

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

COMMERCIAL CONNECT, LLC ) ICDR CASE NO. 01-16-0000-2315  
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 Claimant, )  
 )  
 and )  
 )  
 INTERNET CORPORATION FOR ASSIGNED )  
 NAMES AND NUMBERS, )  
 )  
 Respondent. )  
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**ICANN'S RESPONSE TO CLAIMANT COMMERCIAL CONNECT, LLC'S  
REQUEST FOR INDEPENDENT REVIEW PROCESS**

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The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Commercial Connect, LLC (“Claimant”) on 10 February 2016.

## INTRODUCTION

1. Claimant’s IRP Request should be denied as it was filed almost three-months beyond the deadline and provides no basis for this Panel to declare that ICANN’s Board acted in breach of ICANN’s Articles of Incorporation (“Articles”) or Bylaws.

2. Claimant and eight other applicants each applied to ICANN for the opportunity to operate the highly sought-after new generic top-level domain (“gTLD”) .SHOP. Claimant submitted a “community application,” meaning that it proposed to operate .SHOP “for the benefit of a clearly delineated community” (“Application”).<sup>1</sup> One other applicant for .SHOP also submitted a community application.

3. Where, as here, a community application is in “contention” with other applications for the same proposed new gTLD, the community application is invited to participate in Community Priority Evaluation (“CPE”), which is overseen and conducted by experts selected by the Economist Intelligence Unit (“EIU”), an entity independent of ICANN.<sup>2</sup> If the community application prevails in CPE, only that application (and any other community applications for the same string that have prevailed in CPE) may proceed.<sup>3</sup> The New gTLD Applicant Guidebook (“Guidebook”), which ICANN and Internet stakeholders developed over several years and which sets out the criteria used to evaluate new gTLD applications, specifically states that the requirements to prevail in CPE are “very stringent” because a qualifying

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<sup>1</sup> Guidebook § 1.2.3.1 (CI’s Ex. Annex-9.) Citations to “CI. Ex. Annex-\_\_” refer to the annexes submitted with Claimant’s IRP Request. Citations to “Resp. Ex. \_\_” refer to exhibits submitted by ICANN.

<sup>2</sup> *Id.* § 4.2

<sup>3</sup> *Id.* § 4.2.2.

community application “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”<sup>4</sup> In other words, a community application must meet intentionally-high standards to prevail in CPE.

4. The CPE panel evaluating Claimant’s Application (“CPE Panel”) issued a report (“CPE Report”) finding that the Application did not meet the Guidebook criteria needed to prevail in CPE. The Application received only five out of 16 possible points in CPE, and needed at least 14 points to prevail. The other community application for .SHOP also failed to prevail in CPE. Accordingly, Claimant’s Application remained in contention with all other applications for .SHOP (“.SHOP Contention Set”), as clearly called for in the Guidebook.

5. Disappointed with the CPE results, Claimant filed Reconsideration Request 15-13 (“Request 15-13”), seeking reconsideration of the CPE Report.<sup>5</sup> After reviewing Request 15-13, on 24 August 2015, ICANN’s Board Governance Committee (“BGC”) recommended that Request 15-13 be denied because Claimant did not state a proper basis for reconsideration as defined in ICANN’s Bylaws. The Board’s New gTLD Program Committee (“NGPC”) accepted the BGC’s recommendation in a 28 September 2015 resolution (“Board Resolution”).<sup>6</sup>

6. The deadline to file an IRP challenging the Board Resolution denying Request 15-13 was 18 November 2015.<sup>7</sup> Yet, rather than timely initiate an IRP (or timely invoke one of ICANN’s other accountability mechanisms), Claimant instead engaged in months of improper,

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<sup>4</sup> *Id.* § 4.2.3.

<sup>5</sup> As discussed further below, the reconsideration process is a process by which a person or entity may seek reconsideration of an action (or inaction) of: (1) ICANN’s staff that contradicts established ICANN policies; or (2) ICANN’s Board that the Board took action in reliance on inaccurate information or without consideration of material information. Bylaws, Art. IV, § 3.2 (Cl. Ex. Annex-3).

<sup>6</sup> The NGPC was a Board committee consisting of all ICANN Board members who had no conflicts with respect to the New gTLD Program. The Board delegated to the NGPC full decision-making authority related to the New gTLD Program. As the Program has wound down, the NGPC was decommissioned in October 22, 2015. *See* Board Resolution Nos. 2015.10.22.15-16 (Resp. Ex. 1).

<sup>7</sup> As discussed further below, ICANN’s Bylaws specifically state that IRP requests must be filed within 30 days of the posting of the minutes of the Board meeting that the requesting party contends demonstrates the alleged violation. Bylaws, Art. IV, § 3.3 (Cl. Ex. Annex-3). The minutes of the NGPC’s 28 September 2015 meeting were posted on 19 October 2015. (Resp. Ex. 2.)

dilatory tactics aimed at preventing the resolution of the .SHOP Contention Set, including the filing of a frivolous lawsuit against ICANN in federal court. Indeed, Claimant waited until two weeks after the .SHOP Contention Set was resolved by auction and *almost three months* after the deadline to file an IRP to initiate this IRP. Even now, however, Claimant's time-barred IRP Request, which is based on unsupported allegations of "information and belief," provides no basis for a declaration from this Panel that the Board violated ICANN's Articles or Bylaws.

7. Claimants' IRP Request raises a number of shallow claims, including an also time-barred challenge to the guidelines governing CPE evaluations. But, at bottom, Claimant's IRP Request is a substantive critique of the CPE Report determining that Claimant's Application did not prevail in CPE. An IRP, however, is not an appropriate vehicle for challenging a report issued by a third-party expert, such as the EIU. Instead, IRPs are a method for evaluating actions of ICANN's *Board of Directors*.<sup>8</sup> Put another way, this IRP Panel has one (and only one) responsibility: To provide a declaration stating the Panel's opinion as to "whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws."<sup>9</sup> As the Board was not involved in drafting the CPE Report, and the Board did not substantively review or approve the CPE Report, this IRP Panel has no Board conduct to evaluate.

