

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

CORN LAKE, LLC, ) ICDR CASE NO. 01-15-0002-9938  
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)  
Claimant, )  
)  
v. )  
)  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
)  
)  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S SUR-REPLY TO THE REPLY OF CLAIMANT CORN LAKE, LLC**

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Sur-Reply to the Reply submitted by claimant Corn Lake, LLC (“Corn Lake”) on 10 December 2015 in support of its Request for Independent Review Process (“IRP Request”).

1. In Procedural Order No. 1, the IRP Panel permitted the parties to submit further briefing, but expressly limited the scope of the parties’ submissions to “address[ing] new IRP Rulings since the initial IRP Request, as well as matters arising out of further documents.”<sup>1</sup> Corn Lake’s Reply far exceeds this limited mandate and provides a lengthy discussion of matters that already have been extensively briefed by both sides. Recognizing that its Reply exceeded the scope of the Panel’s instructions, Corn Lake asserts that the “further documents” referenced in Procedural Order No. 1 include “ICANN’s Response to Corn Lake’s initial Request” (“IRP Response”).<sup>2</sup> However, the “further documents” could not possibly include ICANN’s IRP Response, because Procedural Order No. 1 references “further documents in accordance with any Production Ruling,” clearly intending to limit the scope of the briefing to matters raised in documents recently produced by ICANN.<sup>3</sup> Regardless, none of the arguments Corn Lake raises support independent review.

2. Corn Lake challenges what it perceives to be the ICANN Board’s “adoption” and “blind [] accept[ance]” of, and “fail[ure] to rectify,” what Corn Lake characterizes as “clearly contrary” expert determinations rendered in the objection proceedings concerning the two .CHARITY applications.<sup>4</sup> In Corn Lake’s view, the ICANN Board should have undertaken a substantive review of the determinations rendered by the independent expert panels. There is, however, no requirement that ICANN’s Board conduct such a review. Indeed, the Applicant

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<sup>1</sup> Procedural Order No. 1, ¶ 6.

<sup>2</sup> Reply, n.1.

<sup>3</sup> Procedural Order No. 1, ¶ 6.

<sup>4</sup> Reply ¶ 14. Excellent First Limited submitted an application for .慈善 (the Chinese translation of “charity”), but Corn Lake’s Reply does not address the objection proceedings related to that application.

Guidebook (“Guidebook”) contains no suggestion, much less any requirement, that the Board will conduct substantive reviews of expert panel determinations. Rather, per the Guidebook, the “findings of the panel will be considered an expert determination and advice that ICANN *will accept* within the dispute resolution process.”<sup>5</sup> As such, there is no Board action in this regard for the IRP Panel to review because the Board was not obligated to conduct such a review.

3. Three IRP panels have issued final declarations since Corn Lake filed its IRP Request: *Vistaprint Limited v. ICANN* (“*Vistaprint*”); *Merck KGaA v. ICANN* (“*Merck*”); and *DCA Trust v. ICANN* (“*DCA*”). Each confirms that Corn Lake’s arguments do not support independent review (as does the final declaration in *Booking.com v. ICANN* (“*Booking.com*”), which was issued shortly before Corn Lake filed its IRP Request).

4. In *Vistaprint*, the claimant argued that ICANN’s Board should have intervened with respect to a third-party expert report issued by one of ICANN’s vendors in conjunction with the New gTLD Program. The IRP panel in *Vistaprint* (“*Vistaprint Panel*”) denied the IRP request because, among other things, “the ICANN Board has no affirmative duty to review the result in any particular [objection proceeding].”<sup>6</sup>

5. The claimant in *Merck* launched a similar challenge to an objection proceeding, and the IRP panel there (the “*Merck Panel*”) declared ICANN the prevailing party, noting that “Merck’s complaints are . . . focused on the correctness of the conclusion of the Sole Panel Expert. . . . [T]his is not a basis for action by this [IRP] Panel.”<sup>7</sup>

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<sup>5</sup> Guidebook § 3.4.6 (emphasis added).

<sup>6</sup> *Vistaprint v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration (“*Vistaprint Final Declaration*”), Cl.’s Suppl. App. K, ¶ 157; *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (“*Booking.com Final Declaration*”), Cl.’s Suppl. App. I, ¶ 80; *see also id.* ¶ 138 (“there was no action (or inaction) by the Board here”); *id.* ¶¶ 129, 138 (“[T]he fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com.”); *see also id.* ¶ 146; *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration (“*Merck Final Declaration*”), ¶ 49. The *Merck* Final Declaration was issued on 11 December 2015, after Corn Lake submitted its Reply, and is attached hereto as Respondent’s Exhibit 1.

<sup>7</sup> *Merck* Final Declaration ¶ 50, Resp.’s Ex. 1.

6. The IRP panel in *DCA* (“*DCA* Panel”) ultimately did not find ICANN to be the prevailing party, but significant aspects of its final declaration (“*DCA* Final Declaration”) support ICANN’s position that Corn Lake’s claims do not involve Board action. Corn Lake asserts that the *DCA* case is relevant here because *DCA*’s claims also involved alleged disparate treatment of two applicants for the same string,<sup>8</sup> but in fact that is where the similarities between the two proceedings end. In *DCA*, the challenged action under consideration was the Board’s conduct vis-a-vis ICANN’s Governmental Advisory Committee (“GAC”). The *DCA* Final Declaration was entirely premised on the fact that the GAC is a constituent body of ICANN, as set forth in ICANN’s Bylaws.<sup>9</sup> Here, in contrast, the expert panel that addressed the .CHARITY objections was not a constituent body of ICANN, but instead a panel appointed by the International Chamber of Commerce (“ICC”) pursuant to the Guidebook to address objections that ICANN specifically decided not to resolve internally (via the Board or any other ICANN entity).<sup>10</sup> As such, Corn Lake has not explained why the *DCA* Final Declaration is in any way applicable or relevant to these proceedings.

7. ICANN’s Bylaws provide that prior IRP determinations have “precedential value,”<sup>11</sup> and a determination consistent with the declarations in the *Merck*, *Booking.com* and *Vistaprint* IRPs is appropriate here. ICANN’s Board has not taken *any* action with respect to the .CHARITY string that violates any provision of ICANN’s Articles or Bylaws. The expert panel appointed by the International Chamber of Commerce (“ICC”) to evaluate the Independent Objector’s (“IO”)’s community objection to Corn Lake’s application for .CHARITY (“Corn Lake Expert Panel”) rendered a determination (“Corn Lake Expert Determination”) in favor of the IO. ICANN’s Board

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<sup>8</sup> Reply ¶ 25.

