

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

ICDR Case No. _____

Dot Registry, LLC,)
)
Claimant,)
)
v.)
)
Internet Corporation for Assigned Names and Numbers,)
)
Respondent.)

**REQUEST OF DOT REGISTRY, LLC FOR
INDEPENDENT REVIEW PROCESS**

Weil, Gotshal & Manges, LLP
Contact Information Redacted

Counsel for Claimant

I. INTRODUCTION

1. Dot Registry, LLC (“Dot Registry”) hereby submits this Request for Independent Review Process (“IRP”), pursuant to Section 3 of Article IV of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”),¹ the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”)² and the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (the “Supplementary Procedures”),³ in order to seek relief from the harm it has suffered as a result of the actions, inaction and decisions of the ICANN Board of Directors (the “Board”),⁴ in violation of ICANN’s Articles of Incorporation, Bylaws, gTLD Applicant Guidebook (“AGB”) and principles of international law, relating to Dot Registry’s applications to ICANN to operate the generic Top-Level Domains (“gTLDs”) .INC, .LLC and .LLP.

2. Specifically, Dot Registry seeks review of the Board’s actions relating to ICANN’s handling and treatment of the Community Priority Evaluations (“CPEs”) performed by the Economist Intelligence Unit (“EIU”)⁵ and the Determination of the ICANN Board Governance Committee (“BGC”) on Dot Registry’s Reconsideration Request Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014 (the “Determination”).⁶ Dot Registry has complied with ICANN’s policies,

¹ ICANN Bylaws (7 Feb. 2014), Art. IV, § 3 [Ex. C-001].

² See International Centre for Dispute Resolution, International Dispute Resolution Procedures (1 June 2104) (hereinafter “ICDR Rules”) [Ex. 002].

³ See Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (2011) [Ex. C-003].

⁴ For purposes of this Request for IRP, the term “Board” includes bodies operating under the delegated authority of the Board of Directors, such as the Board Governance Committee, the New gTLD Program Committee and the Economist Intelligence Unit.

⁵ The Economist Intelligence Unit is the global analysis and risk-assessment provider branch of the Economist Group. ICANN contracted with the EIU to provide services as an independent evaluator of gTLD applications, including performing the CPE analyses. See *infra* ¶¶ 27-28.

⁶ Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014) [hereinafter, BGC Determination] [Ex. C-004]. ICANN discussed the Determination at its July 24, 2014, meeting; however, the BGC meeting minutes reflecting the BGC’s Determination were not posted to ICANN’s public website until August 22, 2014.

procedures and deadlines at each stage of the application process and has exhausted each issue it has raised in the ICANN accountability mechanisms available to it, yet the Board continues to disregard its own governing documents and policies. Every time Dot Registry has attempted to raise these issues with ICANN, ICANN has failed to exercise appropriate diligence and care in considering them or has neglected to even respond. Accordingly, Dot Registry seeks the relief requested herein.

II. THE PARTIES' CONTACT INFORMATION

A. Claimant

3. The Claimant in this dispute is Dot Registry, LLC (previously defined as "Dot Registry"). Dot Registry's contact details are as follows:

Shaul Jolles, Chief Executive Officer
Tess Pattison-Wade, Executive Director
Contact Information Redacted

Dot Registry is a Limited Liability Company established under the laws of the state of Kansas in the United States of America.

4. Dot Registry is represented in these proceedings by:

Arif H. Ali Contact Information Redacted
Erin Yates Contact Information Redacted
Weil, Gotshal & Manges, LLP
Contact Information Redacted

Meredith Craven Contact Information Redacted
Weil, Gotshal & Manges, LLP
Contact Information Redacted

B. Respondent

5. The Respondent is the Internet Corporation for Assigned Names and Numbers (previously defined as "ICANN"). The following are ICANN's contact details:

Fadi Chehadé, Chief Executive Officer
John Jeffrey, General Counsel
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536
Tel: +1 310 301 5800
Fax: +1 310 823 8649

III. PROCEDURE FOR APPOINTING AN IRP PANEL

6. Dot Registry requests that this IRP be considered by a three-member panel, composed of one arbitrator selected by each party and a presiding arbitrator selected by the parties either by mutual agreement or, in the event the parties are unable to reach an agreement, selected by the parties from a list of five potential presiding arbitrators chosen by the two party-appointed arbitrators, according to the following procedure:

- Each party will rank the proposed presiding arbitrators in order of preference, from one (highest preference) to five (lowest preference);⁷
- The candidate with the lowest combined score will be jointly nominated by the parties as the presiding arbitrator, contingent on the arbitrator's availability and the absence of any conflicts;
- In the event that the first arbitrator is not available, the parties will nominate the arbitrator with the next-lowest score;
- In the event of a tie, the parties will negotiate in order to agree on the arbitrator to be nominated; and
- If this procedure does not result in a viable nomination, either as a result of the parties' inability to resolve a tie or the unavailability of both the first and second candidates, the parties will ask the ICDR to make the appointment, in which case, none of the candidates that were put forward in this procedure will be eligible to be appointed by the ICDR.⁸

Dot Registry requests that the parties adopt this procedure for appointing the arbitrators because ICANN has failed to form an omnibus standing panel of arbitrators from which to appoint the members of the IRP, as required by its Bylaws.⁹ In the absence of a standing panel, the ICDR Rules govern and permit the parties to agree upon "any procedure for appointing arbitrators."¹⁰

⁷ The rankings shall be completely confidential, with no disclosure of the parties' respective rankings to the ICDR, the IRP Panel or to any other person or than the parties and their counsel.

⁸ See ICANN Bylaws, Art. IV, § 3.6, .9 [Ex. C-001].

⁹ *Id.*, Art. IV, § 3.6 ("There shall be an omnibus standing panel of between six and nine members with a variety of expertise . . . from which each specific IRP Panel shall be selected.").

¹⁰ ICDR Rules, Art. 12.1 [Ex. C-002].

IV. BACKGROUND OF THE INTERESTED PARTIES

A. Dot Registry, LLC

7. Dot Registry is a limited liability company registered in the State of Kansas. It was formed in 2011 to apply for and obtain the rights from ICANN to operate five Top-level Domains (“TLDs”):¹¹ .CORP, .INC, .LTD, .LLC and .LLP. Dot Registry’s purpose and mission is to operate these corporate identifier strings in a responsible and accountable manner, coordinating with the legal authorities responsible for managing the corporate identities of businesses in each jurisdiction of the United States in order to protect both consumers and businesses from fraud conducted through the Internet.

B. ICANN

8. ICANN is a California non-profit public benefit corporation responsible for administering certain aspects of the Internet’s domain name system (“DNS”), including coordinating the introduction of new TLDs.¹² ICANN delegates responsibility for the operation of each TLD to a registry operator, which contracts with registrars, which in turn contract with consumers and businesses that wish to register Internet domain names in the TLD.¹³

9. ICANN was established “for the benefit of the Internet community as a whole”¹⁴ and operates subject to international and local law. It is required to achieve its mission in conformity with the principles espoused in its Bylaws and Articles of Incorporation, including transparency, fairness, accountability, and promotion of competition with respect to the DNS.¹⁵

10. ICANN is managed by a Board of Directors (“Board”), whose New gTLD Program Committee

¹¹ TLDs are the string of letters, such as “.com”, “.gov”, “.org”, and so on, following the rightmost “dot” in domain names.

