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August 10, 2015

VIA E-MAIL

Prof. Jack Coe, Chair of Panel
Philip W. Boesche, Jr.
Rayner M. Hamilton

Re: *Donuts v. ICANN*, ICDR Case No. 01-14-0001-6263.

Dear Mr. Chairman and Members of the Panel:

Pursuant to the Panel's Procedural Order No. 2, the Internet Corporation for Assigned Names and Numbers ("ICANN") submits this letter brief to object to three of the five Requests for Documents that Donuts, Inc. ("Donuts") served on ICANN on 24 July 2015. ICANN requests that the Panel issue an order that relieves ICANN of any obligation to produce documents responsive to Requests Nos. 1, 2 and 5 (collectively the "Requests") because these requests are neither necessary nor appropriate to this proceeding.¹

There are three reasons why ICANN contends it should not be compelled to produce documents responsive to Donuts' Requests Nos. 1, 2 or 5:

- *First*, these Requests are exceptionally broad and inappropriate, and collecting and reviewing responsive documents would impose a massive burden on ICANN that would delay this already-delayed proceeding considerably further.
- *Second*, such efforts would in any event be highly unlikely to yield any documents relevant to this Independent Review Process ("IRP") because the requested documents have nothing to do with the objection determinations that Donuts challenges.

¹ We refer here to Paragraph 3 of Procedural Order No. 2, in which the Panel quotes ICDR Rule 20(4) and refers to Article 21 of the ICDR Rules text. The parties have agreed that ICANN will produce documents responsive to the other two requests (Nos. 3 and 4).

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- *Third*, Donuts could have propounded these document requests earlier in these proceedings, which would have avoided the substantial delay the Requests have now wrought. Donuts should not use its own lack of diligence as a reason to cause even further delays in this IRP, delays that are affecting the other applicants for the disputed gTLDs.

1. Requests 1, 2 and 5 Are Grossly Overbroad And Would Impose An Undue Burden on ICANN.

In its Procedural Order Nos. 1 and 2, the Panel noted that any document requests must comply with Article 21 of the ICDR's Rules. Accordingly, any document exchange must be conducted "with a view to maintaining efficiency and economy," and "[t]he tribunal and the parties should endeavor to avoid unnecessary delay and expense" caused by requests for document production.² Donuts' Requests are incompatible with these principles.

Responding to these Requests would require a herculean effort on the part of ICANN, as they seek broad categories of documents that are not specific to the objections at issue in this IRP and contain no date restriction. For example, Request No. 1 seeks all communications between ICANN and the International Chamber of Commerce ("ICC") that relate to any one of seven broadly framed topics, such as the "handling and/or avoidance of conflicts of interest." Request No. 2 is even broader, seeking (without any date restriction) all documents "reflecting" communications between ICANN and the ICC "and/or training by any person of" the ICC, that are also related to the same seven broad topics listed in Request No. 1.

ICANN engaged the ICC as a third party service provider with respect to the objection proceedings associated with the New gTLD Program, and ICANN has corresponded with the ICC regarding a multitude of topics over a series of years. ICANN would be required to invest significant time and energy to search for any documents that are responsive to Request No. 2 because the request is not in any way tailored to the objections that are the subject of this IRP.

Request No. 5 is really four requests in one, as it seeks all documents of any member of ICANN's staff or Board that "reflect[] consideration" of four distinct topics. Collecting documents responsive to just one of those topics alone would require a substantial undertaking because the Request seeks documents related to: "[a]ny oversight mechanisms or procedures for ensuring new gTLD objection panels arrive at consistent results based upon standards provided in the Guidebook." The Applicant Guidebook provides for four varieties of objections, and each has resulted in a large number of objection proceedings and, of course, significant internal

² International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Article 21.1.

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discussion at ICANN. And, as discussed below, none of these documents has any conceivable relevance to the issues in this IRP.

In addition to the above-cited ICDR Rules, the ICDR Guidelines for Arbitrators Concerning Exchanges of Information (“Guidelines”) make clear that “care must be taken to prevent the importation of procedural measures and devices from different court systems,” and that the Panel has the “mandatory duty” to manage these proceedings “so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.” Responding to Donuts’ requests would require ICANN to engage in a large-scale review of more than a dozen individuals’ email communications, and to conduct an extensive search of ICANN’s electronic and hard copy archives. This is not a United States court proceeding, and Donuts cannot properly seek to impose that burden on ICANN. The overly broad nature of Requests 1, 2 and 5 should lead the Panel to reject Donuts’ efforts to compel ICANN to produce documents in response to them.

