INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-19-0004-0808

FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS PTE. LTD., AND DOMAIN VENTURES PARTNERS PCC LIMITED
(Claimants)

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
(Respondent)

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R-45

RESPONDENT'S EXHIBIT

gTLD Applicant Guidebook

Version 2012-06-04

4 June 2012

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012

Module 6

Top-Level Domain Application – Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.

5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement http://newgtlds.icann.org/en/applicants/agb/program-privacy, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:

    a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;

    b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;

    c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

d. Applicant may be requested to supply certain information in the original language as well as in English.

9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.

10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

11. Applicant authorizes ICANN to:

a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;

b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.

14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

R-46

RESPONDENT'S EXHIBIT

New gTLD Program
Community Priority Evaluation Report
Report Date: 11 June 2014

Application ID:	1-1032-95136
Applied-for String:	HOTEL
Applicant Name:	HOTEL Top-Level-Domain s.a.r.l

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Prevailed**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application met the requirements specified in the Applicant Guidebook. Your application prevailed in Community Priority Evaluation.

Panel Summary

Overall Scoring — 15 Point(s)

Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	4	4
#4: Community Endorsement	4	4
Total	15	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — 4/4 Point(s)

1-A Delineation — *2/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.

Delineation
Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community defined in the application ("HOTEL") is:

> The .hotel namespace will exclusively serve the global Hotel Community. The string "Hotel" is an internationally agreed word that has a clear definition of its meaning: According to DIN EN ISO 18513:2003, "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Therefore only entities which fulfil this definition are members of the Hotel Community and eligible to register a domain name under .hotel. .hotel domains will be available for registration to all companies which are member of the Hotel Community on a local, national and international level. The registration of .hotel domain names shall be dedicated to all entities and organizations representing such entities which fulfil the ISO definition quoted above:
> 1. Individual Hotels
> 2. Hotel Chains
> 3. Hotel Marketing organizations representing members from 1. and/or 2.
> 4. International, national and local Associations representing Hotels and Hotel Associations representing members from 1. and/or 2.
> 5. Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2.
> These categories are a logical alliance of members, with the associations and the marketing organizations maintaining membership lists, directories and registers that can be used, among other public lists, directories and registers, to verify eligibility against the .hotel Eligility requirements.

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel. Furthermore, association with the hotel sector can be verified through membership lists, directories and registers.

In addition, the community as defined in the application has awareness and recognition among its members. This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Delineation.

Organization

Two conditions need to be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

The community as defined in the application has at least one entity mainly dedicated to the community. There are, in fact, several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA), among others. According to the application,

> Among those associations the International Hotel and Restaurant Association (IH&RA) is the oldest one, which was founded in 1869/1946, is the only global business organization representing the hotel industry worldwide and it is the only global business organization representing the hospitality industry (hotels and restaurants) worldwide. Officially recognized by United Nations as the voice of the private sector globally, IH&RA monitors and lobbies all international agencies on behalf of this industry. Its members represent more than 300,000 hotels and thereby the majority of hotels worldwide.

The community as defined in the application has documented evidence of community activities. This is confirmed by detailed information on IH&RA's website, as well as information on other hotel association websites.

The Community Priority Evaluation panel determined that the community as defined in the application

satisfies both the conditions to fulfill the requirements for Organization.

Pre-existence
To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. Hotels have existed in their current form since the 19th century, and the oldest hotel association is IH&RA, which, according to the entity's website, was first established in 1869 as the All Hotelmen Alliance. The organization has been operating under its present name since 1997.

The Community Priority Evaluation panel determined that the community as defined in the application fulfills the requirements for Pre-existence.

1-B Extension	*2/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates considerable size and longevity for the community. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size
Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .HOTEL as defined in the application is large in terms of the number of members. According to the applicant, "the global Hotel Community consists of more than 500,000 hotels and their associations".

In addition, the community as defined in the application has awareness and recognition among its members because the community is defined in terms of association with the provision of hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Size.

Longevity
Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .HOTEL community are of a lasting, non-transient nature.

In addition, the community as defined in the application has awareness and recognition among its members because the community is defined in terms of association with the provision of hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Longevity.

Criterion #2: Nexus between Proposed String and Community	**3/4 Point(s)**
2-A Nexus	*2/3 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Nexus as

specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string identifies the name of the community, without over-reaching substantially beyond the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.HOTEL) identifies the name of the community. According to the applicant,

> The proposed top-level domain name, "HOTEL", is a widely accepted and recognized string that globally identifies the Hotel Community and especially its members, the hotels.

The string nexus closely describes the community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels). However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community. Therefore, the string identifies the community, but does not over-reach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string identifies the name of the community as defined in the application. It therefore partially meets the requirements for Nexus.

2-B Uniqueness	*1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string .HOTEL must have no other significant meaning beyond identifying the community described in the application. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies	**4/4 Point(s)**
3-A Eligibility	*1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility, as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by restricting eligibility to the narrow category of hotels and their organizations as defined by ISO 18513, and verifying this association through membership lists, directories and registries. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection	*1/1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that eligible applicants will be entitled to register any domain name that is not reserved or registered at the time of their registration submission. Furthermore, the registry has set aside a list of domain names that will be reserved for the major hotel industry brands and sub-brands. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.

3-C Content and Use	*1/1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.
To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that each domain name must display hotel community-related content relevant to the domain name, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.

3-D Enforcement	*1/1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures as well as appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant's registry will establish a process for questions and challenges that could arise from registrations and will conduct random checks on registered domains. There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies both conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement	**4/4 Point(s)**
4-A Support	*2/2 Point(s)*

The Community Priority Evaluation panel determined that the application fully met the criterion for Support

specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the applicant had documented support from the recognized community institution(s)/member organization(s). The application received a maximum score of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. "Relevance" refers to the communities explicitly and implicitly addressed.

The Community Priority Evaluation panel determined that the applicant was not the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from the recognized community institution(s)/member organization(s), and this documentation contained a description of the process and rationale used in arriving at the expression of support. These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.

4-B Opposition *2 / 2 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received relevant opposition from, at most, one group of non-negligible size. According to the Applicant Guidebook, "To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant". "Relevance" and "relevant" refers to the communities explicitly and implicitly addressed.

The application received letters of opposition, which were determined not to be relevant, as they were either from groups of negligible size, or were from entities/communities that do not have an association with the applied for string. The Community Priority Evaluation Panel determined that these letters therefore were not relevant because they are not from the recognized community institutions/member organizations, nor were they from communities/entities that have an association with the hotel community. In addition, some letters were filed for the purpose of obstruction, and were therefore not considered relevant. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

R-47

RESPONDENT'S EXHIBIT

INDEPENDENT REVIEW PROCESS (IRP)

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-15-0002-8061

Despegar Online SRL

Donuts, Inc.

Famous Four Media Limited

Fegistry, LLC

Radix FZC

-vs-

ICANN

-vs-

Little Birch, LLC

Minds + Machines Group Limited

Final Declaration

IRP Panel

Thomas H. Webster

Dirk P. Tirez

Peter J. Rees QC (Chair)

Table of Contents

A. Introduction and Procedural History

1. This Final Declaration is issued by this Independent Review Process ("IRP") Panel pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN"). This IRP has been administered under the International Centre for Dispute Resolution ("ICDR") International Dispute Resolution Procedures as amended and in effect as of 1 June 2014 along with ICANN's Supplementary Procedures.

2. On 4 March 2015, following a failed Cooperative Engagement Process with ICANN, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC submitted a Request for IRP in relation to ICANN's treatment of the generic top-level domain ("gTLD") string .hotel ("the .hotel IRP").

3. On 17 April 2015, ICANN submitted its Response to this Request.

4. On 15 March 2015, following a failed Cooperative Engagement Process with ICANN, Little Birch, LLC and Minds + Machines Group Limited submitted a Request for IRP in relation to ICANN's treatment of the gTLD string .eco ("the .eco IRP").

5. On 27 April 2015, ICANN submitted its Response to this Request.

6. On 12 May 2015, the ICDR confirmed to the parties that the cases regarding .hotel IRP and .eco IRP would be merged and the parties agreed to keep written submissions separate but recognized that the issues presented by the two cases were closely linked and that the parties' interests in the proceedings were so similar that both should be dealt with during a single hearing.

7. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds + Machines Group Limited are all represented by Flip Petillion and Jan Janssen of Crowell & Moring LLP and ICANN is represented by Jeffrey A. LeVee and Rachel Zernik of Jones Day.

8. The IRP Panel consisting of Thomas H. Webster, Dirk P. Tirez and Peter J. Rees QC (Chair) ("Panel"), having been duly constituted to consider these two Requests, conducted a preparatory conference with the party representatives on 25 August 2015 at which, and following consultation with the party representatives, the procedure was fixed by the Panel for the further conduct of the IRP.

9. On 7 October 2015, the Panel received a letter from Fasken Martineau seeking to make submissions to the Panel on behalf of Big Room Inc. ("Big Room") whilst acknowledging that Big Room was not a party to the IRP.

10. On 19 October 2015, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, and Minds + Machines Group Limited submitted a Reply to ICANN's Response in the .hotel IRP matter, and Little Birch, LLC and Minds + Machines Group Limited submitted a Reply to ICANN's Response in the .eco IRP matter.

11. On 10 November 2015, ICANN submitted its Sur-Replies in both the .hotel IRP and the .eco IRP matters.

12. On 20 November 2015, the Panel received an e-mail from HOTREC seeking to make submissions to the Panel whilst acknowledging that HOTREC was not a party to the IRP.

13. On 2 December 2015, in advance of the telephone hearing due to take place on 7 December 2015, the Panel sent an e-mail to the representatives of the parties asking a number of questions.

14. On 4 December 2015, the parties responded in writing to the Panel's questions.

15. On 7 December 2015, a telephone hearing took place at which the representatives of all the parties made their submissions to the Panel.

B. Factual Background - General

16. In 2005, ICANN's Generic Names Supporting Organization ("GNSO") began a policy development process to consider the introduction of new gTLDs. As part of this process the New gTLD Applicant Guidebook ("Guidebook") was developed and was approved by the Board of ICANN in June 2011 and the New gTLD Program was launched.

17. The final version of the Guidebook was published on 4 June 2012. It provides detailed instructions to gTLD applicants and sets out the procedures for evaluating new gTLD applications. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community based, the latter to be *"operated for the benefit of a clearly delineated community"* (Guidebook § 1.2.3.1).

18. If more than one standard application was made for the same gTLD applicants were asked to try and achieve an amicable agreement under which one or more

of them withdrew their applications. If no amicable solution could be found, applicants in contention for the same gTLD would be invited to participate in an auction for the gTLD.

19. If a community based application was made for a gTLD for which other applicants had made standard applications, the community based applicant was invited to elect to proceed to Community Priority Evaluation ("CPE") whereby its application would be evaluated by a CPE Panel in order to establish whether the application met the CPE criteria. The CPE Panel could award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).

20. If an applicant prevails in CPE, it will proceed to the next stage of evaluation and other standard applications for the same gTLD will not proceed because the community based application will be considered to have achieved priority (Guidebook § 4.2.2).

21. ICANN appointed an external provider, the Economic Intelligence Unit ("EIU") to constitute the CPE Panel.

22. ICANN has a Documentary Information Disclosure Policy ("DIDP"), which permits requests to be made to ICANN to make public documents *"concerning ICANN's operational activities, and within ICANN's possession, custody or control".*

23. ICANN also has in place a process by which any person or entity, materially affected by an action of ICANN, may request review or reconsideration of that action by the Board of ICANN ("Reconsideration Request") (Art IV.2 of ICANN's Bylaws).

24. ICANN also has in place a process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws of ICANN (Art IV.3 of ICANN's Bylaws), namely the IRP Process.

25. Article IV.3.4 of ICANN's Bylaws provides:

> *"Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws,*

and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

a. did the Board act without conflict of interest in taking its decision?
b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"

C. Factual Background - Specific

26. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC each submitted standard applications for .hotel. HOTEL Top-Level-Domain s.a.r.l. ("HTLD") submitted a community based application for .hotel.

27. Little Birch, LLC and Minds + Machines Group Limited each submitted standard applications for .eco. Big Room submitted a community based application for .eco.

28. On 19 February 2014, HTLD was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.

29. On 12 March 2014, Big Room was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.

30. On 11 June 2014, the CPE Panel from EIU issued its report, which determined that HTLD's application should receive 15 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .hotel would not proceed.

31. On 28 June 2014, Despegar Online SRL, DotHotel Inc., dot Hotel Limited, Fegistry LLC, Spring McCook LLC and Top Level Domain Holdings Limited submitted a Reconsideration Request *"to have that decision by the Community Priority Evaluation panel reconsidered"*, and, on 4 August 2014, Donuts Inc., Fair Winds Partners, LLC, Famous Four Media Limited, Minds + Machines Group Limited and Radix FZC submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.

32. On 22 August 2014, the Board Governance Committee ("BGC") of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered and, on 3 September 2014, ICANN responded to the DIDP request

by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.

33. On 22 September 2014, Despegar Online SRL, Radix FZC, Famous Four Media Limited, Fegistry LLC, Donuts Inc., and Minds + Machines Group Limited submitted a Reconsideration Request to *"seek reconsideration of ICANN staff's response to the Requesters' request for documents pursuant to ICANN's Document Information Disclosure Policy ("DIDP")"*, and, on 11 October 2014, the BGC of ICANN denied that Reconsideration Request.

34. On 6 October 2014, the CPE Panel from EIU issued its report, which determined that Big Room's application should receive 14 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .eco would not proceed.

35. On 22 October 2014, Little Birch, LLC and Minds + Machines Group Limited submitted a Reconsideration Request seeking *"the reconsideration of ICANN's Community Priority Evaluation Panel's determination whereby [Big Room's application] prevailed in Community Priority Evaluation"*, They also submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.

36. On 31 October 2014, ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request, and, on 18 November 2014, the BGC of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered.

37. On 27 February 2015, ICANN staff became aware of a configuration issue with ICANN's online New gTLD Applicant and Global Domains Division ("GDD") portals. It appears that, between 17 March 2014 and 27 February 2015, user credentials were used to obtain sensitive and confidential business information concerning several of the .hotel applicants.

38. On 5 June 2015, Crowell & Moring LLP wrote to the ICANN Board and the President of ICANN's GDD *"on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel limited), Fegistry LLC, Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.)"*. The letter requested *"full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties"* and set out a list of information sought.

39. On 5 July 2015, ICANN responded to the letter of 5 June 2015 under the heading *"Response to Documentary Information Disclosure Policy Request"*. ICANN provided further information concerning the issue and referred to certain information that was publicly available, but did not provide any other documentation.

40. Neither the Board of ICANN nor the President of ICANN's GDD has responded to the letter of 5 June 2015.

D. Relief Requested

41. The relief requested by the Claimants in both the .hotel and .eco Requests for IRP was, essentially, the same, namely:

- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and or the gTLD Guidebook;
- Declare that ICANN must reject the determination that HTLD's application for .hotel and Big Room's application for .eco be granted community priority;
- Award Claimants their costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

42. In the Reply to ICANN's Response in the .hotel IRP a further request for relief was added, namely:

- Declare that ICANN must reject HTLD's application for .hotel.

43. In response to the questions raised by the Panel on 2 December 2015, the Claimants' representative also asked for the following relief:

i. That the Panel consider declaring that ICANN continues to act inconsistently with its Articles of Incorporation, its Bylaws, and or the Guidebook by:

- upholding the determination that HTLD's application for .hotel be granted community priority;
- upholding HTLD's application for .hotel; and
- upholding the determination that Big Room's application for .eco be granted community priority.

ii. That the Panel declare that ICANN has breached and continues to breach its Articles of Incorporation and/or Bylaws by upholding the

provisions of the gTLD Applicant Guidebook or of the new gTLD policy which are in violation of the Articles of Incorporation and/or Bylaws.

iii. That the Panel examine the consistency with ICANN's Articles of Incorporation and Bylaws of;

- the contents of the Guidebook
- the CPE process itself
- the selection and appointment process of the EIU as the CPE Panel, and
- the implementation of the CPE process that has led to ICANN accepting community priority for .hotel and .eco.

E. Claimants' Submissions

44. In their submissions, the Claimants, in both the .hotel and .eco IRPs matters, criticise the CPE process as a whole and complain that the ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel. They also complain that the CPE process is unfair, non-transparent and discriminatory due to the use of anonymous evaluators, and that no quality review process exists for CPE Panel decisions.

45. In relation to the CPE process as a whole, the Claimants also argue that, as no opportunity is given for applicants to be heard on the substance of a CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), CPE determinations are made without due process.

46. However, relief in respect of these wider issues was not requested by the Claimants in either the .hotel or .eco Requests, and, although such relief was referred to by the Claimants in their response to the Panel's questions of 2 December 2015, it was confirmed by the Claimants at the hearing on 7 December 2015 that the Claimants were not, in fact, asking the Panel to make a declaration as to the selection process of the CPE Panel by ICANN, nor any declaration as to the CPE process as a whole, nor whether that process breaches ICANN's Articles of Incorporation or Bylaws, nor whether the Guidebook breaches ICANN's Articles of Incorporation or Bylaws.

47. Accordingly, for the purposes of this IRP, it is the submissions made by the Claimants which address the specific relief sought by the Claimants in relation to the granting of CPE in the .hotel and .eco applications that are relevant for the Panel.

48. In the .hotel and .eco Requests and Replies, the Claimants make the following submissions in relation to the CPE Panel's determinations on CPE:

i. *"By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment"* (.hotel Request § 9, .eco Request § 9)

ii. *"The extraordinary outcomes for Big Room's application for .eco and HTLD's application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE"* (.eco Request § 48)

iii. *"If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met"* (.hotel Request § 52, .eco Request § 50)

iv. *"The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN's CPE policy"* (.hotel Request § 53, .eco Request § 51)

v. *"the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a 'community' within the definition of that term under the rules of the Applicant Guidebook"* (.hotel Request § 53)

vi. *"the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a 'community' within the definition of that term under the rules of the Applicant Guidebook"* (.eco Request § 51)

vii. *"The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel"* (.eco Request § 53)

viii. *"The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts"* (.hotel Request § 55)

ix. *"The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts"* (.eco Request § 56)

x. *"However, the CPE Panel's reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a 'community' other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE Panel's findings on organization and nexus between the proposed string and the 'community'."* (.hotel Request § 56)

xi. *"the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED.....Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string."* (.eco Request § 58)

xii. *"The CPE Panel has never considered the appropriateness of [Big Room's] appeal process. In contrast, however, the CPE Panel did investigate the*

appropriateness of proposed appeal processes in other CPEs requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement." (.eco Request § 59)

xiii. *"The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism...such as a Request for Reconsideration"* (.hotel Request § 64, .eco Request § 67) **NB** the Panel notes that this is not actually what the Guidebook says. It says that the *"Board reserves the right to individually consider an application for a new gTLD....under exceptional circumstances"*

xiv. *"Claimants showed that the CPE Panel manifestly misapplied ICANN's defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation"* (.eco Request § 69)

xv. *"Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process"* (.hotel Request § 66, .eco Request § 69)

xvi. *"The IRP Panel's task is to look at whether ICANN's unquestioning acceptance of the CPE Panel's advice and ICANN's refusal to review the issue raised by Claimants are compatible with ICANN's fundamental obligations"* (.hotel Reply § 4, .eco Reply § 3)

xvii. *"ICANN's reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be"* (.hotel Reply § 4, .eco Reply § 8)

xviii. *"the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with principles of fairness, transparency, avoiding conflicts of interest and non-discrimination."* (.hotel Reply § 34, .eco Reply § 33)

xix. *"One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner"* (.hotel Reply § 39, .eco Reply § 38)

xx. *"As the IRP Panel's task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases"* (.hotel Reply § 45, .eco Reply § 44)

49. In the .hotel Reply, the Claimants also make the following submissions in relation to the declaration they are seeking that ICANN must reject HTLD's application for .hotel:

i. *"The IRP Panel is also requested to assess ICANN's refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the*

relevant information that was available to ICANN in relation to the question of taking action" (.hotel Reply § 4)

ii. *"ICANN never showed any willingness to take appropriate measures"* (.hotel Reply § 49)

iii. *"In this case a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible....It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials"* (.hotel Reply § 50)

50. Also in the .hotel Reply the Claimants submit:

> *"Second Claimant in the .eco case, Minds + Machines Group Limited (Minds + Machines), also applied for the .hotel gTLD. Minds + Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds + Machines join the proceedings is accepted by all Claimants"* (.hotel Reply § 2)

F. ICANN's Submissions

51. In the .hotel and .eco Responses and Sur-Replies, ICANN makes the following submissions in relation to the CPE Panel's determinations on CPE:

i. *"Claimants did not state a proper basis for reconsideration as defined in ICANN's Bylaws"* (.hotel Response § 4, .eco Response § 4)

ii. *"ICANN's Board....has no obligation to review (substantively or otherwise) any such report"* (.hotel Response § 9, .eco Response § 9)

iii. *"nothing in the Articles or Bylaws requires the Board [to conduct a substantive review"* (.hotel Response § 9, .eco Response § 10)

iv. *"neither the creation nor the acceptance of the CPE Panel's Report regarding HTLD's Application for .HOTEL constitutes Board action"* (.hotel Response § 12)

v. *"neither the creation nor the acceptance of the CPE Panel's Report regarding Big Room's Application for .ECO constitutes Board action"* (.eco Response § 13)

vi. *"in making those decisions [acceptance of the Guidebook and the decisions by the Board to reject Claimants' Reconsideration Request], the Board followed ICANN's Articles and Bylaws"* (.hotel Response § 13, .eco Response § 14)

vii. *"BGC denied Claimants' Reconsideration Request finding that Claimants had 'failed to demonstrate that the CPE Panel acted in contravention of*

established policy or procedure' in rendering the Report" (.eco Response § 29)

viii. *"BGC denied Claimants' Reconsideration Request [in respect of the DIDP Request] finding that the Claimants had 'failed to demonstrate that ICANN staff acted in contravention of established policy or procedure' in responding to the DIDP Request"* (.hotel Response § 28)

ix. *"the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports"* (.hotel Response § 49, .eco Response § 49)

x. *"Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their Reconsideration Request"* (.hotel Response § 51, .eco Response § 50)

xi. *"It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators."* (.hotel Response § 53, .eco Response § 52)

xii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE then .HOTEL TLD's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding .HOTEL TLD's Application"* (.hotel Response § 55)

xiii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE, Big Room's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding Big Room's Application"* (.eco Response § 54)

xiv. *"there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determination ....over the guidance of an expert panel formed for that particular purpose"* (.hotel Sur-Reply § 11, .eco Sur-Reply § 10)

52. In the .hotel Sur-Reply, ICANN also makes the following submissions in relation to the declaration the Claimants are seeking that ICANN must reject HTLD's application for .hotel:

i. *"Claimants argue that the Portal Configuration is relevant to this IRP, but they have not identified any Board action or inaction with respect to this issue that violates ICANN's Articles or Bylaws such that it is subject to independent review, now or ever"* (.hotel Sur-Reply § 23)

ii. *"The ICANN Board took no action (and was not required to take action under either the ICANN Articles or Bylaws) with respect to Claimant's letter and DIDP request"* (.hotel Sur-Reply § 24)

iii. *"Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants' belief as to what the Board should do. Again Claimants have also failed to show that the Board's conduct in this regard has in any way violated ICANN's Articles or Bylaws"* (.hotel Sur-Reply § 25)

53. Also in the .hotel Sur-Reply ICANN submits:

> *"Minds + Machines Limited ("Minds + Machines") is not a Claimant in this proceeding but, nevertheless signed the Reply and now seeks to join as an additional claimant. Article 7 of the International Center for Dispute Resolution's International Dispute Resolution Procedures explicitly provides that "[n]o additional party may be joined after the appointment of any [neutral], unless* ***all parties****, including the additional party, otherwise agree"* (ICDR International Dispute Resolution Procedures, Art. VII (emphasis added)). *ICANN does not consent to the joinder of Minds + Machines because any claims Minds + Machines may have with respect to the CPE Report or ICANN's response to that Report are time-barred* (Bylaws, Art. IV, § 3.3 (30 day deadline to file IRP request)*"* (.hotel Sur-Reply § 35)

G. The Issues

54. As has already been stated, Article IV.3.4 of ICANN's Bylaws provides:

> *"Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> *a. did the Board act without conflict of interest in taking its decision?*
> *b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
> *c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"*

55. Given that the wider issues of the CPE process as a whole, the appointment of EIU and the provisions of Guidebook are not being pursued, the Panel has concluded that the contested actions of the Board of ICANN in this IRP are:

    i. The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
    ii. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
    iii. The denial by the BGC on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.
    iv. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

56. In addition, the Panel has the procedural issue to deal with of the attempt by Minds + Machines Group Limited to join the .hotel IRP.

H. Analysis - General

57. Before turning to the specific analysis of each of the issues stated above, there are some general points which the Panel wishes to highlight, which have application to one or more of the issues in question.

58. The analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel has identified the following relevant provisions of the Articles of Incorporation and Bylaws against which the actions, or inactions, of the Board should be compared.

Articles of Incorporation

Article 4

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

Bylaws

Article I.2

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice,

situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

Article II.3
ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

Article III.1
ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Article IV.1
In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Article IV.3
The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

a. evaluate requests for review or reconsideration;
b. summarily dismiss insufficient requests;
c. evaluate requests for urgent consideration;
d. conduct whatever factual investigation is deemed appropriate;
e. request additional written submissions from the affected party, or from other parties;
f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

59. In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows:

i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
ii. ICANN has an obligation to adhere to all of its obligations under its Articles of Incorporation and its Bylaws.
iii. The Bylaws, and the BGC's determinations on prior Reconsideration Requests, have established a specific standard for when it is appropriate to reconsider CPE determinations (i.e., when the CPE Panel violated established policy or procedure).
iv. When considering the Reconsideration Requests in the .eco and .hotel matters, the BGC had before it the EIU's determination and the "facts" that the Claimants had submitted with their Reconsideration Requests. The BGC also considered the Guidebook as well as other published CPE procedures. This was all the information required for the BGC to determine that the EIU had followed established policy and procedure in rendering the CPE determinations.
v. The Board is not aware (whether through the BGC or otherwise) as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

60. During the hearing on 7 December 2015, ICANN further confirmed its position as follows:

i. The Claimants (save for Minds + Machines Group Limited in the .hotel IRP) are not time-barred from seeking IRP of:
    a. The denial by the BGC on 22 August 2014 of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
    b. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
    c. The denial by the BGC on 18 November 2014 of the Reconsideration Request to have the CPE Panel decision in the .eco matter reconsidered.
ii. There is no ICANN quality review or control process, which compares the determinations of the EIU on the various CPE applications.

iii. The core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.
iv. The CPE process operated by the EIU involves 5 core EIU staff and 2 independent evaluators. The independent evaluators separately score each CPE application and submit their separate scores to the EIU core staff. The independent evaluators do not confer on the scoring. The independent evaluators are not the same for each CPE application; sometimes both are different and sometimes one is different.
v. ICANN considers there is nothing in its Articles of Incorporation or Bylaws, which requires ICANN to comply with due process.
vi. ICANN does not believe that it is subject to any general international law principle requiring it to comply with due process.
vii. Upon receipt of a Reconsideration Request, ICANN expects the BGC to carry out a procedural review of the CPE determination, not a substantive review and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

61. In the light of the relevant provisions of the Articles of Incorporation and Bylaws identified above, and the clarifications provided by ICANN as to its position in relation to CPE applications and Reconsideration Requests made in respect of them, the Panel will now consider each of the contested actions of the Board of ICANN in this IRP. In doing so, the Panel has taken into account, where relevant, all the submissions of the parties, including, without limitation, those specifically set out in sections E. and F. above.

62. Given the confirmation by ICANN, that a time bar is not being raised in relation to the substantive issues in this IRP, the Panel does not have to discuss this question save for when it considers Minds + Machines Group Limited's attempt to join in the .hotel IRP.

I. Analysis – Specific

1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.

63. In conducting this analysis, the Panel have carefully considered the CPE report dated 11 June 2014, which determined that HTLD's community based application had prevailed, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration Request dated 22 August 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

64. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

> a. whether the BGC acted without conflict of interest in taking its decision?
> b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
> c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

65. No allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

66. As to the requirements of due diligence and care, and the exercise of independent judgment, ICANN's position is that the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

67. That appears to the Panel to be correct, but what is of critical importance is the manner in which the review of whether the EIU has followed the correct procedure and has correctly applied ICANN's policies is conducted.

68. In their Reply in the .hotel IRP at §39 the Claimants submit:

> *"One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....The ICANN Board instead limited its review to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one."*

69. The Panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly the applied the policy.

70. This is particularly so given that the EIU is not subject to ICANN's core values, the EIU independent evaluators are not the same for each CPE application, there is no ICANN quality review or control process which compares the

determinations of the EIU on the various CPE applications and ICANN is not aware as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

71. In their Reconsideration Request of 28 June 2014, at page 5, the Claimants say:

> *"In this case, however, there are 3 instances where the Panel has not followed the [Guidebook] policy and processes for conducting CPE. Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE."*

72. The three instances of failure to follow the Guidebook policy alleged by the Claimants are:

1. Failure to identify a "Community";
2. Failure to consider self-awareness and recognition of the community; and
3. Failure to apply the test for Uniqueness.

73. In their Reconsideration Request, the Claimants then go into significant detail as to the ways in which they allege the EIU failed to follow the Guidebook policy. However, in the BGC denial of 22 August 2014, the BGC state:

> *"...while the Request is couched in terms of the Panel's purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel's Report, which is not a basis for reconsideration"*

74. The BGC's comment quoted above is plainly wrong as any detailed reading of the Reconsideration Request shows. It is unfortunate that the BGC should have included such comments in its determination as, in the Panel's view, this has contributed to this IRP and the clear feeling, on the part of the Claimants, that their Reconsideration Request was not treated appropriately by the BGC.

75. In their Reconsideration Request, the Claimants argue that the first question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there is a community that meets the definition of a community under the Guidebook. They say:

> *"The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.... This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for "community" required.... Had it*

considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion."

76. In dealing with this allegation the BGC gave consideration to the definition of community in the Guidebook and stated:

> *"However, the Requesters point to no obligation to conduct any inquiry as to the definition of community other than those expressed in section 4.2.3 of the Guidebook.....As such, the Requesters fault the Panel for adhering to the Guidebook's definition of a "community" when evaluating the Application. Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.*
>
> *The Requesters also contend the Applicant's proposed community, i.e., the "Hotel Community" does not qualify as a community for CPE purposes because "rather than showing cohesion, [it] depend[s] on coercion....But the Panel reached the contrary conclusion... As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel's conclusions, but only its adherence to the applicable policies and procedures"*

77. In their Reconsideration Request, the Claimants argue that the second question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure to consider self-awareness and recognition of the community. They say:

> *"...the Panel has imported the test for determining whether there is a "community" – self-awareness that the group is a community- into the test for "delineation". With respect, that is an error of process that further invalidates the findings.*
>
> *Even if it were not, and self-awareness and recognition are considered with Delineation, the actual response given under that enquiry about "self-awareness and recognition" shows that the Panel does not understand the test that is to be applied....*
>
> *What is required is a showing by evidence that the members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community.*
>
> *It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of "hotel", and because every hotel is a member of the alleged community....*

The Panel then proceeds through the proper requirements of delineation, which it names accurately – organisation and existence before 2007."

78. In dealing with this allegation, the BGC gave consideration to the definition of delineation in the Guidebook and stated:

"The Panel began its assessment of the test for delineation by noting: "Two conditions must be met to fulfil the requirements for delineation; there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members" (Report, Pg. 1.) As the Requesters admit, the Panel then "proceeds through the proper requirements of Delineation, which it names accurately....The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the "proper requirements" of the test for delineation.

Again the Requesters dispute the Panel's allusion to the "awareness and recognition" of the Hotel Community's members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community's members.....Disagreement with the Panel's substantive conclusions, however, is not a proper basis for reconsideration"

79. In their Reconsideration Request, the Claimants argue that the third question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure properly to apply the test for Uniqueness. They say:

"The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has "no other significant meaning beyond identifying the community" because it has itself cited a significant other meaning and relied on that other meaning (that the word means "an establishment with services and additional facilities where accommodation and in most cases meals are available") in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of "hotel" under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is "no other significant meaning" for the purpose of finding Uniqueness....

The word "hotel" means to most of the world what the ISO definition says it means – a place for lodging and meals. To assert that it means to most

people the association of business enterprises that run the hotels is unsubstantiated and absurd."

80. In dealing with this allegation the BGC gave consideration to the definition of uniqueness in the Guidebook and stated:

> *"The Requesters have identified no procedural deficiency in the Panel's determination that the uniqueness requirement was met. The Requesters concede that "HOTEL" has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel's substantive conclusion, that is not a proper basis for reconsideration.*

81. As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE, the Claimants refer to Article 7 of ICANN's Affirmation of Commitments and Articles I.2.8, III.1 and IV.2.20 of ICANN's Bylaws and say:

> *"Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions...there are a number of features which are prejudicial to standard applicants, including:*
>
> > *(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications....*
> > *(b) There is no publication of materials to be examined by the Panel....*
> > *(c) Insufficient analysis and reasons were given on how the Panelist reached their CPE report...."*

82. In dealing with this allegation the BGC stated:

> *"None of these concerns represent a policy or procedure violation for the purposes of reconsideration under ICANN's Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook's CPE provisions do not include Requester's "wish list" of procedural requirements, the Panel's adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN's foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request."*

83. In considering the original CPE report of 11 June 2014, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration request dated 22 August 2014, the Panel have looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.

84. Taking, first of all, the three instances of failure to follow the Guidebook policy alleged by the Claimants, it is clear from the BGC determination document of 22 August 2014 as a whole and, particularly, from those extracts quoted above that each one was carefully considered by the BGC in its determination, and that the BGC did properly consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.

85. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

86. As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE claimed by the Claimants in the Reconsideration Request, it is clear from the face of these allegations that these are complaints about the CPE process as a whole and are not specific to the .hotel CPE. In consequence of the Claimants' confirmation at the hearing on 2 December 2015, that relief in respect of the CPE process as a whole is not being pursued, it is not strictly necessary for the Panel to consider this further. However, the Panel wishes to put on record that it considers that the BGC, in denying the Claimants' Reconsideration Request, acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants' complaints in this regard are also not made out.

2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.

