

# Weil, Gotshal & Manges LLP

1300 Eye Street NW, Suite 900  
Washington, DC 20005-3314  
+1 202 682 7000 tel  
+1 202 857 0940 fax

BY E-MAIL

August 28, 2014

**Arif H. Ali**  
+1 (202) 682-7004  
arif.ali@weil.com

John O. Jeffrey  
General Counsel & Secretary  
ICANN  
Office of the General Counsel  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
john.jeffrey@icann.org

Re: Donuts Inc.'s Anti-Competitive Actions Concerning the .INSURANCE gTLD

Dear Mr. Jeffrey:

It has come to the attention of fTLD Registry Services, LLC (“fTLD”) that Donuts, Inc. (“Donuts”) has requested that the Internet Corporation for Assigned Names and Numbers (“ICANN”) participate in a Cooperative Engagement Process (“CEP”) regarding the application submitted to ICANN by Donuts’ subsidiary, Auburn Park, LLC (“Auburn”), to operate the .INSURANCE generic Top-Level Domain (“gTLD”). For the reasons stated below, fTLD is seeking your written assurance that (i) ICANN will deny Donuts’ request for CEP with respect to .INSURANCE, and oppose any request to commence an Independent Review Process (“IRP”) with respect to .INSURANCE, given that Donuts does not have proper grounds for requesting a CEP or IRP and, even if Donuts did have standing, such requests are untimely, and (ii) ICANN will reinstate immediately the “resolved” contention resolution status of fTLD’s application for .INSURANCE and proceed to the contracting phase with fTLD. We kindly request that you provide us with such written assurances by no later than **5:00 PM PDT on Wednesday, September 3, 2014.**

## **Background**

fTLD applied for the .INSURANCE gTLD and passed Initial Evaluation on July 26, 2013. fTLD’s application was placed in a contention set with three other applicants, one of which withdrew its application and two of which received community objections that were upheld by experts appointed by the International Centre for Expertise of the International Chamber of Commerce (“ICC”). As a result of the decisions, fTLD prevailed in its contention set for .INSURANCE. Meanwhile, Donuts’ application for the related string .INSURE was determined not to be in contention with any similar strings and Donuts entered into a Registry Agreement for .INSURE on March 20, 2014.

Fifty-eight days after the ICC expert's decision to uphold the community objections to Auburn's application was posted, a representative of Donuts apparently emailed ICANN Ombudsman Chris LaHatte (the "Ombudsman"), indicating that Donuts wanted to lodge a complaint, but did not provide any specific details about the grounds for such complaint.<sup>1</sup> fTLD did not learn about this complaint until May 14, 2014, when the Ombudsman responded to an inquiry from fTLD Managing Director Craig Schwartz, requesting information on why the .INSURANCE string was on hold at that time. Sometime between March 16 and May 14, Donuts apparently filled in the details of its complaint, alleging that the dispute resolution providers involved in proceedings relating to nine separate gTLD strings—including .INSURANCE—made errors in reaching their respective decisions. The Ombudsman conducted his investigation and, on July 7, 2014, issued his final report, finding that it was beyond his jurisdiction to review how the experts interpreted the principles and law underlying the experts' decisions in those proceedings because his jurisdiction is limited to whether there was "procedural fairness." Accordingly, the Ombudsman declined to uphold Donuts' complaint. On July 12, 2014, ICANN updated the "contention resolution status" of fTLD's application for .INSURANCE from "on hold" to "resolved" and fTLD believed that it would proceed to the contracting phase with ICANN for .INSURANCE.

On August 12, 2014, however, ICANN posted on its public website a document, titled "Cooperative Engagement and Independent Review Processes Pending Matters Update – 12 August 2014," which shows that on July 18, 2014, Donuts requested a CEP with ICANN regarding seven gTLD strings, including .INSURANCE. August 12, 2014 is also the date on which ICANN notified fTLD that .INSURANCE is the subject of a pending accountability mechanism and that fTLD's "contention resolution status" would return to "on hold" from "resolved." As you might expect, fTLD is surprised and frustrated by this development. Moreover, for the reasons stated below, fTLD believes that this change to fTLD's "contention resolution status" is improper and should be reversed immediately.

