

1 **Case Number: 01-14-0001-6263 [Donuts Inc.-vs- Internet**
2 **Corporation for Assigned Names and Numbers (ICANN)]**

3 **PROCEDURAL ORDER NO. 4**
4 **Issued September 7, 2015**

5 **1. Procedural History:** In its Procedural Order No. 1, dated July 17, 2015, the
6 Tribunal, inter alia, advised the Parties that “[a]ny further exchanges of documents
7 and other information between the Parties should occur through cooperation and in
8 the manner set forth in Article 21 of the ICDR Rules.”

9 **2.** By email dated August 8, 2015, Mr. Genga informed the Tribunal, in pertinent
10 part, that:

11 Regarding the document requests, while the parties have no dispute as to
12 certain of them, they disagree as to others. As such, the parties would like
13 to present their respective positions to the Panel expeditiously so as not to
14 delay resolving this proceeding on the merits as soon as their respective
15 schedules reasonably allow.

16
17 In furtherance of these objectives, the parties have agreed upon, and
18 respectfully propose that the Panel adopt, the following schedule in lieu of
19 that suggested in Procedural Order No.1: 1) The parties shall
20 simultaneously submit letter briefs of no more than five (5) pages
21 concerning the document requests by 5:00 p.m. PDT on August 10,
22 2015;...

23 **3.** In it Procedural Order No. 2, in view of the foregoing agreed procedure, the
24 Tribunal requested the Parties to simultaneously submit letter briefs of no more
25 than five (5) pages concerning the document requests by 5:00 p.m. PDT on
26 August 10, 2015.

27 **4.** In that Order, the Parties were directed to address the controlling questions
28 of “necessity” and “appropriateness” as established in ICDR Rule 20(4), and to
29 bear in mind Article 21 of the ICDR Rules text, in particular paragraphs 1, 4, 5
30 and 8 of that article.

31 **5.** The Parties made the simultaneous submissions contemplated in Procedural
32 Order No. 2, and, pursuant to a request by Mr. LeVee on behalf of ICANN,
33 were authorized to submit, sequentially, an additional page each (styled as
34 ‘postscripts’); that process was completed on August 12, 2015 with Mr.
35 Genga’s email to the Tribunal, time-stamped 1:59 pm.

1 **6. Previously Contested Matters:** The Parties’ submissions confirmed that the
2 following requests by Donuts for information had been resisted by ICANN, and
3 thus called for a Tribunal determination [original numbering maintained]:

4 1. All communications, training materials and other documents between
5 ICANN, including its staff, Board or any part thereof, on the one hand, and
6 the ICC, Jonathan Peter Taylor and/or Mark Kantor, on the other hand, in
7 furtherance of “applying documented policies neutrally and objectively,
8 with integrity and fairness,” pursuant to Bylaws Art. I § 2.8, with respect to
9 any of the following:

- 10 a. The four standards, or any of them, applicable to community
11 objections as set forth in Guidebook section 3.5.4;
- 12 b. The burden of proof on the objector for all new gTLD objections,
13 pursuant to Guidebook section 3.5;
- 14 c. The right of an applicant to submit a standard or a community
15 application pursuant to Guidebook section 1.2.3.1;
- 16 d. That “An allegation of detriment that consists only of the applicant
17 being delegated the string instead of the objector will not be
18 sufficient for a finding of material detriment,” as set forth in
19 Guidebook section 3.5.4 at 3-24;
- 20 e. That “[a]ll applicants for a new gTLD registry should ... be
21 evaluated against transparent and predictable criteria, fully available
22 to the applicants prior to the initiation of the process,” and/or that
23 “no subsequent additional ... criteria should be used,” as set forth in
24 the final GNSO Report adopted by ICANN’s Board for the new
25 gTLD program;
- 26 f. Applying Guidebook new gTLD objection standards, policies and
27 procedures so as not to “single out any particular party for
28 disparate treatment;” or
- 29 g. The handling and/or avoidance of conflicts of interest.

30 2. All documents in the possession, custody or control of ICANN reflecting
31 communications of any person with, and/or training by any person of, the
32 ICC, Jonathan Peter Taylor or Mark Kantor, concerning:

- 33 a. The four standards, or any of them, applicable to community
34 objections as set forth in Guidebook section 3.5.4;
- 35 b. The burden of proof on the objector for all new gTLD objections,
36 pursuant to Guidebook section 3.5;

- c. The right of an applicant to submit a standard or a community application pursuant to Guidebook section 1.2.3.1;
- d. That “An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment,” as set forth in Guidebook section 3.5.4 at 3-24;
- e. That “[a]ll applicants for a new gTLD registry should ... be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process,” and/or that “no subsequent additional ... criteria should be used,” as set forth in the final GNSO Report adopted by ICANN’s Board for the new gTLD program;
- f. Applying Guidebook new gTLD objection standards, policies and procedures so as not to “single out any particular party for disparate treatment;” or
- g. The handling and/or avoidance of conflicts of interest.

