

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

DONUTS INC.	)	ICDR Case No. _____
	)	
Claimant,	)	
	)	
v.	)	
	)	
INTERNET CORPORATION FOR ASSIGNED	)	
NAMES AND NUMBERS,	)	
	)	
Respondent.	)	
_____	)	

**REQUEST FOR INDEPENDENT REVIEW PROCESS**

**BY DONUTS INC.**

**RE NEW gTLD APPLICATIONS**

**FOR .SPORTS, .SKI and .RUGBY**

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**TABLE OF ABBREVIATIONS**

AGB, Guidebook	ICANN New gTLD Applicant Guidebook
AOC	ICANN-DOC Affirmation of Commitments
Articles, AOI	ICANN Articles of Incorporation
ASOIF	Association of Summer Olympic International Federations
AWOIF	Association of Winter Olympic International Federations
BGC	ICANN Board Governance Committee
Board	ICANN Board of Directors
CAS	Court of Arbitration for Sport
CE or CEP	Cooperative Engagement or Cooperative Engagement Process
DCA Case	<i>DotConnectAfrica Trust v. ICANN</i> , ICDR IRP Case No. 50-2013-001083
DNS	Domain Name System
DOC	Department of Commerce
Donuts	Claimant Donuts Inc.
DRSP	Dispute Resolution Service Provider
FIS	International Ski Federation (objector re .SKI)
GNSO	ICANN Generic Names Supporting Organization
gTLD	Generic Top-Level Domain
ICANN	Respondent Internet Corporation for Assigned Names and Numbers
ICAS	International Council of Arbitration for Sport
ICM Case	<i>ICM Registry, LLC v. ICANN</i> , ICDR IRP Case No. 50-117-T-00224-08
IE	Initial Evaluation of new gTLD applications
IOC	International Olympic Committee
IRB	International Rugby Board (objector and competing applicant for .RUGBY)
IRP	Independent Review Process
ITF	International Tennis Federation
NGPC	New gTLD Program Committee
Procedure	New gTLD Dispute Resolution Procedure, AGB Mod. 3 Attachment
RR	Reconsideration Request

SA	SportAccord (objector and competing applicant for .SPORT, .SKI)
TLD	Top-Level Domain
UNOSDP	United Nations Office on Sport for Development and Peace
WADA	World Anti-Doping Agency

## I. INTRODUCTORY SUMMARY OF REQUEST FOR INDEPENDENT REVIEW

1. Standing. “Materially affected” by acts and omissions of ICANN’s Board contrary to its Bylaws and Articles, Donuts brings this IRP to correct those transgressions. The Board has divested Donuts of its right to compete for valuable Internet “real estate” in the form of new gTLDs – in this case, the “strings” .SPORTS, .SKI and .RUGBY.

2. Reliance. Donuts applied for these among over 300 TLDs, at \$185,000 each plus extensive infrastructure and additional resources. Donuts made these substantial investments in reliance on the terms of the New gTLD Applicant Guidebook. Having approved it, the Board must honor the contract created by the Guidebook and its duties under the Articles and Bylaws.

3. Objection Misuse. Entrenched institutional interests, claiming hegemony over rugby, skiing and all of sports, have acted to eliminate all competition for TLDs denoted by those generic topics of global appeal. They have used “community” objections in a way never intended and completely misconstrued by the experts designated to adjudicate them.

4. Bias. An expert beholden to those same interests, and disqualified for that reason from handling an identical matter, sided in two cases with objectors whose members, principals and supporters include *his own clients* and their representatives. His conflict of interest brings those .SPORTS and SKI decisions directly within the scope of IRP review, which cannot allow them to stand in breach of well recognized rules of judicial and arbitral ethics.

5. Board Action. Only the Board has the power to appoint or authorize experts to help it make decisions. Under the Guidebook, in fact, it may directly “consult with ... experts ... designated to hear objections.” The Board wields ultimate authority over the entire new gTLD program, including to consider any application individually. As such, the three objection rulings against Donuts amount to Board action reviewable and reversible by this proceeding.

6. Board Inaction. Donuts has pursued a number of channels to get the Board to rectify these actions. For instance, in November 2013 and March 2014, Donuts urged ICANN to implement an appeal or other review process for contested objection results. Donuts also has invoked accountability devices short of IRP. The Board’s failure to act subjects it to this IRP.

7. Panel Mission. IRP exists to hold ICANN accountable to all of its stakeholders and those who use the DNS worldwide. The process “compar[es] contested actions of the Board to the Articles ... and Bylaws,” to determine “whether the Board has acted consistently with” their provisions. Board action regarding the .SPORTS, .SKI and .RUGBY objections, and failures to act in light of their results, transgress many of the basic tenets of those governing documents.

8. Ignoring Documented Policies. The Board must “apply[ ] documented policies neutrally and objectively, with integrity and fairness.” Yet, it has allowed the .SPORTS, .SKI and .RUGBY panels to exceed their authority and violate this mandate, and failed to provide for review in cases of inconsistent results and clear violations of the Guidebook. For example, each panel finds “material detriment” on the perception that Donuts is not as valid a “steward” of the respective “communities” described by the strings as the objectors themselves – a ground which the Guidebook expressly forbids, and one not followed by other objection panelists.

9. Discrimination. Donuts and others applied for new gTLDs legitimately expecting that ICANN would honor the Guidebook. For its sizable investment, Donuts depends upon predictability and consistency in decision-making. Erratic application of Guidebook standards and divergent results in like cases undermine the system. The results have singled out Donuts for disparate treatment in violation of the Bylaws’ anti-discrimination creed. The Board’s refusal to use its power to impose some sort of review to create uniformity exacerbates the violation, undercuts ICANN’s credibility, and threatens future applications for new gTLDs.

10. Stifling Competition. The Board approved the Guidebook to foster competition and choice in the namespace. The .SPORTS, .SKI and .RUGBY cases use community objections as anti-competitive weapons that ICANN did not intend. The objectors have hijacked generic terms for their own use, eliminating Donuts and others from competing for these strings.

11. Breach of Good Faith. The covenant of good faith and fair dealing implied in the contract formed by the Guidebook prevents ICANN from depriving applicants of the object of the agreement. The Board has allowed panelists to alter Guidebook standards, changing mid-stream the rules on which Donuts relied in applying for the subject TLDs.

12. Lack of ICANN Accountability. The Board refuses to enforce the policies it approved for the Guidebook. It also will not correct clear violations, eschewing all methods of accountability to right such wrongs. With over a hundred objection results, one would expect some errors. The most egregious – where panelists make up new rules and cause inconsistent results – require redress. Yet, the Board has said that it need not even abide by IRP decisions. Because ICANN serves the public trust, other IRP panels have disagreed, as should this one.

13. Relief Sought. Even under the limited standard of review with which ICANN has constrained it, this Panel has the power to declare that the objection rulings and the Board’s refusal to act on them violate the Bylaws and Articles. It should direct the Board either to reverse the rulings or empanel properly trained and unbiased experts to rehear the objections.