8. And contrary to what Claimant argues, the Board was not required to substantively review the CPE Report because the Board is not tasked with doing so. In adopting the Guidebook, the Board and the ICANN community made clear that the Board would *not* undertake such a responsibility with respect to CPE expert reports, or any other third-party expert reports that would be issued in conjunction with the New gTLD Program, and nothing in the Articles or Bylaws requires the Board to do so.

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<sup>8</sup> ICANN's Bylaws ("Bylaws"), Art. IV, § 3 (Cl. Ex. Annex-3.)

<sup>9</sup> *Id.*, Art. IV, § 3.4.

9. There have now been four IRPs in which claimants have unsuccessfully sought to challenge the substantive determinations of third-party experts issued in conjunction with the New gTLD Program.<sup>10</sup> In the latest, *Despegar Online SRL, et al. v. ICANN v. Little Birch, LLC*, the IRP panel specifically declared that the Articles and Bylaws do not require the ICANN Board to substantively review or evaluate CPE reports.<sup>11</sup> This Panel should reach the same result.

10. To be clear, the only Board action relevant to this IRP is the Board Resolution denying Request 15-13, and there is no question that the Board Resolution was consistent with ICANN's Articles and Bylaws.

## **BACKGROUND FACTS**

### **Background Information On ICANN**

11. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth in its Bylaws, ICANN's mission "is to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems," including the domain name system ("DNS").<sup>12</sup>

12. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors and approximately 350 staff members. Yet, ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and an Ombudsman,<sup>13</sup> the ICANN community includes a

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<sup>10</sup> Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 ("*Booking.com* Final Declaration") (Resp. Ex. 3); Final Declaration, *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505 ("*Vistaprint* Final Declaration") (Resp. Ex. 4); Final Declaration, *Merck KGaA v. ICANN* ("*Merck* Final Declaration"); Final Declaration, *Despegar Online et al. v. ICANN v. Little Birch et al.*, ICDR Case No. 01-15-0002-8061 ("*Despegar* Final Declaration") (Resp. Ex. 5).

<sup>11</sup> *Despegar* Final Declaration.

<sup>12</sup> Bylaws, Art. I, § 1 (Cl. Ex. Annex-3).

<sup>13</sup> *Id.*, Art. V.

Nominating Committee,<sup>14</sup> three Supporting Organizations,<sup>15</sup> four Advisory Committees,<sup>16</sup> a group of technical expert advisors,<sup>17</sup> and a large, globally distributed group of community members who participate in ICANN's processes.

13. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers ("registrars"). ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs ("registries"). In 2000, ICANN approved seven gTLDs in a "proof of concept" phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet.

#### **Background Information On The New gTLD Program**

14. The New gTLD Program ("Program") constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII gTLDs and new non-ASCII, internationalized domain name ("IDN") gTLDs.<sup>18</sup> In developing the Program with the ICANN community, numerous versions of the Guidebook were prepared, distributed for public comment, and then revised as a result of the public input received. That process repeated many times and over many years until ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures as to how new gTLD applications will be evaluated. As a result, the Program has been a great success at achieving its goals: ICANN received 1,930 gTLD applications and, as of

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<sup>14</sup> *Id.*, Art. VII.

<sup>15</sup> *Id.*, Arts. VIII-X.

<sup>16</sup> *Id.*, Art. XI.

<sup>17</sup> *Id.*, Art. XI-A, § 2.

<sup>18</sup> IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

this writing, over 930 new gTLDs have been added to the Internet, with hundreds more to come.

15. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community-based, *i.e.*, “operated for the benefit of a clearly delineated community.”<sup>19</sup> Applicants for community-based gTLDs are expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD string strongly and specifically related to the community named in [their] application.”<sup>20</sup> The Guidebook provides that “community-based applications are intended to be a narrow category, for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string.”<sup>21</sup>

16. If two or more applicants apply for identical or “confusingly similar” gTLDs and complete all preliminary stages of evaluation, their applications are placed in a “contention set.”<sup>22</sup> An applicant for a community-based application that is placed in a contention set may elect to proceed with CPE.<sup>23</sup> If the applicant elects to proceed with CPE, its application is forwarded to an independent, third-party provider—the EIU—for evaluation.<sup>24</sup>

17. A panel of experts coordinated by the EIU (known as a CPE panel) then evaluates the application.<sup>25</sup> If the applicant is found to meet the CPE criteria—meaning, if the CPE panel awards the application at least 14 out of 16 possible points on those criteria—the applicant will prevail in CPE.<sup>26</sup> ICANN selected the EIU to handle CPEs following a public request for proposals from firms interested in performing the various third party evaluations of new gTLD

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<sup>19</sup> Guidebook, § 1.2.3.1 (Cl. Ex. Annex-9).

<sup>20</sup> *Id.*, § 1.2.3.1.

<sup>21</sup> *Id.*, § 1.2.3.2.

<sup>22</sup> *Id.*, § 4.1.

<sup>23</sup> *Id.*, § 4.2.

<sup>24</sup> See Community Priority Evaluation (Resp. Ex. 7).

<sup>25</sup> CPE Panel Process Document (Resp. Ex. 8).

<sup>26</sup> Guidebook, § 4.2.2. The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points. *Id.* § 4.2.3.

applications.<sup>27</sup> ICANN’s Board had no role in selecting the EIU (much less the individual expert panelists), nor does the Board have any role in the analysis of each of the criterion by a panel or in the scoring of an application.

