

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

DONUTS INC.)	ICDR Case No. _____
)	
Claimant,)	WITNESS STATEMENTS OF:
)	1) Jonathon Nevett;
v.)	2) Peter Young;
)	3) Expert Kurt Pritz;
INTERNET CORPORATION FOR ASSIGNED)	4) Expert Marc Edelman; and
NAMES AND NUMBERS,)	5) Expert Arman Sarvarian
)	
Respondent.)	
)	

**WITNESS STATEMENTS IN SUPPORT OF
DONUTS' REQUEST FOR INDEPENDENT REVIEW
RE NEW gTLD APPLICATIONS
FOR .SPORTS, .SKI and .RUGBY**

THE IP & TECHNOLOGY LEGAL GROUP, P.C.
John M. Genga, Contact Information Redacted
Don C. Moody, Contact Information Redacted
Khurram A. Nizami, Contact Information Redacted
Contact Information Redacted

<http://newgtlddisputes.com>

Attorneys for Claimant
DONUTS INC.

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Witness Statement
Jonathon Nevett

WITNESS STATEMENT OF JONATHON NEVETT

1. My name is Jonathon Nevett. I am Executive Vice President of Donuts Inc. and one its co-founders. I submit this statement in support of Donuts' IRP request pertaining to its applications for the .SPORTS, .SKI and .RUGBY domains.

Personal Information

2. I have extensive experience in the domain name industry. Prior to Donuts, I served as President of Domain Dimensions, Senior Vice President at Network Solutions, and Chairman of the Board of NameJet and Central Registry Solutions. I was elected Chair of the ICANN Registrar Constituency for three terms and have served on numerous task forces, working groups, and panels. I am a founding Board member of the Domain Name Association, the industry's trade association; served as co-chair of the U.S. Council for International Business' Domain Name System Working Group; and was appointed to the U.S. Department of Commerce's Online Safety and Technology Working Group related to issues of child safety and the Internet.

3. I have been personally involved with various aspects of what would become the new gTLD program since 2004. Most importantly, I served on the Implementation Recommendation Team, the Special Trademark Issue team, and the Vertical Integration Working Group, as well as formed and served as the first Chair of the New gTLD Applicant Group.

Background of Donuts and ICANN's New gTLD Program

4. I helped to form Donuts in 2010 with others on our management team prior to the official launch of new gTLDs . Our team of seasoned domain name professionals has decades of experience, as reflected in our website biographies, http://donuts.co/index.php?option=com_content&view=article&id=8&Itemid=105.

5. Donuts supports robust competition, choice and free expression in the namespace, consistent with the stated aims of ICANN in creating and implementing the new gTLD program as set forth in the program's Applicant Guidebook ("Guidebook" or

“AGB”). In furtherance of these goals, Donuts applied, through subsidiaries, for a total of 307 new gTLD extensions or “strings,” including .SPORTS, .SKI and .RUGBY, the subject of Donuts’ IRP request (collectively, the “Subject Applications” or “Subject Domains”).

6. By applying for such a relatively large number of strings – Google and Amazon being its closest competitors at just over a hundred domains and seventy-eight, respectively – Donuts seeks to enhance consumer choice more effectively than registries offering a smaller number of TLDs. By leveraging economies of scale, Donuts is able to provide “niche” domains that might not otherwise be as commercially viable. By way of analogy, Donuts’ approach can be thought of as a “shopping mall,” with legacy extensions such as .COM being like “big box” retailers that attempt to be “all things to all people” and to date have not had much competition. Donuts, on the other hand, supplements certain “anchor tenants” with “boutique” extensions that help diversify the Internet “mall space” and heighten consumer experience.

7. Donuts carefully selected its domains as generic words representing subject areas that it believes will interest Internet users and involve them in the domain. We did a great deal of research, came up with various methods to analyze potential choices, and relied on our extensive industry experiences in arriving at names for which to apply. In no case did Donuts opt for any term because it described a specific “community,” such as groups like the Boy Scouts of America, the Native American Navajo tribe or the like. On the contrary, Donuts made every effort to *avoid* selecting terms that one would readily associate with a specific group. Instead, we applied for *generic* terms that could have appeal in any number of contexts and are used by many people in their day-to-day dealings. As such, Donuts did not apply for any TLD on a “community” basis as that limited term of art is used in the Guidebook.

8. From participating in the development of the new gTLD program, Donuts also understood that the significant expansion raised concerns among certain stakeholders for preserving the rights of others and protecting users from misconduct.

These concerns led Donuts to support ICANN's prescription that new gTLD applicants take additional operational stability, security and anti-abuse measures not required of existing gTLDs like .COM, .NET and .ORG. These include items such as:

- i. Controls to ensure proper access to domain management functions;
- ii. 24/7/365 abuse point of contact;
- iii. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown procedures;
- iv. Use of the new Trademark Clearinghouse for "up-front" trademark protection;
- v. A trademark claims process;
- vi. Adherence to various new dispute resolution policies promulgated by ICANN in connection with the new gTLD program;
- vii. Detailed security Policies and Procedures; and
- viii. Strong security controls for access, threat analysis and audit.

9. Donuts also voluntarily committed in its applications to taking *eight more* protective steps, in *addition to* those requirements that ICANN already had imposed over and above what it demands of existing gTLD operators, as follows:

- i. Periodic audit of Whois data for accuracy;
- ii. Remediation of inaccurate Whois data, including takedown, if warranted;
- iii. A "Domain Protected Marks List" ("DPML") for trademark protection;
- iv. A new "Claims Plus" product (also for trademark protection);
- v. Terms of use that prohibit illegal or abusive activity;
- vi. Limitations on domain proxy and privacy service;
- vii. Published policies and procedures that define abusive activity; and
- viii. Proper resourcing for all of the functions above.

Donuts lists these protections in Section 18(a) of all of its applications, including the Subject Applications. These plus the ICANN-directed safeguards, nearly two dozen tools

in all, provide tangible protections that simply do not exist within most existing gTLDs.

Among other things:

- Whois audits and takedown procedures allow for verification of registrant identity and the right to take action against fraudulent registrant;
- Terms of use and published policies that permit Donuts to act in situations where existing registries either refuse or claim no obligation to do so;
- Donuts' "DPML" and "Claims Plus" processes, combined with the ICANN-required safeguards, including the dispute resolution procedures such as the Uniform Rapid Suspension ("URS") process (the initial recommendation of which I co-authored) offer unprecedented protections to trademark owners that will help them police and take action against misuse of their marks online; and
- The "resourcing" Donuts will provide to implement these measures includes a compliance staff dedicated *full-time* to address such issues.

10. In addition, Donuts has made Public Interest Commitments ("PICs") as to all of its 307 strings. The PICs lay out specific undertakings on the part of Donuts to benefit and protect the interests of users, rights holders and others. Further, they make such commitments contractually binding so as to allow ICANN to terminate any Donuts registry that does not honor its PICs. These various devices allow Donuts the ability to address issues quickly and effectively if and when they do arise.

Objections to the Subject Applications

11. I am also a lawyer and was the person chiefly responsible within Donuts for its responses to the many objections it received to its various applications. I worked closely with our outside counsel in their preparation of responses to the different objections, and concerning other matters that may have arisen during the course of the multiple objection proceedings.

12. With regard to .SPORTS, .SKI and .RUGBY in particular, I participated in deciding whether to object to a number of experts appointed to decide the objections. I

recall that we objected to the initial appointee to the .RUGBY panel, and that he was removed as a result. We also sought to remove the expert designated to hear the .SKI objection, Jonathan Peter Taylor, on the basis of his disclosure in that case of connections he had with one of the legal representatives of the objector. That challenge did not succeed, however.

13. We did not object to the same panelist identified for .SPORT, largely based on a disclosure that he and his firm had recently taken positions adverse to the IOC. This suggested a lack of any conflict; he certainly did not disclose any. However, based on information our lawyers have since uncovered and are presenting in this IRP request, I find Mr. Taylor's disclosure, in retrospect, disturbingly misleading. The disclosure creates for me the impression that Mr. Taylor and his firm had moved away from representing institutional sporting interests. In fact, I now understand that they were representing members of SportAccord and supporters of its objection to Donuts' .SPORTS application at the same time as Mr. Taylor was being asked to decide a case that involved those clients' interests. Had I known that at the time, I absolutely would have directed our counsel to seek his disqualification from the .SPORTS panel.

14. I recently have learned a number of things relating to a competitor for essentially the same string – Famous Four Media ("FFM"), for .SPORT. As I now understand, the ICC initially nominated Mr. Taylor to consider SportAccord's community objection to FFM's application. FFM moved to disqualify him based on a number of conflicts it apparently had identified, and the ICC ended up replacing Mr. Taylor as a result. I know nothing at the time about the confidential SportAccord objection to FFM's application, Mr. Taylor's appointment to hear that objection, FFM's request to replace him or the ICC's granting of that request. Again, had I known this information at the time, I would have had our counsel move to disqualify Mr. Taylor from our .SPORTS panel on the same grounds as FFM had successfully asserted.

Subsequent Efforts Relating to the Subject Domains and Others

15. All three objections were upheld, and true and correct copies of the decisions as to each are included in the accompanying Compendium of Exhibits. As a result, the Subject Applications can proceed no further, according to the Guidebook, absent relief obtained by way of one of ICANN's accountability procedures: a reconsideration request ("RR") or this IRP.

16. Before the rulings issued on the objections to the Subject Applications, Donuts had filed RRs for two other strings as to which objections had been granted: .HOSPITAL and .CHARITY. The BGC rejected those requests on February 5 and 27, 2014, respectively, and referred Donuts to the Ombudsman if it wished to pursue the matter further.

17. By a letter dated March 12, 2014, Donuts reiterated a request made to ICANN on November 1, 2013 by Donuts and eleven other groups, representing hundreds of applications in addition to the 307 by Donuts, to create an appeal procedure specifically to review and normalize the many inconsistent new gTLD objection results, including with respect to community objections. True and correct copies of those letters are included in the accompanying Compendium of Exhibits. Donuts to this day has received no response from ICANN to these requests.

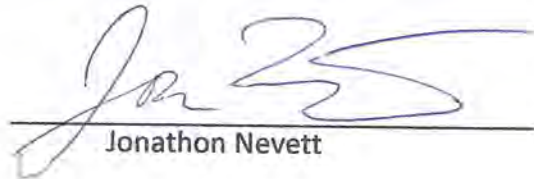
18. Around March 24, 2014, Donuts approached the ICANN Ombudsman, Christopher LaHatte, for possible assistance with the Subject Applications as well as several others. I communicated by email and phone over the course of several months with Mr. LaHatte concerning the subject matter of Donuts' complaint, culminating in a July 7, 2014 letter from him concluding that he had no jurisdiction to act on the matter.

19. On July 18, 2014, I requested on behalf of Donuts that ICANN participate in "cooperative engagement" with Donuts ("CE"), a process available prior to IRP, with respect to the Subject Applications and others. We were unable to resolve our issues

concerning the Subject Applications with ICANN, which deemed the process terminated as of September 19 and agreed on an October 8, 2014 deadline for the filing of this IRP.

20. Despite a number of inquiries, including those reflected in the November 1, 2013 and March 12, 2014 letters as well as during CE, Donuts has received no indication at all from ICANN as to what parties to an objection proceeding can do when a panel does not follow Guidebook rules and renders decisions at odds with other results. Accordingly, Donuts brings this IRP proceeding.

I affirm the truth of the foregoing statements and could and would testify thereto from my personal knowledge if called upon to do so under oath. Executed October 8, 2014 at Rockville, Maryland.



Jonathon Nevett

Witness Statement

Peter Young

WITNESS STATEMENT OF PETER YOUNG

1. I, Peter Young, am Chief Legal Officer of Famous Four Media (FFM). FFM is a Gibraltar company. A small group of recognized domain name experts and successful financiers set it up to provide top-level registry services in furtherance of ICANN's New Generic Top-Level Domains ("gTLD") program.