## II. THE PARTIES

14. Donuts is a corporation organized and existing under the laws of the U.S. state of Delaware, with its principal place of business at Contact Information Redacted

. Donuts brings this IRP as sole owner of Steel Edge, LLC, Contact Information Redacted applicant for .SPORTS, Ex. 1; Wild Lake, LLC, Contact Information Redacted for .SKI, Ex. 18; and Atomic Cross, LLC, Contact Information Redacted for .RUGBY, Ex. 39.

15. ICANN is a “non-profit public benefit corporation” organized and existing under the laws of the U.S. state of California, with its principal place of business at 12025 Waterfront Drive, Suite 300, Los Angeles, California 90094-2536 USA, email [independentreview@icann.org](mailto:independentreview@icann.org) for purposes of this proceeding. On information and belief, ICANN is represented by General Counsel John Jeffrey and by Jeffrey A. LeVee, Jones Day, Contact Information Redacted Contact Information Redacted

## III. FRAMEWORK FOR THIS PROCEEDING

16. An IRP looks to the ICANN Bylaws and Articles. It holds ICANN accountable to its governing principles, and employs a standard of review defined in the Bylaws.<sup>1</sup>

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<sup>1</sup> The Bylaws, Articles and other controlling authorities appear in an accompanying Appendix of Applicable Authorities (the Bylaws at App. A and Articles in App. B). Evidence supporting this Request appears in witness statements, each cited with paragraph references as “[Surname]

**A. ICANN Governing Principles**

17. In 2009, ICANN and DOC entered into the AOC to “ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent, and “promote competition, consumer trust, and consumer choice in the DNS marketplace ....” App. D §§ 3(a), (c), 9.1, 9.3.

18. Under its Articles, ICANN “is organized, and will be operated,” to “pursue the charitable and public purposes of ... promoting the global public interest in the operational stability of the Internet ....” App. B § 3. “In ... recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, [ICANN] shall,” among other things, develop “policies for determining the circumstances under which new top-level domains are added to the DNS root system.” *Id.* Entrusted with a public mission, ICANN “shall operate for the benefit of the Internet community as a whole.” *Id.* § 4.

19. In addition, the Bylaws express “core values” to “guide the decisions and actions” of ICANN and its Board. These include:

- Promoting and sustaining a competitive environment, App. A Art. I § 2.5;
- Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest, *id.* § 2.6;
- Employing open and transparent policy development mechanisms that promote well-informed decisions based on expert advice, *id.* § 2.7;
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness, *id.* § 2.8;
- Not applying its standards, policies, procedures, or practices inequitably or singling out any particular party for disparate treatment, *id.* Art. II § 3; and
- Remaining accountable to the Internet community. *Id.* Art. I § 2.10; App. D § 9.1.

**B. Accountability and the IRP**

20. As one procedure to further accountability, ICANN created the RR, under which the BGC considers whether ICANN Board or staff action has violated an established ICANN

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Stmt. ¶ \_\_,” and in a Compendium of Exhibits with citation to each herein by number, “Ex. \_\_,” all submitted concurrently herewith.



policy or process, failed to consider material information or relied on inaccurate information, and can make non-binding “recommendations” to the full Board. App. A Art. IV §§ 2.2, 2.3, 2.17. The BGC has not made it possible to ascertain whether its recommendations mean anything to the full Board, though, as it has granted reconsideration only once out of over 100 RRs to date. See <https://www.icann.org/resources/pages/reconsideration-2012-02-25-en>.

21. “In addition to ... reconsideration,” ICANN designed the IRP as a “separate process” for review by an “independent third-party” rather than a captive body of the Board. App. A Art. IV § 3.1. Of the seven IRP cases filed to date, the only final determination ever reached, in the ICM Case, went against ICANN. App. E. Since that decision, however, ICANN has placed more obstacles in the path of subsequent IRP complainants, such as imposing short time limits, subjecting only Board action to scrutiny, and attempting to narrow the scope of review. Compare App. A Art. IV §§ 3.2-3.4 to 2009-09-30 Bylaws (App. F) Art. IV §§ 3.2-3.3.

22. Since the DOC announced it would transition its oversight to ICANN’s multiple stakeholders by September 30, 2015,<sup>2</sup> ICANN accountability has come under increased scrutiny. A unanimous GNSO,<sup>3</sup> for example, requested “the Board to support community creation of an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction in contravention of an agreed upon compact with the community” as “a necessary and integral element of the ... transition.” It went on:

True accountability does not mean ICANN is only accountable to itself .... [T]he Board's decisions must be open to challenge and the Board cannot be in a position of reviewing and certifying its own decisions. We need an independent accountability structure that holds the ICANN Board ... accountable under ICANN's governing documents ... as an ultimate review of Board/Staff decisions...

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<sup>2</sup> See <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

<sup>3</sup> GNSO members span the entire namespace: commercial and non-commercial users ranging from business and intellectual property interests and Internet service providers to non-profits, as well as “registries” that operate TLDs and “registrars” that sell users “second-level” names, left of the “dot.” See <http://gnso.icann.org/en/about/stakeholders-constituencies>. At [http://www.circleid.com/posts/20140628\\_gnso\\_constituencies\\_unanimous\\_joint\\_statement\\_icann\\_accountability/](http://www.circleid.com/posts/20140628_gnso_constituencies_unanimous_joint_statement_icann_accountability/), the Panel can find a transcription of GNSO’s entire statement.

Such statements from one of its own supporting organizations suggest that ICANN does not view itself as bound by existing accountability mechanisms such as the IRP.

23. ICANN has done its part to perpetuate that perception. In the DCA Case pending before the ICDR, ICANN argued that its Board need not follow rulings of an IRP panel. App. G ¶¶ 90-97. Unmoved, the panel in that case found a “need for a minimum adequate remedy ... where, as in this case, the party arguing that there is no compulsory remedy is ... entrusted with a special, internationally important and valuable operation” such as the DNS. *Id.* ¶ 113. Refusing to accept the IRP as “a remedial scheme with no teeth,” the panel held that “it has the power to interpret and determine the IRP Procedure,” and that its decisions bind the parties. *Id.* ¶¶ 115, 129, 131. The Panel here should likewise hold ICANN accountable for its actions.<sup>4</sup>

**C. Standard of Review**

24. In “comparing contested actions of the Board to the Articles ... and Bylaws,” an IRP panel “appl[ies] a defined standard of review,” namely:

- 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?
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

App. A Art. IV § 3.4. The “company” in whose “best interests” the Board must act is ICANN, which itself must remain faithful to “the public interest” and “accountable to the Internet community ....” App. A Art. I §§ 2.6, 2.10. A panel takes those interests into account when applying the standard of review to Board action under the Articles and Bylaws.