18. If the applicant prevails in CPE, it (and any other community-based applications in the contention set that prevail in CPE) will proceed to the next stage of evaluation.<sup>28</sup> Other standard applications in the contention set will not proceed because the community-based applications will have achieved priority.<sup>29</sup>

19. The Guidebook specifically cautions that, because “a qualified community application eliminates all directly contending standard applications, regardless of how well qualified [they] may be, . . . [the community priority criteria impose] very stringent requirements for qualification of a community-based application.” Of the 24 applications that have undergone CPE thus far, only five have prevailed.

### **ICANN’s Accountability Mechanisms**

20. In addition to the independent review process, ICANN has two other internal accountability mechanisms that can be invoked by new gTLD applicants. One mechanism is the reconsideration process, by which a person or entity may seek reconsideration of an action (or inaction) of: (1) ICANN’s staff that contradicts established ICANN policies; or (2) ICANN’s Board that the Board took action in reliance on inaccurate information or without consideration of material information.<sup>30</sup> In the specific context of the New gTLD Program, the BGC recommended – and the NGPC agreed – that reconsideration requests generally be permitted with respect to the actions of third-party experts and panels (“Third Party Providers”)

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<sup>27</sup> See “Preparing Evaluators for the New gTLD Application Process,” available at <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>.

<sup>28</sup> Guidebook, § 4.2.2 (Cl. Ex. Annex-9).

<sup>29</sup> *Id.*

<sup>30</sup> Bylaws, Art. IV, § 3.2 (Cl. Ex. Annex-3).

and that such requests shall be considered to be challenges to staff actions (or inactions).

21. Even though ICANN’s Board has extended reconsideration to Third Party Providers (reasoning that they are essentially acting in place of ICANN staff), in no way did it expand the scope of the review, which is still limited to whether the Third Party Providers’ actions contradicted established policies. As the NGPC has explained:

Reconsideration is not, and has never been, a tool for requestors to seek the reevaluation of substantive decisions. . . . [T]he Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in itself, in contravention of established processes and policies within ICANN.<sup>31</sup>

22. In addition to reconsideration requests, applicants may file a complaint with ICANN’s Ombudsman, whose role is to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN Board, staff, or an ICANN constituent body has treated them unfairly.<sup>32</sup>

### **Claimant’s Applications for .SHOP**

23. Claimant submitted an application to operate the .SHOP gTLD in ICANN’s 2000 “proof of concept” round (“2000 Application”).<sup>33</sup> In its 2000 Application, Claimant acknowledged that it had “no legally enforceable right to acceptance or any other treatment of [its] application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root.”<sup>34</sup> Claimant also expressly agreed in its 2000 Application to “release[] and forever discharge[] ICANN . . . from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in

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<sup>31</sup> Rationale for NGPC Resolution 2013.05.18.NG04 (Resp. Ex. 10).

<sup>32</sup> Bylaws, Art. V, § 2 (Cl. Ex. Annex-3).

<sup>33</sup> ICANN TLD Application Process: Information for Applicants (Resp. Ex. 11).

<sup>34</sup> Commercial Connect LLC’s Un-sponsored TLD Application Transmittal Form ¶ B12 (Resp. Ex. 12); *see also id.* ¶ B6 (“there is no understanding, assurance, or agreement that this application will be selected for negotiations toward entry of an agreement with a registry operator”).

connection with this application or (b) the establishment or failure to establish a new TLD.”<sup>35</sup>

Claimant’s 2000 Application was not one of the applications approved by ICANN.

24. In 2012, as part of the New gTLD Program, Claimant submitted its community Application for .SHOP. As provided for in the Guidebook, because Claimant had applied for .SHOP in its 2000 Application but was not awarded the string, Claimant was offered and accepted a US\$86,000 credit for its 2012 .SHOP Application. In accepting this credit, Claimant signed a credit request form confirming that it “was not awarded any string pursuant to the 2000 proof-of-concept round and [] has no legal claims arising from the 2000 proof-of-concept process.”<sup>36</sup>

25. Claimant, like all others submitting applications in connection with the 2012 New gTLD Program, has access to ICANN’s accountability mechanisms. However, Claimant acknowledged and agreed to a waiver and release barring all actions in court or other judicial fora against ICANN or its Affiliated Parties (as defined in Guidebook Module 6) arising out of ICANN’s or those Affiliated Parties’ evaluation of any new gTLD application:

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents] from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . .<sup>37</sup>

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<sup>35</sup> *Id.* ¶ B14.2 (emphasis added).

<sup>36</sup> Commercial Connect LLC’s New gTLD Application 2000 Credit Request (Resp. Ex. 13.)

<sup>37</sup> Guidebook, Module 6, ¶ 6 (Cl. Ex. Annex-9).

26. In accordance with the Guidebook, Claimant’s Application was placed in a contention set with eight other applications for .SHOP. One other applicant, GMO Registry, Inc. (“GMO”), also submitted a community application for .SHOP.

27. On 26 November 2014, Claimant was invited to participate in CPE for .SHOP; it accepted the invitation and its Application was forwarded to the EIU for evaluation.<sup>38</sup> On 21 May 2015, the CPE Panel issued its CPE Report.<sup>39</sup> The CPE Panel determined that the Application received only *five* out of 16 possible points on the CPE criteria, not coming anywhere close to the 14 points necessary to prevail in CPE.<sup>40</sup> A separate CPE panel determined that GMO’s application also did not qualify for community priority.<sup>41</sup> As a result, both GMO’s application and Claimant’s Application remained in contention with the seven other applications for .SHOP.

28. On 10 July 2015 – over a month and a half after the CPE Report was issued – Claimant filed Request 15-13, seeking reconsideration of the CPE Report, among other things.<sup>42</sup> On 24 August 2015, the BGC recommended that Request 15-13 be denied, determining that Claimant’s claims were time-barred (reconsideration requests must be filed within 15 days) and that, in any event, Claimant had not demonstrated a basis for reconsideration with respect to the CPE Report or otherwise.<sup>43</sup>

29. On 28 September 2015, in its Board Resolution, the NGPC accepted the BGC’s recommendation to deny Request 15-13.<sup>44</sup> The minutes of that NGPC meeting were published on 19 October 2015, thus commencing the 30-day period for Claimant to file an IRP relating to

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<sup>38</sup> See Community Priority Evaluation (Resp. Ex. 7).