87. In conducting this analysis, the Panel has carefully considered the DIDP Request dated 4 August 2014, the Response from ICANN of 3 September 2014, the Reconsideration Request dated 19 September 2014 and the BGC denial of the Reconsideration Request dated 11 October 2014. In doing so, the Panel has

considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

88. The Panel knows that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

> a. whether the BGC acted without conflict of interest in taking its decision?
> b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
> c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

89. As with the previous issue, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

90. In line with the approach taken in the previous issue, the Panel consider that the review undertaken by the BGC should look at whether the ICANN staff, in responding to the DIDP Request, followed the correct procedure and correctly applied ICANN policies, and that, in doing so, the BGC needs to look into how the procedure was followed and how policy was applied so that the BGC has a reasonable degree of assurance that the ICANN staff correctly followed the requisite procedure and correctly applied ICANN policies.

91. In their DIDP Request of 4 August 2014, the Claimants asked for four categories of documents, namely:

1) *"All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication ("Communications") between individual member of ICANN's Board or any member of ICANN Staff and the [EIU] or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;*
2) *The curriculum vitaes ("CVs") of the members appointed to the CPE Panel;*
3) *All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and*
4) *All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report."*

92. In ICANN's Response of 3 September 2014 it was explained that ICANN, whether at Board or staff level, is not involved with the selection to the CPE Panel of the two individual evaluators that perform the scoring in the CPE process and that ICANN is not provided with information about who the evaluators on any individual CPE Panel may be. As this is all done within the EIU, ICANN, it was stated, did neither have the documentation sought in numbered request 1) above, nor did it have the CVs sought in numbered request 2) above. These are clear statements that no such documentation exists.

93. However, the Response goes on to say that to *"the extent that ICANN has documentation with the EIU for the performance of its role as the coordinating firm as it relates to the .HOTEL CPE, those documents are subject to certain of the Defined Conditions of Non-Disclosure set forth in the DIDP."* It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Five separate Conditions for Nondisclosure are listed.

94. The Response does not give any more detail as to what documents it actually has *"for the performance of its role as the coordinating firm"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has, and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

95. In dealing with the documentation sought in numbered request 3) above, the Response states *"Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring for any individual CPE. As a result, ICANN does not have documents of this type."* That is a clear and comprehensive statement that such documentation does not exist.

96. However, the Response goes on to say that to *"the extent that ICANN has communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE, (as anticipated in the CPE Panel Process Document), those documents are subject to the following Defined Conditions of Nondisclosure set forth in the DIDP"*. It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Four separate Conditions for Nondisclosure are listed.

97. The Response does not give any more detail as to what *"communications with persons from EIU who are not involved in the scoring of a CPE"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

98. In dealing with the documentation sought in numbered request 4) above, the Response states:

> *"In order to maintain the independence and neutrality of the CPE Panels as coordinated by the EIU, ICANN has limited the ability for requesters or other interested parties to initiate direct contact with the panels – the CPE Panel goes through a validation process regarding letters of support or opposition (as described in the CPE Panel Process document) but that is the extent of direct communications that the CPE Panel is expected to have. For process control purposes, from time to time ICANN is cc'd on the CPE Panel's verification emails. These emails are not appropriate for disclosure pursuant to the following Defined Conditions of Nondisclosure set forth in the DIDP".*

It then goes on to state the single defined Condition for Nondisclosure upon which ICANN is relying to justify nondisclosure.

99. In this instance, unlike those for numbered requests 1), 2) and 3) above, ICANN has described a single category of documents and the single Condition for Nondisclosure upon which it relies, thus making it possible to judge whether the policy for nondisclosure has been correctly applied.

100. In the Panel's view, it is unfortunate that the ICANN staff did not adopt the same approach to dealing with documents which ICANN was not prepared to disclose when responding to numbered requests 1), 2) and 3) as was adopted with numbered request 4). Simply to say that *"to the extent"* ICANN has documents which fall within the categories requested in numbered requests 1), 2) and 3) such documents are not disclosable, for a variety of reasons, without making any attempt to link categories of document to particular Conditions for Nondisclosure, gives the impression of a process not properly conducted.

101. Such an approach does not provide the confidence that those requesting disclosure of documents are entitled to have, namely that a collection of potentially responsive documents has taken place and a review has actually been conducted by the ICANN staff as to whether any of the documents identified as responsive to the request are subject to any of the Conditions of Nondisclosure, as is required by ICANN's published policy for responding to DIDP requests. If the ICANN staff had made this clear in the response it could well have provided the Claimants with the reassurance that both procedure and policy had been followed and applied.

102. In the Reconsideration Request of 19 September 2014, the Claimants say:

> *"ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. At*

minimum, the BGC should review the asserted protections and independently determine if they have any supportable grounds".

103. Such a request is understandable in the circumstances. Article 4 of ICANN's Articles of Incorporation require it to carry out its activities *"through open and transparent processes"*. Its Core Values include:

> *"Making decisions by applying documented policies neutrally and objectively, with integrity and fairness"*, its Bylaws include the requirement to *"operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness".*

104. The Panel is, of course, charged with reviewing the action of ICANN's Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN's staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.

105. Although the Reconsideration Request said that *"the BGC should review the asserted protections and independently determine if they have any supportable grounds"*, it is the view of the Panel that this should not have been the starting point for the BGC in looking at the actions of the ICANN staff in dealing with the DIDP Request. As has already been said, the BGC does need to have a reasonable degree of assurance that the ICANN staff has correctly followed the requisite procedure and correctly applied ICANN policies. If the BGC considers it has that assurance, the Panel does not consider the BGC is required to conduct any form of independent determination as to the decisions made by the ICANN staff. The BGC would only need to go that far if it came to the conclusion that the ICANN staff had not followed the requisite procedure and/or had not correctly applied ICANN policies.

106. It is obvious, from the face of the denial of the Reconsideration Request issued by the BGC on 11 October 2014, that such an independent determination did not take place, and it appears that the BGC were satisfied that the ICANN staff had correctly followed procedure and applied policy. In the denial the BGC quite correctly state:

> *"It is ICANN's responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process "a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]...Here, in finding that certain requested*

documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process.

107. Whilst the BGC does not explicitly say that a collection process occurred, it is implicit in the BGC denial that the BGC does believe that process was followed. In dealing specifically with numbered requests 1), 2) and 3), the denial says:

> *"Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to "documentation with the EIU for the performance of its role" and "communications with persons from EIU who are not involved in the scoring of a CPE," ICANN analysed the Requesters' requests in view of the DIDP Nondisclosure Conditions, including those covering "information exchanged, prepared for, or derived from the deliberative and decision-making processes" and "confidential business information and/or internal policies and procedures."*

108. The denial quotes from the DIDP response as follows:

> *"ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply"*

The denial then goes on to say:

> *In conformance with the publicly posted DIDP process.... ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN's determination that certain Nondisclosure Conditions apply here, the requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters' substantive disagreement with that determination is not a basis for reconsideration."*

109. The denial also reaches a similar conclusion as to the adherence by the ICANN staff to the DIDP process in determining that the potential harm caused by disclosure outweighed the public interest in disclosure.

110. Whilst the Panel considers that the ICANN staff could, and should, have been more explicit as to the process they had followed in refusing disclosure, the BGC determination document of 11 October 2014 provides the requisite degree of confirmation that the correct procedure was actually followed, that the BGC did, properly, consider whether the relevant policy or procedure was actually applied by the ICANN staff and whether, in doing so, the BGC could have a reasonable degree of assurance that the ICANN staff had correctly the applied the policy or procedure.

111. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.

112. In conducting this analysis, the Panel has carefully considered the CPE report dated 6 October 2014, which determined that Big Room's community based application had prevailed, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration request dated 18 November 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

113. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

> a. whether the BGC acted without conflict of interest in taking its decision?
> b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
> c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

114. As with the previous two issues, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

115. As it did in considering the first issue, and for the reasons stated there, the Panel considers that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly the applied the policy.

116. In their Reconsideration Request of 22 October 2014, at page 10, the Claimants say:

"Requester therefore requests ICANN in accordance with its Reconsideration Request process to:

- *Reconsider the Determination, and in particular not award a passing score in view of the [CPE] criteria set out in the [Guidebook] for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;*
- *Reconsider ICANN's decision that the Requester's application for the .eco gTLD "Will not Proceed" to contracting; and*
- *Restore the "Application Status" of the Requester's application and the Application submitted by the Applicant to "Evaluation Complete", their respective "Contention Resolution Statuses" to "Active", and their "Contention Resolution Result" to "In Contention"."*

117. Earlier in the Reconsideration Request (at pages 2 and 3), the Claimants argue that the concept "eco" is much broader than the community definition provided by Big Room in its community based application and say:

> *"the community definition contained in the Application...- in Requester's opinion – does not meet the criteria for community-based gTLDs that have been set out in ICANN's Applicant Guidebook"*

118. The Reconsideration Request goes on to give the reasons for this assertion, which can be summarised as:

- there is no clear and unambiguous definition of the community that Big Room's community based application is intended to serve;
- the string .eco does not closely describe the community or the community members and over-reaches substantially beyond the community referred to in the application;
- the term .eco has various meanings that are completely unrelated to the community determined in Big Room's application; and
- the CPE Panel failed to detail the letters of opposition received.

119. The BGC's denial states:

> *"The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather the Requesters simply disagree with the CPE Panel's determination and scoring of the Application, and challenge the substantive merits of the CPE Panel's Report. Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the [Guidebook].*

Substantive disagreement with the CPE Panel's Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that [the Reconsideration Request] be denied"

120. The BGC denial then goes on to examine whether the EIU properly applied the Guidebook scoring guidelines and CPE Guidelines in respect of each of the items raised by the Claimants and concludes, in respect of each one, that *"the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines"*.

121. In considering the original CPE report of 6 October 2014, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration Request dated 18 November 2014, the Panel has looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.

122. Unlike the Reconsideration Request in respect of the .hotel CPE determination, this Reconsideration Request does not raise questions as to whether the EIU followed ICANN policy and procedure. It is, indeed, correctly categorised by the BGC in its denial as a statement of substantive disagreement with the EIU's determination. Nevertheless, it is clear from the BGC determination document of 18 November 2014 as a whole that the BGC did, properly, consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.

123. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

4. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

124. Crowell & Moring's letter of 5 June 2015 is addressed for the attention of the Members of the ICANN Board and to Mr Akram Atallah, the President of ICANN's GDD. It makes a number of serious allegations arising from a portal

configuration issue, which ICANN has admitted occurred, and which can be summarised as follows:

- The user credentials of someone called D. Krischenowski were used to conduct over 60 searches resulting in over 200 unauthorized access incidents across an unknown number of gTLDs;
- these searches resulted in the obtaining of sensitive and confidential business information concerning several of the .hotel applicants;
- D. Krischenowski is associated with HTLD; and
- the user of those credentials was deliberately looking for sensitive and confidential business information concerning competing applicants.

125. The letter then goes on to ask for certain information in relation to the portal configuration issue.

126. The letter is clearly addressed to the Members of the Board of ICANN and its President of GDD and asks, largely, for information and not documentation. It appears that the letter was also submitted through ICANN's DIDP and, in consequence, ICANN appears solely to have treated the letter as a DIDP request. Accordingly, on 5 July 2015, the ICANN staff responded in a document entitled *"Response to Documentary Information Disclosure Policy Request"* and stated:

> *"ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests".*

127. As is clear from the face of the letter itself, it is not simply a DIDP request. The attempt by ICANN to treat it solely as such represents, at best, a basic error on its part and, at worst, an attempt by the Board to avoid dealing with what is clearly a serious and sensitive issue, which goes to the integrity of the application process for the .hotel gTLD.

128. To be fair, the DIDP Response goes on to provide much detail as to what ICANN has done in the way of forensic investigation and what that has revealed. It does not, however, state whether any consideration has been given as to the impact on the integrity of the application process for the .hotel gTLD.

129. In the Reply in the .hotel IRP, the Claimants have argued that, in the circumstances, HTLD's application for .hotel must be denied and have asked the Panel to declare that ICANN must reject HTLD's application.

130. In its Sur-Reply, ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws. ICANN states in the Sur-Reply that:

> *"The only Board action (or inaction) that the Claimants vaguely allude to in their Reply is that the Board did not directly respond to a letter addressed to both ICANN Board and staff requesting disclosure of information regarding the Portal Configuration issue. But, it was not the Board's responsibility to do so, and ICANN's Articles and Bylaws do not mandate that the Board reply to every letter it receives".*

131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

132. In its Sur-Reply, ICANN goes on to say:

> *"Although Claimants Argue that [HTLD] "is closely linked with individuals who have misused, or have permitted the misuse of, their user credentials...this argument is unsupported and asserts no conduct by the ICANN Board. Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants' belief as to what the Board should do."*

133. Article III.1 of ICANN's Bylaws provides that *"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."*

134. The approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with this Bylaw. It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board

of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

137. This issue was raised after this IRP process had commenced and has only been the subject of relatively brief argument by the Claimants in their Reply and by ICANN in its Sur-Reply. At the hearing, not only did ICANN's representative inform the Panel that the issue was still under consideration by the Board of ICANN, but he also gave an undertaking on behalf of ICANN that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.

138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.

5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP.

139. As has already been stated, in the Claimants' Reply in the .hotel IRP, Minds + Machines Group Limited stated it wished to join in the proceedings and, in its Sur-Reply, ICANN objected, relying on Article 7 of the ICDR International Dispute Resolution Procedures.

140. Article 7 provides that "[n]o *additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*". There is nothing in the ICANN Supplementary Procedures that is inconsistent with this provision and, accordingly, it governs the procedure of this IRP.

141. Minds + Machines Group Limited applied for the .hotel gTLD and there does not appear to be any reason why, should it have so wished, it could not have joined with the Claimants in bringing the .hotel IRP. It did not do so and no reason has been given for its failure to do so. Accordingly, pursuant to Article IV.3.3 of ICANN's Bylaws, it is now time-barred from doing so.

142. In all the circumstances, the Panel rejects the request of Minds + Machines Group Limited to join this IRP.

J. Conclusion

143. Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by

EIU in considering community based applications, and the provisions of the Guidebook. However, the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.

144. Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.

145. At the hearing, ICANN submitted that it was not subject to a due process obligation neither pursuant to its Articles of Incorporation and Bylaws, nor pursuant to general international legal principles, notwithstanding Article 4 of it Articles of Incorporation. If this was intended as a general statement, the Panel finds this most surprising in the context of the role ICANN fulfils and the language of Article 4 itself. ICANN is a California non-profit corporation but Article 4 of the Articles of Incorporation refers to the principles of international law and local law and to the use of open and transparent processes to enable competition and open entry in Internet markets. The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable.

146. Also, at the hearing, ICANN confirmed that, notwithstanding that different individual evaluators can be used to consider different CPE applications, the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.

147. The CPE process for this round of gTLDs is almost at an end, so there is little or nothing that ICANN can do now, but the Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in

place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.

148. Further, as has already been stated:

— In its letter of 4 December 2015, ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
— At the hearing on 7 December 2015, ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.

149. The combination of these statements gives cause for concern to the Panel. As has already been noted, Article I.2 of the Bylaws states:

> *"Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."*

150. The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.

151. Having expressed the Panel's concern at these general issues, the Panel now turns to the specific issues which, ultimately, it was asked to consider in this IRP. The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws, and that the Claimants' complaints have not been made out.

152. In consequence, the Panel will not be making any of the declarations sought by the Claimants.

K. The Prevailing Party and Costs

153. Article IV.3.18 of the Bylaws states:

> *"The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all the costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances including a consideration of the reasonableness of the parties positions and their contribution to the public interest. Each party to the IRP shall bear its own expenses."*

154. The Panel confirms that it makes its declaration based solely on the documentation, supporting materials and arguments submitted by the parties and that on the basis of that documentation, supporting material and arguments, has concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.

155. Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the Claimants' DIDP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.

156. As for the .eco IRP, it is clear that the Reconsideration Request was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.

157. Finally, although the letter from Crowell & Moring of 5 June 2015 raises some very serious issues, which the Panel considers the ICANN Board needs to address, in the end, the Panel has not had to adjudicate on this issue.

158. In conclusion, therefore, whilst the Panel has declared ICANN to be the prevailing party, the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address. In the circumstances, the Panel considers that the Claimants'

contribution to the public interest merits ICANN bearing half of the costs of the IRP Provider, which is the ICDR.

159. Article IV.3.18 provides that "[e]*ach party to the IRP shall bear its own expenses*". Rule 11 of ICANN's Supplementary Procedures provides:

> *"In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the Requestor is not successful in the Independent Review, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees"*

160. ICANN has not sought to argue that any of the Claimants failed to enter into the Cooperative Engagement Process in good faith, and there is no evidence of this in the materials before the Panel. In consequence, the panel considers that, in accordance with Article IV.3.18 of the Bylaws, each side shall bear their own expenses including legal fees.

FOR THE FORGOING REASONS, the Panel hereby:

(1) Declares that the IRP Request made in relation to the .hotel gTLD by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC is denied;

(2) Designates ICANN as the prevailing party in the .hotel IRP;

(3) Declares that the IRP Request made in relation to .eco gTLD by Little Birch, LLC and Minds + Machines Group Limited is denied;

(4) Designates ICANN as the prevailing party in the .eco IRP;

(5) Declares that the fees and expenses of the IRP Panel members, totalling US$113,351.52, and the fees and expenses of the ICDR, totalling US$11,500.00, shall be born as to half by ICANN, and as to the other half collectively by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds +Machines Group Limited ("Applicants"). Therefore, ICANN shall reimburse the Applicants collectively the sum of $5,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Applicants; and

(6) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

Dirk P. Tirez
Date: 11 FEBRUARY 2016

Thomas H. Webster
Date: 11 FEBRUARY 2016

Peter J. Rees QC
Chair of the IRP Panel
Date: 11 FEBRUARY 2016

R-48

RESPONDENT'S EXHIBIT

Subject: Re: [Reconsideration Request] Reconsideration Requests 18-6
Date: Wednesday, May 23, 2018 at 1:59:16 PM Pacific Daylight Time
From: Herb Waye (sent by reconsider <reconsider-bounces@icann.org>)
To: Reconsideration
CC: ombudsman

Reconsideration Request 18-6

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-6.

Best regards,

Herb Waye
ICANN Ombudsman

https://www.icann.org/ombudsman [icann.org]
https://www.facebook.com/ICANNOmbudsman [facebook.com]
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:
https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf [icann.org]
Community Anti-Harassment Policy
https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en [icann.org]
Confidentiality
All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman.The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

---

From: Reconsideration <Reconsideration@icann.org>
Date: Saturday, May 19, 2018 at 7:20 PM
To: ombudsman <ombudsman@icann.org>
Cc: Reconsideration <Reconsideration@icann.org>
Subject: Reconsideration Requests 18-4, 18-5, and 18-6

Dear Herb,

On 13 and 14 April 2018, the following Reconsideration Requests were submitted seeking reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11, which resolved the Community Priority Evaluation (CPE) Process Review:

- Request 18-4 filed by dotgay LLC
- Request 18-5 filed by DotMusic Limited

- Request 18-6 filed by Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., Fegistry LLC

The Requests have been published on the Reconsideration page and are also attached.

The Board Accountability Mechanisms Committee (BAMC) has determined that Requests 18-4, 18-5, and 18-6 are sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, Section 4.2 (l)[icann.org] states:

> (l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.
>
> > (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
> >
> > (ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.
> >
> > (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Requests 18-4, 18-5, and 18-6 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Requests 18-4, 18-5, and 18-6 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of the Requests.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

R-49

RESPONDENT'S EXHIBIT

Resources

- About ICANN
- Board
- Accountability
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- Complaints Office
- Domain Name System Abuse
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- Registrars
- Registry Operators
- Domain Name Registrants
- GDD Metrics
- Identifier Systems Security, Stability and Resiliency (OCTO IS-SSR)
- ccTLDs
- Internationalized Domain Names
- Universal Acceptance Initiative
- Policy
- Operational Design Phase (ODP)
- Implementation
- Public Comment

Approved Board Resolutions | Regular Meeting of the ICANN Board

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27 Jan 2019

1. **Consent Agenda:**
   a. **Approval of Minutes**

   b. **Acceptance of GNSO2 Review Working Group's Implementation Final Report**
   Rationale for Resolutions 2019.01.27.02 – 2019.01.27.03

   c. **Consideration of the At-Large Advisory Committee Detailed Implementation Plan**
   Rationale for Resolutions 2019.01.27.04 – 2019.01.27.07

   d. **FY20 IANA Operating Plan and Budget**
   Rationale for Resolution 2019.01.27.08

   e. **October 2021 ICANN Meeting Venue Contracting**
   Rationale for Resolutions 2019.01.27.09 – 2019.01.27.11

   f. **Contract Renewal and Disbursement for ERP Initiative (Oracle Cloud)**
   Rationale for Resolutions 2019.01.27.12 – 2019.01.27.13

   g. **Reaffirming the Temporary Specification for gTLD Registration Data**
   Rationale for Resolutions 2019.01.27.14 – 2019.01.27.15

2. **Main Agenda:**
   a. **Delegation of the .موريتانيا country-code top-level domain representing Mauritania in Arabic Script to Université de Nouakchott Al Aasriya**
   Rationale for Resolution 2019.01.27.16

   b. **Delegation of the .SS (South Sudan) country-code top-level domain to the National Communication Authority (NCA)**
   Rationale for Resolution 2019.01.27.17

   c. **GAC Advice: Barcelona Communiqué (October 2018)**
   Rationale for Resolution 2019.01.27.18

   d. **Adoption of GNSO Consensus Policy relating to Certain Red Cross & Red Crescent Names at the Second Level of the Domain Name System**
   Rationale for Resolutions 2019.01.27.19 – 2019.01.27.20

   e. **Board Committee Membership and Leadership Changes**
   Rationale for Resolutions 2019.01.27.21 – 2019.01.27.22

   f. **Consideration of Reconsideration Request 16-11: Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (.HOTEL)**

Root Zone KSK Rollover
Technical Functions
Contact
Help

Rationale for Resolution 2019.01.27.23

g. **Consideration of Reconsideration Request 18-9: DotKids Foundation (.KIDS)**
Rationale for Resolution 2019.01.27.24

h. **Consideration of Reconsideration Request 16-12: Merck KGaA (.MERCK)**
Rationale for Resolution 2019.01.27.25

i. **AOB**

1. Consent Agenda:

a. Approval of Minutes

Resolved (2019.01.27.01), the Board approves the minutes of the 25 October Regular and Organizational Meetings of the ICANN Board and the 6 November Special Meeting of the ICANN Board.

b. Acceptance of GNSO2 Review Working Group's Implementation Final Report

Whereas, as part of the second review of the Generic Names Supporting Organization (GNSO), on 3 February 2017 the Board accepted the GNSO Review Implementation Plan and directed the GNSO Council to provide the Board with regular reporting on the implementation efforts.

Whereas, the GNSO Review Working Group, with GNSO Council approval and oversight, provided the Board via the Organizational Effectiveness Committee (OEC) with semi-annual updates on the progress of implementation efforts until such time that the implementation efforts concluded.

Whereas, the OEC monitored the progress of implementation efforts via the semi-annual implementation reports and recommends that the Board accept the Implementation Final Report of the second GNSO Review issued by the GNSO Review Working Group and approved by the GNSO Council on 16 August 2018.

Resolved (2019.01.27.02), the Board acknowledges the GNSO Review Working Group's hard work and thanks them for producing the report of implementation of recommendations to improve the GNSO's effectiveness, transparency, and accountability, in line with the proposed timeline as set out in the adopted GNSO Review Implementation Plan.

Resolved (2019.01.27.03), the Board accepts the GNSO2 Review Implementation Final Report of the second GNSO Review issued by the GNSO Review Working Group, which marks the completion of this important review. The Board encourages the GNSO to continue monitoring the impact of the implementation of the recommendations from the second Review of the GNSO as part of its continuous improvement process.

Rationale for Resolutions 2019.01.27.02 – 2019.01.27.03

Why is the Board addressing the issue?

ICANN organizes independent reviews of its supporting organizations and advisory committees as prescribed in Article 4 Section 4.4 of the ICANN Bylaws, to ensure ICANN's multistakeholder model remains transparent and accountable, and to

improve its performance.

This action completes the second review of the GNSO and is based on the Implementation Final Report as adopted by the GNSO Council, the final report of the independent examiner, Westlake Governance, as well as the GNSO Review Working Group's (WG) assessment of the recommendations as adopted by the GNSO Council. Following the assessment of all pertinent documents and community feedback by the OEC, the Board is now in a position to consider and accept the Implementation Final Report.

The Board, with recommendation from the Organizational Effectiveness Committee of the Board (OEC), considered all relevant documents, including the final report, the GNSO Review Working Party Feasibility Assessment and Prioritization of Recommendations by Independent Examiner ("Feasibility Assessment"), and accepted the final report issued by the independent examiner on 25 June 2016. The Board adopted the Feasibility Assessment, except recommendations 23 and 32. Additionally, the Board directed the GNSO Council to: draft an implementation plan for the adopted recommendations with a realistic timeline that took into account the continuously high community workload and consideration of the prioritization proposed by the WG; publish the plan no later than six (6) months after the Board's adoption of the Feasibility Assessment; ensure that the implementation plan includes definitions of desired outcomes and a way to measure current state as well as progress toward the desired outcome; and report back regularly to the Board on its implementation progress.

On 3 February 2017, the Board accepted the Implementation Plan provided by the WG and approved by the GNSO Council on 15 December 2016, and directed the WG to provide semi-annual updates to the OEC until such time that the implementation efforts have concluded.

What is the proposal being considered?

The proposal being considered is that the Board accepts the WG's Implementation Final Report, adopted by the GNSO Council, and considered by the OEC.

Which stakeholders or others were consulted?

The Board, through the OEC, consulted with the GNSO Review Working Group, who was responsible for the implementation, and recommended good practices for conducting effective reviews on a timely basis and monitored the progress of the review as well as the progress of the implementation of review recommendations.

What concerns, or issues were raised by the community?

The implementation work conducted by the GNSO followed its standard practices to promote transparency and accountability. No concerns were voiced by the community.

What significant materials did the Board review?

The Board reviewed relevant Bylaws sections, Organizational Review Process documentation, GNSO Review Recommendations Implementation Plan, and the GNSO Review Working Group's Implementation Final Report.

What factors did the Board find to be significant?

The Board found several factors to be significant, contributing to the effective completion of the implementation work:

- Convening a dedicated group that oversees the implementation of Board-accepted recommendations
- An implementation plan containing a realistic timeline for the implementation, definition of desired outcomes and a way to measure current state as well as progress toward the desired outcome
- Timely and detailed reporting on the progress of implementation

Are there positive or negative community impacts?

This Board action is expected to have a positive impact on the community by acknowledging and highlighting an effective completion of implementation of GNSO Review Recommendations.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

This Board action is anticipated to have no fiscal impact as the implementation efforts have successfully concluded. The ramifications on the ICANN organization, the community and the public are anticipated to be positive, as this Board action signifies an important milestone for organizational reviews and self-governance of ICANN.

Are there any security, stability or resiliency issues relating to the DNS?

This Board action is not expected to have a direct effect on security, stability or resiliency issues relating to the DNS.

How is this action within ICANN's mission and what is the public interest served in this action?

The Board's action is consistent with ICANN's commitment pursuant to section 4.1 of the Bylaws to continue reviewing that entities within ICANN have an ongoing purpose, and to improve the performance of its supporting organizations and advisory committees. This action will serve the public interest by fulfilling ICANN's commitment to continuous review of its components to confirm that where people engage with the ICANN community support the purposes and expectations of that engagement.

Is public comment required prior to Board action?

No public comment is required.

c. Consideration of the At-Large Advisory Committee Detailed Implementation Plan

Whereas, ICANN Bylaws Article 4, Section 4.4 calls on the ICANN Board to "cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness."

Whereas, the independent examiner of the At-Large Review produced a Final Report in February 2017. That report was received by the Board in June 2018, and

at the same time the Board accepted the At-Large Review Recommendations Feasibility Assessment & Implementation Plan and the At-Large Review Implementation Overview Proposal as approved by the ALAC.

Whereas, in response to that June 2018 resolution, the At-Large Review Implementation Working Group was created. That Working Group developed and approved the At-Large Review Implementation Plan (the "Implementation Plan") on 19 November 2018, which was endorsed by the ALAC endorsement on 27 November 2018.

Resolved (2019.01.27.04), the Board acknowledges the At-Large Review Implementation Working Group's work and thanks the members of that Working Group for their efforts.

Resolved (2019.01.27.05), the Board accepts the At-Large Review Implementation Plan, including the phased approach contained within. The Board acknowledges that more details with regard to implementation details may be required for implementation of Priorities 2 and 3 activities.

Resolved (2019.01.27.06), the Board directs the At-Large Review Implementation Working Group to provide updates to the OEC every six months. Those bi-annual updates shall identify achievements as measured against the existing implementation plan, as well as details on future implementation plans. It is during these updates that the At-Large Review Implementation Working Group shall provide more details on implementation progress, and measurability. The OEC may request interim briefings if deemed necessary.

Resolved (2019.01.27.07), that any budgetary implications of the At-Large Review implementation shall be considered as part of the applicable annual budgeting processes.

Rationale for Resolutions 2019.01.27.04 – 2019.01.27.07

To ensure ICANN's multistakeholder model remains transparent and accountable, and to improve its performance, ICANN organizes independent reviews of its supporting organizations and advisory committees as prescribed in Article 4 Section 4.4 of the ICANN Bylaws. The second At-Large started in 2016 and the independent examiner presented its Final Report in May 2017.

The At-Large Review Implementation recommendations as noted in the At-Large Review Implementation Overview Proposal have the potential to advance ICANN's transparency and accountability objectives and have been considered carefully by the Board's Organizational Effectiveness Committee as well as by the full Board.

The Board resolution will have a positive impact on ICANN and especially the ALAC and At-Large community as it reinforces ICANN's and the ALAC and At-Large community's commitment to maintaining and improving its accountability, transparency and organizational effectiveness throughout the implementation process.

Due to the number of recommendations that need to be implemented, the Board supports the approach by priorities as laid out in the Implementation Plan (Exhibit A). This will allow the community time to refine details as the implementation process proceeds– especially during Priority 2 and 3 activities set out in that Implementation Plan.

Some recommendations – especially those foreseen to be implemented under Priority 2 and 3 activities – may benefit from additional details regarding their exact

implementation. Due to the difficulty to predict these issues months in advance, the Board supports the idea that the At-Large Review Implementation Working Group provides updates bi-annually to the OEC. It is during these updates that the ALAC can provide greater implementation details with regard to those recommendations that are going to be scheduled for the forthcoming six-month period following the respective OEC update. At that time, the ALAC would be in a better position to flag any significant variations from the original implementation plan and timing. The At-Large Review Implementation Plan sets out the prioritization, expected resource allocation in terms of staff time, web and wiki resources, expected budgetary implications such as additional staff resources, and the steps to implementation. While the majority of implementation activities will use existing At-Large resources, any additional fiscal implications are noted below. The ALAC will utilize the normal annual budgetary comment process to request the required resources. If such resources are not provided, the likely result would be a significant slow down in the speed of the Review Implementation.

Why is the Board addressing the issue?

This resolution moves the second review of the At-Large community into the implementation phase. Following the assessment of the Implementation Plan and the feedback from the Board's Organizational Effectiveness Committee, the Board is now in a position to consider the Plan and instruct the ALAC to continue the implementation process as set out in the Plan. This step is an important part of the Organizational Review process of checks and balances, to ensure that the spirit of Board-approved recommendations will be addressed through the implementation plans, while being mindful of budgetary and timing constraints.

What is the proposal being considered?

The proposal the Board is considering is the Organizational Effectiveness Committee's recommendation of the adoption of the At-Large Review Implementation Plan, drafted and adopted by the At-Large Review Implementation Working Group, endorsed by the ALAC.

Which stakeholders or others were consulted?

Immediately after the Board passed the Resolution on the At-Large Review, the leadership of the At-Large Review Working Group provided updates on the Review and next steps on each of the five RALO monthly teleconferences. The creation of the At-Large Review Implementation Working Group involved careful consideration of members to ensure geographical balance and diversity within each RALO, including among the 232 At-Large Structures and over 100 individual members. During the development of the At-Large Review Implementation Plan, the At-Large Review Implementation WG members updated the ALAC as well as each RALO on a regular basis with the progress that was being made. There were also several discussions on the At-Large Review Implementation during ICANN63 face-to-face sessions. At each step, feedback was discussed by the At-Large Review Implementation WG and incorporated into the final Plan.

What concerns, or issues were raised by the community?

During the development of the At-Large Review Implementation Plan, the At-Large community raised the concern over whether the third At-Large Summit (ATLAS III) would take place as tentatively scheduled during ICANN66 in Montreal in October 2019 and identified as a Priority 1 activity and requiring budgetary consideration in advance of the broader organizational budget cycle. In September 2018 the Board confirmed that the ICANN organization still had authority to proceed with the planning and contracting.

What significant materials did the Board review?

The Board reviewed the At-Large Review Implementation Plan as adopted by the At-Large Review Implementation Working Group and endorsed by the ALAC.

Are there fiscal impacts or ramifications on ICANN, the Community, and/or the Public (strategic plan, operating plan, or budget)?

The work to improve the effectiveness of the At-Large organization – by implementing the issues resulting from the Review and the At-Large Review Implementation Overview Proposal, may require additional financial resources that are subject to ICANN's normal budgetary processes. This resolution does not authorize any specific funding for those implementation efforts. The Board understands that some of the Priority 1 work, such as skills development and communication efforts, will require FY20 Additional Budget Requests. The Board also understands that the ongoing and Priority 2 activities are estimated to require the addition of one Full Time Employee equivalent, and there are other anticipated resource needs for items such as communications and data collection.

Are there any security, stability or resiliency issues relating to the DNS?

This action is not expected to have a direct impact on the security, stability or resiliency of the DNS. Still, once the improvements are implemented, future activities of the ALAC and At-Large community, including advice or inputs into the policy development processes, will become more transparent and accountable, which in turn might indirectly contribute to the security, stability or resiliency of the DNS.

Is public comment required prior to Board action?

The Draft Report of the independent examiner was posted for public comment. There is no public comment required prior to this Board action. The voice of the ALAC has been reflected throughout the review process – via the At-Large Review Working Party that produced the ALAC Implementation Overview Proposal; the At-Large Review Implementation Working Group that developed the implementation plan; and the ALAC that endorsed the implementation plan.

How is this action within ICANN's mission and what is the public interest served in this action?

Given that At-Large represents the best interests of individual Internet end users within ICANN's multistakeholder governance approach, the approval of the At-Large Review Implementation Plan, which will lead to a strengthened At-Large community, will have a direct positive impact to ICANN's mission in its bottom-up policy development process. The public interest is also served through this action which furthers the continued development and support of a diverse and informed multistakeholder community.

d. FY20 IANA Operating Plan and Budget

Whereas, the draft FY20 IANA Operating Plan and Budget (OP&B) was posted for public comment in accordance with the ICANN Bylaws on 28 September 2018.

