

# SCEMPLA LOIZON VEVERKA & DE FONTMICHEL

*Association d'avocats à la Cour d'appel de Paris  
à responsabilité professionnelle individuelle*

83, RUE DE MONCEAU  
75008 PARIS

DAVID SCEMPLA  
OLIVIER LOIZON  
FABRICE VEVERKA  
ALEXANDRE DE FONTMICHEL  
CHRISTEL ALBERTI  
MARTIN DONATO  
FRANÇOIS BOURRIER-SOIFER  
LOUIS CHENARD  
CHARLES FILLON\*

*Avocats associés*

\* *Egalement avocat au Barreau de New York*

September 26, 2014

## VIA E-MAIL

Mr. John O. Jeffrey  
General Counsel & Secretary  
Internet Corporation for Assigned Names and Numbers  
Office of the General Counsel  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
john.jeffrey@icann.org

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.

TÉL +33 (0) 71 70 42 42 - FAX +33 (0) 71 70 42 43 - WWW.SLVF-ASSOCIES.COM

PALAIS : P 0564 - N° SIRET : 751 391 095 00021 - N° DE TVA INTRACOMMUNAUTAIRE : FR 94 751391095

MEMBRE D'UNE ASSOCIATION AGRÉÉE RÉGLEMENT DES HONORAIRES PAR CHÈQUE.

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 1<sup>st</sup>, 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 is 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.<sup>1</sup> 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.<sup>2</sup> 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*".<sup>3</sup>

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

<sup>2</sup> ICANN Bylaws, Article IV, § 3(2).

<sup>3</sup> 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.*"<sup>4</sup>

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.<sup>5</sup> 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."<sup>6</sup> 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.*"<sup>7</sup> 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.<sup>8</sup> SD therefore expects that ICANN will proceed with fairness and apply its rules equally to Donuts' .SKI CEP request.

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

<sup>5</sup> ICANN Bylaws, Article IV, §3(2)(a).

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

<sup>7</sup> ICANN Bylaws, Article IV, §3(3)(emphasis added).

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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

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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).

<sup>9</sup> See, e.g., BGC Recommendation on Reconsideration Request 13-2 (May 1<sup>st</sup>, 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).

<sup>10</sup> 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 1<sup>st</sup>, 2013) available at <https://www.icann.org/resources/correspondence/sahjawni-et-al-tochalaby-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.<sup>11</sup> 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.*”<sup>12</sup> 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.<sup>13</sup>

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 1<sup>st</sup>, 2014.**

Sincerely,



François Bourrier-Soifer

cc: Ms. Amy Stathos, Deputy General Counsel, ICANN (amy.sthatos@icann.org)  
Mr. Chris LaHatte, Ombudsman, ICANN (chris.lahatte@icann.org)  
Mr. Alvaro Alvarez, General Counsel, Donuts (alvaro@donuts.co)  
Ms. Linda Corugedo Steneberg, Director, European Commission (cnect-d@ec.europa.eu)  
Mr. David Martinon, Représentant spécial de la France (david.martinon@diplomatie.gouv.fr)  
Mr. Godefroy Jordan, CEO, Starting Dot (godefroy@startingdot.com)

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<sup>11</sup> 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).

<sup>12</sup> 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>.

<sup>13</sup> 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.