<sup>9</sup> *DCA* Final Declaration ¶¶ 102, 105; *see also* Bylaws, Art. III, § 1; Guidebook § 3.1.

<sup>10</sup> International Center of Expertise of the International Chamber of Commerce.

<sup>11</sup> Bylaws, Art. IV, § 3.21, Cl.’s App. A.

was not involved in the creation of the Corn Lake Expert Determination, the Board did not substantively review the determination, and the Board had no obligation to do so.

8. Instead, the Board was involved only to the extent it reviewed Corn Lake’s request for reconsideration (“Request 14-3”). Reconsideration is an accountability mechanism available under ICANN’s Bylaws and involves a review by ICANN’s Board Governance Committee (“BGC”). The BGC’s consideration of reconsideration requests is limited to assessing whether the challenged action (or inaction) violated established policies or procedures. On 27 February 2014, the BGC denied Corn Lake’s Request 14-3.<sup>12</sup>

9. Corn Lake’s Reply delves into two additional issues that, while well beyond the parameters set forth in Procedural Order No. 1, ICANN will address herein. First, Corn Lake repeats its challenge to the limitations of the 12 October 2014 decision of the NGPC<sup>13</sup> (the “12 October 2014 Resolution”), which approved the implementation of a limited review mechanism to address perceived inconsistent expert determinations concerning two specifically identified sets of String Confusion Objections (“SCO Limited Review Mechanism”).<sup>14</sup> Corn Lake contends that the Corn Lake Expert Determination (regarding a community objection) should have been included in the 12 October 2014 Resolution and subject to the SCO Limited Review Mechanism. However, in limiting the SCO Limited Review Mechanism to the two identified sets of string confusion objection expert determinations, the NGPC specifically considered and rejected extending such a review to community objections, noting that “[a]pplicants have already taken action in reliance on many of the Expert Determinations” in those proceedings, and that there are “reasonable explanations for [the] seeming discrepancies [in other types of determinations], both procedurally

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<sup>12</sup> See Determination of the BGC On Reconsideration Request 14-3, *available at* <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

<sup>13</sup> New gTLD Program Committee.

<sup>14</sup> The NGPC had delegated authority from the ICANN Board to make decisions regarding the New gTLD Program.

and substantively.”<sup>15</sup> Moreover, in the words of the *Booking.com* Panel, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant].”<sup>16</sup>

10. Corn Lake’s Reply also discusses and attaches the Final Expert Determinations issued by both of the three-member expert panels convened as a result of the Board’s 12 October 2014 Resolution to re-review two specifically identified string confusion objection expert determinations.<sup>17</sup> Corn Lake asserts that, because those Final Expert Determinations reversed the challenged SCO determinations, “this Panel cannot reasonably uphold the disparate treatment that Corn Lake has suffered,” and it asks that the Board be required to “correct” the Corn Lake Expert Determination.<sup>18</sup> Corn Lake’s reliance upon these Final Expert Determinations is inapplicable here, for at least four reasons. *First*, the NGPC was explicit in its rationale that the SCO Limited Review Mechanism would encompass only the specific string confusion objections addressed in the 12 October 2014 Resolution. *Second*, the findings of these expert panels, which addressed SCO objections against unrelated gTLD applications, have no bearing on the community objection determinations regarding Corn Lake’s .CHARITY application. *Third*, the SCO Limited Review Mechanism is entirely distinguishable because it involved *different* expert panels reaching different conclusions as to the same issues;<sup>19</sup> here, one singular expert panel evaluated both .CHARITY objections at issue and reached different conclusions based on the complete record before it. *Fourth*, Corn Lake’s assertion fails because it (again) presupposes that the ICANN Board has an affirmative

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<sup>15</sup> NGPC Resolution 2014.10.12.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>. See also ICANN’s Response to Corn Lake’s IRP Request ¶¶ 11-13, 40-41, 52-63.

<sup>16</sup> *Booking.com* Final Determination ¶ 138, Cl.’s App. I.

<sup>17</sup> Reply ¶¶ 22-23; Cl.’s Suppl. App. L-M.

<sup>18</sup> Reply at ¶ 23.

<sup>19</sup> See Cl.’s Suppl. App. L-M.

duty to intervene with respect to the Corn Lake Expert Determination, even though neither the Articles nor the Bylaws set forth any such duty.

## **ARGUMENT**

11. In order to address the issues identified in Procedural Order No. 1 and the various arguments raised in Corn Lake's Reply, ICANN first discusses the three IRP rulings that have been issued since Corn Lake filed its IRP Request, each of which confirms that this IRP should be resolved in ICANN's favor. Second, ICANN addresses Corn Lake's argument regarding the appropriate standard of review that applies to these proceedings, and demonstrates that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN's Board. Third, ICANN addresses the claims that Corn Lake raised in its IRP Request and again reiterated in the Reply. Fourth, ICANN addresses Corn Lake's request for relief, and explains that IRP panels do not have the authority to grant the sort of affirmative relief requested here.

### **I. THE IRP DECLARATIONS ISSUED AFTER CORN LAKE FILED ITS IRP REQUEST CONFIRM THAT THIS IRP SHOULD BE RESOLVED IN ICANN'S FAVOR.**

12. Three IRP panels have issued final declarations since Corn Lake filed its IRP Request: *Vistaprint*; *Merck*; and *DCA*. Each confirms that Corn Lake's arguments do not support independent review.

#### **A. THE *VISTAPRINT* FINAL DECLARATION.**

13. Many of the facts involved in the *Vistaprint* IRP are similar to those in this proceeding. *Vistaprint*'s IRP Request related to its two applications to operate the .WEBS gTLD. Several other entities applied to operate the .WEB gTLD (the singular version of WEBS). One of the applicants for .WEB filed string confusion objections against *Vistaprint*'s .WEBS applications. An expert panel selected by the ICDR<sup>20</sup> was then tasked with determining, based on the full record

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<sup>20</sup> The International Center for Dispute Resolution ("ICDR").

before it, whether the .WEBS and .WEB strings were sufficiently similar that they were likely to cause confusion to the average Internet user. The expert panel determined that the objection should be sustained.<sup>21</sup> As a result, Vistaprint's .WEBS applications were placed into contention with the .WEB application that was the subject of the objection proceedings (meaning that only one of these relevant applications can proceed).