Whereas, comments received through the public comment process were reviewed and responded to and provided to the BFC members for review and comment.

Whereas, all public comments have been taken into consideration, and where appropriate and feasible, have been incorporated into a final FY20 IANA OP&B.

Whereas, the Public Technical Identifier's Board adopted a Final FY20 PTI OP&B on 20 December 2018, which is a required input for the ICANN Board's consideration of the broader IANA OP&B. Per the ICANN Bylaws, once the IANA OP&B is adopted by the ICANN Board, it is then posted on ICANN's website and the Empowered Community has an opportunity to consider the IANA OP&B for rejection.

Whereas, the public comments received, as well as other solicited community feedback were taken into account to determine required revisions to the draft IANA FY20 Operating Plan and Budget.

Resolved (2019.01.27.08), the Board adopts the FY20 IANA Operating Plan and Budget, including the FY20 IANA Caretaker Budget.

Rationale for Resolution 2019.01.27.08

In accordance with Section 22.4 of the ICANN Bylaws, the Board is to adopt an annual budget for the operation of the IANA functions and publish that budget on the ICANN website. On 28 September 2018 drafts of the FY20 PTI O&B and the FY20 IANA OP&B were posted for public comment. The PTI Board approved the PTI Budget on 20 December 2018, and the PTI Budget was received as input into the FY20 IANA Budget.

The published draft FY20 PTI OP&B and the draft FY20 IANA OP&B were based on numerous discussions with members of ICANN org and the ICANN Community, including extensive consultations with ICANN Supporting Organizations, Advisory Committees, and other stakeholder groups throughout the prior several months.

All comments received in all manners were considered in developing the FY20 IANA OP&B. Where feasible and appropriate these inputs have been incorporated into the final FY20 IANA OP&B proposed for adoption.

The FY20 IANA OP&B will have a positive impact on ICANN in that it provides a proper framework by which the IANA services will be performed, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN's mission, as it is fully consistent with ICANN's strategic and operational plans, and the results of which in fact allow ICANN to satisfy its mission.

This decision will have a fiscal impact on ICANN and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS) with respect to any funding that is dedicated to those aspects of the DNS.

This is an Organizational Administrative Function that has already been subject to public comment as noted above. ICANN's Empowered Community now has an opportunity to consider if it will exercise its rejection power over this OB&P.

e. October 2021 ICANN Meeting Venue Contracting

Whereas, ICANN intends to hold its last Public Meeting of 2021 in the North America region.

Whereas, ICANN organization has completed a thorough review of the available venues in the North America region and finds the one in Seattle, Washington to be the most suitable.

Resolved (2019.01.27.09), the Board authorizes the President and CEO, or his designee(s), to engage in and facilitate all necessary contracting and disbursements for the host venue for the October 2021 ICANN Public Meeting in Seattle, Washington, in an amount not to exceed *[REDACTED-FOR NEGOTIATION PURPOSES*].

Resolved (2019.01.27.10), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article III, section 5.2 of the ICANN Bylaws until the President and CEO determines that the confidential information may be released.

Resolved (2019.01.27.11), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2019.01.27.09 – 2019.01.27.11

As part of ICANN's Public Meeting strategy, ICANN seeks to host a meeting in a different geographic region (as defined in the ICANN Bylaws) three times a year. ICANN72 is scheduled for 23-28 October 2021. Following a search and evaluation of available venues, the organization identified Seattle, Washington as a suitable location for the ICANN Public Meeting.

The organization performed a thorough analysis of the available locations and prepared a paper to identify those that met the Meeting Location Selection Criteria (see http://meetings.icann.org/location-selection-criteria). Based on the proposals and analysis, ICANN has identified Seattle, Washington as the location for ICANN72. Selection of this North America location adheres to the geographic rotation guidelines established by the Meeting Strategy Working Group.

The Board reviewed the organization's briefing for hosting the meeting in Seattle, Washington and the determination that the proposal met the significant factors of the Meeting Location Selection Criteria, as well as the related costs for the facilities selected, for the October 2021 ICANN Public Meeting. ICANN conducts Public Meetings in support of its mission to ensure the stable and secure operation of the Internet's unique identifier systems, and acts in the public interest by providing free and open access to anyone wishing to participate, either in person or remotely, in open, transparent and bottom-up, multistakeholder policy development processes.

There will be a financial impact on ICANN in hosting the meeting and providing travel support as necessary, as well as on the community in incurring costs to travel to the meeting. But such impact would be faced regardless of the location and venue of the meeting. This action will have no impact on the security or the stability of the DNS.

This is an Organizational Administrative function that does not require public comment.

f. Contract Renewal and Disbursement for ERP Initiative (Oracle Cloud)

Whereas, ICANN has an established a need to renew contracts for ERP solution, Oracle Cloud.

Whereas, the Board Finance Committee has reviewed the financial implications of contract renewal with Oracle Cloud for ICANN's ERP solution and has considered

alternatives.

Whereas, both the organization and the Board Finance Committee have recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the contracts with Oracle Cloud for ICANN's ERP solution and make all necessary disbursements pursuant to those contracts.

Resolved (2019.01.27.12), the Board authorizes the President and CEO, or his designee(s), the take all necessary actions to renew the contracts with Oracle Cloud for ICANN's ERP solution and make all necessary disbursements pursuant to those contracts.

Resolved (2019.01.27.13), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2019.01.27.12 – 2019.01.27.13

ICANN has successfully utilized Oracle Cloud ERP since implementation Go Live in December 2016. Over the past years, ICANN organization has gradually increased the ERP systems and transactional processing knowledge and is in a position to make incremental efficiency improvements to maximize original investment. The Oracle Cloud ERP replaced a then aging Finance, Human Resources and Procurement legacy systems. This solution provided ICANN org with an integrated ERP solution under a single system of record improving systems capacity, global reporting and analysis capability, leading to improved productivity and cross-functional efficiencies, and enhance internal controls.

Current Contract

ICANN's current contract with Oracle Cloud ERP was for a three-year period. This contract expired in December 2018. Oracle Cloud has provided ICANN with a one-month contract extension. Annual cost is *[REDACTED – FOR NEGOTIATION PURPOSES]*.

New Contract

After thorough analysis, negotiations, and an adjustment to the number of licenses with the supplier, the organization has two options available: (i) three-year contract at *[REDACTED – FOR NEGOTIATION PURPOSES]* annually with three-year total cost of *[REDACTED – FOR NEGOTIATION PURPOSES]*, (ii) five-year contract at *[REDACTED – FOR NEGOTIATION PURPOSES]* annually with five-year total cost of *[REDACTED – FOR NEGOTIATION PURPOSES]*.

After careful analysis of options submitted by the organization, the five-year contract option is considered a viable, cost-effective solution. This solution has lower total cost, lock-in pricing for protection against increases for five years, and flexibility for the organization to perform another overall ERP systems analysis in three years (2021-2022) to determine if the solution set is best for ICANN.

The Board reviewed the organization's and the Board Finance Committee's recommendations for contracting and disbursement authority for Oracle Cloud ERP contract renewal.

Taking this Board action fits squarely within ICANN's mission and the public interest in that it ensures that payments of large amounts for one invoice to one entity are reviewed and evaluated by the Board if they exceed a certain amount of delegated

authority through ICANN's Contracting and Disbursement Policy. This ensures that the Board is overseeing large disbursements and acting as proper stewards of the funding ICANN receives from the public.

There will be a financial impact on ICANN to renew Oracle Cloud ERP contract. This impact is currently included in the FY20 Operating Plan and Budget that is pending Board approval. This action will not have a direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

g. Reaffirming the Temporary Specification for gTLD Registration Data

Whereas, on 17 May 2018, the Board adopted the Temporary Specification for gTLD Registration Data (the "Temporary Specification") to be effective 25 May 2018 for a 90-day period. The Temporary Specification establishes temporary requirements to allow ICANN and gTLD registry operators and registrars to continue to comply with existing ICANN contractual requirements and community-developed policies concerning gTLD registration data (including WHOIS) in light of the European Union's General Data Protection Regulation (GDPR).

Whereas, on 21 August 2018, the Board reaffirmed the adoption of the Temporary Specification to be effective for an additional 90-day period beginning on 23 August 2018.

Whereas, on 6 November 2018, the Board reaffirmed the adoption of the Temporary Specification to be effective for an additional 90-day period beginning on 21 November 2018.

Whereas, the Board adopted the Temporary Specification pursuant to the procedures in the Registry Agreement and Registrar Accreditation Agreement for adopting temporary policies. This procedure requires that "[i]f the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy".

Resolved (2019.01.27.14), the Board reaffirms the Temporary Specification for gTLD Registration Data pursuant to the procedures in the Registry Agreement and Registrar Accreditation Agreement concerning the establishment of temporary policies. In reaffirming this Temporary Specification, the Board has determined that:

1. The modifications in the Temporary Specification to existing requirements concerning the processing of personal data in registration data continue to be justified and immediate temporary establishment of the Temporary Specification continues to be necessary to maintain the stability or security of Registrar Services, Registry Services or the DNS or the Internet.
2. The Temporary Specification is as narrowly tailored as feasible to achieve the objective to maintain the stability or security of Registrar Services, Registry Services or the DNS or the Internet.
3. The Temporary Specification will be effective for an additional 90-day period beginning 19 February 2019.

Resolved (2019.01.27.14), the Board reaffirms the Advisory Statement Concerning Adoption of the Temporary Specification for gTLD Registration Data, which sets

forth its detailed explanation of its reasons for adopting the Temporary Specification and why the Board believes such Temporary Specification should receive the consensus support of Internet stakeholders.

Rationale for Resolutions 2019.01.27.14 – 2019.01.27.15

The European Union's General Data Protection Regulation (GDPR) went into effect on 25 May 2018. The GDPR is a set of rules adopted by the European Parliament, the European Council and the European Commission that impose new obligations on all companies and organizations that collect and maintain any "personal data" of residents of the European Union, as defined under EU data protection law. The GDPR impacts how personal data is collected, displayed and processed among participants in the gTLD domain name ecosystem (including registries and registrars) pursuant to ICANN contracts and policies.

On 17 May 2018, the Board adopted the Temporary Specification for gTLD Registration Data ("Temporary Specification") to establish temporary requirements to allow ICANN and gTLD registry operators and registrars to continue to comply with existing ICANN contractual requirements and community-developed policies concerning gTLD registration data (including WHOIS) in relation to the GDPR. The Temporary Specification, which became effective on 25 May 2018, was adopted utilizing the procedure for temporary policies established in the Registry Agreement and the Registrar Accreditation Agreement.

On 21 August 2018, the Board reaffirmed the Temporary Specification for an additional 90-day period beginning 23 August 2018. On 6 November 2018, the Board again reaffirmed the adoption of the Temporary Specification to be effective for a subsequent 90-day period beginning on 21 November 2018.

As required by the procedure in the Registrar Accreditation Agreement and Registry Agreements for adopting a temporary policy or specification, "[i]f the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy."

Today, the Board is taking action to reconfirm the Temporary Specification for an additional 90 days as the temporary requirements continue to be justified in order to maintain the stability or security of registry services, registrar services or the DNS. When adopting the Temporary Specification, the Board provided an Advisory Statement to provide a detailed explanation of its reasons for adopting the Temporary Specification and why the Board believes such Temporary Specification should receive the consensus support of Internet stakeholders. The Board reaffirms the Advisory Statement, which is incorporated by reference into the rationale to the Board's resolutions.

As required when a temporary policy or specification is adopted, the Board took action to implement the consensus policy development process and consulted with the GNSO Council on potential paths forward for considering the development of a consensus policy on the issues within the Temporary Specification. The consensus policy development process must be concluded in a one-year time period. The Board takes note that the GNSO Council launched an Expedited Policy Development Process on the Temporary Specification, and the Working Group is continuing with its deliberations to develop proposed policy recommendations. On 21 November 2018 the Working Group published for public comment the Initial Report of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data. The Working Group defined a schedule to produce a final report in February 2019 and for the report to be provided to the

Board for consideration prior to the expiration of the 1-year period provided for the Temporary Specification. The Board will continue to engage with the GNSO Council on this matter and reconfirms its commitment to provide the necessary support to the work of the Expedited Policy Development Process to meet the deadline (see 7 August 2018 letter from Cherine Chalaby to GNSO Council Chair: https://www.icann.org/en/system/files/correspondence/chalaby-to-forrest-et-al-07aug18-en.pdf).

The Board's action to reaffirm the Temporary Specification is consistent with ICANN's mission "[…] to ensure the stable and secure operation of the Internet's unique identifier systems […]". As one of ICANN's primary roles is to be responsible for the administration of the topmost levels of the Internet's identifiers, facilitating the ability to identify the holders of those identifiers is a core function of ICANN. The Board's action today will help serve the public interest and further the requirement in ICANN's Bylaws to "assess the effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data." [Bylaws Sec. 4.6(e)(ii)]

Also, this action is expected to have an immediate impact on the continued security, stability or resiliency of the DNS, as it will assist in continuing to maintain WHOIS to the greatest extent possible while the community works to develop a consensus policy. Reaffirming the Temporary Specification is not expected to have a fiscal impact on ICANN organization beyond what was previously identified in the Board's rationale for resolutions 2018.05.17.01 – 2018.05.17.09. If the resource needs are greater than the amounts currently budgeted to perform work on WHOIS- and GDPR-related issues, the President and CEO will bring any additional resource needs to the Board Finance Committee for consideration, in line with existing fund request practices.

This is an Organizational Administrative Function of the Board for which public comment is not required, however ICANN's approach to addressing compliance with ICANN policies and agreements concerning gTLD registration data in relation to the GDPR has been the subject of comments from the community over the past year (https://www.icann.org/dataprotectionprivacy).

2. Main Agenda:

   a. Delegation of the موريتانيا. country-code top-level domain representing Mauritania in Arabic Script to Université de Nouakchott Al Aasriya

      Resolved (2019.01.27.16), as part of the exercise of its responsibilities under the IANA Naming Function Contract with ICANN, PTI has reviewed and evaluated the request to delegate the موريتانيا. country-code top-level domain to Université de Nouakchott Al Aasriya. The documentation demonstrates that the proper procedures were followed in evaluating the request.

      Rationale for Resolution 2019.01.27.16

      Why the Board is addressing the issue now?

      In accordance with the IANA Naming Function Contract, PTI has evaluated a request for ccTLD delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

      What is the proposal being considered?

The proposal is to approve a request to create the موريتانيا. country-code top-level domain in Arabic script and assign the role of manager to Université de Nouakchott Al Aasriya.

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD, and their applicability to their local Internet community.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[REDACTED-SENSITIVE DELEGATION INFORMATION]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to obligations under the IANA Naming Function Contract.

Are there financial impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS?

ICANN does not believe this request poses any notable risks to security, stability or resiliency. This is an organizational administrative function not requiring public comment.

b. Delegation of the .SS (South Sudan) country-code top-level domain to the National Communication Authority (NCA)

Resolved (2019.01.27.17), as part of the exercise of its responsibilities under the IANA Naming Function Contract with ICANN, PTI has reviewed and evaluated the request to delegate the .SS (South Sudan) country-code top-level domain to National Communication Authority (NCA). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2019.01.27.17

Why the Board is addressing the issue now?

In accordance with the IANA Naming Function Contract, PTI has evaluated a request for ccTLD delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to create the .SS country-code top-level domain and assign the role of manager to National Communication Authority (NCA).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD, and their applicability to their significantly interested parties.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[REDACTED-SENSITIVE DELEGATION INFORMATION]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to obligations under the IANA Naming Function Contract.

Are there financial impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS?

ICANN does not believe this request poses any notable risks to security, stability or resiliency. This is an Organizational Administrative Function not requiring public comment.

c. GAC Advice: Barcelona Communiqué (October 2018)

Whereas, the Governmental Advisory Committee (GAC) met during the ICANN63 meeting in Barcelona, Spain and issued advice to the ICANN Board in a communiqué on 25 October 2018 ("Barcelona Communiqué").

Whereas, the Barcelona Communiqué was the subject of an exchange between the Board and the GAC on 28 November 2018.

Whereas, in a 20 December 2018 letter, the GAC provided additional clarification of language contained in the Barcelona Communiqué Annex titled Follow-up to Original Joint Statement by ALAC and GAC (Abu Dhabi, 2 November 2017).

Whereas, in a 21 December 2018 letter, the GNSO Council provided its feedback to the Board concerning advice in the Barcelona Communiqué relevant to generic top-level domains to inform the Board and the community of gTLD policy activities that may relate to advice provided by the GAC.

Whereas, the ICANN organization published a memorandum and historical briefing paper providing clarification regarding the development and evolution of ICANN organization's procedure for the release of two-character labels at the second level and the standard framework of measures for avoiding confusion with corresponding country codes.

Whereas, the Board developed a scorecard to respond to the GAC's advice in the Barcelona Communiqué, taking into account the dialogue between the Board and the GAC, the clarification letter provided by the GAC Chair, the information provided by the GNSO Council, and the memorandum and briefing paper released by the ICANN org.

Whereas, the Board has considered the previously deferred GAC advice regarding two-character country codes at the second level from the Panama Communiqué, and has included a response in the current scorecard "GAC Advice – Barcelona Communiqué: Actions and Updates (25 January 2019)".

Resolved (2019.01.27.18), the Board adopts the scorecard titled "GAC Advice – Barcelona Communiqué: Actions and Updates (25 January 2019)" in response to items of GAC advice in the Barcelona Communiqué and the Panama Communiqué.

Rationale for Resolution 2019.01.27.18

Article 12, Section 12.2(a)(ix) of the ICANN Bylaws permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." In its Barcelona Communiqué (25 October 2018), the GAC issued advice to the Board on: two-character country codes at the second level and protection of names and acronyms of Intergovernmental Organizations (IGOs) in gTLDs. The GAC also provided a follow-up to previous advice GDPR and WHOIS, the Dot Amazon applications, protection of the Red Cross and Red Crescent designations and identifiers, and a follow-up to the joint statement by ALAC and GAC (Abu Dhabi, 2 November 2017). The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. Any GAC advice approved by a full consensus of the GAC (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

The Board is taking action today on all items in the Barcelona Communiqué, including the items related to two-character country codes at the second level as well as protections of IGOs. The Board is also taking action on the items regarding two-character country codes at the second level from the Panama Communiqué, consideration of which had been previously deferred.

The Board will continue to defer consideration of five items from the San Juan Communiqué, including: four advice items related to GDPR and WHOIS and one

advice item related to IGO reserved acronyms, pending further discussion with the GAC. The Board will consider if further action is needed following these discussions.

The Board's actions are described in the scorecard dated 25 January 2019.

In adopting its response to the GAC advice in the Barcelona Communiqué, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Panama Communiqué (28 June 2018): https://www.icann.org/en/system/files/correspondence/gac-to-icann-28jun18-en.pdf [PDF, 576 KB]
- Barcelona Communiqué (25 October 2018): https://www.icann.org/en/system/files/correspondence/gac-to-icann-25oct18-en.pdf
- The GNSO Council's review of the advice in the Barcelona Communiqué as presented in the 21 December 2018 letter to the Board: https://www.icann.org/en/system/files/correspondence/drazek-et-al-to-icann-board-21dec18-en.pdf
- The GAC's clarification of Barcelona Communqiué Attach Language – Follow-up to Original Joint Statement by ALAC and GAC (Abu Dhabi, 2 November 2017): https://www.icann.org/en/system/files/correspondence/ismail-to-chalaby-botterman-20dec18-en.pdf
- The ICANN Organization's memorandum providing clarification regarding the development and evolution of ICANN organization's procedure for the release of two-character labels at the second level and the standard framework of measures for avoiding confusion with corresponding country codes: https://www.icann.org/en/system/files/files/implementation-memo-two-character-ascii-labels-22jan19-en.pdf
- The ICANN Organization's Historical Overview of Events Regarding Two-Character Labels at the Second Level in the New gTLD Namespace: https://www.icann.org/en/system/files/files/historical-overview-two-character-ascii-labels-22jan19-en.pdf

The adoption of the GAC advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC concerning gTLDs and other matters. There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. This is an Organizational Administrative function that does not require public comment.

d. Adoption of GNSO Consensus Policy relating to Certain Red Cross & Red Crescent Names at the Second Level of the Domain Name System

Whereas, in March 2017 the Generic Names Supporting Organization ("GNSO") and the Governmental Advisory Committee ("GAC") engaged in a good faith, facilitated dialogue in an attempt to resolve outstanding differences between the GNSO's original Policy Development Process ("PDP") consensus recommendations and the GAC's advice concerning certain Red Cross and Red Crescent names.

Whereas, in the course of that facilitated dialogue the GAC and the GNSO noted certain specific matters, namely:

1. The public policy considerations associated with protecting identifiers associated with the international Red Cross movement ("Movement") in the domain name system;

2. The GAC's rationale for seeking permanent protection for the terms most closely associated with the Movement and its respective components is grounded in the protections of the designations "Red Cross", "Red Crescent", "Red Lion and Sun", and "Red Crystal" under international treaty law and under multiple national laws;

3. The list of names of the Red Cross and Red Crescent National Societies is a finite, limited list of specific names of the National Societies recognized within the Movement (http://www.ifrc.org/Docs/ExcelExport/NS_Directory.pdf);

4. There are no other legitimate uses for these terms; and

5. The GAC had provided clarification following the completion of the GNSO PDP, via its March 2014 Singapore Communiqué, on the finite scope of the specific list of Movement names for which permanent protections were being requested (https://gacweb.icann.org/download/attachments/28278854/Final%20Communique%20%20Singapore%202014.pdf?version=1&modificationDate=1397225538000&api=v2).

Whereas, following the GAC-GNSO discussion, the ICANN Board had requested that the GNSO Council consider initiating the GNSO's process for amending previous GNSO policy recommendations concerning the full names of the Red Cross National Societies and the International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, and a defined, limited set of variations of these names, in the six official languages of the United Nations (https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.e.i).

Whereas, in May 2017 the GNSO Council resolved to reconvene the original PDP Working Group to consider the Board's request (https://gnso.icann.org/en/council/resolutions#20170503-071).

Whereas, in August 2018 the reconvened PDP Working Group submitted six recommendations that received the Full Consensus of the Working Group to the GNSO Council (https://gnso.icann.org/en/issues/igo-ingo/red-cross-protection-policy-amend-process-final-06aug18-en.pdf), including a defined, limited set of variations of the Red Cross and Red Crescent names to be reserved under the proposed Consensus Policy (https://gnso.icann.org/en/issues/igo-ingo/red-cross-identifiers-proposed-reservation-06aug18-en.pdf).

Whereas, in September 2018 the GNSO Council voted unanimously to approve all the PDP consensus recommendations (https://gnso.icann.org/en/council/resolutions#20180927-3) and in October 2018 further approved the submission of a Recommendations Report to the ICANN Board (https://gnso.icann.org/en/council/resolutions#20181024-1).

Whereas, as required by the ICANN Bylaws, a public comment period was opened in November 2018 to allow the public a reasonable opportunity to provide input on the proposed Consensus Policy prior to Board action as well as for the GAC to provide timely advice on any public policy concerns.

Whereas, the Board has considered the GNSO's recommendations and all other relevant materials relating to this matter.

Resolved (2019.01.27.19), the Board hereby adopts the final recommendations of the reconvened International Governmental Organizations (IGO) & International Non-Governmental Organizations (INGO) PDP Working Group, as passed by a unanimous vote of the GNSO Council on 27 September 2018.

Resolved (2019.01.27.20), the Board directs the President and CEO, or his authorized designee, to develop and execute an implementation plan, including costs and timelines, for the adopted recommendations consistent with ICANN Bylaws Annex A and the Implementation Review Team Guidelines & Principles endorsed by the Board on 28 September 2015 (see https://www.icann.org/resources/board-material/resolutions-2015-09-28-en - 2.f), and to continue communication with the community on such work.

Rationale for Resolutions 2019.01.27.19 – 2019.01.27.20

Why is the Board addressing the issue?

The GNSO conducted a PDP, concluding in November 2013, that considered and developed certain policy recommendations for protecting certain identifiers associated with the Red Cross and Red Crescent movement. Those of the GNSO's recommendations that were consistent with GAC advice on the subject; namely, relating to the specific terms "Red Cross", "Red Crescent", "Red Crystal" and "Red Lion & Sun" were adopted by the Board in April 2014 (http://www.icann.org/en/groups/board/documents/resolutions-30apr14-en.htm#2.a). Following implementation work by ICANN Organization and community volunteers, these four specific terms are now withheld from delegation at the top and second levels of the DNS, in the six official languages of the United Nations, under a Consensus Policy that went into force in January 2018.

The Board did not approve the remaining GNSO policy recommendations from 2013 that concerned other Red Cross and Red Crescent identifiers, e.g. the full names of all the National Societies of the Red Cross movement and those of the International Red Cross and Red Crescent Movement, the International Committee of the Red Cross, and the International Federation of Red Cross and Red Crescent Societies. The Board did not approve these policy recommendations at that time to allow for further discussions between the Board, GNSO, GAC and community about the inconsistencies between the GNSO policy recommendations and the GAC's advice. Over the next several months, the Board facilitated dialogue among the groups about a possible path forward. Following the conclusion of a facilitated dialogue between the GAC and the GNSO in March 2017, the GNSO Council reconvened the original PDP Working Group to consider possible modifications of its previous recommendations concerning these specific identifiers.

In September 2018, the GNSO Council unanimously approved the modified policy recommendations presented in the final report of the PDP Working Group. With the GNSO Council's unanimous approval of the modified policy recommendations, the Board is now taking action to adopt the revised consensus policy recommendations in accordance with the process documented under the ICANN Bylaws.

What is the proposal being addressed?

The PDP recommendations are that certain specific Red Cross and Red Crescent names as well as a list of agreed, permitted variants of those names be withheld from delegation at the second level of the DNS, in all six official languages of the United Nations. The PDP recommendations include a specific, documented process and criteria for correcting errors found on the list of agreed names and variants, as well as for adding or removing entries from the list. The adopted policy will supplement the existing Consensus Policy on protection at the top and second

levels of the terms "Red Cross", "Red Crescent", "Red Crystal" and "Red Lion & Sun" in all six official languages of the United Nations.

For clarity, the PDP recommendations do not include proposals for protection of the specific acronyms associated with the international Red Cross movement, which remains an issue outstanding from the original 2013 GNSO PDP that resulted in recommendations that are inconsistent with GAC advice regarding these acronyms.

Which stakeholders or others were consulted?

The reconvened PDP Working Group performed its work in accordance with the GNSO's PDP Manual and Working Group Guidelines, which include provisions pertaining to broad community representation. Members of the Working Group comprised representatives from various parts of the GNSO and ICANN community, including representatives of the Red Cross. The Working Group's Initial Report was published for public comment in June 2018, following which the group considered all input received in developing its final recommendations, all of which received the Full Consensus of the Working Group. Prior to the GNSO Council's vote on the Final Report, the Working Group chair conducted a meeting with community members who had expressed some concerns about the proposed recommendations. The GNSO Council voted unanimously to approve all the recommendations in September 2018.

The policy recommendations as approved by the GNSO Council were published for public comment in November 2018 and the GAC notified of the Council's action.

What concerns or issues were raised by the community?

Possible concerns about freedom of expression were raised concerning reservation of the Red Cross and Red names at the second level of the DNS, as well as the Working Group's development of criteria and a process for adding new names and variants to the list instead of recommending a fixed list. The community also sought clarity about the mechanism for implementing the proposed policy (i.e. whether ICANN Org's contracts with its contracted parties will need to be amended). The Board understands that the Working Group believes it addressed these concerns in developing its final Consensus Policy recommendations.

Other community comments supported the proposed policy, citing the public policy need to provide adequate protections for the Red Cross against abuse of its names and recognized variants, as well as the fact that the recommended protections are grounded in international humanitarian law and multiple national laws.

What significant materials did the Board review?

The Board reviewed the Working Group's Final Report and the recommended protected list of Red Cross names (https://gnso.icann.org/sites/default/files/file/field-file-attach/red-cross-protection-policy-amend-process-final-06aug18-en.pdf and https://gnso.icann.org/sites/default/files/file/field-file-attach/red-cross-identifiers-proposed-reservation-06aug18-en.pdf), the GNSO Council's Recommendations Report (https://gnso.icann.org/en/drafts/reconvened-red-cross-recommendations-14oct18-en.pdf), a summary of the public comments received (https://www.icann.org/en/system/files/files/report-comments-red-cross-names-consensus-policy-04jan19-en.pdf) and the relevant GAC advice on this subject (https://gac.icann.org/).

What factors did the Board find to be significant?

The recommendations were developed following the GNSO Policy Development

Process as set out in Annex A of the ICANN Bylaws and have received the full consensus of the Working Group as well as the unanimous support of the GNSO Council. As stated in the ICANN Bylaws (Annex A, Sec. 9.a.), "Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN."

The Bylaws also allow for input from the GAC in relation to public policy concerns that might be raised if a proposed policy is adopted by the Board. In this context, the GAC's October 2018 Barcelona Communique expressed the hope that the Board will adopt the GNSO's recommendations.

Are there positive or negative community impacts?

The Board's adoption of these recommendations will resolve the issue, outstanding since 2013, of inconsistencies between the GAC's advice and the GNSO's previous policy on these specific Red Cross and Red Crescent names. This means that the interim protections previously put into place by the Board concerning these names will be replaced by the Consensus Policy when it goes into effect, leading to greater clarity as to the scope of protections for these names for ICANN's Contracted Parties and the community at large.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

Aside from any financial or other resource costs that may arise during work on implementation of the adopted policy, no fiscal or ramifications on ICANN, the community or the public are envisaged.

Are there any security, stability or resiliency issues relating to the DNS?

There are no security, stability or resiliency issues relating to the DNS that can be directly attributable to the implementation of the PDP recommendations.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

This matter concerns the GNSO's policy process, as defined and described by the ICANN Bylaws and the GNSO's operating procedures. All requirements for public comments as part of these processes have been met.

e. Board Committee Membership and Leadership Changes

Whereas, Chris Disspain is a member of the Board and the current Chair of the Board Accountability Mechanisms Committee (BAMC).

Whereas, León Sanchez is a current member of the Board and member of the BAMC.

Whereas, to facilitate the smooth transition of leadership of the BAMC, the Board Governance Committee (BGC) recommended that the Board immediately appoint León Sanchez as the Chair of the BAMC and retain Mr. Disspain as a member of the BAMC.

Whereas, Matthew Shears has expressed interest in becoming a member of the Organizational Effectiveness Committee (OEC) and the BGC recommended that the Board immediately appoint Mr. Shears as a member of the OEC.

Resolved (2019.01.27.21), the Board appoints León Sanchez as the Chair of the BAMC and retains Chris Disspain as a member of the BAMC, effectively immediately.

Resolved (2019.01.27.22), the Board appoints Matthew Shears as a member of the OEC, effective immediately.

Rationale for Resolutions 2019.01.27.21 – 2019.01.27.22

The Board is committed to facilitating a smooth transition in the leadership of its Board Committees as part of the Board's ongoing discussions regarding succession planning. To that end, the Board Accountability Mechanisms Committee (BAMC) has suggested that its current Chair, Chris Disspain, step down as Chair (but remain as a member) and that the Board appoint León Sanchez as Chair of the BAMC. As a member of the BAMC, Mr. Disspain will work with Mr. Sanchez during a transition period.

As the Board Governance Committee (BGC) is tasked with recommending committee assignments, the BGC has discussed the BAMC's proposal and has recommended that the Board appoint León Sanchez as the new BAMC Chair and retain Mr. Disspain as a member of the BAMC, effectively immediately. The Board agrees with the BGC's recommendation.

The Board is also committed to facilitating the composition of Board Committees in accordance with the Board Committee and Leadership Selection Procedures. The BGC has considered the interest expressed by Matthew Shears in joining the Organizational Effectiveness Committee and has recommended that the Board approve this appointment. The Board agrees with the BGC's recommendation.

The action is in the public interest and in furtherance of ICANN's mission as it is important that Board Committees, in performing the duties as assigned by the Board in compliance with ICANN's Bylaws and the Committees' charters, have the appropriate succession plans in place to ensure leadership continuity within the Committees. Moreover, it is equally important that the composition of Board Committees is established pursuant to the Board Committee and Leadership Selection Procedures. This action will have no financial impact on the organization and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

f. Consideration of Reconsideration Request 16-11: Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (.HOTEL)

Whereas, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dotHotel Inc.) (collectively, the Requestors) submitted standard applications for .HOTEL, which was placed in a contention set with other .HOTEL applications. Another applicant, HOTEL Top-Level-Domain S.a.r.l. (HTLD), submitted a community-based application for .HOTEL.

Whereas, HTLD participated in Community Priority Evaluation (CPE) and prevailed.

Whereas, on 9 August 2016, the Board adopted Resolutions 2016.08.09.14 and 2016.08.09.15 (the 2016 Resolutions), which directed ICANN organization to move forward with the processing of the prevailing community application for the .HOTEL gTLD (HTLD's Application) submitted by HTLD.

Whereas, Requestors submitted Reconsideration Request 16-11 seeking reconsideration of the 2016 Resolutions.

Whereas, while Request 16-11 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee (BGC) determined that the pending Reconsideration Requests relating to CPEs, including Request 16-11, would be placed on hold until the CPE Process Review was completed.[1]

Whereas, on 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed the Resolutions 2018.03.15.08 through 2018.03.15.11, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, in accordance with Resolutions 2018.03.15.08 through 2018.03.15.11, the BAMC invited the Requestors to make a telephonic presentation to the BAMC in support of Request 16-11, which the Requestors did on 19 July 2018. The BAMC also invited the Requestors to submit additional written materials in response to the CPE Process Review Reports.

Whereas, the BAMC has carefully considered the merits of Request 16-11 and all relevant materials and has recommended that Request 16-11 be denied because the Board adopted the 2016 Resolutions based on accurate and complete information. The BAMC also recommended the Board deny Request 16-11 because there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration, nor is there evidence that the Board discriminated against the Requestors.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 16-11 and all relevant materials related to Request 16-11, including the Requestors' rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.01.27.23), the Board adopts the BAMC Recommendation on Request 16-11.

Rationale for Resolution 2019.01.27.23

1. ### Brief Summary and Recommendation

   The full factual background is set forth in the BAMC Recommendation on Request 16-11 (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 16 November 2018, the BAMC evaluated Request 16-11 and all relevant materials and recommended that the Board deny Request 16-11 because the Board adopted the 2016 Resolutions based on accurate and complete information. The BAMC also recommended the Board deny Request 16-11 because there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration, nor is there evidence that the Board discriminated against the Requestors.