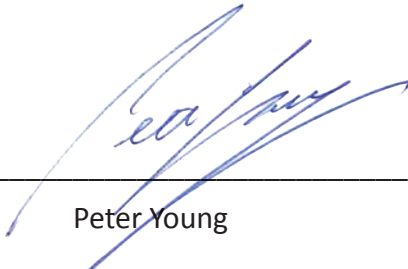
2. FFM's clients, being sixty new single purpose vehicles, applied for sixty (60) new gTLDs, among them .SPORT. FFM received, and opposed, a community objection to that application from SportAccord ("SA"). The objection was assigned for resolution by the International Chamber of Commerce ("ICC") as provided in ICANN's New gTLD Applicant Guidebook.

3. The ICC initially appointed Jonathan Peter Taylor to consider and rule upon SA's objection to FFM's .SPORT application. By a written submission dated June 27, 2013, a true and correct copy of which is submitted in the Compendium of Exhibits herewith, FFM requested that the ICC remove Mr. Taylor from the .SPORT panel due to conflicts of interest identified in that submission.

4. By letter dated July 16, 2013, a true and correct copy of which is submitted in the Compendium of Exhibits herewith, the ICC advised that it would consider FFM's request to replace Mr. Taylor as panelist for the .SPORT objection.

5. By letter dated July 25, 2013, a true and correct copy of which is submitted in the Compendium of Exhibits herewith, the ICC announced that it would in fact replace Mr. Taylor as panelist for the .SPORT objection.

I affirm that the all of foregoing is true of my own personal knowledge, and would so testify under oath if called upon to do so.



Peter Young

7th October, 2014

Expert Witness Statement

Kurt Pritz

WITNESS STATEMENT OF KURT PRITZ

1. My name is Kurt Pritz. I am Executive Director of the Domain Name Association (“DNA”), a non profit global business association that represents the interests of the domain name industry. I make this witness statement in support of the request for Independent Review Process (“IRP”) submitted by Donuts Inc. (“Donuts”) pertaining to its New Generic Top Level Domain Name (“gTLD”) applications for .SPORTS, .SKI and .RUGBY.

Background and Qualifications

2. I am a citizen of the United States and reside in Thousand Oaks, California. I hold a Bachelor of Science in Physics from Rensselaer Polytechnic Institute, a Master of Science degree in Physics from Virginia Tech and an MBA from the University of Michigan. I am also a licensed attorney admitted to the California Bar.

3. I have extensive experience in the domain name industry. Currently with the A, I direct all activities designed to serve the interests of our domain industry members, comprised of country code and generic domain name registry operators and domain name registrars. I lead membership recruitment, and oversee the activities of our Technical, Marketing and Policy Committees, which all seek to improve the operation of the Domain name System and provide new choices for Internet users globally. More information about the organization appears at <http://www.thedna.org/>.

4. Prior to joining the DNA, I served as Chief Strategy Officer and Senior Vice President of Stakeholder Relations for ICANN for nearly ten years, where one of my primary responsibilities was to lead the introduction of the New gTLD Program, preparing and presenting many policy and implementation position papers to the ICANN Community and Board. I attach my current *curriculum vitae* for more information regarding my experience and expertise.

The New gTLD Program

5. As part of my work on the New gTLD Program, I engaged technology, business and policy leaders throughout the world on the safe, secure launch of the expansion of the namespace, and often served as the program's primary spokesperson. By way of example, in 2011 I served as a key witness during hearings conducted by the U.S. Senate and the U.S. House of Representatives' Energy and Commerce Subcommittee on Communications and Technology on New gTLDs.

6. Approximately 2000 new gTLD applications were received during the initial round. Applicants came in many varieties. Some are well known brands such as Amazon, Samsung and Volkswagen. Others report to represent geographic areas – e.g., “.NYC” for New York City. Some applied for one or a small number of TLDs, and some for a large number as a “portfolio.” Donuts’ portfolio focuses on generic TLDs.

The Applicant Guidebook

7. I led, with others, the creation of an “Applicant Guidebook” (“AGB” “Guidebook”) in order to memorialize the basic policies and procedures that would govern the process of submitting New gTLD applications and transitioning them to delegation. The Guidebook was drafted iteratively, there were nine versions, each amended as a result of discussion among a wide variety of stakeholder groups— governments, individuals, civil society, business and intellectual property constituencies, and the technologists. Some of the comments and questions concerned protection of intellectual property rights and community interests; the demand, benefits and risks of new TLDs; the selection criteria that should be applied; and the contractual conditions that should be required for new gTLD registries going forward. The ICANN Board approved final Guidebook was issued on June 4, 2012.

8. All applicants are required to demonstrate the technical and financial wherewithal to operate a domain name registry. Applicants must pass a stringent, live, operational test prior to delegation.

9. All New gTLD registries are required to offer a set of a number of trademark and community protection mechanisms not found in legacy registry operators. These are minimum requirements for security, IP protection and addressing abuse in the New gTLD space.

The Objection Process

10. One component of the AGB (*i.e.*, “Module 3”) describes the various “objection” processes whereby those who meet specific criteria for “standing” can voice concerns with respect to a particular domain extension (the characters to the right of the dot). The GB enumerates four types of objections, with only those brought on “community” grounds relevant here.

11. The objections are handled as a “dispute resolution” process, with the objector bearing the burden of proof. Each type of objection has its own “dispute resolution service provider” (“DRSP”), with community handled by the International Chamber of Commerce (“ICC”).

Community Objections

12. Community objections require a party with standing to prove all four elements of (i) a clearly delineated community, (ii) substantial opposition from the “community” explicitly or implicitly “targeted” by the string, (iii) a strong association between the alleged community and the string, and (iv) likelihood of material detriment to the rights or legitimate interests of the proffered community. To prove “material detriment,” a would be community objector must show that something tangible (and bad) will happen in the “real world.” Section 3.5.4 of the Guidebook lays out specific factors for panels to consider in order to find a “likelihood” of material detriment:

- The nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied for gTLD string;

- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely;
- Interference with the core activities of the community that would result from the applicant's operation of the applied for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

13. Importantly, the Guidebook at page 3 24 also specifies one thing that should *not* be considered "material:"

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.

Inconsistency in Community Objection Results

14. There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. That fact is most easily demonstrated in the "string confusion," objections where challenges to exactly the same strings yielded different results. It is also appears throughout the category of community objections. One can read the decisions and see where, on essentially the same fact set, one panelist deems a "community" to exist or finds material detriment, and another panelist concludes the opposite. While some variance is to be expected, these frequent and material inconsistencies lead to unpredictable results.

15. Lack of consistency in results violates ICANN's adopted New gTLD Policy. First and foremost, the Policy states that, "new generic top level domains (gTLDs) must be introduced in an orderly, timely and predictable way... All applicants for a new gTLD

registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”¹

16. Violations of this Policy (absence of predictability and transparent criteria, and the addition of subsequent criteria) resulted for several reasons.

a. The number of objections far exceeds what ICANN expected. The New gTLD program was designed with 500 applications in mind; that was the figure most mentioned in public meetings. Four times the applications translates into four times the objections.

b. Compounding the problem is applicants’ use of the objection as an anti competitive weapon. When designed, it was thought and publicly stated that the “loser pays” aspect of the objection processes would deter frivolous objections or objections filed in an attempt to eliminate contending applicants. That assumption has proven significantly off the mark. Many objections have been filed by TLD applicants or current TLD operators.

17. The high number of applications means a geometrically greater number of “contention sets” – *i.e.*, situations where more than one party applies for the same TLD. Many contention sets get resolved by means of auction. Auctions have proven that new TLD registry ownership can be worth millions of dollars (mid seven figures). That value will go up as more valuable, contending applications are auctioned. The high value means that the objection fees are a low cost gamble to eliminate a competitor – that is, if an applicant prevails on an objection it would save of millions in auction costs.

18. Thus, the greater number of applications and contention sets has had the effect of eliminating barriers to filing what might be considered a frivolous objection. Instead of a few community objections to protect, say, indigenous names such as

¹ http://gnso.icann.org/en/issues/new_gtlds/pdp_dec05_fr_parta_08aug07.htm#

.NAVAJO or religious communities such as .CATHOLIC, there have been well over a hundred community objections,² many by applicants for the singular purpose of turning the intended protection mechanism into an anti competitive device.

19. The several fold increase in the number of objections filed caused the system to fail with respect to the ICANN Policy. With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanisms put into place to rationalize or normalize the answers.³

20. Comparing the initial evaluation process of the gTLD applications themselves, ICANN put into place an oversight mechanism that developed procedures for ensuring evaluation panels arrived at consistent results based upon the standards provided in the Guidebook. This is because evaluators were facing up to 2000 applications. Using untried standards and providing consistent, predictable outcomes posed a difficult logistics and coordination problem. Accordingly, extensive measures were taken to ensure consistent results.

21. Facing a similar situation (*i.e.*, many objections/evaluations placed in front of panelists using brand new standards), no measures were published to: ensure that the panelists employed the new criteria in a consistent manner; ensure panelists used only the criteria published by ICANN in the Guidebook; and explain the Guidebook criteria to the panelists. In the cases of community objections, the category in which the number of objections was the largest, and the standards were the most complex

² See http://newgtlds.icann.org/en/program_status/odr/determination.

³ This despite the fact that the ICC made clear that it would not review or correct any expert determination on the merits. See http://newgtlds.icann.org/en/program_status/odr/webinar_icc_09jan14_en.pdf at .

and highly disputed when formulated, the likelihood for unpredictability was the greatest.

22. In the cases under review in this proceeding, panelists relied on, among other inapplicable sources, 2007 SO Implementation Guidelines to say that the term community should be interpreted “broadly.” The 2007 Implementation Guidelines are specifically not part of the standard. They were presented to the community as Guidelines – advice that could be taken into consideration when creating the standards and the rest of the Guidebook criteria. After four years of public discussion and argument, the community objection criteria looked nothing like that 2007 guideline. In its community agreed upon implemented form, the term “community” is defined *narrowly* to prevent abuses in the objection process – the type of abuse to which panelists opened the door when improperly altering the standard.

23. When faced with the surprise of many times the number of objections expected, a change should have occurred in the planning and administration of the objection process. Proper due diligence would have avoided the unpredictability and other policy violations. A bigger factory, churning out more product requires increased quality assurance measures to ensure all employees are using the right tools, the right measuring sticks, and are trained to use them properly.

24. These measures were not taken. When the applicants and others first complained of inconsistent results, DRSPs held a webinar where they stated that while they had put some oversight measures in place for *procedural* consistency, they implemented *none* to ensure *substantive* consistency or proper use of and adherence to standards.⁴ The results between pairs of objection results were often diametrically opposed: finding a clearly delineated, well bounded community in some cases but, not in others when the factual set was nearly the same or even slanted in a way opposite of

⁴ http://newgtlds.icann.org/en/program_status/odr/webinar_icc_09jan14_en.pdf at .

the result. Some panelists required only the possibility of detriment to satisfy the material detriment element where others required much more certainty. Some panelists found certain safeguards adequate to prevent detriment while others found the same safeguards did not.

25. It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the New gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning non discrimination, application of documented policies neutrally, objectively and fairly, promotion of competition, and accountability.

Being in full agreement with the statements contained in this document, hereby sign it and acknowledge its contents as of this 8th day of October, 2014.

A handwritten signature in blue ink, appearing to read 'Kurt Pritz', is positioned above a horizontal line.

