



Sent via email to correspondence@icann.org and reconsideration@icann.org

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Internet Corporation for Assigned Names and Numbers (ICANN)

Attn: ICANN Board and ICANN Board Governance Committee

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Re: *Correction of Factual Inaccuracies in Reconsideration Request 16-11 in relation to the 9 August 2016 Board Resolutions 2016.08.09.11, 2016.08.09.12, and 2016.08.09.13 in the Dot Registry, LLC v. ICANN (01-14-0001-5004) Independent Review Process (“IRP”) Declaration of 29 July 2016*

Dear ICANN Board members,

On 25 August 2016, the standard applicants for .HOTEL, in which ICANN cancelled their applications due to a community applicant prevailing at Community Priority Evaluation, filed Reconsideration Request 16-11¹. Within Reconsideration Request 16-11, there are numerous factual inaccuracies that Dot Registry wishes to address and correct for the record.

Inaccuracy No. 1 (Response to Question 6, page 5):

“...Dot Registry – i.e., the applicant for .inc, .llc and .llp who requested community priority – never had a chance of succeeding in a community priority evaluation (CPE). Although, like any applicant, Dot Registry is entitled to ICANN respecting its AoI and Bylaws – and it may initiate whatever procedure to that purpose - until date it has not been proven that Dot Registry has been materially harmed by ICANN’s violation of the AoI and Bylaws. A refusal of Dot Registry’s solicited community priority would be in line with the CPE criteria, as the purpose of community-based applications has never been to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry, and because the CPE criteria were specifically developed to prevent “undue priority [being given] to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string” (Applicant Guidebook; Module 4-9).”

¹ Reconsideration Request 16-11: Travel Reservations SRL, Spring McCook, LLC, Minds + Machines Group Limited, Famous Four Media Limited, dot Hotel Limited, Radix FZC, dot Hotel Inc., Fegistry, LLC of 25 August 2016 (see: <https://www.icann.org/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en>)

Applicant Guidebook, Section 4.2.3, Community Priority Evaluation Criteria, page 4-9 states, among other things, that community applications will be assessed against “false positives” (awarding undue priority to an application that refers to a “community” construed to get a sought-after generic word as a gTLD string) **and “false negatives” (not awarding priority to a qualified community application)** in a holistic approach. It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. Reconsideration Request 16-11 statements are therefore not consistent with what the Applicant Guidebook states.

In addition, these standard .HOTEL applicants are not in any position to determine if Dot Registry’s applications achieve Community Priority status or not, only ICANN retains such authority. Dot Registry reserves its legal rights to seek redress for any interference in the process of ICANN rendering its final decision in the *Dot Registry, LLC v. ICANN* matter.

Inaccuracy No. 2 (Response to Question 7, page 6):

“...ICANN had clear policies to deny community priority to mere industries, and to disqualify applicants who were not trustworthy...”

The word “industries” does not appear anywhere in the Applicant Guidebook nor does ICANN have a policy to exclude “industries” as communities. Consistent with Applicant Guidebook, Section 1.1.2.4, GAC Early warnings, pages 1-7 to 1-8, Dot Registry’s community applications for .corp, .inc, .llc, and .llp were all labeled by the Government Advisory Committee, and accepted by the New gTLD Program Committee, as “highly regulated sectors” vulnerable to online fraud and abuse needing additional protections, not “industries.” Furthermore, the Guidebook specifically contemplates that *“a community can consist of legal entities (for example, an association of suppliers of a particular service) . . . or a logical alliance of communities.”*²

Inaccuracy No. 3 (Response to Question 8.I.A, page 9):

“...The close relationship between these two IRP Declarations makes them an indivisible whole, which requires the ICANN Board to consider them together to avoid the risk of irreconcilable decisions...”

