex parte* communication with ICANN staff, SRL filed a sur-reply with the objection panel

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<sup>1</sup> The Tribunal has asked that Corn Lake submit this Reply "to address new IRP Rulings since the initial Request, as well as matters arising out of further documents." Proc. Ord. 1 ¶ 6. The "further documents" discussed here include ICANN's Response to Corn Lake's initial Request.

<sup>2</sup> <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

stating that it had presented ICANN with a proposed amendment, and made further submissions concerning it after all deadlines had passed but which the panel nonetheless accepted and considered.

7. The substance of SRL's proposed amendment was not made public for nearly two months. And it was only *after* that occurred that ICANN finally published the new mandatory PICs applicable to .CHARITY for comment. The new PICs announced ICANN's intent to implement the GAC safeguards, one for .CHARITY that requires registrants to possess "any necessary authorisations, charters, licenses and/or other related credentials for participation in the sector associated with the Registry TLD string."

8. Having advised the panel that it would (a) fully comply with any new GAC safeguards, including any requirement to limit .CHARITY only to certain charitable organizations, and (b) that the ICANN Board's response to GAC safeguards would contractually require Corn Lake to adopt PICs deemed by the Board to offer sufficient protections on this very issue, Corn Lake alerted the panel that ICANN had accepted the GAC's recommendations, thereby mooting the IO's objection. However, even though the panel had accepted SRL's late submission, it rejected Corn Lake's identical attempt to support its own application.

9. SRL was allowed to submit untimely materials addressing the IO's objections and new GAC safeguards, but Corn Lake was denied that same opportunity. Nevertheless, not only did the panel consider SRL's untimely filing; in fact, it based the decision to deny the IO's objection against SRL's .CHARITY application entirely on the amended PIC that was the subject of the late submission. The panel's decision to deny the objection against SRL's application allowed SRL's .CHARITY application to move forward in the process.

10. At the same time that the panel accepted and considered SRL's amended PIC and allowed SRL's .CHARITY application to move forward, the panel refused to allow Corn Lake to provide evidence of the PIC that it would have to adopt, and consequently upheld the IO objection against Corn Lake, thereby disqualifying Corn Lake's application and removing it from contention altogether.

11. The panel's determinations make clear that the only factor that allowed SRL's application to move forward was acceptance and consideration of SRL's late-offered sur-reply and revised PICs. Corn Lake's application, on the other hand, was removed from contention entirely because the panel refused to even accept or consider Corn Lake's attempt to offer its own submission of identical PICs.

12. These rulings are materially inconsistent and directly at odds with one another. Two similarly situated applicants applied for the same string and both received the same IO objection to that string. During the evaluation process, ICANN changed the rules applicable to that string. One applicant was given both formal and informal opportunities to adequately respond to and address the changed rules. The other applicant was denied that same opportunity and then removed from contention altogether as a result. The ultimate determination against Corn Lake (the "Ruling") therefore singled it out for disparate treatment in contravention of one of ICANN's core governing tenets: the anti-discrimination principle.<sup>3</sup>

13. The outcome in .CHARITY is not the only example of inconsistent rulings that violate ICANN's core values. In addition to .CHARITY, ICANN has encountered similarly inconsistent or unreasonable rulings in other instances: in the .CAM/.COM, .CAR/.CARS and .SHOP/.ONLINESHOPPING (in Japanese characters) contexts. When confronted with these examples of inconsistent rulings, ICANN's Board, through the October 2014 Resolution of its NGPC, decided to pursue a formal review of the inconsistent results but only for .CAM/.COM and .SHOP/.ONLINESHOPPING (in Japanese).<sup>4</sup> Although the same rationale that justified Board action in the .CAM/.COM and .SHOP/.SHOPPING context applied with equal force in the .CHARITY context (inconsistent or unreasonable rulings resulting discriminatory treatment of an applicant), the Board declined to formally review the .CHARITY rulings and instead allowed and

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<sup>3</sup> Bylaws Art. II § 3.

<sup>4</sup> The Resolution did not include .CAR/.CARS because the dispute over those TLDs had settled privately. See Ex. 16 at 10.

effectively ratified the inconsistent and unreasonable determinations and discriminatory treatment against Corn Lake.

14. The ICANN Board's adoption of the ICC determination violates the Bylaws and Articles and is therefore subject to review in this proceeding. Specifically, the Board acted in excess of its Bylaws and Articles in the following respects:

a. The Board acted in violation of its own Bylaws requiring fairness, transparency, consistency, accountability and non-discriminatory treatment by blindly accepting clearly contrary objection determinations issued by the ICC;

b. The Board acted in violation of its own Bylaws by denying Corn Lake's Reconsideration Request ("RR") pertaining to the Ruling; and

c. The Board acted in violation of its own Bylaws when it arbitrarily and inexplicably excluded the inconsistent Ruling from consideration in its October 2014 Resolution that expressly provided for review of certain "inconsistent and unreasonable" objection determinations, such as the one at issue here.

This proceeding reviews each of these matters, including in light of the recent IRP determinations that have been issued since Corn Lake's initial filing.

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.