5. All documents, including staff briefings to the Board, reflecting consideration of or communications concerning any of the following by the ICANN staff, Board or any committee(s) or designee(s) thereof:

- h. Subsequent to March 15, 2013, implementation of a means for review of or appeal from contested community objection rulings;
- i. Subsequent to March 15, 2013, implementation of a means for review of or appeal from contested rulings on any new gTLD objection other than for string confusion, including in connection with the recently-formed review procedure for addressing “perceived inconsistent and unreasonable Expert Determinations” as described in ICANN Board Resolutions 2014.10.12.NG02 – 2014.10.12.NG03 (October 12-14, 2014);
- j. Exhibits 51 and/or 52 to Donuts’ IRP Request; or
- k. Any oversight mechanisms or procedures for ensuring new gTLD objection panels arrive at consistent results based upon standards provided in the Guidebook.

7. Previously Agreed Matters: The Parties’ submissions also confirmed that ICANN has agreed to respond to the following requests [original numbering maintained]:

1 3. All communications between ICANN, including its Board or any part
2 thereof, on the one hand, and the ICC, Jonathan Peter Taylor or either of
3 them, on the other hand, concerning:

4 a. The community objections against Application ID 1-1174-59954 by
5 dot Sport Limited for .SPORT and/or Application ID 1-1614-27785 by
6 Donuts (Steel Edge LLC) for .SPORTS; or

7 b. The service of Mr. Taylor on a panel hearing either of the foregoing
8 objections.

9 4. All communications between ICANN, including its Board or any part
10 thereof, on the one hand, and the ICC, Mark Kantor or either of them, on
11 the other hand, concerning the community objections against
12 Application ID 1-1206-66762 by dot Rugby Limited, and/or Application
13 ID 1-1612-2805 by Donuts (Atomic Cross LLC), for .RUGBY.

14
15 8. The Tribunal consulted the submissions of the Parties and considered the
16 instructions of the ICDR Rules (Articles 20(4) and 21(1)(4)(5) and (8)) to, on the
17 one hand, avoid surprise, assure equality of treatment, and safeguard each party's
18 opportunity to present its claims and defenses fairly, and, on the other hand, to
19 manage the exchange of information between the parties with a view to
20 maintaining efficiency and economy, and to avoiding unnecessary delay and
21 expense.

22
23 9. The Tribunal further noted its obligation under those same Rules, in resolving
24 any dispute about pre-hearing exchanges of information, to require the requesting
25 party to justify the time and expense that its request may involve in light of the
26 timing of the request, the stage of these proceedings, the scope of the request, and
27 the limited mandate of this Tribunal as described in Rule 8 of the ICDR
28 Supplemental Procedures. The Tribunal also considered its continuing power under
29 ICDR Rules, Article 20(4), subject to contrary agreement by the Parties, to "[a]t
30 any time during the proceedings, order the parties to produce documents, exhibits,
31 or other evidence it deems necessary or appropriate."

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33 10. **Past Rulings:** Given the foregoing, in its Procedural Order No. 3 (Issued
34 August 14, 2015) the Tribunal ordered as follows:

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36 A. ICANN should perform its undertaking to respond in good faith to the
37 requests identified in Paragraph 7 above.
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1 B. In the course of performing its undertaking under Paragraph 7 above,
2 ICANN should remain alert to other materials that may help that Parties
3 establish common factual ground in the current IRP; subject to applicable
4 privileges, it will disclose to Donuts any such additional items it uncovers.
5 Its principal duty, however, is to acquit itself under Paragraph 7.
6

7 **Categories 1, 2 and 5; meet and confer:** The Tribunal shall defer any
8 decision with respect to the disputed categories 1, 2 and 5, and makes no
9 finding concerning them at this time. Rather, the Tribunal orders the Parties
10 to meet, confer, and strive to identify further production they can agree to
11 make, or to forego, in light of the burdens and costs of production and such
12 other factors as may guide them in good faith. The Parties are further
13 ordered to advise the Tribunal as to the result of their meet-and-confer
14 sessions within ten days from the date hereof.

15 11. The Tribunal further noted its power, under ICDR Rules Article 20(7), to
16 allocate costs and draw adverse inferences, explaining that: In appropriate
17 circumstances, those powers would be available to address unreasonable requests
18 for disclosure as well as unreasonable objections or failures to fully perform
19 reasonable requests for disclosure.