2. The Requests Are Highly Unlikely To Result In The Production Of Relevant Documents.

Compounding the impropriety of Requests 1, 2 and 5 is the fact that none is likely to lead to the discovery of relevant documents. This IRP proceeding is narrow in scope: the Panel must declare whether the ICANN Board has acted consistently with ICANN’s Bylaws and Articles of Incorporation in connection with specific determinations rendered by a third party (the ICC) that upheld certain “community objections” to Donuts’ applications for the new gTLDs .SPORTS and .RUGBY. There is no other issue before this Panel.

Despite this, Requests Nos. 1 and 2 seek reams of correspondence between the ICC and ICANN that not only has nothing to do with the challenged objection determinations, but (as drafted) does not even relate to objections or new gTLDs at all. And, even to the extent any of the correspondence relates to “conflicts of interest,” it would be irrelevant to this IRP whether ICANN and the ICC communicated regarding this topic – the ICC has a standard for conflicts of interest, and it applied that standard with respect to the objections that are relevant to this IRP. To the extent there are communications between ICANN and the ICC specifically related to Donuts’ applications in this matter, ICANN has already agreed to produce those documents in response to Requests Nos. 3 and 4.

Request No. 5 seeks documents related to objection proceedings more generally, without tying the request to the particular determinations that Donuts challenges. Prior to and during the course of the New gTLD Program, ICANN considered the possibility of creating an “appellate mechanism” to address objection proceedings and ultimately decided *not* to implement such a mechanism. Donuts offers no reason why documents relating to the Board’s decision, including a decision taken long before Donuts ever participated in the objection proceedings at issue could

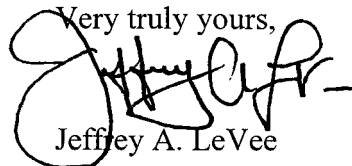
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conceivably be relevant here. The Guidebook says what it says, the Board did not revise the Guidebook to permit “appeals” of ICC decisions, and thus there is no basis to suggest that internal communications about the ICANN’s decision *not* to provide for substantive appeals could have any bearing on the outcome of this IRP.³

In other words, while imposing a substantial burden on ICANN, the Requests will sweep in vast swaths of irrelevant material. As noted above, ICANN has already agreed to produce documents in response to Requests Nos. 3 and 4, which (unlike the other Requests) appear to be tailored to matters related to the objection proceedings giving rise to this IRP. Donuts cannot explain how the other three Requests seek any documents that are both relevant and not already captured by Request Nos. 3 or 4.

3. Delays In These Proceedings Directly Affect Third Parties.

Innocent third parties are being affected by the delay in these proceedings, as the applicants for the .SPORTS and .RUGBY gTLDs that prevailed in the objection proceedings are forced to wait months for the resolution of this IRP. For this reason, Donuts’ delay in propounding the Requests must be held against Donuts,⁴ particularly since requiring ICANN to produce documents in response to Request Nos. 1, 2 and 5 likely would require an even further delay of the schedule that the Panel ordered in Procedural Order No. 2.

Very truly yours,

Jeffrey A. LeVee

³ Given the lack of relevance of the documents sought, before resorting to bringing the matter before this Panel, ICANN informally requested that Donuts clarify whether it meant to limit the scope of these requests to documents related to the objection proceedings forming the basis of this IRP. Donuts would not agree to limit the Requests in that manner.

⁴ Donuts commenced this proceeding on 13 October 2014, and the Panel was fully constituted by 7 April 2015. Donuts, however, waited until 24 July 2015 (*after* the administrative call with the Panel), to propound these broad and objectionable document requests. None of the Requests involves matters that came to light after 13 October 2014, much less after early April 2015. Knowing that it intended to seek additional briefing and some type of document production, Donuts could easily have requested these from the Panel weeks or months ago, and any disputes about them could have been resolved during the administrative call held on 14 July 2015. Given Donuts’ delay, the Panel has now been forced to delay the merits hearing for this IRP as a result of the disputes associated with the Requests.