Kurt Pritz

KURT J. PRITZ

PROVEN OPERATIONS EXECUTIVE WITH 25+ YEARS EXPERIENCE

- *SKILLED COMMUNICATOR AND NEGOTIATOR • EFFECTIVE MANAGER OF LARGE AND COMPLEX PROJECTS • EXEMPLARY LEADER IN MULTI-STAKEHOLDER ENVIRONMENTS*
-

EXECUTIVE SKILLS

Leadership. Built and led successful teams that transformed three industries:

- Directed ICANN’s global policy effort that opened the door to an expansion of top level Internet domains, providing greater choice, innovation and competition to the world’s Internet users. In addition to .com and .net, here may soon be .bank, .shop, 公益 and hundreds of others.
- Developed state of the art surface mount manufacturing techniques that enabled reliable production of miniaturized avionics to support immediate delivery requirements and establish new industry methods.
- Grew Walt Disney Imagineering Production’s operations to design and deliver technically complex shows and rides for the “Disney Decade” to Disneyland, Walt Disney World, Disneyland Paris and Tokyo Disneyland.

Growth Management. Successfully managed start ups, rapid growth and company culture changes:

- Ensured stability of ICANN’s operations, increasing revenues from \$8 million to \$80 million in eight years by negotiating increased stakeholder contributions.
- Expanded engineering and production operations at Walt Disney Imagineering by 300% while controlling overhead spending and meeting all quality, schedule and cost goals.
- Directed automated production facility start up for Eaton Corporation, shipping product within 6 months of the start of construction to support critical schedule requirements of a \$2.2 billion program.

Policy Development and Stakeholder Relations. Developed solid relationships with business and government leaders around the world. Resolved difficult Internet policy issues through negotiation and public participation. Negotiated global supply chain agreements.

Systems Implementation. Implemented MRP/ERP, finance and earned value systems; integrated estimating, planning, product development and production processes. Successfully implemented ISO compliant systems, statistical process controls and six sigma methodologies.

Teambuilding and Organizational Design. Built powerful, cross functional and geographically diverse teams by focusing on customer satisfaction and frequent, effective communication, and by reducing direct reports and organizational layers.

PROFESSIONAL EXPERIENCE

Domain Name Association

Executive Director

Los Angeles, California; Boston, Massachusetts, 2013-present

Led start up of global trade association representing the Internet's Domain Name Industry members such as Google, Amazon, GoDaddy, Nominet (operator of .uk), and Verisign (operator of .com). In first six months: grew membership 200%; established Marketing, Technical and Policy Committees; influenced important, global Internet governance and policy discussions through public interventions and interactions with governments. Facilitated several business start ups: providing financial, strategy, legal and technical direction.

ICANN

Chief Strategy Officer; Senior Vice President, Services; and Vice President, Business Operations

Los Angeles, California, 2003-2012

ICANN is the not for profit responsible for development of global Internet policy, distribution of IP addresses worldwide, and oversight of the sale and use of domain names such as .com, .net. and .org. Drove the strategic planning process and business operations for the non profit organization responsible for the technical coordination and stability of the global Internet's domain name system. Led stakeholder relations with national governments, multinational corporations, intergovernmental organizations, Internet service providers, domain name managers, intellectual property interests and the world's Internet users.

- Headed the team responsible for major expansion of Internet namespace. Directed key Internet policy initiatives to increase competition and choice for Internet users globally.
- Led formulation of strategy and operating budgets, approved by Board of Directors and key stakeholders.
- Named one of the 50 most influential people by *Managing Intellectual Property* magazine (2011 and 2012).
- Represented ICANN in testimony before U.S. Congress on three occasions.
- Negotiated and managed agreements with domain name service providers that: increased ICANN's revenues from \$16MM to \$70mm; and improved Internet stability, security and resiliency; and added protections for trademark owners and Internet users.
- Managed successful delivery of outcomes required in ICANN's agreement with the US Government.
- Reduced lead times for key services to governments and top level domain managers from 8 to 5 days.

Pritz & Associates

Consultant and Attorney

Westlake Village, California, 2000-2003

Partnered with clients Universal Studios, Wet Design and J. Robert Scott to create new business segments, build effective, cross functional teams and reduce product and operational costs.

- Developed contract maintenance business, increasing architectural services firm revenue by 10%.
- Reduced product lead times by up to 50% and operating costs by \$900K through enhanced teamwork and streamlined development/manufacturing processes, enabling company to pursue new markets.

Walt Disney Imagineering

Vice President, Engineering & Production

Glendale, California, 1991-2000

Led a staff of 500+ and a geographically diverse vendor base in the design, production and installation of highly technical theme park shows and rides worldwide.

- Grew production operations from \$25 million to \$100 million; created partnerships through worldwide supply chain; implemented flexible organization to accommodate demand; employed new technology.
- Improved team effectiveness by reducing direct reports 50% and eliminating management layers.
- Implemented earned value, activity based costing and other cost control metrics, enabling under budget production of an \$80+ million project involving 20,000 deliverables.
- Applied digital production processes, shortening development lead times from 4 weeks to 2 days.
- Injected real invention into *audio-animatronics figures*; reduced costs 30% and improved reliability.
- Implemented production management MRP/ERP) systems.

Eaton Corporation

Manager, Advanced Assembly Facility, and Quality Assurance Manager

Westlake Village, California; Athens, Georgia, 1982-1991

For provider of technically advanced electronic avionics sub systems, hybrid circuits, electronic sensors:

- Led plant start up; hired and directed staff of 100+.
- Shipped product within 6 months of construction start to meet critical delivery demands of \$2 billion contract.
- Implemented state of the art automated surface mount technology clean room assembly facility.
- Managed international supply chain quality, supplier relationships and customer service.
- Implemented automated test equipment, sell six sigma and lean manufacturing methodologies.
- Authored and implemented quality assurance manual, plant wide procedures and statistical process.

EDUCATION AND COMMUNICATION

Bachelor of Science, Physics	Rensselaer Polytechnic Institute	Troy, New York
Master of Science, Physics	Virginia Tech	Blacksburg, Virginia
Master of Business Administration	University of Michigan	Ann Arbor, Michigan
Juris Doctorate	University of LaVerne	Los Angeles, California

Admitted to California bar

Published in manufacturing, technology, physics, and law journals

Frequent speeches, keynotes, and presentations in Americas, Africa, Asia/Pacific, and Europe

Named one of the 50 most influential people by Managing Intellectual Property magazine (2011 and 2012)

Held USG Secret Clearance

Expert Witness Statement

Marc Edelman

EXPERT WITNESS STATEMENT OF MARC EDELMAN

1. My name is Marc Edelman. I submit the following expert witness statement in support of the Request for Independent Review Process (“IRP”) submitted by Donuts Inc. (“Donuts”) pertaining to its New Generic Top-Level Domain Name (“gTLD”) applications for .SPORTS,.SKI and .RUGBY. I am a citizen of the United States of America, and currently reside in New York, NY. If called to testify on any of the subjects listed below, I can and would do so competently.

2. I have extensive experience pertaining to the sports business industry, with a particular emphasis on sports law and sports-related antitrust issues. To date, I have published 26 law review articles on matters related to sports jurisprudence, including law review articles in the *Harvard Journal of Sports & Entertainment Law*, *Stanford Journal of Sports, Business, & Finance*, *Northwestern University Journal of International Law & Business* and *Virginia Journal of Sports & Entertainment Law*.¹ I also write a column on legal and business issues in the sports industry for *Forbes SportsMoney*. I am an Associate Professor of Law at Baruch College’s Zicklin School of Business, and an Adjunct Professor of Sports Law at Fordham University Law School. My academic credentials include a B.S. in Economics, *magna cum laude*, from the University of Pennsylvania’s Wharton School, an M.A. in Kinesiology (Sports

¹ A full collection of my published academic work is available to review and download on the Social Science Research Network database, at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1145394.

Management) from the University of Michigan, and a law degree, *cum laude*, from Michigan Law School. My full curriculum vitae is available for review at <http://www.marcedelman.com/images/stories/M. Edelman CV 1-5-2014.pdf>.

A. SportAccord and Its Member Associations/Federations

3. SportAccord was founded in 1967 as an umbrella organization that is governed by its many constituent members, which include various sports federations and associations such as the International Tennis Federation (“ITF”), the International Rugby Board (“IRB”) and Federation Internationale De Ski (“FIS”).

4. In addition, SportAccord includes a number of “partners” from the “private sector” that are involved with SportAccord for financial reasons. According to SportAccord’s own website, these private sector partners include SwatchGroup and Samsung.² SportAccord sponsors do not include any rival brands to SwatchGroup or Samsung. Thus, their membership in SportAccord affords them financial advantages.

5. Some SportAccord members had engaged in collective, organized behavior as early as the 1920s; however, the exact scope of who should be eligible for membership in these collective sports organizations and how to join these organizations has changed substantially throughout time, even according to the “History” section on SportAccord’s own webpage.³

B. Sports Long Predates the Creation of International Associations/Federations, and Encompasses Far More Than What Is Governed By These Associations/Federations

² See SportAccord Website, at <http://sportaccord.com/en/partners> (last visited October 2, 2014).

³ See SportAccord Website (History), at <http://www.sportaccord.com/en/who-we-are/history> (last visited October 2, 2014).

6. The history of “sports,” as the term is most commonly defined, is presumed to date back to wrestling matches that took place as long ago as 2000 – 3000 B.C.E. Such is evidenced by cave drawings in both Europe and Egypt, depicting such activities as taking place.⁴

7. Similarly, team sports with balls date back nearly two thousand years, as evidenced by Chinese frescoes from the first century A.C.E. depicting Chinese women and men competing in a sport known as Tsu Chu, which involves kicking a ball into a net.⁵

8. The exact date when organized sporting events and standardized rules began to emerge is uncertain. However, one could reasonably trace the practice back to around 1815, when a number of colleges in England came together to impose the Cambridge Rules for soccer.

9. Sports on the university level similarly began to proliferate in the United States in the late 1840s when regattas between Ivy League schools such as Harvard University and Yale University emerged as an important part of campus life.⁶ By the late 1850s, many colleges had launched competitive

⁴ See, e.g., Wrestling Greco-Roman & Equipment, at <http://www.olympic.org/wrestling-greco-roman-equipment-and-history?tab=history> (last visited October 3, 2014) (proclaiming cave drawings of wrestling date back to 3000 B.C.E.); Origins of Wrestling, at <http://www.livestrong.com/article/339526-origins-of-wrestling> (last visited October 3, 2014) (stating that cave drawings depicting wrestling date back to 3000 B.C. in the Sumero-Akkadian civilization and to 2400 B.C. in ancient Egypt).

⁵ See Tsu Chu Foundation Website, at <http://tsuchubizfoundation.org/about-us/tsuchu-meaning> (last visited October 3, 2014) (dating the sport of Tsu Chu, an early derivative of soccer, back to the Chinese Han Dynasty); see also Marc Edelman & Liz Masterson, *Could A New Women’s Professional Soccer League Survive in America*, 19 SETON HALL SPORTS & ENTERTAINMENT LAW JOURNAL 283, 287, n. 19 & 20 and accompanying text (2009) (providing various sources discussing the origins of women’s soccer).

⁶ Marc Edelman, *The NCAA’s ‘Death Penalty Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*, 18 LEWIS & CLARK LAW REVIEW 385, 388-89 (2014); see also

baseball teams.⁷ And in 1860, the College of New Jersey (now Princeton University) and Rutgers College met for the first official collegiate football game.⁸ Throughout this entire time, these sporting events operated in a laissez-faire manner, without any formal oversight association or federation.⁹

10. In the United States, the first known paid professional athlete, Jim Creighton, was paid \$500 in the year 1859 to join the Excelsior Club of Brooklyn's baseball team.¹⁰ At that time, the Excelsior Club of Brooklyn competed in baseball games against other clubs in the region, and these games were not organized or overseen by any federation. Nevertheless, the games were a source of great pride for all of the involved clubs and athletes.

