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October 27, 2016

VIA E-MAIL AND U.S. MAIL

ICANN
ATTN: Board of Directors
c/o John O. Jeffrey, Esq., jj@icann.org
General Counsel and Secretary
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Independent Review Process, *Corn Lake, LLC v. ICANN*
ICDR Case No. 01-15-0002-9938 (.CHARITY)

Dear Members of the ICANN Board:

On behalf of Corn Lake, LLC (“Corn Lake”), the successful claimant in the above-referenced Independent Review Process (“IRP”), we write regarding the Board’s compliance with the Panel’s unanimous declaration therein at <https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf> (“Declaration” or “IRP Dec.”). By an October 25, 2016 email, ICANN has advised Corn Lake that the Board will “consider its response to” the Declaration at its next meeting on November 8, 2016. The email recognizes the Declaration as “final regardless of such Board action, to the fullest extent allowed by law,” citing Bylaws § 4.3(x)(iii)(A) (as amended 1 Oct. 2016). The amended Bylaws establish an IRP decision “as a final, binding arbitration process.” *Id.* § 4.3(x). As such, the Board must comply with the Declaration; its only discretion, if any, rests in how it may do so.

Finding Board action “inconsistent with the Articles of Incorporation of Bylaws” of ICANN in connection with a community objection ruling against Corn Lake on its application to operate a .CHARITY gTLD, the IRP Panel “[r]ecommend[ed] that the Board extend the new Inconsistent Determinations Review Process to include a review of” that ruling. IRP Dec. ¶¶ 8.96, 11.1(b), (c). As such, the Board certainly may comply with the Declaration by engaging a review panel as it did for certain other inconsistent new gTLD objection rulings under Resolution Nos. 2014.10.12.NG02 – 2014.10.12.NG03, <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b> (“NGPC Resolution”). However, the Board also may implement the Declaration by reinstating Corn Lake’s .CHARITY application and allowing it to compete for the domain without going through the additional time and expense, to

ICANN and Corn Lake, of a review process that will consider the very same issue that the IRP Panel found in its Declaration.

Specifically, the Declaration found that Corn Lake had suffered disparate treatment in contravention of the Bylaws when:

the Expert Panel upheld the IO community objection to the Claimant's application despite the practical effect of ICANN's announcement in October 2013 that it intended to adopt the GAC Beijing Communiqué's recommendations concerning Category I and Category II safeguards, coupled with the Claimant's (and SRL and Excellent First's)¹ advance undertakings to comply with such safeguards ... to put all three applications on a level playing field and *rendering them functionally indistinguishable* in respect of eligibility requirements.

IRP Dec. ¶ 8.60(f) (emphasis added). ICANN's announcement "that it would adopt the GAC Beijing Communiqué" rendered "*all* applicants ... committed to the same registration limitations, both because the recommendations became mandatory and, importantly, because all had indicated in their applications a commitment to comply with any adopted recommendations." *Id.* ¶ 8.84 (emphasis in original).

The .CHARITY IRP Panel emphasized "that this is a unique situation and peculiar to its own unique and unprecedented facts ...[,] rendered particularly complicated and unusual by ... the exceedingly unlikely and difficult timing of the Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made." *Id.* ¶ 8.97. Further review of the underlying objection determination will not make it any less unique. The case stands out for its unusual facts, and the IRP Panel could not have found it a predicate for the Board's violation of the non-discrimination provision of the Bylaws if the objection ruling itself had not improperly treated Corn Lake disparately.

A Final Review Panel ("FRP") under the NGPC Resolution would have the task of determining "whether the original Expert Panel could have reasonably come to the decision reached on the underlying [objection] through an appropriate application of the standard of review as set forth in the Applicant Guidebook" The IRP Panel effectively has made that decision already, finding no basis for the disparate treatment that the Board allowed to stand despite the identity of the community objections and the safeguards that Corn Lake and SRL both must implement for TLD in light of ICANN's adoption of the GAC's recommendations in its Beijing Communiqué. A FRP would have nothing further to consider.

¹ SRL also had applied for .CHARITY, and Excellent First for .CHARITY in Chinese characters, and both survived what the IRP Panel found were "identical objections" as that brought against the Corn Lake application by the same objector, who prevailed solely against that application. *Id.* ¶ 8.60(e).

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Accordingly, a review of the underlying objection ruling must lead to this foregone conclusion. Going through the motions of such review will cost money to ICANN and Corn Lake, and unnecessary time for all .CHARITY applicants. Corn Lake applied for the domain in June 2012, and the inconsistent objection determinations came out in January 2014. After more than four years since filing its application, Corn Lake should not have to wait another six months to a year to get to the contention set that a proper application of Guidebook standards would have put them more than two-and-a-half years ago when the objections to *both* applications should have been denied. Corn Lake thus urges the Board to reinstate its .CHARITY application without additional review. Should the Board desire it, Corn Lake will present its position in person and in greater detail at the upcoming Hyderabad meeting.

Respectfully,

THE IP & TECHNOLOGY LEGAL GROUP, P.C.

/jmg/

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