**D. Board Action and Inaction**

25. A party has a right to independent review where it has “suffer[ed] injury or harm ... directly and causally connected to the Board’s ... violation of the Bylaws or the Articles ....” App. A Art. IV § 3.2. IRP calls upon this Tribunal to “declare whether an action *or inaction* of the

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<sup>4</sup> “The declarations of the IRP Panel ... have precedential value.” App. A Art IV § 3.21.

Board was inconsistent with the Articles ... or Bylaws.” App. A Art. IV § 3.11.c. The Guidebook and Bylaws together make clear that both the objection rulings themselves, as well as the Board’s failure to correct them, constitute reviewable Board action and inaction.

26. “[T]he powers of ICANN shall be exercised by ... the Board.” App. A Art. II § 1. The entire new gTLD program emanates from the Board’s exercise of that power. In June 2008, the Board adopted GNSO policy recommendations for a new gTLD program. App. C Preamble. ICANN implemented that Board-approved policy through numerous Guidebook drafts and stakeholder comments, culminating in the Board’s decision in June 2011 to launch the new gTLD program. *Id.* “As approved by the ICANN Board of Directors, this Guidebook forms the basis of the New gTLD Program.” *Id.* § 1.2.11 (emphasis added).

27. The AGB contemplates continuing Board involvement in the new gTLD program, including with objections. For example, it authorizes the Board in certain circumstances to “consult with independent experts,” even “those designated to hear objections ....” *Id.* § 3.1.

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.

*Id.* § 5.1. The Guidebook expressly envisions “the use of an ICANN accountability mechanism,” such as this IRP, to enforce the Board’s authority with respect to the new gTLD program. *Id.*

28. Further, only the Board has the power to appoint or authorize the appointment of experts to assist it in decision-making. App. A Art. XI-A § 1.2.a. The appointment “shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.” *Id.* § 1.4. The Guidebook and Procedure do exactly that for experts designated to hear new gTLD objections.

29. The Guidebook acknowledges that panels determining new gTLD objections act as experts appointed by or under authority of the Board pursuant to the Bylaws. “The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.” App. C § 3.4.6. Under the Bylaws, however, such advice

“is advisory and not binding, and is intended to augment the information available to the Board ... in carrying out its responsibilities.” App. A Art. XI-A § 1.5.

30. Reading these charters together, the Board “will accept” panel decisions unless it wields its ultimate authority, either on its own or by an accountability mechanism such as IRP, to cure the breaches of the Bylaws and Articles perpetrated by such decisions. Thus, both the objection rulings themselves and the Board’s failure to correct them constitute Board “action” and “inaction.” This Panel should exercise its express authority to declare whether such “action or inaction of the Board was inconsistent with the Articles ... or Bylaws.” App. A Art. IV § 3.11.

#### **IV. FACTS**

##### **A. The New gTLD Program**

31. Consistent with its governing principles, ICANN adopted its new gTLD program to enhance choice, competition and free expression.<sup>5</sup> Having the same goals, Donuts subsidiaries applied for 307 new gTLDs, including .SPORTS, .SKI and .RUGBY. Its economies of scale allow Donuts to offer “boutique” domains on subjects that otherwise might not find their way to the sprawling “department store” of existing gTLDs, such as .COM and .NET, which have not experienced such competition. Nevett Stmt. ¶¶ 5-6. Donuts would make each domain open to all legitimate uses of the multiple meanings that Internet users may ascribe to the common, English-language words chosen for those strings, as all of its applications forthrightly state:

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN’s new TLD program.

This TLD is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN’s objective of maximizing Internet

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<sup>5</sup> See App. A Art. I §§ 2.5, 2.6; App. B § 4; App. C Preamble, § 1.1.2.3, Mod. 2 Attmt. at A-1; App. D § 9.3. Because the Guidebook exceeds 300 pages, we include only Module 3 and the Procedure attached to it, together with any other portions specifically cited herein.

participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

See § 18(a) of Exs. 1, 18 and 39. With nearly two dozen anti-abuse mechanisms not required of existing gTLDs, these TLDs would operate neutrally, without favoring any one constituency, giving *all* users nondiscriminatory and highly protected access. *Id.*; Nevett Stmt. ¶¶ 7-10.

32. Procedurally, an applicant must submit an exhaustive application, App. C § 1.1.2.2, and on the merits meet detailed string and applicant qualification criteria, *id.* § 1.1.2.5, even to qualify for a new gTLD. The rigorous process involves review by as many as six third-party panels assembled by ICANN for expertise in evaluating technical, financial and registry service capabilities of applicants, as well as DNS stability and naming issues. *Id.* §§ 2.1, 2.2, 2.4.

33. The AGB provides for a period to object to qualified applications, substantive criteria for such objections, and the separate Procedure for handling them. App. C Mod. 3 and Attmt. to Mod. 3. The “community” objections here “must meet all four tests” below:

- A “clearly delineated community” invoked by the objector;
- “Substantial opposition” to the application from that community;
- “Strong association” between that community and the applied-for string; and
- A “likelihood” that the application will cause “material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be ... targeted.”

*Id.* § 3.5.4. “The objector bears the burden of proof in each case.” *Id.* at 3-18.

#### **B. Objection and Ruling re .SPORTS**

34. In line with its philosophy of inclusiveness behind its carefully planned choice of generic terms, Donuts did not apply for .SPORTS or any other TLD as a community. Ex. 1 § 19; Nevett Stmt. ¶ 7. Two competitors applied for .SPORT – SportAccord and dot Sport Limited.

See <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>. SA applied as a community, *id.*, and also objected to the dot Sport and Donuts applications on that basis.

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

35. SA dubs itself “the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events.” Ex. 2 at 6. It objected to Donuts’ application on behalf of what it calls the “sport community,” which it defines in full and verbatim as:

The community of individuals who associate themselves with Sport. Sport is activity by individuals or teams of individuals aiming at healthy exertion, improvement in performance, perfection of skill, fair competition and desirable shared experience between practitioners as well as organizers, supporters and audience.

*Id.* at 8 ¶ T1a. SA states clearly, “Individual practitioners of sport, sport spectators, sport fans and sport sponsors are part of the Sport community ....” *Id.* at 10 ¶ T1b. Despite its concession that “[a]ny person in the world can be a member,” SA asserts that this “community” is “clearly delineated,” one of the objection criteria. *Id.* at 9 ¶ T1c; App. C § 3.5.4.

36. SA also contends that Donuts’ application meets a second of the four community objection factors – namely, that it “targets” the claimed community. App. C § 3.5.4. SA asserts that “the word ‘sport’ or ‘sports’ is almost exclusively associated with organized sport, sport for leisure and sport for health, in line with [SA’s] definition....” Ex. 2 ¶ T3b.

