

INDEPENDENT REVIEW PROCESS (IRP)

ICDR Case No. 01-15-0002-9938

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Corn Lake, LLC (“Applicant”)

-v-

Internet Corporation for Assigned Names and Numbers (“ICANN”)

PROCEDURAL ORDER NO. 2

Production Ruling

IRP Panel:

Mark Morril

Michael Ostrove

Wendy Miles QC (Chair)

17 November 2015

1. In accordance with Procedural Order No. 1, document production has proceeded as follows:
 - a. On 6 November 2015 the Claimant submitted its Requests to Produce Further Documents (the “**Requests to Produce**”);
 - b. on Tuesday 10 November the Respondent responded with objections to the Request to Produce (the “**Production Dispute**”); and
 - c. on Thursday 12 November 2015 Claimant referred a dispute arising out of production.

In addition, the Respondent sent a further letter to the Panel dated 17 November 2015.

2. Procedural Order requires the Panel to rule on any further production of documents by Tuesday 17 November 2015 (“**Production Ruling**”).
3. The Production Ruling below is made taking into account all of the aforementioned submissions by the Parties. (A summary of the Parties’ submissions, and the Panel’s rulings, is attached at **Annex A.**)
4. The Claimant has made five separate Requests to Produce. As to three of the Requests, the Respondent states that it has determined preliminarily that no responsive, non-privileged documents exist. Respondent has agreed to produce responsive, non-privileged documents in response to each of the requests by the production deadline of December 4, 2015.
5. The Respondent nevertheless objects to all five Requests on the ground and to the extent that they seek the production of documents that are protected from disclosure by: (a) the attorney-client privilege; (b) the attorney work product doctrine; and/or (c) any other applicable privilege or doctrine.
6. The Panel orders the Respondent, in accordance with its agreement, to produce all non-privileged documents responsive to Requests No 1 to 5, inclusive, which are not otherwise public or in the Claimant’s custody, possession or control, by 4 December 2015.

7. In order to facilitate the Respondent's identification and production of responsive, non-privileged documents, the Panel further orders the Parties to meet, confer, and strive to identify in good faith such further production they can agree to make, or to forego. The Parties are further ordered to inform the Panel of the outcome within 10 days.
8. No documents are to be withheld on the basis of confidentiality. Any confidential documents are to be sent to the Panel for review of confidentiality and, if necessary, appropriate protection measures will be put in place.
9. At this stage, no order is made for production of any privilege log. However, and for the avoidance of doubt, the Panel notes for the purpose of ICANN's identification of production documents, ICANN is reminded that the mere sending of a communication to or from an internal ICANN attorney does not render that communication privileged. The communication also must be made to facilitate the rendition of professional legal services to the client; therefore, the sending or receiving ICANN attorney must be functioning in the capacity of a lawyer (as opposed to Board Member or business advisor, for example) at the relevant time. Further, the mere fact that an in-house ICANN attorney is copied on an e-mail, including as one of many addressees, is insufficient by itself to establish the attorney-client privilege.
10. The Panel notes its power, under ICDR Rules Article 20(7), to allocate costs and draw adverse inferences. In appropriate circumstances, these powers are available to address unreasonable requests for disclosure as well as unreasonable objections or failures to fully perform reasonable requests for disclosure. At this stage, no orders are made pursuant to these powers.

Signed:



Wendy Miles QC
On behalf of the Panel

Date: 17 November 2015

ANNEX A

No.	Document(s) requested	Reasons for request	Objections to request	Response to objections	Panel's decision
1.	All communications among, by or to the Board or ICANN staff in connection with Reconsideration Request 14-3 by Corn Lake, LLC.	ICDR Rules Art. 21: "The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case."	<p>ICANN objects to Request No. 1 because it seeks documents that are neither relevant nor likely to lead to the discovery of admissible evidence, especially insofar as Corn Lake's IRP Request does not challenge ICANN's response to Reconsideration Request 14-3. Moreover, ICANN objects on the ground and to the extent that Request No. 1 seeks the production of documents that are protected from disclosure by: (a) the attorney-client privilege; (b) the attorney work product doctrine; and/or (c) any other applicable privilege or doctrine. ICANN also objects to Request No. 1 because it is vague and ambiguous with respect to the phrase "in connection with." ICANN is construing Request No. 1 as seeking documents only concerning Reconsideration Request 14-3 itself, not all documents related to any matter referenced therein.</p> <p>Notwithstanding the above, ICANN has determined preliminarily that no responsive, non-privileged documents exist with respect to Request No. 1. ICANN will confirm that this is the case, or produce responsive, non-privileged documents by the production deadline of December 4, 2015.</p>	<p>Corn Lake carefully targeted its requests to obtain only those documents specific to its application for the .CHARITY gTLD. As such, we do not view ICANN's stated objections to the relevance and breadth of the requests as well taken.</p> <p>Corn Lake does not seek documents disclosed publicly, as on the ICANN website, but rather those not otherwise available. Its requests thus fall well within the scope of the ICDR Rules.</p> <p>Our primary issue lies with the extent to which ICANN might withhold responsive documents. For that reason, we believe a privilege log appropriate to enable Corn Lake – and the Panel, if requested – to assess the propriety of any claim of privilege ICANN might make. Otherwise, neither Corn Lake nor the Tribunal has any means of making such an evaluation, or of determining the extent of documents that ICANN may withhold. The notion that</p>	ICANN is ordered to produce all non-privileged documents responsive to Request No 1, which are not otherwise public or in the Claimant's custody, possession or control, by 4 December 2015.