<sup>39</sup> Community Priority Evaluation Report for Commercial Connect LLC’s Application for .SHOP (Resp. Ex. 14).

<sup>40</sup> *Id.*

<sup>41</sup> Community Priority Evaluation Report for GMO Registry’s Application for .SHOP (Resp. Ex. 15).

<sup>42</sup> Reconsideration Request 15-13 (Resp. Ex. 16).

<sup>43</sup> BGC Recommendation on Request 15-13 (Cl. Ex. Annex-6).

<sup>44</sup> Resolution 2015.09.28.NG02 (Resp. Ex. 17).

the Board Resolution.<sup>45</sup>

**Claimant's Dilatory Tactics and Failure to Timely Invoke ICANN's Accountability Mechanisms**

30. Claimant's IRP Request challenging the Board Resolution was due on 18 November 2015, because IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."<sup>46</sup> But rather than timely invoking the accountability mechanisms available to it following the Board Resolution denying RR 15-13, Claimant began a months-long campaign aimed at improperly preventing ICANN staff from facilitating resolution of the .SHOP contention set.

31. On 17 November 2015, Claimant sent ICANN an email that appeared to attempt, but failed to properly, initiate the Cooperative Engagement Process ("CEP"), a process intended to help resolve or narrow the issues contemplated to later be brought in an IRP.<sup>47</sup> Claimant's email also stated that Claimant anticipated initiating an IRP relating to the Board Resolution, but had delayed doing so on the mistaken impression that the minutes of that NGPC meeting had not yet been published. Claimant also claimed that it had been unable to submit an IRP request due to alleged issues with the International Centre for Dispute Resolution's ("ICDR's") website. Claimant attached an unsigned two-page Notice of IRP form (without any of the supporting documentation required to initiate an IRP) to its email and requested a 30-day extension to initiate an IRP.<sup>48</sup>

32. The very next day, on 18 November 2015, ICANN advised Claimant that minutes

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<sup>45</sup> Minutes of 20 September 2015 NGPC Meeting (Resp. Ex. 2); Bylaws, Art. IV, § 3.3 (Cl. Ex. Annex-6).

<sup>46</sup> Bylaws, Art. IV, § 3.3 (emphasis added) (Cl. Ex. Annex-3).

<sup>47</sup> *Id.*, Art. IV, § 3.14.

<sup>48</sup> 17 November 2015 Email from J. Smith to Independent Review@icann.org (Resp. Ex. 18).

of the NGPC's 28 September 2015 meeting had been published on 19 October 2015 and directed Claimant to the link for the published minutes.<sup>49</sup> ICANN also advised Claimant that the fifteen-day deadline to initiate a CEP related to the NGPC Resolution had been 3 November 2015, and that the Bylaws-mandated deadline to file an IRP request was 18 November 2015.<sup>50</sup> Additionally, ICANN provided Claimant with links to pages on the ICDR's website with information about the requirements for filing IRP requests in order to assist Claimant with its attempts to initiate an IRP.<sup>51</sup> With respect to the request for a 30-day extension, ICANN informed Claimant that because the deadline is mandated by ICANN's Bylaws, ICANN could not grant the requested extension.<sup>52</sup> In this time frame, Claimant never properly initiated CEP or an IRP, notwithstanding ICANN and the ICDR's assistance.

33. On 3 December 2015, Claimant informed ICANN that it was "still [its] intent to file [a] request for Independent Review . . . but [was] still unclear on what is needed and how to proceed."<sup>53</sup> The ICDR, which was copied on Claimant's email, responded by providing Claimant with all the relevant information for initiating an IRP. ICANN followed up, continuing to try to help Claimant, stating that ICANN understood that the ICDR had "provided [Claimant] with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know."<sup>54</sup>

34. On 10 December 2015, ICANN was contacted by Claimant's then attorney. She stated that Claimant was considering pursuing an IRP relating to Request 15-13 and sought additional information regarding when that request would be considered by the NGPC.<sup>55</sup> On 12

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<sup>49</sup> 18 November 2015 Email from E. Le to J. Smith (Resp. Ex. 19).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 3 December 2015 Email from J. Smith to Independent Review@icann.org (Resp. Ex. 20).

<sup>54</sup> 4 December 2015 Email from J. Smith to E. Le (Resp. Ex. 21).

<sup>55</sup> 12 December 2015 Email from E. Le to B. McKenna (Resp. Ex. 22).

December 2015, ICANN responded to the attorney, setting forth the information it had previously provided to Claimant by email on 18 November 2015 (including that the NGPC had considered Request 15-13 on 28 September 2015, and that the minutes of that meeting had been published on 19 October 2015).<sup>56</sup>

35. During this same period, the process for resolving the .SHOP Contention Set was moving forward. On 29 October 2015, all applicants in the .SHOP Contention Set were invited to enter into the auction process and were informed that the auction for .SHOP (“Auction”) was scheduled for 27 January 2016. Applicants were given a deadline of 26 November 2015 to elect to enter into the auction process and participate in the Auction.<sup>57</sup> ICANN sent Claimant repeated reminders of that deadline and provided Claimant with multiple extensions of time to submit the necessary documentation to participate in the Auction. Despite this, and despite stating that it would do so, Claimant never responded to the Auction request.<sup>58</sup>

36. On 11 December 2015, ICANN again provided Claimant with further information regarding the Auction process.<sup>59</sup> ICANN also specifically advised Claimant that at that time there were no accountability mechanisms affecting the .SHOP Contention Set and that the Auction was still scheduled for 27 January 2016.<sup>60</sup> ICANN repeated these reminders on 15, 18, 22, and 23 December 2015.<sup>61</sup> ICANN staff also participated in a telephone conference with Claimant on 7 January 2016.<sup>62</sup>

37. During this entire period, Claimant never initiated an IRP. Instead, on 6 January 2016, Claimant filed a lawsuit against ICANN and the ICDR in the United States District Court

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

<sup>57</sup> Intent to Auction Notification (Resp. Ex. 23).