11. Meanwhile, traditional sports leagues first emerged in the United States in 1876, beginning with the formation of the National League of Professional Baseball Clubs – a league of baseball teams that continues to exist and thrive to this day.¹¹ Even at that time and well into the 1900s, there were various professional baseball leagues in the United States other than those that

Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 INDIANA LAW JOURNAL 985, 988-89 (1987) (discussing the origins of college sports in the United States).

⁷ See Robert N. Davis, *Academics and Athletics on a Collision Course*, 66 N.D. LAW REVIEW 239, 243 (1990) (mentioning the earliest collegiate baseball game, played between Amherst and Williams colleges in 1859).

⁸ *Id.*

⁹ See Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 490 (1995) (explaining that “[u]ntil the 1870s there were no standardized [American] football rules”).

¹⁰ See Bob Liff, *New Field and New Dreams, Borough Has a Rich Tradition*, N.Y. DAILY NEWS, Aug. 29, 2000, at 3; see also Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform its Sports Agent Laws to Conform with True Agency Principles*, 4 HARVARD JOURNAL OF SPORTS AND ENTERTAINMENT LAW 145, 149, n. 12 (2013) (providing various other sources as accounts of Jim Creighton).

¹¹ See *National League of Baseball is Founded*, at <http://www.history.com/this-day-in-history/national-league-of-baseball-is-founded> (last visited October 3, 2014).

exist today. Meanwhile, various professional basketball and football leagues, in addition to those active today, existed in the United States well into the 1970s and 1980s, respectively.¹²

12. All of these “sports” activities discussed in Paragraphs 6-11 predated the creation of SportAccord and the creation of most, if not all, of SportsAccord’s constituent members. All of these activities even predated the creation of the modern Olympics, which was first hosted in Athens, Greece in 1896.¹³

13. While certain associations/federations that are members of SportAccord have, over time, attempted to portray themselves as “governing” a particular sporting activity, these attempts are often grounded in financial and/or political agendas, and these associations/federations are not ubiquitously recognized as the governing body of any sport by all of those who play the sport in any form. For example, SportAccord regards the Federation Internationale de Basket-ball (“FIBA”) as the official governing body for the sport of basketball; however the game rules, competition schedules and economic interests of FIBA often conflict with those of the National Basketball Association (“NBA”) and its

¹² See, e.g., *American Basketball Association Debuts*, at <http://www.history.com/this-day-in-history/american-basketball-association-debuts> (last visited October 3, 2014) (discussing the history of the American Basketball Association, which lasted from 1967-1976 – a true rival basketball league in the United States to the National Basketball Association); *The History of the USFL 1982-86*, at <http://www.remembertheusfl.8m.com/history.html> (last visited October 3, 2014) (discussing the history of the United States Football League – an attempt at a rival football league in the United States to compete against the National Football League).

¹³ See *The First Modern Olympic Games*, SMITHSONIAN, available at <http://amhistory.si.edu/sports/exhibit/olympians/first/> (last visited October 3, 2014).

member clubs.¹⁴ In some cases FIBA and the NBA even compete directly against each other for players and fans, as it is well documented that the NBA owners have actively discouraged their players from participating in FIBA competitions.¹⁵ Moreover, as a more general matter, there is typically no affirmative government mandate or law stating that one must be affiliated with any specific association or federation in order to play a particular sport. Much of sport activity exists in the non-commercial market, through “free play” and spontaneous activity of the participants.

14. Indeed, for many centuries, spontaneous sporting activities such as running races, soccer, wrestling and ball-games have sprouted up in the most innocent and non-organized of venues, such as at elementary schools during recess, in senior citizen centers as a way of staying physically fit, and even in refugee camps where families try to maintain some normalcy in their lives.¹⁶ All of these activities are, no doubt, sport, in the truest meaning of the word – even

¹⁴ See, e.g., Brian Mahoney, *New FIBA World Cup Qualifying Format Raises Scheduling Conflict for NBA and Team USA*, SPIN INTERACTIVE, Sept. 11, 2014, at <http://www.spin.ph/basketball/news/mike-krzyzewski-us-team-fiba-world-cup-basketball-soccer-football-spain-2014> (explaining how the NBA has no intention of cancelling games to allow its players, who are for the most part the nation’s elite, to compete in FIBA basketball competitions); Daniel Friedman, Q&A: *Shaq Sounds Off at Rucker Park*, SPORTS ILLUSTRATED, Aug. 19, 2014, at <http://www.si.com/nba/2014/08/19/shaquille-oneal-sacramento-kings-rucker-park-rudy-gay-nba-tnt> (former NBA legend Shaquille O’Neal criticizes the closeness of the basket to the court in FIBA basketball games and argues FIBA should adopt the NBA rules to reduce risk of future player injuries).

¹⁵ See, e.g., Austin Burton, *NBA Players Discouraged from Pro Ball: Right or Wrong*, DIME MAGAZINE, Sept. 14, 2009, at <http://dimemag.com/2009/09/nba-players-discouraged-from-fiba-ball-right-or-wrong> (explaining how both the NBA and the National Hockey League teams discourage their players from participating in international competition).

¹⁶ See, e.g., Beth Bragg, *Kids Who Learned Soccer in Refugee Camps Team Up Here*, ALASKA DISPATCH NEWS, Jul. 16, 2011, at <http://www.adn.com/article/20110716/kids-who-learned-soccer-refugee-camps-team-here> (explaining how Catholic Social Service’s Refugee Assistance & Immigration Services program decided to start a soccer program for kids who learned to play soccer primarily in African refugee camps).

though these activities are not overseen by SportAccord or any of its member associations that try to formally organize, commercialize and control sport.

15. Without the efforts of SportAccord members to exert their influence, there could be even greater proliferation of non-organized sports, as well as alternative organized sport entities. For example, the 2002 U.S. Court of Appeals for the First Circuit decision in *Fraser v. Major League Soccer* explained that the U.S. Soccer Federation “decided as early as 1988 to sanction only one Division I professional league [in the United States].” Reason being, the U.S. Soccer Federation’s concern that “sanctioning rival leagues would dilute revenues [and] drive up costs.”¹⁷

16. At the same time, it is also important to note that while SportAccord members and the International Olympic Committee (“IOC”) have authority over the *Olympic Games* events, this does not necessarily mean that SportAccord serves as an all-encompassing “governing body” of any particular sport – even where the sport is an Olympic sport.

17. This is not to say that, in some instances, sports associations and federations do not serve any useful purpose. They can, and do, provide valuable resources to help promote and organize the sport, so long as their role as facilitator is kept in proper perspective. Participants in sports may choose to be affiliated with a sports federation because of the benefits they offer, but this is usually not required as any precondition for playing that sport in some form or another.

¹⁷ *Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002).

18. Participation in “sports,” even today, is regularly conducted by casual participants outside of traditionally organized leagues. In this vein, sport can be used for so many purposes, ranging from exercise and friendship to maintaining history and tradition. As a 2012 article from *The New York Times* reminds us, the famous stickball leagues of East Harlem, New York are not regulated by any national or international governing body nor have they ever been so.¹⁸ The popularity of these leagues arises from the authenticity of the games and the participants themselves – many of whom play to maintain a family tradition. Indeed, many would agree that East Harlem stickball players are true sportsmen, and the activities in which they participate represent the truest meaning of “sport.” The same can also be said about the many generations of American urban “street basketball players,” who have honed their skills on world-famous street basketball courts such as Upper Manhattan’s Holcombe Rucker Park and Southern California’s Venice Beach.¹⁹

19. At the same time, the definitions of “sport” and “athlete” are constantly expanding to include new activities. Some of the modern trends that have changed sport include, among other things: (1) the emergence of the X

¹⁸ Kia Gregory, *They are Still Swinging for the Rooftops in East Harlem*, N.Y. TIMES, Jul. 8, 2012, at http://www.nytimes.com/2012/07/09/nyregion/theyre-still-swinging-for-the-rooftops-in-east-harlem.html?_r=0.

¹⁹ See Kevin W. Ryan, *9 Basketball Courts Every Fan Needs to Visit*, BLEACHER REPORT, Mar. 4, 2014, at <http://bleacherreport.com/articles/1966882-nine-basketball-courts-every-fan-needs-to-visit> (ranking both Holcombe Rucker Park and Venice Beach among the basketball courts that any American basketball fan needs to visit); Daniel Friedman, *Q&A: Shaq Sounds Off at Rucker Park*, SPORTS ILLUSTRATED, Aug. 19, 2014, at <http://www.si.com/nba/2014/08/19/shaquille-oneal-sacramento-kings-rucker-park-rudy-gay-nba-tnt> (discussing former NBA All-Star Shaquille O’Neal’s role coaching kids in a game at Rucker Park and expressing his lament and not having the opportunity to become a street basketball star at the park in his younger years).

Games as sport;²⁰ (2) the mainstream adoption of the term “Mathletes” (short for mathematics athletes) as a form of mental sport participation;²¹ (3) the mass proliferation of “fantasy sports” which is often internally self-regulated by league participants;²² and (4) the emergence of electronic sports (eSports) and videogame athletes.²³

C. Why The Proliferation of Sport Accord and Its Member Associations/Federations Might Harm “Sport” Overall

20. Even within the broader sports business and legal community, there is widespread debate as to whether formalized sports associations/federations are good for sport itself or truly represent the myriad athletes that compete in sport. For all the benefits these associations/federations provide (i.e. standardization and oversight), there are equally as many reasons why many athletes prefer sports without such associations/federations, including principles pertaining to individual rights, marketing freedom, athlete autonomy,

²⁰ See Kate Pickert, *A Brief History of the X Games*, TIME, Jan. 22, 2009, at <http://content.time.com/time/nation/article/0,8599,1873166,00.html> (last visited October 3, 2014).

²¹ See, e.g., Definition of Mathlete, Wikipedia, available at <http://en.wikipedia.org/wiki/Mathlete> (last visited October 3, 2014) (defining a “mathlete” as “a person who completes in mathematics competitions at any age or level”); Mathletes Challenge 2014, at <http://mathletes.ie> (last visited October 3, 2014). For the use of the term “Mathlete” in mass or popular culture, see, e.g., movie, MEAN GIRLS (2004) (including various scenes related to Mathlete competitions).

²² See Marc Edelman, *A Brief Treatise of Fantasy Sports and the Law: How America Regulates its New National Pastime* 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1 (2012) (providing a very thorough history of fantasy sports and the mechanisms for internal self-regulation of fantasy sports leagues by the participants themselves).

²³ See, e.g., Nick Wingfield, *In E-Sports, Video Gamers Draw Big Crowds and Real Money*, N.Y. TIMES, Aug. 30, 2014, available at http://www.nytimes.com/2014/08/31/technology/esports-explosion-brings-opportunity-riches-for-video-gamers.html?_r=0 (last visited October 3, 2014); *Gamers to Get College Scholarships*, ASSOCIATED PRESS, Jun. 20, 2014, at http://espn.go.com/chicago/college-sports/story/_/id/11113637/robert-morris-university-offers-esports-scholarships-league-legends-video-game (last visited October 3, 2014) (“Robert Morris University Illinois announced its new program this month and said it recognizes the growing legitimacy of what are known as ‘eSports’ The school says it also wants to give credit to those with a competitive spirit who don’t necessarily want to play traditional sports such as basketball or football.”).

differentiation, and even, in some cases, free market competition. These reasons are outlined further in Paragraphs 21 - 23 below.