16. In response to Corn Lake's arguments, ICANN contends that the Board has no affirmative obligation to review inconsistent rulings offered by its third party experts – even when those inconsistent rulings result in discriminatory treatment of similar or identically situated applicants. But this position cannot be squared with ICANN's own Bylaws, which

unequivocally state that the Board **does** have the obligation to review such conduct that adversely affects a complaining party.<sup>5</sup>

17. ICANN's position – that it has no obligation to review inconsistent rulings – not only runs afoul of its own Bylaws, it also directly contradicts ICANN's own previous actions in similar contexts. For example, ICANN's October 2014 Resolution expressly sets forth a process for Board review of inconsistent rulings. And ICANN has utilized that very process, as described above, to review the inconsistent and materially unreasonable rulings that result in discriminatory treatment in the .CAM/.COM and .SHOP/SHOPPING contexts. The .CHARITY Ruling presents the exact situation covered by the October 2014 Resolution – inconsistent objection rulings. But of the examples of inconsistent rulings – *i.e.*, disparate treatment in objection results of different applications for the same TLD – that reached with regard to .CHARITY is the only one that the Board declined even to review, much less correct, the inconsistency. In this respect, too, Corn Lake suffered disparate treatment from other similarly situated applicants who were discriminated against in the objection process. The applicants in the .COM/.CAM and .SHOP/.SHOPPING contexts were given the opportunity to have the inconsistent rulings reviewed and corrected. Corn Lake was denied that opportunity, and is the only applicant in this exact position as to whom the Board acted in such a discriminatory manner.

18. As discussed in detail below, recent IRP decisions suggest that IRP review and a declaration that the ICANN Board violated its own Bylaws and directives are especially appropriate here. Indeed, the most recent IRP cases, which have “precedential value” under the Bylaws,<sup>6</sup> have uniformly held that the IRP does not serve merely to rubberstamp or blindly accord deference to the ICANN Board. It is meant to be meaningful: specifically, to ensure that the Board's actions or inactions do not run afoul of ICANN's Bylaws and Articles.

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<sup>5</sup> Bylaws Art. IV 2.2.

<sup>6</sup> Bylaws Art. IV § 3.21.

19. For example, the recent *DotConnectAfrica Trust v. ICANN*, ICDR No. 50-117-T-1083-13 (the “DCA Case”), found that the ICANN Board’s actions improperly favored one applicant over another.<sup>7</sup> And the final declaration in, *Vistaprint Ltd. v. ICANN*, ICDR No. 01-14-0000-6505 (the “Vistaprint Case”),<sup>8</sup> while generally favorable to ICANN, specifically recommended that the Board take certain actions it previously had not done (to avoid transgressing its Bylaws). And, a Review Panel’s ruling on an “inconsistent or otherwise unreasonable” objection decision made pursuant to the October 2014 Resolution, while not itself binding, applies with persuasive force here.<sup>9</sup> In sum, the standards set forth in the Bylaws and Articles, and application of those standards in this forum and as applied in various decisions, require a ruling in favor of Corn Lake.

## II. RECENT FACTUAL DEVELOPMENTS

20. A number of material developments have occurred since Corn Lake submitted its Request in March of this year. These developments include at least four case determinations by various panels — two in an IRP context — as well as a document production by ICANN. Each of these developments is relevant to this Panel’s review and may have some bearing on its ultimate determination.

### A. Panels Have Overturned “Inconsistent and Unreasonable” New gTLD Objection Determinations Pursuant to the October 2014 Resolution.

21. Corn Lake’s initial Request extensively referenced the October 2014 Resolution issued by the NGPC of the Board. In the October 2014 Resolution, the Board identified three sets of rulings on “string confusion objections” (“SCOs”) that it deemed “inconsistent and unreasonable” and “not in the best interests of the New gTLD Program or the Internet

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<sup>7</sup> For the Panel’s convenience, we include the final declaration in that and other recent cases in a Supplemental Appendix submitted concurrently herewith. Supp. App. J.

<sup>8</sup> *Vistaprint Ltd. v. ICANN*, ICDR No. 01-14-0000-6505. Supp. App. K.

<sup>9</sup> *VeriSign, Inc. v. United TLD Holdco Ltd.*, ICDR No. 01-15-0003-3822 (the “.COM-.CAM Case”). Supp. App. L.

Community,” and called for the establishment of “a three-member panel to re-evaluate” two of them (the third having become moot by settlement). Ex. 16 at 3, 4.<sup>10</sup>

22. Separate 3-member panels reviewed the two SCO rulings covered by the October 2014 Resolution.<sup>11</sup> Both applied the standard of review established by the NGPC, *i.e.*, “[w]hether 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.” Using that standard, both panels overturned their respective objection panelist’s original ruling.<sup>12</sup> In other words, the review process did exactly what it was supposed to do in those two instances: it reviewed and corrected inconsistent or unreasonable rulings that had unfairly discriminated against similarly situated applicants.