37. For the third prong of the community test, App. C § 3.5.4, the objection cites as “substantial opposition” various “official statements” of the IOC, WADA and UNOSDP; itself on behalf its 107 member federations; and individual federation statements of opposition. Ex. 2 at 9 ¶ T2b.<sup>6</sup> The IOC and WADA have a close association with SA; representatives of all three make up the advisory board of SA’s Doping-Free Sport Unit.<sup>7</sup>

38. For the fourth, “material detriment” aspect of the objection, SA alleges possible “ambush marketing,” cybersquatting, pornography, illegal gambling, racism, bullying, “hooliganism,” ticket scalping and disruption of SA’s dispute resolution, anti-doping and other efforts, all combining to cause monetary harm in an amount estimated at over \$400 billion over

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<sup>6</sup> It appears that SA members comprise about 90% of the international federations individually opposed to Donuts’ application. See Exs. 3, 4.

<sup>7</sup> See <http://www.sportaccord.com/en/search/?idContent=16246>; see also <http://www.sportaccord.com/en/search/?idContent=16323>.

ten years.<sup>8</sup> Throughout its objection, SA predicts these consequences if anyone other than a representative “accountable” to the “community” – *i.e.*, itself – “controls” a .SPORTS registry.<sup>9</sup>

39. Donuts responded to the objection on May 22, 2013. Ex. 5. Thereafter, SA lobbied for a panelist with “a good knowledge of the activities of the ... Sport Community” and “familiarity with the institutional framework of such Community.” Ex. 6.

40. The ICC nominated Jonathan Peter Taylor to preside over the .SPORTS objection on June 25, 2013. Ex. 7. Mr. Taylor is a partner of the UK firm Bird & Bird, with background in “advising international and national governing bodies, public and quasi-public agencies” on the “full range of commercial, contentious, regulatory and disciplinary issues that arise in the sports sector.” Ex. 9. The specific disclosures he made regarding his .SPORT appointment indicate that his firm had represented the IOC in the past, but since had acted adverse to it. Ex. 8.

41. From the generality of his disclosures, Donuts did not challenge the appointment of Mr. Taylor to the .SPORTS panel, which the ICC made final on July 16, 2013. Nevett Stmt. ¶ 13; Ex. 12. However, as described more fully below, it did move – unsuccessfully – to disqualify him from the .SKI panel for which he also was nominated, based on his disclosures in that case.

42. Further, yet unbeknownst to Donuts at the time, the ICC had also appointed Mr. Taylor to hear SA’s community objection to dot Sport’s application for .SPORT. Nevett Stmt. ¶ 14; Young Stmt. ¶ 3. On the same day the ICC designated Taylor for SA’s objection against Donuts, dot Sport asked for his removal from *its* case, presenting detailed evidence of bias. Young Stmt. ¶ 3, Ex. 10. The ICC ultimately granted dot Sport’s request to remove him from that panel. *Id.* ¶¶ 4-5, Exs. 11, 13. Despite knowing the potential conflicts of Mr. Taylor and his firm, the ICC confirmed his appointment to the Donuts panel on July 16 – the same day it announced it would consider removing him from the dot Sport panel. Exs. 11, 12. On January 22, 2014, Mr. Taylor issued his ruling upholding SA’s objection. Ex. 14 at 24 ¶ 45i.<sup>10</sup>

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<sup>8</sup> See *id.* at 11-17 ¶¶ T4a1, T4a2, T4a5, T4b2-b7, H3a.

<sup>9</sup> See *id.* at 11-17 ¶¶ T4a1, T4a2, T4a4-a9, T4b, T4b2-b7.

<sup>10</sup> A different panel had upheld SA’s community objection to the dot Sport application. That decision received vociferous criticism for failing to adhere to AGB standards. See, *e.g.*,

### C. Objection and Ruling re .SKI

43. Donuts made a standard application to operate .SKI as a registry open to all, including those interested in snow, water or sand skiing. Ex. 18 §§ 18-19. A company named Starting Dot Limited, supported by FIS,<sup>11</sup> made the only other .SKI application, as a community.

44. FIS filed a community objection to Donuts' application on March 13, 2013, on behalf of a "community" defined by downhill and cross-country snow skiing. Ex. 19 at 6 § 6.3. As does SA for .SPORTS, FIS cites doping, gambling, bullying and similar concerns as "material detriment" to a .SKI registry run by anyone, unlike itself, not "accountable" to the alleged community, and estimates damages of about €450 million over 10 years. *Id.* at 11-14. Donuts timely opposed the objection on May 15, 2013. Ex. 20.

45. On June 19, 2013, the ICC nominated Jonathan Taylor as panelist, and provided his disclosures. Exs. 21-23. There, Mr. Taylor states specifically that he knows Sarah Lewis from having "advised" a WADA "working party" on which she served. Ex. 22 at 2. The FIS objection identifies Ms. Lewis as FIS's representative. Ex 19 at 2.

46. On June 30, 2013, Donuts objected to Mr. Taylor's appointment. "[A]nyone who has provided legal advice to someone within an organization that later appears before him in an adversary proceeding – and which raises issues that relate specifically to matters covered by the prior professional relationship – would have difficulty putting that history aside when rendering a decision that could affect that organization" and should be replaced. Ex. 24 at 3.

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<https://www.icann.org/en/system/files/correspondence/sahjwani-et-al-to-chalaby-et-al-01nov13-en.pdf>; <http://domainincite.com/14959-applicants-call-for-new-gtld-objections-appeals-process>. One blogger authored an elaborate parody, involving an imagined community objection to a ".BREATHE" domain, in which panelist Aru Kiddinme finds a "clearly delineated" community "defined by only those human beings who have ever breathed a breath on the planet Earth." <http://domainnamewire.com/2013/10/29/breatheaccord-wins-community-objection-against-breathe-top-level-domain-name/>. The decision against Donuts' application for .SPORTS elicited similar criticism. See, e.g., <http://domainnamewire.com/2014/01/22/there-will-be-no-sports-top-level-domain-in-the-first-round/>.

<sup>11</sup> See <http://www.dot-ski.com/community/main-partner/>. The objection lists Sarah Lewis of FIS as one of its representatives, and Godefroy Jordan of Starting Dot as its contact. Ex. 19 at 2.



47. On July 1, Starting Dot, as “attorney” for FIS, opposed Donuts’ objection to Mr. Taylor’s appointment. Ex. 25. On July 12, the ICC invited a response from Mr. Taylor, which he timely provided. Exs. 26, 27. His response stated that he of course could not rule upon his own disqualification, but noted that he agreed with the statements of FIS on the issue. Ex. 27.

48. On July 25, 2013, the ICC rejected Donuts’ request to remove Mr. Taylor from the panel. Ex. 28. It did so even though, *on the same day*, it *granted* dot Sport’s request to remove Mr. Taylor from the .SPORT panel based on more general conflicts than Donuts had raised in its objection to Taylor’s .SKI appointment. *See* Exs. 10, 13.

49. Meanwhile, on June 27, FIS submitted a reply in support of its community objection. Ex. 29. Donuts urged the rejection of the unsolicited filing on July 3. Ex. 30. After his appointment was confirmed, Mr. Taylor accepted the supplemental FIS submission on August 2, 2013, and allowed Donuts two weeks to respond, which it timely did. Exs. 31, 32.