21. In terms of individual rights and marketing freedom, many formalized sports associations/federations chill the free speech of their athletes for purposes of maximizing their own financial gains. For example, many of the associations and federations that are longstanding members of SportAccord enforce rules in their charter that prevent athletes from speaking favorably about those brands that do not pay for exclusive sponsorship rights to their athletic events. Most notably, Rule 40 of the Olympic Charter, which is otherwise known as the 'blackout rule,' prevents Olympic athletes and other participants from appearing in advertisements or promotions for any sponsors, other than paid Olympic Charter sponsors, around the time of the Olympic Games.²⁴ This rule not only chills the free speech of athletes, but also precludes them from competing in the free market to endorse products. It also chills the ability of brands that do not receive exclusive sponsorship rights for a given event to present their message through TV, radio and other media. As a result, it provides longstanding Olympics sponsors such as Nike with just one more medium to keep rival (and often much smaller) brands out of business.

22. In terms of fostering product differentiation, the proliferation of SportAccord and its member associations/federations can also have negative effects. Some of the greatest innovations in sport such as basketball's three-

²⁴ See Olympic Guidelines PDF on USA Track & Field Association Webpage, http://www.usatf.org/events/2012/OlympicTrials-TF/athleteInfo/Rule40_Pamphlet_4.pdf (last visited October 2, 2014).

point shot have come from the competition among rival sport associations to develop athlete- and consumer-friendly game rules.²⁵ Thus, the attempt to standardize athletic rules may actually harm, rather than benefit, both athletes and consumers.

23. In terms of free market competition, formalized sports associations/federations create limitations on a number of levels. On the athlete level, formalized sports associations limit competition for players' services and for providing the best terms for participation. On the brand marketing level, formalized sports associations/federations often award exclusive sponsorships that exclude all but a single brand from each category from the marketplace; this prohibits small- and mid-size companies in various categories, especially the apparel category, for competing for athlete endorsers.²⁶ At the same time, association and federation rules about permissible athletic equipment could harm a given brand's ability to compete across broader markets. From a consumer perspective, the potential emergence of singular sports associations/federations would reduce choice for fans in terms of what style of the sport to watch, and under what game rules. Indeed, fans often do not have any direct say in the

²⁵ See PAUL WEILER & GARY ROBERTS, *SPORTS & THE LAW* 594-95 (2d. ed. 1998) ("Although league resistance to innovations that may improve the quality of the sport only rarely generates antitrust litigation on the part of the product suppliers, such innovation is an important value from the point of view of consumer welfare. The competitive pressures generated by a challenger league create an incentive for innovations that enhance enjoyment of the sport. Perhaps the best example is the American Basketball Association, whose heritage for professional football includes not only the *Oscar Robinson* case and thence veteran free agency, but also the three-point shot and the slam dunk").

²⁶ See, e.g., *USATF and Nike Inc. Sign Long-Term Partnership*, USA Track & Field Website at <http://www.usatf.org/News/USATF-and-NIKE-Inc--sign-long-term-partnership.aspx> (last visited October 5, 2014) (discussing the dominance of Nike in track and field, due to the exclusive sponsorship rights that USA Track & Field has granted Nike, to the detriment of the many smaller sneaker and sports apparel brands that seek to compete in that same marketplace).

rules of a sport as approved by SportAccord members and their bylaws. Sometimes, the interests of high-paid sponsors are placed by SportAccord member associations ahead of not only the athletes, but also the fans. As a result, there is slowly emerging a powerful voice for sports fans that lies separate and apart from anything affiliated with institutionalized sports, such as with SportAccord and its members. This voice, which is beginning to appear in Sports Fan Coalitions, represents “sport” in its truest essence, and should not be ignored when considering what constitutes “sport” today.²⁷

24. Finally, it is worth noting that while SportsAccord associations and federations serve an important role in organizing, regulating and overseeing sport, they are not immune from their own legal scandals that require external judicial oversight, separate and apart from the accord’s internal mechanisms for self-governance and conflict resolution. For example, in July 2008, a British Broadcasting Corporation (“BBC”) investigation purportedly found documents that showed under SportAccord president Hein Verbruggen’s watch, “a cycling event may have bought its way into the Olympic Games” via a \$3 Million bribe.²⁸ In addition, Verbruggen on multiple occasions has been accused of accepting bribes to cover up doping offenses in the sport of cycling—including the doping of

²⁷ See Sports Fans Coalition Website, at <http://www.sportsfans.org> (last visited October 3, 2014); see also Dan Markel, Michael McCann & Howard Wasserman, *Catalyzing Fans*, 6 HARVARD SPORTS & ENTERTAINMENT LAW JOURNAL (forthcoming 2014), available draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297050 (discussing the emergence of Fan Action Committees as an important countervailing force to the establishment in collectively regulating sport).

²⁸ Matt McGrath, *Cycling Cash Linked to Olympics*, BBC NEWS, at <http://news.bbc.co.uk/2/hi/asia-pacific/7525072.stm> (last visited October 3, 2014).

Lance Armstrong.²⁹ Meanwhile, in June 2004, a court in Seoul, South Korea sentenced International Olympic Committee vice-president Kim Un-yong to “two and a half years in prison on embezzlement and bribery charges.”³⁰

D. Concerns Unique to the Instant Dispute

25. I have reviewed the arguments raised by SportAccord, its members, and its partners concerning “material detriment” related to lack of control of the “.Sport” and similar domain names. They allege that without control of the “.Sport” domain name, there will be increased “racism,” “bullying” “violence” and “pornography” in sports, and they estimate “economic” damage figure of “400 billion US Dollars.”³¹ In my view, these claims of “racism,” “bullying,” “violence,” and “pornography” are remote, and the claimed loss in value emanating from any such results, even under the worst case scenario, is minimal. While it is true that failing to grant SportAccord control of the “.Sport” domain might lead to negative positions for SportAccord and its membership in terms of market power, this is only because control of the “.Sport” domain would allow SportAccord and its members to further strengthen their commercial control over sport licensing and endorsement markets.

²⁹ See *McQuaid and Verbruggen Accused of Corruption in Report Summary*, Cycling News, September 10, 2013 at <http://www.cyclingnews.com/news/mcquaid-and-verbruggen-accused-of-corruption-in-report-summary> (last visited October 3, 2014); see also Nathaniel Vinton, *Lance Armstrong Accuses Former Cycling Chief Hein Verbruggen of Covering Up His Positive Drug Tests*, the Daily News (New York, NY), Nov. 19, 2013, at <http://www.nydailynews.com/sports/i-team/armstrong-accuses-cycling-chief-covering-positive-drug-tests-article-1.1521191> (last visited October 3, 2014) (“Armstrong said that Verbruggen, as head of the International Cycling Union, helped minimize the impact of some of his suspicious drug test results. ‘I’m not going to lie to protect these guys. I hate them.’”)

³⁰ See *Olympic Chief Jailed for Bribes and Embezzlement*, EVENING STANDARD (London, UK), June 3, 2004, at 16.

³¹ New Generic Top-Level Domain Names (“gTLD”) Dispute Resolution Procedure, Objection Form to Be Completed by the Objector, at 11-19.

26. Indeed, granting SportAccord and its members full control over the “.Sport” domain name would only intensify the problematic elements of sports associations/federations that are discussed in detail in Paragraphs 21 - 23 above. Among other things, granting SportAccord and its members a monopoly over the “.Sport” domain name would allow SportAccord and its member associations to take far greater action to squeeze out of businesses those entities that do not pay for exclusive sponsorship rights to SportAccord, and thus would allow SportAccord and its members to charge far greater fees for exclusive sponsorship rights to various events.

27. Giving SportAccord and/or its members control of the “.Sport” domain name would also likely aid SportAccord to grant powerful category sponsors such as Swatch, Samsung, and Nike with the exclusive rights to use the “.Sport” domain, while keeping out smaller rival companies in each of these industries. This would lead to further consolidation in each of these markets to the detriment of not only small businesses, but also consumers. As one example of such, Oiselle, a small running apparel brand owned by female entrepreneurs and their sponsored athletes would likely be denied access to “.Sport” because they are not the exclusive sponsor of SportAccord running events.³² Meanwhile, Nike, a gargantuan company that pays huge fees for exclusive sponsorship rights to SportAccord events, would likely gain access. This result would only make it more difficult for companies such as Oiselle to compete against companies like Nike in a free economic market.

³² See *An Unlikely Story, But True*, Oiselle Website, at <http://www.oiselle.com/about>.

28. In this vein, to the extent it is true that SportAccord and its members would lose the opportunity to substantial income streams from not controlling the “.Sport” domain, the monetary loss could be best attributed to the loss of the ability to charge monopoly prices to exclusive category sponsors in yet another market – and not due to the opening of a Pandora’s Box of “racism,” “violence,” “bullying,” “pornography” or any other atrocities throughout society, as SportAccord has suggested.³³ These alternative reasons are not justifiable rationales for turning over domains such as “.Sport” to SportAccord. To the contrary, they may even serve as reasons to do just the opposite.

29. The claims of “racism,” “violence,” “bullying.” and “pornography,” not to mention increased “doping,” seem to serve primarily as red herrings to obscure the true issue – the desire of powerful businessmen that control SportAccord and its member sports associations/federations to expand their monopoly power over various advertising markets and their stranglehold over athlete speech into yet another powerful sphere – the Internet.³⁴

30. Of course, this is not to say that SportAccord or its member trade associations/federations do not provide some very real value to athletes and consumers. However, individuals affiliated with SportAccord and its member associations seem to overemphasize the value that SportAccord and its members bring to sport, and seem to deemphasize the potentially deleterious

³³ New Generic Top-Level Domain Names (“gTLD”) Dispute Resolution Procedure, Objection Form to Be Completed by the Objector, at 11-19.

³⁴ The claim that giving control of the “.Sport” domain name to anybody other than SportAccord and its member associations would lead to increased doping in sport seems especially disingenuous in light of various allegations that the former SportAccord president was in part responsible for past doping scandals, as discussed above in Paragraph 24.

effects that may emanate from the increasing economic and social power of SportAccord. In addition, individuals affiliated with SportAccord and its member associations seem to deemphasize the many past scandals involving SportAccord and its member associations. Given that the expert who initially decided this matter, Jonathan Taylor, regularly “advises a wide range of sport bodies (including international and national governing bodies)”, one could reasonably presume that Mr. Taylor has experienced far greater exposure to arguments related to the value provided by SportAccord and its member associations/federations than to the arguments about the deleterious effects that SportAccord and its member associations/federations have on athletes, small and mid-sized brands, and even consumers. While these sort of views may not be regularly discussed by those involved with SportAccord and its member associations/federations, these views in opposition to SportAccord and its member associations are very real and have a *bona fide* voice in both sports business and legal discourse.³⁵

31. Even recognizing the value that SportAccord and its members provide to society, this value would, at best, seem to justify their rights to control domain names such as “.SportAccord” “.Olympics” or “.IOC,” and it would not

³⁵ See, e.g., Daniel A. Craig, note, *Has Olympic Brand Protection Gone Too Far?* 9 SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW & BUSINESS 375, 376-77 (“Overall, brand enforcement [by the Olympics] appears to be far too strict. Protection against impermissible use of Olympic property is left with National Olympic Committees (NOCs), and the NOCs even seek injunctions against individuals and non-profit organizations that do not seek significant monetary gain from use of the Olympic symbol”); Queenie Ng, note, *United States and Canadian Olympic Coverage: A Tale of Two Monopolists*, 8 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS 251 (2001-02) (discussing author’s perception of antitrust concerns with respect to the International Olympic Committee’s granting of monopoly rights to a single television station to broadcast the Olympic Games).

seem to justify control of domains reflective of the industry in its entirety such as “.Sport” or “.Ski.” This is because SportAccord entities oversee only a very small amount of “sport” in the entirety. Furthermore, while SportAccord’s control of organized and commercialized sport may be higher, even such control is still not absolute, and it has been derived, in some cases, through monopolistic conduct rather than free market competition.

Being in full agreement with the statements contained in this document, I hereby sign it and acknowledge its contents as of this 6 day of October, 2014.