14. Vistaprint submitted a Reconsideration Request challenging the expert determinations finding that Vistaprint's applications were confusingly similar to the relevant .WEB application. The BGC found that neither the expert panel nor ICANN failed to follow established policies and procedures in rendering and accepting the expert determinations, and therefore denied Vistaprint's Reconsideration Request. In its IRP, Vistaprint challenged the two relevant expert panel determinations, as well as the BGC's denial of Vistaprint's Reconsideration Request. The *Vistaprint* Panel determined that ICANN prevailed in its Final Declaration, dated 9 October 2015.

15. Several of the conclusions in the *Vistaprint* Final Declaration are relevant here. First, the *Vistaprint* Panel acknowledged that "the Panel is not tasked with reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN (such as the ICDR or the experts in the *Vistaprint* [objection proceeding])."<sup>22</sup> The same is true in the instant proceeding: this IRP Panel may not assess the propriety of the ICC's rules and procedures, nor the substance of the Corn Lake Expert Determination. Instead, as the Bylaws make clear, this IRP Panel's mandate is limited to

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<sup>21</sup> That the *Vistaprint* Final Declaration concerned string confusion objections and not community objections does not render it less relevant to these proceedings with respect to the handling of expert determinations. Both the ICC (regarding community objections) and the ICDR (regarding string confusion objections) are third-party providers that coordinate the relevant expert panels, which render the expert determinations, and the Guidebook provides similar guidance as to their role as well as ICANN's procedure relating to the expert determinations. Guidebook § 3.4.6 (providing that for all types of objections, "[t]he findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.>").

<sup>22</sup> *Vistaprint* Final Declaration ¶ 127, Cl.'s Suppl. App. K.

comparing actions of the ICANN Board to the Articles and Bylaws; if no violation is found, the IRP Request must be denied.

16. Second, the *Vistaprint* Panel declared that “the ICANN Board has no affirmative duty to review the result in any particular SCO [string confusion objection] case.”<sup>23</sup> The same is true here. Corn Lake presents a list of reasons why it believes the Board had (or should have) a duty to intervene in the community objection proceedings related to its .CHARITY application (“Application”). But neither the Articles nor the Bylaws set forth any such duty. That the Board has the *discretion* to intervene does not mean that the Articles or Bylaws *mandate* Board intervention in independent dispute resolution procedures governing objection proceedings. The *Vistaprint* Final Declaration – as well as the *Booking.com* Final Declaration – confirms that the Board has no such duty: “[T]here is no affirmative duty stated in the Articles, Bylaws or Guidebook that the Board must [] review the result in each and every [objection proceeding].”<sup>24</sup>

17. Third, *Vistaprint* asserted (as Corn Lake does here) that the Board had a duty to establish in the Guidebook an appeals process to challenge expert determinations in objection proceedings. The *Vistaprint* Panel rejected that notion because “the lack of an appeal mechanism to contest the merits of the [objection] determination is not, in itself, a violation of ICANN’s Articles or Bylaws.”<sup>25</sup> The *Vistaprint* Panel further concluded “ICANN’s commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the [objection proceedings] mechanism so that the result of a [objection] determination would be subject to a right of appeal.”<sup>26</sup>

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<sup>23</sup> *Id.* at ¶ 157.

<sup>24</sup> *Id.* at ¶ 153; *Booking.com* Final Declaration ¶¶ 128, 138, Cl.’s Suppl. App. I.

<sup>25</sup> *Vistaprint* Final Declaration at ¶ 174, Cl.’s Suppl. App. K.

<sup>26</sup> *Id.* ¶ 174; *see also* *Booking.com* Final Declaration ¶ 138 (fourth bullet) (“ICANN’s guiding principles of transparency and fairness” do not require the ICANN Board to substantively review every expert determination or provide some sort of appeal mechanism.).

18. Fourth, the *Vistaprint* Final Declaration took note of the fact that gTLD applicants enjoy “recourse to an accountability mechanism such as [a Reconsideration Request],” the resolution of which engenders Board action that could, in turn, potentially be susceptible to challenge in an IRP.<sup>27</sup> The *Vistaprint* Panel denied the IRP request because the Board, in its review of the Reconsideration Request, had properly limited its consideration to whether the contested actions comported with established policies and procedures.<sup>28</sup>

**B. THE *MERCK* FINAL DECLARATION.**

19. The Merck KGaA (“Merck”) IRP Request arose out of its legal rights objections to new gTLD applications submitted by its former affiliate, U.S.-based Merck Sharp & Dohme Corporation (“MSD”), for strings incorporating the “Merck” mark.<sup>29</sup> Merck’s legal rights objections were overruled (“Merck Expert Determinations”).<sup>30</sup> Merck subsequently filed a Reconsideration Request challenging the Merck Expert Determinations, which the BGC denied (“Merck Reconsideration Determination”).<sup>31</sup> Merck’s IRP Request challenged the Merck Reconsideration Determination and also argued that the Board should have intervened with respect to the Merck Expert Determinations. Merck also challenged the legal rights objection procedures set forth in the Guidebook.

20. In its 11 December 2015 Final Declaration, the *Merck* Panel unanimously denied Merck’s IRP Request and declared ICANN to be the prevailing party.<sup>32</sup> The *Merck* Panel made clear that the claimant’s disagreement with the outcome of the Merck Expert Determinations cannot form the basis for an IRP: “Merck’s complaints are [] not focused on the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of

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<sup>27</sup> *Id.* at ¶ 157.

<sup>28</sup> *Id.* at ¶ 159; Bylaws, Art. IV, § 2.

<sup>29</sup> *Merck* Final Declaration ¶ 27, Resp.’s Ex. 1.

<sup>30</sup> *Id.* at ¶ 28.

<sup>31</sup> Reconsideration Request 14-9, *available at* <https://www.icann.org/resources/pages/14-9-2014-03-14-en>.