On 30 November 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal). The Board notes that the Rebuttal is not called for under the Bylaws applicable to Request 16-11, which are set forth in the 2016 Bylaws that were in effect Request 16-11 was filed.[2] Nonetheless, the Board has considered the arguments in the Requestors' rebuttal and finds that they do not support reconsideration for the reasons set forth below.

2. Issue

The issues are whether the Board's adoption of the 2016 Resolutions occurred: (i) without consideration of material information; or (ii) were taken as a result of its reliance on false or inaccurate material information.

These issues are considered under the relevant standards for reconsideration requests in effect at the time that Request 16-12 was submitted. These standards are discussed in detail in the BAMC Recommendation.

3. Analysis and Rationale

A. **The Board Adopted The 2016 Resolutions After Considering All Material Information And Without Reliance On False Or Inaccurate Material Information.**

The Requestors suggest that reconsideration of the 2016 Resolutions is warranted because ICANN org failed to properly investigate the Portal Configuration and failed to address the alleged actions relating to the Portal Configuration. Specifically, the Requestors assert that ICANN org did not verify the affirmation by Dirk Kirschenowski, the individual whose credentials were used to access confidential information of other authorized users of the New gTLD portal, that he did not and would not provide the information he accessed to HTLD or its personnel. The BAMC concluded, and the Board agrees, that this argument does not support reconsideration because Requestors did not identify any false or misleading information that the Board relied upon, or material information that the Board failed to consider relating to the Portal Configuration in adopting the 2016 Resolutions.

First, the BAMC determined, and the Board agrees, that ICANN org undertook a careful and thorough analysis of the Portal Configuration and the issues raised by the Requestors regarding the Portal Configuration. The results of the investigation were shared with the ICANN Board, and were carefully considered by the Board in its adoption of the 2016 Resolutions. The BAMC noted that, in its investigation, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. Moreover, ICANN's investigation

revealed that at the time that Mr. Krischenowski accessed confidential information, he was not directly linked to HTLD's Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD. Mr. Philipp Grabensee, the sole Managing Director of HTLD, informed ICANN org that Mr. Krischenowski was "not an employee" of HTLD, but that Mr. Krischenowski acted as a consultant for HTLD's Application at the time it was submitted in 2012. Mr. Grabenesee further verified that HTLD "only learned about [Mr. Krischenowski's access to the data] on 30 April 2015 in the context of ICANN's investigation." Mr. Grabensee stated that the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015.[3]

Second, contrary to the Requestors' assertions, the BAMC determined that ICANN org did verify the affirmation from Mr. Krischenowski that he and his associates did not and would not share the confidential information that they accessed as a result of the Portal Configuration with HTLD. ICANN org also confirmed with HTLD that it did not receive any confidential information from Mr. Krischenowski or his associates obtained from the Portal Configuration. As discussed in the Rationale of the 2016 Resolutions, this information was considered by the Board in adopting the Resolutions.[4] As the Board noted Rationale of the 2016 Resolutions, even if Mr. Krischenowski (or his associates) had obtained sensitive business documents belonging to the Requestors, it would not have had any impact on the CPE process for HTLD's Application. The Requestors have not explained how confidential documents belonging to the other applicants for .HOTEL could impact the CPE criteria, which do not consider other entities' confidential information. While Mr. Krischenowski's access occurred prior to the issuance of the CPE Report in June 2014, HTLD did not seek to amend its application during CPE, nor did it submit any documentation that could have been considered by the CPE panel.[5] There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.[6]

For these reasons, which are discussed in further detail in the BAMC Recommendation and incorporated herein by reference, the BAMC determined, and the Board agrees, the Requestors did not identify any false or misleading information that the Board relied upon, or material information that the Board failed to consider relating to the Portal Configuration in adopting the 2016 Resolutions. The Board's decision to allow HTLD's Application to proceed was made following a comprehensive investigation, and was well reasoned and consistent with ICANN org's Articles and Bylaws. In particular, in reaching its decision that HTLD's Application should not be excluded, the Board carefully considered the results of ICANN org's forensic review and investigation of the Portal Configuration and the Requestors' claims relating the alleged impact of Portal Configuration on the CPE of HTLD's Application.

B. **The Board Did Not Rely Upon False Or Misleading Information In Accepting The Despegar IRP Panel's Declaration.**

Although Request 16-11 challenges the Board's conduct as it relates to the 2016 Resolutions, the Requestors also appear to challenge the Board's acceptance of the Despegar IRP Panel's Declaration. In particular, the Requestors assert that "the Despegar et al. IRP Panel relied on false and inaccurate material information," such that "[w]hen the ICANN Board accepted the Despegar et al. IRP Declaration, it relied on the same false and inaccurate material information."[7]

As an initial matter, the Board agrees with the BAMC's conclusion that the Requestors' claim is time-barred. The Board's resolution regarding the Despegar IRP Panel's Declaration was published on 10 March 2016.[8] Request 16-11 was submitted on 25 August 2016, over five months after the Board's acceptance of the Despegar IRP Panel's Declaration, and well past the then 15-day time limit to seek reconsideration of a Board action.[9]

1. **The Requestors' Claims Regarding the Dot Registry and Corn Lake IRP Panel Declarations Do Not Support their Claims of Discrimination.**

   Even had the Requestors timely challenged the Board's resolution regarding the Despegar IRP Panel's Declaration, the Board agrees with the BAMC that the Requestors' claims do not support reconsideration. The Requestors cite to the IRP Panel Declaration issued in *Dot Registry, LLC v. ICANN* (Dot Registry IRP Panel Declaration) to support their claim that the Despegar IRP Panel Declaration was based "upon the false premise that the [CPE Provider's] determinations are presumptively final and are made independently by the [CPE Provider], without ICANN's active involvement."[10] In particular, the Requestors claim that the Dot Registry IRP Panel Declaration demonstrates that "ICANN did have communications with the evaluators that identify the scoring of individual CPEs,"[11] such that the Despegar IRP Panel relied upon false information (namely ICANN org's representation in its Response to the 2014 DIDP Request that ICANN org does not engage in communications with individual evaluators who are involved in the scoring of CPEs, which was the subject of Request 14-39), when it found ICANN org to be the prevailing party. As a result, the Requestors suggest that the ICANN Board also relied upon false information when it accepted the Despegar IRP Panel Declaration. The Requestors also argue that they are "situated similarly" to the Dot Registry claimants, and therefore if the Board refuses to grant the Requestors relief when the Board granted the Dot Registry claimants relief, then the Board is discriminating against the Requestors in contradiction to ICANN's Articles and Bylaws. The BAMC concluded, and the Board agrees, that the Dot Registry IRP Declaration and the Board's response to it, however, do not support the Requestors' request for reconsideration for the following reasons.

   First, contrary to the Requestors' assertion, the Dot Registry IRP Panel did not find that ICANN org engaged in communications with CPE evaluators who were involved in the scoring of CPEs. Second, the statements made by one IRP Panel cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP. The Dot Registry IRP

concerned .LLC, .INC, and .LLP while the Despegar IRP concerned .HOTEL. Different issues were considered in each IRP, based on different arguments presented by different parties concerning different applications and unrelated factual situations. As such, there is no support for the Requestors' attempt to apply the findings of the Dot Registry IRP Declaration to the Despegar IRP.

Similarly, the BAMC concluded, and the Board agrees, that the Requestors' citation to the Board's acceptance of the final declaration in *Corn Lake, LLC v. ICANN*, (Corn Lake IRP Declaration) and decision "to extend its final review procedure to include review of Corn Lake's charity expert determination"[12] does not support reconsideration. As was the case with the Dot Registry IRP, the circumstances in the Corn Lake IRP and the Board's subsequent decision concerning .CHARITY involved different facts and distinct considerations specific to the circumstances in Corn Lake's application. As such, the Board's action there does not amount to inconsistent or discriminatory treatment; it is instead an example of the way that the Board must "draw nuanced distinctions between different [gTLD] applications,"[13] and is consistent with ICANN's Articles and Bylaws.

2. **The CPE Process Review Confirms that ICANN Org did not have any Undue Influence on the CPE Provider with respect to the CPEs Conducted.**

The BAMC concluded, and the Board agrees, that the Requestors' suggestion that ICANN org exerted undue influence over the CPE Provider's execution of CPE does not warrant reconsideration.[14] Indeed, as the BAMC correctly pointed out, this argument has already been addressed by the Board in the 2018 Resolutions.[15]

In short, the CPE Process Review's Scope 1 Report confirms that "there is no evidence that ICANN org had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process," including with respect to HTLD's Application.[16] The Requestors believe that the Scope 1 Report demonstrates that "the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue."[17] The Requestors do not identify what "policy" they are referring to, but regardless, their disagreement with the conclusions of the Scope 1 Report do not support reconsideration. This is because the Requestors do not dispute that, when ICANN org provided input to the CPE Provider, that input did *not* involve challenging the CPE Provider's conclusions, but rather was to ensure that the CPE Reports were clear and "that the *CPE Provider's* conclusions"—not ICANN org's conclusions—were "supported by sufficient reasoning."[18] The Requestors also cite "phone calls between ICANN and the CPE Provider to discuss 'various issues,'" claiming that those calls "demonstrate that the CPE Provider was not free from external influence from ICANN" org and was therefore not independent.[19] Neither of these facts demonstrates that the CPE Provider was "not independent" or

that ICANN org exerted undue influence over the CPE Provider. These types of communications instead demonstrate that ICANN org protected the CPE Provider's independence by focusing on ensuring that the CPE Provider's conclusions were clear and well-supported, rather than directing the CPE Provider to reach a particular conclusion. This argument therefore does not support reconsideration. Accordingly, the BAMC concluded, and the Board agrees, that because the Scope 1 Report demonstrates that ICANN org did not exert undue influence on the CPE Provider and CPE process, it disproves the Requestors' claim that "the *Despegar et al.* IRP Panel was given incomplete and misleading information" which is based solely on the premise of ICANN org's undue influence in the CPE process.[20]

3. **The Requestors Have Not Demonstrated that ICANN Org was Obligated to Produce Communications Between ICANN Org and the CPE Panel.**

   The Board agrees with the BAMC's conclusion that reconsideration is not warranted because, as the Requestors claim, the Despegar IRP Panel did not order ICANN org to produce documents between ICANN org and the CPE Provider. The BAMC noted that that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter.[21] In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce all documents reflecting "[c]onsideration by ICANN of the work performed by the [CPE Provider] in connection with Dot Registry's application" and "[a]cts done and decisions taken by ICANN with respect to the work performed by the [CPE Provider] in connection with Dot Registry's applications."[22] ICANN org's communications with the CPE panels for .INC, .LLC, and .LLP fell within the scope of such requests, and thus were produced. Ultimately, ICANN org acted in accordance with applicable policies and procedures, including ICANN's Bylaws, in both instances.[23]

4. **The Requestors Have Not Demonstrated that a New CPE of HTLD's Application is Appropriate.**

   Without identifying particular CPE criteria, the Requestors ask the Board to "ensure meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration]."[24] The BAMC determined, and the Board agrees, that to the extent the Requestors are asserting that the outcome of the CPE analysis of HTLD's Application is inconsistent with other CPE applications, this argument was addressed in Scope 2 of the CPE Process Review. There, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."[25] Additionally, for the reasons discussed in above and in detail in the BAMC

Recommendation, the Board finds that neither the .HOTEL CPE nor the 2016 Resolutions evidence inconsistent or discriminatory treatment toward the Requestors. For these reasons, this argument does not support reconsideration.

C. **The 2018 Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).**

The Requestors' criticisms of the 2018 Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC found, and the Board agrees, that the BAMC and the Board addressed the Requestors' concerns regarding the 2018 Resolutions in its Recommendation on Request 18-6,[26] which the Board adopted on 18 July 2018.[27] The rationales set forth by the BAMC, and the Board in its determination of Request 18-6, are incorporated herein by reference.

D. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

As an initial matter, Request 16-11 was submitted pursuant to the 11 February 2016 Bylaws, *see* Discussion *supra*, which do not call for a rebuttal to the BAMC's recommendation.[28] Nonetheless, the Board has considered the Requestors' Rebuttal and finds that the Requestors have not provided any additional arguments or facts supporting reconsideration.

1. **The 11 February 2016 Bylaws Govern Request 16-11.**

The Requestors assert that the Board should consider Request 16-11 under the standards for reconsideration set forth in ICANN org's 18 June 2018 Bylaws, i.e., the version of the Bylaws in effect at the time of the BAMC's recommendation, rather than the 11 February 2016 version which was in effect when Request 16-11 was submitted on 25 August 2016. However, the 18 June 2018 Bylaws did not exist when the Requestors submitted Request 16-11, and the Board did not provide for retroactive treatment when it approved the 18 June 2018 version of the Bylaws; accordingly, the 18 June 2018 Bylaws have no retroactive effect. Indeed, the Reconsideration Request form that the Requestors submitted references the standard for reconsideration under the 11 February 2016 Bylaws, instructing requestors that, for challenges to Board action, "[t]here has to be identification of material information that was in existence [at] the time of the decision and that was not considered by the Board in order to state a reconsideration request." (*See* Request 16-11, § 8, at Pg. 7.) Therefore, the BAMC correctly considered Request 16-11 under the 11 February 2016 Bylaws, which were in effect when the Requestors submitted Request 16-11.

2. **The Requestors' Challenges to the Bylaws are Untimely.**

The Requestors assert that "the formal requirements of Article 4(2)(q) [of the 18 June 2018 Bylaws] and the circumstances of this case create an unjustified imbalance that prevents Requestors from participating in the reconsideration proceedings in a meaningful way" because the BAMC issued a

33-page recommendation "almost four months" after the Requestors' telephonic presentation concerning Request 16-11, when (under the current Bylaws) rebuttals must be filed within 15 days after the BAMC publishes its recommendations and may not exceed 10 pages. (Rebuttal, at Pg. 1.) As noted above, the operative version of the Bylaws do not provide the Requestors with a right to submit a rebuttal, so reconsideration is not warranted on account of the Requestors' apparent disagreement with the deadlines governing rebuttals under the current (inapplicable) version of the Bylaws.[29] Moreover, the Requestors *have* meaningfully participated in the reconsideration process: the Requestors made a presentation at a telephonic hearing concerning Request 16-11 (Rebuttal, at Pg. 1); and, as noted in the BAMC's Recommendation, the Requestors submitted—and the BAMC considered—seven letters in support of Request 16-11.[30] The Requestors have now also submitted a rebuttal in support of Request 16-11, which the Board has considered. Accordingly, the Requestors have not shown that they have been prevented from "meaningful" participation in the reconsideration request process.

3. **The Board Considered Ms. Ohlmer's Actions When it Adopted the 2016 Resolutions.**

   The Requestors assert that the "Board ignored the role of [Katrin] Ohlmer" (Rebuttal, at Pg. 3) in the Portal Configuration issue. The Requestors claim that Ms. Ohlmer was CEO of HTLD when she accessed the confidential information of other applicants, and that she had been CEO from the time HTLD submitted HTLD's Application until 23 March 2016. (Request 16-11, § 8, at Pg. 19; see also Rebuttal, at Pg. 3.) The Requestors claim that, because of her role at HTLD, information Ms. Ohlmer accessed "was automatically provided to HTLD." (Rebuttal, at Pg. 4.) The Requestors also assert that "HTLD acknowledged that [Ms. Ohlmer] was (i) principally responsible for representing HTLD, (ii) highly involved in the process of organizing and garnering support for [HTLD's Application], and (iii) responsible for the day-to-day business operations of HTLD."[31]

   The Board finds that this argument does not support reconsideration as the Board did consider Ms. Olhmer's affiliation with HTLD when it adopted the 2016 Resolutions. Indeed, the Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 notes that: (1) Ms. Ohlmer was an associate of Mr. Krischenowski; (2) Ms. Ohlmer's wholly-owned company acquired the shares that Mr. Krischenowski's wholly-owned company had held in GmbH Berlin (itself a 48.8% minority shareholder of HTLD); and (3) Ms. Ohlmer (like Mr. Krischenowski) "certified to ICANN [org] that [she] would delete or destroy all information obtained, and affirmed that [she] had not used and would not use the information obtained, or convey it to any third party."[32] As the BAMC noted in its Recommendation, Mr. Grabensee affirmed that GmbH Berlin would transfer its ownership interest in HTLD to another company, Afilias plc. Once this transfer occurred, Ms. Ohlmer's company would not have held an ownership interest in

HTLD.[33]

4. **The Requestors' Arguments Concerning HTLD's and Mr. Krischenowski's Assurances and HTLD's Relationship with Mr. Krischenowski Do Not Support Reconsideration.**

   The Board finds that the Requestors' arguments that the Board should not have accepted the statements from Messrs. Grabensee or Krischenowski that HTLD did not receive the confidential information from the Portal Configuration does not warrant reconsideration because the Requestors have not provided any arguments or facts that have not already been addressed by the BAMC in its Recommendation.

   Similarly, the Board concludes that the Requestors' arguments that the Board failed to consider timing of HTLD's separation from Mr. Krischenowski in adopting the 2016 Resolutions does not warrant reconsideration. Contrary to the Requestors' argument, it is clear that the Board considered the timing of HTLD's separation from Mr. Krischenowski when it adopted the Resolutions. In the Rationale for the 2016 Resolutions, the Board referenced the same timing in the Rationale for the Resolutions, noting that "the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015" and "Mr. Krischenowski stepped down as a managing director of GmbH Berlin effective 18 March 2016."[34] The Requestors disagree with the Board's conclusion that the timing did not support cancelling HTLD's Application, but this disagreement, without more, is not grounds for reconsideration.

5. **The Requestors Do Not Challenge the Application of Specific CPE Criteria to HTLD's Application**

   The Requestors claim that the BAMC incorrectly concluded that the Requestors "do not challenge the application of the CPE criteria to HTLD's application or a particular finding by the CPE Provider on any of the CPE criteria." (Rebuttal, at Pg. 9, citing Recommendation, at Pg. 1). However, neither Request 16-11 nor the Rebuttal identifies any of the CPE criteria nor discusses the application of specific CPE criteria to HTLD's Application. (*See* Request 16-11; Rebuttal.) The Requestors simply reiterate their arguments that the CPE Provider applied (unspecified) CPE criteria "inconsistent[ly] and erroneous[ly]," and that the BAMC should not have considered the CPE Process Review Reports when it made its Recommendation. (Rebuttal, at Pgs. 9-10.) The BAMC addressed these arguments in its Recommendation, and the Board adopts the BAMC's reasoning as if fully set forth herein.

   For these reasons, the Board concludes that reconsideration is not warranted.

   This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which

a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

g. Consideration of Reconsideration Request 18-9: DotKids Foundation (.KIDS)

Whereas, in Resolution 2010.03.12.47, as part of the New gTLD Program, the ICANN Board "request[ed] stakeholders to work through their [Supporting Organizations] SOs and [Advisory Committees] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."

Whereas, in response to Resolution 2010.03.12.47, the Joint SO/AC New gTLD Applicant Support Working Group (JAS WG) was formed.

Whereas, on 13 September 2011, the JAS WG issued its Final Report, setting forth various recommendations regarding financial and non-financial support to be offered to "Support-Approved Candidates" in conjunction with the New gTLD Program.

Whereas, in Resolution 2011.10.28.21, the Board committed to taking the JAS Final Report seriously, and convened a working group of Board members "to oversee the scoping and implementation of recommendations out of [the JAS Final] Report, as feasible."

Whereas, in Resolutions 2011.12.08.01 – 2011.12.08.03, the Board approved the implementation plan of the JAS Final Report developed by the Board working group, directed ICANN organization to finalize the implementation plan in accordance with the proposed criteria and process for the launch of the Applicant Support Program (ASP) in January 2012, and approved a fee reduction to US$47,000 Applicant Support candidates that qualify for the established criteria.

Whereas, the Requestor DotKids Foundation submitted a community-based application for .KIDS, which was placed in a contention set with one other .KIDS application and an application for .KID.

Whereas, the Requestor applied for, and was awarded, financial assistance in the form of a reduced application fee pursuant to the ASP.

Whereas, the Requestor participated in Community Priority Evaluation and did not prevail, and an ICANN Auction was scheduled for 10 October 2018.

Whereas, in August 2018, the Requestor contacted ICANN org to request financial support for engaging in the string contention resolution process, which ICANN org denied as being out of scope for the ASP.

Whereas, on 21 September 2018, the Requestor submitted Reconsideration Request 18-9, seeking reconsideration of ICANN org's response to its request for financial assistance to participate in the string contention resolution process.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-9 is sufficiently stated and sent the Request to the

Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC has carefully considered the merits of Request 18-9 and all relevant materials and has recommended that Request 18-9 be denied because ICANN org adhered to established policies and procedures in responding to the Requestor's request for financial assistance for engaging in the string contention resolution process; and ICANN org did not violate its core values established in the Bylaws concerning the global public interest.

Whereas, on 3 December 2018, the Requestor submitted a rebuttal to the BAMC Recommendation on Request 18-9.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-9 and all relevant materials related to Request 18-9, including the Requestors' rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.01.27.24), the Board adopts the BAMC Recommendation on Request 18-9.

Rationale for Resolution 2019.01.27.24

1. Brief Summary and Recommendation

The full factual background is set forth in the BAMC Recommendation on Request 18-9 (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated by reference here.

On 16 November 2018, the BAMC evaluated Request 18-9 and all relevant materials and recommended that the Board deny Request 18-9 because ICANN org adhered to established policies and procedures in responding to the Requestor's request for financial assistance for engaging in the string contention resolution process; and ICANN org did not violate its core values established in the Bylaws concerning the global public interest.

On 3 December 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal). The Board notes that the Rebuttal was submitted after the time period allotted under Article 4, Section 4.2(q) of the ICANN Bylaws. Nonetheless, the Board has considered the arguments in the Requestor's rebuttal and finds that they do not support reconsideration for the reasons set forth below.

2. Issue

The issues are as follows:

- Whether ICANN org complied with established policies when responding to the Requestor's request for financial support for engaging in the string contention resolution process for the .KID/.KIDS contention set under the ASP; and
- Whether ICANN org complied with its Core Values established in the Bylaws concerning ICANN org's commitment concerning the global public interest.[35]

These issues are considered under the relevant standards for reconsideration requests, which are set forth in the BAMC Recommendation.

3. Analysis and Rationale

A. ICANN Org Adhered to Established Policies and Procedures in Responding to the Requestor's Request for Financial Assistance.

The Requestors suggest that reconsideration is warranted because ICANN org's denial of its request for financial assistance to participate in contention resolution contradicts the JAS Final Report. Specifically, the Requestor claims that ICANN org was under "time pressure" when it considered the JAS Final Report, which caused the ICANN Board to only approve the JAS WG's recommendation for a reduction in the application fee for qualified applicants and, correspondingly, the ICANN Board did "not consider[]" other parts of the recommendations at that time.[36] The BAMC determined, and the Board agrees, that the Requestor has not provided any evidence to support its claim that the ICANN Board did not consider the entire JAS Final Report in 2011. As discussed in detail in BAMC Recommendation and incorporated herein by reference, the ICANN Board *did* thoughtfully and fully consider all of the recommendations set forth in the JAS Final Report. On 28 October 2011, the ICANN Board resolved to "seriously" consider the Final Report and convened a working group of Board members "to oversee the scoping and implementation of the recommendations arising out of [the JAS Final Report], as feasible."[37] The Board working group thereafter worked with a subgroup of community members appointed by the JAS WG to develop the *Process* and *Criteria* documents that set forth the scope and requirements of the ASP, which the Board then approved in December 2011.[38]

The fact that the ICANN Board did not adopt all of the JAS Final Report's recommendations when it approved the implementation plan in accordance with the *Process* and *Criteria* documents does not support the Requestor's view that ICANN org did not consider (and reject) the recommendations which were not implemented. As an initial matter, no policy or procedure required ICANN to adopt the recommendations set forth in the JAS Final Report in full. To the contrary, as noted in the JAS Final Report, the recommendations were only "submitted *for consideration* to the GNSO, ALAC, ICANN Board and ICANN community."[39] It remained within the ICANN Board's discretion to determine which recommendations to implement, if any, and the ICANN Board resolved to do so only "as feasible."[40]

The Requestor's position also is contradicted by the plain language of the Rationale for Resolutions 2011.12.08.01 – 2011.12.08.03, which specified that that Board had considered and determined *not* to adopt all of the recommendations set forth in the JAS Final Report: "Note: This process does not follow all JAS recommendations."[41] Instead, the Board, in its discretion, found it feasible and resolved to approve financial assistance in the form of a "fee reduction to $47,000" for qualifying Applicant Support candidates.[42]

As the BAMC noted, the only JAS recommendations approved by the Board are those set forth in the *Process* and *Criteria* documents, which in turn defined the scope and requirements of the ASP. All

other JAS WG recommendations were considered and not adopted. Because the ASP, as implemented, does not provide for financial assistance for the contention resolution process, the Board agrees with the BAMC's conclusion that ICANN org did not contravene any established policy or procedure when it denied the Requestor's request for such support.

Nor does the Requestor identify any policy or procedure (because there is none) obligating ICANN to go back and reconsider, as part of the current New gTLD Program round, the JAS WG's recommendations that were previously not adopted. To the contrary, the requirements of the ASP as set forth in the *Process* and *Criteria* documents were intended to be "very clear requirements that are the *final requirements* of the program for applicant support."[43]

The Board further agrees with the BAMC's conclusion that even if the Board were to "address the remainder of the JAS Final Report," as the Requestor asks,[44] reconsideration still would be not warranted. The BAMC has reviewed the JAS Final Report and associated relevant materials, including comments made in response to the Request for Public Comment, and has confirmed that financial assistance in the form requested by the Requestor was never recommended by the JAS WG or otherwise. Thus, even if ICANN org were to "address the remainder of the JAS Final Report," as the Requestor asks,[45] ICANN org would not find any recommendation in the JAS Final Report that financial support be made available for engaging in the contention resolution process.

B. **ICANN Org Adhered to Its Core Values in Responding to the Requestor's Request for Financial Assistance.**

The Board agrees with the BAMC's finding that ICANN org has not violated its core value to act in the global public interest by denying the Requestor's financial assistance request. The Core Value cited by the Requestor provides:

> Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.[46]

ICANN org's implementation of the ASP is the embodiment of this Core Value, not, as the Requestor claims, a contravention of it. The Core Value to "seek[] and support broad, informed participation" via the multistakeholder model is illustrated in the ICANN Board's request, in March 2010, that stakeholders "work through their [Supporting Organizations] SOs and [Advisory Committees] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."[47] The JAS Final Report, which the ICANN Board fully considered, was developed in response to ICANN's commitment to the multistakeholder model, and exemplifies ICANN's commitment to "ascertain the global public interest" as it concerns the New gTLD Program. In resolving to consider the JAS Final Report, the Board noted that it "takes seriously the assertions of the ICANN

community that applicant support will encourage diverse participation in the New gTLD Program and promote ICANN's goal of broadening the scope of the multi-stakeholder model."[48]

The BAMC determined, and the Board agrees, that the Requestor appears to urge ICANN org to circumvent the established policy set forth in the requirements governing the ASP in a manner favorable to the Requestor, which undermines, rather than bolsters, the global public interest. ICANN org is committed to diversity, operational stability, and non-discrimination, but it is not responsible for guaranteeing a gTLD for any specific applicant. The Requestor has failed to demonstrate any violation of ICANN's core values.

C. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

As an initial matter, the Board notes that the Rebuttal is untimely. The Requestor received the Recommendation on 17 November 2018.[49] The Rebuttal was due 15 days later, on 2 December 2018.[50] The Requestor submitted the Rebuttal on 3 December 2018, one day after the deadline.[51] Nonetheless, the Board has considered the arguments in the Requestor's rebuttal and finds that they do not support reconsideration for the following reasons.

1. **Request 18-9 Seeks Reconsideration of ICANN Org's Denial of the Requestor's Request for Financial Support.**

   The Requestor argues in the Rebuttal that is not "directly" seeking "funding support." (Rebuttal at Pg. 1. *See also id.* at Pg. 3 (Request 18-9 "did not request any particular form of financial assistance.").) However, as the BAMC noted in the Recommendation, on 27 August 2018, the Requestor sent an email to ICANN org stating that it was "looking to request financial support for engaging in the string contention resolution process." (BAMC Recommendation at Pg. 9, citing Exhibit A to Recommendation.) The Requestor identified ICANN org's response to this email "reject[ing] the request" as the action it seeks to have reconsidered.[52] Accordingly, the BAMC reasonably understood Request 18-9 to seek reconsideration of ICANN org's denial of the Requestor's request for financial support.

   The Requestor now asserts that Request 18-9 "simply" asks "the ICANN Board to initiate the process to consider the remaining parts of the JAS Final Report." (Rebuttal at Pg. 1.) However, the BAMC already considered this claim. The BAMC concluded that "ICANN org *did* thoughtfully and fully consider all of the recommendations set forth in the JAS Final Report." (BAMC Recommendation, at Pg. 13.) The Board agrees, and adopts the reasoning set forth in the BAMC Recommendation.

   The Board finds that the Requestor's Rebuttal has not provided any new arguments, or identified any policy or procedure (because there is none) obligating ICANN to reconsider the JAS WG's recommendations that it previously did not adopt.

   The Board notes that the Rebuttal expresses disagreement with the BAMC's conclusion that the Board made it clear that it

had determined not to adopt all of the recommendations set forth in the JAS Final Report. The Requestor claims that this "at best leaves the question open" as to whether the Board would give further consideration to the recommendations that it did not follow. (Rebuttal, at Pg. 2) However, nothing in the materials cited the Requestor supports the Requestor's assertion that the Board intended to "leave[] . . . open" the possibility of further consideration of the JAS recommendations that it did not adopt in 2011. (Rebuttal, at Pg. 2.) As the BAMC explained, Resolutions 2011.12.08.01 – 2011.12.08.03 and supporting materials make clear that the Board considered and decided not to adopt any JAS WG recommendations except those set forth in the *Process* and *Criteria* documents. Specifically, Resolution 2011.12.08.01 directed ICANN org to "finalize the implementation plan *in accordance with the proposed criteria and process* for the launch of the Applicant Support Program."[53] The *Process* and *Criteria* documents neither provide for the additional funding the Requestor seeks nor provide for potential reevaluation of the JAS recommendations that the Board did not adopt in 2011.[54] The Board is not persuaded by the Requestor's arguments to the contrary, which are based on opinion. The Requestor has not provided any new facts or evidence to demonstrate that reconsideration is warranted.

2. **The JAS WG Never Recommended Financial Support in the Form Sought by the Requestor.**

   For the first time in the Rebuttal, the Requestor argues that, without "some further support (e.g., in terms of fee reduction, adjustment, staggering or otherwise), the Applicant Support program simply does not make sense." (Rebuttal, at Pg. 1.) As a preliminary matter, the Bylaws state that Rebuttals "shall . . . be limited to rebutting or contradicting the issues raised in the" Recommendation, and shall "not offer new evidence" if the Requestor "could have provided" that evidence when it originally submitted the Request.[55] As such, this argument does not rebut a specific issue raised in the Recommendation; it should have been raised in the Request, and is therefore not properly raised in the Rebuttal. Moreover, any challenge to the Board Resolutions 2011.12.08.01 – 2011.12.08.03 or the ASP is long since time barred. Nevertheless, the Board has considered the argument and concludes that it does not support reconsideration for the following reasons.

   The Requestor argues that the BAMC incorrectly concluded that none of the JAS WG's recommendations that the Requestor relied on in Request 18-9 "suggest a specific intent to make financial support available to assist in the contention resolution process." (Rebuttal, at Pg. 3.) The Requestor asserts that "[e]ven if direct support for the contention resolution process is not available, the adjustment of other fees could have significant impact on" Support-Approved Candidates, and that the BAMC should not have concluded that "just because direct contribution might not be included[,] . . . other fee adjustments" might have been contemplated. (*Id.*) The BAMC's conclusion was not as limited as the Requestor suggests; the BAMC concluded that the JAS Final Report did

not support financial support of any type for any portion of the contention resolution process. (BAMC Recommendation, at Pgs. 15-16.) Additionally, as the BAMC noted, the JAS Final Report specifically stated that, in the case of string contention, the Applicant would have to "'fund[] this additional step'" of the process. (BAMC Recommendation, at Pg. 16, quoting JAS Final Report at 28.) The Requestor does not identify any policy or procedure (nor is there one) requiring ICANN org to modify or add on to the JAS WG's recommendations to provide additional support to the Requestor or similarly situated applicants when the Board has not made such provisions and the report to the Board did not even recommend such support.

The Board also finds that the Requestor's assertion that the BAMC concluded that "any other further financial support will not help" is inaccurate. (Rebuttal, at Pg. 3.) The BAMC concluded that ICANN org adhered to established policies and procedures when it concluded that additional financial assistance for the Requestor was not available under the ASP. (BAMC Recommendation, at Pgs. 12-16.)

For the above reasons, none of the Requestor's Rebuttal arguments support reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

h. Consideration of Reconsideration Request 16-12: Merck KGaA (.MERCK)

Whereas, Merck KGaA (Requestor) submitted a community-based application for .MERCK (the Application), which was placed in a contention set with other .MERCK applications.

Whereas, the Requestor participated in Community Priority Evaluation (CPE) and but did not prevail.

Whereas, the Requestor submitted Reconsideration Request 16-12, seeking reconsideration of the CPE report of its Application, and ICANN organization's acceptance of that CPE report.

Whereas, while Request 16-12 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-12, would be placed on hold until the CPE Process Review was completed.[56]

Whereas, on 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, in accordance with Resolutions 2018.03.15.08 through 2018.03.15.11, the BAMC invited the Requestor to submit additional materials and to make a presentation to the BAMC in support of Request 16-12.

Whereas, the Requestor submitted additional materials in support and made a telephonic presentation to the BAMC in support of Request 16-12; the Requestor also submitted a written summary of its telephonic presentation to the BAMC.

Whereas, the BAMC has carefully considered the merits of Request 16-12 and all relevant materials and has recommended that Request 16-12 be denied because the CPE Provider did not violate any established policies or procedure in its evaluation of Criterion 2 and ICANN org's acceptance of the CPE Provider's Report complied with established policies.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 16-12 and all relevant materials related to Request 16-12 and the Board agrees with the BAMC's Recommendation.

Resolved (2019.01.27.25), the Board adopts the BAMC Recommendation on Request 16-12.

Rationale for Resolution 2019.01.27.25

1. ### Brief Summary and Recommendation

   The full factual background is set forth in the BAMC Recommendation on Request 16-12 (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

   On 14 December 2018, the BAMC evaluated Request 16-12 and all relevant materials and recommended that the Board deny Request 16-12 because the CPE Provider did not violate any established policies or procedure in its evaluation of Criterion 2 and that ICANN organization's acceptance of the CPE Provider's Report complied with established policies.

