

November 21, 2014

Thomas J. Klitgaard, Esq.
Emergency Arbitrator
International Centre for Dispute Resolution

Re: ICDR Case No. 01-14-0000-1579, Donuts Inc. and ICANN

Dear Mr. Klitgaard:

On behalf of SportAccord (the umbrella organization for all Olympic and non-Olympic international sports federations), the International Rugby Board, and Starting Dot Limited (affiliated with Fédération Internationale de Ski; “recognised by the International Olympic Committee as the sole international governing body for ski sport”)¹ (collectively the “Sports Communities”), we seek the immediate denial of the Donuts’ Emergency Petition, dismissal of Donuts’ Independent Review Process (“IRP”) action, and an end to Donuts’ unwarranted, anticompetitive and illegitimate attempts to delay the delegation to the Sport, Ski and Rugby Communities of their legitimately-won and long overdue New Generic Top Level Domain Names (“New gTLDs”).

The Sports Communities respectfully submit that, as shown below, Donuts wholly lacks standing to pursue the relief it seeks, and its petition is both untimely and lacks merit. Donuts’ Emergency Petition and IRP filings against .SPORT, .RUGBY and .SKI are also abusive and violate the basic tenets of due process and ICANN Applicant Guidebook requirements barring ex parte communications that improperly exclude interested parties such as the Sports Communities here. Accordingly, good cause exists for the International Centre for Dispute Resolution’s

¹ International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/421/ICANN/38, Fédération Internationale de Ski (Switzerland) vs/ Wilde Lake, LLC (USA).

(“ICDR’s”) acceptance of this letter. Finally, there can be no justification for Donuts’ request for emergency relief where such would further irreparably harm the Sports Communities.

Background

Since Donuts lost the Community Objections before the International Chamber of Commerce’s International Centre of Expertise (“ICC”) for .SPORT, .SKI and .RUGBY, it has engaged in baseless, abusive and anticompetitive tactics before ICANN and now before this Tribunal. Donuts is a “group registry,” the largest applicant for New gTLDs having raised more than \$100 million in venture capital funds to apply for and manage more than 307 new generic top level domains. Its founders are drawn largely from the ICANN community of registrars, those companies that register domain names, and who in their capacity as then-leaders of the registrar community helped to draft the principles that became ICANN’s New gTLD Applicant Guidebook – the rules of the road for applying for and winning New gTLD delegations.

Even as Donuts has received from ICANN the delegation of over 140 new generic top level domains through the procedures of the Applicant Guidebook – rolling out dozens of New gTLDs every month – it has created anti-competitive obstacles to stop a similar rollout by the prevailing Sport, Ski and Rugby Communities in tainted proceedings and abusive processes never envisioned by the Applicant Guidebook and never intended to delay the public availability of these important, community-supported New gTLDs.

As shown by Starting Dot in its letter to ICANN of September 26, 2014, and the International Rugby Board in its letter of October 9, 2014 to ICANN’s General Counsel, CEO, Chair, and Chair of the Government Advisory Committee (both attached hereto), Donuts’ earlier appeal to ICANN’s Ombudsman and its subsequent use of the Cooperative Engagement Process were unfounded and abusive. These procedures are nowhere mentioned in the Applicant

Guidebook; they provide no mechanism of appeal for the ICC decisions regarding community objections to New gTLD applications. Nonetheless, they have been improperly used by Donuts to “adversely affect critically important Community interests”² and delay the roll-out of .SPORT, .SKI and .RUGBY by their respective Communities.

Donuts Lacks Standing To Engage the IRP, and Its Filings Are in any Event Untimely

As ICANN has explained, Donuts’ IRP filing is both untimely and lacking in standing. Simply put, there has been no Board action affecting the .SPORT, .SKI or .RUGBY New gTLDs that could be a predicate to an IRP action here, much less any action within the prescribed time period for filing an IRP. Accordingly, Donuts’ IRP filing should be summarily dismissed as urged by ICANN.³

The ICC’s .SPORT decision issued on October 23, 2013, the .SKI decision issued on January 21, 2014, and the .RUGBY decision issued on January 31, 2014. Had Donuts filed a Reconsideration Request with the ICANN Board, as other applicants did, such a request would have been due within 15 days of the ICC decisions under ICANN’s Bylaws and Accountability and Review, Article IV. But, Donuts did not file such a Reconsideration Request – not against any of the .SKI, .RUGBY or .SPORT decisions.

Even had Donuts filed such a Reconsideration Request and lost, as so many others did, it would have had only 30 days from the posting of the minutes of the Board reporting the decisions to file an IRP petition. Bylaws, Article IV, Section 3. Had this happened, any IRP proceedings would necessarily have been brought before the ICDR in the early Spring, and by

² Letter from Fletcher, Heald & Hildreth on behalf of the International Rugby Board to ICANN General Counsel, John O. Jeffrey, October 9, 2014 (hereinafter “IRB Letter”) at 2 (attached).

³ ICANN's Consolidated Response to Claimant Donuts Inc.'s Request for Independent Review Process and Request for Emergency Relief, November 14, 2014 (hereinafter "ICANN's Response") at 12-13.

now the Sports Communities would be implementing their New gTLDs to the benefit of their members. But Donuts omitted these necessary steps and unreasonably delayed any IRP filing. Therefore, Donuts has no standing and no grounds for being before this Forum. Accordingly, Donuts' invocation of the IRP and related emergency filings must be summarily dismissed.

Donuts' Filings Violate Due Process and the New gTLD Rules

In addition, the rules of the Community Objection process require that all parties agree to submit all communication with the ICC Panelist and staff – all motions, substantive materials and procedural communications – to the other party; nothing may be submitted on an ex parte basis. New gTLD Applicant Guidebook, sections 3.1, 3.3.3 and Attachment to Module 3, (b). Yet, when Donuts filed a complaint regarding the Community Objection decisions against .SKI, .SPORT and .RUGBY with ICANN's Ombudsman, it failed to provide the IRB, SportAccord and Starting Dot with either notice of its filing or a copy of its complaint. SportAccord, Starting Dot and IRB learned of these unauthorized and ex parte appeals by other means, and had to fight for their right to be heard. Ultimately, the Ombudsman dismissed Donuts' complaints.