<sup>32</sup> *Merck* Final Declaration § V, Resp.’s Ex. 1.

the [Expert Determinations]. . . . [T]his is not a basis for action by this Panel . . . .”<sup>33</sup> In support, the *Merck* Panel noted that the Guidebook does not include any appeals process for determinations on objection proceedings, and confirmed that “it is not open to this Panel to create it.”<sup>34</sup>

21. Notably, the *Merck* Panel rejected Merck’s “critic[ism]” of the fact that the Board did intervene in the determinations covered by the 12 October 2014 Resolution, in the form of the SCO Limited Review Mechanism, but did not intervene with respect to the determinations Merck challenged.<sup>35</sup> The *Merck* Panel recognized that “in different cases, the BGC and the Board are entitled to pursue different options depending on the nature of the cases at issue.”<sup>36</sup> For precisely the same reason, the *Merck* Panel (and the *Booking.com* Panel<sup>37</sup>) rejected the argument that the SCO Limited Review Mechanism compels Board intervention in every objection determination.

22. In sum, just as the *Merck* Panel held, substantive disagreement with an expert determination cannot form the grounds for an IRP. Accordingly, as in *Merck*, Corn Lake’s IRP Request should be denied.

### C. THE *DCA* FINAL DECLARATION.

23. The *DCA* Final Declaration also demonstrates why Corn Lake’s claims fail to support independent review. Claimant DCA Trust (“DCA”) requested independent review of ICANN’s decision not to proceed with DCA’s application for the new gTLD .AFRICA.<sup>38</sup> This decision was made following the issuance of “consensus advice” issued by an ICANN constituent body known as the Governmental Advisory Committee (“GAC”), which stated that DCA’s application should not proceed. Pursuant to the Guidebook, the ICANN Board was obligated to

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<sup>33</sup> *Id.* at ¶ 50.

<sup>34</sup> *Id.* at ¶ 60.

<sup>35</sup> *Merck* Final Declaration ¶ 56, Resp.’s Ex. 1.

<sup>36</sup> *Id.* at ¶ 61.

<sup>37</sup> *Booking.com* Final Declaration ¶ 138 (“the fact that ICANN enjoys such discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by *Booking.com*”), Cl.’s Suppl. App. K.

<sup>38</sup> *DCA* Final Declaration ¶¶ 3, 5, Cl.’s Suppl. App. J.

consider (and did consider) the GAC’s advice.<sup>39</sup> The crux of DCA’s claim was whether the Board’s action in accepting the GAC’s advice conformed to the terms of the Articles and Bylaws.<sup>40</sup> The *DCA* Panel determined that in that particular case, the Board’s acceptance of the GAC’s advice regarding DCA’s application did not comport with the Bylaws.

24. Here, the *DCA* Final Declaration is not relevant or applicable. The *DCA* Panel premised its declaration on the GAC’s status as an ICANN constituent body, but here neither the ICC nor the expert panels it established to preside over the two objection proceedings at issue are constituent bodies of ICANN. The ICC was not created by ICANN’s Bylaws; ICANN merely selected the ICC to administer certain objection proceedings pursuant to the terms of the Guidebook. Thus, while the *DCA* Final Declaration suggested that the Board “was bound to conduct a meaningful review” of the GAC’s advice and “investigate the matter further,”<sup>41</sup> Corn Lake’s suggestion that the same is true here fails on a threshold level because the Bylaws at issue in *DCA* do not apply to third party dispute resolution service providers or the expert panels they establish.

25. Further, under ICANN’s Bylaws as well as the Guidebook, the Board is **required** to consider GAC consensus advice in conjunction with an application for a new gTLD.<sup>42</sup> There was no dispute in the *DCA* IRP that the Board had “acted” because the Bylaws required the Board to act once the GAC issued consensus advice relative to DCA’s application. By contrast, the Board did not act with respect to Corn Lake’s application. Instead, the Guidebook provides that the ICC (not the Board) will administer the community objection resolution process.<sup>43</sup> Nothing in the Guidebook provides for the Board to be involved in any way in the creation of the expert determinations, and the Guidebook does not provide any procedure by which ICANN (or anyone else) is to conduct a

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<sup>39</sup> Guidebook § 1.1.2.7.

<sup>40</sup> *DCA* Final Declaration ¶¶ 82-84.

<sup>41</sup> *Id.* ¶¶ 107, 113.

<sup>42</sup> Bylaws, Art. XI, §§ 1, 2.1; Guidebook §§ 1.1.2.7, 3.1

<sup>43</sup> Guidebook § 3.2.3.

substantive review of the expert panels' results. To the contrary, the Guidebook states that the "findings of the [expert] panel will be considered an expert determination and advice that ICANN *will accept* within the dispute resolution process."<sup>44</sup> Simply put, the Bylaws do not require the Board to *consider* expert determinations, in stark contrast to the Bylaws' requirement that the Board must consider GAC advice.<sup>45</sup>

## II. THE SCOPE OF THIS IRP AND THE APPLICABLE STANDARD OF REVIEW ARE SET FORTH CLEARLY IN ICANN'S BYLAWS.

26. The scope of an IRP is limited to challenging the actions or inactions of the ICANN Board.<sup>46</sup> As the *Vistaprint* Panel declared: "the Panel's review is limited to addressing challenges to conduct by ICANN's Board, the Panel is not tasked with reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN (such as the ICDR or the experts in the *Vistaprint* [objection proceeding])."<sup>47</sup> The *Booking.com* Panel similarly stated: "There is also no question but that the authority of an IRP panel [is] to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws . . . ."<sup>48</sup> The *Merck* Panel agreed: "The analysis which the Panel is mandated to undertake is one of comparison. . . . [A] contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency."<sup>49</sup>

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<sup>44</sup> Guidebook § 3.4.6 (emphasis added).

<sup>45</sup> There was Board action in connection with Request 14-3, but Corn Lake did not timely challenge the treatment of its Reconsideration Request in this IRP since it first raised a challenge to the BGC's determination in its Reply. Even if the IRP Panel were to consider this belated additional claim, the BGC undertook a complete analysis of the issues Corn Lake raised in Request 14-3, and nothing about the BGC's determination constituted a violation of ICANN's Articles or Bylaws, as discussed below.

<sup>46</sup> Bylaws, Art. IV, § 3.11(c) ("The IRP Panel shall have the authority to: . . . (c) declare whether an *action or inaction of the Board* was inconsistent with the Articles of Incorporation or Bylaws.") (emphasis added).

