

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

CORN LAKE, LLC,	)	ICDR Case No. 01-15-0002-9938
	)	
Claimant,	)	
	)	
v.	)	
	)	
INTERNET CORPORATION FOR ASSIGNED	)	
NAMES AND NUMBERS,	)	
	)	
Respondent.	)	

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**ADDITIONAL SUBMISSION OF CLAIMANT CORN LAKE, LLC  
CONCERNING THE FINAL IRP DECLARATION IN *DONUTS v. ICANN***

THE IP and TECHNOLOGY LEGAL GROUP, P.C.  
John M. Genga, Contact Information Redacted  
Don C. Moody, Contact Information Redacted  
Khurram A. Nizami, Contact Information Redacted  
15260 Ventura Boulevard, Suite 1810  
Sherman Oaks, California 91403 USA  
Telephone: +1 (818) 444-4580  
Facsimile: +1 (818) 444-4585  
<http://newgtliddisputes.com>

*Attorneys for Claimant*  
CORN LAKE, LLC

## I. INTRODUCTION

1. ICANN would have this Panel find dispositive a ruling by 2 of 3 panelists in an IRP proceeding that applied completely different principles to widely divergent facts. The decision in that case (“Majority Opinion”) does not have the effect that ICANN ascribes to it. Rather, its distinctions highlight that Corn Lake should prevail in this case.

2. ICANN overgeneralizes this case and *Donuts v. ICANN* to a point tantamount to equating a base-model Fiat and a racing Ferrari as Italian-made cars. The *Donuts* case involved an expert determination *consistent* with a ruling by a different expert regarding the same TLD against another party, which Donuts did *not* follow with a reconsideration request. This case, by material contrast, features *opposite* rulings as to the *same* TLD, as to which Corn Lake requested reconsideration and the Board denied.

3. Moreover, the two cases turn on different grounds for relief. The claimant in *Donuts* asserted that the challenged expert panels failed to apply Guidebook standards fairly or properly to the community objections at issue there, and that the expert ruling on one of the objections had undisclosed conflicts of interest. This case centers on the Board’s disparate treatment of Corn Lake regarding both identical as well as similarly situated TLDs, creating a much more compelling case for relief than two of the three panelists found in *Donuts*.

## II. FACTS PRESENT HERE BUT NOT IN *DONUTS* BOLSTER CORN LAKE’S CASE

4. *Donuts* featured applications by two Donuts subsidiaries for the TLDs .SPORTS and .RUGBY. Other applicants for those domains had successfully objected to the applications on community grounds (and one of them to another party’s application for .SPORT). Donuts did not seek reconsideration of either adverse decision. Instead, it sought Ombudsman review, and later brought an IRP request based on the primary contentions that: (i) the .SPORTS and .RUGBY objection panelists failed to “apply[ ] documented policies neutrally and objectively, with integrity and fairness,” in violation of Bylaws Art. I § 2.8; (ii) the .SPORTS panelist had an undisclosed conflict of interest directly reviewable by IRP pursuant to Bylaws Art. IV 3.4(a); and (iii) the Board had an obligation, but failed, to act to correct these transgressions of the Bylaws.

5. The split panel in *Donuts* rejected these claims. It found no Board action subject to review, in large part because Donuts had not sought reconsideration per Bylaws Art. IV § 2. Maj. Op. ¶¶ 211-214. The panel held that it could not attribute the decisions of the ICC to the Board, and that no evidence established a duty on the part of the Board to act so as to render its inaction reviewable by IRP. *See, e.g., id.* ¶¶ 159, 165, 168-169, 208-209. Thus, the majority could not declare the Board in violation of ICANN's Bylaws or Articles. *Id.* ¶ 225. It did offer recommendations, however, including for further review of the underlying .SPORTS objection ruling by a different expert (or three). *Id.* ¶¶ 226-230. The dissent found that the Board had violated its obligations of independence, transparency, accountability and conformance with law, and that the Majority had too narrowly applied the standard of review and exceeded precedent (especially the *DCA Case*), in failing to overturn the .SPORTS ruling. Dissent at 1-7.

6. Corn Lake presents a markedly different case. This one involves a single TLD, .CHARITY, which fell to an objection that itself failed as to an *indistinguishable* application for the *same* TLD. The Board allowed that disparate outcome to stand, in violation of violation of the Bylaws non-discrimination mandate, when it rejected Corn Lake's reconsideration request (a circumstance not present in the *Donuts* IRP). Corn Lake further establishes that these conflicting results represent the *only* fact pattern, out of hundreds of objection rulings, *identical* to the opposing .CAM and .COM decisions as to which the Board ordered further review. The *Donuts* case did not involve such blatant and unique disparate treatment.