23. The .COM-.CAM Case is particularly instructive because it involves a situation virtually identical to that before this Panel. In .COM-.CAM, as here, two similarly situated applicants for the same string were treated disparately through the objection process, which initially went virtually unchecked. Similarly, in the .SHOP/.SHOPPING example, the Board corrected an unreasonable objection result. Treating two applications for the same TLD differently based on the scenario here is materially unreasonable. Application of the standards established by .COM-.CAM and .SHOP/.SHOPPING is especially appropriate here, given the similarity of the situations, and requires the same outcome. In other words, the result in

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<sup>10</sup> The Board selected two of the cases because they involved “objections raised by the same objector against different applicants for the same string, where the outcomes of the [objections] differ.” Ex. 15 at 2. The **only** conflicting objection rulings to which this standard applies, apart from those specifically covered by the October 2014 Resolution, are those rendered with respect to two applications for .CHARITY – one by Corn Lake, as to which the panel upheld the objection, and the other by SRL, where the panel denied the objection. These outcomes not only fall squarely within what the Board considered “inconsistent or otherwise unreasonable” and therefore subject to review, but present an even more egregious scenario because the **same panelist** reached the **opposite** result in the **same** consolidated proceeding.

<sup>11</sup> Supp. App. L; *see also Commercial Connect LLC v. Amazon EU S.à.r.l.*. ICDR No. 01-15-0003-3821 (the “SHOP Case”) (Supp. App. M herewith).

<sup>12</sup> Supp. App. L at 12, 19-20; Supp. App. M at 1-3, 6.



.COM/.CAM and .SHOP/.SHOPPING means that this Panel cannot reasonably uphold the disparate treatment that Corn Lake has suffered as a result of the Ruling and the Board's acts and failures to act in connection with it.

**B. Final Declarations in Two IRP Cases Support Corn Lake's Position Here.**

24. Corn Lake filed its Request before this panel in March 2015. As of that time, IRP panels had issued only two final declarations – one in the ICM Case and one in *Booking.com*.<sup>13</sup> Since then, panels have issued two more final declarations, in the DCA and Vistaprint Cases.

25. The DCA Case is particularly relevant to this Panel's analysis because DCA also involved disparate treatment of two applicants for the same string – in that case, .AFRICA. The case did not arise in the context of new gTLD objection rulings as this one does, but instead during the course of the application process. There, the Board adopted, without investigation, GAC advice to allow one particular application for .AFRICA to proceed, and to reject the other application (by the DCA Trust) for the string entirely.<sup>14</sup> After citing, among other things, both the non-discrimination and transparency provisions of the Bylaws,<sup>15</sup> the DCA Case panel declared that “both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN,” and recommended that ICANN “refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD

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<sup>13</sup> As described in Corn Lake's initial Request, both the *Booking* and ICM cases can be readily distinguished from the present case at hand. *Booking* is distinguishable from the situation here because there the panel found no Board action. The ICM Case also is distinguishable because it involved a markedly different fact pattern than that presented here. Nevertheless, ICM remains noteworthy because, after the decision in that case, ICANN attempted to establish a more deferential standard of review for IRP cases. Subsequent IRP decisions, however, have uniformly and consistently rejected ICANN's attempts to establish a more deferential standard of review. *See infra* Sec. III.A.

<sup>14</sup> *See* Supp. App. J ¶¶ 105-109.

<sup>15</sup> The latter appears at Bylaws Art. III § 1: “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”

application process.”<sup>16</sup> It also ordered ICANN to bear all costs of the IRP.<sup>17</sup> In other words, the IRP Panel expressly held that ICANN’s delegation to a third party that resulted in discriminatory treatment of a similarly situated applicant was subject to review by the IRP and violated ICANN’s Bylaws requiring non-discrimination and transparency. In addition, the IRP’s determination also had the effect of allowing the aggrieved party’s application that had been taken out of contention to move forward in the process. In short, the analysis and outcome in the .AFRICA IRP provide a strong basis for a similar outcome here. In this case, ICANN allowed one applicant for .CHARITY to present evidence of additional PICs well after closure of the submission window. Like DCA Trust, Corn Lake seeks a determination that its application should be permitted to go forward through the remainder of the application process.

26. Another case relevant to this Panel’s review is the Vistaprint Case. Vistaprint involved an objection by one of seven applicants for .WEB against Vistaprint’s standard and community applications for .WEBS. The panel hearing that SCO affirmed the objection.<sup>18</sup> Vistaprint brought its IRP on numerous grounds, most of which did not succeed. Vistaprint’s IRP did get some traction with the panel on one issue pertinent to *this* Panel’s review.

27. Specifically, Vistaprint argued that the Board’s failure to extend the review procedure established by the October 2014 Resolution beyond just the .CAM and .SHOP situations constituted disparate and discriminatory treatment. Vistaprint contended that granting a SCO by a .WEB applicant against the Vistaprint application for .WEBS conflicted with at least one other SCO ruling that found no confusing similarity between two strings using the singular and plural of the same word.<sup>19</sup> The panel struggled with this issue, and ultimately declined to rule on it on ripeness grounds, stating that the Board had not considered the specific question of plural versus singular strings.<sup>20</sup> In lieu of a final *declaration* on this point,

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<sup>16</sup> See Supp. App. J ¶¶ 96, 148-149.

<sup>17</sup> *Id.* ¶¶ 146, 150.

<sup>18</sup> See Supp. App. K ¶¶ 9-10, 23-24.

<sup>19</sup> *Id.* ¶¶ 181-182.