Further, when Donuts filed unauthorized Cooperative Engagement Process requests against .SKI, .SPORTS, .RUGBY and four other New gTLDs – which likewise effectively operated as unauthorized appeals of the ICC decisions – it similarly failed to provide notice to those Communities who had won these proceedings, and did not serve a copy of its allegations or submissions on them. Here too, before the ICDR, Donuts has filed without notice of or copying the pleadings to the Sports Communities that won their Community Objections. Such stark

violations of fundamental due process principles should not be countenanced. Donuts' filings should be summarily dismissed on this ground alone.⁴

To make matters worse, it appears that Donuts is acting in collusion with another similarly-situated "group registry" applicant to magnify the adverse impact of these tactics on the Sport Communities. The timing of Donuts' actions before the Ombudsman and this present IRP filing shows that Donuts and Famous Four Media ("FFM", the second group registry applicant in the .sport/.sports and .rugby contention sets) collude in their strategy of procedural harassment. Donuts waited for the multiple frivolous proceedings submitted by FFM to be dismissed and then took over. These two portfolio applicants thus managed to maximize the delays suffered by the Sport Communities. IRB Letter at 2-3. As both are funded by venture capital and both are engaged in private and ICANN auctions for many TLDs they have applied for, they have an interest in perpetuating uncertainty as to the status of TLDs that target communities. In this way, they maintain artificial financial valuation for the applications in their portfolio which target communities and were prevailed upon by way of ICANN's Community-based objections or ICANN's Community Priority Evaluation.

Donuts Request for Emergency Relief Should Be Immediately Rejected

The well recognized test for emergency relief is a FOUR-part one:

- (1) whether the plaintiff will likely succeed on the merits;
- (2) whether irreparable harm to the plaintiff would result if the relief is not granted;
- (3) **THE BALANCE OF HARMS BETWEEN THE PETITIONER AND OTHER PARTIES IF THE RELIEF IS GRANTED;**

⁴ The fact that the IRP rules appear to permit an ex parte filing of this nature further confirms that the IRP is not properly available for the type of appellate review sought by Donuts, as ICANN has explained. ICANN's Response at 8-9.

(4) how the relief will impact the public interest.⁵

As discussed above and shown by ICANN, Donuts has not demonstrated a likelihood of success on the merits because it lacks standing and its filings even if arguably authorized are hopelessly untimely. ICANN's Response at 12, 15-16. Donuts nonetheless argues that it need not show such a likelihood because of the alleged irreparable harm it will suffer absent relief.⁶ However, this forum must balance the harms claimed by Donuts against the exacerbation of the myriad of harms the Sports Communities are already suffering and will continue to suffer from the unwarranted and lengthy delays in the delegation of their New gTLDs, and in turn, the registration and delivery of .SKI, .SPORT and .RUGBY domain names to the community members awaiting their use. As ICANN represents, absent Donuts' filings ICANN is prepared to move forward with delegation and contracting for the sports strings. ICANN's Response at 12. Further delay occasioned by a grant of the requested emergency relief to Donuts – and failure to dismiss its IRP summarily – will massively and irreparably harm the Sports Communities.

In the case of .SKI, Starting Dot, the Fédération Internationale de Ski, and the Ski Community are at risk of losing the 2014-2015 Ski Season. Starting Dot alone faces \$700,000 in unexpected losses in finance activity due to this delay. The ski sport community has had to postpone marketing actions of over 4,000 domain names already pre-reserved and sought by the world's major ski resorts and facilities.

In the case of .RUGBY, this IRP proceeding now interferes with all reasonable efforts and timing to prepare for the international Rugby World Cup taking place in the UK in September 2015 (being one of the top five global sporting events in the world). Opportunities for

⁵ Virginia Petroleum Jobbers Ass'n v. FPC, 2590 F.2d 921 (D.C. Cir. 1958).

⁶ See Additional Submission by Donuts Inc. In Further Support of Its Request for Emergency Relief (Application Freeze) Re New gTLD Applications for .SPORTS, .SKI and .RUGBY at 4.

unveiling this new gTLD in time for the development of .RUGBY websites to serve this tech-savvy community are fast diminishing – a calculated act by Donuts to frustrate the use of this New gTLD by the Community that legitimately seeks it.

In the case of .SPORT, SportAccord had expected to use the .SPORT extension by way of an event-specific pioneer domain name to launch the World Mind Games in Beijing next month, December 2014, and was unable to do so. Hundreds of its members (100+ International Sports Federations) seek domain names in the .SPORT gTLD for their upcoming events and to establish their global digital presence. Yet, their work is frustrated, time wasted and opportunities lost on a regular basis as the unwarranted delays by Donuts continue.

In contrast, requiring Donuts to forego only a further baseless attempt to shake down the Sports Communities with a consequent reduction in its portfolio of New gTLDs by less than 1% of those for which it has applied, cannot come close to outweighing the harm to the Sports Communities of further delaying the use of their signature strings. There can be no doubt that the balance of harms tips decidedly in favor of the Sports Communities.

Further, the ongoing disruption and overhang of uncertainty that the toleration of these abusive tactics has occasioned for ICANN's important New gTLD program and the broad-based Sports Communities themselves demonstrates that the public interest as well counsels against grant of emergency relief to Donuts. Donuts' request for emergency relief is therefore meritless and should be rejected out of hand.

Conclusion

Ultimately, in the language of sportsmanship, Donuts' actions are unsportsmanlike as well as illegal. It is time for this Forum to fulfill its proper role as an objective referee, enforce

the rules of the game, call the appropriate penalties on the unsportsmanlike and unlawful conduct of Donuts, and throw Donuts out of the game.