¹² See ICANN Bylaws, Art. I [Ex. C-001].

¹³ TLDs are the identifier after the final “dot” in an Internet address. The original gTLDs were .com, net, .org, .gov, .mil, and .edu, the first three of which are open gTLDs and the last three of which are closed gTLDs. Under the ICANN New gTLD Program, any “established corporations, organizations or institutions in good standing” may apply to operate an open gTLD. See gTLD Applicant Guidebook (Version 2012-06-04) (“AGB”), Modules 1.2.1, 1.2.3.1 [Ex. C-005].

¹⁴ ICANN Articles of Incorporation, Art. 4 (as revised, 21 Nov. 1998) [Ex. C-006].

¹⁵ See ICANN Bylaws, Art. I, Section 2, “Core (Council of Registrars) Values” [Ex. C-001].

(“NGPC”) evaluates applications for new gTLDs.¹⁶ The Board’s decision-making process is informed by input from Supporting Organizations and Advisory Committees established by the Bylaws.¹⁷

11. The Governmental Advisory Committee (“GAC”) is an Advisory Committee composed of representatives of national governments, distinct economies, and multinational and treaty organizations (as observers).¹⁸ The role of the GAC in the New gTLD Program is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”¹⁹

V. SUMMARY OF RELEVANT FACTS

A. The New gTLD Program

12. Practically since its inception, ICANN has contemplated introducing new TLDs as an initiative to increase diversity, competition and utility of the DNS.²⁰ Beginning in 2007, representatives from a wide variety of stakeholder groups, including governments, businesses, and the technology community, provided input on what policies should apply to new gTLDs and how they should be allocated, culminating in June 2011 in the launch of the “New gTLD Program.”²¹

1. Standard Applications vs. Community Applications

13. Applicants for new gTLDs may designate their applications as “community-based” (“Community Applications”), meaning that the applicant intends to operate the gTLD “for the benefit of a clearly delineated community.”²² Non-community-based applications are known as “Standard

¹⁶ See New gTLD Program Committee, available at <http://www.icann.org/en/groups/board/new-gtld>.

¹⁷ See, e.g., ICANN Bylaws, Art. VIII, “Address Supporting Organization”; Art. IX “Country-Code Names Supporting Organization”; Art. X, “Generic Names Supporting Organization”; Art. XI “Advisory Committee” [Ex. C-001].

¹⁸ See *id.*, Art. XI Section 2.1.

¹⁹ AGB, Module 3.1 [Ex. C-005].

²⁰ *Id.*, Preamble.

²¹ *Id.*

²² *Id.*, at 1.2.3.1.

Applications.²³ An applicant filing a Community Application must have an “ongoing relationship with a clearly-delineated community,” apply for “a gTLD string strongly and specifically related to the community,” propose “dedicated registration and use policies” that provide “appropriate security verification procedures,” and demonstrate “written endorsement in support of the application” from “one or more established institutions representing the community.”²⁴ The AGB prohibits applicants from materially changing their applications—including altering the Community or Standard designation—once the application is submitted.²⁵

14. Unlike Standard Applications, which may be used for any purpose consistent with ICANN’s standard registry agreement, prevailing Community Applicants are contractually bound to operate the gTLD consistent with the protections and restrictions described in the applicant’s Community Application.²⁶ To ensure protection of the affected community, the operator of a community-based gTLD may only alter the protections and restrictions with ICANN’s express approval.²⁷

15. Both Standard and Community Applications undergo evaluation, whereby the applicant and its proposed registry services are reviewed for technical, operational and financial capabilities.

2. String Contention

16. String contention occurs when more than one applicant for the same or similar gTLD strings has passed the evaluation process and prevailed in any dispute resolution procedures (*e.g.*, in a proceeding involving an objection to a particular application).²⁸ Applications for such strings are grouped together in “contention sets,” and after all applications within a contention set have completed the evaluation process, the contention set is subjected to “string contention procedures” to identify a

²³ *Id.*

²⁴ *Id.*

²⁵ *See id.*, at 1.2.3.3.

²⁶ *See id.*, at 1.2.3.2.

²⁷ *See id.*

²⁸ *See* AGB Module 4.1 [Ex. C-005]; *see also id.*, Module 3.2 (describing various dispute resolution mechanisms available to contest applications filed under the New gTLD Program).

prevailing applicant.²⁹ ICANN’s AGB provides for three options for resolving string contention: (i) the parties reach a negotiated outcome among themselves; (ii) a Community Applicant prevails in a Community Priority Evaluation;³⁰ or, if the latter options have not resolved string contention, (iii) ICANN facilitates an auction among the eligible applicants to identify a prevailing party.³¹

B. Dot Registry’s Mission and Key Supporters

1. Dot Registry is the Only Community Applicant for .INC, .LLC and .LLP

17. Dot Registry applied to ICANN as the *only Community Applicant* for the corporate identifier extensions, .INC, .LLC and .LLP.³² Dot Registry chose to submit Community Applications for these strings, because its founders believed that the protections and restrictions associated with Community Applications were essential safeguards to protect businesses and consumers from misuse of the strings.

18. Dot Registry aims to combat corporate identity theft and fraud on consumers by making the applied-for corporate identifier gTLDs available exclusively to registered U.S. businesses, as verified through each registrant’s Office of the Secretary of State or other regulatory authority. Internet users, registrants and the general public would be assured that web addresses ending in “.INC,” “.LLC” or “.LLP” belong to valid business entities registered with a governmental authority in the United States.

19. Businesses representing themselves as corporations, limited liability companies or limited liability partnerships by including “INC,” “LLC,” “LLP,” “Incorporated” or “Corporation” in their name creates an expectation amongst consumers that such companies have the legal right to conduct business in the U.S. Despite the increased popularity of the Internet as a consumer marketplace, there

²⁹ *Id.*, Module 4.1.

³⁰ Discussed *infra* ¶¶ 26-28.

³¹ See AGB Modules 1.1.2.10, 4.1 [Ex. C-005].

³² See New gTLD Application ID: 1-880-35979 (.INC) [Ex. C-007]; New gTLD Application ID: 1-880-17627 (.LLC) [Ex. C-008]; New gTLD Application ID: 1-880-35508 (.LLP) [Ex. C-009]. Dot Registry also filed a Community Application for .CORP; however, ICANN has since determined that .CORP cannot be delegated, as it would collide with a private space on the DNS. Dot Registry has not received a refund of its \$185,000 application fee or release of its \$169,000 letter of credit for .CORP. Dot Registry filed a Standard Application for .LTD because, unlike “LLP,” “LLC” and “INC,” “LTD” is not a corporate form limited to the U.S. business community, which makes it impossible to define a single community with common membership, standards and registration requirements.

are no mechanisms for consumers to quickly verify the accuracy of this representation. Fraudulent business entities rely on this lack of information to prey on both businesses and consumers.³³

Dot Registry proposes a system to help combat this issue.