<sup>20</sup> *Id.* ¶¶ 185-191.

the panel made a *recommendation* for the Board to consider “whether an additional review mechanism is appropriate to re-evaluate the ... determination in the *Vistaprint SCO*, in view of ICANN’s Bylaws concerning core values and non-discriminatory treatment, and based on ... (i) the Vistaprint SCO determination ..., (ii) the Board’s (and NGPC’s) resolutions on singular and plural gTLDs, and (iii) the Board’s decisions to delegate numerous other singular/plural versions of the same gTLD strings.”<sup>21</sup>

28. In other words, a previous IRP panel already has recognized the very argument raised by Corn Lake here: that ICANN’s policy of applying the October 2014 Resolution review *only* in the .COM/.CAM and .SHOP/.SHOPPING scenarios may violate ICANN’s core values and Bylaws prohibiting discriminatory treatment. Here, the Board had the opportunity to take action to remedy the “inconsistent and unreasonable” objection Ruling as to .CHARITY. For example, the Board could have applied the October 2014 Resolution review procedure to the .CHARITY ruling but did not. The Board also could have remedied the “inconsistent” ruling through the reconsideration process, but failed to do so. In this case, the Board’s actions and failures to act improperly treated Corn Lake differently from the indistinguishably situated applicant for the same string.

**C. ICANN’s Document Production Raises Issues Bearing on This Panel’s Analysis.**

29. In accordance with IRP procedures and ICDR Rules, Corn Lake requested that ICANN produce certain documents to aid the fact-finding process in this case. ICANN objected to each of the five categories of documents requested, including on privilege and confidentiality grounds. Corn Lake disputed the objections, and the Panel ordered ICANN to “produce all non-privileged documents responsive to Requests No 1 to 5, inclusive, which are not otherwise public or in [Corn Lake’s] custody, possession or control ....”<sup>22</sup> “No documents are to be withheld on the basis of confidentiality,” the Panel further instructed.<sup>23</sup> While the Panel

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<sup>21</sup> *Id.* at 70 ¶ (3). The Panel ordered that Vistaprint bear 60%, and ICANN 40%, of the IRP’s costs. *Id.* ¶ 197 and p. 70 ¶ (4).

<sup>22</sup> Proc. Ord. 2 ¶ 6.

<sup>23</sup> *Id.* ¶ 8.

declined to require production of a privilege log “[a]t this stage,” it “reminded” ICANN that “the mere sending of a communication to or from an internal ICANN attorney does not render an item privileged,” but rather that a communication “must be made to facilitate the rendition of professional legal services.”<sup>24</sup>

30. After ICANN produced about 800 pages of documents on November 20, 2015, Corn Lake noted that certain documents it would have expected to see did not appear in the production. By an e-mail to ICANN counsel, Corn Lake specifically inquired about ICANN staff’s recommendation to the Board concerning the .CHARITY Reconsideration Request. ICANN responded that its “legal department makes recommendations on reconsideration requests, and therefore any drafts or discussions related to those recommendations are privileged and will not be produced.” Corn Lake then suggested that a privilege log would make sense for that limited set of documents, to ensure that ICANN did not take an overly expansive view of the privilege, as the Panel had admonished it not to do. ICANN rejected this, responding that “[t]he Panel has already ruled on the privilege log issue.”<sup>25</sup>

31. ICANN produced about another 100 pages of documents on November 26, and around 500 more on the December 4, 2015 deadline. It did not produce any communication between Staff and the Board or Staff and the IO related to .CHARITY, a type of communication likely to exist. ICANN also declined to produce a targeted and limited privilege log that would have been appropriate particularly given ICANN’s expansive and overly broad view of privilege. The Panel should consider ICANN’s compliance with the letter and spirit of the ICDR discovery rules as well as the Panel’s own prior orders defining the appropriate guidelines for withholding documents.

32. ICANN did produce one document that may be especially relevant to the Panel’s analysis. It appears that the Board, through its NGPC, took issue with recommendations of the

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<sup>24</sup> *Id.* ¶ 9.

<sup>25</sup> These e-mail exchanges, and other exhibits referenced herein but not provided with the Request, appear in a Supplemental Exhibit package submitted herewith. See Supp. Exs. 18-21.

GAC on which the IO relied so heavily as purportedly establishing the “material detriment” to the charity “community” that the objection panelist ultimately found. Among other things, the Board, well before the objection Ruling, found “no principled basis for distinguishing between” .CHARITY and other strings.<sup>26</sup> Indeed, the Board expressed that implementation of certain of the GAC-recommended safeguards “would potentially discriminate against users” of the Internet in different countries that have widely varying regulations applicable to charities and other subjects embodied in TLDs deemed “sensitive” by the GAC.<sup>27</sup>

33. In other words, the Board believed that requiring certain purported safeguards for a .CHARITY gTLD would single it out for disparate treatment. Already attuned to this issue, the Board violated the non-discrimination policy of Bylaws Art. II Sec. 3 when it allowed such disparate treatment to stand after the objection panel overruled the objection to one .CHARITY application but sustained the same objection to Corn Lake’s application.

### **III. ARGUMENT**

34. In its Response to the IRP Request, ICANN attempts to limit the scope of this proceeding. However, an IRP calls upon this Tribunal to “declare whether an action or inaction of the Board” – any action or inaction – was inconsistent with the Articles of Incorporation or Bylaws.” Bylaws Art. IV § 3.11.c.