7. This case involves Board action not present in *Donuts*. Its facts differ greatly. These significant variances render the result in *Donuts* inapplicable to this case.

### **III. THE DISTINCT GOVERNING PRINCIPLES AT ISSUE HERE COMPEL A RESULT DIFFERENT FROM THAT IN THE *DONUTS* CASE.**

8. ICANN again overly abstracts the *Donuts* IRP when it attempts to apply the legal grounds for the Majority Opinion to this case. None of its five arguments can succeed.

9. First, ICANN argues that, as in *Donuts*, the Panel cannot equate the ICC expert's objection ruling with Board action. However, Corn Lake does not ask this Panel to do so.

Rather, it contests the Board's failure to act on the conflicting .CHARITY determinations on reconsideration or when it provided for review of the similarly situated .CAM and .COM rulings. ICANN inappropriately dismisses reconsideration here when it and the Majority so heavily relied on its *absence* in *Donuts*.

10. Second, ICANN misleads this Panel when it cites the Majority Opinion's general language regarding varying objection rulings. The Majority's expectation that some experts might uphold certain objections while others may deny *different* objections as to *other* TLDs has no bearing on whether this Panel should countenance *opposite* results regarding *identical* objections to the *same* .CHARITY TLD.

11. Third, ICANN misconstrues Corn Lake's position and too broadly interprets the Majority Opinion about providing a review mechanism for inconsistent objection rulings. First of all, Corn Lake does not argue for ICANN to employ means to review community objection rulings generally, as ICANN suggests in its "third" point. To the contrary, Corn Lake focuses on a specific, unique situation. The .CHARITY rulings represent the *only other* situation, out of hundreds of decisions, *identical* to .CAM and .COM, involving *different* objection results as to the *same* TLD pairs. The Board failed to act without discrimination when it *did* provide for review regarding .CAM and .COM but not as to .CHARITY. It "single out" Donuts "for disparate treatment" without "substantial and reasonable cause" contrary to Bylaws Art. II § 3.

12. Corn Lake does not contend that the Board should "rush into adding *another* layer of adjudication," as the *Donuts* Majority felt the Board "need not" do. Nor would Corn Lake have the Board exercise its power beyond what it already has done, as ICANN's "fourth" point so characterizes Corn Lake's position. Corn Lake seeks, rather, to have the *same* review procedure applied *equally* to a situation *identical* to that for which it *has* created such a device. The Board's failure to include .CHARITY within that framework again treats Donuts disparately in violation of Bylaws Art. II § 3.

13. The Majority in *Donuts* did not have the same situation as this Panel before it. Nor did it consider that the Board since *has* extended review *beyond* string confusion to include

an inconsistent *LPI* objection determination regarding .HOSPITAL. Corn Lake would not have the Board do anything other than what it already has recognized it should do, and which it in fact did do, in identical and uniquely analogous circumstances. Whether or not the Board had an obligation to do so, it has created a method for review of objection rulings inconsistent in the same way as the .CHARITY objection rulings. This IRP contends that the Board has discriminated against Corn Lake by not including *its* inconsistent result.

**IV. THE *DONUTS* COST ALLOCATION DOES NOT GOVERN THIS IRP.**

14. Finally, ICANN argues that Corn Lake should pay 100% of the ICDR's and this Panel's fees. That should not occur first and foremost because Corn Lake should prevail. If it does not in whole or in part, the great weight of precedent provides at most for an even split of fees. The Majority Opinion goes against that authority in burdening Donuts with all costs. It does so due to perceived "tenuousness" in "some of Donuts' positions." This case, however, involves Board action not present in *Donuts*, and the Board's *actual* knowledge of the disparity in the .CHARITY decisions when it chose *not* to provide for their review as it *did* for .COM and .CAM. The allocation made against Donuts the outlying Majority Opinion simply does not apply to the much stronger case that Corn Lake presents, and which should prevail, in this IRP.

**V. CONCLUSION**

15. This case involves unique circumstances not addressed, and a non-discrimination principle not implicated (certainly not in the same manner or to the same degree), in *Donuts*. The two cases diverge to such a great extent that *Donuts* offers no meaningful precedent. The differences in this case support the relief that the Majority in *Donuts* found it could not grant.

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Respectfully submitted,

THE IP and TECHNOLOGY LEGAL GROUP, P.C.

By: \_\_\_\_\_/jmg/\_\_\_\_\_  
John M. Genga  
Attorneys for Claimant  
CORN LAKE, LLC