### **Donuts' Request for CEP is Improper and Untimely**

First and foremost, Donuts does not have standing to request a CEP or IRP with respect to Auburn's application for the .INSURANCE gTLD. As you know, the purpose of requesting a CEP is to resolve or narrow the issues that are contemplated to be brought in an IRP.<sup>2</sup> The only basis for requesting an IRP is "a decision or action by the Board" that is alleged to be "inconsistent with the Articles of Incorporation or Bylaws."<sup>3</sup> ICANN's Bylaws provide that "[i]n order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation

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<sup>1</sup> See email from C. LaHatte to C. Schwartz (Aug. 21, 2014) [Appendix 1].

<sup>2</sup> See ICANN Bylaws, Article IV, § 3(14) (Feb. 7, 2014).

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

of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."<sup>4</sup> As ICANN surely agrees, none of the ICANN Board of Directors, the Board Governance Committee nor the New gTLD Program Committee under the delegated authority of the Board of Directors, has made any decision or taken any action with respect to Auburn's application for the .INSURANCE gTLD. Rather, Donuts appears to have complained of the decision of the ICC expert who evaluated the community objections. At most, Donuts is complaining about the action or inaction of ICANN *staff* with respect to the expert's decision. As ICANN itself recently pointed out in the Vistaprint Limited IRP, "[f]ollowing receipt of expert determinations, it is ICANN *staff* that is tasked with taking the next step, not ICANN's Board. As such there is no Board action in this regard for the IRP Panel to review."<sup>5</sup>

Indeed, the only accountability mechanism in ICANN's Bylaws designed to address staff action or inaction alleged to "contradict established ICANN policy(ies)" is Reconsideration.<sup>6</sup> Neither Donuts nor Auburn, however, has filed a Request for Reconsideration ("RFR") regarding .INSURANCE. Furthermore, the timeframe for doing so expired several months ago: "All Reconsideration Requests must be submitted . . . within fifteen days after: . . . for requests challenging *staff actions*, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action" or, "for requests challenging either Board or *staff inaction*, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner."<sup>7</sup> The 15-day window for Donuts/Auburn to file a RFR regarding ICANN's action or inaction with respect to the ICC expert's decision commenced on or about January 17, 2014—the date the ICC expert's decision was posted—and expired on or about February 1, 2014—which is more than 6 months ago.

Moreover, because there has been no Board decision on a RFR nor any other Board action relating to the .INSURANCE gTLD, the period for requesting a CEP or IRP has not commenced (nor will it in the future given that the window for filing a RFR concerning the ICC expert's determination has closed). Requests for IRPs must be filed within "*thirty days of the posting of the minutes of the Board meeting* (and the accompanying Board Briefing Materials, if available, that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."<sup>8</sup> Although the Bylaws

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<sup>4</sup> *Id.*

<sup>5</sup> ICANN's Response to Claimant Vistaprint Limited's Request for IRP at 3, Vistaprint Limited v. ICANN, ICDR Case No. 01-14-0000-6505 (July 21, 2014).

<sup>6</sup> ICANN Bylaws, Article IV, § 3(2)(a).

<sup>7</sup> ICANN Bylaws, Article IV, § 3(2)(5)(b)-(c).

<sup>8</sup> ICANN Bylaws, Article IV, § 3(3) (emphasis added).

provide for consolidated requests “when the casual connection between the circumstances of the requests and the harm is the same for each of the requesting parties,” there is nothing in the Bylaws that tolls the period for filing the request for IRP.

