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February 16, 2016

VIA E-MAIL

Wendy Miles QC, Chair of Panel
Michael Ostrove
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Re: Corn Lake, LLC v. ICANN, ICDR Case No. 01-15-0002-9938

Members of the Panel:

Pursuant to the Panel's request during the 8 February 2016 hearing, ICANN submits this letter brief to address two issues. *First*, ICANN will address the recent Board resolution concerning the string .HOSPITAL. *Second*, ICANN will address whether there existed any other perceived inconsistent or unreasonable expert determinations that were "situated identically" to .CAM/.COM and .通販/.SHOP at the time the New gTLD Program Committee (NGPC) decided to send certain determinations related to those strings back to the third party dispute resolution provider for re-evaluation.

1. The Board's Decision To Send The Limited Public Interest Expert Determination On The Application For The .HOSPITAL TLD Back To The Dispute Resolution Provider Involves Very Different Facts and Does Not Demonstrate that the Board Violated Its Articles or Bylaws With Respect To The .CHARITY Application.

On 3 February 2016, the ICANN Board approved Resolutions 2016.02.03.12 - 2016.02.03.13 (3 February 2016 Resolution) to address the perceived inconsistency and unreasonableness of the .HOSPITAL Limited Public Interest (LPI) objection Expert Determination (.HOSPITAL Expert Determination) by sending all of the materials for the relevant objection proceeding back to the dispute resolution provider for re-evaluation.

A. Background Regarding The 3 February 2016 Resolution.

On 12 March 2013, the Independent Objector (IO) filed a LPI objection with the International Centre of Expertise of the International Chamber of Commerce (ICC)¹ to Ruby Pike, LLC's² application for .HOSPITAL (the Objection). The Objection was one of nine LPI objections filed by the IO against health-related applications that resulted in an Expert Determination. The materials submitted by the IO

¹ The International Centre of Expertise of the International Chamber of Commerce is the third party dispute resolution provider contracted with ICANN to oversee the LPI objection process as well as the Community Objection process. (See <https://newgtlds.icann.org/en/program-status/odr>.)

² Like Corn Lake, Ruby Pike is a Donuts subsidiary.

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and the applicants to the expert panels in each instance were very similar and, in some instances, nearly identical. Pursuant to Module 3.5.3 of the Applicant Guidebook (Guidebook), an expert panel hearing a LPI objection is to “consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.” (Guidebook, § 3.5.3.) In a 2-1 decision, the ICC expert panel upheld the IO’s objection to .HOSPITAL. The .HOSPITAL Expert Determination is the only LPI objection, out of the nine health related LPI objections that resulted in expert determinations, where the expert determination was in favor of the objector rather than the applicant. The nine expert determinations were decided by different expert panels (except that the same three member panel resolved the objections to .HEALTH).

Ruby Pike contended that this determination was unreasonable and inconsistent in light of the eight other health-related³ LPI determinations. Ruby Pike argued that the .HOSPITAL Expert Determination was just as unreasonable and inconsistent as the .CAM/.COM and .通販/.SHOP expert determinations that gave rise to the limited review mechanism discussed most recently in Corn Lake’s 10 December 2015 Reply and ICANN’s 8 January 2016 Sur-Reply. Ruby Pike and ICANN engaged in a cooperative engagement process (CEP), ICANN’s informal dispute resolution process. As part of the CEP, the Board was asked to evaluate the matter.

The Board Governance Committee (BGC) carefully considered the .HOSPITAL Expert Determination and Ruby Pike’s arguments and agreed that the Objection proceedings leading to the .HOSPITAL Expert Determination should be re-evaluated. The BGC recommended, and the Board agreed, to send the .HOSPITAL objection back for re-evaluation by a new three-member ICC panel.