2. Dot Registry Is the Only Applicant for .INC, .LLC and .LLP to Have the Support of the Secretaries of State and NASS

20. Dot Registry has widespread support from the offices of State Secretaries (the “Secretaries”), which are responsible for overseeing business filings and formations and are responsible for chartering businesses that wish to operate within the state, and from the National Association of Secretaries of State (“NASS”).³⁴ Dot Registry has made a commitment to the Secretaries and to the NASS, to assist them in combatting business identity theft and misrepresentation online by creating the first-ever verifiable Internet community for registered U.S. businesses (the “Community”).

21. Dot Registry’s applications bind it to manage the corporate identifier strings so as to provide long-term security to the Community and to Internet end users generally. Dot Registry worked diligently with the Secretaries and NASS to create registration guidelines that protect the Community, comply with state laws and provide unprecedented transparency for consumers. To date, Dot Registry is the *only* applicant that has earned the support of the Secretaries and the NASS.

22. Furthermore, Dot Registry has developed verification software to interact in real-time with the database platforms of each of the Secretaries in order to ensure that Dot Registry’s registration policies remain current with state statutes. In the last two years alone, Dot Registry has invested millions of dollars developing this and other proprietary technology to solidify its technical capability to operate

³³ In January 2012, the Business Services Committee of the National Association of Secretaries of State (“NASS”) released the NASS White Paper on Business Identity Theft, indicating that at least 26 states have reported business identity theft cases resulting from fraudulent business representations online. National Association of Secretaries of State, “Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection Efforts by Secretary of State Offices” available at <http://sos.sd.gov/content/html/corporations/corporationpdfs/white-paper-business-id-theft-012612.pdf>.

³⁴ The Secretary of State maintains records of all of the business activities conducted within the state and, in some states, also has wide-ranging regulatory authority over businesses. In the vast majority of states, the Office of the Secretary of State also is responsible for administering the Uniform Commercial Code, an act which provides for the uniform application of business contracts, registrations and practices across the United States.

these extensions and to stay compliant with changes in ICANN’s policies.³⁵

3. The GAC’s Advice Regarding “Category 1” Strings and the Public Interest Commitments

23. On April 11, 2013, nearly one year after Dot Registry submitted its applications for the corporate identifier strings, the GAC issued its Beijing Communiqué, advising ICANN that “in those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such an opinion should be duly taken into account, together with all other relevant information.”³⁶ The GAC identified Dot Registry’s applied-for extensions as “Category 1” strings, which “are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.”³⁷ The GAC advised ICANN to require specific measures of protection, transparency and accountability for Category 1 strings. These sentiments were echoed in four consecutive GAC Communiqués and supported by the NASS Business Services committee, the U.S. Federal Trade Commission and various Secretaries.³⁸

24. ICANN responded to the GAC’s concerns by introducing Public Interest Commitments (“PICS”), which allowed applicants to reinforce statements made in their applications or add new commitments to comply with the GAC standards. These voluntary PICS provided applicants the

³⁵ On numerous occasions, ICANN’s actions have resulted in damage to the investments Dot Registry undertook in furtherance of its gTLD applications. Notably, the unexplained crash of ICANN’s TLD Application System a week before the application deadline—and its continued dysfunction for over a month—may have compromised Dot Registry’s proprietary information. ICANN notified some applicants, including Dot Registry, that the crash resulted in some of their confidential application details becoming visible to other applicants; however, ICANN was unable to detail the extent of the disclosure. In addition, Dot Registry developed extremely specialized software and obtained access to a data center in order to compete in ICANN’s batching process, a “game” that ICANN developed to determine the order in which the 1930 gTLD applications received would be reviewed. However, after the game took place, ICANN realized that many applicants had not had the technological capability to play the game. ICANN cancelled the results and forced all applicants including Dot Registry to fly to Los Angeles to purchase a raffle ticket and participate in an in-person “Prioritization Draw.”

³⁶ GAC Communiqué – Beijing, People’s Republic of China, p. 4, 8 (11 Apr. 2013) [Ex. C-010].

³⁷ *Id.*, at 8.

³⁸ The GAC’s Communiqués from Durban, Buenos Aires, Singapore and London referencing Category 1 strings are available at <https://gacweb.icann.org/display/gacweb/GAC+Recent+Meetings>. See also, Letter from Ross Miller, President, National Association of Secretaries of State to Lawrence Strickling, Assistant Secretary for Communications and Information (18 July 2012) [Ex. C-011]; Letter from Lauren Kapin, Counsel for International Consumer Protection, Federal Trade Commission to Shaul Jolles, CEO, Dot Registry (29 Jan. 2014) [Ex. C-012].

opportunity to make material changes to their applications, something that is prohibited by the AGB.³⁹ The PIC program has since evolved into a generic binding agreement reiterating the GAC's preferences, which applicants are required to execute along with the standard registry agreement. This new version of PIC represents general commitments—not specific calls to action—which are relevant only *after abuse occurs*, based upon consumer reporting, and no mechanism to enforce them is specified. Consequently, the PICs did not provide a deterrent to abuse and their lenient provisions serve to protect the registry operating the gTLD rather than the registrants.⁴⁰

25. Dot Registry did not file PICS for .LLC, .LLP and .INC because its original applications already provided the protections requested by the GAC for Category 1 strings.⁴¹

C. The EIU Evaluators' Bungling of the Community Priority Evaluation Process

26. Dot Registry's applications for .INC, .LLC and .LLP passed initial evaluation between June and October 2013, and each entered into string contention along with a number of Standard Applications.⁴² Community Applicants may elect to apply for CPE in order to resolve string contention by submitting a deposit of \$22,000 per application.⁴³ An application that prevails in the CPE automatically "wins" the string and is refunded its deposit,⁴⁴ while Standard Applicants no longer in

³⁹ See, e.g., AGB Modules 1.2.3.2, 1.2.7, 4.1.3 [Ex. C-005].

⁴⁰ The GAC expressed dissatisfaction at this non-binding, unenforceable and ineffective solution. See GAC Communiqué – London, United Kingdom, p. 10-11 (25 June 2014) [Ex. C-013]; GAC Communiqué – Singapore, p. 11-14 (27 March 2014) [Ex. C-014].

⁴¹ Dot Registry did file a PIC for .LTD, as .LTD was Dot Registry's only Standard Application. In the PIC, Dot Registry reaffirmed its commitment to protect the Community—even in the context of its Standard Application for .LTD—through strict registration policies, comprehensive abuse mitigation procedures and a continuing relationship with the NASS.