<sup>47</sup> *Vistaprint* Final Declaration ¶ 127, Cl.'s Suppl. App. K.

<sup>48</sup> *Booking.com* Final Declaration ¶ 110, Cl.'s Suppl. App. I.

<sup>49</sup> *Merck* Final Declaration ¶ 17, Resp.'s Ex. I.

27. ICANN’s Bylaws specifically identify the standard of review that the IRP panel must apply, focusing on whether the Board acted without any conflict of interest, exercised due diligence in care, and exercised independent judgment believed to be in the best interests of the company.<sup>50</sup> As the IRP panels in *Booking.com*, *Vistaprint*, and *Merck* each found, this defined standard of review reflects the fact that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN’s Board. According to the *Booking.com* Panel: “There can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN.”<sup>51</sup> In the words of the *Vistaprint* Panel: “The Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”<sup>52</sup> And in the view of the *Merck* Panel, “it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.”<sup>53</sup>

### **III. CORN LAKE HAS NOT STATED A BASIS FOR INDEPENDENT REVIEW.**

#### **A. CORN LAKE’S CLAIM THAT THE ICANN BOARD ACTED CONTRARY TO ITS BYLAWS BY “BLINDLY ACCEPTING” THE EXPERT PANEL’S DETERMINATION IS INCORRECT AND INVOLVES NO BOARD “DECISION OR ACTION.”**

28. Corn Lake argues that ICANN acted inconsistently with its Bylaws by its “adoption” and “blind [] accept[ance]” of what Corn Lake characterizes as “clearly contrary” expert determinations rendered in the IO’s objection proceedings concerning the two .CHARITY

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<sup>50</sup> Bylaws, Art. IV, § 3.4, Cl.’s App. A.

<sup>51</sup> *Booking.com* Final Declaration ¶ 108, Cl.’s Suppl. App. I

<sup>52</sup> *Vistaprint* Final Declaration ¶ 96, Cl.’s Suppl. App. K

<sup>53</sup> *Merck* Final Declaration ¶ 21, Resp.’s Ex. 1.

applications.<sup>54</sup> However, no Article or Bylaws provision requires the ICANN Board to review or analyze expert panel determinations (and Corn Lake cites to none).

29. The Guidebook states that the designated dispute resolution provider (here the ICC), not ICANN, will appoint “one expert in proceedings involving a community objection.”<sup>55</sup> Once the expert panel has sustained a community objection, the “findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”<sup>56</sup>

30. For this reason, Corn Lake’s claim that the Board violated the Bylaws by “accepting” the Corn Lake Expert Determination without a substantive review is erroneous. The Board took no action with respect to the Corn Lake Expert Determination because the Bylaws, Articles and Guidebook do not require the Board to do anything further. Because there is no Board action associated with the Corn Lake Expert Determination, there is nothing for the IRP Panel to review.

31. As for the Corn Lake Expert Determination itself, Corn Lake claims that it “does not challenge [its] merits,” “but rather challenges the *process* that permitted the panelist to issue a Ruling that singles out Corn Lake for disparate treatment.”<sup>57</sup> First, Corn Lake complains that the expert considered a submission from Spring Registry Limited (“SRL”), the other applicant for .CHARITY, that post-dated the applicable deadline, concerning SRL’s Public Interest Commitments.<sup>58</sup> Corn Lake asserts that, following the Board’s acceptance of the Beijing Communiqué, SRL was permitted to file supplemental materials in connection with its objection proceeding, whereas Corn Lake was not.<sup>59</sup> The BGC’s determination on Request 14-3 thoroughly explained why Corn Lake’s portrayal of the situation is inaccurate.<sup>60</sup> Specifically, in the SRL

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<sup>54</sup> Reply ¶ 14.

<sup>55</sup> Guidebook § 3.4.4.

<sup>56</sup> Guidebook § 3.4.6.

<sup>57</sup> Reply ¶ 49 (emphasis added).

<sup>58</sup> Reply ¶ 9.

<sup>59</sup> Reply ¶¶ 43-48.

<sup>60</sup> BGC’s Determination on Request 14-3, *available at* <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>, Pgs. 12-14.

proceeding, the expert panelist invited each party to submit an additional written statement, and in complying with that directive, SRL included the materials Corn Lake deems “untimely.”<sup>61</sup> In the Corn Lake proceeding, Corn Lake attempted to submit similar materials without first requesting or obtaining the approval of the expert panelist, who declined to consider it after analyzing whether it was properly submitted under the applicable procedural rules.<sup>62</sup> Briefing schedules and the outcome of discretionary procedural determinations are conduct of the Corn Lake Expert Panel, not any action or inaction of the ICANN Board. Indeed, the ICC “wrote separately to the Parties and to the [Corn Lake] Expert Panel reserving to the [Corn Lake] Expert Panel the decision as to whether to admit the Parties’ further submissions into the proceeding.”<sup>63</sup>

32. Second, Corn Lake asserts that a document produced by ICANN in this IRP suggests that the Board has already determined that some discrimination took place with respect to the Application. Nothing about the document Corn Lake presents suggests that any discrimination took place with respect to the .CHARITY string or Corn Lake’s Application. As background, the GAC’s Beijing Communiqué, issued on 11 April 2013, recommended that certain additional safeguards be applied to “[s]trings that are linked to regulated or professional sectors” because those strings “are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm” (Category 1 Advice).<sup>64</sup> The .CHARITY gTLD was one of the strings subject to the GAC’s Category 1 Advice.<sup>65</sup>

33. In its consideration of the GAC’s Beijing Communiqué, ICANN staff prepared a Board Paper addressing the GAC’s Category 1 Advice. Portions of this Board Paper were drawn from “talking points” the Board sent to the GAC. Corn Lake’s Reply relies upon a document

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<sup>61</sup> See *id.* at Pgs. 12-13; Reply ¶ 9.

<sup>62</sup> BGC’s Determination on Request 14-3, *available at* <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>, Pg. 13.

<sup>63</sup> See Panel’s Denial of Claimant’s Further Requested Submission, Cl.’s Ex. 7.