35. This particular IRP presents several instances of Board action or inaction in connection with the Ruling that discriminates against Corn Lake and its application for the .CHARITY gTLD. The Board acted inconsistently with its Bylaws and Articles when it accepted an objection result that it already believed could present discrimination issues. It maintained this impermissible disparate treatment even in the face of Corn Lake’s RR, which the Board denied and thereby contravened the Bylaws.

36. The Board failed to act yet again in connection with the October 2014 Resolution. While the initial Request covered this area in some detail, the Response filed by

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<sup>26</sup> July 12, 2013 NGPC memo at 3 ¶ 2 (Supp. Ex. 22 at 4, (ICANN\_CHARITY0001356).

<sup>27</sup> *Id.* at 5 (Supp. Ex. 22 at 6, ICANN\_CHARITY0001358).

ICANN, unfortunately raises issues that this Reply must correct – namely, claiming justifications for excluding .CHARITY from the review process that factually do exist (as discussed more fully below). In all, the Board’s conduct does not survive the standard of review that all IRP determinations to date have applied.

**A. The Panel Independently Examines Board Action and Inaction to Determine Its Consistency or Inconsistency with the Bylaws, Articles and Guidebook.**

37. ICANN’s Response misleads as to the standard of review that this Panel must employ. ICANN states that the Panel must not substitute its judgment for that of the Board.<sup>28</sup> Yet, it goes on to quote the *Booking* case, which makes clear that even where the Board acts reasonably and in what it believes to be the best interests of ICANN, a panel still must *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.”<sup>29</sup>

38. The latest IRP determinations reaffirm this. In the DCA Case, the panel aptly noted that “ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to ... ‘operate for the benefit of the Internet community as a whole ... consistent with these Articles and its Bylaws ....’”<sup>30</sup> It went on:

Both ICANN’s Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.... The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws.... [T]he only and ultimate “accountability” remedy for an applicant is the IRP.<sup>31</sup>

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<sup>28</sup> ICANN Resp. ¶ 43.

<sup>29</sup> *Id.*, quoting *Booking*, App. I ¶ 109.

<sup>30</sup> DCA Final Dec., Supp. App. J ¶¶ 66-67, quoting AOI Art. IV.

<sup>31</sup> *Id.* ¶¶ 71-73 (emphases in original).

Accordingly, the panel concluded that the IRP standard of review “is a *de novo, objective and independent* one, which does not require any presumption of correctness.”<sup>32</sup>

39. The Vistaprint Case follows these same principles. While noting that the panel “is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN[,] ... this more detailed listing of a defined standard *cannot be read to remove from the Panel’s remit* the fundamental task of comparing actions or inactions of the Board with the Articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, *the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case ....*”<sup>33</sup> Further:

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, as required by ICANN’s Affirmation of Commitments, Bylaws and core values.<sup>34</sup>

Accordingly, the Vistaprint Case follows the other IRP decisions, “[a]ll of [which] have reached the same conclusion: the Board’s conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard, without any presumption of correctness.”<sup>35</sup>

40. The Panel here will no doubt honor the uniform precedent and independently determine on a *de novo* basis, without any presumption of correctness, whether the Board acted reasonably and in what it believed to be the best interests of ICANN, and, if so, whether

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<sup>32</sup> *Id.* ¶ 76 (emphasis in original).

<sup>33</sup> Vistaprint Final Dec., Supp. App. K ¶ 123 (emphases added).

<sup>34</sup> *Id.* ¶ 124.

<sup>35</sup> *Id.* ¶ 125.

its actions and inactions complied with the Bylaws, Articles and Guidebook. Employing this controlling standard, we believe the Panel will find that the Board failed to act reasonably, and that, even if it did, it did not comply with the provisions and core values of the Bylaws, Articles or Guidebook.

**B. Corn Lake Does Not Challenge the Adverse Objection Ruling, but Rather the Board's Discriminatory Treatment of Corn Lake in Connection with It.**

41. As mentioned in the Request, the IO obtained leave to and did file reply papers in August 2013 in further support of his community objection against Corn Lake's Application for .CHARITY. His reply trumpeted the April 2013 GAC Beijing Communiqué as evidence that the Application lacked adequate safeguards and thus created a likelihood of material detriment to a perceived charity "community."<sup>36</sup>

42. While noting that the post-objection period Beijing Communiqué did not constitute a proper "early warning" or "advice" under the Guidebook, the Board nevertheless worked through its NGPC to address the GAC's stated concerns. As mentioned above, the Board noted during this process, as early as July 2013, potential discrimination issues posed by the GAC's recommendations as to certain identified TLDs, including .CHARITY.<sup>37</sup>

43. Nevertheless, acknowledging in its September 6, 2013 response to the IO's reply that ICANN "remains in 'dialogue' with GAC on the specific means of" implementing the Beijing recommendations, Corn Lake made clear that "[w]hatever specific measures ICANN enacts will require implementation by Applicant in the form of a PIC, then embodied in a formal registry agreement by which Applicant must bind itself ...."<sup>38</sup> As ICANN had yet to reach agreement with the GAC as to what recommendations it would adopt and how it would put them into

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<sup>36</sup> See Ex. 4 ¶ 24.