⁴² The competitors for .LLC are Google (as "Charleston Road Registry, Inc."), Donuts, Inc. (as "Foggy North, LLC"), Afiliás, Ltd., myLLC GmbH (backed by Afiliás, Ltd.), Top Level Domain Holdings, Ltd., Top Level Design, LLC, Straat Investments (as "NU DOT CO LLC"), and LLC Registry, LLC (application withdrawn). The competitors for .LLP are Google (as "Charleston Road Registry, Inc."), myLLP GmbH (backed by Afiliás, Ltd.), and PLL Registry, LLC (application withdrawn). The competitors for .INC are Google (as "Charleston Road Registry, Inc."), Donuts, Inc. (as "Baxter Sunset, LLC"), Afiliás, Ltd., Top Level Domain Holdings, Ltd., Uniregistry, Corp., Straat Investments (as "NU DOT CO LLC"), GMO Registry, Inc., GTLD, LTD, CNI Registry, LLC (application withdrawn), C.V. TLDcare (application withdrawn).

⁴³ See AGB Modules 1.5.1, 4.2.3 [Ex. C-005]. The fee originally was \$10,000 per application, but was raised to \$22,000 over two years after the close of the application period. See Community Priority Evaluation (CPE) Frequently Asked Questions, p. 2 (October 31, 2013), available at <http://newgtlds.icann.org/en/applicants/cpe/faqs-31oct13-en.pdf>.

⁴⁴ See AGB Modules 4.2.1, 4.2.3 [Ex. C-005].

string contention receive a partial refund of their application fee from ICANN.⁴⁵

27. The EIU, the research and analysis branch of The Economist Group, is the sole evaluator appointed by ICANN to perform CPEs.⁴⁶ The EIU, under the delegated authority of ICANN, is tasked with reviewing and scoring applications according to specific criteria set forth in the AGB.⁴⁷ Applications are scored on a 16-point scale with a maximum of four points awarded in each of the following four categories: (i) establishment of a clearly delineated, preexisting community; (ii) nexus between the proposed string and the community; (iii) inclusion of registration policies that effectively limit the gTLD to community members; and (iv) endorsement by the affected community.⁴⁸ Applicants must score a minimum of 14 out of 16 possible points to prevail.⁴⁹

28. Following ICANN's announcement that the EIU would be the sole CPE evaluator, the EIU promulgated its own criteria for conducting CPEs, which included requirements in addition to those in the AGB—*requirements upon which applicants could not have based their applications* when they submitted them more than one year earlier.⁵⁰ Therefore, Dot Registry found itself subject to standards that did not exist when it prepared and submitted its applications, applied by evaluators whose area of expertise is composing country reports and performing industry analyses, economic risk forecasts and other research assistance to industry and government clients—not American corporate law.

⁴⁵ *Id.*, Modules 4.2.2, 1.5.1 (indicating that following a successful CPE, non-prevailing Standard Applicants will be entitled to a 20% refund or USD 37,000 each).

⁴⁶ In November 2011, following a more than two-year long bidding process, involving twelve companies, ICANN announced that IntelliConnect Communications and the EIU would both contract to perform CPEs, explaining that it would hire two providers because, among other things, it would “provide an alternate channel” for evaluations to “avoid conflicts of interest” and to “ensure quality and value” through “continued competition among service providers.” Nevertheless, in August 2013, ICANN announced that the EIU would be the sole evaluator for CPEs and made no mention of IntelliConnect Communications. ICANN did not explain its decision to proceed with one evaluator instead of two. *See generally*, <http://newgtlds.icann.org/en/about/evaluation-panels-selection-process>.

⁴⁷ *See* AGB Module 4.2 [Ex. C-005].

⁴⁸ AGB Module 4.2.3 [Ex. C-005].

⁴⁹ *Id.*

⁵⁰ *See* The Economist Intelligence Unit, Community Priority Evaluation (CPE) Guidelines (27 Sept. 2013) [Ex. C-015]; The Economist Intelligence Unit, Community Priority Evaluation Panel and its Processes (7 Aug. 2014) [hereinafter, CPE Processes] [Ex. C-016].

1. Each of the Statements of Opposition Filed in Response to Dot Registry's Applications to Participate in the CPE Were Withdrawn

29. On February 19, 2014, ICANN invited Dot Registry to participate in CPE for .INC, .LLC and .LLP to resolve string contention. Prior to commencing CPE, Dot Registry's strings were subject to a 14-day notice and public comment period.⁵¹ Naturally, Dot Registry's competitors and their affiliates filed statements of opposition.⁵² On March 3, 2014, one day before the close of the comment period, Donuts, Inc., one of Dot Registry's direct competitors, commented that the State of Delaware objected to Dot Registry's Community Application. Delaware Secretary of State the Honorable Jeffrey Bullock wrote to ICANN on March 20, 2014, indicating that Donut's "comments erroneously implied that the State of Delaware is specifically opposed to the community application of Dot Registry, LLC. Such a statement is entirely out of context and does not reflect the views of the State of Delaware."⁵³

30. On March 4, 2014, the European Commission also filed a statement of opposition, which was based on a misunderstanding of the scope of Dot Registry's applications. On March 25, 2014, the European Commission retracted the statement, explaining that "the European Commission [has] resolved the issues at hand and therefore we are respectfully withdrawing our previous comments objecting to Dot Registry's applications for .inc, .llp, and .llc."⁵⁴

2. The Conduct of the EIU Evaluators was Arbitrary and Unprofessional and Demonstrated a Lack of Requisite Skill and Expertise

31. From the very outset of Dot Registry's CPEs, the EIU evaluators appeared confused about which strings Dot Registry had applied for and which applications each supporter had endorsed. For example, corporations that supported Dot Registry's .LLC string were asked to verify their support for

⁵¹ See Community Priority Evaluation (CPE) Frequently Asked Questions, p. 2, *supra* n. 4543.

⁵² Opposition statements that are anticompetitive are not relevant to CPE. See AGB Module 4.2.3 [Ex. C-005].

⁵³ This statement is further validated because Secretary Bullocks wrote an email to the EIU, confirming his support of the community application process and the awarding of these extensions to Dot Registry, "over any non-community applicant."

⁵⁴ See <https://gtldcomment.icann.org/applicationcomment/commentdetails/12359> for the European Commission's initial comment. The withdrawal is available at <https://gtldcomment.icann.org/applicationcomment/commentdetails/12412>.

.LLP, and Secretaries who endorsed Dot Registry's .INC, .LLC and .LLP applications were asked to verify their support of .GMBH, a string for which Dot Registry had not even submitted an application.