In fact, ICANN has demonstrated that it holds users of its accountability mechanisms to strict filing deadlines.<sup>9</sup> Accordingly, we expect that ICANN will do so with Donuts’ request for CEP regarding .INSURANCE. We also note that it has been ICANN’s practice to distinguish between timely and untimely claims made by the same applicant and to dismiss the untimely claims at the outset—precisely the action fTLD requests that ICANN take with respect to Donuts’ improper and untimely .INSURANCE claim.<sup>10</sup>

### **The Effect of Donuts’ CEP is Anticompetitive and Harmful to fTLD**

Donuts lacks any semblance of standing to bring an IRP regarding .INSURANCE and, therefore, should not be engaged in a CEP concerning .INSURANCE. One of the primary benefits Donuts stands to gain from its CEP for .INSURANCE is a competitive advantage for Donuts’ similar gTLD .INSURE. While fTLD awaits the outcome of Donuts’ baseless CEP and IRP for .INSURANCE, Donuts’ related gTLD .INSURE already has been delegated, is currently in sunrise phase, and is projected to begin general availability starting on September 3, 2014. Therefore, instead of members of the global insurance community having a choice between two gTLDs to register in, Donuts’ dilatory tactics have left the community with only one option. As Donuts cannot prevail in an IRP for the .INSURANCE string,

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<sup>9</sup> See, e.g., BGC Recommendation on Reconsideration Request 13-13 (12 December 2013) (dismissing the RFR brought by Christopher Barron relating to .GAY on the basis that it was untimely because Mr. Barron filed 17 days after the ICC expert’s decision upholding the community objection to his application was published—*2 days late*—and rejecting Mr. Barron’s argument that he was unaware that the actions of Dispute Resolution Service Providers constituted staff action until four days before he filed the RFR); BGC Recommendation on Reconsideration Request 13-15 (12 December 2013) (dismissing the RFR brought by Commercial Connect relating to .SHOP on the basis that it was untimely because Commercial Connect filed 19 days after ICANN Staff emailed notice of its action—*4 days late*—and rejecting Commercial Connect’s argument that it was not aware of the notice until fifteen days before it filed the RFR); BGC Recommendation on Reconsideration Request 13-17 (8 January 2014) (dismissing the RFR brought by GCCIX, W.L.L. relating to .GCC on the basis that it was untimely because GCCX filed over five months after the New gTLD Program Committee posted its acceptance of GAC Advice—*146 days late*—and rejecting GCCIX’s argument that it had repeatedly solicited a rationale for the NGPC’s decision from ICANN and received a response confirming that the NGPC would not take such action only 15 days before GCCIX filed the RFR; see also ICANN’s Response to Claimant Better Living Management Co. Ltd.’s Request for Independent Review Process (23 June 2014) (objecting to the notice of IRP filed by Better Living Management (“BLM”) on the basis that it was untimely because BLM filed “nearly six months after ICANN posted the minutes” of the NGPC’s meeting denying BLM’s RFR; BLM’s IRP was subsequently discontinued).

<sup>10</sup> See, e.g., BGC Recommendation on Reconsideration Request 13-2 (1 May 2013) (dismissing in part the RFR brought by Nameshop relating to .IDN/.INTERNET on the basis that the portion relating to Nameshop’s Change Request was untimely, because Nameshop filed 42 days after ICANN staff denied the Change Request—*12 days late*—and determining that Nameshop could not use its timely claims to bootstrap its delayed Change Request claim into a RFR).

where Donuts can cite *no board action* relating to its .INSURANCE application and where Donuts cannot at this juncture even file a timely RFR with regard to *staff action*, it is unreasonable – indeed, improper and contrary to ICANN’s procedures and policies – to allow Donuts to continue to stall delegation of .INSURANCE in this anticompetitive manner.

Another concern, which should be brought to ICANN’s attention and that of the broader Internet community, is the apparent collaboration by certain portfolio applicants—companies associated with a large number of applications—in abusing ICANN’s internal processes in order to impede community-based applicants from moving forward with their applications for the same strings.<sup>11</sup> ICANN’s Governmental Advisory Committee (“GAC”) has repeatedly expressed its concern that the ICANN processes and in particular the auction mechanism raise public policy concerns by routinely disadvantaging community applicants.<sup>12</sup> In light of the high costs associated with Community Objections and the high standard community applicants must meet in order to prevail in Community Priority Evaluations, the GAC reiterated in four separate Communiqués its Advice that ICANN consider “preferential treatment for all applications which have demonstrable community support.”<sup>13</sup> Despite the GAC’s consistent and repeated Advice on the subject, ICANN has failed to give due regard to the Advice and has not conducted any meaningful discussion or briefing with the GAC on the subject of community applicants.<sup>14</sup> In light of ICANN’s apparent disregard of repeated GAC Advice, Heather