/s/ Julie O'Mahoney

Julie O'Mahoney
Senior Legal Counsel
International Rugby Board

/s/ Godefroy Jordan

Godefroy Jordan
CEO
Starting Dot Limited

/s/ Vlad Marinescu

Vlad Marinescu
Director General
SportAccord

cc: John O. Jeffrey, General Counsel, ICANN
Jeffrey A. LeVee, Jones Day
Alvaro Alvarez, Donuts Inc.
John M. Genga, The IP & Technology Legal Group

Attachments (IRB Letter and Starting Dot Letter)

Attachments



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October 9, 2014

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BY EMAIL: John.jeffrey@icann.org

Mr. John O. Jeffrey
General Counsel & Secretary
ICANN
12025 Waterfront Drive, Suite 300
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Re: Famous Four Media Limited and Donuts Inc.
Abusive, Baseless and Harmful Actions
Concerning the .RUGBY gTLD

Dear Mr. Jeffrey:

It has come to the attention of IRB Strategic Developments Limited (“International Rugby Board” and “IRB”), the successful applicant for the .RUGBY New gTLD, that Famous Four Media Limited (Famous Four) and Donuts, Inc. have requested that ICANN engage in a Cooperative Engagement Process (CEP) and may have filed or be filing to further delay the IRB’s New gTLD Application for .RUGBY under ICANN’s Independent Review Process (IRP). It is long past time for ICANN to put an end to these baseless and abusive tactics before ICANN itself is tarred with the consequences of Famous Four’s and Donut’s irresponsible conduct.

For the reasons set out below, it is clear that Donut’s and Famous Four’s requests to overturn the IRB’s successful application through the CEP and IRP process, as well as their earlier attempts at reconsideration and Ombudsman intervention, violate the ICANN Bylaws, the rules and procedures applicable to the CEP and IRP, and the requirements set out in the New gTLD Applicant Guidebook (“Applicant Guidebook). Even worse, we strongly submit that they are anticompetitive, undermine ICANN’s commitment to promote and protect the interests of Communities under the new gTLD program, and are materially harmful to the IRB. The IRB seeks immediate written confirmation that ICANN will deny Famous Four’s CEP request, reject any existing or forthcoming CEP and IRP requests by Donuts and Famous Four regarding the .RUGBY gTLD, and immediately update the IRB’s “contention resolution status” for .RUGBY to “resolved.”

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The secret, ex parte nature of the actions of Famous Four and Donuts exacerbates their pernicious impact on the IRB. This violation of the IRB's and others' fundamental due process rights has closed the IRB and other Community Objectors out of proceedings taking place at ICANN that adversely affect critically important Community interests. The terrible example being set here may come back to haunt ICANN in connection with its other programs such as the proposed IANA transfer.

It is therefore imperative for both Communities and the credibility of ICANN itself that ICANN terminate such tainted proceedings immediately and refuse to allow the continued abuse of its processes. Such action is clearly warranted because the CEP and possible IRP filings by Famous Four and Donuts are baseless, untimely, and wholly lack standing. Their obviously coordinated strategy is to cause unwarranted and severe harm to the IRB by delaying its roll-out of the .RUGBY domain names even as Donuts and Famous Four regularly introduce their own New gTLDs and domain name offerings. They cannot be permitted to succeed in their abusive plans.

The IRB is Entitled to the .RUGBY gTLD Under ICANN's New gTLD Rules

The International Rugby Board applied for .RUGBY and passed Initial Evaluation on May 3, 2013. This application was placed in a contention set with applications from Famous Four and Donuts. At great expenditure of time and funds, and on behalf of the International Rugby Community, the IRB filed Community Objections with the International Chamber of Commerce's International Centre for Expertise (ICC) following the Objection section of the New gTLD Applicant Guidebook.

In these Objections, the IRB met the high standards for winning a Community Objection, namely that there is a Clearly-Delineated Community, with a strong association to the applied-for gTLD string, presenting substantial opposition within the Community, whose rights and interests will be materially harmed if either Respondent were to be delegated .RUGBY. The ICC consolidated the two Objection proceedings. On January 31, 2014, the Panelist issued his decision in favor of the IRB.¹

On February 17, 2014, Famous Four filed a Reconsideration Request (14-6) with ICANN's Board Governance Committee (BGC) seeking a set-aside of the ICC Decision.² On March 13, 2014, the BGC found that:

“the Requestor has not stated proper ground for reconsideration, and therefore denies Reconsideration Request 14-6. Given there is no indication that the Panel violated any policy or process in reaching, or Staff in accepting, the Determination, this Request should not proceed.”³

On May 22, 2014, the IRB learned that Donuts had lodged a complaint with the ICANN Ombudsman which had stalled the contracting and delegation progress of .RUGBY for the IRB. Donuts did not provide the IRB with notice of its complaint or a copy of its allegations, but the IRB was given a limited opportunity to respond by the

¹ CASE No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134), INTERNATIONAL RUGBY BOARD (IRELAND) vs/ DOT RUGBY LIMITED (GIBRALTAR) and INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CROSS, LLC (USA), January 31, 2014, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination/>

² Dot Rugby Limited, Request 14-6 (17 February 2014), <https://www.icann.org/resources/pages/14-6-2014-02-20-en>

³ BGC Determination on Reconsideration Request 14-6 (13 March 2014), <https://www.icann.org/resources/pages/14-6-2014-02-20-en>

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Ombudsman. On July 8, 2014, the Ombudsman issued his determination that Donuts' complaint would not be upheld.

On the heels of the Donuts dismissal, and with seemingly clear knowledge of unpublished information from Donuts, Famous Four filed its own complaint against .RUGBY with the Ombudsman on July 23, 2014. Despite not seeing the complaint, the IRB raised its concerns about this submission as well. On August 12, 2014, the Ombudsman issued his decision, concluding that he found no unfairness in the way the Famous Four reconsideration request against .RUGBY was handled by the BGC or the New gTLD Committee.

Unsatisfied, on July 18, 2014, Donuts filed a CEP claim against seven (7) gTLD strings: .RUGBY, .CHARITY, .HOSPITAL, .SKI, .INSURANCE, .MEDICAL and .SPORTS, all seeking review by ICANN of Community Objections which Donuts lost before the ICC. The ICANN *Cooperative Engagement and Independent Review Process Pending Matters Update – 12 August 2014*,⁴ provided the only information about this CEP request. At no point did Donuts provide any notice to the IRB or provide the IRB with a copy of this CEP request impacting IRB's substantive rights. Further, at no point has ICANN provided the IRB with a fair or even any opportunity to respond to this request.