32. The EIU also treated Dot Registry's three strings as one application, which is in direct contravention of the AGB's premise that every application will be considered individually.⁵⁵ For example, in the final CPE results, which were released to Dot Registry, the CPE evaluators for .INC, .LLC and .LLP found—in *identical language*—that each of “the community as defined in the application does not have awareness and recognition of a community among its members. This is because [Limited Liability Companies / Limited Liability Partnerships / Corporations] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales and other criteria not related to the entities structure as an [LLC / LLP / CORP].”⁵⁶

33. Not only is this evidence of procedural irregularities, but it demonstrates that the EIU lacked the requisite knowledge of corporate structure or research acumen to serve as a qualified expert on Dot Registry's strings. The EIU's evaluation of a “defined community” grossly misinterprets the motivation and effects of structuring businesses according to particular legal formats in the United States. Every business entity in the United States is acutely aware of its membership in the business community, the rights afforded to it by being a registered business and the reporting requirements in place to maintain membership such as filing annual reports with the applicable State Secretary, filing entity specific tax forms with the IRS and complying with rules and regulations in its jurisdiction.

34. Furthermore, the EIU showed that it lacked the requisite knowledge and skill to understand and accord proper weight to the standing of the Secretaries within the business community. The evaluators indicated that the Secretaries could not possibly represent an entity mainly dedicated to the U.S.

⁵⁵ See AGB Modules 4.2.2, 4.2.3 [Ex. C-005].

⁵⁶ See Reconsideration Request Form, for Application No. 1-880-17627 (.LLC), Annex 4 (11 Apr. 2013) [Ex. C-017] for a redline demonstrating that the three CPE evaluations are virtually identical.

business community because they “are not mainly dedicated to the community as they have other roles/functions beyond processing corporate registrations.”⁵⁷

35. In addition, the EIU also noted doing “extensive research,” which apparently hurt Dot Registry’s scores on several key questions and ultimately resulted in the EIU denying Dot Registry’s applications community priority. This “research,” which was cited as the reason for the deduction of up to four points in the evaluation process, is not cited by the EIU in the CPE results.

3. The EIU Evaluators Misapplied the CPE Criteria Set Forth in the AGB as well as in its Own Guidelines

42. The EIU evaluators also ignored or contradicted AGB policies and procedures, as well as the EIU’s own CPE Processes, by failing to properly investigate letters of support and opposition, failing to award points where criteria was admittedly met and double-counting purported negatives aspects.

(i) The EIU’s Harassment of Dot Registry’s Supporters

43. The CPE process lasted approximately three-and-a-half months, during which time the EIU evaluators contacted Dot Registry’s supporters—the U.S. Secretaries of State—numerous times to confirm (and reconfirm) not only the authenticity of their letters of support but proof of their authority to write such letters. The number of complaints Dot Registry received from its supporters about the EIU evaluators’ unprofessional and disorganized behavior reached a peak in May 2014, which prompted Dot Registry to contact ICANN directly on the 19th of that month. Within approximately one week, the EIU issued formal apology emails to Dot Registry’s supporters.

44. Although some Secretaries supporting Dot Registry’s applications received upwards of seven emails from EIU evaluators to authenticate their support, the European Commission and the State of Delaware did not receive a single email to authenticate their potential opposition. Because of this, Dot

⁵⁷ New gTLD Program, Community Priority Evaluation Report, for Application No. 1-880-17627 (.LLC) (11 June 2014), p. 2 [hereinafter, .LLC Evaluation] [Ex. C-018]; New gTLD Program, Community Priority Evaluation Report, for Application No. 1-880-35508 (.LLP) (11 June 2014), p. 2 [hereinafter, .LLP Evaluation] [Ex. C-019]; New gTLD Program, Community Priority Evaluation Report, for Application No. 1-880-35979 (.INC) (11 June 2014), p. 2 [hereinafter, .INC Evaluation] [Ex. C-020].

Registry was surprised to learn via the CPE results published June 11, 2014, that the applications had “received relevant opposition from one group of non-negligible size.”⁵⁸ The EIU’s failure to validate all letters of support and opposition directly contravene the CPE criteria in Module 4 and explicitly violate the EIU’s own CPE Processes.⁵⁹ Moreover, it is unclear why the EIU maintains that a group of “non-negligible size” opposed Dot Registry’s applications, as the only opposition to Dot Registry’s applications that was not withdrawn came from Dot Registry’s competitors and their affiliates and, therefore, is irrelevant to the CPE.

(ii) The EIU’s Numerous Scoring Inconsistencies

45. The CPE Results were riddled with inconsistencies and instances where the evaluators acknowledged that Dot Registry demonstrated certain criteria, but nonetheless awarded Dot Registry no points. For example, the CPE Guidelines for Criterion 1, “Community Establishment,” are judged on the basis of “delineation, pre-existence and organized.”⁶⁰ A Community Application with a clear and straight-forward definition will score high, while a community with an unclear, dispersed or unbounded definition scores low. The AGB defines “pre-existing” to mean “that a community has been active since before the new gTLD policy recommendations were completed in September 2007.”⁶¹ The evaluator reviewing Dot Registry’s application for community priority for .LLC found that “the community definition shows a clear and straightforward membership. While broad, the community is clearly defined....”⁶² Dot Registry also provided information in its application for .LLC explaining that the first LLC was validated in Wyoming in 1977 and that in 1996, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Limited Liability

⁵⁸ .LLC Evaluation, p. 7 [Ex. C-018]; .LLP Evaluation, p. 7 [Ex. C-019]; .INC Evaluation, p. 7 [Ex. C-020].

⁵⁹ See AGB Module 4.2.3 [Ex. C-005]; See also, CPE Processes [Ex. C-016] (requiring the EIU to verify “every letter of support/opposition received” except in the two narrow instances where no contact details can be obtained for the sender or the sender does not represent and is not affiliated with or linked to any organization).

⁶⁰ AGB Module 4.2.3 [Ex. C-005].

⁶¹ *Id.*

⁶² .LLC Evaluation, p. 2 [Ex. C-018]; see also, .LLP Evaluation, p. 2 [Ex. C-019]; .INC Evaluation, p. 2 [Ex. C-020].

Company Act, providing for both the definition of an LLC and the governmental standards under which an LLC may be formed. Through this act, a standard set of policies were created to define, validate and monitor the operations of LLC's, thus creating a unique and accountable business community in the United States. Nonetheless, Dot Registry's application scored zero out of two possible points in this category, because "these limited liability companies would typically not associate themselves with being part of the community as defined by the applicant."⁶³

(iii) The EIU's Improper Double Counting

46. The EIU also engaged in "double-counting" of perceived weaknesses in Dot Registry's Community Applications. According to the AGB, "any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria."⁶⁴ Twice throughout the CPE results the Panel uses the phrase "as previously stated" prior to deducting points for a particular criterion. This is a clear example of the "double counting" prohibited by the AGB.

(iv) Evaluators' Conflict of Interest

47. Finally, the EIU appears to have a conflict of interest with regard to Dot Registry's application. Eric Schmidt, a member of the Board of Directors of the Economist Group, is the former chief executive officer and current Executive Chairman of Google.⁶⁵ Google is in contention sets for six out of the fifteen strings that have undergone the CPE process, including .INC., LLC and .LLP.⁶⁶ In other words, the EIU had a conflict of interest in 40 percent of the CPEs it has performed overall and 100 percent of the CPEs it has performed on Dot Registry's applications.