<sup>37</sup> Supp. Ex. 22 at 4, 6, ICANN\_CHARITY0001356, 1358.

<sup>38</sup> Ex. 5 at 9.



place, Corn Lake could not specify what safeguard it would implement, only that it would do whatever ICANN ultimately required.<sup>39</sup>

44. On the same date in the consolidated objection proceeding, the other applicant for .CHARITY in the English language, SRL, submitted a response to the IO's reply in which it also stated it would enter into a PIC with ICANN that would address the IO's stated concerns.<sup>40</sup> However, SRL had not yet agreed to such a PIC with ICANN; rather, it advised the objection panel on October 25, 2013, in an unsolicited submission which it had not obtained prior leave to file, that ICANN had only just published it for public comment.<sup>41</sup> The PIC did undertake to limit registration to those who "establish that they are a charity or 'not for profit' enterprise with charitable purposes," but also "reserve[d] the right to amend or change this PIC Spec once the details of the Program are finalized."<sup>42</sup> Neither the IO nor the objection panelist commented on SRL's October 25, 2013 submission.

45. Although it took some time, and despite its previously articulated concerns about their potential for discrimination among different Internet users, the Board ultimately announced that it would adopt the GAC's Beijing recommendations, and published the PIC to which registries of "sensitive" domains would have to adhere.<sup>43</sup> It provides, among other things, for registries to employ registration agreements "requiring a representation that the Registrant possesses any necessary ... credentials for participation in the sector associated with the ... string."<sup>44</sup>

46. On December 3, 2013, Corn Lake brought to the objection panel's attention that it would need to implement this and other provisions of the PIC in order to operate a .CHARITY registry, thus mooted the IO's stated concern about potential "material detriment" to a charity

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<sup>39</sup> *Id.*

<sup>40</sup> See Supp. Ex. 23 at 4, 9-12.

<sup>41</sup> Supp. Ex. 24.

<sup>42</sup> Ex. 12 at 1, 3.

<sup>43</sup> See Ex. 13.

<sup>44</sup> *Id.* at 3 ¶ 6.

“community.”<sup>45</sup> The IO objected to Corn Lake’s further submission, and on December 13, 2013, the objection panelist stated that he would not consider it since, among other things, he already had submitted his determination “in draft” to the ICC.<sup>46</sup>

47. However, the Ruling did not issue until almost a month later, on January 9, 2014,<sup>47</sup> during which time the panelist certainly could have considered the measures that Corn Lake would implement to protect the asserted community, just as he had done with the objection against the SRL application. Insofar as a community objector, to prevail, must prove all four elements set forth in the Guidebook,<sup>48</sup> a panel giving the same credit to the Corn Lake PIC as to the SRL PIC would have found proof lacking as to the fourth “material detriment” element and denied the objection, as was done in SRL’s case. This certainly constitutes disparate treatment upon which the Ruling is based – a Ruling that the Board ultimately approved and allowed to stand.

48. Both Corn Lake and SRL represented in authorized supplemental filings that they would put in place certain protective measures for a .CHARITY TLD. Both later and without formal leave SRL sought to submit evidence of the status of the agreement they would be entering into with ICANN to implement such measures in a PIC. The objection panel accepted SRL’s evidence but refused to consider that offered by Corn Lake. This made the single difference that led the panel to overrule the IO’s community objection against SRL and sustain it against Corn Lake.

49. Once again, Corn Lake does not challenge the Ruling on the merits, as ICANN contends, but rather challenges the process that permitted the panelist to issue a Ruling that singles out Corn Lake for disparate treatment in contravention of Bylaws Art. II Sec. 3. The Board’s delays with the GAC allowed that to happen in the first instance, as Corn Lake had no

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<sup>45</sup> See Ex. 6.

<sup>46</sup> Ex. 7 at 2.

<sup>47</sup> Ex. 8.

<sup>48</sup> AGB § 3.5.4 at 3-25.

indication of what safeguards ICANN would require,<sup>49</sup> although it affirmed it would honor them, as it would have to do. Later Board action, in the form of the BGC’s denial of Corn Lake’s Request for Reconsideration of the Ruling, perpetuated the violation.<sup>50</sup>

50. “[A]ny person or entity materially affected by an action of ICANN may request ... reconsideration of that action by the Board.”<sup>51</sup> Reconsideration lies in cases of:

- a. Staff actions or inactions that contradict established ICANN policy(ies);
- b. Actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information; and
- c. Actions or inactions of the ICANN Board taken as a result of the Board’s reliance on false or inaccurate material information.<sup>52</sup>

51. Corn Lake sought reconsideration of the Ruling on the first basis, asserting that the Ruling exceeded ICANN policies set forth in the Guidebook for community objections and in the Bylaws prohibiting disparate treatment.<sup>53</sup> ICANN had “previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels ... in the New gTLD Program ....”<sup>54</sup>

52. The BGC ruled that it would not review the merits of the Ruling,<sup>55</sup> and found that the objection panel did apply – whether or not it did so “correctly” – the Guidebook criteria to

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<sup>49</sup> Because pre-registration eligibility restrictions represented such a radical departure from the Guidebook, upon which applicants justifiably relied, Corn Lake understandably wanted formal guidance from the Board as to whether and to what extent it planned to adopt these drastic changes. The climate of uncertainty created by months of ICANN’s silence regarding the GAC Beijing Communiqué compelled Applicants such as SRL and Corn Lake to significantly narrow potential subscriber bases to safeguard their \$185,000 application fees. With no guidance in place, SRL’s last minute and non-binding commitments on how to comply with the GAC Beijing Communiqué proved dispositive in which application prevailed against the objection.

