

INTRODUCTION

Claimants maintain that ICANN and ICDR have refused to comply with ICANN Bylaws and contractual obligations, denying critical procedural rights that purportedly have been guaranteed by those Bylaws for many years, as described fully below and in prior briefing. Claimants hereby Request this honorable IRP Panel to stay these IRP proceedings until such time as parallel judicial proceedings in the California Superior Court are resolved. Those proceedings will resolve whether ICANN must comply with its Bylaws in these critical procedural respects, in this case, or not.

If the panel refuses a stay, then it will effectively deprive Claimants of those fundamental and critical procedural rights, set forth in the Bylaws for so many years. And, the panel effectively would substitute its judgment for that of the Superior Court, before whom these issues are pending in the discovery process, prior to court-ordered mediation in October and a hearing on ICANN's demurrer (a motion to dismiss the case) in December. That judicial litigation will determine ICANN's obligations as a public benefit corporation to comply with its own Bylaws, whether ICANN's compliance with Bylaws is necessary for a fair adjudication of Claimants' rights in this IRP, and whether the parties' agreement to use ICANN's so-called Accountability Mechanisms are enforceable given those mechanisms are not in place.

We urge the panel to exercise restraint and deference to the Superior Court, as there is no harm caused to anyone by even an indefinite delay to these proceedings. Also, there is no other way to pressure ICANN to implement the Bylaws procedures that it promised its community, including Claimants, so many years ago. It has already ignored three different IRP panel proclamations on the subject, further warranting court intervention and injunction

requiring ICANN, at last, to follow its own Bylaws. Even if this panel made a similar finding, ICANN would ignore it. Only a court can force ICANN to do anything, and it is long past time for that to happen.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Claimants have been denied independent Ombudsman review of their Requests for Reconsideration, and subsequently have been denied consideration of their I(RP Complaint by a trained and community-chosen Standing Panel. Thus, they also have been denied their right to an *en banc* appeal of any adverse decision to such a Standing Panel. ICANN has also failed to adopt IRP Rules of Procedure addressing important issues such as discovery and appeal. Moreover, ICANN has forced Claimants to pay hefty fees to ICDR despite the Bylaws requiring ICANN to pay all administrative costs and fees of the IRP. Claimants raise all of those issues before the Superior Court, seeking appropriate remedies including injunctive relief.¹

On September 3, 2020, in light of the ICDR Emergency Panelist's Decision in this matter dated August 7, 2020, Claimants wrote ICANN counsel to request that ICANN agree to a suspension of this IRP proceeding, until the IRP Standing Panel is in place.² Claimants warned that if the request was refused, then Claimants would file suit. And subsequently after the request was denied, Claimants did file suit in the Superior Court for Los Angeles County, which suit is progressing through discovery, towards court-ordered mediation³ and hearing on ICANN's demurrer (a motion to dismiss the case) set for early December this year.

Claimants maintain that request now -- that these proceedings be immediately stayed

¹ Ex. A, *Fegistry et al. v. ICANN*, Superior Court complaint.

² Ex. B, *Fegistry et al.* letter to ICANN, dated Sept. 3, 2020.

³ Claimants have paid nearly \$9,000 to JAMS for the upcoming mediation session. Ex. C.

until either 1) ICANN implements the Standing Panel as required by Bylaws since 2013, and provides Ombudsman review of the Claimants' RFRs; or 2) the Superior Court matter is either finally resolved, or ICANN obtains an order from that court directing the IRP to proceed before this panel. The IRP panel in this case should be selected from a Bylaws-compliant Standing Panel, and Claimants must be ensured their right to an *en banc* appeal of any adverse decision to that full Standing Panel.

While it may take some time for ICANN to complete the work of implementing the Standing Panel, it ought not take long. ICANN stated to the Emergency Panelist that implementation of the Standing Panel will take no more than six to twelve months longer than if it does not implement the Standing Panel.⁴ And that was to be measured from the time of ICANN's briefing – more than a year ago already. Claimants aver that is a minimal, additional wait period given there is absolutely no evidence of ongoing harm to anyone, whatsoever.