50. On September 19, 2013, Mr. Taylor advised the parties that he would submit his draft ruling to the ICC the next day. Ex. 33. Not until January 22, 2014, however, did his final determination issue. Ex. 34. It upheld the FIS objection against Donuts. *Id.*

#### **D. Objection and Ruling re .RUGBY**

51. Donuts applied for .RUGBY, Ex. 39, in competition with dot Rugby Limited and IRB. *See* <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>. No one, including IRB, applied on behalf of a community. *See id.* Nevertheless, IRB objected to Donuts’ application on community grounds, Ex. 40, as it did against dot Rugby.

52. “In its capacity as trusted steward for the sport, IRB maintains that control and management of the .RUGBY TLD must be lodged with an entity such as IRB that will act for the benefit of the Rugby Community.” Ex. 40 at 10. Otherwise, according to IRB, the “community” would suffer “material detriment” by ambush marketing, ticket scalping, counterfeit merchandise, cybersquatting and “reputational” and other asserted harms. *Id.* at 10-12. Donuts timely responded to the objection. Ex. 41.

53. The ICC first appointed Richard McLaren as panelist for the objections. Because of his service as a CAS arbitrator – designated by ICAS, the majority of whose members are, in turn, appointed directly or indirectly by SA members that include IRB and FIS – Donuts requested Mr. McLaren’s removal from the panel on July 23, 2013. Ex. 42. Dot Rugby joined in that request the same day, and both IRB and Mr. McLaren himself opposed it on August 1. Exs. 43-45. The ICC announced its decision to remove Mr. McLaren from the panel on August 23, Ex. 46, and appointed a new panelist, Mark Kantor, on August 27, 2013.

54. Mr. Kantor’s ruling – dated January 31, 2014, over five months later – upholds both objections. Ex. 47. It finds that the Donuts application creates a likelihood of material detriment because it:

... does not offer community members an enforceable voice in governance of a gTLD strongly associated with that community. The governance structure for a community-associated domain must necessarily be more protective of the interests of that community than the governance structure for a generic domain.

Ex. 47 ¶ 88. The ruling thus essentially requires Donuts to operate the TLD as a community.

#### **E. Subsequent Unsuccessful Resolution Efforts Necessitating This Review**

55. When the ruling came out against dot Sport on SA’s community objection to its .SPORT application, Donuts joined eleven other applicants, which account for hundreds of applications beyond the 307 filed by Donuts, in a call for ICANN to establish a procedure to appeal from adverse objection rulings, or for review to assure compliance with the Guidebook and consistency with decisions on similar objections. Nevett Stmt. ¶ 17, Ex. 52. Donuts made that request again on March 12, 2014. *Id.* Ex. 51. It has received no response. *Id.*

56. On December 23, 2013 and January 24, 2014, respectively, Donuts filed RRs challenging the objection rulings with respect to two strings not involved in this IRP.<sup>12</sup> On February 5 and 27, 2014, respectively, the BGC declined reconsideration on the grounds that it could not review the merits, and ruled that the decisions did not exceed policies expressed in

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<sup>12</sup> See <https://www.icann.org/en/system/files/files/request-ruby-pike-27dec13-en.pdf>; <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>.

Guidebook standards for the objections.<sup>13</sup> In each case the BGC stated, “If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.”<sup>14</sup>

57. As the BGC directed, Donuts asked the Ombudsman in late March 2014 to act on rulings against Donuts that include the three at issue in this case. Nevett Stmt. ¶ 18. On July 7, 2014, the Ombudsman concluded that he did not have jurisdiction to do so. *Id.*

58. Donuts requested “cooperative engagement” with ICANN (“CE” or “CEP”) on July 18. *Id.* ¶ 19. That process with regard to the strings at issue ended September 19, 2014, during which time the period within which to initiate IRP was tolled. *Id.*; *see also* App. H.

59. Donuts timely makes this request for IRP. The Board has not acted on its requests of November 1, 2013 and March 12, 2014 for an appeal or other review process specifically for new gTLD objection rulings. Also, Donuts meets the combined 30-day period from July 7 to 18, the dates the Ombudsman rejected Donuts’ complaint and Donuts requested CE, and from the September 19 close of CE to the date of this IRP. App. A Art. IV § 3.3.<sup>15</sup>

## **V. BREACHES OF BYLAWS, ARTICLES AND OTHER ICANN GOVERNING PRINCIPLES**

60. Donuts brings this proceeding regarding .SPORTS, .SKI and .RUGBY together because of their many similarities. The general subject matter of the TLDs obviously overlaps. Challenges to appointed experts were made relating to each, with the failure to remove the panelist in two of those cases tainting the rulings and compelling their annulment. All three cases involve community objections and the documented policies that govern them. The misapplication of those standards has resulted in disparate treatment in violation of the Bylaws.

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<sup>13</sup> The RRs did not seek, and the BGC did not conduct, review based on any ICANN policies other than those set forth in the Guidebook as to the particular objections at issue.

<sup>14</sup> <https://www.icann.org/en/system/files/files/determination-ruby-pike-05feb14-en.pdf> at 15; <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf> at 14-15.

<sup>15</sup> Moreover, as a result of the objection rulings, nothing has occurred that Donuts asks this Tribunal to undo. ICANN has not yet delegated any of the subject strings to other applicants. Donuts concurrently requests emergency relief to prevent that from occurring pending this IRP.

61. This review enforces the accountability obligations of ICANN and its Board. Granting the requested relief will reinstate Donuts' applications for the subject domains, in keeping with ICANN's mandate to promote competition, which the Board has refused to do.

**A. The Board Allowed Decisions on .SPORTS and .SKI to Result from Conflicts.**

62. An IRP determines, among other things, whether the act under review took place "without conflict of interest" and as a result of "independent judgment." App. A Art. IV §§ 3.4.a, c. The Bylaws also require "applying documented policies neutrally and objectively, with integrity and fairness." *Id.* § 2.8. The panels for the .SPORTS and .SKI objections, constituted under the Bylaws solely by authority of the Board, breached these fundamental principles.

63. The ruling on the .SPORTS objection in particular reflects a panelist going out of his way to find in favor of the entrenched interests with which he and his firm long worked. Mr. Taylor agrees with Donuts that "the community of individuals and organizations who associate themselves with Sport" is "boundlessly wide" and "too broad, diverse and wide-ranging in interests to be 'clearly delineated:'"

The Expert agrees that 'the community of individuals and organizations who associate themselves with Sport', on its face, is *a very broad group with no clearly delineated boundaries*. If [SA] had stopped there, the Expert considers that [Donuts] would be right that [SA] had failed to satisfy this requirement ...