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<sup>11</sup> There have been several communications from portfolio applicants specifically seeking to undermine community applications for similar strings. *See, e.g.* letter from Shweta Sahjawni, Radix FZC et al to Cherine Chalaby, NGPC (1 November 2013) available at <https://www.icann.org/resources/correspondence/sahjawni-et-al-to-chalaby-et-al-2013-11-01-en>; Shweta Sahjawni & Bhavin Turakhia, Radix FZC, Community Priority Evaluation Guidelines Red-lined Feedback on the Guidelines (12 September 2013), available at <http://newgtlds.icann.org/en/applicants/cpe/guidelines-comment-redline-radix-minds-machines-20sep13-en.pdf>.

<sup>12</sup> *See* GAC Communiqué – Buenos Aires, Argentina, p. 2 (20 November 2013) (explicitly requesting a briefing on the public policy implications of holding auctions to resolve string contention where community applications are involved).

<sup>13</sup> *See, e.g.* GAC Communiqué – Singapore (27 March 2014) (reiterating past advice on community applications and indicating that issues with community applicants will have to be dealt with through policy changes prior to additional TLD application cycles). *See also*, GAC Communiqué – Buenos Aires, Argentina (20 November 2013); GAC Communiqué – Durban, South Africa (18 July 2013); GAC Communiqué – Beijing, People’s Republic of China (11 April 2013) available at <https://gacweb.icann.org/display/GACADV/GAC+Advice+Tracking>.

<sup>14</sup> ICANN Bylaws, Art. XI § 2(1)(j) (“The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the [ICANN Board] determines to take an action that is not consistent with the [GAC] advice, it shall so inform the [GAC] and state the reasons why it decided not to follow that advice. The [GAC] and the [Board] will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”). To the best of our knowledge and in spite of the GAC’s specific request in the Buenos Aires Communiqué, the Board has neither taken an action consistent with the GAC’s public policy Advice on community applications; nor has the Board engaged the GAC in a discussion regarding the public policy concerns.

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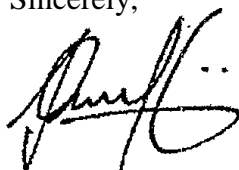
**Weil, Gotshal & Manges LLP**

Dryden, Chair of the GAC, has been copied on this communication so that the full GAC may consider this issue at its upcoming in-person meeting in Los Angeles.

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

Please confirm at your earliest convenience and in any case no later than **5:00 PM PDT** on **Wednesday, September 3, 2014**.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif H. Ali', with a stylized flourish at the end.

Arif H. Ali

cc: Amy Stathos, Deputy General Counsel, ICANN  
Alvaro Alvarez, General Counsel, Donuts  
Heather Dryden, Chair, Governmental Advisory Committee, ICANN  
Chris LaHatte, Ombudsman, ICANN  
Craig Schwartz, Managing Director, fTLD Registry Services, LLC

## APPENDIX 1

Date: Thu, 21 Aug 2014 03:51:03 +0000  
From: Chris LaHatte <[CHRIS.LAHATTE@ICANN.ORG](mailto:CHRIS.LAHATTE@ICANN.ORG)>  
Reply-To: Chris LaHatte <[CHRIS.LAHATTE@ICANN.ORG](mailto:CHRIS.LAHATTE@ICANN.ORG)>  
Subject: RE: Auburn Park Complaint to ICANN Ombudsman  
To: Craig Schwartz <[CRAIG@FTLD.COM](mailto:CRAIG@FTLD.COM)>

Hi Craig

The process started with an email from Donuts which I received on 16 March 2014. I do not have a formal system for recording a start date, because as you will know, complaints to the ombudsman's office are informal in nature, and can even start with a verbal discussion. In this case I was sent an email indicating they wanted to start a process, which I received on that date. It was brief in nature, and it was agreed that we would meet later to have an in-depth discussion, because there were no details of the grounds for the complaint. But for purposes of your engagement with the IRP process, that may be the appropriate date.

Regards

Chris LaHatte

Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>