<sup>58</sup> Case Comments for Commercial Connect, LLC at 1-3, 5-8 (Resp. Ex. 24).

<sup>59</sup> *Id.* at 4-5.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2-4.

<sup>62</sup> Exhibit L, Pg. 132.

for the Western District of Kentucky, together with a motion for Temporary Restraining Order and Preliminary Injunction (“Motion for TRO/PI”).<sup>63</sup> Despite Claimant’s assertions of exigent circumstances in the lawsuit and Motion for TRO/PI, Claimant failed to ever serve ICANN with a copy of the summons, complaint, or motion papers in order to initiate a lawsuit.

38. On 11 January 2016, after ICANN learned of Claimant’s lawsuit through means other than proper service, ICANN’s counsel sent Claimant’s counsel a letter advising that Claimant’s lawsuit was barred by a release accepted by Claimant no less than three times. First, when Claimant submitted its 2000 Application, then when it submitted its current Application, and again when it accepted a credit towards its Application fee.<sup>64</sup> For these reasons, and others, ICANN’s counsel demanded that Claimant dismiss the lawsuit or risk ICANN pursuing sanctions against Claimant and its counsel for filing a frivolous lawsuit, as well as terminating Claimant’s Application for breach of the Guidebook’s Terms and Conditions.<sup>65</sup>

39. Despite this, Claimant proceeded with its lawsuit. On 18 January 2016, Claimant’s counsel filed a motion to withdraw as counsel, stating that he had not been aware of the release when the suit was filed and had a “fundamental disagreement” with Claimant’s decision to proceed with the suit.<sup>66</sup> On 25 January 2016, despite still not having been served in the case, ICANN filed an opposition to Claimant’s Motion for TRO/PI, via special appearance and pursuant to an order from the court.<sup>67</sup> On 26 January 2016, the court denied Claimant’s Motion for TRO/PI, finding that Claimant had failed to show a likelihood of success on the

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<sup>63</sup> Complaint, *Commercial Connect v. ICANN*, Case No. 3:16-cv-00012-JHM-DW, available at <https://www.icann.org/en/system/files/files/cc-v-icann-complaint-06jan16-en.pdf>.

<sup>64</sup> 11 January 2015 Letter from E. Enson to P. Shurman (Resp. Ex. 25).

<sup>65</sup> *Id.*

<sup>66</sup> Motion to Withdraw, *Commercial Connect v. ICANN*, Case No. 3:16-cv-00012-JHM-DW, available at <https://www.icann.org/en/system/files/files/cc-v-icann-plaintiff-motion-withdraw-counsel-18jan16-en.pdf>.

<sup>67</sup> Special Appearance in Opposition of Motion for Temporary Restraining Order, *Commercial Connect v. ICANN*, Case No. 3:16-cv-00012-JHM-DW, available at <https://www.icann.org/en/system/files/files/cc-v-icann-special-appearance-atallah-declaration-25jan16-en.pdf>.

merits of its claims because the releases agreed to by Claimant were “clear and comprehensive.”<sup>68</sup> The court also granted Claimant’s counsel’s motion to withdraw, finding that “[g]ood cause exists where an attorney’s continued representation of a client could subject counsel to [] sanctions.”<sup>69</sup>

40. On 22 January 2016, and while the Claimant’s Motion for TRO/PI was pending, a representative for Claimant sent ICANN a Notice of IRP filing, but did not provide the supporting documents required to complete its filing.<sup>70</sup> On 26 January 2016, the ICDR informed Claimant’s representative by email that its attempt to initiate an IRP was defective and “not sufficient in order to proceed with administration of this matter,” under the ICDR Rules and the Supplementary Procedures for IRPs, because it was not accompanied by the requisite supporting documentation.<sup>71</sup>

41. Claimant’s next tactic, less than 24 hours before the Auction was scheduled to take place, was to attempt to invoke *all* of ICANN’s accountability mechanisms in a last-ditch effort to derail the Auction, even though Claimant had previously and affirmatively chosen not to participate in the Auction. First, on the morning of 26 January 2016, Claimant attempted to initiate a CEP regarding the Board Resolution.<sup>72</sup> ICANN staff promptly informed Claimant, as it had previously done on two other occasions, that the CEP was not properly invoked because the deadline to initiate a CEP relating to that Board action was 3 November 2015, nearly three months earlier.<sup>73</sup>

42. Second, in the afternoon of 26 January 2016, Claimant filed a complaint with the

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<sup>68</sup> Memorandum Order and Opinion, *Commercial Connect v. ICANN*, Case No. 3:16-cv-00012-JHM-DW, available at <https://www.icann.org/en/system/files/files/cc-v-icann-court-order-prelim-injunction-withdraw-counsel-26jan16-en.pdf>.

<sup>69</sup> *Id.* at 2.

<sup>70</sup> Commercial Connect, LLC’s Notice of Independent Review (Resp. Ex. 27).

<sup>71</sup> 26 January 2016 Email from T. Simotas to E. Enson, B. Lieben (Resp. Ex. 28).

<sup>72</sup> 26 January 2016 Email from J. Smith to Independent Review (Resp. Ex. 29).