Ex. 14 ¶¶ 14.2-14.4 (emphases added). Mr. Taylor goes on, though, to construe "community" in a way that SA explicitly had *not* defined it, stating that it "refer[s] to the individuals and organisations who associate themselves with organized sport," which he calls the "Organised Sports Movement." *Id.* ¶ 14.4 (emphasis in original). Thus, he strains to find a "clearly delineated" community, even though SA itself had "delineated" it to include: (i) "individuals and organizations who associate themselves with Sport;" (ii) "practitioners as well as organizers, supporters and audience;" (iii) "individual practitioners of sport, ... spectators, ... fans and sponsors;" and (iv) "any person in the world." Ex. 2 at 8-9 ¶¶ T1a-c. Nevertheless:

... when the vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model [atop which SA claims to sit].

Ex. 14 ¶ 16.1. Citing no evidence for this “self-evident” proposition, Mr. Taylor reveals his proclivity to side with entrenched sports interests.

64. That Mr. Taylor possesses such an inclination appears to result from his direct representation of and other involvement with such interests, which manifested itself more clearly with his decision than it had with his disclosures:

- He cites as evidence of “substantial opposition” a letter from WADA, a working group of which he admits to having “advised.” Ex. 14 ¶¶ 26, 27; Ex. 8\_.
- He accepts as “likely detrimental” to the “organized” sports “community” the prospect of “ambush marketing” in a Donuts-run .SPORTS registry, in line with his history of taking “action in the courts against third parties ambushing/infringing on sports’ bodies events and rights.” Ex. 14 ¶¶ 41.1.1, 41.3, 43.4; Ex. 9.
- He cites as legal authority for one of his conclusions a case in which he acted as lead counsel for ITF, a SA member. Ex. 14 ¶ 43.3; Ex. 15.

65. Mr. Taylor himself having alerted it to his alignment with institutional sports interests, Donuts has since uncovered further conflicts:

- In addition to advising one of its working groups (Ex. 8), Mr. Taylor has represented WADA, one of the supporters of SA’s objection, as lead counsel before the CAS.<sup>16</sup>
- Mr. Taylor and others in his firm have represented, in addition to ITF, several other SA members and supporters of its objection (Exs. 3, 4), including IAAF,<sup>17</sup> FEI,<sup>18</sup> and International Cricket Council (ICC).<sup>19</sup>
- The president of ITF, Mr. Taylor’s client, is also president of ASOIF.<sup>20</sup> Sarah Lewis of FIS, who served on the WADA working group advised by Mr. Taylor (Ex. 8), is Secretary-General of AWOIF.<sup>21</sup> Together, ASOIF and AWOIF, all of whose members

<sup>16</sup> <http://www.tas-cas.org/d2wfiles/document/5879/5048/0/Award20265820FINAL.pdf>.

<sup>17</sup> [http://www.tas-cas.org/d2wfiles/document/7467/5048/0/Award20348720\\_internet\\_.pdf](http://www.tas-cas.org/d2wfiles/document/7467/5048/0/Award20348720_internet_.pdf)

<sup>18</sup>

[http://www.doping.nl/media/kb/1166/CAS%202012\\_A\\_2959%20WADA%20v.%20Ali%20Nilfor%20%26%20FEI%20%28S%29.pdf](http://www.doping.nl/media/kb/1166/CAS%202012_A_2959%20WADA%20v.%20Ali%20Nilfor%20%26%20FEI%20%28S%29.pdf)

<sup>19</sup> [http://static.icc-cricket.com/ugc/documents/DOC\\_CF78CCD3836520E24F2D2D68A6B28766\\_1326261335095\\_886.pdf](http://static.icc-cricket.com/ugc/documents/DOC_CF78CCD3836520E24F2D2D68A6B28766_1326261335095_886.pdf)

<sup>20</sup> <http://www.asoif.com/About/Default.aspx>

<sup>21</sup> <http://www.olympic.org/content/the-ioc/governance/international-federations/?tab=aiowf>

also belong to SA,<sup>22</sup> directly appoint four, and indirectly eight more, of the 20 members of the ICAS board, which in turn appoints all CAS arbitrators.<sup>23</sup>

- Martin Schimke of Bird & Bird regularly serves as a CAS arbitrator.<sup>24</sup> Citing the same affiliation, Donuts succeeded at removing Richard McLaren, the panelist initially appointed to hear the objection to its .RUGBY application. See Exs. 42, 46.
- Mr. Taylor was a panelist at SA's 2011 LawAccord Conference.<sup>25</sup>

In addition, the ICC possessed the information that dot Sport had provided regarding Mr. Taylor, and the request by Donuts to disqualify him from the .SKI panel. Exs. 10, 24.

66. The information offered by dot Sport sufficed for the ICC to disqualify Mr. Taylor from ruling on SA's objection to .SPORT, and should have caused the ICC to do likewise with the same panelist for .SPORTS and .SKI. Donuts specifically objected to Mr. Taylor's designation for the .SKI objection, and while it did not do so regarding .SPORTS, it would have done so but for the fact that it did not have the same type of information from Mr. Taylor's disclosures that it had for .SKI. Nevett Stmt. ¶¶ 13-14. Ethical principles applicable to international arbitrators place the onus on the prospective panelist to investigate and disclose potential conflicts, not on any one party to uncover them. Sarvarian Stmt. ¶¶ 18, 22 and n.19.

67. Nevertheless, Donuts *has* discovered further information, evidencing what Mr. Taylor should have disclosed, whereupon he should not have remained on the .SPORTS or .SKI panels. *Id.* ¶¶ 25-29, 32-34, 36-41. As part of a small group who often serve organized sports interests, often claiming more sweeping jurisdiction than they have, it comes as no surprise that Mr. Taylor sided with such interest against Donuts. Edelman Stmt. ¶¶ 13-19, 23, 25-30.

68. The ICC has shown that it knows when it should remove panelists, having done so in the indistinguishable case of .SPORT, and with the initial .RUGBY panelist. With standards and procedures born from the Guidebook and employed for the first time, these matters call

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<sup>22</sup> Compare Ex. 3 to links immediately above in fns 20, 21.

<sup>23</sup> [http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20(en).pdf) Arts. S4, S6 § 3.

<sup>24</sup> <http://www.twobirds.com/en/our-lawyers/m/martin-schimke1>

<sup>25</sup> [http://www.sportaccordconvention.com/sites/default/files/page/file/SportAccord\\_day3.pdf](http://www.sportaccordconvention.com/sites/default/files/page/file/SportAccord_day3.pdf) at 3.

for heightened sensitivity. Mr. Taylor should not have served as the panelist in either case, and the taint of his having done so cannot allow his decisions to stand.

69. The Board cannot say that the .SPORTS and .SKI decisions were taken without conflict of interest. Its lack of action despite this subjects it to IRP review. App. A Art. IV § 3.4.a.

**B. The Board Failed in All Three Case to Exercise Independent Judgment to Ensure Consistent Application of Documented Governing Policies, Violating the Bylaws and Articles in a Number of Ways.**

70. All three cases reflect failures to observe other provisions of the Bylaws and Articles. These violations, as well as the Board’s refusal to act on Donuts’ still-pending requests for a new gTLD objection review mechanism, constitute Board action or inaction subject to IRP.