20 12. **Results of the Parties' Meet-and-Confer Collaboration:** By email dated
21 August 24, 2015 (sent at 5:03pm) Mr. Genga informed the Tribunal that:

22 Pursuant to its Procedural Order No. 3, the Panel directed the parties to
23 meet and confer further regarding Donuts' requests for production of
24 documents, and to report on the status of same by today.

25 The Panel will recall that Donuts had requested five categories of
26 documents. ICANN originally agreed to produce documents in response to
27 request nos. 3 and 4, and in fact did produce documents last week that we
28 are now going through.

29 Also last week, the parties met and conferred further regarding request nos.
30 1, 2 and 5. Donuts proposed specific modifications to narrow each of the
31 requests, and ICANN has agreed to produce documents to request nos. 1
32 and 2 as so redefined, but stands on its objection to request no. 5. Attached
33 is an email string that describes the ways in which the subject requests
34 were modified and as to which ICANN partially agreed to produce
35 responsive documents.

36 13. Donuts reiterated its view that ICANN should produce documents responsive
37 to request no. 5 as modified, referring the Tribunal to its prior letter brief on the

1 subject, its "post-script" thereto, and supplemental submission on the merits that it
2 submitted on August 20, 2015 (pursuant to Procedural Order No. 3).

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4 14. The modifications in the request relative to request no. 5 are indicated in the
5 "email string" supplied by Mr. Genga, in which he communicated to counsel for
6 ICANN the following proposal:

7 As for request no.5, I could eliminate subparagraphs a. and d., and modify
8 b. as follows:

9 Subsequent to March 15, 2013, implementation of a means for review of
10 or appeal from contested rulings on any new gTLD objection other than
11 for string confusion in connection with the recently-formed review
12 procedure for addressing "perceived inconsistent and unreasonable Expert
13 Determinations" as described in ICANN Board Resolutions 2014.10.12.NG02
14 2014.10.12.NG03 (October 12-14, 2014).

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16 **15. Tribunal's Ruling regarding Category No. 5:** The Tribunal has attempted to
17 balance the still-controlling considerations reiterated in Paragraphs 1, 4, 8 and 9
18 above. It believes that some items falling under category 5 may be helpful to it in
19 discharging its mandate to consider specific Board action and inaction judged
20 against the requirements of ICANN's Articles and Bylaws. Accordingly, ICANN
21 shall respond to Donuts' Category No. 5 request, as further narrowed by the
22 Tribunal; specifically:

23 5. All documents reflecting consideration by the Board of any of the
24 following, and all documents submitted to the Board by the ICANN
25 staff or by any ICANN committee that refer expressly to, any of the
26 following:

- 27 a. Subsequent to March 15, 2013, implementation of a means for
28 review of, or appeal from, contested rulings on any new gTLD
29 community objection.
- 30 b. The recently-formed review procedure for addressing "perceived
31 inconsistent and unreasonable Expert Determinations" as described
32 in ICANN Board Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
33 (October 12-14, 2014); or
- 34 c. Donuts' March 12, 2014 request for a review procedure for
35 community objections [Donuts' IRP Request Exh. 51] and joint
36 letter of November 1, 2013 [Donuts' IRP Request Exh 52].

1 16. Documents made available to Donuts pursuant to Paragraph 15 above may
2 be relied upon by either party at the Hearing for Argument. The Tribunal notes
3 that it may order post-hearing written submissions if appropriate to do so for
4 any reason, including to provide the parties a final opportunity to address
5 matters raised by documents supplied pursuant to Paragraph 15.

6 **17. Briefing on the merits:** The Tribunal notes with appreciation receipt of
7 Donuts’ supplemental written submission on the merits, delivered
8 electronically on August 20, 2015 (pursuant to Procedural Order 3), and
9 reiterates that, pursuant to Procedural Order No. 2, ICANN will make its
10 supplemental written submission on the merits electronically by 5:00 p.m. PDT
11 on **September 20, 2015**. In that submission, it should follow the “further
12 briefing instructions” established in Procedural Order No. 3—specifically:

13 ICANN should provide a reaction to the schedule of proposed common
14 ground submitted by Donuts. It should be framed as neutrally as possible,
15 should seek to establish agreement, but may offer refinements or
16 qualifications. It may also propose items of common ground not identified
17 by Donuts in its Appendix. The Appendix should not exceed 5 pages; those
18 pages will not to be counted against the page limitation.

19 **18. Hearing for Argument:** The Tribunal reiterates that the Hearing for
20 Argument is scheduled for **October 8, 2015**, commencing at 9:30 a.m. At this
21 juncture, the Tribunal favors holding the Hearing at a physical meeting in
22 Southern California, rather than telephonically, but requests the Parties to
23 express, **by September 17, 2015**, their respective views on that prospect.

24
25 *Jack J. Coe, Jr* (Chair, for the Tribunal)
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