Marc Edelman

Expert Witness Statement

Dr. Arman Sarvarian

EXPERT WITNESS REPORT OF ARMAN SARVARIAN, Ph.D.

A. Introduction

1. My full name is Dr Arman Sarvarian. I am a national of the United Kingdom and the Republic of Armenia and reside at Contact Information Redacted

Contact Information Redacted I have been retained by counsel for Donuts Inc. to produce this Report in my capacity as an expert on professional ethics in international courts and tribunals, including investment and commercial arbitration.

2. Since 3 September 2012, I have been lecturer in law at the University of Surrey and Director of the Surrey International Law Centre in the United Kingdom. I am a specialist in public international law matters in general and an expert on the procedural law of international courts and tribunals, in particular the professional ethics of counsel, arbitrators and judges. My monograph entitled *Professional Ethics at the International Bar* (Oxford University Press, International Courts and Tribunals Series, 19 September 2013) is the first comprehensive work on the subject and has been cited in proceedings before the International Tribunal for the Law of the Sea and the International Court of Justice. In addition, I have written comprehensive articles on counsel and arbitrator ethics published in the *European Journal of International Law*, *The Law and Practice of International Courts and Tribunals* and the *Journal of International Criminal Justice*.

3. I was a member of the International Bar Association Task Force on Counsel Ethics in International Arbitration throughout the drafting of the IBA Guidelines on Party Representation in International Arbitration 2013. I previously served as Secretary to the International Law Association Study Group on International Courts and Tribunals throughout the drafting of the ILA Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals 2010. I am presently a member of the ILA Committee on the Use of Force and have advised the Government of the Republic of Armenia and committees of the UK House of Commons and of the Scottish Parliament as an expert in public international law.

4. I hold an LL.B. in Law (First-Class) from the School of Oriental and African Studies, University of London (2007), an LL.M. in Public International Law (First-Class) from Jesus College, University of Cambridge (2008) and a Ph.D. in Public International Law from University College London (2012). I am also a non-practising barrister in England and Wales, having been called to the Bar in 2009. My full curriculum vitae, including a complete list of my scholarship, is annexed to this Report.

5. I affirm that I have no personal, financial or other interest in these proceedings. Donuts Inc. has agreed to remunerate me for my time at a rate of US \$650 per hour regardless of the conclusions I may reach. That agreement does not affect my independence or my ultimate conclusions.

B. Background and Scope of the Report

6. I have been retained to produce this Report, based on my expertise in professional ethics in investment and commercial arbitration, concerning the conduct of Mr Jonathan Peter Taylor ('the Expert') in connexion with an alleged conflict of interest in the community objection proceedings brought against Donuts and its subsidiaries' applications for the generic top-level domains (gTLDs) .SPORTS and .SKI. In producing this Report, I have had two discussions by telephone with counsel for Donuts, Messrs Don Moody and John M. Genga, concerning my professional qualifications, the context and procedure of the proceedings, the scope of the report and its role in the proceedings. I have been furnished with several documents germane to the proceedings in order to provide a factual basis for this Report. I have also shared an earlier draft of this Report with Messrs Moody and Genga to ensure factual accuracy and an understanding of the issues.

7. I take full responsibility for the contents of this Report and the views expressed herein are entirely my own. Consequently, this Report is produced in my capacity as an independent expert and not in the role of an advocate for Donuts or any other party. As stated above, apart from my fee paid by Donuts, I have no interest, direct or indirect, in the outcome of these proceedings.

8. In assessing the conduct of the Expert regarding the alleged conflict of interest in these proceedings, I approach the question as follows: 1) whether there was a conflict of interest for the Expert; 2) if so, what was the gravity of that conflict; and 3) what remedial action, if any, was appropriate to that conflict in the circumstances. After addressing each of these sub-questions, I conclude with an overall assessment of the conduct of the Expert. I have not been requested to address the question of what remedy, if any, is appropriate as they stand at present, but merely to determine whether, in my view, a conflict of interest arose at the time of the proceedings in question.

9. Conflicts of interest have been an increasingly fraught and contentious issue in both investment and commercial arbitration with challenges to arbitrators having become more frequent over the course of the past twenty years. Until comparatively recently, there existed no binding rules or exhortative guidelines to standardise practice concerning such conflicts. Whilst there are no common rules that apply to all arbitral tribunals, whether institutional or *ad hoc*, there exist exhortative guidelines devised by practitioners and academic experts that are intended to be a tool for tribunals.

10. Foremost amongst these is the International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2005 ('the IBA Guidelines').¹ Since their inception, the IBA Guidelines have seen considerable application by arbitral tribunals in practice.² In its quinquennial review in 2010, the IBA Conflicts of Interest Sub-Committee concluded:

'Five years after the dissemination of the Guidelines, most international arbitrators consult the Guidelines whenever they must exercise their judgment on whether to disclose circumstances that might be viewed as conflicts. Whilst the courts in most cases rightly do not directly apply the IBA Guidelines, the cases reported below illustrate

¹ http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

² IBA Conflicts of Interest Sub-Committee, 'The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009', 4(1) *Dispute Resolution International* (2010), 5-52.

that courts called on to decide on challenges to arbitrators are increasingly referring to the IBA Guidelines.³

Whilst the current quinquennial review of the Sub-Committee has yet to be concluded, in my view this conclusion was correct at that time and the body of practice since that conclusion has continued to support it. Consequently, I take the IBA Guidelines as my point of departure, not only due to the growing body of practice in which they have been utilised but also due to the unique status of the International Bar Association as a global bar of quasi-federal character, which vests its exhortatory guidelines with the added value of reflecting broad consensus amongst professionals from jurisdictions throughout the world. The IBA Guidelines are intended to be applied 'with robust common sense and without unduly formalistic interpretation.'⁴

11. The value of the IBA Guidelines is also enhanced by the lack of published practice on conflicts of interest by several commercial arbitral institutions, including the International Chamber of Commerce ('ICC'),⁵ due to the general confidentiality of their proceedings. Amongst these institutions, only the London Court of International Arbitration ('LCIA') provides reasoned decisions on challenges to the parties and publishes sanitised digests of those decisions.⁶ In addition to these decisions, this Report draws upon relevant decisions from the world of investment arbitration, particularly the International Centre for the Settlement of Investment Disputes ('ICSID'), in which conflicts matters tend to arise in similar circumstances and are approached in similar procedural contexts.

³ *Ibidem*, 6.

⁴ IBA Guidelines, 'Introduction', para. 6.

⁵ The ICC reported to the IBA Sub-committee on Conflicts that it had referred to at least one article of the IBA Guidelines in 106 of 187 cases concerning conflicts between 2004 and 2009, including 'a situation where an arbitrator was counsel of parent company of entity which is currently adverse to one party in an unrelated arbitration' - 'The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009', *supra* note 2, 29.

⁶ Walsh and Teitelbaum, 'The LCIA Court Decisions on Challenges to Arbitrators: An Introduction', 27(3) *Arbitration International* (2011), 283-313, 283. The digests of reasoned LCIA decisions on conflicts up to 2010 are published in volume 27, issue 3 of *Arbitration International*. Decisions for the 2010-2014 period have yet to be published.

C. Whether there was a Conflict of Interest

12. On 19 June 2013, the Expert was appointed as sole Panellist in accordance with Article 13 of the Procedure of the ICC International Centre for Expertise to determine the application brought by Donuts for the new generic top-level domain .SKI, which was opposed by an objector on 'community grounds'. In his Statement of Impartiality and Independence accompanying his appointment in that matter, the Expert made the following disclosure:

'Neither my firm nor I has ever acted for either party. However, I do know Sarah Lewis of FIS. I met her in 2007, when I advised a working party concerned by the World Anti-Doping Agency to consider revisions to the International Standard for Testing, and she was a member of the Working Party. I have seen her at anti-doping seminar from time to time since then. I do not consider this affects my independence or impartiality but note it in the interests of full disclosure.'

13. On 25 June 2013, the Expert was also appointed as sole Panellist to determine the application brought by Donuts for the new generic top-level domain .SPORTS and opposed by another objector on 'community grounds'. In his Statement of Impartiality and Independence accompanying his appointment in that matter, he made the following disclosure:

'My firm had given advice in the past to the IOC, once in a data protection issue, and I gave some advice on anti-doping before the Vancouver Games 2010 and London Games 2012. We have not done anything for them since May 2011. We have acted against them on various matters since then.'

In his curriculum vitae submitted at the same time, the Expert is stated to be a Partner in Bird & Bird LLP's Sports Group, in which capacity he had performed work for the World Anti-Doping Agency, the International Olympic Committee, the International Tennis Federation, the International Cricket Council, the British Darts Organisation, the Rugby Football League, the International Rugby Board and others.

14. On 26 June 2013, the Applicant objected to the appointment of the Expert in accordance with the procedure of the International Centre for Expertise. It asserted, *inter alia*,

that the disclosed professional link between the Expert and Ms Lewis of the World Anti-Doping Agency would give rise to an appearance of bias due to the asserted 'serious concerns regarding potential preconceptions' on the part of the Expert. It relied not only upon the Rules of the Centre, particularly Article 7, but also invoked judicial ethics of US and other national jurisdictions.

15. On 1 July 2013, the Objector responded to the Applicant's objection. It opposed the objection on the ground that the disclosed link between the Expert and Ms Lewis was insufficient to constitute a conflict of interest. It invoked, in particular, the IBA Guidelines, whose 'Red list and Orange lists do not apply to such situation.' On 25 July 2013, the ICC Centre for Expertise notified the parties that the Chairman of the Standing Committee of the Centre had rejected the objection and that the Expert would continue to act in the matter.

16. I am informed by counsel for Donuts that, due largely to the representation in his disclosure that his firm had recently acted adverse to the IOC, Donuts did not object to Mr Taylor's appointment in the .SPORTS case. However, I have also been given a copy of a request by an applicant for .SPORT, in a community objection matter in which the ICC had appointed Mr Taylor to act as expert, to remove Mr Taylor from that case, and documentation reflecting that the ICC granted that request. I am informed by counsel for Donuts that Donuts knew nothing of this at the time.

17. The approach taken in the IBA Guidelines is that, whilst not every potential link will constitute a reason for disclosure or a conflict of interest, 'any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.'⁷ Because of the strongly-held view of many arbitral institutions that the disclosure test should reflect the perspectives of the parties, the IBA accepted, after much debate, a subjective test for disclosure. According to the subjective test, a potential arbitrator should consider whether grounds for disclosure of a given situation exist based on the perception of

⁷ IBA Guidelines, General Standard 3(c).

the parties to the arbitration. This is a distinctive facet of arbitral ethics in that, unlike in the case of judicial ethics, the views of the parties assume particular importance in light of the 'private' (e.g. – funding) rather than 'public' nature of arbitration. Nevertheless, this subjective test is distinct from the objective test for disqualification and limitations to the subjective test are reflected in its Green List. Thus, not every disclosure is *ipso facto* a conflict of interest.

18. The objective test for the existence of a conflict of interest is reflected in General Standard 2(b):

'[I]f facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.'

In assessing potential grounds for the appearance of bias, the IBA Guidelines enumerate such situations in non-exhaustive lists grouped in four categories: 1) the non-waivable Red List, which contains situations that cannot be cured by waiver; 2) the waivable Red List, which encompasses situations that are serious but not as severe and thus may be expressly waived by the fully-informed parties; 3) the Orange List, containing situations that give rise to a duty of disclosure by the arbitrator but may or may not necessarily constitute a conflict of interest, depending on the circumstances; and 4) the Green List, reflecting situations that do not objectively give rise to any actual or apparent conflict and thus are not subject to a duty of disclosure.