Claimants further note, as an example, that recently Facebook Inc. stood up an entire Oversight Board of twenty international expert specialists, under great public scrutiny, and in just eighteen months.⁵ ICANN has no excuse for its continuing failure, and should be pressed to implement its promised Accountability Mechanisms now. In the meanwhile, Claimants again request that ICANN hire an independent Ombudsman to review their Requests for Reconsideration in light of the *DotRegistry* IRP decision and resulting Board action, and make its

⁴ Compare, ICANN Opp. Mem., p.2 (“until this IRP concludes, likely another year to eighteen months”), with, *id.*, (“for perhaps two more years”), and at p.23 (“total delay could be two years”). <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-icann-opp-claimant-amended-request-12may20-en.pdf>

⁵ See Ex. D, Wikipedia article re Facebook Oversight Board.

independent report to ICANN and Claimants, as long clearly required by the Bylaws.

COMMENTS ON THE LAW OF THE PRESENT PROCEEDINGS

As an initial matter in its Procedural Order No. 2, the IRP Panel has requested the parties to provide “comments on the law of the present proceedings.” Insofar as the present proceedings are limited to this Request for Stay, and Claimants are allotted just ten pages to brief such a fundamentally critical issue, Claimants consider this request limited to the law applicable to this procedural request. The ICDR International Arbitration Rules clearly provide basis for the Panel to decide its own jurisdiction (Art. 21.1), and to manage the case in any manner it finds equitable (Art. 22.1). Also, Art. 27.1 provides: At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.

Here, Claimants request a stay, in order to preserve their right to challenge ICANN’s intransigence in court. Indeed, we note Art. 7.7 and Art. 27.3, each providing that “A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”⁶ Claimants do not waive their right to arbitrate per the IRP, but do continue to demand that ICANN provide Reconsideration and IRP procedures, and cover all costs and fees, as set forth in the Bylaws for

⁶ See also, e.g., *Holderby v. Int’l Union etc. Engineers*, 45 Cal.2d 843, 847 (1955) (“When an organization violates its rules for appellate review or upon a showing that it would be futile to invoke them . . . the further pursuit of internal relief is excused.”); *Brown v. Dillard’s, Inc.*, 430 F.3d 1004, 1010-1012 (9th Cir. 2005) (breach of arbitration clause results in loss of the right to compel arbitration); *California Dental Assn. v. American Dental Assn.*, 23 Cal.3d 346, 354 (1979) (“The courts will . . . accept jurisdiction over private voluntary organizations when the aggrieved party can demonstrate “ ‘an abuse of discretion, and a clear, unreasonable and arbitrary invasion of (its) private rights.’ ”) (quoting, *Lawson v. Hewell*, 118 Cal. 613, 620 (1897)).

many years now. Only then can any IRP be adjudicated fairly and legitimately, consistent with ICANN's own very clear, longstanding Bylaws.

ARGUMENT: ICANN Has Denied Critical Procedural Rights Guaranteed Since 2013

Claimants thoroughly briefed these issues to the Emergency Panelist last year, over seven pages and including several Exhibits.⁷ Claimants fully incorporate that briefing and those Exhibits here, and provide the briefing excerpt here for convenience of the Panel.⁸ The Emergency Panelist denied all of these requests as of that time, concluding that each issue properly could be raised again before the full IRP panel.

As to the Standing Panel, the Emergency Panelist found that ICANN's delays "risked breaching the commitment that it made through its Bylaws on this point, starting with the 2013 Bylaws." Moreover, he found that Claimants raised "legitimate concerns" but found our request "premature" because "on the present record" Claimants have a limited risk of harm "during the course of this IRP." (Par. 209.) He recognized the risk of harm to Claimants "is *not* zero" but he thought such risk is dependent upon the notion that ICANN loses its "new-found momentum to get the Standing Panel constituted" and upon the possibility Claimants lose this case, decided to appeal, and still there is no Standing Panel (Par. 210 (emphasis in original).) Here we are a year later, and ICANN appears no closer to implementing the Standing Panel. Whatever momentum they pretended to have last year, appears to be lost.