Now, in a repeat of their earlier strategy, Famous Four has followed the apparent dismissal of the CEP complaint of Donuts with perfectly coordinated timing. According to *Cooperative Engagement and Independent Review Process Pending Matters Update – 25 September 2014*, Famous Four has filed its own CEP claims against .RUGBY and .SPORT,⁵ without notice to or the opportunity to respond by the IRB and, we understand, SportAccord. (Regarding Donuts' claims, because of the secret, ex parte nature of the process, the IRB is unclear as to whether Donuts has moved from the CEP to filing an Independent Review Process action against .RUGBY and/or the other gTLDs won by Communities.)

This Delay is Deeply Harmful to the IRB and the International Rugby Community

The IRB is a global non-profit organization headquartered in Dublin, Ireland, dedicated to the development of rugby at all levels, training coaches and referees worldwide to manage rugby teams and tournaments, and promoting national, regional and international competitions which challenge teams and delight fans. The ICC Panelist, in his decision in favor of the IRB, noted

“The Objector has more than 5 ½ million registered individuals participating in 118 countries. Rugby 15's have participated in four Olympics. Rugby 7's will participate in the 2016 Olympics. Several federations (including the Objector, the Rugby League International Federation, and Wheelchair Rugby) represent the interest of members of the community. The Rugby World Cup is one of the most prominent of sporting events in the world.”⁶

⁴ *Cooperative Engagement and Independent Review Process Pending Matters Update – 12 August 2014*, no longer posted under the Pending CEP and IRP Matters, <https://www.icann.org/resources/pages/irp-2012-02-25-en>

⁵ *Cooperative Engagement and Independent Review Process Pending Matters Update – 25 September 2014*, Pending CEP and IRP Matters, <https://www.icann.org/resources/pages/irp-2012-02-25-en>

⁶ CASE No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134), INTERNATIONAL RUGBY BOARD (IRELAND) vs/ DOT RUGBY LIMITED (GIBRALTAR) and INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CROSS, LLC (USA), January 31, 2014, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination/>

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The current delay is very frustrating for the Rugby Community, but more that, it is difficult, painful, expensive, burdensome and harmful for the IRB as this non-profit organization is unable to proceed to delegation and the offering of .RUGBY domain names to serve the global Rugby Community, even as Donuts and Famous Four unveil and introduce New gTLDs virtually every week.

Further, these unwarranted delays come as the IRB and Rugby Community prepare for the upcoming Rugby World Cup to take place in the United Kingdom in 2015. Each day of delay results in increased costs and lost opportunities for the IRB and the global Rugby Community in their preparations for this important international tournament, as the IRB is prevented from offering the global information, communication, education and other services that it intends to provide through the .RUGBY gTLD.

Appellate Proceedings, Whether Ex Parte or Otherwise, Are Not Permitted Under the New gTLD Rules

We are very disturbed by the process of review ICANN is now allowing to take place. The ICC conducted a full arbitration process consistent with both its own rules and the Applicant Guidebook, under which no express avenue of appeal was created. We do not understand on what basis an appeal of process or substance would come to ICANN (or even the Ombudsman) or by what rules or standards it would be evaluated. That just such proceedings have been conducted and are still pending before ICANN on a manifestly unfair ex parte basis is an injustice that must be rectified immediately.

It is indisputable that the rules of the Community Objection Process require openness and bar all ex parte communications. Specifically:

3.1 Applicant Guidebook: “An objector must provide copies of all submissions to the DRSP associated with the objection proceedings to the applicant.”

3.3.3 Applicant Guidebook: “Each applicant must provide copies of all submissions to the DRSP associated with the objection proceedings to the objector.”

Article 6, Applicant Guidebook, Attachment to Module 3, (b): “The DRSP, Panel, Applicant, and Objector shall provide copies to one another of all correspondence (apart from confidential correspondence between Panel and the DRSP and among the Panel) regarding the proceedings.”

Starting with the initial filing of the Community Objections, the rules of the Applicant Guidebook required all parties to copy each other on all communications – procedural or substantive – to ICC Staff or Panelists.

It is further indisputable that Famous Four and Donuts knew the rules of the New gTLD Objection process, but apparently now are choosing not to comply with them. As a result, the IRB and other Communities have found themselves facing Kafkaesque challenges to their ICC decisions that are taking place behind closed doors without notice or a full and fair opportunity to participate and represent their Community interests.

How are these backroom processes consistent with the “no ex parte” standards of the New gTLD Applicant Guidebook? How are they consistent with the standards of openness, transparency and accountability promised to all by ICANN? Finally, how are these processes consistent with the universally accepted due process standards by which adjudicatory and appellate processes operate? We submit that they plainly are not.

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We Need the Opportunity to Participate

We respectfully, but forcefully submit that the Rules of ICANN cannot and should not bar the IRB's participation in any complaint or challenge to the .RUGBY gTLD string, deny the IRB prompt notice of and an opportunity to review any opposition filings, or limit the IRB's right to comment on and refute the filed challenges. Whatever the nature of the proceeding, the IRB must be permitted to participate fully.

Accordingly, and at a minimum, we ask to be allowed to review and respond to the submissions of Famous Four and Donuts currently pending or filed in the future regarding the .RUGBY gTLD. We highlight again the deep unfairness of taking an open process behind closed doors and thereby turning a fair and balanced proceeding into an ex parte discussion with the potential for all the evils such a process has been shown to generate. The principles of fundamental fairness and due process, as well as well-settled international adjudicatory norms, require that ICANN fully include the IRB as an equal party in all current and future challenges to the .RUGBY gTLD if, contrary to all concepts of fairness and justice, they are permitted to go forward.

This Attack on Communities is Untimely, Unwarranted and Contrary to Clear GAC Advice

The actions of Famous Four and Donuts in their serial, coordinated actions against the Rugby Community and other Communities constitute an attack on Communities in the New gTLD Process. These actions delay and thwart the implementation of sound ICC decisions and the delegation of hard-won Community gTLDs in clear disregard of the advice of ICANN's Government Advisory Committee (the GAC).

The GAC has repeatedly told ICANN, in unambiguous consensus terms, through formal communication, that ICANN must take special care to protect communities in the New gTLD process:

Governmental Advisory Committee, GAC Communiqué – Beijing, People's Republic of China, 11 April 2013:⁷

e. Community Support for Applications

The GAC advises the Board:

i. 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 opinion should be duly taken into account, together with all other relevant information.