<sup>50</sup> <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

<sup>51</sup> Bylaws Art. IV § 2.1.

<sup>52</sup> *Id.* § 2.2.

<sup>53</sup> <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf> ¶¶ ii, iii, v, 3, 8, 8.2.2, 8.2.3, 8.3.3, 8.3.4, 9.1, 10.3.2, 10.6, 10.7.

<sup>54</sup> <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf> at 4.

<sup>55</sup> *Id.* at 5.

the IO's community objection.<sup>56</sup> It further concluded that the panelist acted within his right in refusing to consider Corn Lake's submission "after the evidence closed on 6 September 2013."<sup>57</sup>

53. Apart from having no information that the "evidence" in fact had "closed" as of that date,<sup>58</sup> nowhere did the reconsideration ruling ever mention the disparate treatment basis upon which Corn Lake had sought relief, or cite the section of the Bylaws in which it appears. The Board simply refused to consider the evidence placing Corn Lake in the same position as SRL,<sup>59</sup> and thereby allowed Corn Lake to have been singled out for disparate treatment contrary to Bylaws Art. II Sec. 3.<sup>60</sup>

54. Corn Lake thereafter sought assistance from the ICANN Ombudsman, who reports to the Board.<sup>61</sup> In this case, the Ombudsman concluded that he had no jurisdiction to resolve the issue, and reported that he would not uphold Corn Lake's complaint.<sup>62</sup> Another opportunity for the Board to act missed.

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<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Id.* at 13.

<sup>58</sup> The BGC cited a paragraph of the Ruling that did not so state. *Id.*

<sup>59</sup> Corn Lake has consistently maintained that it will implement whatever safeguards ICANN may require, including by a PIC identical to SRL's.

<sup>60</sup> Otherwise unable to avoid this inevitable conclusion, ICANN asserts flatly that "Corn Lake does not challenge the BGC's denial of its Reconsideration Request in this IRP." ICANN Resp. ¶ 38. Not true, as plainly shown above. While Corn Lake may have devoted more of its initial Request to the October 2014 Resolution, it certainly noted the BGC's denial of its RR. Req. ¶ 54 and n. 30. It cannot be deemed to have waived prosecution of that Board action in this proceeding, which charges the Panel to declare whether any action or inaction of the Board with respect to the matter at issue is or is not consistent with the Bylaws, Articles and, in this case, the Guidebook. Bylaws Art. IV §§ 3.2, 3.11.c; *Booking*, App. I ¶ 109.

<sup>61</sup> Bylaws Art. V § 4.4.

<sup>62</sup> See Supp. Ex. 25.

**C. The Board Did Not Act “in the Best Interests of the Internet Community,” or in Accordance with the Non-Discrimination Provision of the Bylaws, When It Omitted the .CHARITY Ruling from the Review Procedure Established by the October 2014 Resolution.**

55. ICANN argues that the Board acted within its discretion when it chose to include certain “inconsistent or otherwise unreasonable” objection determinations and not others in its October 2014 Resolution providing for further review of such decisions.<sup>63</sup> Its position ignores the reality of the identical situation presented with regard to the conflicting .CHARITY decisions *and no others*, the operation of the controlling standard of review, the rationale behind the October 2014 Resolution and its implementation by Final Review Panels.

56. The NGPC originally proposed review of certain objection decisions because they were “raised by the same objector against different applications for the same string, [and] the outcomes of the [objections] differ.”<sup>64</sup> The *only* objection sets to which this description applies are two for which the NGPC proposed a further review mechanism – .CAM/.COM and .CAR/.CARS – and the two conflicting .CHARITY rulings at issue here. The Panel can search the entire new gTLD objection results page of the ICANN website – as Corn Lake has done – and find, out of the hundreds of objection determinations, *no conflicting sets* like those three.<sup>65</sup> As such, the stated reasons for the Board’s choice not to include the uniquely similar .CHARITY decisions in the review process, both in the October 2014 Resolution itself and ICANN’s Response to the instant IRP Request, simply do not apply. For example, there has been no action taken by other .CHARITY applicants in reliance on the objection Ruling, and no “nuanced distinctions” exist as between Corn Lake and SRL where both agree to the same PIC limits.

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<sup>63</sup> See, e.g., Resp. ¶¶ 53, 60.

<sup>64</sup> Ex. 15 at 2.

<sup>65</sup> See <http://newgtlds.icann.org/en/program-status/odr/determination>.

57. Additionally, the Panel must consider the Board’s conduct under the governing standard of review. First, did the Board act reasonably and in what it considered to be the best interests of ICANN?<sup>66</sup> Well, it already had identified as “unreasonable” the situation of objections “raised by the same objector against different applications for the same string, where the outcomes of the [objections] differ.”<sup>67</sup> Indeed, it ultimately concluded in the October 2014 Resolution that allowing such results to stand was “not in the best interests” of ICANN and the Internet community generally.<sup>68</sup> The Board’s conduct thus fails the Bylaws’ *express* standard of review,<sup>69</sup> before one even gets to the *independent* evaluation of whether it complied with other aspects of the Bylaws, Articles or Guidebook.