<sup>73</sup> *Id.*

Ombudsman, which the Ombudsman promptly declined for lack of jurisdiction in light of Claimant's lawsuit.<sup>74</sup>

43. Third, also on 26 January 2016, Claimant filed Reconsideration Request 16-1, seeking reconsideration of ICANN staff's determination that the time to initiate a CEP had passed, arguing that staff had somehow prevented it from initiating an IRP, and renewing the various challenges raised in its prior Request 15-13.<sup>75</sup>

44. Fourth, on the morning of 27 January 2016, less than two hours before the scheduled Auction, Claimant submitted a Request for Emergency Arbitrator to the ICDR ("Emergency Request").<sup>76</sup> Without conceding Claimant's claims or the appropriateness and merit of the Emergency Request, ICANN immediately informed the ICDR that it would not challenge Claimant's pursuit of its Emergency Request.<sup>77</sup> Accordingly, the ICDR moved forward with the Emergency Request.

45. The .SHOP Auction was conducted on 27 January 2016, as it had been scheduled to do since 29 October 2015.

46. On 28 January 2016, ICANN received an email from the ICDR stating that the Claimant was seeking a short stay of the Emergency Request.<sup>78</sup> On 1 February 2016, Claimant's counsel notified the ICDR that Claimant was suspending its Emergency Request.<sup>79</sup> On 3 February 2016, the ICDR informed Claimant and ICANN that, based on Claimant's suspension, the ICDR was terminating the appointment of an emergency panelist to hear the Emergency Request.<sup>80</sup>

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<sup>74</sup> 27 January 2016 Email from J. Smith to K. Rosette (Resp. Ex. 30).

<sup>75</sup> Reconsideration Request 16-1 (Cl. Ex. Annex-11).

<sup>76</sup> 27 January 2016 Email from B. Lieben to T. Simotas, E. Enson (Resp. Ex. 31).

<sup>77</sup> 27 January 2016 Email from E. Enson to T. Simotas, B. Lieben (Resp. Ex. 31).

<sup>78</sup> 28 January 2016 Email from T. Simotas to E. Enson, B. Lieben (Resp. Ex. 32).

<sup>79</sup> 1 February 2016 Email from B. Lieben to T. Simotas, E. Enson (Resp. Ex. 32).

<sup>80</sup> 3 February 2016 Email from T. Simotas to B. Lieben, E. Enson (Resp. Ex. 32).

47. Claimant then sought from the ICDR an extension to 5 February 2016 to submit papers supporting an IRP request, which the ICDR permitted without consulting ICANN.<sup>81</sup> On 5 February 2016, Claimant sought another extension from the ICDR to submit papers supporting an IRP request.<sup>82</sup> The ICDR consulted ICANN, and ICANN's counsel responded to the ICDR and Claimant that since Claimant had not yet filed any written submissions supporting an IRP request, as required by ICANN's Bylaws and the Supplementary Procedures, Claimant had not yet initiated an IRP and, in ICANN's view, extensions were not relevant.<sup>83</sup>

48. On 10 February 2016, Claimant filed this IRP and yet another reconsideration request, Request 16-2, seeking reconsideration of ICANN staff's decision to go ahead with the Auction.<sup>84</sup> On 25 February 2016, the BGC denied Requests 16-1 and 16-2, noting that the both requests were time-barred and both failed to state a basis for reconsideration.<sup>85</sup> The BGC also noted it was "deeply concerned by [Claimant's] repeated abuses of ICANN's accountability mechanisms and New gTLD Program processes" and that "[a]lthough providing fair, open, and transparent access to ICANN's accountability mechanisms is critical to ICANN's mandate, there is no justification for ICANN and members of its community having to suffer repeated baseless invocations of those mechanisms."<sup>86</sup>

### STANDARD OF REVIEW

49. The IRP is a unique, non-binding process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, and only to the extent that Board action was inconsistent with

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<sup>81</sup> 1 February 2016 Email from B. Lieben to T. Simotas, E. Enson (Resp. Ex. 32); 3 February 2016 Email from T. Simotas to B. Lieben, E. Enson (Resp. Ex. 32).

<sup>82</sup> 5 February 2016 Email from T. Simotas to B. Lieben, E. Enson (Resp. Ex. 32).

<sup>83</sup> 5 February 2016 Email from R. Zernik to T. Simotas, B. Lieben (Resp. Ex. 32).

<sup>84</sup> Reconsideration Request 16-2 (Cl. Ex. Annex-13).

<sup>85</sup> BGC Determination on Reconsideration Requests 16-1 and 16-2 (Resp. Ex. 33).

<sup>86</sup> *Id.* at 2-3.

ICANN’s Articles or Bylaws.<sup>87</sup> The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN’s Articles or Bylaws.<sup>88</sup> ICANN’s Bylaws specifically identify the standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, 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?<sup>89</sup>
50. The IRP Panel is not to substitute its judgment for that of the Board.<sup>90</sup> As the IRP

panel in *Booking.com v. ICANN* explained:

[s]o long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN [...]. 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 by the Guidebook.”<sup>91</sup>

51. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.<sup>92</sup> The Board will give serious consideration to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.<sup>93</sup>

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<sup>87</sup> Bylaws, Art. IV, §§ 3.1, 3.2 (Cl. Ex. Annex-3).

<sup>88</sup> *See id.* Art. IV, §§ 3.2, 3.4.

<sup>89</sup> *Id.*, Art. IV, § 3.4.

<sup>90</sup> *See id.*

<sup>91</sup> *Booking.com* Final Declaration ¶¶ 108-109 (Resp. Ex. 3).

<sup>92</sup> Bylaws, Art. IV, § 3.18.

<sup>93</sup> *Id.*, Art. IV, § 3.21.

## ARGUMENT

52. Not only is Claimant’s IRP Request time-barred by months, but the requested relief – that the IRP Panel “determine that Claimant’s Application meets the Community Priority Evaluation Criteria set forth in the [Guidebook]” – confirms that this IRP is nothing more than a substantive attack on the CPE Report.<sup>94</sup> Nevertheless, as discussed herein and made clear in ICANN’s Bylaws, IRPs are not a forum for challenging determinations made by third-party experts because they involve no Board action. The only Board action with respect to the CPE Report was the Board’s denial of Claimant’s Request 15-13 in the Board Resolution, and that action was in every way consistent with ICANN’s Articles and Bylaws. Indeed, Claimant does not even allege otherwise.