Governmental Advisory Committee, GAC Communiqué – Durban, South Africa, Durban, 18 July 2013:⁸

7. Geographic Names and Community Applications

b. Community Applications

⁷ Governmental Advisory Committee, GAC Communiqué – Beijing, People's Republic of China, 11 April 2013, <https://www.icann.org/resources/correspondence/gac-to-board-2013-04-11-en>

⁸ Governmental Advisory Committee, GAC Communiqué – Durban, South Africa, Durban, 18 July 2013, <https://www.icann.org/news/announcement-2013-07-18-en>

- i. The GAC reiterates its advice from the Beijing Communiqué regarding preferential treatment for all applications which have demonstrable community support, while noting community concerns over the high costs for pursuing a Community Objection process as well as over the high threshold for passing Community Priority Evaluation.
- ii. Therefore the GAC advises the ICANN Board to: a. Consider to take better account of community views, and improve outcomes for communities, within the existing framework, independent of whether those communities have utilized ICANN's formal community processes to date.

Governmental Advisory Committee, GAC Communiqué - Singapore, 27 March 2014:⁹

3. Community Applications

The GAC reiterates its advice from the Beijing and Durban Communiqués regarding preferential treatment for all applications which have demonstrable community support.

1. The GAC advises

- a. ICANN to continue to protect the public interest and improve outcomes for communities, and to work with the applicants in an open and transparent manner in an effort to assist those communities. The GAC further notes that a range of issues relating to community applications will need to be dealt with in future rounds.

The message from the GAC is a clear and unequivocal one setting forth the value of Communities working with gTLDs and directing the improvement of outcomes for them.

The actions of Famous Four and Donuts run directly counter to this directive. Donuts, in fact, has made its ultimate objectives quite clear within ICANN's Generic Name Supporting Organization (GNSO) – that it seeks to eliminate communities from the New gTLD process and ban them from future gTLD rounds. In the Non-PDP Discussion Group of the GNSO on New gTLD Subsequent Procedures, Mason Cole, Donuts Vice President of Communications and Industry Relations, submitted as his first priority and highest goal the “1. Potential limiting of the next round [of New gTLDs] to trademarked TLDs.”¹⁰ *I.e.*, no Communities whatsoever.

We note that the Donuts vision undermines that of the GAC for Communities, and the Donuts and Famous Four actions are extremely damaging to Communities today.

⁹ Governmental Advisory Committee, GAC Communiqué - Singapore, 27 March 2014, <https://www.icann.org/news/announcement-55-2014-04-08-en>

¹⁰ Email of Mason Cole, Donuts VP of Communications and Industry Relations, to Non-PDP Discussion Group - New gTLD Subsequent Procedures, subject line: *[Gnso-newgtld-dg] - Reminder: Submit Issues & Nominations for Group Chair(s)*, archived at <http://mm.icann.org/pipermail/gnso-newgtld-dg/2014-September/000079.html>

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Neither Famous Four Nor Donuts Are Timely in Their Demands or Have Standing To Seek a CEP or IRP – Even if Such Were Conducted in Open and Balanced Manner

As fTLD and Starting Dot shared with you in their letters of August 28th and September 26th, there is nothing legitimate or timely about the Famous Four or Donuts requests for CEP and possible IRP claims. As they noted, Donuts never bothered to file a Petition for Reconsideration with the BGC against any of the ICC decisions for which it filed CEP claims, and that includes .RUGBY. Further, as the CEP is a predecessor to the Independent Review Process to reevaluate an action of the Board, fTLD and Starting Dot correctly explain that there is no underlying action from which review may be sought. We agree with their conclusions that any Donuts' CEP or IRP must be dismissed for lack of standing.

Famous Four, however, did file a Petition for Reconsideration with the Board Governance Committee on the .RUGBY decision, but this request was flatly denied on March 13, 2014. In its decision, the BGC wrote:

“the Requestor [Famous Four] has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-6. Given there is no indication that the Panel violated any policy or process in reaching, or Staff in accepting, the Determination, this Request should not proceed.”¹¹

The ICANN Bylaws require that an IRP action, or the CEP in anticipation of an IRP, be filed “within thirty days of the posting of the minutes of the Board meeting...”¹² But the BGC decision was made over 180 days ago, and more than 150 days from the August 21, 2014, the date the ICANN website lists for the CEP filing by Famous Four against .RUGBY.¹³ Even using the filing deadline now listed on ICANN's CEP Public Notice page, the Board decision was over 150 days ago, far outside the window for the timely filing of such a request even if it were otherwise authorized.

Clearly such a filing is untimely, and it would be manifestly unfair to accept this filing even as other users of ICANN's accountability mechanisms have been held to strict filing deadlines (as set out in the fTLD letter at page 4, n. 9).

Accordingly, we call on ICANN immediately and pursuant to its own rules to dismiss the Famous Four filing and any current or forthcoming Donuts filings against .RUGBY as improper, untimely, and without standing.

At This Crucial Time, ICANN Must Be Vigilant in Its Commitment to Accountability, Transparency and Due Process

These are important times for ICANN. In evaluating the transition and transfer of key IANA oversight from the US Department of Commerce to ICANN, ICANN has in turn made clear commitments to expanding and improving its own commitment to transparency and accountability. As ICANN President and CEO Fadi Chehade assured the U.S. Congress on April 10, 2014:¹⁴

¹¹ Request 14-6: Dot Rugby Limited, BGC Determination on Reconsideration Request 14-6 (13 March 2014) [PDF, 134 KB]<https://www.icann.org/resources/pages/14-6-2014-02-20-en>

¹² ICANN Bylaws, Article IV, Section 3(3).

¹³ Pending CEP and IRP Matters – 3 October 2014 [PDF, 87 KB], <https://www.icann.org/en/system/files/files/cep-irp-pending-03oct14-en.pdf>

¹⁴ Testimony of Fadi Chehade', President and Chief Executive Officer, Internet Corporation for Assigned Names and Numbers (ICANN) Before the U.S. House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, Hearing: *Should the Department of Commerce Relinquish Direct Oversight Over*

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“Since its inception in 1998, ICANN has evolved its accountability and transparency mechanisms for the benefit of the global community. ICANN’s Bylaws, and the Affirmation of Commitments, establish clear mechanisms for ICANN’s evolution, review of its processes, and improvements, through community input and multistakeholder review committees. With the eventual transition, ICANN recognizes the urgency of enhancing and extending its accountability mechanisms.”