<sup>64</sup> GAC Beijing Communiqué, Annex 1, Pg. 8, *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

<sup>65</sup> *Id.*, Pg. 9.

comprised of a version of these talking points.<sup>66</sup> The only reference to the .CHARITY string is found on the third page: “There is no principled basis for distinguishing between certain categories and strings. Examples provided by the community include ... .charity but not .foundation.”<sup>67</sup> Corn Lake claims that this document evidences the Board’s “belie[f] that requiring certain purported safeguards for a .CHARITY gTLD would single it out for disparate treatment.”<sup>68</sup>

34. However, as the above-quoted language shows, the Board merely questioned why “.charity but not .foundation” was included in the GAC’s Category 1 Advice.<sup>69</sup> The Board did *not* address or suggest any claim of disparate treatment among the competing .CHARITY applications as a result of the Category 1 Advice.<sup>70</sup> As such, this document is wholly irrelevant to Corn Lake’s IRP Request. Corn Lake does not challenge the applicability of the Category 1 Advice to the .CHARITY string, which is what the Board was discussing in the referenced document. Because Corn Lake’s claims do not involve the propriety of the GAC’s decision to include the string .CHARITY in its Category 1 Advice, the document is inapplicable to Corn Lake’s position.

35. Nor do the Board’s questions concerning .CHARITY give rise to any duty to review the objection proceedings concerning that string. In Corn Lake’s view, simply because the Board inquired into the reasoning behind the GAC’s Category 1 Advice (which concerned many strings beyond .CHARITY),<sup>71</sup> the Board somehow was thereafter obligated to inject itself in any objection proceeding relating to strings that were identified in the GAC’s Category 1 Advice.<sup>72</sup> However, as explained above (and as confirmed by other IRP panels), outside of ICANN’s accountability

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<sup>66</sup> Corn Lake’s Suppl. Ex. 22 (ICANN\_CHARITY0001353-59).

<sup>67</sup> *Id.* at ICANN\_CHARITY0001356.

<sup>68</sup> Reply ¶ 33.

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

<sup>70</sup> Corn Lake extensively details its correspondence with ICANN concerning ICANN’s document production and suggests that ICANN’s production is somehow deficient because ICANN declined to produce a privilege log. *See* Reply ¶¶ 29-31. However, the IRP Panel has already addressed the privilege log issue, which is why ICANN declined to produce it when Corn Lake requested that ICANN do so for a second time. *See* Procedural Order No. 2.

<sup>71</sup> Corn Lake’s Suppl. Ex. 22 at ICANN\_CHARITY0001356.

<sup>72</sup> Reply ¶ 15 (“The Board acted by failing to rectify the [Corn Lake Expert Determination].”).

mechanisms (such as reconsideration or an IRP) *nothing* in ICANN’s Articles or Bylaws require the ICANN Board to review, evaluate, or otherwise involve itself in *any* objection proceeding.<sup>73</sup>

**B. CORN LAKE CHALLENGES THE DENIAL OF REQUEST 14-3 FOR THE FIRST TIME IN ITS REPLY, BUT THIS NEW CLAIM DOES NOT SUPPORT INDEPENDENT REVIEW.**

36. As Corn Lake concedes, the *only* instance in which the ICANN Board is obligated to review a specific application for a gTLD string is in conjunction with ICANN’s accountability mechanisms, such as a Reconsideration Request.<sup>74</sup> A Reconsideration Request challenging staff action considers whether the “staff actions or inactions . . . contradicted established ICANN policy(ies).”<sup>75</sup> ICANN’s Board has extended reconsideration to third-party experts (“Third Party Providers”),<sup>76</sup> reasoning that they are essentially acting in place of ICANN staff, but the Board did not expand the scope of the review, which is still limited to whether the Third Party Providers’ actions contradicted established policies. As the NGPC has explained: “Reconsideration is not, and never has been, a tool for requestors to seek the reevaluation of substantive decisions. . . . [T]he Board is not a mechanism for direct, de novo appeal of staff (or expert panel) decisions with which the requester disagrees.”<sup>77</sup>

37. The BGC has reiterated these principles and further explained that “there is not—nor is it desirable to have—a process for the BGC or the Board (through the NGPC) to supplant its own determination . . . over the guidance of an expert panel formed for that particular purpose.”<sup>78</sup> Experts – including those appointed by the ICC – were selected because they had specific expertise

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<sup>73</sup> *Vistaprint* Final Declaration ¶¶ 150-53, Cl.’s Suppl. App. K; *Merck* Final Declaration ¶¶ 47-50, Resp.’s Ex. 1.

<sup>74</sup> Reply ¶ 18.

<sup>75</sup> Bylaws, Art. IV, § 2.2, Cl.’s App. A.

<sup>76</sup> See Recommendation on Request 13-5, available at <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>. The BGC’s recommendation was adopted by the NGPC. NGPC Resolution 2013.09.10.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en>.

<sup>77</sup> Rationale for NGPC Resolution 2013.05.18.NG04 (emphasis added), available at <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-05-18-en#1.b.rationale>.

<sup>78</sup> BGC Recommendation on Request 13-5, pgs. 9-10, available at <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>.

that the ICANN Board does not. Accordingly, and specifically in accordance with the Bylaws, the Board must limit its review to whether the Third Party Provider followed established policies and procedures in rendering its determination.

38. Here, Corn Lake filed Request 14-3 challenging the Corn Lake Expert Determination.<sup>79</sup> The BGC denied Request 14-3 because it found “no indication that the [Expert] Panel violated any policy or process in reaching ... the Determination.”<sup>80</sup> After ICANN noted in its IRP Response that Corn Lake had not challenged the denial of Request 14-3, Corn Lake attempted to add the claim in its Reply.

39. Corn Lake’s untimely challenge to the BGC’s denial of Request 14-3 is time-barred. Corn Lake did not assert any such claim in its IRP Request and waited until its Reply to raise this argument. Corn Lake argues that it “noted the BGC’s denial of its RR” in a footnote in the IRP Request,<sup>81</sup> but this is not sufficient, as it does not put ICANN on notice that any such claim is at issue.

40. The Bylaws provide that “[a] request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.”<sup>82</sup> The BGC issued its determination on Request 14-3 on 27 February 2014. ICANN publicly posted the minutes of the 27 February 2014 BGC meeting on 13 March 2014.<sup>83</sup> Accordingly, Corn Lake’s right to file an IRP Request challenging the denial of Request 14-3 expired on 28 March 2014. As such, Corn Lake’s claims relating to the denial of Request 14-3 must be dismissed.