### I. CLAIMANT’S IRP REQUEST IS TIME-BARRED.

53. Claimant’s IRP Request runs far afoul of the IRP timing requirements set forth in ICANN’s Bylaws, which specifically state 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 Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.”<sup>95</sup>

54. The only Board action even potentially at issue in this IRP is the Board Resolution denying Claimant’s Request 15-13. The minutes of the meeting at which the Board Resolution was passed were posted on 19 October 2015.<sup>96</sup> Thus, the deadline to initiate an IRP relating to the Board Resolution was 18 November 2015. Despite this, and despite repeated reminders and explanations from both ICANN staff and the ICDR regarding IRP procedure,

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<sup>94</sup> IRP Request ¶ 61(5). The IRP Panel has no authority to grant affirmative relief. Rather, the IRP Panel is limited to stating its opinion by “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and *recommending* that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

<sup>95</sup> Bylaws, Art. IV, § 3.3 (emphasis added) (Resp. Ex. Annex-3).

<sup>96</sup> See <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en> (Resp. Ex. 2).

Claimant failed to properly initiate an IRP until 10 February 2016 – almost *three months* after the deadline. There is no explanation or excuse for Claimant’s delay in initiating its IRP and, as such, Claimant’s IRP Request should be denied as time-barred.

**II. ICANN’S BOARD PROPERLY DENIED REQUEST 15-13 AND HAD NO OBLIGATION TO INTERVENE FURTHER WITH RESPECT TO THE CPE REPORT.**

55. Claimant’s IRP Request does not explicitly seek review of the Board Resolution denying Request 15-13, but it is the only Board action even potentially at issue here. Nor does Claimant give this Panel any basis to declare that the Board Resolution was in any way inconsistent with ICANN’s Articles and Bylaws. Specifically, Claimant does not even *allege*, let alone establish, that the Board “acted with[] conflict of interest,” failed to “exercise due diligence and care in having a reasonable number of facts in front of [it,]” or failed to “exercise independent judgment” in denying Request 15-13, as Claimant must do in order state a proper IRP claim.<sup>97</sup>

56. In fact, the Board acted precisely as required by the Articles and Bylaws. Despite the fact that Request 15-13 was time-barred by over a month, the BGC and the NGPC nevertheless evaluated the CPE Report and properly determined that the CPE Panel had not violated any established policy or procedure in rendering the CPE Report.<sup>98</sup>

57. In Request 15-13, Claimant raised several issues regarding the CPE Report. Claimant first argued that the CPE Panel had not properly considered expressions of support for, and opposition to, Claimant’s Application (one of the four CPE criteria set forth in the Guidebook).<sup>99</sup> The BGC examined Claimant’s arguments and determined that the CPE Panel

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<sup>97</sup> *Id.*, Art. IV, § 3.4.

<sup>98</sup> BGC Determination on Reconsideration Request 15-13 (Cl. Ex. Annex-6); NGPC Resolution 2015.09.28.NG02 (Resp. Ex. 17).

<sup>99</sup> Reconsideration Request 15-13 at 13-15 (Resp. Ex. 16).

had followed established policy in its verification of support and opposition to Claimant's Application.<sup>100</sup> Claimant next disputed the CPE Panel's substantive determination that Claimant's Application did not meet the CPE criteria set forth in the Guidebook.<sup>101</sup> The BGC examined the CPE Report and determined that the CPE Panel had applied the CPE criteria as set forth in the Guidebook. As such, the Board concluded that Claimant had not identified any violation of established policy by the CPE Panel and that Claimant's substantive disagreement with the CPE Report was not a proper basis for reconsideration.

58. The Board clearly adhered to the reconsideration standard, which limits the Board to reviewing only whether actions of third-party evaluators "contradict[ed] established ICANN policy(ies)."<sup>102</sup> In all respects, the Board acted consistently with the Articles and Bylaws.

59. Claimant similarly has identified no Article or Bylaws provision violated by the Board in exercising its independent judgment not to conduct a substantive review of the results of the CPE Report, or otherwise intervene further with respect to the CPE Report. As the *Booking.com* IRP Panel found, "the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant]."<sup>103</sup> Likewise, the *Vistaprint* IRP Panel concluded that there is "no affirmative duty stated in the Articles, Bylaws or Guidebook that the Board must review the result in each and every [application objection]."<sup>104</sup> And in a similar challenge to a CPE report, the *Despegar* IRP Panel found it to be "correct" that "the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review

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<sup>100</sup> BGC Recommendation on Request 15-13 at 9-11 (Cls. Ex. Annex-6).

<sup>101</sup> Reconsideration Request 15-13 at 13-15 (Resp. Ex. 16).

<sup>102</sup> Bylaws, Art. IV, § 2.2(a) (Cl. Ex. Annex-3); Rationale for NGPC Resolution 2013.05.18.NG04 (Resp. Ex. 10).

<sup>103</sup> *Booking.com* Final Determination ¶ 138 (Resp. Ex. 3).

<sup>104</sup> *Vistaprint* Final Declaration ¶ 153 (Resp. Ex. 4).

should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.”<sup>105</sup> This is precisely what the Board did when it evaluated Request 15-13.

60. It is not the role of the Board (or this IRP Panel) to second-guess the substantive determinations of independent, third-party experts. The decision not to have ICANN (much less ICANN’s Board) perform substantive reviews of third-party expert reports reflects a considered decision of ICANN’s Board, made after significant public input and comment, that third-party experts (and not ICANN) should be resolving these types of issues with respect to the hundreds of gTLD applications that were expected and the 1,930 applications that ICANN received.