No.	Document(s) requested	Reasons for request	Objections to request	Response to objections	Panel's decision
				<p>ICANN involves attorneys in every area covered by the document requests – such that creating a log would present a “massive burden” – seems overblown, particularly given the focus of the requests solely on matters having to do with Corn Lake’s .CHARITY application.</p>	
2.	<p>All documents containing information considered by the Board or ICANN staff in connection with Reconsideration Request 14-3, other than those accessible at https://www.icann.org/resources/pages/14-3-2014-01-30-en.</p>	As above.	<p>ICANN objects to Request No. 2 because it likewise seeks documents that are neither relevant nor likely to lead to the discovery of admissible evidence, especially insofar as Corn Lake’s IRP Request does not challenge ICANN’s response to Reconsideration Request 14-3. Moreover, ICANN objects on the ground and to the extent Request No. 2 seeks the production of documents that are protected from disclosure by: (a) the attorney-client privilege; (b) the attorney work product doctrine; and/or (c) any other applicable privilege or doctrine. ICANN also objects to Request No. 2 because it is vague and ambiguous with respect to the phrase “in connection with.” ICANN is construing Request No. 2 as seeking documents only concerning Reconsideration Request 14-3 itself, not all documents related to any matter referenced therein.</p> <p>ICANN has determined preliminarily that no responsive, non-privileged documents exist with respect to Request No. 2. ICANN will</p>	As above.	<p>ICANN is ordered to produce all non-privileged documents responsive to Request No 2, which are not otherwise public or in the Claimant’s custody, possession or control, by 4 December 2015.</p>

No.	Document(s) requested	Reasons for request	Objections to request	Response to objections	Panel's decision
			confirm that this is the case, or produce responsive, non-privileged documents by the production deadline of December 4, 2015.		
3.	All communications among, by or to the Board or ICANN staff regarding the applicability to a .CHARITY gTLD of "Category 1 Safeguards as Public Interest Commitments in Specification 11 of the New gTLD Registry Agreement," as appears in Attachment 5, Annex A of Corn Lake's Reconsideration Request No. 14-3.	As above.	<p>ICANN objects to Request No. 3 on the ground and to the extent it seeks the production of documents that are protected from disclosure by: (a) the attorney-client privilege; (b) the attorney work product doctrine; and/or (c) any other applicable privilege or doctrine. ICANN also objects to Request No. 3 because it is vague and ambiguous with respect to the phrase "as appears in[.]"</p> <p>ICANN has determined preliminarily that no responsive, non-privileged documents exist with respect to Request No. 3. ICANN will confirm this is the case, or produce responsive, non-privileged documents by the production deadline of December 4, 2015.</p>	As above.	ICANN is ordered to produce all non-privileged documents responsive to Request No 3, which are not otherwise public or in the Claimant's custody, possession or control, by 4 December 2015.
4.	All communications between ICANN and the Independent Objector related to .CHARITY.	As above.	<p>ICANN objects to Request No. 4 on the ground and to the extent it seeks the production of documents that are protected from disclosure by: (a) the attorney-client privilege; (b) the attorney work product doctrine; and/or (c) any other applicable privilege or doctrine.</p> <p>ICANN will produce non-privileged documents responsive to Request No. 4.</p>	As above.	ICANN is ordered to produce all non-privileged documents responsive to Request No 4, which are not otherwise public or in the Claimant's custody, possession or control, by 4 December 2015.

No.	Document(s) requested	Reasons for request	Objections to request	Response to objections	Panel's decision
5.	<p>All communications between ICANN, including the Board or its staff, on the one hand, and the ICC, Tim Portwood or either of them, on the other hand, concerning the community objections against any one or more of the following: (a) Application ID 1-961-6109 by Excellent First Limited for .慈善 (Charity IDN); (b) Application ID 1-1241-87032 by Spring Registry Limited for .CHARITY; or (c) Application ID 1-1384-49318 by Corn Lake LLC for .CHARITY.</p>	As above.	<p>ICANN objects to Request No. 5 on the ground and to the extent it seeks the production of documents that are protected from disclosure by: (a) the attorney-client privilege; (b) the attorney work product doctrine; and/or (c) any other applicable privilege or doctrine. ICANN will produce non-privileged documents responsive to Request No. 5.</p> <p>Further with respect to Request No. 5, you propounded a request for documents that was substantively similar in <i>Donuts, Inc. v. ICANN ("Donuts")</i>, seeking communications between the ICC and ICANN related to the objection determinations you challenged in that matter. Among other documents, ICANN produced to you weekly emails sent from the ICC to ICANN that attached spreadsheets detailing the administrative progress for each objection determination. You later criticized ICANN for producing these documents, as they presumably did not advance your position. ICANN is proceeding under the assumption that you do not want to receive the same types of documents in this matter redacted to show only information relevant to .CHARITY (whereas the documents produced in <i>Donuts</i> contained unredacted information related only to the strings at issue there) unless you promptly inform us otherwise.</p>	As above.	<p>ICANN is ordered to produce all non-privileged documents responsive to Request No 5, which are not otherwise public or in the Claimant's custody, possession or control, by 4 December 2015.</p>