

1 **Case Number: 01-14-0001-6263 [Donuts Inc.-vs- Internet**
2 **Corporation for Assigned Names and Numbers (ICANN)]**

3 **PROCEDURAL ORDER NO. 3**
4 **Issued August 14, 2015**

5 1. In its Procedural Order No. 1, dated July 17, 2015, the Tribunal, inter alia,
6 advised the Parties that “[a]ny further exchanges of documents and other
7 information between the Parties should occur through cooperation and in the
8 manner set forth in Article 21 of the ICDR Rules.”

9 2. By email dated August 8, 2015, Mr. Genga informed the Tribunal, in pertinent
10 part, that:

11 Regarding the document requests, while the parties have no dispute as to
12 certain of them, they disagree as to others. As such, the parties would like
13 to present their respective positions to the Panel expeditiously so as not to
14 delay resolving this proceeding on the merits as soon as their respective
15 schedules reasonably allow.

16
17 In furtherance of these objectives, the parties have agreed upon, and
18 respectfully propose that the Panel adopt, the following schedule in lieu of
19 that suggested in Procedural Order No.1: 1) The parties shall
20 simultaneously submit letter briefs of no more than five (5) pages
21 concerning the document requests by 5:00 p.m. PDT on August 10,
22 2015;...

23 3. In it Procedural Order No. 2, in view of the foregoing agreed procedure, the
24 Tribunal requested the Parties to simultaneously submit letter briefs of no more
25 than five (5) pages concerning the document requests by 5:00 p.m. PDT on
26 August 10, 2015.

27 4. In that Order, the Parties were directed to address the controlling questions
28 of “necessity” and “appropriateness” as established in ICDR Rule 20(4), and to
29 bear in mind Article 21 of the ICDR Rules text, in particular paragraphs 1, 4, 5
30 and 8 of that article.

31 5. The Parties made the simultaneous submissions contemplated in Procedural
32 Order No. 2, and, pursuant to a request by Mr. LeVee on behalf of ICANN,
33 were authorized to submit, sequentially, an additional page each (styled as
34 ‘postscripts’); that process was completed on August 12, 2015 with Mr.
35 Genga’s email to the Tribunal, time-stamped 1:59 pm.

1 **6. Contested Matters:** The Parties’ submissions confirmed that the following
2 requests by Donuts for information by are resisted by ICANN, and thus call for a
3 Tribunal determination [original numbering maintained]:
4

5 1. All communications, training materials and other documents between
6 ICANN, including its staff, Board or any part thereof, on the one hand, and
7 the ICC, Jonathan Peter Taylor and/or Mark Kantor, on the other hand, in
8 furtherance of “applying documented policies neutrally and objectively,
9 with integrity and fairness,” pursuant to Bylaws Art. I § 2.8, with respect to
10 any of the following:

- 11 a. The four standards, or any of them, applicable to community
12 objections as set forth in Guidebook section 3.5.4;
- 13 b. The burden of proof on the objector for all new gTLD objections,
14 pursuant to Guidebook section 3.5;
- 15 c. The right of an applicant to submit a standard or a community
16 application pursuant to Guidebook section 1.2.3.1;
- 17 d. That “An allegation of detriment that consists only of the applicant
18 being delegated the string instead of the objector will not be
19 sufficient for a finding of material detriment,” as set forth in
20 Guidebook section 3.5.4 at 3-24;
- 21 e. That “[a]ll applicants for a new gTLD registry should ... be
22 evaluated against transparent and predictable criteria, fully available
23 to the applicants prior to the initiation of the process,” and/or that
24 “no subsequent additional ... criteria should be used,” as set forth in
25 the final GNSO Report adopted by ICANN’s Board for the new
26 gTLD program;
- 27 f. Applying Guidebook new gTLD objection standards, policies and
28 procedures so as not to “single out any particular party for
29 disparate treatment;” or
- 30 g. The handling and/or avoidance of conflicts of interest.

31 2. All documents in the possession, custody or control of ICANN reflecting
32 communications of any person with, and/or training by any person of, the
33 ICC, Jonathan Peter Taylor or Mark Kantor, concerning:

- 34 a. The four standards, or any of them, applicable to community
35 objections as set forth in Guidebook section 3.5.4;
- 36 b. The burden of proof on the objector for all new gTLD objections,

1 pursuant to Guidebook section 3.5;

- 2 c. The right of an applicant to submit a standard or a community
3 application pursuant to Guidebook section 1.2.3.1;
- 4 d. That “An allegation of detriment that consists only of the applicant
5 being delegated the string instead of the objector will not be
6 sufficient for a finding of material detriment,” as set forth in
7 Guidebook section 3.5.4 at 3-24;
- 8 e. That “[a]ll applicants for a new gTLD registry should ... be
9 evaluated against transparent and predictable criteria, fully available
10 to the applicants prior to the initiation of the process,” and/or that
11 “no subsequent additional ... criteria should be used,” as set forth in
12 the final GNSO Report adopted by ICANN’s Board for the new
13 gTLD program;
- 14 f. Applying Guidebook new gTLD objection standards, policies
15 and procedures so as not to “single out any particular party for
16 disparate treatment;” or
- 17 g. The handling and/or avoidance of conflicts of interest.

18 5. All documents, including staff briefings to the Board, reflecting
19 consideration of or communications concerning any of the following by
20 the ICANN staff, Board or any committee(s) or designee(s) thereof:

- 21 h. Subsequent to March 15, 2013, implementation of a means for
22 review of or appeal from contested community objection
23 rulings;
- 24 i. Subsequent to March 15, 2013, implementation of a means for
25 review of or appeal from contested rulings on any new gTLD
26 objection other than for string confusion, including in connection
27 with the recently-formed review procedure for addressing “perceived
28 inconsistent and unreasonable Expert Determinations” as described
29 in ICANN Board Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
30 (October 12-14, 2014);
- 31 j. Exhibits 51 and/or 52 to Donuts’ IRP Request; or
- 32 k. Any oversight mechanisms or procedures for ensuring new
33 gTLD objection panels arrive at consistent results based upon
34 standards provided in the Guidebook.