   The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 16-12, and the Board agrees with the BAMC's Recommendation.

2. ### Issue

   The issues are as follows:

   - Whether the CPE Provider adhered to the Guidebook in its application of Criterion 2, Nexus between Proposed String and Community, in the

CPE Report;

- Whether ICANN org complied with applicable policies and procedures when it accepted the CPE Report;
- Whether ICANN org must disclose documentary information and communications between ICANN org and the CPE Provider relating to the Application; and
- Whether the Board complied with applicable Commitments, Core Values, and policies when it acknowledged and accepted the findings set forth in the CPE Process Review Reports.

These issues are considered under the relevant standards for reconsideration requests in effect at the time that Request 16-12 was submitted. These standards are discussed in detail in the BAMC Recommendation.

3. Analysis and Rationale

A. The CPE Criteria and Procedures

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.[57] The CPE standards and CPE process are defined in Module 4, Section 4.2 of the Applicant Guidebook (Guidebook). Community-based applications that undergo CPE are evaluated by the following criteria: Criterion 1: Community Establishment; Criterion 2: Nexus Between the Proposed String and Community; Criterion 3: Registration Policies; and Criterion 3: Community Endorsement.[58] Pursuant to the Guidebook, the sequence of the criteria reflects the order in which those criteria will be assessed by the CPE Provider. To prevail in CPE, an application must receive at least 14 out of 16 points on the scoring of the four criteria, each of which is worth a maximum of four points. An application that prevails in CPE "eliminates all directly contending standard applications, regardless of how well qualified the latter may be."[59] CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.[60] A CPE Provider's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook.[61]

B. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Criterion 2.

The Requestor claims that the CPE Provider erred in awarding the Requestor's Application zero out of four points for Criterion 2. Criterion 2 evaluates "the relevance of the string to the specific community that it claims to represent."[62] It is measured by two sub-criterion: sub-criterion 2-A-Nexus (worth a maximum of three points); and sub-criterion 2-B-Uniqueness (worth a maximum of one point).[63]

1. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-A-Nexus.

The Requestor's Application received zero points for sub-criterion 2-A. To obtain three points for sub-criterion 2-A, the applied-for string must "match the name of the community or be a well-known short-form or abbreviation of the

community."[64] The CPE Provider determined that the Requestor's Application did not satisfy the three point test because the applied-for string does not "match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community."[65]

For a score of two, the applied-for string should "closely describe the community or the community members, without over-reaching substantially beyond the community."[66] It is not possible to obtain a score of one for this sub-criterion. The CPE Provider also found that the Requestor's Application did not satisfy the two-point test because the applied-for string does not "identify…the community as defined in the application."[67]

The CPE Provider found that

> although the string "Merck" matches the name of the community defined in the Application, it also matches the name of another corporate entity known as "Merck" within the US and Canada. This US-based company, Merck & Co., Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US$39.5 billion in 2015. It is therefore a substantial entity also known by the name "Merck".[68]

The CPE Provider therefore determined that the string is "'over-reaching substantially beyond the community'…it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant."[69]

The BAMC found that, although the Requestor disagrees with the CPE Provider's conclusion, the Requestor has not identified any policy or procedure that the CPE Provider violated in its determination.[70] Nor has the Requestor provided any evidence that the CPE Provider violated any established policy or procedure. The BAMC noted that the Requestor does not deny that the U.S.-based entity is connected to the Requestor's community as defined in the Application; to the contrary, the majority of Request 16-12 is devoted to summarizing the decades-old, contentious legal dispute between the Requestor and the U.S.-based Merck & Co., Inc. (a former subsidiary of the Requestor) over which company may use the name "MERCK" outside the United States.[71] As such, the BAMC concluded, and the Board agrees, that the Requestor's substantive disagreement with the CPE Provider's conclusion is not grounds for reconsideration.

Additionally, as reported in the CPE Process Review Scope 2 Report, the CPE Provider acted consistent with the Guidebook in its analysis under sub-criterion 2-A for all the CPEs that were conducted.[72]

Consideration of the CPE Provider's treatment of the Merck & Co. Application confirms the consistency of the CPE Provider's

analysis of sub-criteria 2-A across the board for all CPEs. In the CPE Report on the community-based application filed by Merck & Co., Inc. for the .MERCK gTLD (Merck & Co. CPE Report), the CPE Provider applied the same reasoning to the Merck & Co. Application as the reasoning included in the Requestor's CPE Report: it found that the Merck & Co., Inc.'s applied-for string (.MERCK) substantially over-reaches beyond the community because the Requestor here is "a substantial entity also known by the name 'Merck'" and is not included in the Merck & Co. Application's community definition in its application for .MERCK.[73] There, the CPE Provider considered whether the existence of the Requestor should prevent the Merck & Co. Application from receiving any points on the nexus element.[74] For that reason, the CPE Provider awarded the Merck & Co. Application zero points on sub-criterion 2-A, just as the CPE Provider did with respect to the Requestor's Application.[75]

With respect to the Requestor's claim that the size of its community is larger than the community associated with Merck & Co., Inc. and therefore "the string clearly identifies the Requestor"[76], the BAMC concluded, and the Board agrees, that this assertion does not show that the CPE Provider failed to adhere to any established policy or procedure in concluding that the string .MERCK over-reaches substantially beyond the community definition in the Requestor's Application. Nor has the Requestor shown that the CPE Provider failed to adhere to any policy or procedure in awarding zero points on the nexus element. Rather, as the BAMC noted, the Guidebook specifically instructs that zero points must be awarded if the string substantially over-reaches beyond the community in the application.

The BAMC determined, and the Board agrees, that the Requestor's suggestion that it should have been awarded more points for sub-criterion 2-A because it "will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights" does not warrant reconsideration because the Requestor does not point to any policy or procedure indicating that the CPE Provider must (or even should) take geo-targeting considerations into consideration when scoring sub-criterion 2-A. The BAMC notes that no such policy exists under the Guidebook.

With respect to the Requestor's suggestion that the CPE Provider failed to consider evidence of "unlawful intrusion" into its territories and its "illegal use" of the word Merck by Merck & Co., Inc.,[77] the BAMC concluded, and the Board agrees, that the CPE Provider was not required to evaluate the decades-long trademark dispute between the Requestor and Merck & Co., Inc.[78,79] Accordingly, the CPE Provider did not violate any established policy or procedure in not taking the ongoing legal disputes into consideration, and this argument does not warrant reconsideration. For the same reason, the Board also agrees with the BAMC's conclusion that ICANN org was not required to provide the CPE Provider with information relating to the legal disputes between the Requestor and Merck & Co.,

Inc. The Requestor does not and cannot identify any policy or procedure obligating ICANN org to provide such information to the CPE Provider.

2. **The Application of Sub-Criterion 2-A is Consistent with Other CPE Reports.**

   The Requestor asserts that the CPE Provider's analysis of sub-criterion 2-A in the CPE Report is inconsistent with its analysis of the same sub-criterion for the applications for .ECO, .RADIO, .SPA, and .ART, claiming that in each of those cases, the "applicant was awarded three points under the nexus requirement although there were other entities using the same name."[80] The BAMC concluded, and the Board agrees, that the Requestor provides no support or additional argument concerning this assertion, and further, the argument is misplaced. As discussed in detail in the BAMC Recommendation and incorporated herein by reference, in each of these cases, the CPE Provider determined that the applied-for string did *not* match the name of the community, but it identified the community without over-reaching substantially beyond the community.[81] By contrast, the CPE Provider concluded that .MERCK *did* match the name of the community, but it *also* matched the name of another community, that of US-based Merck & Co., Inc.[82] Accordingly, the Board agrees with the BAMC's conclusion that reconsideration is not warranted on this basis because the Requestor has not provided any evidence that the CPE Provider contradicted any established policy or procedure.

3. **The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-B-Uniqueness.**

   The BAMC determined, and the Board agrees, that the Requestor has not demonstrated that the CPE Provider violated any policy or procedure in awarding the Requestor's Application zero points for sub-criterion 2-B-Uniqueness. To obtain one point for sub-criterion 2-B, the applied-for string must have no other significant meaning beyond identifying the community described in the application.[83] An application that does not qualify for two or three points for sub-criterion 2-A will not qualify for a score of one for sub-criterion 2-B.[84] Here, the CPE Provider awarded zero points under sub-criterion 2-B because the applied-for string did not receive a score of two or three on sub-criterion 2-A for the reasons discussed above.[85]

   The Requestor suggests that the CPE Provider should have awarded the Application one point on the uniqueness element because of the Requestor's longstanding and sole use of its community name MERCK.[86] Similar to its arguments in sub-criterion 2-A, the Board agrees with BAMC that Requestor's challenge of the CPE Provider's scoring on sub-criterion is based solely on a substantive disagreement with the CPE Provider's conclusions, which is not grounds for reconsideration. The Requestor has failed to show any policy or procedure violation in connection with the CPE Provider's finding that the Application should receive a score of zero

points for sub-criterion 2-B.

C. **The CPE Report did not Implicate Due Process Rights.**

The Requestor argues that the CPE Provider "failed to take reasonable care" in drafting the CPE Report, "and misapplied standards and policies developed by ICANN in the [Guidebook], resulting in a denial of due process to the Request[o]r."[87] The Board agrees with the BAMC that this argument does not warrant reconsideration. For the reasons discussed above and in further detail in the BAMC Recommendation, the Requestor has not demonstrated any failure by the CPE Provider to follow the established policy and procedures for CPE as set forth in the Guidebook. Rather, the Requestor suggests that there should have been a formal appeal process for decisions by ICANN org's third-party service providers, including the CPE Provider, Legal Rights Objection Panels, and String Confusion Panels. The methods for challenging determinations in the course of the gTLD contention resolution process are set forth in the Guidebook, which was developed after extensive community consultation, and adopted by the Board in June 2011.[88] The time for challenging the Guidebook has long passed.[89]

As the BAMC noted, the Guidebook provides a path for challenging the results of the CPE process through ICANN's accountability mechanisms.[90] Indeed, the Requestor has exercised this right by invoking the Reconsideration process with Request 16-12.[91] Accordingly, the Board finds that because the CPE Provider's application of Criterion 2 to the Application was consistent with the Guidebook, ICANN org's acceptance of the CPE Report was also consistent with applicable policies and procedures, and did not implicate any "due process" violation. The Board further finds that the absence of an appeal mechanism under the Guidebook for the substance of evaluation results does not constitute a due process violation.

D. **The CPE Process Review Supports the Results of the Merck KGaA Application.**

The CPE Process Review Scope 2 Report shows that CPE Provider applied the CPE criteria consistently across all CPEs and that there is no evidence that CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines.[92] For this additional reason, the BAMC found, and the Board agrees, that the Requestor's argument that the CPE Provider incorrectly applied Criterion 2 does not support reconsideration.

The Requestor argues that the CPE Process Review Scope 2 and 3 Reports are excessively narrow and did not reevaluate the CPE Provider's application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE Provider.[93] For the reasons set forth in the BAMC Recommendation and incorporated herein by reference, the BAMC concluded, and the Board agrees, that the Requestor's claims do not support reconsideration because the Requestor did not demonstrate that any violation of process or procedure has been violated. (BAMC Recommendation, Pgs. 25-28.)

E. **The Requestor's Request for the Disclosure of Documentary**

Information is Not Grounds for Reconsideration.

The BAMC determined, and the Board agrees, that the Requestor's request for the disclosure of documentary information between the ICANN org and the CPE provider relating to the Application and CPE Report is not properly made in the context of a reconsideration request, as the Requestor is not asking ICANN org to reconsider Board or staff action or inaction.[94] As such, the Board agrees with the BAMC that this is not grounds for reconsideration. To the extent the Requestor wishes to make a request under ICANN's Documentary Information Disclosure Policy (DIDP), the Requestor may do so separately, consistent with the DIDP.[95] However, it should be noted that the documentary information that the Requestor seeks was the subject of multiple DIDP Requests and subsequent Requests for Reconsideration, which the Requestor may consider consulting before submitting an additional substantially identical request.[96]

For the foregoing reasons, the Board concludes that reconsideration is not warranted.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

i. AOB

Pubished on 29 January 2019

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[1] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

[2] *See* ICANN Bylaws, 11 February 2016, Art. 4, § 2 (https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV).

[3] Letter from Mr. Philipp Grabensee to ICANN (https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf. The Requestors assert that Ms. Ohlmer has also been associated with HTLD. *See* Request 16-11 § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h. The BAMC concluded that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 § 8, at Pg. 15) does not support reconsideration because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE. The Board agrees.

[4] https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h.

[5] Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf).

[6] *Id.* at Pg. 95-96.

[7] *Id.*, § 8, Pg. 9.

[8] 2016 Resolutions (https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a).

[9] ICANN Bylaws, 11 February 2016, Art. IV, § 2.5.

[10] Request 16-11, § 8, Pg. 12.

[11] *Id.* (emphasis in original).

[12] Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 4-5 (https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf.

[13] *Id.*

[14] Request 16-11, § 8, at Pg. 12-13.

[15] 2018 Resolutions (https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a).

[16] FTI Scope 1 Report at Pg. 3 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf).

[17] 1 February 2018 letter from Petillion to BAMC, at Pg. 3 (https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf.

[18] 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing FTI Scope 1 Report, at Pg. 12 (emphasis added).

[19] *Id.*

[20] *Id.*, at Pg. 3.

[21] Nothing in ICANN's Bylaws, the DIDP, or other policy or procedure requires ICANN to voluntarily produce in the course of an IRP documents that were properly withheld in response to a DIDP request.

[22] Procedural Order No. 3, *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en.

[23] The Requestors were fully aware that communications occurred between ICANN org and the CPE panel, since such communications are expressly contemplated in the CPE Panel Process Document and ICANN disclosed the existence of these communications in the 2014 DIDP Response. *See* CPE Panel Process Document (https://newgtlds.icann.org/en/applicants/cpe ("The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.").

[24] Request 16-11, § 9, Pg. 20.

[25] Scope 2 Report, at Pg. 2 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[26] BAMC Recommendation on Request 18-6 (https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf.

[27] Resolution 2918.07.18.09 (https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g.

[28] *See* ICANN Bylaws, 11 February 2016, Art. 4, § 2 (https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV).

[29] *See* ICANN Bylaws, 11 February 2016, Art. 4, § 2 (https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV).

[30] *See* https://www.icann.org/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en (providing links to letters).

[31] *Id.*, citing Letter from Grabensee to ICANN org, 18 May 2016, (https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf).

[32] *See* Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15, https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h.

[33] *Id.*

[34] Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15, https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h.

[35] *See generally*, Reconsideration Request 18-9.

[36] Reconsideration Request 18-9, § 7 at Pg. 4.

[37] 28 October 2011 Board Resolution (https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2.

[38] 8 December 2011 Board Resolution (https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1.

[39] JAS Final Report at I (emphasis added) (http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf).

[40] 28 October 2011 Board Resolution (https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2.

[41] 8 December 2011 Board Resolution (https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1).

[42] 8 December 2011 Board Resolution (https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1.

[43] 28 October 2011 Board Minutes (emphasis added) (https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2.

[44] Reconsideration Request 18-9, § 7 at Pg. 4.

[45] Reconsideration Request 18-9, § 7 at Pg. 4.

[46] ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(ii).

[47]

12 March 2010 Board Resolution (https://www.icann.org/resources/board-material/resolutions-2010-03-12-en.

[48] https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2.

[49] Email from Requestor to ICANN, dated 3 December 2018, attached as Attachment __ to the Reference Materials.

[50] *See* ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(q) (setting out deadline for submitting rebuttals).

[51] *See* https://www.icann.org/resources/pages/reconsideration-18-9-dotkids-request-2018-09-21-en.

[52] Request 18-9, § 2, at Pg. 1.

[53] Resolution 2018.12.08.01 (https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1 (emphasis added).)

[54] *See Process* and *Criteria* documents, included in Board Briefing Materials for 8 December 2011 Board Meeting, at pages 81 and 87 of 164 (https://www.icann.org/en/system/files/bm/briefing-materials-3-08dec11-en.pdf.

[55] ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(q).

[56] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

[57] *See* Guidebook, Module 4, § 4.2 at Pg. 4-7 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf. *See also* https://newgtlds.icann.org/en/applicants/cpe.

[58] *Id.* at Module 4, § 4.2 at Pg. 4-7 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf).

[59] *Id.* at Module 4, § 4.2.3, Pg. 4-9.

[60] *Id.* Module 4, § 4.2.2.

[61] *Id.* at Module 4, §§ 4.2.2 and 4.2.3. at Pgs. 4-8 and 4-9 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf).

[62] *See* Guidebook, Module 4, § 4.2.3 at Pg. 4-13 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf.

[63] *Id.* at Pgs. 4-12-4-13.

[64] *Id.*

[65] CPE Report, at Pg. 3.

[66] *Id.* at Pg. 4-12.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] The Requestor asserts that the BAMC should re-evaluate the Application in the course of making a recommendation on Request 16-12. *See* Written Submission in support of Oral

Presentation to BAMC on 4 September 2018, at Pg. 1 (https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf). The applicable version of ICANN's Bylaws direct the BAMC to consider only whether the challenged action violates established ICANN policies or procedures and do not authorize the BAMC to perform a *de novo* review of the Application. *See* ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

[71] *See* Request 16-12, § 8, Pgs. 7-10.

[72] CPE Process Review Scope 2 Report, at pgs. 36-37 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf).

[73] *Id.*

[74] Merck & Co., Inc. CPE Report, Pg. 4.

[75] *Id.*

[76] Request, § 8, Pg. 9.

[77] *Id.*

[78] *See* Request 16-12, § 8, at Pg. 7-10.

[79] *See*, Guidebook, Module 4, § 4.2.3.

[80] 2017 Presentation Summary at Pg. 3 (https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf).

[81] .ART CPE Report at Pg. 5 (https://newgtlds.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf); .SPA CPE Report at Pg. 4 (https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf); .ECO CPE Report at Pg. 5-6 (https://newgtlds.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf); .RADIO CPE Report at Pg. 4-5 (https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf).

[82] CPE Report at Pg. 3-4.

[83] *Id.* at Pg. 4-13.

[84] *Id.* at Pg. 4-14.

[85] CPE Report at Pg. 5; *see also* Guidebook, Module 4, § 4.2.3, Pg. 4-14 ("The phrasing '. . . beyond identifying the community' in the score of 1 for 'uniqueness' implies a requirement that the string does identify the community, i.e. scores 2 or 3 for 'Nexus,' in order to be eligible for a score of 1 for 'Uniqueness.'").

[86] Request, § 8, Pg. 11.

[87] Request 16-12, § 8, Pg. 6.

[88] *Id.*

[89] *See* https://www.icann.org/resources/board-material/resolutions-2011-06-20-en#1. Under the Bylaws in effect in June 2012, Reconsideration Requests were due no later than thirty days after information regarding the challenged Board action is published or within thirty days after a Requestor became aware of or should reasonably have become aware of challenged Staff action.

ICANN Bylaws, 16 March 2012, Art. IV, § 2.5 (https://www.icann.org/resources/pages/bylaws-2012-12-21-en#IV).

[90] Guidebook, Module 6, § 6, at Pg. 6-4.

[91] The Requestor also exercised this right when it filed an IRP proceeding concerning objections that the Requestor and Merck & Co., Inc. filed against each other in the course of their competing applications for the .MERCK gTLD. *See* https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf.

[92] Scope 2 Report, at Pg. 2 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf. The Requestor believes that the Scope 2 Report "has no significance with respect to Merck KGaA's Request for Reconsideration." (12 April 2018 Letter from Bettinger to ICANN, at Pg. 8.) However, the Scope 2 Report's findings are directly relevant to the Requestor's claim that the CPE Provider's determination concerning sub-criterion 2-A-Nexus, was inconsistent with the CPE Provider's determinations under the same sub-criterion for .SPA, .RADIO, .ART, and .ECO.

[93] 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6 (https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-supp-submission-12apr18-en.pdf). *See also* Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 7 (https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf.

[94] 12 April 2018 Letter from Bettinger to ICANN, at Pg. 10.

[95] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.

[96] *See, e.g.,* DIDP Request 20180115-1 and response thereto (https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en) (Request for Reconsideration Denied on 18 July 2018 (https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c)); DIDP Request 20180110-1 and response thereto (https://www.icann.org/resources/pages/didp-20180110-1-ali-request-2018-02-12-en) (Request for Reconsideration Denied on 18 July 2018 (https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.b)).

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RESPONDENT'S EXHIBIT

Resources

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18 Jul 2018

1. **Consent Agenda:**
   a. **Approval of Minutes**

   b. **Revisions to the Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy**
      Rationale for Resolution 2018.07.18.02

2. **Main Agenda:**
   a. **Initiating Next Steps on the Uniform Board Member Integrity Screening Process**
      Rationale for Resolution 2018.07.18.03

   b. **Consideration of Reconsideration Request 18-1: DotMusic Limited**
      Rationale for Resolution 2018.07.18.04

   c. **Consideration of Reconsideration Request 18-2: dotgay LLC**
      Rationale for Resolution 2018.07.18.05

   d. **Consideration of Reconsideration Request 18-3: Astutium Ltd**
      Rationale for Resolution 2018.07.18.06

   e. **Consideration of Reconsideration Request 18-4: dotgay LLC**
      Rationale for Resolution 2018.07.18.07

   f. **Consideration of Reconsideration Request 18-5: DotMusic Limited**
      Rationale for Resolution 2018.07.18.08

   g. **Consideration of Reconsideration Request 18-6: Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., Fegistry LLC**
      Rationale for Resolution 2018.07.18.09

   h. **AOB**

3. **Executive Session - Confidential:**
   a. **President and CEO FY18 SR2 At-Risk Compensation and Goals for FY19**
      Rationale for Resolutions 2018.07.18.10 – 2018.07.18.11

   b. **President and CEO Executive Services Agreement – One Year Extension**
      Rationale for Resolutions 2018.07.18.12 – 2018.07.18.13

   c. **Officer Compensation**
      Rationale for Resolutions 2018.07.18.14 – 2018.07.18.15

Public Comment

Root Zone KSK Rollover

Technical Functions

Contact

Help

d. **Ombudsman FY18 At-Risk Compensation**
Rationale for Resolution 2018.07.18.16

e. **Extension of Ombudsman Contract**
Rationale for Resolutions 2018.07.18.17 – 2018.07.18.19

1. Consent Agenda:

a. Approval of Minutes

Resolved (2018.07.18.01), the Board approves the minutes of the 23 June 2018 Meeting of the ICANN Board.

b. Revisions to the Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy

Whereas, on 27 May 2016, the Board approved extensively revised Bylaws, which became effective on 1 October 2016.

Whereas, the Board Governance Committee has reviewed suggested changes to the Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Board Conflicts of Interest Policy to conform them to the 1 October 2016 Bylaws and recommends that the Board approve the revised documents.

Resolved (2018.07.18.02), the Board adopts the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy.

Rationale for Resolution 2018.07.18.02

Adopting the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy is consistent with ICANN's commitments to ensuring legitimacy and sustainability of the ICANN multistakeholder model by ensure that the Board members are operating at the highest ethical standards.

The Board Governance Committee (BGC) has recommended that the Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy be revised to conform with the 1 October 2016 version of the Bylaws and the Board agrees. Because these revisions are non-material, a public comment process is not required.

This decision is squarely within the public interest and consistent with ICANN's mission as it is expected to positively impact the ICANN community through the incorporation of recently adopted Bylaws into the Board's governance documents to ensure that those Bylaws revisions are consistently addressed.

The adoption of the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy is not expected to have a fiscal impact on ICANN organization.

This decision should not have any negative impact on the security, stability or

resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

2. Main Agenda:

a. Initiating Next Steps on the Uniform Board Member Integrity Screening Process

Whereas, the Board agrees that the ICANN Community and organization should expect Board members to hold the highest values of integrity and to uphold the reputation and credibility of the Board as a whole.

Whereas, there is no uniform practice in place today for conducting screening of Directors and Liaisons (collectively Board members) selected to the ICANN Board.

Whereas, the ICANN Nominating Committee has long maintained a practice of conducting, or having conducted, due diligence screening of their selected candidates prior to finalizing selections, including basic compliance screening, public records reviews, criminal records reviews, and reputational reviews. The Address Supporting Organization and the At-Large Community have also adopted this same due diligence screening process as part of their regular Board-member selection procedures.

Whereas, on 2 November 2017, the Board directed the President and CEO, or his designee(s), "to develop a proposal paper to be posted for public comment… ask[ing] all of ICANN's Supporting Organizations and Advisory Committees that do not currently employ a due diligence integrity screening process similar to the Nominating Committee to seriously consider utilizing the same or similar due diligence integrity screening process for both voting Directors and non-voting Liaisons."

Whereas, a public comment proceeding was held from 2 March to 17 April 2018 on the Proposed Integrity Screening Process and all comments received during the public comment period generally supported the Proposed Screening Process.

Whereas, some of the comments expressed concerns regarding the timing and criteria of the screening process, which are addressed in the Proposed Screening Process document and related information that can be found in the ICANN Bylaws.

Whereas, the Board re-emphasizes the importance of a relying upon a uniformed due diligence integrity screening process in Board member selection as a good practice towards seating Board members with high levels of integrity.

Resolved (2018.07.18.03), the Board strongly encourages all Board-member selecting groups that do not currently employ a due diligence screening process similar to the Nominating Committee to adopt the Proposed Screening Process. For any individual selected to serve as a Board member without undergoing the Proposed Screening Process, the Board will ensure that ICANN organization facilitate completion of the screening process upon the announcement of selection by the Board-member selecting group.

Rationale for Resolution 2018.07.18.03

Because of the ever-increasing scrutiny of the ICANN Board of Directors, relying upon due diligence integrity screening practices in Board member selection – including interviews, reference checks and external due diligence checks – is a good practice towards seating Board members with high levels of integrity. While conducting such diligence cannot prevent future bad acts of Board members, it does give a level of confidence of the integrity of members at the time of seating. It also serves to uphold confidence in ICANN overall, as seating Board members with red flags in their past undermines the integrity and reputation of ICANN as a whole.

On 2 November 2017, the ICANN Board passed Resolution 2017.11.02.33 directing the President and CEO, or his designee(s), to develop a proposal paper for public comment calling on ICANN's Supporting Organizations (SOs) and Advisory Committees (ACs) that do not currently employ a due diligence integrity screening process to seriously consider utilizing an integrity screening process similar or identical to the Nominating Committee process to screen both voting Directors and non-voting Liaisons (collectively Board Members).

Between 2 March through 17 April 2018, the proposed Uniform Board Member Integrity Screening Process (Proposed Screening Process) was published for public comment. (*See* Proposed Screening Process.)

ICANN org received six comments from Stephen Deerhake of GDNS, LLC (GDNS), the Noncommercial Stakeholders Group (NCSG), the Registrar Stakeholder Group (RrSG), the Registries Stakeholder Group (RySG), and two individuals, Alfredo Calderon (AC) and Vanda Scartezini (VS). (*See* Report of Public Comments.)

In general, the commenters (RrSG, NCSG, AC, VS) were in support of a uniform screening process across all SOs and ACs regardless if certain SOs or ACs currently perform their own screening process.

Two commenters (NCSG and GDNS) expressed some concerns. The NCSG was concerned about the feasibility of access to documents called for per the screening process in certain regions and its impact on the timelines in the Proposed Screening Process. GDNS suggested that the Proposed Screening Process might impact Board member selection of the SOs and ACs that elect, rather than appoint Board members and noted that the Proposed Screening Process "contains no objective criteria that would govern the disqualification of a prospective Board member." (*See* Report of Public Comments.)

As always, the Board thanks and appreciates the commenters for their views and concerns raised. The Board Governance Committee (BGC) has considered the comments provided and recommends no change to the Proposed Screening Process, and the Board agrees. First, the types of screenings set forth in the Proposed Screening Process are guidelines of screening processes commonly used in similar settings. The specified timing for each level are approximations, and not meant to serve as a strict timeline of when a specific screening level should be completed.

With respect to GDNS' first concern regarding the potential impact on the selection process, the BGC noted, and the Board agrees, that as stated in the Proposed Screening Process document, the Process "is not intended to modify

other community-specific selection criteria and processes applied by any of the Board member-selecting groups." (Proposed Screening Process, Pgs. 2, 4.) As for GDNS' second concern relating to objective criteria for disqualification of Board members, the Board notes that the criteria are addressed in the Proposed Screening Process document and related information that can be found in the ICANN Bylaws.

For any Board member who will undergo the screening process facilitated by ICANN organization upon the announcement of selection by the Board-member selecting group, their screening will be conducted using an external provider with expertise in international due diligence screening of individuals, similar to the process currently employed by the NomCom. The screening process will be conducted in a manner that ensures the confidentiality of information received as part of the process for the Board member.

When the screening reveals an area of concern, the manner in which the concern is addressed, as well as the end result, may vary depending on the nature of the concern and the timing of the screening results. If raised before the Board member is seated, it is typically up to the selecting body to address any areas of concern. If the concern is identified after the Board member has been seated, the options could range from simply asking the Board member for an explanation which may be all that is needed to address the concern, all the way up to the extraordinary measure of the Board member potentially stepping down or being removed by the Board pursuant to the Bylaws.

This decision is squarely within the public interest and consistent with ICANN's mission as it is imperative that selected Board members can perform their fiduciary and general obligations of service, and are capable of upholding the reputation and credibility of the Board, ICANN organization and the Community, along with being capable and committed to taking actions that are consistent with ICANN's Bylaws and Articles of Incorporation.

There is a fiscal impact to this decision, as there is a cost to each external due diligence integrity screening conducted. The Board anticipates that ICANN organization will facilitate and fund these screenings without negative impact on any of the budgets of the selecting entities.

This decision should not have any negative impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment at this stage as the underlying Proposed Screening Process has already been subject to public comment.

b. Consideration of Reconsideration Request 18-1: DotMusic Limited

Whereas, on 10 January 2018, DotMusic Limited (the Requestor) submitted a request for the disclosure of documentary information pursuant to the ICANN Documentary Disclosure Information Policy (DIDP) seeking documents and information relating to the Community Priority Evaluation (CPE) Process Review (DIDP Request).

Whereas, on 9 February 2018, ICANN organization responded to the DIDP Request (DIDP Response).

Whereas, on 10 March 2018, the Requestor filed Reconsideration Request 18-1 (Request 18-1) claiming that certain portions of ICANN org's DIDP Response violate the DIDP and ICANN org's Commitments established in the Bylaws concerning accountability, transparency, and openness.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-1 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-1 and all relevant materials and recommended that Request 18-1 be denied because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-1 and all relevant materials related to Request 18-1, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.04), the Board adopts the BAMC Recommendation on Request 18-1.

Rationale for Resolution 2018.07.18.04

1. ### Brief Summary and Recommendation

   The full factual background is set forth in the BAMC Recommendation, which the Board has reviewed and considered, and which is incorporated here.

   On 5 June 2018, the BAMC evaluated Request 18-1 and all relevant materials and recommended that the Board deny Request 18-1 because ICANN org adhered to established policies and procedures in its response to the DIDP Request. (*See* BAMC Recommendation.)

   On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal.) The Requestor claims that the DIDP Response "is clearly improper because (1) ICANN's assertion that the responsive documents fall under [] Nondisclosure Conditions is conclusory and unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Conditions; and (3) ICANN's decision violates its Commitments and Core Values."[1]

   The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 18-1, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

2. Issues

The issues for reconsideration are:

- Whether ICANN org complied with established ICANN policies in responding to the DIDP Request; and
- Whether ICANN org complied with its Core Values, Mission, and Commitments.[2]

These issues are considered under the relevant standards for reconsideration requests and DIDP requests, which are set forth in the BAMC Recommendation.

3. Analysis and Rationale

A. ICANN Org Adhered to Established Policies and Procedures in Responding to the DIDP Request.

1. The DIDP Response Complies with Applicable Policies and Procedures.

The Requestor's DIDP Request sought the disclosure of documents relating to the CPE Process Review. As noted in the BAMC Recommendation, Request 18-1 focuses on ICANN org's response to Items No. 1-9, 11-15, and 17-19. The DIDP Request sought the disclosure of: (i) emails relating to the CPE process (Items No. 1, 2, 4, 5, and 9); (ii) the CPE Provider's work product (Items No. 6-8, 11, and 12); [3] (iii) FTI's work product in the course of the CPE Process Review (Items No. 3 and 13-15); [4] and (iv) correspondence and documents relating to the CPE Process Review and its scope (Items No. 17-19). [5]

The BAMC determined that ICANN org's response was consistent with the DIDP Process, and the Board agrees. That is, ICANN org identified documents responsive to these Items and determined that they were subject to certain applicable Nondisclosure Conditions. (*See* BAMC Recommendation, Pgs. 13-14.) The BAMC noted, and the Board agrees, that the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the Nondisclosure Conditions.[6] The BAMC found that this argument constitutes a substantive disagreement with ICANN org's discretionary determination, and is not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, the BAMC concluded that reconsideration is not warranted, and the Board agrees.

Further, notwithstanding those Nondisclosure Conditions, the BAMC found that ICANN org *did* consider whether the public interest in disclosing the information outweighed the

harm that may be caused by the disclosure and determined that there were no circumstances for which the public interest in disclosure outweighed that potential harm.[7] Accordingly, the BAMC concluded, and the Board agrees, that the DIDP Response complied with applicable policies and procedures. The BAMC further concluded, and the Board agrees, that the Requestor provided no evidence to the contrary, because none exists.

2. **ICANN Org Adhered to Established Policy and Procedure in Finding That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public's Interest in Disclosing the Information.**

   Under the DIDP, information subject to the Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.[8] As detailed in the BAMC Recommendation, the BAMC determined, and the Board agrees, that ICANN org undertook such an analysis with respect to each Item requested by the Requestor, and articulated its conclusions in the DIDP Response.

   The Requestor disagrees with ICANN org's conclusions. The Requestor claims that the public interest in disclosure outweighs the harm that may be caused by such disclosure because the documents at issue "are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has threatened litigation."[9] The BAMC found, and the Board agrees, that the Requestor provides no explanation as to why the CPE Provider's decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure. (BAMC Recommendation, Pg. 26.)

   The Requestor also claims that the public interest in disclosure outweighs any purported harm because FTI's conclusions are allegedly "contrary to the findings of other panels and experts"[10] and that "[w]ithout the underlying documents," it cannot "analyze whether ICANN unduly influenced the CPE Provider."[11] As discussed in detail in the BAMC Recommendation, and incorporated herein by reference, the Requestor's claims do not support reconsideration. The Requestor does not provide any support for this argument. The Board did *not* direct FTI to come to one conclusion over another. FTI was retained to assess the CPE process and reach its own conclusions. The Requestor has provided no evidence to the contrary.