It follows that ICANN must ensure that all parties are treated equitably in connection with its New gTLD Group Registries, no matter how prominent their work, voices and influence within the ICANN Process may be. Famous Four and Donuts are owned and operated by longtime members of the ICANN Multistakeholder Community. Famous Four’s CEO Geir Rasmussen has been involved with the ICANN Community since the early 2000s and received the gTLD contract for .NAME, one of the few gTLDs created during ICANN’s short lived “sponsored gTLD” period. Donuts co-founders Jon Nevett, Paul Stahura, and Richard Tindal have been deeply involved with ICANN since at and near its founding. Donuts founders were intimately involved in drafting and editing the rules of the New gTLD program – rules codified in the New gTLD Applicant Guidebook and rules by which they agreed to abide and be governed as the ultimate arbiters of the New gTLD Program. However, it is now our understanding that they are all actively involved in skirting, bypassing and derailing these rules, especially for Communities, even as Mason Cole takes his seat as GNSO liaison to the GAC.

We urge and call upon ICANN to preserve its processes and principles and not favor its relationships with insiders. As discussed above, there is much at stake in this tenuous and transitional period, and ICANN’s commitment to accountability, transparency and due process must be paramount.

We respectfully submit that to permit these Star Chamber proceedings for New gTLD Community Objection “appeals” to continue behind closed doors, without full notice to or participation by the affected parties and in blatant disregard for the rules of the New gTLD process and the multiple GAC Communiqués seeking protection for Communities, will place ICANN’s own commitments and priorities at risk as well as present the strong potential for ICANN itself to be embroiled in, and on the wrong side of, legal challenges to these abusive tactics.

We echo the Independent Objector in our principled objection to this abuse of process:

“I am not ‘ideologically’ opposed to an appeal process in the framework of the ICANN New gTLDs Dispute Resolution Procedure. However, I believe that such a process should be expressly provided by that Applicant Guidebook and... both parties (that is the Applicant and IO [in our case, Community Objector]) should be placed on the same footing – i.e.: both could be called to lodge an appeal... and both could make their arguments”.¹⁵

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Conclusion

ICANN's express commitment to openness, accountability and transparency is oft-stated. We call on you to stop the flagrant abuse of your processes and bar their use for secret, ex parte Community Objection appellate proceedings.

In light of the array of concerns expressed above and in letters from other frustrated Communities, the IRB requests written confirmation from ICANN that it will immediately include the IRB in all proceedings involving the .RUGBY gTLD and provide the IRB with a full opportunity to review and respond to all filings. Further, ICANN must promptly deny Famous Four's request for a CEP of .RUGBY and turn down any request for IRP actions against .RUGBY that may be submitted now or in the future by Donuts or Famous Four. Finally, we ask that you permit the global Rugby Community to move forward with its plans and achieve its goals for the global roll-out of the .RUGBY gTLD by immediately changing the contention resolution status of the IRB's .RUGBY string to "resolved" in final implementation of the long and unduly delayed decision of the ICC. Otherwise, we reserve our rights to consider and pursue all legal and other remedies.

Please confirm at your earliest convenience and in any case no later than 5:00 pm PDT on Thursday, October 16, 2014.

Sincerely,



Kathryn Kleiman
Robert J. Butler

Counsel for the International Rugby Board

Fadi Chehadé, President and CEO
Dr. Steve Crocker, Chairman of the Board, ICANN
Cherine Chalaby, Chairman of the new gTLD Program Committee
Heather Dryden, Chair, Governmental Advisory Committee, ICANN
Amy Stathos, Deputy General Counsel, ICANN
Daniel Halloran, Deputy General Counsel, ICANN
Chris LaHatte, Ombudsman, ICANN
Alvaro Alvarez, Donuts Inc.
Peter Young, Famous Four Media
Julie O'Mahony, Senior Legal Counsel, International Rugby Board

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September 26, 2014

VIA E-MAIL

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Internet Corporation for Assigned Names and Numbers
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Re: Donuts Inc.'s Illegitimate, Unfair and Harmful Actions Concerning the .SKI gTLD

Mr. Jeffrey:

It has come to the attention of Starting Dot ("SD") that Donuts, Inc. ("Donuts") has requested that the Internet Corporation for Assigned Names and Numbers ("ICANN") participate in a Cooperative Engagement Process ("CEP") regarding the application submitted to ICANN by Donuts' subsidiary Wild Lake, LLC ("Wild Lake"), to operate the .SKI generic Top-Level Domain ("gTLD").

This situation is untenable.

As will be carefully explained below, SD is seeking your urgent written confirmation that ICANN will deny Donuts' CEP request and reject all requests to commence an Independent Review Process ("IRP") with respect to .SKI gTLD. Such a decision is warranted since Donuts' CEP or IRP requests are not only baseless but also untimely.

Contact Information Redacted

Moreover, SD is also seeking an urgent written confirmation that ICANN will immediately reinstate SD's contention resolution status for its .SKI gTLD application as "*resolved*" so that it may proceed to the contracting phase with SD.

We kindly request that you provide us with such written assurances by no later than **5:00 PM PDT on Wednesday, October 1st, 2014**. In the event ICANN failed to provide such assurances, SD would be under the obligation to pursue all available legal venues to remedy the current situation and obtain compensation for the harm suffered.

Background

SD applied for the .SKI gTLD and passed Initial Evaluation on August 23, 2013. SD's application received a community objection that was upheld by experts appointed by the International Centre for Expertise of the International Chamber of Commerce ("**ICC**") on January 27, 2014. As a result, as of March 14, 2014, SD's application for .SKI gTLD was no longer in contention and its status was deemed resolved.

On April 8, 2014, the status changed again to "*on-hold*" following a request by Donuts on behalf of Wild Lake to the Ombudsman. It appears that the basis of this complaint stems from the ICC panelist decision rendered on January 27, 2014, which found in favor of the International Ski Federation ("**FIS**") against Wild Lake's application.

This situation was rapidly taken care of because as soon as SD sent a letter request to the Ombudsman, the .SKI gTLD application status changed back to "*resolved*" on July 7, 2014. Actually, the Ombudsman fully affirmed SD's position in his final report on July 8, 2014.