19. In preparing this Report, I have been requested to advise on whether the following situations as alleged by Donuts give rise to a conflict of interest:

- the Expert served as a panellist at Sport Accord's 2011 LawAccord conference;

- Professor Dr Martin Schimke, a fellow member of the law firm of Bird & Bird, serves as a CAS arbitrator before whom affiliates of the Objector have appeared on multiple occasions;⁸
- Ms Lewis and the President of the ITF serve as Secretary-General and President, respectively, to the bodies that directly or indirectly appoint a majority of the 20 members of the International Council of Arbitration for Sport (ICAS);
- the Expert having advised a WADA working group that included Sarah Lewis of FIS (identified as the representative of FIS in its community objection to .SKI); and
- the Expert having represented the World Anti-Doping Agency ('WADA'),⁹ the International Association of Athletics Federation ('IAAF'),¹⁰ Fédération Equestre Internationale ('FEI'),¹¹ the International Cricket Council¹² and the International Tennis Federation ('ITF'),¹³ which are said to be affiliates of the Objector, as counsel before the Court of Arbitration for Sport ('CAS');

20. The first situation is enumerated in the Green List of the IBA Guidelines, namely, 'specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view.'¹⁴ To my knowledge, there is no precedent according to which an arbitrator has been found to have had a duty to disclose participation in an academic

⁸ Arbitration CAS 2001/A/354 *Irish Hockey Association (IHA)/Lithuanian Hockey Federation (LHF) and International Hockey Federation (LHF)/International Hockey Federation (FIH)*, Award (15 April 2002); Arbitration CAS 2003/A/461 & 473 *WCM-GP Limited v. Fédération Internationale Motocycliste (FIM)*, Award (19 August 2003); Arbitration CAS 2005/A/830 *S. v. FINA*, Award (15 July 2005); Arbitration CAS 2007/A/1319 *Caner Doganeli & Turkish Boxing Federation v. AIBA*, Award (30 January 2008).

⁹ CAS 2011/A/2658 *British Olympic Association (BOA) v. World Anti-Doping Agency (WADA)*, Award (30 April 2012).

¹⁰ CAS 2014/A/3487 *Veronica Campbell-Brown v. The Jamaica Athletics Administrative Association (JAAA) & The International Association of Athletics Federations (IAAF)*, Award (24 February 2014).

¹¹ CAS 2012/A/2959 *World Anti-Doping Agency (WADA) v. Ali Nilforushan & Fédération Equestre Internationale (FEI)*, Award (30 April 2013).

¹² *International Cricket Council ("ICC") v. Salman Butt, Mohammad Asif and Mohammad Amir*, Determination (5 February 2011).

¹³ CAS 2009/A/1926 *International Tennis Federation v. Richard Gasquet*, CAS 2009/A/1930 *WADA v. ITF & Richard Gasquet*, Award (17 December 2009); CAS 2013/A/3327 *Marin Cilic v. International Tennis Federation*, CAS 2013/A/3335 *International Tennis Federation v. Marin Cilic*, Award (11 April 2014).

¹⁴ IBA Guidelines, 'Application of the General Standards', para. 6.

conference conducted under the auspices of a party to the proceedings or in which the party or its counsel took part.¹⁵ Whilst this situation is not specifically enumerated in the current version of the Green List, I consider this to be a situation that is analogous to those enumerated in the Green List. Consequently, in principle this situation cannot constitute a conflict of interest as recognised by the ethical standards of the community of commercial arbitration.

21. The second situation encompasses two scenarios envisaged in the Orange List, namely, 'the arbitrator and another arbitrator are lawyers in the same law firm'¹⁶ or 'a lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.'¹⁷ The essence of the potential conflict is it may appear to the reasonable third person that Bird & Bird, by virtue of having two of its members serving as expert in the ICC Centre for Expertise and as an arbitrator at the CAS, would have a financial interest in favouring a sporting body (namely, SportAccord) and its affiliates appearing as party in parallel proceedings before those bodies.

22. In this respect, Professor Schimke served as a CAS arbitrator in proceedings that concluded in 2002, 2003, 2005 and 2008. As the general expectation for disclosure envisaged in the IBA Guidelines and in applicable precedent on past professional links (in his own capacity) is proceedings taking place within three years of the appointment,¹⁸ I consider that, applying this expectation by extension to the potential conflict arising from professional associations between a law firm and a party, the proceedings in which Professor Schimke served as arbitrator are too remote to be subject to disclosure. Consequently, in principle this situation cannot constitute a conflict of interest as recognised by the ethical standards of the community

¹⁵ To the contrary, see, e.g. – Swiss Federal Supreme Court, Case No 4A_506/2007 (20 March 2008), 26 *ASA Bull* 565 (2008), in which membership of a professional organisation (in that case, an organisation called 'Rex Sport') was found, pursuant to the IBA Guidelines, to not be capable of being a conflict of interest.

¹⁶ IBA Guidelines, 'Orange List', 3.3.1.

¹⁷ IBA Guidelines, 'Orange List', 3.3.4.

¹⁸ E.g. – in the ICSID case of *The Rompetrol Group N.V. v. Romania* (Case No ARB/06/03), Decision on the Participation of Counsel (14 January 2010), the past professional link (a member of the three-arbitrator panel had been a partner in the same firm as counsel for one of the parties between 2004 and 2008) was rejected as being 'past' despite falling within the three-year period for disclosure (para. 26).

of commercial arbitration. However, if Mr Taylor or any of his colleagues at his law firm rendered such services within the three years prior to his appointment to the .SKI and .SPORTS panels, that information should have been disclosed.¹⁹ I note as well that similar disclosures in the community objection matters regarding the gTLDs .SPORT and .RUGBY resulted in disqualification.

23. The third situation concerns the prospect for the appearance that the Expert was influenced by the fact that representatives of the objector have influence in the CAS, a body before which the Expert regularly appears. This situation is not expressly covered in the current version of the IBA Guidelines. By analogy, I believe this situation to be closest to rule 4.4.1 in the Green List: 'The arbitrator has a relationship with another arbitrator or with counsel for one of the parties through membership in the same professional association or social organization.' Although it could be said that the fact that Ms Lewis and the President of the ITF play a role in the appointments of the CAS is a significant factor, I consider this link to be too remote to be a matter for disclosure due to the fact that Mr Taylor is not an arbitrator at the CAS and thus not directly affected by any influence that Ms Lewis and the President of the ITF may have in that institution. Consequently, in principle this situation cannot constitute a conflict of interest as recognised by the ethical standards of the community of commercial arbitration.

24. The fourth situation is the matter that was disclosed by the Expert in his Statement of Impartiality and Independence in the .SKI matter. This prior link between the Expert and Ms Lewis, in which the Expert seemingly acted in an advisory capacity, is covered by rule 3.1.1 in the Orange List: 'The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing

¹⁹ The IBA Guidelines and other authorities place the burden on the expert to investigate and disclose and not on the party to try to uncover potential conflicts that the appointee may fail to disclose.

relationship.’ In this case, the Expert properly disclosed this past relationship and, both for that reason and for the fact that there is no extraneous evidence suggesting an ongoing relationship from this advisory work, or at least nothing within the last three years,²⁰ I conclude that this this situation is not a conflict of interest as recognised by the ethical standards of the community of commercial arbitration.

25. The fifth situation comprises representation of affiliates of the Objector by the Expert in multiple CAS proceedings concluding in 2009, 2011, 2012, 2013 and 2014. In determining whether these situations meet the objective threshold under General Standard 2(b) to constitute conflicts of interest, two sub-issues arise: 1) whether representation of a subsidiary entity of a party can, in principle, constitute a conflict of interest; and 2) if so, did these situations give rise to justifiable doubts as to the arbitrator’s independence from a reasonable third person’s point of view having knowledge of the relevant facts.

26. On the first sub-issue, the IBA Guidelines recognise the situation as a potential conflict of interest in its ‘Non-Waivable Red List’,²¹ ‘Waivable Red List’²² and ‘Orange List’.²³ The WADA, ITF, IAAF, IRB, FEI and International Cricket Council are all described on the website of SportAccord as ‘members of SportAccord’, which describes itself as ‘the umbrella organisation for all (Olympic and non-Olympic) international sports federations as well as organisers of multi-sports games and sport-related international associations.’²⁴ Also, SportAccord specifically identifies all but FEI as groups affirmatively supporting its objection, and provides copies of their letters of support.²⁵ Although the term ‘affiliate’ is not defined in the current version of the IBA Guidelines,²⁶ on a common sense approach advocated by the Guidelines and

²⁰ Had there been such a relationship within the last three years that Mr Taylor failed to disclose, that potentially constitute a conflict.

²¹ IBA Guidelines, ‘Non-Waivable Red List’, 1.4.

²² IBA Guidelines, ‘Waivable Red List’, 2.3.1.

²³ IBA Guidelines, ‘Orange List’, 3.1.1 *et seq.*

²⁴ <http://www.sportaccord.com/en/members/>.

²⁵ Annex A-3 to SportAccord objection, included in the accompanying Compendium of Exhibits.

²⁶ A working definition might be: ‘all companies or organisations in one group of companies or organisations including the parent company or organisation’.

employed in practice, I believe that these entities comprise affiliates of the Objector, and certainly are expressing views aligned with those of the Objector.

27. On the second sub-issue, I consider for the reasons laid out at paragraph 18 above, that the 2009 proceedings did not meet the threshold for disclosure. However, for the same reasons, I consider that the 2011-2014 proceedings met the threshold for disclosure, as the Expert had represented the affiliates concerned in matters whose resolution fell within three years of his appointment.²⁷ Grounds for disclosure do not *per se* give rise to a conflict of interest such as would require disqualification, which is a separate threshold. The purpose of disclosure is to ‘inform the parties of a situation that they may wish to explore further in order to determine whether objectively – i.e., from a reasonable third person’s point of view having knowledge of the relevant facts – there is a justifiable doubt as to the arbitrator’s impartiality or independence.’²⁸

28. Nevertheless, in considering whether the objective test for disqualification has been met, non-disclosure is a relevant factor.²⁹ It is a single factor to be taken into account cumulatively in determining whether, in a holistic assessment, the reasonable third person having knowledge of the facts would consider there to be a real possibility of bias. Analogous decisions in other proceedings³⁰ suggest that the reasonable third person is not one who is familiar with the customs of an insular sub-specialism, such as, in this case, that of the sporting

²⁷ IBA Guidelines, ‘Orange List’, 3.1.1.

²⁸ IBA Guidelines, ‘Application of the General Standards’, para. 4.

²⁹ For example, in *LCIA Reference No. UN3476, Decision Rendered 24 December 2004*, 27(3) *Arbitration International* (2011), 367-370, a challenge to an arbitrator who had previously represented the respondent over a six-month period four years prior to the arbitration was rejected on the ground, *inter alia*, that the arbitrator in question had himself disclosed the prior association with the respondent and that his detailed explanation of the brevity and nature of that association was entirely unchallenged on the facts by the claimant, with the consequence that the professional relationship in question was considered to have been severed.

³⁰ *Hrvatska Elektroprivreda, dd v. Republic of Slovenia* (ICSID Case No ARB/05/24), Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings (6 May 2008), paras 18. 31; *LCIA Reference No. 81160, Decision Rendered 28 August 2009*, 27(3) *Arbitration International* (2011), 442-454, 450 (para. 4.1), 452 (para. 4.14).

law world. Rather, the reasonable third person is one who is unaccustomed to the behavioural norms and working relationships of that world.

29. Additional factors include: the fact that the Expert was sitting as a sole expert rather than as part of a panel, the percentage that the cases in question comprise in relation to the total income or casework of the Expert and the total number of instructions as counsel that the Expert received within the three-year period by affiliates of the Objector. Whilst neither the percentage of income nor the total number of instructions by affiliates of the Objector is available for the purposes of this report, I nevertheless conclude that, according to the holistic approach outlined above, the complete non-disclosure by the Expert of these prior professional links with affiliates of the Objector within the three-year period and the fact that the number of undisclosed instructions uncovered by Donuts' research is at least four, have the cumulative effect of causing the reasonable third person in full knowledge of these facts to conclude that there would be a real possibility of bias. Consequently, there arose a conflict of interest for the Expert.