**i. The Board failed to “inform” community objection panels sufficiently for them to apply “documented policies” appropriately.**

71. The Bylaws call for “open and transparent policy development mechanisms that promote well-informed decisions based on expert advice.” App. A Art. I § 2.7. The Board does not appear to have “informed” panels adequately regarding the standards that the AGB impels them to employ. Omitting to train experts sufficiently resulted in failure of the panels to apply the Guidebook’s “documented policies ... objectively ... and fair[ly].” *Id.* § 2.8.

72. All three cases effectively hold that Donuts cannot acceptably operate any of the three domains unless it does so as a community. *See, e.g.,* Ex. 39 ¶ 88 (“material detriment” will result because Donuts does not indicate it will give “community members an enforceable voice in governance of ... a community-associated domain”). The panels accept the position of all three objectors that only they, as recognized “stewards” of their respective “communities,” have the ability to run the TLDs in the best interests of those alleged communities.

73. By contrast, the Guidebook explicitly vests an applicant with sole discretion over whether to submit a standard or a community application. App. C § 1.2.3.1. And, for community objections, it unequivocally states that claiming detriment from “the applicant being delegated the string instead of the objector will not be sufficient ....” *Id.* § 3.5.4 at 3-24.

74. Also, in the case of .SPORTS most notably, the panel exceeded its authority in defining the “community” more narrowly than SA had done. The term “sports” covers a much broader universe.<sup>26</sup> SA’s definition itself concedes this; the “community” can include “anyone in the world.” However, casting such a wide net does not capture a true “community,” which implies “more ... cohesion than a mere commonality of interest,” and “an awareness and recognition of a community among its members.” App. C § 4.2.3 at 4-11.<sup>27</sup>

75. Nor did the new gTLD program approved by the Board have such an intent, as ICANN encapsulated the “ultimate goal of the community-objection process” to:

... prevent the misappropriation of a community label by delegation of a TLD and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.<sup>28</sup>

The .SPORTS panel viewed the string itself as too broad to label a true community, yet all three kept Donuts from obtaining that and the .SKI and .RUGBY TLDs legitimately directed to all users with an interest in those generic terms. The objections served as anti-competitive weapons to eliminate Donuts’ otherwise valid applications improperly. App. A. Art. I § 2.8.

**ii. The Board has failed to make divergent results consistent with “documented policies,” resulting in “disparate treatment.”**

76. The Board could rectify its failure to train on the front end with corrective action on the back end. It has the power to “consult with independent experts ... designated to hear objections,” and to consider individual applications to determine how or if they should proceed. App. C §§ 3.1, 5.1. The ICC itself flatly refused to conduct substantive consistency reviews:

NEITHER THE CENTRE NOR THE STANDING COMMITTEE CAN CHANGE THE SUBSTANTIVE DECISION OF THE EXPERT PANEL.

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<sup>26</sup> Mr. Taylor’s narrower view predictably coincides with his “organized sports” background, and reflects the growing tension in sporting circles between individual and institutional interests as the latter continue to exert greater influence. Edelman Stmt. ¶¶ 23, 26, 30.

<sup>27</sup> A party cannot simply claim a generic word as a “community” descriptor. A panel rejecting community status for an application for .MUSIC, for example, “determined that this application refers to a ‘community’ construed to obtain a sought-after generic word as a gTLD string.” <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf> at 4.

<sup>28</sup> See <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf> at 94.



[newgtlds.icann.org/en/program-status/odr/webinar-icc-09jan14-en.pdf](http://newgtlds.icann.org/en/program-status/odr/webinar-icc-09jan14-en.pdf). With the DRSP declining to act, and as done at other stages of the new gTLD program, the Board should have put in place oversight mechanisms and procedures for ensuring panels arrived at consistent results based upon the standards provided in the Guidebook. Pritz Stmt. ¶¶ 19-25.

77. Widely differing applications of Guidebook rules lead to inconsistent results and offend ICANN’s non-discrimination directive. “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” App. A Art. II § 3. The rulings in .SPORTS, .SKI and .RUGBY single Donuts out for disparate and adverse treatment,<sup>29</sup> and thwart rather than promote competition. This results directly from the Board’s failure to assure consistent adherence to AGB principles as it should have done. This Panel can remedy the Board’s refusal to consider such wildly inconsistent objection results, or to act on them for the benefit of all DNS users. App. A Art. IV § 3.4.b., c.

**iii. Inconsistent application of “documented policies” contravenes applicable law.**

78. ICANN also must conform to relevant principles of international and local law. App. B § 4. The Guidebook establishes globally the “law” for the new gTLD program generally and for community objections specifically.

79. The Board launched the new gTLD program upon the recommendation of the GNSO. See App. C Preamble. The final GNSO report adopted by ICANN states, “New generic top-level domains (gTLDs) must be introduced in an orderly, timely and *predictable* way.”<sup>30</sup>

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<sup>29</sup> Many sports-related strings, such as .FISHING, .SURF, .DANCE, .CRICKET, .FOOTBALL and .RACING, despite being subject to the same potential “detriments,” have gone unchallenged. See <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>. Community objections to .BASKETBALL and strings that similarly describe both general and more specific subject matters – e.g., .BOOK, .CLOUD, .GAME, .HOTELS, .MAIL, .MUSIC and .REPUBLICAN – likewise have failed. See <http://newgtlds.icann.org/en/program-status/odr/determination>. See also <http://newgtlds.icann.org/en/applicants/cpe#invitations> (.TENNIS not a community).

<sup>30</sup> <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>, Princ. A (emphasis added).

All applicants for a new gTLD registry should ... be evaluated against transparent and *predictable criteria*, fully available to the applicants *prior to the initiation of the process*.... [N]o subsequent additional ... criteria should be used.<sup>31</sup>

The community criteria became embodied in the Guidebook. Donuts chose deliberately to apply for new gTLDs using generic terms that describe subjects of broad interest, relying on the competitive goals of the program and the limited purpose and express standards of community objections, and understanding it had no obligation to operate for the benefit of or to restrict access to any particular group. Nevett Stmt. ¶¶ 5-7.

80. Applicants agree to the terms of the Guidebook by applying for a new gTLD, thus forming a contract on those terms with ICANN, a California corporation. App. C Mod. 6 Intro. Those who succeed must enter into registry agreements that provide for exclusive California enforcement jurisdiction. *Id.* Mod. 6 § 10; Mod. 5 Attmt. § 5.2. The law of California implies in all contracts a covenant of good faith and fair dealing that neither party will “do anything which will deprive the other parties thereto of the benefits of the contract.” *Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960); *see also Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218 Cal. App. 4th 1230, 1244 (2013). Donuts thus had the right to expect that, by submitting an application complying with the Guidebook, the application would not have any additional terms imposed upon it, including that it operate for the benefit of any one community. By allowing panels to wrongfully impose that prohibited burden on Donuts, the Board has breached the covenant of good faith and fair dealing in contravention of “local” law and the Articles. App. B § 4.