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<sup>79</sup> Reconsideration Request 14-3, *available at* <https://www.icann.org/resources/pages/14-3-2014-01-30-en>.

<sup>80</sup> BGC Determination on Reconsideration Request 14-3, pg. 14, *available at* <https://www.icann.org/resources/pages/14-3-2014-01-30-en>.

<sup>81</sup> Reply n. 60.

<sup>82</sup> Bylaws, Art. IV, § 3.3.

<sup>83</sup> BGC Meeting Minutes, *available at* <https://www.icann.org/resources/board-material/minutes-bgc-2014-02-27-en>.

41. Corn Lake’s challenge to the BGC’s denial of Request 14-3 fails substantively as well. The BGC’s reconsideration of the Corn Lake Expert Determination is limited by the Bylaws to an assessment of whether the expert panel violated any “established [] policy(ies).”<sup>84</sup> The BGC conducted this assessment fully in conformance with the Bylaws, and properly determined that the Corn Lake expert panel did not act in contradiction to established policies or procedures. Corn Lake has not identified any Article or Bylaws provision that the BGC violated in determining that Corn Lake had not stated a basis for reconsideration of the Corn Lake Expert Determination or in electing not to intervene further with respect to that expert determination.

42. This same argument was presented by the claimant in the *Vistaprint* IRP with respect to an expert determination on a string confusion objection. There, the *Vistaprint* Panel declared that “[a]lthough the Guidebook provides in § 5.1 that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program, ***there is no affirmative duty stated in the Articles, Bylaws or Guidebook*** that the Board must review the result in each and every SCO case.”<sup>85</sup> The *Vistaprint* Panel also concluded that ICANN’s Articles, Bylaws and Guidebook do not require an appeal mechanism, through the BGC or otherwise, to contest the merits of an expert determination. In the words of that panel: “ICANN’s commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the SCO mechanism so that the result of a string confusion determination would be subject to a right of appeal.”<sup>86</sup>

43. The *Booking.com* Panel also concluded that ICANN’s Articles, Bylaws and “ICANN’s guiding principles of transparency and fairness” do not require the ICANN Board to

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<sup>84</sup> Bylaws, Art. IV, § 2, Cl.’s App. A.

<sup>85</sup> *Vistaprint* Final Declaration ¶ 153 (emphasis added), Cl.’s Suppl. App. K.

<sup>86</sup> *Id.* at ¶ 174.

substantively review every expert determination or provide some sort of appeal mechanism.<sup>87</sup>

Similarly, in evaluating the *Merck* claimant's argument that the BGC should have overturned an expert determination, the *Merck* Panel declared that "[n]one of the three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits."<sup>88</sup>

44. The ICANN Board was not tasked – under the Articles, Bylaws or Guidebook – to substantively review each and every expert determination. The fact that the Board retains the **discretion** to conduct such a review does not mandate that it must exercise that discretion in each case or at the behest of an applicant. Indeed, as the *Merck* Panel declared, "[i]t is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it."<sup>89</sup> Thus, the Board's refusal to substantively review the Corn Lake Expert Determination does not support Corn Lake's IRP Request.

**C. ICANN'S BOARD HAD NO OBLIGATION TO INTERVENE WITH RESPECT TO THE CORN LAKE EXPERT DETERMINATION.**

45. Corn Lake asserts that independent review is warranted with respect to the Board's "inaction" in failing to create a review process for the .CHARITY community objection determinations because the Board did so with respect to string confusion objection determinations on two "string groups" unrelated to this dispute.<sup>90</sup> As noted above, merely because the Board chose to exercise its discretion with respect to two specific sets of expert determinations does not obligate it to apply the same discretion in all objection determinations. In fact, the Board specifically

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<sup>87</sup> *Booking.com* Final Declaration ¶ 138 (fourth bullet), Cl.'s Suppl. App. I; *id.* ¶ 128.

<sup>88</sup> *Merck* Final Declaration ¶ 47, Resp.'s Ex. 1.

<sup>89</sup> *Id.* at ¶ 61.

<sup>90</sup> Reply ¶¶ 55-59.

considered whether this limited review mechanism should also address community objections (such as those at issue in this IRP).<sup>91</sup> The Board, in its discretion, determined that it should not.<sup>92</sup>

46. Corn Lake is correct that there have been hundreds of objections resolved pursuant to the terms of the Guidebook, and that the ICANN Board has intervened with respect to just two string confusion objection (“SCO”) expert determinations. Specifically, the .COM/.CAM and .SHOP/.通販 strings were the subject of multiple *inconsistent* expert determinations on SCOs on the same strings by different expert panels, thus rendering their results to be so inconsistent and unreasonable that (following a public comment period) the Board elected to send back for expert re-evaluation (which, notably, is still not a substantive review by the Board).<sup>93</sup>

47. In .COM/.CAM, one expert panel upheld an SCO asserting that .CAM was confusingly similar to .COM, while another expert panel overruled two separate SCOs asserting that .CAM was not confusingly similar to .COM. Similarly, in .SHOP/.通販, one expert panel overruled an SCO asserting that .SHOP was confusingly similar to .通販 (Japanese for “online shopping”), while a different expert panel reached a contrary conclusion regarding a string with similar Chinese characters. Given what were perceived to be *inconsistent* determinations by different expert panels on objections to the same strings, the BGC requested that ICANN staff draft a report for the NGPC “setting out options for dealing . . . [with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes. . . .”<sup>94</sup>

48. The NGPC then considered potential approaches to address these two perceived

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<sup>91</sup> See Rationale for NGPC Resolution 2014.02.05.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see also BGC Recommendation on Reconsideration Request 13-10, at 11, available at <https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf>.

inconsistent SCO determinations.<sup>95</sup> Following a public comment period, the NGPC determined that the determinations regarding .COM/.CAM and .SHOP/.通販 were “not [] in the best interest of the New gTLD Program and the Internet community” and directed ICANN staff to establish a process whereby the ICDR would convene a new expert panel to re-evaluate those determinations.<sup>96</sup>

49. The expert determinations at issue in the SCO Limited Review Mechanism are distinguishable from the expert determinations that Corn Lake challenges here. The SCO Limited Review Mechanism presented a situation where *different* expert panels reached different conclusions as to the same issues; on re-evaluation, a single expert panel was tasked with re-evaluating the seemingly inconsistent SCO determinations.<sup>97</sup> Here, a single expert panel has already evaluated the objections to both .CHARITY applications at issue, since the Corn Lake Expert Panel and the SRL Expert Panel were comprised of the same panelist. The Corn Lake Expert Panel therefore had all of the evidence for *both* objection proceedings in hand when issuing the Corn Lake Expert Determination.<sup>98</sup> That different conclusions were reached by the same panel for each .CHARITY objection, while considering the whole record, indicates there was a substantive difference underlying the results and, as such, they are not inconsistent in the same manner as the determinations at issue in the SCO Limited Review Mechanism, where the expert panels were not privy to the grounds for objection in the other proceedings that resulted in inconsistent determinations on the same string.