Although SD received ICANN's Contracting Invitation Request ("**CIR**") on July 17, 2014, it then never received the final Registry Agreement for signature. Moreover, some days later, SD discovered by chance, while navigating on ICANN's Contention Set Status webpage, that its status application had reverted back to "*on-hold*" due to Donut's CEP request with ICANN.

As of today, SD has no information regarding its .SKI gTLD application. SD is not only surprised but also severely frustrated by this turn of event – especially with respect to ICANN's management.

Evidently, these abrupt and unexplained changes regarding SD's "*contention resolution status*" are both improper and untimely. They should accordingly be reversed immediately.

Donut's Request for CEP is Improper Because Donuts Lacks Standing

First and foremost, Donuts does not have standing to request a CEP or IRP with respect to Wild Lake's application for the .SKI gTLD.

As you know, the purpose of requesting a CEP is to resolve or narrow the issues that are contemplated when bringing an IRP.¹ The sole basis for requesting an IRP is a "*decision or action by the Board*" that is alleged to be inconsistent with the Articles of Incorporation or Bylaws.² In that regard, ICANN's Bylaws provide that "*in order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action*".³

¹ See ICANN Bylaws, Article IV, §3(14) (February 7, 2014).

² ICANN Bylaws, Article IV, § 3(2).

³ Id

As ICANN surely agrees, none of the ICANN Board of Directors, the Board Governance Committee nor the new gTLD Program Committee under the delegated authority of the Board of Directors, has made any decision or taken any action with respect to Wild Lake's application for the .SKI gTLD. Rather, Donuts appears to have only complained of the ICC expert's decision who evaluated the community objection. At most, Donuts is complaining about the action or inaction of ICANN staff with respect to the expert's decision. Yet, as ICANN itself recently pointed out in the Vistaprint Limited IRP, "*following receipt of expert determinations, it is ICANN staff that is tasked with taking the next step, not ICANN's Board. As such there is no Board action in this regard for the IRP Panel to review.*"⁴

Indeed, the only accountability mechanism in ICANN's Bylaws designed to address staff action or inaction alleged to "*contradict established ICANN policy(ies)*" is an action for Reconsideration.⁵ But neither Donuts nor Wild Lake have filed a Request for Reconsideration ("**RFR**") regarding the .SKI gTLD.

The action brought by Donuts is thus baseless and aimed solely at once again hindering SD's application from proceeding, as it duly should.

Donuts CEP Request is Untimely

Not only is Donuts wholly improper, but the timeframe for doing so also expired several months ago.

Indeed, ICANN's Bylaws are crystal clear in that regard: "[a]ll Reconsideration Requests must be submitted ... within fifteen days after: ... for requests challenging **staff actions**, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action" or, "for requests challenging either Board of **staff inaction**, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner."⁶ The 15-day window for Donuts/Wild Lake to file a RFR regarding ICANN's action or inaction with respect to the ICC expert's decision commenced on or about January 24, 2014 – the date on which the ICC expert's decision was posted – and expired on or about February 8, 2014 – that is, more than 6 months ago.

Moreover, because there has been neither Board decision on an RFR nor any Board action relating to the .SKI gTLD, the period for requesting a CEP or IRP has not commenced (nor will it in the future given the fact that the window for filing an RFR concerning the ICC expert's determination has lapsed). Requests for IRPS must be filed within "*thirty days of the posting of the minutes of the Board meeting (and accompanying Board Briefing Materials, if available, that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.*"⁷ Although the Bylaws provide for consolidated requests "*when the casual connection between the circumstances of the requests and the harm is the same for each of the requesting parties*", there is nothing in the Bylaws that tolls the period for filing the request for IRP.

Actually, ICANN has demonstrated the contrary, holding users of its accountability mechanisms to strict filing deadlines.⁸ SD therefore expects that ICANN will proceed with fairness and apply its rules equally to Donuts' .SKI CEP request.

⁴ ICANN's Response to Claimant Vistaprint Limited's Request for IRP at 3, Vistaprint Limited v. ICANN, ICDR Case.

⁵ ICANN Bylaws, Article IV, §3(2)(a).

⁶ ICANN Bylaws, Article IV, §3(2)(5)(b)-(c).

⁷ ICANN Bylaws, Article IV, §3(3)(emphasis added).

⁸ See, e.g., BGC Recommendation on Reconsideration Request 13-13 (December 12, 2013) (dismissing the RFR brought by Christopher Barron relating to .GAY gTLD on the basis that it was untimely because Mr. Barron filed 17 days after the ICC expert's decision upholding the community objection to his application was published – 2 days late – and rejecting Mr. Barron's argument that he was unaware that the actions of Dispute Resolution Service Providers constituted

We also note that it has been ICANN's practice to distinguish between timely and untimely claims made by the same applicant and to dismiss the untimely claims at the outset—precisely the action SD requests ICANN to take concerning Donuts' improper and untimely .SKI gTLD claim.⁹

There exists no justification for Donuts to be above ICANN's Bylaws and regulations. Acting to the contrary would amount to allowing a violation to SD's right to due process.

The Effect of Donuts' CEP is Abusive and Harmful to SD

Donuts lacks standing to bring an IRP regarding the .SKI gTLD and, therefore, should not be engaged in a CEP concerning the .SKI gTLD. If ICANN allows Donuts to continue its action under the CEP and IRP, then the members of the global Ski community that wish to register their domain names under the .SKI extension in order to promote their businesses and seal the quality and authenticity of their activities, will have to postpone their registrations for an indefinite period of time. This impedes both their commercial activity and their reputation.

Moreover, Donuts is aware of the deadlines and standing conditions required to initiate a CEP and IRP before ICANN. Therefore, Donuts has been undoubtedly intentionally abusing ICANN's procedures in order to harm SD's business. SD was invited to contract on July 17, 2014, and now, two months later, it has still not signed the Registry Agreement.

SD was forced to cease all activities relating to the .SKI gTLD because of its "on-hold" status. Evidently, by demanding an IRP, Donuts' sole intent is to further disrupt SD's business by prolonging the registration of the .SKI gTLD. Donuts is knowingly engaging into an abusive and illegal activity, taking advantage of ICANN procedures in order to harm and impede SD's business and the interests of the Ski community. It is therefore unreasonable to allow Donuts to continue to stall delegation of .SKI in this hurtful manner.