   The BAMC further concluded, and the Board agrees, that there is no merit to the Requestor's argument that "ICANN

cannot claim that there is no legitimate public interest in disclosing the requested documents"[12] because ICANN org "has not disclosed any 'compelling' reason that outweighs the public interest in disclosure."[13] ICANN org *did* identify compelling reasons in each instance of nondisclosure; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.[14] There is no policy or procedure requiring ICANN org to provide *additional* justification for nondisclosure.[15] Further, ICANN org did explain why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. Accordingly, reconsideration on this basis is not warranted.

The Requestor further claims that rather than state compelling reasons for nondisclosure, ICANN org "ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole."[16] However, as the BAMC concluded, and the Board agrees, the Requestor provides no support—because there is none for this baseless assertion. (BAMC Recommendation, Pg. 23.) The Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the DIDP Request.[17] No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor's request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason for nondisclosure.[18]

Moreover, the BAMC noted, and the Board agrees, that it is a fundamental principle of law that invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. (BAMC Recommendation, Pg. 24.) The BAMC and the Board therefore reject the Requestor's assertion that the attorney-client privilege is merely a "loophole" that ICANN org sought to take advantage of here, and the Requestor's suggestion that ICANN org's invocation of the privilege indicates that ICANN org had anything to hide.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because "ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology."[19] As the BAMC noted, ICANN org did not determine that applicants would not be interviewed or submit materials in the course of the CPE Process Review. (BAMC Recommendation, Pgs. 24-25.) Rather,

FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports. The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one.[20] Accordingly, reconsideration is not warranted on this basis.

B. **ICANN Org Adhered to Its Commitments and Core Values in Responding to the DIDP Request.**

1. **ICANN Org Adhered to Its Commitments to Accountability, Openness, and Transparency in Responding to the DIDP Request.**

The Requestor asserts that ICANN org's determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments under the Bylaws to "operate to the maximum extent feasible in an open and transparent fashion,"[21] "apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"[22] and "[r]emain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN's effectiveness."[23]

The DIDP, and particularly the Nondisclosure Conditions, balances ICANN org's commitments to transparency and accountability against other competing commitments and obligations.[24] This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

ICANN org's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."[25]

A critical competing Core Value is ICANN org's Core Value of operating with efficiency and excellence[26] by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information.[27] As part of ICANN's commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual

obligation, if appropriate ICANN org seeks consent from the contractor to release information.[28] Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org's request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org's contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

2. **ICANN Org Adhered to Its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the DIDP Request.**

   The Board finds that the Requestor's argument that "[t]here is an 'international minimum standard of due process as fairness-based on the universal views of all legal systems,'" which is "violated when a decision is based on evidence and argumentation that a party has been unable to address"[29] does not support reconsideration.

   While ICANN org is committed to conform to *relevant* principles of international law and conventions,[30] constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.[31] ICANN org was not required to establish a DIDP, but instead did so voluntarily, as part of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org's general commitment to conform to relevant principles of international law. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment to conform to relevant principles of international law.

   Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor.[32]

   The Requestor's conclusory statement that it has been

deprived of due process because it did not have access to every document underlying the CPE Process Review Reports does not support reconsideration. The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-5.

Ultimately, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN org's correspondence with the Requestor, as none were violated. Accordingly, reconsideration is not warranted.

C. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that the DIDP Response "is clearly improper because (1) ICANN's assertion that the responsive documents fall under [] Nondisclosure Conditions is conclusory and unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Conditions; and (3) ICANN's decision violates its Commitments and Core Values."[33] These are the same arguments set forth in the Request 18-1 and which were addressed by the BAMC in its Recommendation.

With respect to the first claim, the Requestor now asserts that "neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a Nondisclosure Condition."[34] The Board notes that the Requestor does not dispute the BAMC's finding that "the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the DIDP Response."[35] Nor does the Requestor identify a policy or procedure requiring ICANN org or the BAMC to provide an "analysis" or other explanation for nondisclosure, because there is none. The Nondisclosure Conditions speak for themselves and each condition provides the explanation for why disclosure is not appropriate. Further, as noted in the BAMC's Recommendation, contrary to the Requestor's assertion, ICANN org *did* explain why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. Accordingly, reconsideration on this basis is not warranted.

Second, the Requestor repeats its argument that "the public interest outweighs any Nondisclosure Conditions" because the CPE Process Review "not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from certain community gTLDs, such as .MUSIC."[36] While the Requestor believes that ICANN org should have exercised its discretion differently, that is not a basis for reconsideration because the Requestor has not shown that ICANN org contravened the DIDP in any way. Accordingly, the Board finds that this argument was sufficiently considered and addressed in

the BAMC Recommendation and the Board adopts the BAMC's Recommendation that reconsideration is not warranted.[37] The Requestor also suggests that ICANN org has "restricted [] access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself."[38] The Board notes that the BGC and ICANN org have provided several updates concerning the CPE Process Review, including updates on 2 June 2017,[39] 1 September 2017,[40] and 13 December 2017[41]. In addition, ICANN org published three reports on the CPE Process Review, which detailed the methodology and conclusions reached by FTI.[42] The suggestion that applicants are "uninformed" about the CPE Process Review is not only unsupported but also irrelevant to the DIDP Response.

Third, the Requestor repeats its argument that "ICANN must comply with its Commitments and Core Values, even when issuing the DIDP Response, or ICANN will violate its own Bylaws."[43] The BAMC addressed this argument and found that the DIDP Response *did* comply with ICANN org's Commitments and Core Values. As the BAMC concluded, and the Board agrees, neither the DIDP nor ICANN org's Core Value of transparency obligates ICANN org to make public every document in ICANN org's possession.[44]

Fourth, the Requestor again asserts that that the DIDP Response contradicted ICANN's Commitments to fairness and accountability, which required ICANN org to disclose the requested materials even if certain Nondisclosure Conditions apply, because the CPE Process Review "is significant not only to Requestor but also to other gTLD applicants."[45] The Board finds that this argument is not supported. The "public interest" is not determined by whether any entity deems the matter to be "significant." Instead, "public interest" refers to the benefit or well-being of the general public. As explained in the BAMC Recommendation, consistent with the DIDP, ICANN org exercised its discretion in finding that the harm in disclosing the requested information – some of which comprised privileged materials and other documents which were subject to contractual confidentiality obligations – outweighed the public interest in disclosing the information.

Nor is there support for the Requestor's claim that "ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community . . ."[46] As explained in the BAMC Recommendation, without contravening its commitment to transparency and accountability, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

Further, the Requestor's assertion that "the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff"[47] is baseless and does not support the Requestor's claim that ICANN org violated its

Commitment to fairness. As support, the Requestor cites to the fact that the CPE Provider refused to produce certain categories of documents to FTI. The CPE Provider claimed that, pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and that internal and external emails were not "working papers."[48] This is no evidence of obfuscation by the CPE Provider, nor is it evidence of any complicit action by ICANN org. The CPE Provider asserted its position with respect to its contractual obligations under the parties' Statement of Work; no policy or procedure required ICANN org to litigate that issue. Further, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider's working papers, draft reports, notes, and spreadsheets for all CPE Reports. The CPE Provider also made its staff available for interviews by FTI; ICANN org did the same. FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations. Accordingly, there is no support for the Requestor's assertion that the CPE Provider or ICANN org attempted to "obscure" any facts pertinent to CPE.

Finally, the Requestor repeats its claim that "[t]he ICANN Bylaws thus require that ICANN comply with principles of international law, which includes due process."[49] However, as explained in the BAMC Recommendation, the Requestor has not demonstrated how the DIDP Response violates this commitment.

Moreover, the Requestor does not have the "right" to due process with respect to the DIDP. Indeed, the Requestor does not cite any persuasive authority supporting its position that such due process rights exist here. To the contrary, all the Requestor cites is an excerpt from *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), which was authored by two attorneys representing other gTLD community applicants in connection with the pending reconsideration requests relating to the CPE process and which raise similar issues to those asserted by the Requestor here. The excerpt cited simply posits the authors' unsupported opinion that principles of international law should be placed first before local law and ICANN's Bylaws.[50] Indeed, the book even states that it offers only the "recommendations" of the authors, which are "no doubt colored by their perspectives; after all, the authors have been involved in many of the leading IRP proceedings and have counseled innumerable applicants on their right in the domain name system and the new gTLD application process."[51] These "recommendations" are not definitive of international law principles, nor do they support reconsideration.

Accordingly, the Board concludes that nothing in the Requestor's Rebuttal warrants reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the

Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

c. Consideration of Reconsideration Request 18-2: dotgay LLC

Whereas, on 15 January 2018, dotgay LLC (the Requestor) submitted a request for the disclosure of documentary information pursuant to the ICANN Documentary Disclosure Information Policy (DIDP) seeking documents and information relating to the Community Priority Evaluation (CPE) Process Review (DIDP Request).

Whereas, on 14 February 2018, ICANN organization responded to the DIDP Request (DIDP Response).

Whereas, on 15 March 2018, the Requestor filed Reconsideration Request 18-2 (Request 18-2) claiming that certain portions of ICANN org's DIDP Response violate the DIDP and ICANN org's Commitments established in the Bylaws concerning accountability, transparency, and openness.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-2 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Sections 4.2(j) and (k) of the Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-2 and all relevant materials and recommended that Request 18-2 be denied because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-2 and all relevant materials related to Request 18-2, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.05), the Board adopts the BAMC Recommendation on Request 18-2.

Rationale for Resolution 2018.07.18.05

1. Brief Summary and Recommendation

The full factual background is set forth in the BAMC Recommendation, which the Board has reviewed and considered, and which is

incorporated here.

On 5 June 2018, the BAMC evaluated Request 18-2 and all relevant materials and recommended that the Board deny Request 18-2 because ICANN org adhered to established policies and procedures in its response to the DIDP Request. (*See* BAMC Recommendation.)

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal.) The Requestor claims that Request 18-2 "is properly within the scope of the reconsideration process, ICANN must recognize and apply international principles, and that both the DIDP Response and [BAMC] Recommendation violate ICANN's commitments and core values."[52]

The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 18-2, including the Requestor's Rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

2. Issues

The issues for reconsideration are:

- Whether ICANN org complied with established ICANN policies in responding to the DIDP Request, and particularly with respect to Item Nos. 1-9, 12-16, and 18-21; and
- Whether ICANN org complied with its Core Values, Mission, and Commitments.[53]

These issues are considered under the relevant standards for reconsideration requests and DIDP requests, which are set forth in the BAMC Recommendation.

3. Analysis and Rationale

A. **ICANN Org Adhered to Established Policies and Procedures in Responding to the DIDP Request.**

1. **The DIDP Response Complies with Applicable Policies and Procedures.**

The Requestor's DIDP Request sought the disclosure of documents relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). As noted in the BAMC Recommendation, Request 18-2 focuses on ICANN org's response to Items No. 1-9, 12-16, and 18-21. The DIDP Request sought the disclosure of: (i) emails relating to the CPE process (Items No. 1, 2, 4, 5, and 9); (ii) the CPE Provider's work product (Items No. 6-8, 12, and 13); (iii) FTI's work product in the course of the CPE Process Review (Items No. 3 and 14-16); and (iv) correspondence and documents relating to the CPE

[54]

Process Review and its scope (Items No. 18-21). The BAMC determined that ICANN org's response was consistent with the DIDP Process, and the Board agrees. That is, ICANN org identified documents responsive to these Items and determined that they were subject to certain applicable Nondisclosure Conditions. (*See* BAMC Recommendation, Pgs. 14-21.) The BAMC noted, and the Board agrees, that the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the DIDP Response. Instead, the Requestor claims that ICANN org is "hiding behind" those Nondisclosure Conditions and, in the Requestor's view, ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.[55] The BAMC found, and the Board agrees, that this represents a substantive disagreement with ICANN org's discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. (BAMC Recommendation, Pg. 12.)

2. **ICANN Org Adhered to Established Policy and Procedure in Finding That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public's Interest in Disclosing the Information.**

   Under the DIDP, information subject to the Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.[56] As detailed in the its Recommendation, the BAMC determined, and the Board agrees, that ICANN org undertook such an analysis with respect to each Item requested by the Requestor, and articulated its conclusions in the DIDP Response. (BAMC Recommendation, Pgs. 24-27.)

   The Requestor disagrees with ICANN org's conclusions. The Requestor claims that the public interest in disclosure outweighs the harm that may be caused by such disclosure because the documents at issue "are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has threatened litigation. [57] The BAMC found, and the Board agrees, that the Requestor provides no explanation as to why the CPE Provider's decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure. (BAMC Recommendation, Pg. 24.)

   The BAMC also found, and the Board agrees, that the Requestor's claims that the public interest in disclosure

outweighs any purported harm because "there are clear problems and contradictions contained within the reports,"[58] and that it cannot "analyze whether ICANN unduly influenced the [CPE Provider] without the underlying documents"[59] do not support reconsideration. The Board did *not* direct FTI to come to one conclusion over another. FTI was retained to assess the CPE process and reach its own conclusions. The Requestor has provided no evidence to the contrary to support its claims.

The BAMC further concluded, and the Board agrees, that there is no merit to the Requestor's claim that ICANN org "failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy."[60] ICANN org *did* identify compelling reasons in each instance of nondisclosure; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.[61] There is no policy or procedure requiring that ICANN org to provide *additional* justification for nondisclosure.[62] Further, ICANN org explained why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. Accordingly, reconsideration on this basis is not warranted.

The Requestor further claims that rather than state compelling reasons for nondisclosure, ICANN org "ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole."[63] However, as the BAMC concluded, and the Board agrees, the Requestor provides no support—because there is none for this baseless assertion. (BAMC Recommendation, Pg. 25.) The Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the DIDP Request.[64] No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor's request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason for nondisclosure.[65]

Moreover, the BAMC noted, and the Board agrees, that it is a fundamental principle of law that invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. (BAMC Recommendation, Pg. 26.) The BAMC and the Board therefore reject the Requestor's assertion that the attorney-client privilege is merely a "loophole" that ICANN org sought to take advantage of here, and its suggestion that ICANN org's invocation of the privilege indicates that ICANN org had anything to hide.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because "ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology." [66] As the BAMC noted, ICANN org did not determine that applicants would not be interviewed or submit materials in the course of the CPE Process Review. (BAMC Recommendation, Pgs. 26.) Rather, FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports. The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, reconsideration is not warranted on this basis.

B. **ICANN Org Adhered to Its Commitments and Core Values in Responding to the DIDP Request.**

1. **ICANN Org Adhered to Its Commitments to Accountability, Openness, and Transparency in Responding to the DIDP Request.**

The Requestor asserts that ICANN org's determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments under the Bylaws to "operate to the maximum extent feasible in an open and transparent manner,"[67] "apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"[68] and "[r]emain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN's effectiveness." [69] The BAMC concluded, and the Board agrees, that this assertion does not support reconsideration.

The DIDP, and particularly the Nondisclosure Conditions, balance ICANN org's commitments to transparency and accountability against its competing commitments and obligations.[70] This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

ICANN org's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test

must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."[71]

A critical competing Core Value is ICANN org's Core Value of operating with efficiency and excellence[72] by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information. As part of ICANN's commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.[73] Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org's request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org's contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

2. **ICANN Org Adhered to Its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the DIDP Request.**

   The Board finds the Requestor's argument that the CPE Process Review did not provide due process to the Requestor because "it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available"[74] does not support reconsideration. The Requestor claims that "[p]ursuant to [international] laws and conventions, there is an 'international minimum standard of due process as fairness-based on the universal views of all legal systems,'" which is "violated 'when a decision is based on evidence and argumentation that a party has been unable to address.'"[75]

   As discussed in the BAMC Recommendation, and incorporated herein by reference, while ICANN org is committed to conform to *relevant* principles of international law and conventions,[76] constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.[77] Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to the DIDP, and the fact that certain Nondisclosure

Conditions apply here does not demonstrate that ICANN org violated its commitment to conform to relevant principles of international law.

The Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor.[78]

The Requestor's conclusory statement that it has been deprived of due process because it did not have access to every document underlying the CPE Process Review Reports does not support reconsideration. The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-3.

Ultimately, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN org's correspondence with the Requestor, as none were violated. Accordingly, reconsideration is not warranted.

C. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration.

The Requestor claims that Request 18-2 "is properly within the scope of the reconsideration process, ICANN must recognize and apply international principles, and that both the DIDP Response and [BAMC] Recommendation violate ICANN's commitments and core values."[79] These are the same arguments set forth in Request 18-2 and which were addressed by the BAMC in its Recommendation.

With respect to the first claim, the Requestor asserts that ICANN's Bylaws "do not limit reconsideration requests to contesting 'the process by which ICANN reached that decision.'"[80] According to the Requestor, the Reconsideration Request process instead provides a vehicle for requestors to seek reconsideration of ICANN organization "actions or inactions that contradict ICANN's Mission, Commitments, Core Values, and/or established ICANN policy(ies) and adversely affect the requestor."[81] The Requestor is correct that reconsideration may be appropriate *if* the Requestor demonstrates that the action or inaction contradicts "ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies)."[82] However, a Reconsideration Request that challenges the *outcome* of ICANN org's action or inaction without any supporting evidence beyond the Requestor's dissatisfaction with that outcome does not meet

the standard for reconsideration. Similarly, a Reconsideration Request that does not explain how the challenged action or inaction contradicted ICANN org's Mission, Commitments, Core Values, and/or established ICANN policy(ies), without more, cannot justify reconsideration; if it did, the Board would be compelled to grant reconsideration to every requestor that sought it, which would render the process meaningless.

Second, the Requestor repeats its argument that "[t]he DIDP Response violates the principle of transparency."[83] The Board finds that this argument has been sufficiently addressed by the BAMC and that the Rebuttal provides no new fact or evidence to support reconsideration. (BAMC Recommendation, Pgs. 27-31.)

Similarly, with respect to the Requestor's argument that the requested documents should be disclosed because the "public is specifically interested" in the CPE Process Review"[84] was sufficiently considered and addressed in the BAMC Recommendation and the Board adopts the BAMC's Recommendation that reconsideration is not warranted.[85] While the Requestor believes that ICANN org should have exercised its discretion differently, that is not a basis for reconsideration because the Requestor has provided any new facts or evidence on rebuttal warranting reconsideration.

Nor is there support for the Requestor's suggestion that there was only a "single harm" – namely the "[w]eakening [of] the attorney-client privilege – that ICANN org considered when it determined that the public interest did not warrant the harm that would be caused by disclosure under the circumstances.[86] This claim has already addressed by the BAMC and the Requestor provides no additional evidence or facts that would support reconsideration. The Requestor's other arguments concerning the application of the attorney-client privilege confirm that no policy or procedure exists that would require ICANN org to waive the privilege just because the Requestor asks it to do so. (Rebuttal, Pg. 7).

Fourth, the Requestor asserts that ICANN org has "restricted interested parties' access to information in a blatantly unfair decision that keeps affected applicants uninformed and raised several read flags regarding the integrity of the independent review itself."[87] The Board notes that the Board Governance Committee and ICANN org have provided several updates concerning the CPE Process Review, including updates on 2 June 2017,[88] 1 September 2017,[89] and 13 December 2017[90]. In addition, ICANN org published three reports on the CPE Process Review, which detailed the methodology and conclusions reached by FTI.[91] The suggestion that applicants are "uninformed" about the CPE Process Review is not only unsupported but also irrelevant to the DIDP Response.

Nor is there support for the Requestor's claim that "ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community . . .

."[92] As explained in the BAMC Recommendation, without contravening its commitment to transparency and accountability, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

Finally, the Requestor repeats its claim that "[t]he ICANN Bylaws require that ICANN comply with principles of international law, which includes due process."[93] However, the Requestor has not demonstrated how the DIDP Response violates this commitment.

Moreover, the Requestor does not have the "right" to due process with respect to the DIDP. Indeed, the Requestor does not cite any persuasive authority supporting its position that such due process rights exist here. To the contrary, all the Requestor cites is an excerpt from *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), which was authored by at least two attorneys representing other gTLD community applicants in connection with the pending reconsideration requests relating to the CPE process and which raise similar issues to those asserted by the Requestor here. The excerpt cited simply posits the authors' unsupported opinion that principles of international law should be placed first before local law and ICANN's Bylaws.[94] Indeed, the book even states that it offers only the "recommendations" of the authors, which are "no doubt colored by their perspectives; after all, the authors have been involved in many of the leading IRP proceedings and have counseled innumerable applicants on their right in the domain name system and the new gTLD application process."[95] These "recommendations" are not definitive of international law principles, nor do they support reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. Consideration of Reconsideration Request 18-3: Astutium Ltd.

Whereas, 5 October 2014, Astutium Ltd. and ICANN organization executed the Registrar Accreditation Agreement (RAA).

Whereas, on 17 December 2017, ICANN org's contractual compliance team (Contractual Compliance) received a complaint concerning WHOIS inaccuracies regarding the domain name <tomzink.com>, which is registered

through Astutium Ltd.

Whereas, following unsuccessful resolution of the issues through an informal resolution process, Contractual Compliance issued a Notice of Breach, requesting that Astutium Ltd. cure the breaches by 20 March 2018, but the Requestor failed to cure the breaches.

Whereas, on 21 March 2018, Contractual Compliance issued the Notice of Termination (Termination Notice) to Astutium Ltd; the termination was scheduled to become effective 20 April 2018.

Whereas, on 30 March 2018, Astutium Ltd. filed Reconsideration Request 18-3 (Request 18-3) challenging the Notice of Termination on the basis that ICANN org: (i) relied on faulty data and misunderstandings; and (ii) failed to adhere to applicable policies and procedures.

Whereas, 5 May 2018, the Ombudsman submitted his substantive evaluation of Request 18-3 to the Board Accountability Mechanisms Committee (BAMC) and concluded that "nothing [the] Requestor has set forth in Request 18-3 merits a recommendation by the BAMC or the Board to take any of the actions as requested by [the] Requestor."

Whereas, the BAMC carefully considered the merits of Request 18-3 and all relevant materials and recommended that Request 18-3 be denied because: (i) ICANN org adhered to established policies and procedures when it issued the Termination Notice; (ii) ICANN org did not rely on faulty data or misunderstandings when it issued the Termination Notice; and (iii) ICANN org did not publish any defamatory statements concerning the Requestor on its website.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-3 and all relevant materials related to Request 18-3, including Astutium Ltd.'s rebuttal, and the Board agrees with the BAMC's recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.06), the Board adopts the BAMC Recommendation on Request 18-3 and directs the President and CEO, or his designee(s), to continue with the termination process of Astutium Ltd.'s RAA.

Rationale for Resolution 2018.07.18.06

1. ### Brief Summary and Recommendation

   The full factual background is set forth in the BAMC Recommendation, which the Board has reviewed and considered, and which is incorporated here.

   On 5 June 2018, the BAMC recommended that Request 18-3 be denied because the Requestor has not demonstrated sufficient basis for reconsideration for the reasons set forth in the BAMC Recommendation, which are incorporated here. (*See* BAMC Recommendation.)

   On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of

ICANN's Bylaws, which the Board has also carefully reviewed and considered. (*See* Rebuttal.) In the Rebuttal, the Requestor suggests that: (1) Contractual Compliance failed to communicate with the Requestor during the informal and formal resolution process; (2) the Complaint contained inaccuracies that were not vetted by ICANN org; (3) the Requestor corrected the inaccuracies in the Complaint; (4) ICANN org misunderstood the Requestor's process to validate the information; (5) the Requestor responded to the Notice of Breach; (6) the Requestor was prevented by EU privacy laws from disclosing information to ICANN org; (7) the Requestor complied with the Expired Registration Recovery Policy (ERRP) Section 4.1; and (8) the Requestor maintained a valid correspondence address on its website.[96]

The Board has carefully reviewed and considered The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 18-3, including the Requestor's Rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

2. Issues

The issues for reconsideration are:

- Whether ICANN org complied with applicable Commitments, Core Values, and established policies when it issued the Termination Notice;
- Whether ICANN org relied on faulty data or misunderstandings when it issued the Termination Notice; and
- Whether ICANN org published defamatory statements on its website, in violation of the applicable Commitments, Core Values, and established policies.

These issues are considered under the relevant standards for reconsideration requests and the contractual compliance process, which are set forth in the BAMC Recommendation.

3. Analysis and Rationale

A. **Contractual Compliance Complied with Applicable Policies and Procedures.**

The Requestor claims that Contractual Compliance's decision to issue the Termination Notice was based on an "overall failure of ICANN staff/policies/procedures."[97] As discussed below and in further detail in the BAMC Recommendation, Contractual Compliance adhered to the applicable policies and procedures when addressing each of the six areas of noncompliance identified in the Termination Notice.

1. **Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to take**

reasonable steps to investigate and correct WHOIS inaccuracies.

The Requestor claims that the Complaint regarding the <tomzink.com> domain name contained inaccuracies that "were clearly and obviously faults in the ICANN reporting process;" that the Requestor nonetheless contacted the registrant and updated the inaccuracies; and that Contractual Compliance's "demands for copies of communications to 'demonstrate compliance' are both unreasonable and unnecessary."[98] The Requestor also claims that Contractual Compliance did not manually review the Complaint and instead automatically forwarded it to the Requestor. The BAMC determined, and the Board agrees, that Requestor's claims are factually incorrect and do not support reconsideration.

First, Contractual Compliance follows a defined approach and process to ensure compliance with contractual obligations.[99] The BAMC determined, and the Board agrees, that Contractual Compliance followed its process with respect to the handling of the Complaint. That is, upon receipt of the Complaint, Contractual Compliance evaluated and confirmed that the Complaint was within the scope of the relevant RAA and consensus policies. While some portions of the Complaint may have been inaccurate, the Complaint contained other portions that were within scope. Thus, Contractual Compliance initiated the "Informal Resolution Process" by sending the first compliance notice to the Requestor, attaching the entire Complaint.[100] Contractual Compliance does not modify complaints, except to redact reporter-related data associated with requests for anonymity, even if it determines that portions of the complaint are inaccurate. Registrars are free to explain why portions of a complaint do not need to be addressed, but the fact that a portion of a complaint is inaccurate does not waive the need to address the accurate/in-scope portions of the complaint. (BAMC Recommendation, Pgs. 16-19.)

Second, the BAMC concluded, and the Board agrees, that the Requestor's claims that Contractual Compliance's "demands for copies of communications to 'demonstrate compliance are unreasonable and unnecessary'"[101] do not support reconsideration. The RAA requires the Requestor to "comply with the obligations specified in the Whois Accuracy Program Specification" (WAPS) to maintain and confirm accurate contact information for its Registered Name Holder (RNH). (BAMC Recommendation, Pg. 3.) The Requestor also is required to maintain "all written communications constituting registration applications, confirmations, modifications, or terminations and related correspondence with Registered Name Holders," and must make such data available to ICANN org upon
[102]

reasonable notice. (BAMC Recommendation, Pg. 4.) The Requestor's refusal to provide or make such data available to Contractual Compliance is a breach of its RAA. (BAMC Recommendation, Pgs. 17-18.)

As discussed in detail in the BAMC Recommendation, the Requestor did not remedy all the WHOIS inaccuracies at issue during the Informal Resolution Process. For example, information in the Administrative and Technical fields (such as street names) appeared to belong to the Requestor rather than the registrant.[103] Additionally, the Requestor had not validated the postal address under WAPS to ensure it was in a proper format for the applicable country as defined in the UPU Postal addressing format templates.[104]

The Board notes that Contractual Compliance attempted numerous times to resolve the deficiencies with the Requestor through the three separate compliance notices during the Informal Resolution Process before escalating the matter to the Formal Resolution Process by the issuance of the Breach Notice on 27 February 2018.[105] (BAMC Recommendation, Pg. 18.)

The Requestor never responded to the Breach Notice, despite outreach effort from Contractual Compliance.[106] As a result, Contractual Compliance escalated the matter to termination in accordance with its process and Section 5.5.4 of the RAA. Accordingly, the BAMC concluded, and the Board agrees, that Contractual Compliance followed applicable policies and procedures throughout this process and therefore, the Requestor's claims do not support reconsideration.

2. **Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to validate and verify WHOIS contact information, as required by WAPS.**

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to validate and verify WHOIS contact information as required by WAPS. The Requestor claims that Contractual Compliance "misunderstand[s] … the technologies involved," that "[v]alidation of client submitted data is done prior to acceptance of that data, and [that] manual 'eyeballing' of the data is not a general requirement."[107] The Requestor explained that "[i]n the event of certain specific data being updated (and subject to it not already having been verified on other domains) automated processes are then invoked as needed in accordance with [WAPS] 1.f."[108]

The Requestor's claim is factually incorrect. WAPS Section 1 requires the Requestor, upon "any change in the [RNH] with respect to any Registered Name sponsored by" the Requestor, to "[v]alidate the presence of data for all fields required under Subsection 3.3.1 of the Agreement in a proper format," and validate that other contact information is in the proper format.[109] It also requires the Requestor to verify "the email address of the [RNH] … by sending an email requiring an affirmative response through a tool-based authentication method…."[110] Within 15 days of receiving "any changes to contact information in Whois …, [the Requestor] will validate and, to the extent required by Section 1, verify the changed fields in the manner specified in Section 1 above. If [the Requestor] does not receive an affirmative response from the [RNH] providing the required verification, [the Requestor] shall either verify the applicable contact information manually or suspend the registration…."[111] WAPS Section 4 requires that if the Requestor "has any information suggesting that the contact information … is incorrect[,] … [it] must verify or re-verify as applicable…." If the Requestor does not receive an affirmative response, it "shall either verify the applicable contact information manually or suspend the registration."[112]

Contractual Compliance requested this information from the Requestor throughout the Informal Resolution and Formal Resolution Processes. However, to date, Contractual Compliance has not received evidence of verification or validation, as required under WAPS Sections 1, 4, and 5.[113] Accordingly, the Requestor's claims do not support reconsideration. (BAMC Recommendation, Pgs. 19-20.)

3. **Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to maintain and make available to ICANN registration data and records relating to the Requestor's communications with the RNH of the domain name <tomzink.com>.**

   The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to maintain and make available to ICANN org registration data and records of the Requestor's communications with the RNH of the domain name <tomzink.com>. Sections 3.4.2 and 3.4.3 of the RAA require the Requestor to maintain records "relating to its dealings with Registry Operator(s) and [RNHs]," including correspondence, and to make those available for inspection and copying to ICANN upon reasonable notice.[114] If the Requestor "believes that the provision of any such data, information or records to ICANN would

violate applicable law or any legal proceedings, ICANN and [the Requestor] agree to discuss in good faith whether appropriate limitations, protections or alternative solutions can be identified to allow the production of such data."[115]

In Request 18-3, Requestor claims for the first time that it is prohibited from providing ICANN org the requested data because EU privacy laws limit the types of data that can be exported to the United States.[116] Yet, during Informal and Formal Resolution Processes, the Requestor never raised EU privacy law as a basis for withholding the requested information.[117] Rather, the Requestor simply refused to comply with Sections 3.4.2 and 3.4.3, stating "we don't provide details of private communications to 3rd parties," but did not provide a reason for withholding such communications.[118]

The BAMC noted that Contractual Compliance nevertheless offered to work with the Requestor on how such records could be provided to demonstrate compliance but that such efforts were met with the following response from the Requestor: "There is no requirement in WAPS to provide you with anything at all."[119] Accordingly, the BAMC concluded, and the Board agrees, that the Requestor's claims do not support reconsideration. (BAMC Recommendation, Pgs. 20-22.)

4. **Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to provide domain name data in the specified response format, as required by the RAA.**

   The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to provide domain name data in the format required by the RAA. (BAMC Recommendation, Pgs. 22-23.) In accordance with its process when a complaint reaches the third compliance notice phase,[120] Contractual Compliance conducted a full compliance check to identify whether there were any additional areas of non-compliance by Astutium Ltd., and confirmed that there were three additional areas of non-compliance as identified in the Breach Notice.[121] Contrary to the Requestor's assertion, Contractual Compliance did not create additional "backdoor" requirements, but rather complied with its process when identifying other areas of noncompliance.

5. **Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to include a link in its registration agreement to its renewal fees**

and post-expiration renewal fees.

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to include a link to its renewal fees and post-expiration renewal fees in its registration agreement as required by Section 4.1 of the Expired Registration Recovery Policy (ERRP).[122] The Requestor claims that it complied with Section 4.1 of the ERRP because its fees are displayed on every page of its website.[123] However, a link to the Requestor's renewal fees and post-expiration renewal fees on its website was not included in the Requestor's registration agreement as required by Section 4.1 of the ERRP.[124]

Accordingly, because Contractual Compliance adhered to applicable policies and procedures, the BAMC concluded, and the Board agrees, that reconsideration is not warranted. (BAMC Recommendation, Pgs. 23-24.)

6. **Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to publish a correspondence address on Requestor's website.**

   The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to publish a correspondence address on its website. The Requestor claims that "[n]o breach has occurred" because the Requestor's website "has a 'Contact' link at the top of every page, has telephone numbers on every page, contains multiple methods of communication (email, telephone, ticket, fax post) listed and clearly shows [its] address at the bottom of every page."[125] However, the Requestor's correspondence address on its website must be the same as the address provided in its Registrar Information Specification (RIS).[126] Contractual Compliance was unable to locate the correspondence address provided in the Requestor's RIS on the Requestor's website.[127] Accordingly, consistent with the RAA and Contractual Compliance's process, Contractual Compliance issued the Termination Notice. (BAMC Recommendation, Pgs. 24-25.)

B. **The Requestor Has Not Demonstrated That Contractual Compliance Relied on False or Inaccurate Information When It Issued the Termination Notice.**

   The BAMC concluded, and the Board agrees, that the Requestor has not identified any false or inaccurate information that Contractual Compliance purportedly relied upon when it decided to issue the Termination Notice. The only apparent reference to

purported reliance on false or misleading information is the Requestor's claim that ICANN org "misunderstands … the technologies involved" in the Requestor's automated validation process of registrant contact information.[128] That is not a basis for reconsideration. (BAMC Recommendation, Pgs. 25-26.)

C. **The Requestor Has Not Demonstrated That ICANN Org Published Defamatory Statements on Its Website or Violated Its Commitments by Publishing the Notices on Its Website.**

The BAMC concluded, and the Board agrees, that Contractual Compliance did not violate any established process or procedures when it published the Breach and Termination Notices on the Notices webpage. Notices sent during the Formal Resolution process are published on https://www.icann.org/compliance/notices, and ICANN updates the progress of each enforcement action.[129] (BAMC Recommendation, Pgs. 26-27.)

To the extent that the Requestor is suggesting that the publicly available Breach and Termination Notices contain libelous statements, the BAMC determined and the Board agrees that this is unconvincing. ICANN org takes defamation claims seriously. Accordingly, in the evaluation of Request 18-3, ICANN org reviewed the Breach and Termination Notices and confirmed that there neither the breaches identified nor any statements contained in the Notices are false or defamatory. Moreover, the Requestor has failed to show how any statements in the Notices are defamatory. Accordingly, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN organization, and reconsideration is not warranted on this ground.