⁶³ .LLC Evaluation, p. 3 [Ex. C-018]; *see also*, .LLP Evaluation, p. 3 [Ex. C-019]; .INC Evaluation, p. 3 [Ex. C-020].

⁶⁴ AGB Module 4.2.3 [Ex. C-005].

⁶⁵ The Economist Group's webpage boasts Mr. Schmidt's long career at Google and his impressive accomplishments with the company and indicates that he joined the Economist Group Board of Directors in November 2013, shortly after the EIU began conducting CPEs. *See* http://www.economistgroup.com/results_and_governance/board.html.

⁶⁶ Google filed under the name of its affiliate, Charleston Road Registry. *See infra* n. 42.

D. The BGC's Failure to Exercise Appropriate Due Diligence and Care in Considering Dot Registry's Reconsideration Requests

48. After reviewing the CPE Results and identifying the aforementioned issues, Dot Registry, in collaboration with NASS, timely filed with the BGC on June 25, 2014, requests for review and reconsideration of the actions and inaction of ICANN staff relating to the CPE Results and the subsequent decision of ICANN's New gTLD Program Committee ("NGPC") to place the contention sets for .INC, .LLC and .LLP into active contention (collectively, the "Reconsideration Requests").⁶⁷ "Reconsideration" is the first step in the escalating set of review processes available to parties under ICANN's accountability framework.⁶⁸ Pursuant to the delegated authority of the Board,⁶⁹ the BGC conducts the review process, weighs the evidence, may even conduct in-person hearings and "makes a final determination or recommendation to the Board" on the request.⁷⁰

49. Dot Registry's Reconsideration Requests state the actions complained of, the adverse effects of such actions on Dot Registry and the grounds on which it had standing to submit its Reconsideration Requests.⁷¹ Dot Registry specifically identified the CPE Results and the NGPC's subsequent reliance on such results to change the status of the contention sets for .INC, .LLC and .LLP from "on-hold" to "active," as inconsistent with ICANN's Bylaws and the AGB.⁷² Furthermore, Dot Registry explained in detail the inconsistencies with applicable policies and procedures, including, (i) the CPE Panel's failure to validate all letters of support and opposition; (ii) the Panel's repeated reliance on "research"

⁶⁷ See Reconsideration Request For, for Application No. 1-880-35979 (.INC) (11 Apr. 2013) [hereinafter .INC Reconsideration Request] [Ex. C-021]; Reconsideration Request For, for Application No. 1-880-17627 (.LLC) (11 Apr. 2013) [hereinafter .LLC Reconsideration Request] [Ex. C-017]; Reconsideration Request Application, for Application No. 1-880-35508 (.LLP) (11 Apr. 2013) [hereinafter .LLP Reconsideration Request] [Ex. C-022].

⁶⁸ See Bylaws, Art. IV, § 2(2) [Ex. C-001].

⁶⁹ *Id.*, Art. IV, § 2(17).

⁷⁰ *Id.*, Art. IV, § 2(2), (12).

⁷¹ See .INC Reconsideration Request [Ex. C-021]; .LLC Reconsideration Request [Ex. C-017]; .LLP Reconsideration Request [Ex. C-022].

⁷² See .INC Reconsideration Request [Ex. C-021]; .LLC Reconsideration Request [Ex. C-017]; .LLP Reconsideration Request [Ex. C-022].

without disclosing the source or substance of such research; (iii) the Panel’s “double counting;” (iv) the Panel’s failure to perform independent evaluations of each of Dot Registry’s applications for community priority; and (v) the Panel’s failure to properly apply the CPE criteria in the AGB.⁷³

50. Nevertheless, on July 24, 2014, the BGC issued its Determination that Dot Registry and NASS’ claims did not support reconsideration and, therefore, were denied. According to the BGC, the Reconsideration Requests did not demonstrate that Dot Registry (i) was adversely affected by the CPE Panels’ alleged failure to validate letters of support or opposition; (ii) the Panels failed to independently evaluate its applications; and (iii) the Panels did not properly apply the CPE criteria.⁷⁴ Furthermore, the Determination mischaracterized Dot Registry’s claims as “challeng[ing] the substantive determinations of the Panels,” rather than acknowledging that the CPE panels violated established policies and procedures.⁷⁵

E. ICANN’s Failure to Participate in the Cooperative Engagement Process with Dot Registry

51. After exhausting all other options for resolving the serious issues regarding the conduct and results of the CPEs and the actions, inaction and decisions of ICANN staff and the Board with respect to the handling of these processes, Dot Registry timely invoked ICANN’s cooperative engagement process (“CEP”) on September 5, 2014, by emailing written notice to independentreview@icann.org and to ICANN General Counsel John O. Jeffrey.⁷⁶

52. As of the date of this request for IRP, ICANN has failed to participate in the CEP, or respond in any fashion to Dot Registry’s notice invoking it or any subsequent communications.⁷⁷ In fact,

⁷³ See .INC Reconsideration Request [Ex. C-021]; .LLC Reconsideration Request [Ex. C-017]; .LLP Reconsideration Request [Ex. C-022].

⁷⁴ BGC Determination [Ex. C-004].

⁷⁵ *Id.*, pp. 15-22.

⁷⁶ See Ex. C-023. Dot Registry Chief Executive Officer Shaul Jolles received email “read receipts” confirming that Dot Registry’s notice has been delivered to and opened by both email addresses.

⁷⁷ Although participating in the CEP is not a prerequisite for requesting an IRP, if a party does not first participate “in good faith” in a CEP, as well as a “conciliation period” with ICANN after submitting a request for IRP, the Bylaws mandate that

ICANN’s deadline for communicating its point of contact for the CEP expired 12 days ago.⁷⁸ Both Dot Registry’s Chief Executive Officer Shaul Jolles and Weil, acting on behalf of Dot Registry, have asked ICANN to confirm whether it intends to participate in the CEP.⁷⁹ ICANN has failed to explain its apparent unwillingness to participate in the CEP, an accountability mechanism that ICANN specifically “urge[s]” complainants to participate in and, for which complaints face a costly penalty for not participating in the event they do not prevail in the IRP.⁸⁰

F. ICANN Changed the Status of the Contention Sets for .INC, .LLC and .LLP to “Active” and Eligible for Auction, Despite Dot Registry Invoking the CEP

53. On September 17, 2014, *11 days* after Dot Registry submitted its notice invoking the CEP, Dot Registry received a notification through ICANN’s customer portal containing a link to ICANN’s Contention Set Status page, indicating that ICANN had changed the status of the contention sets for strings .INC, .LLC and .LLP from “on-hold,” and ineligible for auction as a result of pending accountability mechanisms, to “active,” and, therefore, eligible for auction, and provided a new date (January 21, 2015) for the auctions to be held.⁸¹ Stunned by ICANN’s apparent disregard for its own operating principles and practices, Dot Registry asked its representatives to contact ICANN, requesting that ICANN immediately revert the status of the contention sets for .INC, .LLC and .LLP to “on hold” and ineligible for auction on the basis of a pending accountability mechanism. To date, Dot Registry has not received any response from ICANN.

the future IRP Panel must award to ICANN (if ICANN is the prevailing party) all reasonable fees and costs, including legal fees, incurred in the IRP. This amounts to a potential penalty for not first engaging in these non-binding dispute resolution mechanisms. Bylaws Art. IV § 3(16) [Ex. C-001]. Dot Registry submits that this does not apply in this IRP since it attempted to participate in the CEP good faith, but could not do so, due to ICANN’s apparent unwillingness to participate.