Notably, as set forth in their IRP Complaint,⁹ Claimants have previously been denied a

⁷ Claimants' Brief in Support of Request for Interim Measures, filed Apr. 24, 2020, pp. 12-20 and Exhs. F-H.

⁸ See, Ex. E.

⁹ Request for IRP, filed by Claimants Dec. 16, 2019.

fair IRP process, leading to a patently unfair result as subsequently proved in a highly similar IRP decision. Claimants were denied discovery they should have been given, which was given and was dispositive in the later *DotRegistry* case (and must ultimately be disclosed in this case). Claimants were denied their right to an *en banc* appeal of that decision to a fully comprised Standing Panel as had been detailed in the Bylaws since 2013. ICANN denied them that right, by willfully refusing to implement a Standing Panel as of that point, in 2016. And still now, ICANN has no excuse for wholly failing, for so many years, to implement that Standing Panel – despite admonitions from different, unanimous IRP panels in 2014,^{10/11} and 2017.¹²

The unanimous DCA Trust panel warned ICANN in June 2014:

It is not reasonable to construe the By-law proviso for ... when a standing panel is not in place as relieving ICANN indefinitely of forming the required standing panel. ... Here, more than a year has elapsed, and ICANN has offered no explanation why a standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.¹³

And yet, ICANN did literally nothing to even begin to form the Standing Panel until February **2020** – three months after Claimants filed their IRP complaint, again raising this issue and

<https://www.icann.org/en/system/files/files/irp-fegistry-et-al-request-16dec19-en.pdf>

¹⁰ Ex. F, *DCA Trust v. ICANN*, Decision on Interim Measures of Protection, ¶¶ 29-30 (May 12, 2014).

¹¹ Ex. G, *DCA Trust v. ICANN*, Decision on Partial Reconsideration, ¶12 (June 4, 2014).

¹² Ex. H, *Asia Green IT Sys. v. ICANN*, Final Declaration, ¶ 146 (Nov. 30, 2017) (“Bylaws requires a ‘Standing Panel’ be established, and this Panel recommends, along with previous IRP panel recommendations, that one is created.”)

¹³ Ex. G, ¶ 12; *see also, e.g., Braude v. Automobile Club of So. California*, 178 Cal. App. 3d 994, 1014 (1986) (“Corporations have no power to create bylaws that are unreasonable in their application.’ ... Thus the court is the ultimate arbiter as to the legality of the bylaws adopted.) (quoting, *People’s Bank v. Superior Court*, 104 Cal. 649, 652 (1894)).

citing those IRP decisions. Even since then, ICANN has made scant little progress, and shown no interest whatsoever in hurrying the matter.

The Emergency Panelist “makes clear that this decision does not finally resolve the issue, which can be fully addressed by the IRP Panel.” (Par. 211.). He specifically allowed Claimants to “reassert this relief in the main IRP proceedings, in order to preserve rights under the Bylaws to an appeal to the Standing Panel, sitting *en banc*.” (*Id.*). And thus, Claimants again reassert their claim to this relief here, as they have done before the Superior Court. Those proceedings already have progressed through early discovery and towards court-ordered mediation. And as ICANN has demonstrated by ignoring two prior IRP rulings on the issue, only judicial proceedings can bind ICANN in any meaningful way. Those proceedings are well under way. So, Claimants urge this panel to defer decision on these issues to the Superior Court.

ARGUMENT: Neither ICANN Nor Any Third Party Has Shown Any Harm from the Status Quo

ICANN has provided no evidence whatsoever as to any urgency or other potential hardship in this matter, which ICANN itself unilaterally delayed for many years while it internally reviewed and reported on its own admitted failures underlying Claimants’ IRP Complaint. ICANN has delayed this matter for nine months recently, as in the absence of a Standing Panel, nor of well-defined criteria for choosing a chair, it was difficult to find an appropriate chair available to handle the matter. Twice the parties did agree to a chair, only to have that person decline the role. Meanwhile, what progress has ICANN made in creating the mythical Standing Panel? Almost none.