D. **The Requestor's Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration.

The Rebuttal states that: (1) Contractual Compliance failed to communicate with the Requestor during the Informal and Formal Resolution Processes; (2) the Complaint contained inaccuracies that were not vetted by ICANN org; (3) the Requestor corrected the inaccuracies in the Complaint; (4) ICANN org staff misunderstands the process the Requestor used to validate the information; (5) the Requestor responded to the Notice of Breach; (6) the Requestor was prevented by EU privacy laws from disclosing information to ICANN org; (7) the Requestor complied with ERRP Section 4.1; and (8) the Requestor maintained a valid correspondence address on its website.

With respect to the first claim, the Board finds that this argument is not supported. Rather, the chronologies attached to the Breach and Termination Notices, as well as the detailed written

correspondence between Contractual Compliance and the Requestor[130] demonstrate that Contractual Compliance repeatedly contacted the Requestor via email, facsimile, courier mail, and telephone to resolve the breaches at issue.

With respect to the Requestor's claim that there were inaccuracies in the Complaint sent to the Requestor, as detailed above in Section 3.A.1, the Board finds that this argument has been sufficiently addressed by the BAMC. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

Similarly, the Board finds that the third and fourth claims in the Rebuttal have been sufficiently addressed by the BAMC for the reasons discussed above and in the BAMC Recommendation. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

With respect to the Requestor's rebuttal that it responded to the Breach Notice by contacting Mukesh Chulani, the Registrar Services & Engagement Senior Manager, the Board finds that this claim does not support reconsideration. The Requestor does not provide – nor is ICANN org aware of – anything to show that the Requestor cured the breaches identified in the Breach Notice during the communication with Mr. Chulani. Moreover, Mr. Chulani engaged with the Requestor to encourage the Requestor to cure the breaches with Contractual Compliance before the matter escalated to termination. (*See* Attachment H to Reference Materials.)

With respect to the Requestor's rebuttal that it was prevented by EU privacy laws from disclosing information to ICANN org, the Board finds that this claim has been sufficiently addressed by the BAMC for the reasons discussed above and in the BAMC Recommendation. The Requestor acknowledges that it never raised these concerns with Contractual Compliance during the Informal and Formal Resolution Processes. Further, as the BAMC noted, even though the Requestor did not identify privacy regulations as the basis for withholding from ICANN the requested information, Contractual Compliance nevertheless offered to work with the Requestor on how such records could be provided to demonstrate compliance, but the Requestor rejected Contractual Compliance's offer. (Attachment 1 to BAMC Recommendation on Request 18-3, Pgs. 9-10.) The BAMC concluded, and the Board agrees, that the Requestor's response to Contractual Compliance on this matter demonstrates that the Requestor's concerns about this breach item is not the inability to comply due to privacy regulations, but rather that the Requestor believes that "[t]here is no requirement in WAPS to provide [Contractual Compliance] with anything at all." (*Id.* at Pg. 10.)

With respect to the Requestor's rebuttal that it complied with ERRP Section 4.1 because it displays its renewal fees and post-expiration renewal fees on its website, the Board finds that this argument has been sufficiently addressed by the BAMC. (*See*

infra at Section 3.A.5.) The Requestor has not provided anything new to show that its Domain Registration Agreement contains a link to the renewal fees as required by the ERRP Section 4.1. Accordingly, reconsideration is not warranted.

Finally, with respect to the Requestor's claims that the RIS form that ICANN org has on file "is not the current RIS form" and that ICANN has "failed to update/store/file the correct and updated information,"[131] the Board finds that the Requestor has not provided anything to support these claims. While the Requestor claims that it updated its RIS through the ICANN Registrar Database RADAR,[132] RADAR does not, in fact, contain any RIS information because it does not have the functionality for RIS forms to be submitted on its platform. As specified in the Registrar Contacts Update webpage at https://www.icann.org/resources/pages/registrar-contact-updates-2015-09-22-en, RIS updates should be emailed to registrarupdates@icann.org.[133] The Requestor has not provided any evidence demonstrating that it submitted a revised RIS form pursuant to applicable procedures. The only RIS form that ICANN org has received from the Requestor is the RIS form that Contractual Compliance sent the Requestor on 13 March 2018, and that form reflects an address that is different from the address listed on the Requestor's website.

Accordingly, the Board concludes that nothing in the Requestor's rebuttal warrants reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

e. Consideration of Reconsideration Request 18-4: dotgay LLC

Whereas, dotgay LLC submitted a community-based application for the .GAY generic top-level domain (gTLD), which was placed in a contention set with three other .GAY applications.

Whereas, dotgay LLC participated in Community Priority Evaluation (CPE), but did not prevail.

Whereas, dotgay LLC challenged the results of the CPE in Reconsideration Request 15-21 (Request 15-21), which the Board Governance Committee (BGC) denied. Thereafter, dotgay LLC filed Reconsideration Request 16-3 (Request 16-3), challenging the BGC's denial of Request 15-21.

Whereas, while Request 16-3 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.[134]

Whereas, on 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11, in which the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports; declared that the CPE Process Review was complete; concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, on 13 April 2018, dotgay LLC submitted Reconsideration Request 18-4 (Request 18-4), claiming that the Board's adoption of the CPE Process Review Reports in Resolutions 2018.03.15.08 through 2018.03.15.11 violates its commitment to fairness, and is inconsistent with ICANN org's commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.

Whereas, the BAMC previously determined that Request 18-4 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-4 and all relevant materials and recommended that Request 18-4 be denied because the Board considered all material information when it adopted Resolutions 2018.03.15.08 through 2018.03.15.11, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-4 and all relevant materials related to Request 18-4, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.07), the Board adopts the BAMC Recommendation on Request 18-4.

Rationale for Resolution 2018.07.18.07

1. Brief Summary and Recommendation

The full factual background is set forth in the BAMC Recommendation on Request 18-4 (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 14 June 2018, the BAMC evaluated Request 18-4 and all relevant materials and recommended that the Board deny Request 18-4 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in Resolutions 2018.03.15.08 through 2018.03.15.11 (the Resolutions), the Board considered the CPE Process Review Reports.[135] The CPE Process Review Reports identify the materials considered by FTI.[136] Additionally, as noted in the Rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions. (*See* BAMC Recommendation.)

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal.) The Requestor claims that: (i) the BAMC "misconstrues Requestor's position regarding the BAMC's invitation to make additional submissions on Reconsideration Request 16-3;" (ii) the Requestor presented significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;" (iii) FTI's methodology for the CPE Process Review is materially flawed; and (iv) "the CPE Process Review Reports are substantively flawed."[137]

The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 18-4, including the Requestor's Rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

2. Issue

The issue for reconsideration whether the Board's adoption of the Resolutions contradicted ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).

These issues are considered under the relevant standards for reconsideration requests, which are set forth in the BAMC Recommendation.

3. Analysis and Rationale

A. The Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).

The Requestor's claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Reviews. The BAMC noted, and the Board agrees, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN's

commitment to fairness, or that the Board's action is inconsistent with ICANN's commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board's acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. **The Requestor's Challenges to FTI's Methodology Do Not Warrant Reconsideration.**

   The Requestor claims that FTI's methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any former employees of the CPE Provider; and (3) FTI did not accept materials from, or interview, CPE applicants in the course of its investigation.[138]

   The BAMC determined, and the Board agrees, that, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.[139] The Board selected FTI because it has "the requisite skills and expertise to undertake" the CPE Process Review, and relied on FTI to develop an appropriate methodology.[140] The Requestor has not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review. (BAMC Recommendation, Pg. 11.)

   With respect to the first concern, the BAMC determined, and the Board agrees, that it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider. The CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider's working papers, draft reports, notes, and spreadsheets for all CPE Reports.[141] FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations.[142] (BAMC Recommendation, Pgs. 11-12.)

   As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider's personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not "working papers."[143] The BAMC concluded, and the Board agrees, that no policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE

Provider did not produce its internal emails. As such, this argument does not support reconsideration. (BAMC Recommendation, Pg. 12.)

With respect to the second claim, as detailed in the BAMC Recommendation, the Requestor has not identified a policy or procedure requiring FTI to do more because none exists. FTI interviewed the "only two remaining [CPE Provider] personnel," who were both "part of the core team for all 26 evaluations" in the CPE Process Review.[144] Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.[145] Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. Accordingly, the BAMC concluded, and the Board agrees, reconsideration is not warranted on this ground. (BAMC Recommendation, Pgs. 12-13.)

The BAMC also determined, and the Board agrees, that the Requestor has not identified a policy or procedure requiring FTI to interview the CPE applicants or accept materials from the applicants in the course of the review. The BAMC further noted that FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.[146] As discussed in further detailed in the BAMC Recommendation, the claim does not warrant reconsideration.

The BAMC also concluded and the Board agrees that the comments of one Board member about FTI's methodology also do not support reconsideration. That Board member, Avri Doria, abstained from voting on the Resolutions due to concerns "about the rigor of the study and some of its conclusions,"[147] does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless "accept[ed] the path forward" that the Board was setting.[148]

2. **FTI was Not Required to Agree with the Findings of Prior Third-Party Reports.**

The Requestor argues that the Board should not have accepted the findings of the CPE Process Review Reports because those findings are inconsistent with conclusions that third parties have reached concerning the CPE process.[149] As detailed in the BAMC Recommendation, the Requestor asserts that certain third parties identified concerns with the CPE process before FTI completed the

CPE Process Review that the Requestor believes are inconsistent with and not addressed in the CPE Process Review Reports. (BAMC Recommendation, Pgs. 13-16.) According to the Requestor, these reports should be taken to mean that any conclusion *other than* that the CPE Provider's process was inconsistent with the Applicant Guidebook and that ICANN org exerted undue influence over the CPE Provider must be incorrect.[150]

The BAMC determined, and the Board agrees, that the Requestor's argument is both contrary to the facts and completely inconsistent with proper investigative methodology. As discussed in the BAMC Recommendation, the Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence[151]—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI "carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE," specifically allegations that the CPE criteria "were applied inconsistently across the various CPEs as reflected in the CPE reports."[152] Second, as noted in the CPE Process Review Reports, FTI considered all available evidence, including but not limited to, relevant IRP documents, relevant Reconsideration Requests, and the report from the Ombudsman's Own Motion Investigation on the CPE process.[153]

Based upon the *evidence* available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes "were not the result of inconsistent application of the criteria," but rather of different underlying circumstances.[154]

FTI was not directed to conduct an investigation that supported (or contradicted) the third parties opinions that identified concerns with the CPE process.[155] Nor was the Board obligated to direct ICANN org to undertake the CPE Process Review. Rather, the Review was "intended to have a positive impact on the community" and "provide greater transparency into the CPE evaluation process."[156] Contrary to the Requestor's claim, the Board's decision to initiate the CPE Process Review was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. The

Requestor's arguments do not support reconsideration.

3. **Professor Eskridge's Criticisms of the CPE Process Review Do Not Support Reconsideration.**

   The BAMC determined, and the Board agrees, that the "Second Expert Opinion of Professor William N. Eskridge, Jr." (Second Eskridge Opinion), which the Requestor submitted in support of Request 16-3 and referenced in Request 18-4,[157] does not warrant reconsideration. (BAMC Recommendation, Pgs. 16-17.) The claims set forth in the Second Eskridge Opinion will be addressed as part of the BAMC and Board's consideration of Request 16-3.

   Moreover, as the BAMC noted, Professor Eskridge's primary complaint is that FTI did not re-evaluate the merits of the CPE applications or consider the substance and reasonableness of the CPE Provider's research.[158] However, that was not what FTI was tasked to do and the Requestor provides no evidence of any policy or procedure requiring that the Board instruct FTI to re-evaluate the applications.

   With respect to the Requestor's "assertion that 'a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind,'" neither the Requestor nor Professor Eskridge "offers any support for this baseless claim, and there is none."[159] Accordingly, these claims do not support reconsideration.

4. **The Third-Party Letters of Support Do Not Support Reconsideration.**

   The BAMC considered three letters submitted to the Board by third parties in support of the dotgay Application, criticizing the CPE Process Review.[160] Although all three letters express "frustration" or dissatisfaction with the findings of the CPE Process Review, the BAMC determined, the Board agrees, that none states grounds for reconsideration, nor do they identify any policy or procedures that ICANN organization or FTI violated in the course of the CPE Process Review. Accordingly, they do not support reconsideration.

5. **The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-3.**

   The BAMC determined, and the Board agrees, that the Requestor claims that the BAMC's "reliance on" the CPE Process Review Reports would "directly affect its consideration of [Request] 16-3"[161] does not support reconsideration. When the Board acknowledged and accepted the CPE Process Review Reports, it directed the

BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.[162] The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-3), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3. (BAMC Recommendation, Pg. 18.)

6. **ICANN Org Adhered to its Transparency Obligations.**

   Finally, the Requestor asserts that ICANN org "has been remarkably nontransparent throughout" the CPE Process Review, and "has, and continues to, rebuff all efforts to obtain detailed information about FTI's independent review," because the "only substantive information available to the public about the independent review is the CPE Process Review Reports themselves."[163]

   As discussed in the BAMC Recommendation, the Requestor has not explained how making the CPE Process Review Reports public somehow falls short of ICANN organization's transparency obligations. The Board addressed and resolved this claim in its determination on the Requestor's Request 18-2,[164] which is incorporated herein, and will not repeat itself here, except to say that the Requestor has raised no additional argument here that warrants reconsideration based on this assertion. (BAMC Recommendation, Pgs. 18-19.)

B. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that: (i) the BAMC "misconstrues Requestor's position regarding the BAMC's invitation to make additional submissions on Reconsideration Request 16-3;" (ii) the Requestor presented significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;" (iii) FTI's methodology for the CPE Process Review is materially flawed; and (iv) "the CPE Process Review Reports are substantively flawed."[165] These are the same arguments set forth in Request 18-4 and were addressed by the BAMC in its Recommendation.

First, the Requestor asserts that ICANN org "oversimplifies Requestor's response to the BAMC's limited invitation" to make a telephonic oral presentation to the BAMC in support of Request 16-3.[166] The Requestor concedes that it rejected ICANN org's invitation, but asserts that ICANN org did not respond to its demand that ICANN org permit the Requestor a more "meaningful opportunity to make additional submissions to

ICANN regarding the CPE Process Review Reports."[167] This claim does not support reconsideration. The Requestor does not have a right to dictate the manner in which it is permitted to present to the BAMC. Under the Bylaws in effect when Request 16-3 was filed, the BAMC's decision on the opportunity to be heard is final.[168] Indeed, the same invitation was extended to all requestors with pending reconsideration requests; were ICANN org to treat the Requestor differently, that would be unfair to other applicants in contravention of ICANN's commitments in its Bylaws.

Second, the Requestor claims that it "provided ICANN with significant evidence supporting its claims," and thus takes issue with the BAMC's conclusion that "no evidence [exists] demonstrating how the Resolutions violate ICANN's commitment to fairness, or that the Board's action is inconsistent with ICANN's [other] commitments."[169] This represents a substantive disagreement with the BAMC's conclusions, and is not a basis for reconsideration. The Requestor otherwise attempts to import arguments it made in connection with Reconsideration Request 18-2, which challenges ICANN org's response to the Requestor's request for documents (DIDP Request) pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the CPE Process Review. The Board addressed and resolved the Requestor's claims concerning ICANN org's response to the DIDP Request in its determination on Request 18-2, which is incorporated herein, and will not be repeated here, except to say that the Requestor has raised no additional argument that warrants reconsideration based on this assertion.

Third, with respect to the Requestor's claim that FTI's methodology for the CPE Process Review is materially flawed, the Board finds that this argument has been sufficiently addressed by the BAMC. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration. Moreover, there is *no* support for the Requestor's assertion that FTI "simply accepted statements and information [from the CPE Provider and ICANN org] without further investigation or critical analysis."[170] While the Requestor disagrees with the conclusions reached by FTI, that is *not* evidence that FTI failed to critically and impartially analyze the issues relevant to the CPE Process Review. As the BAMC concluded, and the Board agrees, FTI considered *all* available evidence, and did so in a fair and impartial manner. (*See* BAMC Recommendation, Pgs. 13-16.)

Fourth, the Requestor repeats its assertion that the CPE Process Review Reports are substantively flawed because they "did not address any of the relevant independent evaluations," and "failed to consider divergent views on the CPE Process."[171] The Board finds that this argument has been sufficiently addressed by the BAMC. (*See* BAMC Recommendation, Pgs. 16-17.) The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

f. Consideration of Reconsideration Request 18-5: DotMusic Limited

Whereas, DotMusic Limited submitted a community-based application for the .MUSIC generic top-level domain (gTLD), which was placed in a contention set with other .MUSIC applications.

Whereas, DotMusic Limited participated in Community Priority Evaluation (CPE), but did not prevail.

Whereas, DotMusic Limited challenged the results of the CPE in Reconsideration Request 16-5 (Request 16-5).

Whereas, while Request 16-5 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee (BGC) determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-5, would be placed on hold until the CPE Process Review was completed.[172]

Whereas, on 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed the Resolutions 2018.03.15.08 through 2018.03.15.11, in which the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports; declared that the CPE Process Review was complete; concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, on 14 April 2018, DotMusic Limited submitted Reconsideration Request 18-5 (Request 18-5), claiming that the CPE Process Review is procedurally and methodologically deficient; that the CPE Process Review failed to perform a substantive analysis of the CPE process; and that the Board's adoption of Resolutions 2018.03.15.08 through 2018.03.15.11 were in violation of ICANN's Bylaws.

Whereas, the BAMC previously determined that Request 18-5 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-5 and all relevant materials and recommended that Request 18-5 be denied because the Board considered all material information when it adopted Resolutions 2018.03.15.08 through 2018.03.15.11, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-5 and all relevant materials related to Request 18-5, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.08), the Board adopts the BAMC Recommendation on Request 18-5.

Rationale for Resolution 2018.07.18.08

1. Brief Summary and Recommendation

The full factual background is set forth in the BAMC Recommendation on Request 18-5 (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 14 June 2018, the BAMC evaluated Request 18-5 and all relevant materials and recommended that the Board deny Request 18-5 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in Resolutions 2018.03.15.08 through 2018.03.15.11 (the Resolutions), the Board considered the CPE Process Review Reports.[173] The CPE Process Review Reports identify the materials considered by FTI.[174] Additionally, as noted in the Rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions. (*See* BAMC Recommendation.)

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal.) The Rebuttal claims that: (i) the BAMC "misconstrues Requestor's position regarding the BAMC's invitation to make additional submissions on Reconsideration Request 16-5;" (ii) the Requestor presented "significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;" (iii) FTI's methodology for the CPE Process Review is flawed; and (iv) "the CPE Process Review Reports are substantively flawed."[175]

The Board has carefully considered the BAMC's Recommendation and

all relevant materials related to Request 18-5, including the Requestor's Rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

2. Issue

The issue for reconsideration whether the Board's adoption of the Resolutions contradicted ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).

These issues are considered under the relevant standards for reconsideration requests, which are set forth in the BAMC Recommendation.

3. Analysis and Rationale

A. **The Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).**

The Requestor's claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Reviews. The BAMC noted, and the Board agrees, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN's commitment to fairness, or that the Board's action is inconsistent with ICANN's commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board's acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. **The Requestor's Challenges to FTI's Methodology Do Not Warrant Reconsideration.**

The Requestor claims that FTI's methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any former employees of the CPE Provider; and (3) FTI did not interview CPE applicants or accept materials from them in the course of its investigation.[176]

The BAMC determined, and the Board agrees, that, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.[177] The Board selected FTI because it has "the requisite skills and expertise to undertake" the CPE Process Review, and it relied on FTI to develop an appropriate methodology.[178] The Requestor has not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

(BAMC Recommendation, Pgs. 9-12.)

With respect to the first concern, the BAMC determined, and the Board agrees, that it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider. The CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider's working papers, draft reports, notes, and spreadsheets for all CPE Reports.[179] FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations.[180]

As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider's personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not "working papers."[181] The BAMC concluded, and the Board agrees, that no policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE Provider did not produce its internal emails. As such, this argument does not support reconsideration. (BAMC Recommendation, Pgs. 10-11.)

With respect to the second claim, as detailed in the BAMC Recommendation, the Requestor has not identified a policy or procedure requiring FTI to do more because none exists. FTI interviewed the "only two remaining [CPE Provider] personnel," who were both "part of the core team for all 26 evaluations" in the CPE Process Review.[182] Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.[183] Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. Accordingly, the BAMC concluded, and the Board agrees, reconsideration is not warranted on this ground. (BAMC Recommendation, Pgs. 9-12.)

The BAMC also determined, and the Board agrees, that the Requestor has not identified a policy or procedure requiring FTI to interview the CPE applicants or accept materials from the applicants in the course of the review. The BAMC further noted that FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP)

proceedings.[184] As discussed in further detailed in the BAMC Recommendation, the claim does not warrant reconsideration. (BAMC Recommendation, Pgs. 9-12.)

The BAMC also concluded and the Board agrees that the comments of one Board member about FTI's methodology also do not support reconsideration. That Board member, Avri Doria, abstained from voting on the Resolutions due to concerns "about the rigor of the study and some of its conclusions,"[185] does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless "accept[ed] the path forward" that the Board was setting.[186]

2. **FTI Was Not Required to Agree with Others' Substantive Conclusions and Did Not Fail to Engage in "Substantive Analysis."**

The Requestor argues that reconsideration is warranted because, according to the Requestor, "FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on [Scope 1 and Scope 2] but also concluded there are no issues with the CPE despite the significant evidence to the contrary."[187] The BAMC determined, and the Board agrees, that the Requestor's argument is both contrary to the facts and completely inconsistent with proper investigative methodology. As detailed in the BAMC Recommendation and incorporated herein by reference, the Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence[188]—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI "carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE," specifically allegations that the CPE criteria "were applied inconsistently across the various CPEs as reflected in the CPE reports."[189] Based upon the evidence available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes "were not the result of inconsistent application of the criteria," but rather of different underlying circumstances.[190] The fact that others reached different conclusions than FTI does not invalidate FTI's Reports, nor does it warrant reconsideration of the Board's action in adopting the Resolutions.[191] (BAMC Recommendation, Pgs. 12-16.)

FTI was not directed to conduct an investigation that

supported (or contradicted) the third party's opinions that identified concerns with the CPE process.[192] Nor was the Board obligated to direct ICANN org to undertake the CPE Process Review. Rather, the Review was "intended to have a positive impact on the community" and "provide greater transparency into the CPE evaluation process."[193] Contrary to the Requestor's claim, the Board's decision to initiate the CPE Process Review was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. The Requestor's arguments do not support reconsideration. (BAMC Recommendation, Pgs. 12-13.)

The BAMC concluded, and the Board agrees, that the Requestor's claim that "FTI simply defended the CPE process without performing substantive analysis,"[194] does not support reconsideration. (BAMC Recommendation, Pg. 16.) FTI did not conduct a *de novo* redetermination of the scores awarded to each applicant. That was not within the scope of the CPE Process Review, and it would have been improper for FTI to do so. Instead, FTI "examined all aspects of the CPE Provider's evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE."[195] The methodical nine-step process FTI laid out and followed cannot plausibly be described as lacking "substantive analysis." Accordingly, reconsideration is not warranted.

3. **The ICANN Board's Adoption of the Resolutions Complied with the ICANN Bylaws.**

The Requestor contends that the adoption of the Resolutions violated ICANN organization's Bylaws in three ways: (1) that the Board's action violated international law and conventions with which the Bylaws require compliance; (2) that the Board's action violated the Commitments and Core Values set out in the Bylaws; and (3) that the Board's action violated the Bylaws' requirement of fairness. The BAMC determined, and the Board agrees, that none of these arguments warrant reconsideration.

With respect to the first claim, the Requestor asserts that the CPE Process Review did not provide due process to the Requestor because "it has been unable to address the evidence supporting the CPE Review because they [sic] have not been made publically available."[196] As detailed in the BAMC Recommendation, the Requestor has not demonstrated how the Board's action in adopting the Resolutions violates its commitment to "carrying out its activities in conformity with relevant principles of

international law and international conventions and applicable local law."[197] Rather, the Requestor is attempting to reassert the claims it presented in Request 18-1, challenging ICANN organization's response to its 2018 DIDP Request seeking documents related to the CPE Process Review. However, for the reasons set forth in the BAMC's Recommendation of Request 18-1, which are incorporated herein by reference, ICANN org's response to the Requestor's 2018 DIDP request did not violate any relevant international law or convention; while the Requestor has a right to full consideration of its position, which the BAMC is committed to giving, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to the DIDP.[198] (BAMC Recommendation, Pgs. 17-18.)

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its oversight of the New gTLD Program, after considering all the relevant issues.[199] As noted by the Panel in the *Booking v. ICANN* IRP Final Declaration, "the fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded" by the Requestor.[200] Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor. The Requestor's conclusory statement that it has been deprived due process because it did not have access to every document underlying the CPE Process Review Reports[201] does not support reconsideration. (BAMC Recommendation, Pg. 18.)

With respect to the Requestor's second claim that the Board purportedly violated its Commitments and Core Values set out in the Bylaws, the Requestor bases its claim on its earlier criticisms of the CPE Process Review, which does not warrant reconsideration for many of the reasons outlined above and in further detail in the BAMC Recommendation.[202]

The Board also finds no basis for reconsideration as to the Requestor's claim that the Board's action violated the Bylaws' requirement of fairness because the CPE Review is purportedly "based on an incomplete and unreliable universe of documents biased in favor of ICANN."[203] As discussed above, FTI's choice of investigative methodology provides no reason for reconsideration, and it likewise does not when made again through the lens of this particular Bylaws provision.

4. **The BAMC Will Consider All of the Evidence**

Submitted by the Requestor as Part of its Consideration of Request 16-5.

The BAMC determined, and the Board agrees, that the Requestor claims that it is "materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor's Reconsideration Request 16-5"[204] does not support reconsideration. When the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.[205] The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-5 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-5), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-5. (BAMC Recommendation, Pgs. 19-20.)

B. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that: (i) the BAMC "misconstrues Requestor's position regarding the BAMC's invitation to make additional submissions on Reconsideration Request 16-5;" (ii) the Requestor presented "significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;" (iii) FTI's methodology for the CPE Process Review is flawed; and (iv) "the CPE Process Review Reports are substantively flawed."[206] These are the same arguments set forth in Request 18-5 and were addressed by the BAMC in its Recommendation.

First, the Requestor asserts that ICANN org "oversimplifies Requestor's response to the BAMC's invitation" to make a telephonic oral presentation to the BAMC in support of Request 16-5.[207] The Requestor concedes that it rejected ICANN org's invitation, but asserts that ICANN org did not respond to its demand that ICANN org permit the Requestor a more "meaningful opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports."[208] This claim does not support reconsideration. The Requestor does not have a right to dictate the manner in which it is permitted to present to the BAMC. Under the Bylaws in effect when Request 16-5 was filed, the BAMC's decision on the opportunity to be heard is final.[209] Indeed, the same invitation was extended to all requestors with pending reconsideration requests; were ICANN org to treat the Requestor differently, that would be unfair to other applicants in contravention of ICANN's commitments in its Bylaws.

Second, the Requestor claims that it "provide[d] ICANN with significant evidence supporting its claims," and thus takes issue with the BAMC's conclusion that "no evidence [exists] demonstrating how the Resolutions violate ICANN's commitment to fairness, or that the Board's action is inconsistent with ICANN's [other] commitments."[210] This represents a substantive disagreement with the BAMC's conclusions, and is not a basis for reconsideration. The Requestor otherwise attempts to import arguments it made in connection with Reconsideration Request 18-1, which challenges ICANN org's response to the Requestor's request for documents (DIDP Request) pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the CPE Process Review. The Board addressed and resolved the Requestor's claims concerning ICANN org's response to the DIDP Request in its determination on Request 18-1, which is incorporated herein, and will not be repeated here, except to say that the Requestor has raised no additional argument that warrants reconsideration based on this assertion.

Third, with respect to the Requestor's claim that FTI's methodology for the CPE Process Review is materially flawed, the Board finds that this argument has been sufficiently addressed by the BAMC. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration. Moreover, there is *no* support for the Requestor's assertion that FTI "simply accepted that the documents and interview statements [from the CPE Provider and ICANN org] were accurate and free of bias" without further investigation or analysis.[211] While the Requestor disagrees with the conclusions reached by FTI, that is *not* evidence that FTI failed to critically and impartially analyze the issues relevant to the CPE Process Review. As the BAMC concluded, and the Board agrees, FTI considered *all* available evidence, and did so in a fair and impartial manner. (*See* BAMC Recommendation, Pgs. 9-16.)

Fourth, the Requestor repeats its assertion that the CPE Process Review Reports are substantively flawed because they "did not address any of the independent evaluations," and "fail[ed] to consider divergent views on the CPE Process."[212] The Board finds that this argument has been sufficiently addressed by the BAMC. (*See* BAMC Recommendation, Pgs. 19-20.) The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

g. Consideration of Reconsideration Request 18-6: Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., Fegistry LLC

Whereas, Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC (and its subsidiary applicant dotHotel Inc.), and Fegistry LLC (collectively the Requestors) submitted standard applications for the .HOTEL generic top-level domain (gTLD), which was placed in a contention set with other .HOTEL applications. One of the other application for the .HOTEL gTLD, was a community application filed by HOTEL Top-Level-Domain S.a.r.l. (HTLD).

Whereas, HTLD participated in Community Priority Evaluation (CPE) and prevailed.

Whereas, the Requestors have challenged the CPE Provider's determination that the HTLD Application satisfied the requirements for community priority, and the Board's decision not to cancel the HTLD Application, via numerous DIDP Requests, Reconsideration Requests, and Independent Review Process. All of those challenges have been resolved, with the exception of Reconsideration Request 16-11 (Request 16-11), which is pending.

Whereas, while Request 16-11 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee (BGC) determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.[213]

Whereas, on 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed the Resolutions 2018.03.15.08 through 2018.03.15.11, in which the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, on 14 April 2018, the Requestors submitted Reconsideration Request 18-6 (Request 18-6), claiming that the Board's adoption of the CPE Process Review Reports in Resolutions 2018.03.15.08 through 2018.03.15.11 are contrary to ICANN org's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.

Whereas, the BAMC previously determined that Request 18-6 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-6 and all relevant materials and recommended that Request 18-6 be denied because the Board considered all material information when it adopted Resolutions 2018.03.15.08 through 2018.03.15.11, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-6 and all relevant materials related to Request 18-6, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.09), the Board adopts the BAMC Recommendation on Request 18-6.

Rationale for Resolution 2018.07.18.09

1. ### Brief Summary and Recommendation

   The full factual background is set forth in the BAMC Recommendation on Request 18-6 (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

   On 14 June 2018, the BAMC evaluated Request 18-6 and all relevant materials and recommended that the Board deny Request 18-6 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in Resolutions 2018.03.15.08 through 2018.03.15.11 (the Resolutions), the Board considered the CPE Process Review Reports.[214] The CPE Process Review Reports identify the materials considered by FTI.[215] Additionally, as noted in the Rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions. (*See* BAMC Recommendation.)

   On 29 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal.) The Requestor claims that "the BAMC's Recommendation is based on both factual errors and on a misrepresentation of Requestors' position and of the applicable rules."[216]

   The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 18-6, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

2. ### Issue

The issue is whether the Board's adoption of the Resolutions contradicted ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies). These issues are considered under the relevant standards for reconsideration requests, which are set forth in the BAMC Recommendation.

The Board notes that it agrees with the BAMC's decision to not consider Request 16-11 in conjunction with Request 18-6 (as requested by the Requestors) because the Requests were filed under different Bylaws with different standards for Reconsideration and involve different subject matters.

3. Analysis and Rationale

A. The Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).

The Requestor's claims focus on the transparency, methodology, and scope of the CPE Process Review. The BAMC noted, and the Board agrees, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN's commitment to fairness, or that the Board's action is inconsistent with ICANN's commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board's acceptance of those findings. As demonstrated below and in further detail in the BAMC Recommendation which is incorporated herein, these are not sufficient bases for reconsideration.

1. The CPE Process Review Satisfied Applicable Transparency Obligations.

The Requestors argue that the CPE Process Review—and therefore the Resolutions—are contrary to ICANN's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.[217] Specifically, the Requestors believe that the CPE Process Review lacked transparency concerning: (1) "the selection process for the CPE process reviewer ([FTI]), and the names and curricula vitae of the FTI individuals involved in the review"; (2) the "instructions FTI received from ICANN [organization]"; (3) the "criteria and standards that FTI used to perform the CPE process review"; (4) the "documents or the recordings of the interviews on which [FTI's] findings are based"; and (5) the "questions that were asked during [FTI's] interviews."[218]

With respect to the first three claims, ICANN org provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of

its effort to operate to the maximum extent feasible in an open and transparent manner.[219] In the same document, ICANN org provided information concerning the scope of FTI's investigation.[220] Similarly, the CPE Process Review Reports themselves provide extensive detail concerning FTI's "criteria and standards" for conducting the CPE Process Review.[221] Accordingly, the BAMC concluded, and the Board agrees, that none of these arguments support reconsideration. (BAMC Recommendation, Pg. 13.)

Concerning FTI's documents, recordings, and interview questions, as noted in the CPE Process Review Reports, many of the materials that FTI reviewed are publicly available documents, and are equally are available to the Requestors.[222] Additionally, FTI requested, received, and reviewed (1) emails from ICANN org (internal to ICANN personnel as well external emails exchanged with the CPE Provider) and (2) the CPE Provider's working papers, including draft reports, notes, and spreadsheets.[223] While the Requestors did not file a request for documentary information pursuant to the Documentary Information Disclosure Policy (DIDP), these materials are the subject of two DIDP Requests, which were submitted by parties in January 2018. ICANN organization considered the request and concluded that ICANN organization explained that those documents would not be made publicly available because they were subject to certain Nondisclosure Conditions.[224] These same Nondisclosure Conditions apply to the Requestors' claim. Moreover, the reasoning set forth in the BAMC's Recommendations on Reconsideration Requests 18-1 and 18-2, denying reconsideration on those DIDP Responses are applicable here and are therefore incorporated herein by reference.[225] The Requestors here provide no evidence that ICANN org's decision not to disclose these materials contravened any applicable policies, or ICANN's Mission, Commitments, or Core Values. Accordingly, the BAMC determined, and the Board agrees, this argument does not support reconsideration. (BAMC Recommendation, Pgs. 13-15.)