B. The 3 February 2016 Resolution Is Irrelevant To These Proceedings.

The ICANN Board’s decision to adopt the 3 February 2016 Resolution does not support Corn Lake’s position in this IRP for multiple reasons, primarily because the objections to and the resolution of the .HOSPITAL and .CHARITY applications were so different. Different panels assessed the IO’s *nine* health-related LPI objections, and only the objection to .HOSPITAL was sustained. Here, the *same expert panelist* decided the .CHARITY determinations, who had access to all arguments and evidence submitted by both the IO and both applicants, and made a fully informed determination that there was a rational basis to reach different conclusions. Further, one of Corn Lake’s primary arguments is that the expert panelist should have accepted a late brief that Corn Lake submitted without any advance request, a procedural matter as to which the expert panelist has great discretion.

Moreover, a split panel decided .HOSPITAL, with one panelist dissenting, which is not the case here. And there were no competing applicants for .HOSPITAL, whereas here SRL has also applied for .CHARITY. In addition, Ruby Pike’s concerns regarding .HOSPITAL were resolved in *CEP*, meaning that the IRP standard of review did not apply, as it does here. Finally, the IO raised the essentially same arguments with respect to each of the nine LPI objections; here, for the reasons discussed at length at the Hearing and in ICANN’s briefing, there were both procedural and substantive differences between the

³ The objected-to strings were .MED, .MEDICAL, .HEALTHCARE, and .HEALTH.

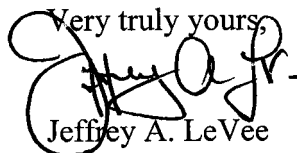
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positions taken by SRL and Corn Lake. Indeed, the situation with .HOSPITAL confirms that the Board has *discretion* to address issues associated with applications where it believes there has been an unjust result. That there now exist three (instead of two) such situations does not mean that the Board should address every perceived unfairness in the New gTLD Program.⁴

2. Counsel's Statement Regarding The "Unique" Status Of .CHARITY Is Inaccurate.

At the Hearing, counsel for Corn Lake stated that at the time the NGPC decided to send the .CAM/.COM and .通販/.SHOP determinations back to the third party dispute resolution provider for re-evaluation (the 12 October 2014 Resolution), .CHARITY was "situated *identically* to .COM/.CAM." (Corn Lake's slide presentation, § 1.3 (emphasis in original).) This statement is inaccurate.⁵ As demonstrated at the hearing on 8 February 2016 and below, the .CHARITY expert determinations are not similar to the .CAM/.COM and .通販/.SHOP determinations. Further, as explained below, aside from .HOSPITAL Expert Determination, there were no other determinations that rose to level of inconsistent and unreasonable as defined by the NGPC in the 12 October 2014 Resolution at the time that resolution was adopted.

Corn Lake really is arguing that the differing results at issue in the .CHARITY objection proceedings were equally as "unreasonable" as the .CAM/.COM and .通販/.SHOP determination outcomes. But the NGPC defined unreasonable in a precise manner, and noted that while different panels may reach differing results as to the same issues, a single panel would not, militating in favor of a re-review of all similar objections to be adjudicated by the same panelist. Other applicants have also complained that the results in their determination proceedings was equally as unreasonable as what occurred with respect to .CAM/.COM and .通販/.SHOP,⁶ and for the Board to give credence to Corn Lake's argument here, even though it was *not* "identically situated" to .CAM/.COM, would risk opening a floodgate of "appeals" for other objection determinations.

Very truly yours,

 Jeffrey A. LeVee

cc: Counsel for Corn Lake, LLC

⁴ See *Booking.com* IRP Final Declaration, ¶ 138, available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf> ("the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean it is bound to exercise it, let alone at the time and in the manner demanded by [an applicant].").

⁵ Corn Lake also offers a more precise assertion, with which ICANN does not quarrel: ".CHARITY was the only other TLD . . . where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant." (Corn Lake's slide presentation, § 5.3 (emphasis removed).) This observation does not suggest .CHARITY should have been included in the limited review mechanism because the .CHARITY determinations were already decided by the same panel, and in any event, there was a rational basis underlying the different results.

⁶ See, e.g., *Merck KGaA v. ICANN* Final Declaration ¶ 53, <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf>.