Another concern, which should be brought to ICANN's attention and that of the broader Internet community, is the apparent collaboration by certain portfolio applicants-companies associated with a large number of applications-in abusing ICANN's internal processes in order to impede community-based applicants from moving forward with their applications for the same strings.¹⁰ ICANN's Governmental Advisory Committee ("GAC") has repeatedly expressed its concern that the ICANN processes –in particular the auction mechanism – raise public policy concerns by routinely

staff action until four days before he filed the RFR); BGC Recommendation on Reconsideration Request 13-15 (December 12, 2013) (dismissing the RFR brought by Commercial Connect relating to .SHOP gTLD on the basis that it was untimely because Commercial Connect filed 19 days after ICANN Staff emailed notice of its action – 4 days late – and rejecting Commercial Connect's argument that it was not aware of the notice until fifteen days before it filed the RFR); BGC Recommendation on Reconsideration Request 13-17 (January 8, 2014) (dismissing the RFR brought by GCCIX, W.L.L. relating to .GCC gTLD on the basis that it was untimely because GCCIX filed over five months after the New gTLD Program Committee posted its acceptance of GAC Advice – 146 days late – and rejecting GCCIX's argument that it had repeatedly solicited a rationale for the NGPC's decision from ICANN and received a response confirming that the NGPC would not take such action only 15 days before GCCIX filed the RFR; see also ICANN's Response to Claimant Better Living Management Co. Ltd.'s Request for Independent Review Process (June 23, 2014) (objecting to the notice of IRP filed by Better Living Management ("BLM") on the basis that it was untimely because BLM filed "nearly six months after ICANN posted the minutes" of the NGPC's meeting denying BLM's RFR; BLM's IRP was subsequently discontinued).

⁹ See, e.g., BGC Recommendation on Reconsideration Request 13-2 (May 1st, 2013) (dismissing in part the RFR brought by Nameshop relating to IDN/INTERNET on the basis that the portion relating to Nameshop's Change Request was untimely, because Nameshop filed 42 days after ICANN staff denied the Change Request – 12 days late – and determining that Nameshop could not use its timely claims to bootstrap its delayed Change Request claim into a RFR).

¹⁰ There have been several communications from portfolio applicants specifically to undermine community applications for similar strings. See, e.g., letter from Shweta Sahjawni, Radix FZC et al to Cherine Chalaby, NGPC (November 1st, 2013) available at <https://www.icann.org/resources/correspondence/sahjawni-et-al-to-chalaby-et-al-2013-11-01-en>; Shweta Sahjawni & Bhavin Turakhia, Radix FZC, Community Priority Evaluation Guidelines Red-lined Feedback on the Guidelines (September 12, 2013), available at <http://newgtlds.icann.org/en/applicants/cpe/guidelines-comment-redline-radix-minds-machines-20sept13-en.pdf>

disadvantaging community applicants.¹¹ In light of the high costs associated with Community Objections and the high standards community applicants must meet in order to prevail in Community Priority Evaluations, the GAC reiterated in four separate *Communiqués* its Advice that ICANN consider “*preferential treatment for all applications which have demonstrable community support.*”¹² Despite the GAC’s consistent and repeated Advice on the subject, ICANN has failed to give due regard to the Advice and has not conducted any meaningful discussion or briefing with the GAC on the subject of community applicants.¹³

In light of the standing requirements and deadlines set forth in the Bylaws for using ICANN’s accountability mechanisms and ICANN’s past practice with other gTLD applicants, SD requests written confirmation from ICANN that it will immediately decline Donuts’ request for CEP with respect to the .SKI gTLD and return SD’s contention resolution status to “*resolved*”, so that SD may properly proceed to the contracting phase of the gTLD process with ICANN.

In the event ICANN fails to provide the act on these two items, SD will be forced to take immediate legal action restore the contention resolution status and obtain compensation for the harm caused. In doing so, please be assured that SD will pinpoint every indicia of ICANN’s personal failure in the handling of this issue. ICANN’s roller coaster management has been nothing of shortsighted and irresponsible, causing severe setbacks to SD’s legitimate expectations. These setbacks can still be cured, and SD hopes ICANN will act accordingly.

Please confirm at your earliest convenience and in any case no later than **5:00 PM PDT on Wednesday, October 1st, 2014.**

Sincerely,



François Bourrier-Soifer

cc: Ms. Amy Stathos, Deputy General Counsel, ICANN Contact Information Redacted
Mr. Chris LaHatte, Ombudsman, ICANN Contact Information Redacted
Mr. Alvaro Alvarez, General Counsel, Donuts Contact Information Redacted
Ms. Linda Corugedo Steneberg, Director, European Commission Contact Information Redacted
Mr. David Martinon, Représentant spécial de la France Contact Information Redacted
Mr. Godefroy Jordan, CEO, Starting Dot Contact Information Redacted

¹¹ See GAC Communiqué – Buenos Aires, Argentina, p.2 (September 20, 2013) (explicitly requesting a briefing on the public policy implications of holding auctions to resolve string contention where community applications are involved).

¹² See, e.g., GAC Communiqué – Singapore (March 27, 2014) (reiterating past advice on community applications and indicating that issues with community applicants will have to be dealt with through policy changes prior to additional TLD application cycles). See also, GAC Communiqué – Buenos Aires, Argentina (November 20, 2013); GAC Communiqué – Durban, South Africa (July 18, 2013); GAC Communiqué – Beijing, People’s Republic of China (April 11, 2013) available at <https://gacweb.icann.org/display/GACADV/GAC+Advice+Tracking>.

¹³ ICANN Bylaws, Art. XI § 2(1)(j) (“*The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the [ICANN Board] determines to take an action that is not consistent with the [GAC] advice, it shall so inform the [GAC] and state the reasons why it decided not to follow that advice. The [GAC] and the [Board] will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*”). To the best of our knowledge and in spite of the GAC’s specific request in the Buenos Aires Communiqué, the Board has neither taken an action consistent with the GAC’s public policy Advice on community applications; nor has the Board engaged the GAC in a discussion regarding the public policy concerns.