ICANN should not consider the two IRP Declaration to be one in the same. The *Despegar, et al. v. ICANN* IRP arose from scorned standard applicants whose applications were cancelled as a result of the community applicant prevailing at Community Priority Evaluation. The *Despegar* Panel determined that ICANN did not violate its Articles of Incorporation or Bylaws and that ICANN prevailed in the IRP. In contrast, the *Dot Registry, LLC v. ICANN* IRP arose out of issues relating to the fair and transparent treatment and handling of their community applications, by ICANN and the Economist Intelligence Unit, during the Community Priority Evaluation process, as required by ICANN’s Articles of Incorporation, ICANN’s Bylaws, ICANN’s

² Applicant Guidebook, p. 4-12.

Applicant Guidebook, and the Economist Intelligence Unit's Community Priority Evaluation Guidelines. Unlike the .HOTEL standard applicants, Dot Registry prevailed in its IRP.

Dot Registry suggests that the Board consider the *Despegar* IRP Declaration only to the extent that it take heed of the *Despegar* IRP Panel's view that the BGC needs to look into how the EIU applies the CPE criteria to determine whether the EIU properly applied them. As the *Despegar* IRP Panel rightly noted, "*The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.*"³

Inaccuracy No. 4 (Response to Question 8.III.A, page 15):

"...Requesters learnt from the Decision [Despegar, et al. v. ICANN IRP] that Mr. Krischenowski was not the only individual affiliated to HTLD, who violated Requestors trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer (identified in the Decision as Mr. Krischenowski's associates) were also 'responsible for numerous instances of suspected international unauthorized access to other applicants' confidential information, which occurred from March through October 2014'..."

As an affected party to ICANN's Applicant Portal Data Breach, Dot Registry, LLC has not been made aware of the existence of this new information that other individuals may have also been involved in the data breach. As a matter of transparency, ICANN should immediately send formal notification to all of the affected parties.

Inaccuracy No. 5 (Response to Question 8.III.B, page 16):

"...The ICANN Board even agreed to refund Dot Registry's legal costs."

In accordance with the ICANN Board Resolution 2016.08.09.11:

The Board accepts the findings of the Final Declaration that:

- (i) Dot Registry is the prevailing party in the Dot Registry, LLC v. ICANN IRP; and*
- (ii) ICANN shall pay to Dot Registry US\$235,294.37 upon demonstration that these incurred costs have been paid in full.*

In the *Dot Registry, LLC v. ICANN IRP*, the majority Panel declared in Section 154:

Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR") totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing

³ Final Declaration, *Despegar Online SRL v. ICANN*, ICDR Case No. 01-15-0002-8061, ¶ 69 (Feb. 11, 2016), <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

ICANN has not paid any of Dot Registry's legal fees, only Dot Registry's portion of the ICDR fees related to the IRP, as required in the final Declaration.

Inaccuracy No. 6 (Response to Question 8.IV.B, page 18):

"...As already explained under section III.B above, the ICANN Board is addressing the violations of its AoI and Bylaws in the CPE for Dot Registry, and has provided a remedy to Dot Registry..."

ICANN has not provided a remedy or final decision related to the *Dot Registry, LLC v. ICANN* IRP Declaration. Dot Registry understands that the ICANN Board will meet during its 15 September 2016 retreat to discuss next steps in the matter. The *Dot Registry, LLC, v. ICANN* IRP Majority Panel determined that Dot Registry suffered harm and injury, directly and indirectly, as a result of the Board's actions and inactions, as well as ICANN staff and EIU actions and inactions, and that harm and injury has yet to be addressed by the Board in good faith. Dot Registry has written multiple times to the ICANN Board and has not received a response to date.

As previously conveyed to the ICANN Board, Dot Registry is certainly interested in meeting with the Board to discuss acceptable remedies in the context of their deliberations, in order to reach a mutually acceptable resolution once and for all.

Dot Registry asks ICANN to publish this correspondence on the correspondence page and under Reconsideration Request 16-11.

Please feel free to reach me directly at +1.816.200.7080 Central Time if you have any questions.

DOT REGISTRY, LLC

Sincerely,



Shaul Jolles
Chief Executive Officer