50. While Corn Lake may disagree with the Board’s ultimate determination to limit the review mechanism to two specific sets of inconsistent SCO expert determinations, Corn Lake has

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<sup>95</sup> See Rationale for NGPC Resolution 2014.02.05.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

<sup>96</sup> NGPC Resolution 2014.10.12.NG02, also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>. The expert determinations regarding the .CAR/.CARS strings were no longer at issue when the Board adopted the SCO Limited Review Mechanism because the contention set was resolved by the applicants themselves.

<sup>97</sup> See Cl.’s Suppl. App. L-M.

<sup>98</sup> Cl. Exs. 8, 11.

not identified any Article or Bylaws provision that the ICANN Board violated by exercising its independent judgment to limit the review mechanism and to not intervene with respect to the Corn Lake Expert Determination. As recently confirmed by the *Merck* Panel, “a referral or appeal process for [objection] decisions ...was not included in the delegation, challenge and dispute resolution process adopted by ICANN and it is not open to this [IRP] Panel to create it.”<sup>99</sup> Since the Board had no obligation to address any of these objection determinations, the fact that the Board elected to act in a very limited situation with respect to certain SCO determinations, but chose not to act with respect to Corn Lake’s .CHARITY application, is not a violation of the Articles or Bylaws.

51. Corn Lake argues that the *Vistaprint* Panel “recognized the very argument raised by Corn Lake here: that ICANN’s policy of applying the October 2014 Resolution review only in the .COM/.CAM and .SHOP/.SHOPPING scenarios may violate ICANN’s core values and Bylaws prohibiting discriminatory treatment.”<sup>100</sup> However, Corn Lake’s reliance on the *Vistaprint* Final Declaration in this regard is unavailing because the *Vistaprint* Panel unanimously sided with ICANN as to this point. After considering the same argument Corn Lake raises here, the *Vistaprint* Panel declared that “the ICANN Board has no affirmative duty to review the result in any particular [objection proceeding],” and denied Vistaprint’s IRP Request.<sup>101</sup>

52. The *Booking.com* Final Declaration also addressed this argument head-on: “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a new gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant].”<sup>102</sup> The *Booking.com* Panel further explained that:

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<sup>99</sup> *Merck* Final Declaration ¶ 60, Resp.’s Ex. 1.

<sup>100</sup> Reply ¶ 28.

<sup>101</sup> *Vistaprint* Final Declaration ¶¶ 157, 196, Cl.’s Suppl. App. K.

<sup>102</sup> *Booking.com* Final Declaration ¶ 138, Cl.’s Suppl. App. I.

So long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN . . . .

. . . in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws, and . . . the Guidebook.”<sup>103</sup>

53. Corn Lake’s Reply discusses and attaches the determinations issued by the three-member expert panels convened as a result of the Board’s 12 October 2014 Resolution to conduct new reviews of the two specifically identified sets of string confusion objection expert determinations.<sup>104</sup> Corn Lake asserts that, because those determinations reversed the challenged SCO determinations, “this Panel cannot reasonably uphold the disparate treatment that Corn Lake has suffered,” and therefore asks that the Board be required to “correct” the Corn Lake Expert Determination.<sup>105</sup> In fact, these expert determinations are irrelevant. First, the NGPC was explicit in its rationale that the SCO Limited Review Mechanism would encompass only the specific SCOs addressed in the 12 October 2014 Resolution. Second, the findings of these expert panels, which address SCOs against unrelated gTLD applications, have no bearing on the community objection determination regarding Corn Lake’s .CHARITY application. Third, Corn Lake’s assertion fails because it presupposes that the ICANN Board has an affirmative duty to intervene with respect to the Corn Lake Expert Determination, but neither the Articles nor the Bylaws set forth any such duty.

#### **IV. RESPONSE TO CORN LAKE’S REQUESTED RELIEF.**

54. ICANN’s Bylaws (as well as the Supplementary Procedures that govern this IRP) limit an IRP panel to stating “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending, if requested, that the Board stay any

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<sup>103</sup> *Id.* at ¶¶ 108-109; *see also Vistaprint Ltd. v. ICANN*, Final Declaration ¶ 123 (“The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN.”), Cl.’s Suppl. App. K.

<sup>104</sup> Reply ¶¶ 22-23; Suppl. App. L-M.

<sup>105</sup> *Id.* at ¶ 23.

action or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP panel.<sup>106</sup> Even if there were a basis for some kind of relief here (which there is not), no IRP panel has the authority to award affirmative relief.<sup>107</sup> As the *Vistaprint* Panel recently affirmed: “[A]n IRP Panel does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”<sup>108</sup>

55. The ICANN Board’s consideration and action upon the recommendation of IRP panels, in conjunction with the final declaration, resolves the dispute. Even though Corn Lake cites to the declarations issued in other IRPs,<sup>109</sup> affirmative relief was not “awarded” or “mandated” by those IRP panels but by ICANN’s Board, which considered and accepted the panels’ recommendations.<sup>110</sup>

## CONCLUSION

56. For the foregoing reasons, ICANN urges the IRP Panel to declare that the ICANN Board did not act inconsistently with ICANN’s Articles of Incorporation or Bylaws.

Respectfully submitted,

JONES DAY

Dated: January 8, 2016

By: /s/ Jeffrey A. Levee  
Jeffrey A. LeVe  
Counsel for Respondent ICANN

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<sup>106</sup> Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

<sup>107</sup> The first IRP panel found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 133, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

<sup>108</sup> *Vistaprint* Final Declaration ¶ 149, Cl.’s Suppl. App. K.

<sup>109</sup> Reply ¶¶ 62-63.

<sup>110</sup> See, e.g., NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*).