58. The Board itself raises the issue of reasonableness in its own October 2014 Resolution. It identified for review sets of new gTLD objection results that it found “inconsistent or otherwise unreasonable,” and directed final review panels to consider “[w]hether the original Expert Panel could have reasonably come to the decision reached ... through an appropriate application of the standard of review as set forth in the Applicant Guidebook ....”<sup>70</sup> IRP precedent also has uniformly included reasonableness among the criteria by which a panel judges Board action.<sup>71</sup> This Panel appropriately may ask, if the expert making the Ruling could not have “reasonably come to the decision reached ... through an appropriate application of the ... Guidebook” or Bylaw principles such as non-discrimination, whether the Board could have acted reasonably in failing to provide for its further review in the October 2014 Resolution.

59. This Tribunal certainly can conclude, as did the panel in the CAM-COM Case, that Mr. Portwood could not reasonably have sustained the IO’s objection to Corn Lake’s application

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<sup>66</sup> See *Booking*, App. I ¶ 109.

<sup>67</sup> Ex. 15 at 2.

<sup>68</sup> Ex. 16 at 2.

<sup>69</sup> Bylaws Art. IV § 3.4.c (“Did the Board ... exercise independent judgment ..., believed to be in the best interests of [ICANN]?”).

<sup>70</sup> Ex. 16 at 7.

<sup>71</sup> *E.g.*, *Booking*, App. I ¶ 109.

for .CHARITY while at the same time he overruled the same objection as to SRL. This does not require reviewing the substance of the decision. Rather, it involves applying the second part of the standard of review – namely, whether the Ruling, “touched” as it ultimately was by the Board on reconsideration, by the Ombudsman subsequently and by the Board again thereafter in the October 2014 Resolution, complied with the Bylaws and Articles. If the Panel finds, as it should, that the Ruling and the Board’s acts or failures to act thereon unfairly singled Corn Lake out for disparate treatment, it may declare the Board to have acted inconsistent with the manner that the Bylaws require.

**D. Corn Lake Seeks Proper Remedies in This IRP.**

60. Corn Lake has asked that this Panel “(i) ... reverse the .CHARITY objection ruling against Corn Lake; (ii) subject that ruling to the same review as provided in the Resolution for the similarly situated .COM and .CAM decisional conflicts; or (iii) reinstate Corn Lake’s application conditioned upon its acceptance of the PIC agreed to by SRL.”<sup>72</sup> ICANN calls this “affirmative” relief that it contends the Panel may not grant.<sup>73</sup>

61. This is not correct. The Bylaws allow an IRP panel to, among other things, (i) “declare” that a particular Board action or inaction does or does not comport with the Bylaws or Articles, and (ii) “recommend” that ICANN take or refrain from taking certain actions.<sup>74</sup> And, while Corn Lake offered the foregoing as potential avenues the Panel might take, it never contended that the Panel had no other options.

62. Furthermore, the final decisions in the DCA and Vistaprint Cases provide valuable clarification on the precise scope of an IRP panel’s authority to award relief. A panel may issue one or more “declarations” or “recommendations,” and the difference largely comes down to cost allocation. In the DCA Case, the panel “declared” that the Board had violated the Bylaws in a number of ways; it also “recommended” that ICANN “refrain from delegating the .AFRICA

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<sup>72</sup> Req. ¶ 58.

<sup>73</sup> Resp. ¶ 64.

<sup>74</sup> Bylaws Art. IV § 3.11.c, d.

gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.” Consequently, it found the Claimant had “prevailed” and allocated the full cost burden to ICANN.<sup>75</sup>

63. By contrast, the panels in the Booking and Vistaprint Cases did not find, and thus could not “declare,” that the Board had acted contrary to any Bylaw, Article or Guidebook provision.<sup>76</sup> As noted above, though, the Vistaprint Case did include a specific and detailed “recommendation.”<sup>77</sup> In neither case did the panel order claimant to bear all costs; the *Booking* panel split costs 50/50,<sup>78</sup> while the Vistaprint Case assigned 60% to claimant and 40% to ICANN.<sup>79</sup>

#### IV. CONCLUSION

64. The Panel should declare the ICANN Board in violation of the non-discrimination and other provisions of the Bylaws and Articles, including the duty to act in the best interests of ICANN and Internet users, and should recommend that the ICANN Board either allow Corn Lake’s Application to proceed or subject the Ruling to final review as under the October 2014 Resolution. ICANN should bear all costs of this proceeding.

DATED: December 10, 2015

Respectfully submitted,

THE IP and TECHNOLOGY LEGAL GROUP, P.C.

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<sup>75</sup> Supp. App. J ¶¶ 148-150.

<sup>76</sup> App. I ¶¶ 144, 147; Supp. App. K at 69.

<sup>77</sup> Supp. App. K at 70 ¶ (3).

<sup>78</sup> App. I ¶ 152.

<sup>79</sup> Supp. App. K ¶ 197.