**C. The Board Must but Has Failed to Act with Accountability and for the Benefit of the Internet Community As a Whole.**

81. ICANN acts in “the global public interest” and must “[r]emain[ ] accountable” to that interest. App. A Art. I § 2.10; App. B §§ 3, 4; App. D § 9.1. However, it did not build accountability into the new gTLD objection process. It opted against an appellate process,<sup>32</sup> and has not acted on Donuts’ request for such a remedy. Nevett ¶¶ 17, 20, Exs. 51, 52.

<sup>31</sup> *Id.* Rec. 1 (emphases added).

<sup>32</sup> *See* <http://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>.

82. Existing accountability tools have proved valueless. To date, aggrieved parties have filed dozens of RRs from new gTLD objection decisions against them, with all but one denied. An outcry over inconsistent results from another type of objection has led the NGPC to propose a “review mechanism to address” such at-odds results, but only as to two string groups.<sup>33</sup> Comments in response call for ICANN to “widen” the review process “to include cases” where “the results were just as inconsistent,”<sup>34</sup> and to “undergo a similar review mechanism in cases of inconsistent outcomes with ... Community objections.”<sup>35</sup> The GNSO has asked the Board generally to create “an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction.”<sup>36</sup> The Board, however, has taken no action on any of these requests.

83. For community objections – an entirely new procedure for which no precedent exists – ICANN provided for but a single panelist, while prescribing or allowing for 3-member panels for more familiar types of disputes.<sup>37</sup> It selected a completely inexperienced provider in the ICC. *Id.* Art. 3(c), (d). The ICC’s lack of domain name experience has led to significant criticism of its handling of new gTLD objections.<sup>38</sup> The Board alone had the power to appoint the DRSPs, yet failed to see to their proper training.<sup>39</sup> This became apparent when the ICC took

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<sup>33</sup> <https://www.icann.org/public-comments/sco-framework-principles-2014-02-11-en>.

<sup>34</sup> See <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfRLQ8MpMNuv.pdf>.

<sup>35</sup> See <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfJC5UktBBxf.pdf> (Donuts’ response to request for public comment). See also <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfwgCYo2go5h.pdf> (Comments by ICANN’s Business Constituency, calling for broad appeal mechanism and citing similar comments by others).

<sup>36</sup> See citation at ¶ 22, *supra*.

<sup>37</sup> This refers to “legal rights objections,” involving trademarks, and “limited public interest” objection, which apply documented principles of international law. See App. C §§ 3.5.2, 3.5.3.

<sup>38</sup> See, e.g., <http://domainincite.com/15304-should-new-gtlds-objections-have-an-appeals-process> (“Community Objection ... panels often seem to be making up rules as they go”).

<sup>39</sup> The Memorandum of Understanding by which ICANN engaged the ICC for LPI and community objections, <https://www.icann.org/en/system/files/files/icc-mou-12jun12-en.pdf>, provides for ICANN to give its “advice and support” to help the ICC “establish the necessary structure and procedures ... to perform its duties as DRSP,” and to “communicate regularly with” the ICC “to

inordinately more time to issue its rulings than other DRSPs did and the Guidebook requires.<sup>40</sup> Yet, the Board sits idly in the face of these procedural violations and substantively varied and contradictory rulings. This exemplifies the antithesis of accountability.

84. ICANN has argued in other IRPs that the “deferential” standard of review allows the Board to exercise its “independent judgment” based on what it deems in the “best interests of [ICANN],” and that an IRP panel cannot second-guess that decision.<sup>41</sup> However, ICANN is not just any “company;” as a “nonprofit public benefit corporation,” it serves as steward of the Internet, entrusted to oversee the DNS for the benefit of those who use it “as a whole.” App. A Art. 1 § 1; App. B §§ 3, 4; App. G ¶ 113. A nonprofit organized to preserve rainforests or house rare historical artifacts acts in its own “best interests” when it does those things, not when it makes decisions for its own convenience or to avoid scrutiny. The same holds true for ICANN.

85. While ICANN may protest otherwise, a finding that the Board has not followed its own governing documents likely will serve the “best interests of the company” in the long run. It will promote confidence in ICANN’s accountability processes and enhance predictability for all stakeholders. Turning a blind eye to panels’ lack of adherence to some of the most basic Guidebook principles – the subject of years of extensive multi-stakeholder input, on which Donuts and other applicants have relied to their material financial detriment – makes the need for meaningful independent review all the more urgent. Short of some “legislative or executive initiative to create a truly independent compulsory process,” an IRP panel has the power to issue a binding decision against ICANN on the merits. App. G ¶¶ 115, 131.

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optimize the service that [it] provides as a DRSP in the New gTLD Program.” *Id.* §§ 2(d), (e). Donuts may enforce these obligations as a third-party beneficiary. *See* citations *supra* at ¶ 80.

<sup>40</sup> The Guidebook provides for rulings within 45 days after constitution of the panel. App. C Mod. 3 Attmt. Art. 21(a). Although final panels for .SPORTS, .SKI and .RUGBY were in place by July 16, July 25 and August 27, 2013, respectively, their decisions did not issue until 6 months later, January 22, 2014 for .SPORTS and .SKI, and 5 months for .RUGBY (2/3/14). The ICC has faced vociferous public criticism for its plodding and inconsistent decisions. *See, e.g.,* <http://www.law360.com/articles/542740/problems-with-gtld-community-objection-process>.

<sup>41</sup> *See, e.g.,* <https://www.icann.org/en/system/files/files/icann-response-irp-25apr14-en.pdf> ¶ 24; <https://www.icann.org/en/system/files/files/icann-response-irp-21jul14-en.pdf> ¶ 33 (both citing Bylaws Art. IV § 3.4).

86. By exercising that power and compelling the Board to comply with its governing documents in this case, the Panel also reaffirms ICANN's core value of "introducing and promoting competition" to allow "open-entry into Internet-related markets." See App. A Art. II § 2.6; App. B § 4. The rulings on the .SPORTS, .SPORT, .SKI and .RUGBY objections eliminate all but one competitor for these TLDs. App. C § 1.1.2.9. To enforce the Board's undertaking to promote competition and remain accountable, this Tribunal should vacate those decisions.


**VI. CONCLUSION and RELIEF REQUESTED**

87. The subject objection rulings go against key provisions of the Bylaws, Articles, Guidebook and other principles on which ICANN and its new gTLD program rest. The Board has neglected to assure consistent application of Guidebook rules, implement an appeals process or otherwise correct decisions that fail to apply documented policies, despite Donuts' significant investment in reliance upon such rules and their predictability. This Panel should direct the Board to reinstate Donuts' three applications and either (i) reverse the objection rulings or (ii) vacate them and appoint properly trained panels to rehear the objections as to those TLDs.

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Respectfully submitted,

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