⁷⁸ According to the CEP procedures, which are incorporated by reference into ICANN’s Bylaws, “ICANN *shall* designate a single executive to serve as the point of contact for the resolution of the issue, and provide notice of the designation to the requestor.” Bylaws, Art. IV, § 3(14); ICANN Cooperative Engagement Process – Requests for Independent Review, ¶ 3 (11 April 2013) [hereinafter CEP Procedures] (emphasis added). Accordingly, ICANN should have communicated to Dot Registry by no later than September 9, 2014, its point of contact for the CEP.

⁷⁹ See Email from Shaul Jolles to John Jeffrey (10 Sept. 2014) [Ex. C-024]; Letter from Arif Ali to John Jeffrey (17 Sept. 2014) [Ex. C-025].

⁸⁰ See Bylaws, Art. IV § 3(16) [Ex. C-001].

⁸¹ See, e.g. Letter from Grant Nakata to Tess Pattison Wade (17 Sept. 2014) [Ex. C-026].

54. Given the “active” status of the contention sets for these strings and unsure of ICANN’s commitment to its CEP, Dot Registry files this request for IRP in order to preserve its claims.

VI. APPLICABLE RULES AND GOVERNING LAW

55. This IRP is constituted under Section 3 of Article IV of ICANN’s Bylaws.⁸² ICANN’s Articles of Incorporation, Bylaws, the AGB, the ICDR Rules and the Supplementary Procedures govern this proceeding. The applicable law is international law, local law, as provided in Article 4 of ICANN’s Articles of Incorporation, and ICANN’s Bylaws and Articles of Incorporation.⁸³

VII. STANDING

56. To have standing to request an IRP, a person must be “materially affected by a decision or action of the Board” that is alleged to be “inconsistent” with ICANN’s Articles of Incorporation or Bylaws.⁸⁴ As the applicant for the .INC, .LLC and .LLP gTLD strings, Dot Registry is directly and materially affected by the actions, inaction and decisions of the Board described herein relating to these strings and the contention sets for each string. Dot Registry has invested substantial time, funds and effort to obtain the rights to operate these strings,⁸⁵ including \$621,000 in applications fees alone.⁸⁶

57. Furthermore, Dot Registry has suffered financial loss and its staff (and supporters) have expended significant time and effort in connection with the Board’s handling and treatment of Dot Registry’s applications for, and the status of the contention sets for, .INC, .LLC and .LLP. The

⁸² See ICANN’s Bylaws, Art. IV § 3 [Ex. C-001].

⁸³ See ICANN Articles of Incorporation, Art. 4 [Ex. C-006] (“The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and Bylaws, through open and transparent process that enable competition and open entry in Internet-related markets.”); *see also* Excerpt from Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN [Ex. C-027], p. 70, *available at* <https://www.icann.org/resources/pages/icm-v-icann-2012-02-25-en> (Concluding that Article 4 of ICANN’s Articles of Incorporation “requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.”).

⁸⁴ Bylaws, Art. IV, § 3.2 [Ex. C-001].

⁸⁵ *See supra* ¶¶ 17-19, 22.

⁸⁶ Dot Registry paid ICANN \$185,000 fee per application and \$22,000 per application to participate in the CPE.

BGC's conduct relating to Dot Registry's Reconsideration Requests and its Determination regarding the issues raised by Dot Registry with respect to the EIU's failure to properly apply the CPE scoring criteria to Dot Registry's applications for these strings, leave Dot Registry's applications in contention sets that are scheduled for auction, a process that not only further delays the delegation of these strings, but forces Dot Registry to incur significant additional expenses.

58. Regardless of the outcome of the auctions, Dot Registry has been materially harmed. Without the relief sought, Dot Registry will have to wait months to participate in the auctions scheduled for these strings, at which point it will either spend millions of dollars to secure them or lose all of its substantial investment to date, neither of which are acceptable outcomes when the CPEs should have resolved string contention months ago. These losses are material to Dot Registry—which was established for the specific purpose of applying for and operating these and two other corporate identifier strings—and the direct result of Board actions, inaction and decisions in violation of ICANN's Articles of Incorporation, Bylaws, AGB and principles of international law.

59. For all of these reasons, Dot Registry submits that it has standing to make this request for IRP and the right to assert the claims set forth herein.

VIII. SUMMARY OF ICANN'S BREACHES

60. The ICANN Board has committed numerous breaches of its Articles of Incorporation, Bylaws, AGB, principles of international and local law, and other applicable rules of conduct in its handling and treatment of Dot Registry's applications for .INC, .LLC and .LLP, as described below.

A. ICANN Failed to Operate in a Transparent and Accountable Manner, Consistent with Relevant Principles of International Law

61. ICANN's Articles of Incorporation require it to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international

law and applicable international conventions and local law.”⁸⁷ These principles include fair dealing, acting in good faith, and respecting the legitimate contract-based expectations of applicants to the new gTLD program.⁸⁸ In addition, ICANN’s Bylaws require it to act in an open, transparent and non-discriminatory manner, remaining accountable to the Internet community and parties that are affected by ICANN’s actions.⁸⁹ The ICANN Board violated its obligation to comply with principles of international law and its obligations to transparency and accountability to the Internet community by ignoring and perpetuating a pattern of behavior undertaken by ICANN staff in violation of those principles, which includes,

- Altering the requirements that applicants must satisfy after the Application period closed;
- Allowing Standard Applicants to make material amendments to their applications after the application period closed by way of non-binding PICs, which had the effect of making their Standard Applications more competitive with Community Applications; and
- Failing to adequately address the potential disclosure and misuse of applicants’ confidential and proprietary information.

In refusing to undertake any investigation whatsoever when presented with evidence of this pattern of behavior, the ICANN Board has failed to comply with its obligations under international law and its obligations to act with transparency and accountability.

B. ICANN Breached Its Articles Of Incorporation And Its Bylaws By Failing to Ensure that the EIU Followed ICANN Policies Accurately and without Bias and Failing to Correct for the EIU’s Blatant Abuse of Those Policies

62. ICANN’s Bylaws explicitly require ICANN to ensure that its policies are implemented accurately and in a transparent, unbiased manner.⁹⁰ In addition, pursuant to its obligation to act

⁸⁷ Articles of Incorporation, Cl. 4 [Ex. C-006].

⁸⁸ Excerpt from Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN, pp. 69-70 [Ex. C-027].