**III. THERE IS NO BOARD ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE PROMULGATION OF THE CPE GUIDELINES.**

61. In another flawed claim, Claimant appears to take issue with the CPE Guidelines applied by the CPE Panel because they were developed separately from the Guidebook development process.<sup>106</sup> There are several issues with this claim. As a preliminary matter, Claimant’s challenge of the CPE Guidelines, like the rest of its IRP Request, is time-barred. The CPE Guidelines were published on 27 September 2013, over two years before Claimant filed this IRP Request.<sup>107</sup> Further, there was no Board action involved in the promulgation of the CPE Guidelines. ICANN staff, not the Board, “published the CPE Guidelines produced by the [EIU] after considering ICANN community feedback on the first draft.”<sup>108</sup>

62. Moreover, the process for adopting the CPE Guidelines was entirely proper. The Board, in accordance with the Guidebook, adopted the new gTLD policies and overall New gTLD Program, while properly leaving implementation to ICANN staff. This is particularly appropriate with respect to the New gTLD Program, which involved over 1,900 applications and

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<sup>105</sup> *Despegar* Final Declaration ¶¶ 66-67, 84-86, 122, 158 (Resp. Ex. 6).

<sup>106</sup> IRP Request ¶ 61(3).

<sup>107</sup> *See* Community Priority Evaluation (Resp. Ex. 7).

<sup>108</sup> *See id.*

thousands of evaluation decisions that had to be performed with respect to those applications. The notion that the Board should have injected itself into each aspect of the New gTLD Program and the promulgation of implementation guidelines is without merit and not supported. As such, Claimant's argument fails to support an IRP.

63. In addition, and to be clear, the CPE Guidelines do not alter the CPE framework set forth in the Guidebook. The CPE Guidelines expressly state that they “do *not* modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook].”<sup>109</sup> Rather, they are “an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and consistency in the evaluation process.”<sup>110</sup> Moreover, the Terms and Conditions of the new gTLD applications provide that “ICANN reserves the right to make reasonable updates and changes to [the Guidebook] and to the application process,” and that new gTLD applications “will be subject to any such updates and changes.”<sup>111</sup>

#### **IV. CLAIMANT PROVIDES NO BASIS FOR ITS IRRELEVANT CONTENTION THAT THE CPE PANEL ERRED.**

64. In another procedurally improper and unsupported request, Claimant asks this Panel to “determine [that] the EIU erred in reviewing and scoring Claimant's Application.”<sup>112</sup> As discussed previously, the Board was not involved in any way in generating the CPE Report, and Claimant's substantive disagreement with a CPE report is not a basis for independent review. In any event, other than the conclusory statement that “[u]pon information and belief, based upon the contents of the [CPE Report], it is clear that the information relied upon by the EIU w[as] false, incomplete or materially correct,” Claimant's IRP Request does not put forth *any*

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<sup>109</sup> CPE Guidelines at 2 (emphasis added) (Resp. Ex. 34).

<sup>110</sup> *Id.*

<sup>111</sup> New gTLD Application Terms and Conditions ¶ 14 (Cl. Ex. Annex-10).

<sup>112</sup> IRP Request ¶ 61(5).

arguments supporting its contention that the CPE Panel erred with respect to its scoring of Claimant's Application.<sup>113</sup> As described in detail in the BGC's recommendation regarding Request 15-13, the CPE Panel did not deviate from any of the required CPE criteria in evaluating Claimant's Application.<sup>114</sup>

#### **V. CLAIMANT HAS NO RIGHT TO THE .SHOP STRING.**

65. Finally, Claimant makes the baseless assertion that it is entitled to priority for the .SHOP string because of its 2000 Application for .SHOP. Notwithstanding the fact that this contention raises no alleged Board action, Claimant's argument in this regard is entirely frivolous. When Claimant submitted its 2000 Application it affirmatively acknowledged that it had "no legally enforceable right to acceptance or any other treatment of [its] application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root."<sup>115</sup> Claimant again confirmed this when it accepted a US\$85,000 credit towards its new gTLD application fee, acknowledging that it "has no legal claims arising from the 2000 proof-of-concept process."<sup>116</sup> Claimant has no basis to now disavow those acknowledgments.

#### **CONCLUSION**

66. Claimant's IRP Request provides this Panel with no basis for finding that ICANN's Board violated its Articles or Bylaws or "acted with[] conflict of interest," failed to "exercise due diligence and care in having a reasonable number of facts in front of [it,]" or failed to "exercise independent judgment." Claimant is understandably disappointed that the CPE Panel determined that its Application for .SHOP did not qualify for community priority. But

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<sup>113</sup> *Id.* ¶ 47.

<sup>114</sup> BGC Recommendation on Reconsideration Request 15-13 at 12-17 (Cls. Ex. Annex-11).

<sup>115</sup> Commercial Connect LLC's Unsponsored TLD Application Transmittal Form ¶ B12 (Resp. Ex. 12).

<sup>116</sup> Commercial Connect LLC's New gTLD Application 2000 Credit Request (Resp. Ex. 13).

even if Claimant's filing was not time-barred, the CPE Panel's substantive decision did not involve – and was never intended to involve – any Board conduct. As such, it is not subject to independent review under the terms of ICANN's Bylaws. Similarly, Claimants' belated challenge to the CPE Guidelines does not involve Board action and is, in any event, both unsupported and time-barred.

67. The Board Resolution evaluating Request 15-13 was fully consistent with ICANN's Articles and Bylaws; Claimant provides no argument otherwise. For these reasons, ICANN urges the Panel to declare ICANN the prevailing party and deny Claimant's IRP Request.

Respectfully submitted,

JONES DAY

Dated: March 11, 2016

By: Eric P. Enson / RHE  
Eric P. Enson  
Counsel for Respondent ICANN