35

1 **7. Agreed Matters:** The Parties’ submissions also confirmed that ICANN
2 has agreed to respond to the following requests [original numbering
3 maintained]:

4 3. All communications between ICANN, including its Board or any part
5 thereof, on the one hand, and the ICC, Jonathan Peter Taylor or either of
6 them, on the other hand, concerning:

7 a. The community objections against Application ID 1-1174-59954 by
8 dot Sport Limited for .SPORT and/or Application ID 1-1614-27785 by
9 Donuts (Steel Edge LLC) for .SPORTS; or

10 b. The service of Mr. Taylor on a panel hearing either of the foregoing
11 objections.

12 4. All communications between ICANN, including its Board or any part
13 thereof, on the one hand, and the ICC, Mark Kantor or either of them, on
14 the other hand, concerning the community objections against
15 Application ID 1-1206-66762 by dot Rugby Limited, and/or Application
16 ID 1-1612-2805 by Donuts (Atomic Cross LLC), for .RUGBY.

17
18 8. The Tribunal has consulted the submissions of the Parties and considered the
19 instructions of the ICDR Rules (Articles 20(4) and 21(1)(4)(5) and (8)) to, on the
20 one hand, avoid surprise, assure equality of treatment, and safeguard each party’s
21 opportunity to present its claims and defenses fairly, and, on the other hand, to
22 manage the exchange of information between the parties with a view to
23 maintaining efficiency and economy, and to avoiding unnecessary delay and
24 expense.

25
26 9. Equally, the Tribunal has noted its obligation under those same Rules, in
27 resolving any dispute about pre-hearing exchanges of information, to require the
28 requesting party to justify the time and expense that its request may involve.

29
30 10. In its deliberations, the Tribunal has been mindful of the timing of the request,
31 the current stage of these proceedings, the scope of the request, and the limited
32 mandate of this Tribunal as described in Rule 8 of the ICDR Supplemental
33 Procedures. The Tribunal has also considered its power under ICDR Rules, Article
34 20(4), subject to contrary agreement by the Parties, to “[a]t any time during the
35 proceedings, order the parties to produce documents, exhibits, or other evidence it
36 deems necessary or appropriate.”

1 11. **Rulings:** Having considered the Parties' submissions in light of the standards
2 and considerations suggested above, the Tribunal orders as follows:

3
4 A. ICANN should perform its undertaking to respond in good faith to the requests
5 identified in paragraph 7 above.

6
7 B. In the course of performing its undertaking under Paragraph 7 above, ICANN
8 should remain alert to other materials that may help that Parties establish common
9 factual ground in the current IRP; subject to applicable privileges, it will disclose
10 to Donuts any such additional items it uncovers. Its principal duty, however, is to
11 acquit itself under Paragraph 7.

12
13 12. **Categories 1, 2 and 5; meet and confer:** The Tribunal shall defer any
14 decision with respect to the disputed categories 1, 2 and 5, and makes no finding
15 concerning them at this time. Rather, the Tribunal orders the Parties to meet,
16 confer, and strive to identify further production they can agree to make, or to
17 forego, in light of the burdens and costs of production and such other factors as
18 may guide them in good faith. The Parties are further ordered to advise the
19 Tribunal as to the result of their meet-and-confer sessions within ten days from the
20 date hereof.

21 13. The Tribunal underscores that it has the power at any time, on its own initiative
22 or at the further request of either Party, to make targeted requests for disclosure
23 from either Party. Such Tribunal requests may, but need not, replicate those made
24 by Donuts under categories 1 through 5.

25 14. The Tribunal further notes its power, under ICDR Rules Article 20(7), to
26 allocate costs and draw adverse inferences. In appropriate circumstances, these
27 powers are available to address unreasonable requests for disclosure as well as
28 unreasonable objections or failures to fully perform reasonable requests for
29 disclosure.

30 15. **Supplemental briefing on the merits:** The Tribunal reiterates the schedule
31 for supplemental briefing on the Merits set in Procedural Order No. 2, as
32 follows:

33 Donuts will make its supplemental written submission on the merits
34 electronically by 5:00 p.m. PDT on **August 20, 2015**;

35 ICANN will make its supplemental written submission on the merits
36 electronically by 5:00 p.m. PDT on **September 20, 2015**.

1 **16. Further briefing instructions:** In its supplemental written submission on
2 the merits, as an appendix, Donuts should provide a schedule of matters,
3 factual and legal, it considers to be common ground. The Appendix should be
4 framed as neutrally as possible, and should not exceed 5 pages; those pages
5 will not to be counted against the page limitation.

6 17. In its supplemental written submission, as an appendix, ICANN should
7 provide a reaction to the schedule of proposed common ground submitted by
8 Donuts. It should be framed as neutrally as possible, should seek to establish
9 agreement, but may offer refinements or qualifications. It may also propose
10 items of common ground not identified by Donuts in its Appendix. The
11 Appendix should not exceed 5 pages; those pages will not to be counted
12 against the page limitation.

13 **18. Hearing for Argument:** The Tribunal reiterates that the Hearing for
14 Argument is scheduled for **October 8, 2015**, commencing at 9:30 a.m. The
15 Tribunal continues to hold the possibility that the Hearing will occur at a
16 physical gathering in Southern California, rather than telephonically, and
17 requests the Parties' views on that prospect.

18

19 *Jack J. Coe, Jr* (Chair, for the Tribunal)

20

21