Claimants are far more prejudiced than anyone by the interminable delay to resolving their concerns with ICANN’s decisions. It is each Claimants’ respective investment

-- worth at least a half million dollars each when considering consultants' fees (not to mention executive time and other resources, the time value of money, legal fees, etc....) – that sit idly worthless as this matter continues. Moreover, each Claimant operates many other TLDs under contract from ICANN, and thus has a vested interest in ICANN complying with its Bylaws accountability mechanisms. But these Claimants value their procedural rights more importantly than prompt resolution of this action, particularly insofar as they have been burned before by ICANN's deficient IRP process.

Moreover, there would be no apparent benefit to anyone, even if ICANN quickly won this IRP case and then immediately delegated the .hotel TLD to HTLD. ICANN has touted the so-called "Hotel Community" purportedly represented by a limited liability company HTLD¹⁴ and the harm to that purported community alleged to be happening as we speak.¹⁵ Yet further down that same page, ICANN argued that Claimants can later be "made whole" by transfer of the TLD straight out of the hands of that so-called community, presumably even after many .hotel domains have been registered.¹⁶ That proves that ICANN understands there is no harm to any third party if this action is stayed, even indefinitely.

There is still further evidence that ICANN cannot conceivably be prejudiced by maintaining the *status quo* until this case is resolved. ICANN delegated the .Hoteles (Spanish/plural) TLD in 2015, and it has not even launched yet -- six years later. Similarly, ICANN delegated the .Hotels (plural) TLD in 2017, and it also has not launched yet. Those

¹⁴ On information and belief, HTLD is now wholly owned by Donuts Inc., a domain industry titan that runs some 440 TLDs. See, Ex. I, Wikipedia entry re Donuts Inc.

¹⁵ See *supra* n.4, ICANN Opp. Mem., #3, 5.

¹⁶ *Id.*, #6.

facts prove there are two available, nearly identical TLDs already delegated by ICANN, with market demand apparently so weak that they are not even launched for any use at all -- after many years.¹⁷

Indeed, HTLD (and/or its corporate overlord, Donuts Inc.) have had ample opportunity to try to intervene in this matter over the past 18+ months -- if they think their rights might be prejudiced. But, they have said and done nothing. ICANN has offered no evidence tending to prove any potential harm to the purported hotel community, or anyone else. Instead, ICANN has speculated without any evidence -- contrary to clear evidence presented here.

ICANN focuses only on purported harm to one company and to an imaginary 'community' of hotel operators that company wants to sell domains to. On the other hand, Claimants allege that ALL members of the ICANN community (to wit, all internet users) are harmed by ICANN's intransigent, willful failures to adopt key procedural rights required by its Bylaws -- for eight years and counting. The active, broader community harm -- in combination with the specific harm to these Claimants that already have suffered from an inadequate, non-compliant IRP process and fear future processes of the same ilk -- is exponentially greater than any speculative harm to ICANN, HTLD and/or the phony 'Hotel Community' that they have concocted.

¹⁷ Ex. J -- ICANN's IANA delegation information pages for those TLDs, showing delegation dates, the "Coming Soon" page at nic.hoteles, and the Registry information page at nic.hotels (showing that TLD's Registration Policy is "coming soon").

CONCLUSION; PRAYER FOR RELIEF

For all of the foregoing reasons, Claimants respectfully request that this IRP proceeding be stayed until either 1) ICANN implements the Standing Panel as required by Bylaws since 2013, and provides Ombudsman review of Claimants' RFRs; or 2) the Superior Court matter is either finally resolved, or ICANN obtains an order from that court directing the IRP to proceed before this panel.

RESPECTFULLY SUBMITTED, August 4, 2021

By: 

Mike Rodenbaugh
RODENBAUGH LAW

Attorney for Claimants