⁸⁹ ICANN Bylaws, Art. I § 2(7), (8), (10), Art. II § 3, Art. III §§ 1, 6(1) [Ex. C-001]; Affirmation of Commitments, Cls. 3, 9.1 (30 Sept. 2009) [Ex. C-028].

⁹⁰ Bylaws, Art. I §2 (7), (8), Art. II § 3, Art. III § 1, §6(1) [Ex. C-001]; Affirmation of Commitments, Cls. 3, 9.1 [Ex. C-028].

transparently and accountably and in accordance with relevant principles of international law, ICANN must ensure that anyone it delegates authority to is competent to exercise that authority and will likewise implement ICANN's policies in compliance with the principles expressed in ICANN's governing documents.⁹¹ Finally, ICANN is required to ensure a lack of conflicts of interest among its affiliated parties and independent experts.⁹² As the only entity within ICANN authorized to contract on behalf of ICANN and the ultimate authority for such contracts,⁹³ the ICANN Board violated these obligations through the following actions:

- Appointing the EIU to conduct reviews for which the EIU lacked the requisite skill and expertise, and failing to correct for this shortcoming when it became apparent;
- Appointing the EIU as sole CPE reviewer, contrary to a policy ICANN established to prevent conflicts of interest and promote superior performance through competition;
- Failing to address a conflict of interest which arose after the EIU was appointed and affected a large percentage of the EIU's evaluations, even after it was brought to the Board's attention;
- Allowing the EIU to promulgate new policies and procedures that created additional requirements for applicants undergoing CPE *after* the application period closed, and failing to rectify the issue when it was brought explicitly to the Board's attention; and
- Allowing the EIU to contravene numerous criteria in the AGB and the EIU's own CPE Processes—including conflating applications, deducting points when requisite criteria were admittedly met, engaging in double-counting, failing to verify statements of support and objection, engaging in unprofessional and arbitrary harassment and conclusively disposing of the rights of applicants based upon undisclosed and unverifiable “research”—and failing to address the EIU's violations when brought explicitly to the Board's attention.

C. ICANN Breached Its Articles of Incorporation and its Bylaws by Refusing to Acknowledge Policy Advice Offered by Affected Parties and Policy-Making Bodies and Refusing to Take Action to Protect the Security and Stability of the Internet and Consumer Confidence

63. ICANN's Bylaws fundamentally commit it to protect the security and stability of the Internet and promote consumer confidence and consumer trust in the Internet.⁹⁴ In furtherance of that

⁹¹ Bylaws, Art. I §2(7), Art. XV §1 [Ex. C-001].

⁹² *Id.*

⁹³ *Id.*, Art. XV §1.

⁹⁴ *Id.*, Art. I § 2(1); Affirmation of Commitments, Cls. 3, 9.1, 9.3 [Ex. C-028].

responsibility, ICANN's Bylaws require that it give due regard to the opinions of entities affected by ICANN's actions and particularly give due regard to the policy recommendations or entities tasked with a policy role that are affected by ICANN's actions.⁹⁵

- Failing to adequately address the GAC's Communique that delegating corporate identifier strings to unsecure Standard Applicants under ICANN's standard registry agreement would risk an unprecedented level of fraud on businesses and consumers and certainly damage consumer confidence in the Internet as a marketplace; and
- Deliberately ignoring the role of the NASS in the business community and the NASS's participation—as the representative of an affected community and as a representative of policy-making bodies within the United States—as a co-complainant in Dot Registry's Reconsideration Requests.

D. ICANN Breached Its Articles of Incorporation and its Bylaws by Refusing to Engage in CEP in Explicit Violation of Its Bylaws.

64. ICANN is unequivocally required to participate in the accountability mechanisms enumerated in its Bylaws,⁹⁶ which are the only means for relief ICANN believes are available to new gTLD Applicants, pursuant to Module 6 of the AGB. Aside from the general premise that ICANN cannot possibly act accountably if it refuses to engage in its own accountability mechanisms, the Bylaws explicitly require ICANN to engage in the CEP “in good faith.”⁹⁷ ICANN's refusal to cooperate with Dot Registry is in violation of its Bylaws. The action by the NGPC, under the delegated authority of the Board, changing the status of the contention sets for .INC, .LLC and .LLP to “active” and, therefore, eligible for auction—despite Dot Registry invoking the CEP—perpetuates the aforementioned violation and directly and materially harms Dot Registry.

IX. RELIEF REQUESTED

65. Based on the foregoing, Dot Registry respectfully requests that the Panel issue a declaration:

⁹⁵ Bylaws, Art. I §2(1), (3), (4), (7), (10), (11), Art. III § 6(1), Art. XI § 2(1) [Ex. C-001], Affirmation of Commitments, Cl. 9.1 [Ex. C-028].

⁹⁶ Bylaws Art. I § 2(10), Art. IV [Ex. C-001]; Articles of Incorporation, Cl. 4 [Ex. C-006]; Affirmation of Commitments, Cls. 3, 9.1 [Ex. C-028].

⁹⁷ Bylaws, Art. IV, § 3(14) [Ex. C-001]; Cooperative Engagement Process (CEP) – Request for Independent Review (11 Apr. 2013), p. 2 (“ICANN is expected to participate in the cooperative engagement process in good faith”), *available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.

- Finding that the Board breached its Articles of Incorporation, its Bylaws and the AGB;
- Finding that the EIU erred in scoring Dot Registry’s applications for .INC, .LLC and .LLP;
- Requiring ICANN to reject the determinations of the EIU-appointed experts regarding Dot Registry’s applications for .INC, .LLC and .LLP;
- Finding that Dot Registry’s applications for .INC, .LLC and .LLP satisfied the CPE criteria set forth in the AGB or, in the alternative, ordering ICANN to permit each of Dot Registry’s applications for CPE to be reevaluated by newly constituted panels not under the direction of the EIU;
- Awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- Awarding such other relief as the Panel may find appropriate or Dot Registry may request.

X. RESERVATION OF RIGHTS

66. DCA reserves all of its rights to seek emergency relief or interim measures of protection⁹⁸ and to supplement or amend its claims during the IRP, including to further elaborate upon and substantiate the factual and legal positions set forth herein.⁹⁹

Respectfully submitted,



Arif H. Ali
Counsel for Claimant

⁹⁸ See Excerpt from Request for Emergency Arbitrator in the Independent Review Process between DotConnectAfrica Trust and ICANN, p. 1 n. 1, Annex A [Ex. C-029] available at <https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en> (citing ICANN’s admission that the Emergency Arbitrator provision of the ICDR Rules shall apply in ICANN IRP actions, in the absence of a standing panel to grant emergency relief).

⁹⁹ See ICDR Rules, Art. 9 (“Any party may amend or supplement its claim, counterclaim, setoff or defense unless the tribunal considers it inappropriate to allow such amendment or supplement because of the party’s delay in making it, prejudice to the other parties or any other circumstances.”) [Ex. C-002].