30. In conclusion, I consider that the first, second, third and fourth situations do not satisfy the threshold for a conflict of interest, but that the fifth situation does satisfy it for the reasons set out above.

D. How Serious was the Conflict

31. Having concluded that a conflict of interest arose, the next question is the seriousness of that conflict. As outlined above, not every conflict of interest necessitates disqualification: rather, certain conflicts can be cured by disclosure, others by waiver by the parties and still others are so serious as to not be waivable conflicts. The question is where on the scale of seriousness this particular conflict fell at the time of the appointment.

32. Individually, these prior professional links are of differing levels of seriousness. In the case of the International Cricket Council (2011), WADA (2012) and FEI (2013)

proceedings, they had all been concluded by the time of his appointment (albeit in the case of the last only two months prior). These would individually comprise Orange List conflicts,³¹ for which prompt disclosure would suffice as remedy in most cases. However, as the ITF proceedings (2014) were ongoing at the time of his appointment, this constitutes a Waivable Red List conflict.³² Moreover, the cumulative effect of the four appointments is to potentially satisfy the threshold for a 'Non-Waivable Red List' conflict;³³ to make a definitive assessment of this point would require information regarding the total income of the Expert and his firm stemming from affiliates of the Objector.

33. Had the Expert disclosed these prior professional links with affiliates of the Objector to the parties at the time of his appointment, Donuts would have had the opportunity to waive the conflict or to avail itself of the challenge procedure under the ICC Centre for Expertise. In light of the current situation, it appears to be likely that Donuts would have opted for the latter course of action. However, the complete absence of disclosure in this case deprived it of the opportunity to consider its position on the matter.

34. Thus, whereas I consider these situations to individually be of differing levels of seriousness, when considered cumulatively and holistically, I consider the conflict of interest to have the level of seriousness to potentially merit disqualification.

E. What Remedial Action was Appropriate

35. Having determined that the conflict of interest was of the level of seriousness to potentially merit disqualification, the final question is what remedial action would have been appropriate to the circumstances had a challenge been made at the point of appointment.

³¹ IBA Guidelines, 'Orange List', 3.1.1: 'The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.'

³² IBA Guidelines, 'Waivable Red List', 2.3.1: 'The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.'

³³ IBA Guidelines, 'Non-Waivable Red List', 1.4: 'The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.'

Although the appropriate remedial action for the proceedings at this juncture is beyond the scope of this Report, an evaluation of whether a challenge at the time would have been successful is useful in order to determine whether the Expert's award should stand.

36. The prior professional links within the past three years, taken individually, could have been disposed of by disclosure at the time of appointment. However, taken cumulatively, they have the potential to constitute grounds for disqualification; at a minimum, they would have been grounds for further investigation in order to determine the degree to which the Expert's financial income was dependent upon his fees earned as counsel for affiliates of the Objector. Had full disclosure been made at the time and the overall financial percentage been insignificant, such a challenge may have been unsuccessful. Nonetheless, the fact of non-disclosure has the effect of exacerbating the appearance of a possibility of bias with the consequence that a challenge made after the discovery of these links by independent investigation would have been successful. These have played critical roles in decisions in the LCIA³⁴ and ICSID³⁵ to disqualify arbitrators and counsel on conflicts grounds.

37. In addition, the existence of an ongoing professional relationship between the Expert and an affiliate of the Objector would separately constitute grounds for disqualification, unless the Expert had opted to terminate the other appointment.³⁶

38. In the circumstances, in my view there was a strong, likelihood that a challenge made after the point of disclosure would have been successful. I find further support for that conclusion from the fact that the ICC granted a parallel request by another applicant to remove Mr Taylor from the objection panel for .SPORT, and by Donuts to remove an appointee from the panel for .RUGBY.

³⁴ LCIA Reference No. 81160, *supra* note 30, 452-453 (paras 4.16-4.18).

³⁵ *Hrvatska Elektroprivreda*, *supra* note 30, para. 31.

³⁶ LCIA Reference No. 81160, *supra* note 34, 453 (para. 4.19).

F. Conclusions

39. Overall, I conclude that the first, second, third and fourth situations were not grounds for disclosure. However, the fifth situation of past and ongoing professional links were not only grounds for disclosure but met the objective threshold to comprise a conflict of interest.

40. Had the Expert disclosed the existence of the conflict at the time of appointment, it is possible that the resulting investigation into the extent of his professional links with affiliates of the Objector would have resulted in disclosure being in itself a sufficient remedy. However, the absence of disclosure coupled with the cumulative effect of the four appointments and the separate effect of the ongoing professional relationship in the ITF proceedings concluded in 2014 render, in my view, the prospects for a challenge brought after the time of appointment strong.

41. Consequently, I conclude that a conflict of interest existed for the Expert such as would have merited disqualification had a challenge been brought after the time of appointment due to the non-disclosure of that conflict.

I affirm that the all of foregoing represent my true and accurate personal opinions based on the cited information provided me, and would so testify under oath if called upon to do so.



Dr Arman Sarvarian
7 October 2014

Dr Arman Sarvarian



Personal Details

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Professional Profile

In September 2012, I joined the University of Surrey School of Law as a lecturer in law and became Director of the Surrey International Law Centre in September 2013. I lecture in public international law subjects, including the Law of International Organisations and the Law of Armed Conflict and the Use of Force, as well as English law of property. In September 2014, I became Programme Leader of the Master of Laws programme. In September 2013, my monograph entitled *Professional Ethics at the International Bar* was published by Oxford University Press and has since been cited in litigation before international courts and tribunals. I was entered by my university in the Research Excellence Framework 2014.

Education

- Ph.D. Public International Law (2012, Principal Supervisor Professor Philippe Sands QC) from University College London
- Non-practising barrister, Bar of England and Wales (Lincoln's Inn, Call: 2009).
- LL.M. Public International Law (2008), Jesus College, University of Cambridge
- LL.B. Law (2007), School of Oriental and African Studies, University of London

Publications

Monograph:

- *Professional Ethics at the International Bar* (Oxford University Press, International Courts and Tribunals Series, 19 September 2013).¹

Peer-Reviewed Journal Articles:

- 'The Attribution of Conduct in the Law of International Responsibility, the European Union and the Jurisprudence of the European Court of Human Rights', 1(4) *European Journal of Human Rights* (2013), 656-679.
- 'Common Ethical Standards for Counsel before the European Court of Justice and European Court of Human Rights', 23(4) *European Journal of International Law* (2012), 991-1014.²

¹Cited in *The M/V 'Louisa' Case (St Vincent and the Grenadines v. Spain)*, Judgment of 28 May 2013, Separate Opinion of Judge Jean-Pierre Cot, International Tribunal for the Law of the Sea.

²DOI: <http://ejil.oxfordjournals.org/cgi/reprint/chs059?ijkey=XEvK5noPfrSe9vC&keytype=ref>

- ‘Ethical Standards for Counsel before International Criminal Tribunals: The Legacy of the Nuremberg International Military Tribunal’, 10(1) *Journal of International Criminal Justice* (2012), 423-446.³
- ‘Problems of Ethical Standards for Representatives before ICSID Tribunals’ 10(1) *The Law and Practice of International Courts and Tribunals* (2011), 67-134.⁴

Case Comment:

- ‘The (In-)Dependent Lawyer Before the Court (Case E-7/12 Schenker North AB and others v EFTA Surveillance Authority, Order of the President (21 December 2012))’,⁴ *European Law Reporter*, 127-132.

Book Chapters:

- ‘The Attribution of Conduct in the Law of International Responsibility, the European Union and the Jurisprudence of the European Court of Human Rights’. in V. Tzevelakos *et al.* (Eds), *The EU Accession to the ECHR* (Hart, July 2014).
- ‘The *Kadi II* Judgment of the Court of Justice of the European Union: Implications for Judicial Review of UN Security Council Resolutions’ in Avbelj *et al.* (Eds), *Kadi on Trial: a multifaceted analysis* (Routledge, 13 May 2014).

Conference Papers:

- ‘Humanitarian Intervention after Syria’, Society of Legal Scholars Annual Conference International Law Subject Section (9 September 2014).
- ‘The Doctrine of *Uti possidetis iuris* and Territorial Disputes’, Conference on 21st Century Borders, University of Lancaster (13 June 2014).
- ‘The Struggle for the Soul of Europe: Manifestation of Christianity in the Public Sphere’, ‘Exchanging Ideas on Europe’ University Association for Contemporary European Studies Conference, Leeds University (2-4 September 2013).
- ‘Common Ethical Standards for Counsel before International Courts and Tribunals’, 5th European Society of International Law Research Forum, University of Amsterdam (24 May 2013).
- ‘The Accession of the EU to the European Convention on Human Rights’, EU Accession to the ECHR Workshop, University of Maastricht (17 Nov. 2012).

Research Funding and Collaborations

Research Councils and Trusts:

- Principal Investigator, Arts and Humanities Research Council Early Career Researcher Care for the Future Developmental Award (£55,000 FEC), ‘Apologies for Historical Wrongs: When, How, Why?’, 1 October 2014 – 1 June 2015.

Conferences:

- Principal Investigator, Institute of Advanced Studies Workshop Fund (£4,250) ‘Procedural Fairness in International Courts and Tribunals’ Workshop, University

³DOI: [10.1093/jicj/mqs015](https://doi.org/10.1093/jicj/mqs015).

⁴DOI: [10.1163/157180311X565160](https://doi.org/10.1163/157180311X565160).

of Surrey, 19-20 September 2014.⁵ Supported by the British Institute of International and Comparative Law and the University of Hull.

- Principal Investigator, ‘The Ratification of the International Criminal Court Statute by the Republic of Armenia: Problems and Prospects’ conference, 6 April 2013,⁶ American University of Armenia, sponsored by the Coalition for the International Criminal Court and the International Committee for the Red Cross (\$8000 award).

Training Workshops:

- Principal Investigator, ‘International Criminal Court Defence Counsel Training Workshop’, Republic of Armenia Chamber of Advocates, 25-26 September 2014, sponsored by the Embassy of the United Kingdom to the Republic of Armenia, the Organisation for Security and Cooperation in Europe, the University of Surrey, the American University of Armenia, the International Committee for the Red Cross and the Coalition for the International Criminal Court (£4000 cumulative value).

Professional Committees:

- Member of the European Society of International Law Interest Group on International Courts and Tribunals (September 2014 – Present).
- Member of the International Law Association Committee on the Use of Force (May 2013-Present).
- Member of the International Bar Association Task Force on Counsel Ethics in International Arbitration throughout the drafting of the IBA Guidelines on Party Representation in International Arbitration (2011-2013).
- Legal secretary of the International Law Association Study Group on International Courts and Tribunals for the ILA Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (2009-2010).

Governmental Reports:

- Written evidence cited in the report of the Scottish Parliament European Union and External Relations Committee, *The Scottish Government’s proposals for an independent Scotland: membership of the European Union* (23 May 2014), http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Inquiries/09_Arman_Sarvarian.pdf.
- Written evidence cited in the report of the House of Commons Defence Select Committee, *Intervention: Why, When and How?* (28 April 2014), <http://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/inquiries/parliament-2010/intervention1/?type=Written#pnlPublicationFilter>.
- ‘Memorandum on Ratification of the International Criminal Court Statute by the Republic of Armenia’ (in Armenian)(20 January 2014), recommendation for constitutional amendment to enable ratification adopted by the Commission on Constitutional Reforms in its final report of 28 June 2014.

⁵ <http://www.ias.surrey.ac.uk/workshops/Procedural%20Fairness/>.

⁶ <http://icc2013.aua.am/>.