2. **The Requestors' Challenges to FTI's Methodology Do Not Warrant Reconsideration.**

   The Requestors assert that the Board should not have acknowledged or accepted the CPE Process Review Reports because FTI's methodology was flawed.[226] Specifically, the Requestors complain that FTI: (1) did not explain why the CPE Provider refused to produce email correspondence; and (2) did not try to contact former employees of the CPE Provider.[227]

   As discussed in the detail in the BAMC Recommendation, FTI, not the Board or ICANN org, defined the methodology

for the CPE Process Review Reports.[228] The Board selected FTI because it has "the requisite skills and expertise to undertake" the CPE Process Review, and relied on FTI to develop an appropriate methodology.[229] The Requestors have not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the Requestor's first concern, the BAMC concluded, and the Board agrees, that the claim does not support reconsideration. The CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider's working papers, draft reports, notes, and spreadsheets for all CPE Reports.[230] FTI also received and reviewed emails (and attachments) produced by ICANN organization between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations.[231] The Requestors are correct that FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider's personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not "working papers."[232] The BAMC determined, and the Board agrees, no policy or procedure exists that would require ICANN organization to reject the CPE Process Review Reports because the CPE Provider did not produce internal emails. This argument does not support reconsideration. (BAMC Recommendation, Pgs. 15-16.)

The BAMC concluded, and the Board agrees, that the Requestors' concern that FTI interviewed the "only two remaining [CPE Provider] personnel" does not warrant reconsideration. Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview. [233] Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has not identified a policy or procedure requiring FTI to do more (including to explain why it did not seek out former employees) because none exists. Reconsideration is not warranted on this ground. (BAMC Recommendation, Pg. 16.)

The Requestors also claim that FTI's methodology was flawed because FTI did not identify that the CPE Provider determined that the HTLD Application "provided for an

appeal system," when in fact the application "d[id] not provide for an appeal system" as required under Criterion 3, Registration Policies.[234] The Requestors claim that "[t]he Despegar et al. IRP Panel considered [this] inconsistenc[y] to have merit," and the "existence of said inconsistencies has never been contested."[235] As discussed in detail in the BAMC Recommendation and incorporated herein by reference, this assertion is an overstatement of the Despegar IRP Panel's findings. (BAMC Recommendation, Pgs. 16-17.) The Despegar IRP Panel stated that: (1) ICANN org had confirmed that the CPE Provider did not have a "process for comparing the outcome of one CPE evaluation with another in order to ensure consistency," nor did ICANN org have a process for doing so; and that (2) "[m]uch was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations, . . . some of which, ***on the basis solely of the arguments provided by [the Requestors]***, have some merit."[236] The Despegar IRP Panel did not make a determination concerning these arguments, nor was it asked to. Accordingly, the IRP Panel's side note concerning the Requestors' allegations of inconsistencies does not support reconsideration.

3. **The Requestors' Challenge to the Scope of the CPE Process Review Does Not Warrant Reconsideration.**

   The BAMC determined, and the Board agrees, that the Requestors' complaints about the scope of FTI's investigation do not support reconsideration.[237] The Requestors believe that FTI "sum[med] up" but did not "analyse" "the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria," that it did not analyze "the inconsistencies invoked by applicants in [reconsideration requests], IRPs or other processes," and that FTI "did not examine the gTLD applications underlying the CPE [evaluations]."[238] Essentially, the Requestors wanted FTI to substantively re-evaluate the CPE applications, which was beyond the scope of the CPE Process Review. The requestor's substantive disagreement with FTI's methodology is not a basis for reconsideration. (BAMC Recommendation, Pgs. 17-18.)

4. **The Resolutions Are Consistent with ICANN's Mission, Commitments, Core Values, and Established Policy(ies).**

   The BAMC concluded, and the Board agrees, that there is no merit to the Requestors' assertions that the Resolutions are contrary to ICANN's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner,[239] and they will prevent Requestors from obtaining "a meaningful review of their

complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process."[240] In the Resolutions, the Board directed the BAMC to consider the CPE Reports along with all of the materials submitted in support of the relevant reconsideration requests.[241] The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-11 (just as the BAMC will consider all of the materials submitted by the Requestors in connection with Request 16-11), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-11. (BAMC Recommendation, Pg. 18.)

The BAMC notes that it provided the Requestors an opportunity to make a telephone presentation concerning the effect of the CPE Process Review on Request 16-11, which the Requestors accepted. The BAMC will carefully review and consider all of the materials that the Requestors submitted in support of Request 16-11, as well as the CPE Process Review Reports as one of many reference points in its consideration of Request 16-11. Accordingly, reconsideration is not warranted.

With respect to the Requestors' due process claims, as discussed in the BAMC Recommendation and incorporated herein by reference, while ICANN org is committed to conform with *relevant* principles of international law and conventions, any commitment to provide due process is voluntary and not coextensive with government actors' obligations. Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN organization, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.[242] ICANN organization was not required to establish any internal corporate accountability mechanism, but instead did so voluntarily. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to ICANN's accountability mechanisms. (BAMC Recommendation, Pgs. 19-20).

Even if ICANN organization *did* have due process obligations, and even though the "rights" the Requestors invoke do not apply to corporate accountability mechanisms, the Requestors have not explained how the alleged misapplication of ICANN org's policies resulted in a denial of due process. ICANN org *did* take due process into account when it designed the accountability mechanisms, including the Reconsideration Request process that the Requestors exercised by submitting Request 16-11 and the IRP Process that the Requestors exercised in the Despegar IRP. ICANN org's

accountability mechanisms—that is, Reconsideration Requests and the Independent Review Process—consider the CPE Provider's compliance with the Guidebook and with ICANN organization's Articles of Incorporation and Bylaws. They consider whether the CPE Provider complied with its processes, which requires the adjudicator (the BAMC, Board, or an Independent Panel) to consider the outcome in addition to the process. Accordingly, the accountability mechanisms, including this reconsideration request, provide affected parties like the Requestor with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider. This is not grounds for reconsideration. (*See id.*)

B. **The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestors' Rebuttal and finds that the Requestors have not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that "the BAMC's Recommendation is based on both factual errors and on a misrepresentation of Requestors' position and of the applicable rules." (Rebuttal, Pg. 1)

First, the Requestors assert that the ICANN Board did not consider the claims raised in the Requestors' 16 January 2018 and 22 February 2018 correspondence when the Board adopted the 2018 Resolutions. This claim is factually incorrect and does not support reconsideration. The Requestors' 16 January 2018 letter did not identify any specific challenges to the CPE Process Review Reports, but instead only made passing references to the Requestors' broad "concerns" about transparency, the methodology employed by FTI, due process, and alleged disparate treatment and inconsistencies.[243] These "concerns" were then detailed in the Requestors' 1 February 2018 letter, which the Board acknowledged and considered in the 2018 Resolutions.[244] Further, contrary to the Requestors' claim, the Board *did* acknowledge and consider the Requestors' 22 February 2018 letter.[245]

Second, the Requestors assert that ICANN org has "largely ignored" many of the Requestors' challenges to the CPE Provider's determination that the HTLD Application satisfied the requirements for community priority, and the Board's decision not to cancel the HTLD Application.[246] This claim is unsupported and does not warrant reconsideration because, as the BAMC explained (*see* BAMC Recommendation, Pgs. 4, 14-15), and the Board agrees, ICANN org responded to Requestors' DIDP Requests,[247] Reconsideration Requests, and the Despegar IRP in accordance with established policies and procedures. With respect to Reconsideration Request 16-11, ICANN org has not "ignored" it, as the Requestors claim. Rather, it remains pending and will be considered on the merits as soon as practicable following the completion of the Requestors' oral presentation to

the Board. Regarding the Requestors' claim that ICANN org has not provided details concerning the selection process for FTI, the Board finds that this argument has been sufficiently addressed by the BAMC. (*See* BAMC Recommendation, Pgs. 13-14.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

Third, the Requestors repeat their argument that Board's adoption of the 2018 Resolutions will prevent Requestors from obtaining a "meaningful review of their complaints made in the framework of [Request] 16-11."[248] The Board finds that this argument has been sufficiently addressed by the BAMC. (*See* BAMC Recommendation, Pgs. 18-19.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

Fourth, with respect to the Requestors' due process claim, the Requestors now assert that "the fact that the BAMC refuses to hear [Requests] 16-11 and 18-6 together limits Requestors' due process rights even further."[249] The Requestors state that they "cannot accept the BAMC's reasoning that both [Requests] cannot be handled together because [Request] 16-11 was filed under different (previous) Bylaws," and summarily conclude that this will result in Request 16-11 being determined under "less robust accountability standards" than Request 18-6.[250] However, the Requestors do not provide any basis for this assertion, because there is none. As the BAMC explained, "the Requests were filed under different Bylaws with different standards for Reconsideration and involve different subject matters." (BAMC Recommendation, Pg. 11.) Accordingly, reconsideration is not warranted.

Finally, the Requestors again disagree with the scope of the CPE Process Review and the methodology employed by FTI. The Board finds that these arguments have been sufficiently addressed by the BAMC. (*See* BAMC Recommendation, Pgs. 15-20.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

h. AOB

No Resolutions taken.

3. Executive Session - Confidential:

a. President and CEO FY18 SR2 At-Risk Compensation and Goals for FY19

Whereas, each Board member has confirmed that he/she does not have a conflict of interest with respect to establishing the amount of payment for the President and CEO's FY18 SR2 at-risk compensation payment.

Whereas, the Compensation Committee recommended that the Board approve payment to the President and CEO for his FY18 SR2 at-risk compensation.

Whereas, the Compensation Committee has worked with the President and CEO to develop a set of goals for his FY19 at-risk compensation component.

Resolved (2018.07.18.10), the Board hereby approves a payment to the President and CEO for his FY18 SR2 at-risk compensation component.

Resolved (2018.07.18.11), the Board hereby approves the President and CEO goals for his FY19 at risk compensation component.

Rationale for Resolutions 2018.07.18.10 – 2018.07.18.11

When the President and CEO was hired, he was offered a base salary, plus an at-risk component of his compensation package. This same structure exists today. Consistent with all personnel with the ICANN organization, the President and CEO is to be evaluated against specific goals, which the President and CEO sets in coordination with the Compensation Committee and the Board.

Following FY18 SR2, which is a scoring period that ran from 16 November 2017 through 15 May 2018, the President and CEO provided to the Compensation Committee his self-assessment of his achievements towards his goals for the FY18 SR2 measurement period. After reviewing, the Compensation Committee discussed and agreed with the President's self-assessment. Following discussion, the Compensation Committee recommended that the Board approve the President and CEO's at-risk compensation for the second scoring period of FY18. The Board agrees with the Compensation Committee's recommendation.

The Compensation Committee also discussed a set of goals for the President and CEO for his FY19, which the Compensation Committee Chair discussed with the President and CEO. The Board has evaluated these goals and agrees that they are appropriate and consistent with ICANN's Strategic and Operating plans.

Taking this decision is in furtherance of ICANN's Mission and is in the public interest in that it helps ensure that President and CEO is sufficiently compensated in line with his performance in furtherance of the Mission, and which reflects that his goals are consistent with ICANN's Strategic and Operating plans.

While the decision to pay the President and CEO his at-risk compensation for FY18 SR2 will have a fiscal impact on ICANN, it is an impact that was

contemplated in the FY18 budget. This decision will not have an impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

b. b. President and CEO Executive Services Agreement – One Year Extension

Whereas, the President and CEO's Executive Services Agreement (Agreement) has a term of 23 May 2016 through 23 May 2021.

Whereas, the President and CEO has requested that the Board extend his Agreement by an additional year so that the Agreement will run through May 2022.

Whereas, the Compensation Committee has recommended that the Board approve a one-year extension to the Agreement.

Whereas, all members of the Board have determined that they have no conflict in relation to making this decision.

Resolved (2018.07.18.12), the Board hereby approves a one-year extension to the President and CEO's Executive Services Agreement term, which as extended will now expire on 23 May 2022.

Resolved (2018.07.18.13), the Board hereby authorizes the General Counsel and Secretary to take all steps necessary to amend the President and CEO's Executive Services Agreement term in accordance with and limited to the amendment approve through this resolution.

Rationale for Resolutions 2018.07.18.12 – 2018.07.18.13

The President and CEO has asked the Board to consider a one year extension to his current Executive Services Agreement (Agreement). The President and CEO's current term began on 23 May 2016, and runs for a term of five years, or through 23 May 2021. With such a one-year extension, the President and CEO's Agreement will expire in May 2022 rather than May 2021.

The President and CEO has asked for this extension now because, among other things, it helps ensure that he can properly live and perform his duties while he is based in Los Angeles, as required by his Agreement. In particular, this short extension helps align the expiration of the Agreement with the President and CEO's Visa renewal which, when obtained, will have a three-year term and will expire in 2022.

The Compensation Committee has discussed the President and CEO's request for a one-year extension with the Committee, as well as with the President and CEO directly. The Compensation Committee evaluated the request, as well as the President and CEO's performance to date, and has recommended that the Board approve the President and CEO's request.

The Committee has noted, and the Board agrees, that the President and CEO has a very demanding job. Approving this short extension to his contract will, among other things, help reduce the burden on the President and CEO to

perform his job and remain based in the Los Angeles region where the Board wants him to remain during the pendency of his Agreement.

Following a discussion with the full Board, the Board agrees that it makes sense to approve the one-year extension to the President and CEO's Agreement. Easing the burden on the President and CEO's ability to perform his duties while remaining based in Los Angeles will have a beneficial impact on ICANN, and will help ensure that ICANN continues to fulfill its mission and act in the public interest.

While the decision to extend the President and CEO's Agreement will have a fiscal impact on ICANN, payment of compensation to any President and CEO will be accounted for in the FY21 and FY22 budget development processes. This decision will not have a direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

c. Officer Compensation

Whereas, it is essential to ICANN's operations that ICANN offer competitive compensation packages for its personnel.

Whereas, independent market data provided by outside expert compensation consultants indicates that current and proposed increases to compensation amounts for the President, GDD, the General Counsel & Secretary, the SVP, Policy Development Support, the SVP & CFO, and the SVP, Engineering & CIO are within ICANN's target of the 50th to 75th percentile for total cash compensation based on comparable market data for the respective positions.

Whereas, the proposed maximum increase for the above Officers is less than the 2018 reported U.S. inflation rate and less than the reported Consumer Price Index cost-of-living increases for the geographic regions in which the Officers reside.

Whereas, independent market data provided by outside expert compensation consultants indicates that current compensation for the SVP & COO is slightly above ICANN's target of the 50th to 75th percentile for total cash compensation based on comparable market data for the respective job.

Whereas, given the additional responsibilities that the SVP & COO has assumed in the last fiscal year, falling slightly above ICANN's target of between 50% and 75% of comparable market positions is entirely reasonable in this circumstance.

Whereas, each Board member has confirmed that they are not conflicted with respect to compensation packages for any of ICANN's Officers.

Resolved (2018.07.18.14), the Board grants the President and CEO the discretion to adjust the compensation for FY19, effective 1 July 2018, of: (i) Akram Atallah, President, GDD; (ii) John Jeffrey, General Counsel & Secretary; (iii) David Olive, SVP, Policy Development Support; (iv) Susanna Bennett, the SVP & COO; and (v) Ashwin Rangan, the SVP Engineering & CIO, in accordance with the independent study on comparable compensation, subject

to a limitation that their annual base salaries shall not increase by more than 1.8% per annum from their current rates.

Resolved (2018.07.18.15), the Board grants the President and CEO the discretion to adjust the compensation for FY19, effective 1 July 2018, of Xavier Calvez, the SVP & CFO, in accordance with the independent study on comparable compensation, subject to a limitation that his annual base salary shall not increase by more than 4.79% per annum from his current rate.

Rationale for Resolutions 2018.07.18.14 – 2018.07.18.15

The goal of the organization's compensation program is to provide a competitive compensation package. The organization's general compensation philosophy is to pay base salaries within a range of the 50th – 75th percentile of the market for a particular position, including an annual cost of living adjustment (COLA) based on local inflation and market conditions.

Each of the Officers at issue in this resolution resides in the United States, with five residing in the greater Los Angeles area and one in the District of Columbia. As of May 2018, the U.S. inflation rate was reported as 2.8%, while the Consumer Price Index (CPI), the commonly accepted metric for cost-of-living increases, increased in the greater Los Angeles area by 4.1% and increased in the District of Columbia by 2.5%.

ICANN's President and CEO has requested that he be granted the discretion to increase the FY18 base salaries of: (i) the President, GDD, the General Counsel & Secretary, the SVP, Policy Development Support, the SVP & COO and the SVP, Engineering & CIO by up to 1.8% of their current base salaries; and (ii) the SVP & CFO, by up to 4.79% of his current base salary. The President and CEO has also informed the Board that he intends to also exercise the same discretion with respect to the other members of ICANN's Executive Team who are not Officers (which does not require Board approval).

The requested increases for each of the Officers listed in (i) in the immediately above paragraph, are less than both the standard U.S. inflation rate and the local CPI increases. The increase for the SVP & CFO listed in (ii) in the immediately above paragraph, includes an additional 2.99% increase. The additional increase is based on the independent market data provided by the organization's outside compensation experts. The market data indicates that the overall 4.79% increase will align the salary for the SVP & CFO to the 50th percentile of the market for that position – the low end of the compensation range.

The salary adjustments provided under this resolution will assist these officers and the organization in fulfilling its mission and in ensuring ICANN acts in the public interest.

There will be some fiscal impact to the organization, but that impact will be covered in the FY19 budget. This resolution will not have any direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

d. Ombudsman FY18 At-Risk Compensation

Whereas, the Compensation Committee recommended that the Board approve payment to the Ombudsman of his FY18 at-risk compensation.

Resolved (2018.07.18.16), the Board hereby approves a payment to the Ombudsman of his FY18 at-risk compensation component.

Rationale for Resolution 2018.07.18.16

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and Board members during the year to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN community.

Evaluation of the Ombudsman's objectives results from both the Ombudsman self-assessment as well as review by the Compensation Committee, leading to a recommendation to the Board.

Evaluating the Ombudsman's annual performance objectives is in furtherance of the goals and mission of ICANN and helps increase the Ombudsman's service to the ICANN community, which is in the public interest.

While there is a fiscal impact from the results of the scoring, that impact was already accounted for in the FY18 budget. This action will have no impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

e. Extension of Ombudsman Contract

Whereas, the current Ombudsman's contract concluded on 30 June 2018.

Whereas, the scope and breadth of the Ombudsman's office is still being reviewed by the Community through its Work Stream 2 work.

Whereas, in order to ensure that the Office of the Ombudsman remains operational, the Compensation Committee has recommended that the Board extend the Ombudsman's contract by two years following the recent conclusion of his contract term, which expired on 30 June 2018; the extension will cover the period from 1 July 2018 through 30 June 2020, or until the Board selects ICANN's next Ombudsman, whichever is sooner.

Resolved (2018.07.18.17), the Board approves the extension of Herb Waye's contract to serve as ICANN's Ombudsman for two additional years, covering the time period from 1 July 2018 through 30 June 2020, or until the Board selects ICANN's next Ombudsman, whichever is sooner.

Resolved (2018.07.18.18), the Board directs the President and CEO, or his designee(s), to take all steps necessary to effectuate the Ombudsman's contract extension.

Resolved (2018.07.18.19), the Board directs the President and CEO, or his designee(s), to ensure that, following the community work relating to the Ombudsman, and the Board's adoption of any relevant recommendations, the search for the next Ombudsman begins as soon as feasible and practicable.

Rationale for Resolutions 2018.07.18.17 – 2018.07.18.19

ICANN's Bylaws require ICANN to maintain an Office of the Ombudsman. (*See* Article 5 of the Bylaws at https://www.icann.org/resources/pages/governance/bylaws-en/#article5.) Having an ICANN Ombudsman positively affects the transparency and accountability of ICANN as the Ombudsman is one of the three main accountability mechanisms within ICANN. Accordingly, maintaining an appropriate Office of the Ombudsman squarely supports ICANN's mission, and is within the public interest.

Currently, the Community is involved in discussing ICANN's accountability mechanisms, including the scope and breadth of the Ombudsman's office. Once the Community work is completed, and the Board adopts the relevant recommendations there will almost certainly be changes to the role and responsibilities of ICANN's Ombudsman, which could significantly impact the position description for the role.

The current Ombudsman, Herb Waye, was appointed as ICANN's Ombudsman in July 2016, and his current contract expired on 30 June 2018. A new Ombudsman has not yet been selected since searching for ICANN's next Ombudsman before the Work Stream 2 work relating to the scope of the Ombudsman's office is completed may prove inefficient and premature. However, ICANN must ensure that the Ombudsman's office remains operational during this time period. Mr. Waye, has been serving as the Ombudsman for approximately two years, and served as the Adjunct Ombudsman for 10 years prior to that. He is extremely familiar with and well versed in the complex issues facing ICANN. By all accounts, Mr. Waye has been serving ICANN well as the Ombudsman since his term began in July 2016.

The Board also notes that there are discussions to possibly add a new Adjunct Ombudsman, a role that the current Ombudsman served for 10 years before becoming ICANN's Ombudsman. This is, in part, specific response to make sure the Office can address complaints that may be submitted pursuant to the Community Anti-Harassment Policy.

As there has been a budget for an ICANN Ombudsman since 2004 when the first Ombudsman was appointed, this decision does not have a financial impact on ICANN, the community, or the public that was not already anticipated or included in the budget, outside of the anticipated potential costs of the search for the new Ombudsman. This decision will not have any impact on the security, stability or resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Published on 20 July 2018

[1] Rebuttal at Pg. 3.

[2] Request 18-1.

[3] DIDP Request No. 20180110-1, https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf (internal citations omitted).

[4] DIDP Request No. 20180110-1, https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf (internal citations omitted).

[5] DIDP Request No. 20180110-1, https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf (internal citations omitted).

[6] *Id.*, § 6, at Pg. 9-10.

[7] *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id*.

[8] https://www.icann.org/resources/pages/didp-2012-02-25-en.

[9] Request 18-1, § 6, at Pg. 9 (internal quotation marks omitted).

[10] *Id.*, § 6, at Pg. 8.

[11] *Id.*

[12] Request 18-1, § 6, at Pg. 8.

[13] Request 18-1, § 6, at Pg. 10.

[14] 2018 DIDP Response at Pg. 9-21.

[15] *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, *available at* https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf.

[16] Request 18-1, § 6, at Pg. 9.

[17] *Id.*

[18] DIDP Nondisclosure Conditions.

[19] Request 18-1, § 6, at Pg. 9.

[20] *Id.*

[21] ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

[22] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(v).

[23] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(vi); *see* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-1. *See* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The BAMC considers Request 18-1 under the Bylaws in effect when the Requestor submitted the reconsideration request, which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor's claims under the 22 July 2017

version of the Bylaws.

[24] *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, *available at* https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf.

[25] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(c).

[26] ICANN Bylaws, Art. 1, Section 1.2(b)(v).

[27] *See* New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A, § 5, at Pg. 6, 21 November 2011, *available at* https://newgtlds.icann.org/en/applicants/cpe.

[28] *See, e.g.*, Response to Request 20150312-1 at Pg. 2, *available at* https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf.

[29] Request 18-1, § 6, at Pg. 6-7 (quoting Charles T. Kotuby Jr., "General Principles of Law, International Due Process, and the Modern Role of Private International Law," 23 Duke J. of Comparative and Int'l L. 411, 422 (2013) and Charles T. Kotuby & Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes 179 (Mar. 15, 2017)).

[30] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

[31] Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

[32] For the same reasons, the Board was not required to direct FTI to "attempt[] to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process" or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. *See* 16 January 2018 letter from Ali to ICANN Board, at Pg. 3, 5, https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf.

[33] Rebuttal at Pg. 3.

[34] Rebuttal at Pg. 8.

[35] BAMC Recommendation at Pg. 12.

[36] Rebuttal at Pgs. 7-8.

[37] BAMC Recommendation at Pgs. 19-25.

[38] Rebuttal at Pg. 8.

[39] https://www.icann.org/news/announcement-4-2017-06-02-en.

[40] https://www.icann.org/news/announcement-2017-09-01-en.

[41] https://www.icann.org/news/announcement-2017-12-13-en.

[42] https://newgtlds.icann.org/en/applicants/cpe.

[43] Rebuttal at Pg. 3.

[44] *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3.

[45] Rebuttal at Pg. 6.

[46] Rebuttal at Pg. 9.

[47] Rebuttal at Pg. 7, n. 29.

[48] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf. *See also* EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services 12 Mar 2012, at Pg. 8, *available at* https://newgtlds.icann.org/en/applicants/cpe#process-review.

[49] Rebuttal at Pg. 4.

[50] Rebuttal at Pg. 4.

[51] Flip Petillion, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. XXIV.

[52] Rebuttal, at Pg. 1.

[53] Request 18-2.

[54] *See* Request 18-2.

[55] *Id.* § 6, at Pg. 10.

[56] https://www.icann.org/resources/pages/didp-2012-02-25-en.

[57] Request 18-2, § 6, at Pg. 10 (internal quotation marks and citations omitted).

[58] *Id.*, § 6, at Pg. 10.

[59] *Id.*

[60] *Id.*, § 6 at Pg. 10-11.

[61] 2018 DIDP Response at Pg. 9-22.

[62] *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, *available at* https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf.

[63] *Id.*

[64] *Id.*

[65] DIDP Nondisclosure Conditions.

[66] Request 18-2, § 6, at Pg. 11.

[67] ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

[68] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(v).

[69] *Id.*, Art. 1, § 1.2(a)(vi); Request 18-2, § 6, at Pg. 9-10. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-2. *See* Request 18-2, § 6, at Pg. 9. The BAMC considers Request 18-2 under the Bylaws in effect when the Requestors submitted the reconsideration request which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor's claims under the 22 July 2017 version of the Bylaws.

[70] *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, *available at* https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf.

[71] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(c).

[72] ICANN Bylaws, Art. 1, Section 1.2(b)(v).

[73] *See, e.g.*, Response to Request 20150312-1 at Pg. 2, *available at* https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf.

[74] *Id.*

[75] Request 18-2, § 6, at Pg. 8 (quoting Charles T. Kotuby Jr., "General Principles of Law, International Due Process, and the Modern Role of Private International Law," 23 Duke J. of Comparative and Int'l L. 411, 422 (2013) and Charles T. Kotuby and Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes 179 (Mar. 15, 2017)).

[76] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

[77] Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

[78] For the same reasons, the Board was not required to "seek . . . input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation," or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. *See* 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf.

[79] Rebuttal, at Pg. 1.

[80] Rebuttal, at Pg. 1.

[81] ICANN Bylaws, Art. 4, Section 4.2(c)(i).

[82] *Id.*; *see also, e.g.*, Board Determination on Request 17-3, https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b; Board Determination on Request 17-1, https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.d. Reconsideration also is appropriate if the requestor shows that it was adversely affected by Board or Staff action or inaction taken without consideration of material information, or taken as a result of reliance on false or inaccurate relevant information. (ICANN Bylaws, Art. 4, Section 4.2(c)(ii), (iii).)

[83] Rebuttal, at Pg. 3.

[84] *Id*.

[85] BAMC Recommendation, Pgs. 21-27.

[86] Rebuttal, at Pgs. 6-7.

[87] Rebuttal, at Pg. 9.

[88] https://www.icann.org/news/announcement-4-2017-06-02-en.

[89] https://www.icann.org/news/announcement-2017-09-01-en.

[90] https://www.icann.org/news/announcement-2017-12-13-en.

[91] https://newgtlds.icann.org/en/applicants/cpe.

[92] Rebuttal at Pg. 9.

[93] Rebuttal, at Pg. 2.

[94] Rebuttal at Pg. 2.

[95] Flip Petillion, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. XXIV.

[96] *See generally* Rebuttal.

[97] Request 18-3, § 5, at Pg. 2.

[98] Request 18-3, § 9, at Pgs. 4-5.

[99] *See* About ICANN's Contractual Compliance Approach and Processes webpage, *available at* https://www.icann.org/resources/pages/approach-processes-2012-02-25-en.

[100] *See* Notice of Termination, at Pg. 4.

[101] Request 18-3, § 9, at Pgs. 4-5.

[102] *See also* RAA, §§ 3.4.2.2; 3.4.3

[103] Contractual Compliance staff confirmed this fact during investigation of Request 18-3.

[104] *See, e.g.*, Attachment E, at Pg. 25.

[105] *Id.*, at Pg. 5.

[106] *Id*.

[107] Request 18-3, § 9, at Pg. 5.

[108] *Id.*

[109] RAA, WAPS § 1.

[110] *Id.* § 1.f.i.

[111]

Id. § 2.

[112] *Id.* § 4.

[113] *See* Notice of Termination, at Pg. 5. This was further confirmed with Contractual Compliance staff during investigation of Request 18-3.

[114] RAA §§ 3.4.2, 3.4.3.

[115] *Id*. § 3.4.3.

[116] Request 18-3, § 9, at Pgs. 6-7.

[117] *See generally*, Attachment E.

[118] *Id.*, at Pgs. 13-14, 18.

[119] Attachment E, Pg. 9.

[120] *See* Informal Resolution Process, *available at* https://www.icann.org/en/system/files/files/informal-resolution-07mar17-en.pdf.

[121] Notice of Breach, at Pgs. 1-2.

[122] ERRP § 4.1, *available at* https://www.icann.org/resources/pages/errp-2013-02-28-en.

[123] Request 18-3, § 9, at Pg. 8.

[124] *See* Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2. This fact was confirmed by Contractual Compliance staff during investigation of Request 18-3.

[125] Request 18-3, § 9, at Pg. 9 (emphasis added).

[126] RAA, § 3.17; RAA, RIS § 7.

[127] Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2.

[128] *Id.*

[129] *See* Complaints and Disputes FAQ, Question 32, *available at* https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#32.

[130] *See* Attachment 1 to BAMC Recommendation on Request 18-3, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-bamc-recommendation-attachment-1-05jun18-en.pdf.

[131] Rebuttal (citing Pg. 25 of BAMC Recommendation).

[132] *Id.* ("I went through the convoluted procedure of updating ICANN with new details and forms when access to RADAR was restored. . . .").

[133] Registrar Information Specification Updates, *available at* https://www.icann.org/resources/pages/registrar-contact-updates-2015-09-22-en.

[134] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

[135] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[136] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[137] *See generally* Rebuttal.

[138] Request 18-4, § 8, at Pg. 12-13. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf (FTI did not interview applicants); 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf (FTI did not interview or accept materials from applicants, and "received almost no input from the CPE Provider")

[139] *See, e.g.*, Scope 2 Report at Pg. 3-9, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[140] *See* CPE Process Review Update, 2 June 2017, *available at* https://newgtlds.icann.org/en/applicants/cpe.

[141] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[142] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[143] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf. *See also* CPE Provider Consulting Agreement Statement of Work #2 – Application Evaluation Services_12Mar2012, at Pg. 8, *available at* https://newgtlds.icann.org/en/applicants/cpe#process-review.

[144] *Id.* at Pg. 9.

[145] Scope 1 Report, at Pg. 14, *available at* https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf.

[146] *Id.*

[147] San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137.

[148] *Id.*

[149] Request 18-4, § 8, at Pg. 13.

[150] Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-10. The Requestor also points to reports that the Requestor and other CPE applicants submitted in support of their CPE applications. For the same reasons that the independent reports identified in text are not determinative of the outcome of the CPE Process Review, the CPE applicants' expert reports are likewise not determinative. *See* Request 18-4, § 8, at Pg. 10, 13.

[151] *See* Scope 1 Report at Pg. 3, *available at* https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf.

[152]

Scope 3 Report, at Pg. 3.

[153] Scope 1 report, at Pgs. 3-6.

[154] *Id*.

[155] *See* Transcript of ICANN Cross Community Working Group's Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, *available at* https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

[156] https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.

[157] Request 18-4, § 8, at Pg. 14.

[158] Request 18-4, § 8, at Pg. 13.

[159] ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[160] https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf; https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf; https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf.

[161] Request 18-4, § 6, at Pg. 4.

[162] *See* ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[163] Request 18-4, § 8, at Pg. 12.

[164] *See* BAMC Recommendation on Request 18-2, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf.

[165] *See generally* Rebuttal.

[166] Rebuttal, Pg. 1.

[167] *Id*.

[168] Bylaws, Art. IV, § 2.12, effective 11 February 2016. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

[169] Rebuttal, Pg. 2.

[170] Rebuttal, Pg. 6.

[171] Rebuttal, Pg. 8.

[172] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

[173] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[174] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[175] *See generally* Rebuttal.

[176] Request 18-5, § 6, at Pg. 3. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf (FTI did not interview applicants); 16 January Letter from Ali to ICANN Board, https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf (alleging that FTI "deliberately ignored the information and materials provided by the applicants").

[177] *See, e.g.*, Scope 2 Report at Pg. 3-9, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[178] *See* CPE Process Review Update, 2 June 2017, https://newgtlds.icann.org/en/applicants/cpe.

[179] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[180] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[181] *See* Scope 2 Report at Pg. 7-8, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf. *See also* CPE Provider Consulting Agreement Statement of Work #2 – Application Evaluation Services_12Mar2012, at Pg. 8, *available at* https://newgtlds.icann.org/en/applicants/cpe#process-review.

[182] *Id.* at Pg. 9.

[183] Scope 1 Report, at Pg. 14, *available at* https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf.

[184] *Id.*

[185] San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137.

[186] *Id.*

[187] Request 18-5, § 6, at Pg. 6.

[188] *See* Scope 1 Report at Pg. 3, *available at* https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf.

[189] Scope 3 Report, at Pg. 3.

[190] *Id.*

[191] This is equally true of the reports of Dr. Blomqvist and Professor Eskridge that Requestor

cites for their disagreement with the CPE Review's conclusion. *See* Request 18-5, § 6, at Pg. 8.

[192] *See* Transcript of ICANN Cross Community Working Group's Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, *available at* https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

[193] https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.

[194] Request 18-5, § 6, at Pg. 10.

[195] Scope 2 Report, at Pg. 8.

[196] *Id.*, § 6, at Pg. 11.

[197] ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

[198] Recommendation of the BAMC on Request 18-1, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf.

[199] https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.

[200] *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, *available at* https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf.

[201] Request 18-5, § 6, p. 11-12.

[202] *See generally* BAMC Recommendation.

[203] Request 18-5, § 6, at Pg. 13.

[204] Request 18-5, § 6, at Pg. 3.

[205] *See* ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[206] *See generally* Rebuttal.

[207] Rebuttal, Pg. 1.

[208] *Id.*

[209] Bylaws, Art. IV, § 2.12, effective 11 February 2016. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

[210] Rebuttal, Pg.

[211] Rebuttal, Pg. 6.

[212] Rebuttal, Pg. 8.

[213] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

[214] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[215] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[216] Rebuttal, Pg. 1.

[217] Request 18-6, § 7, at Pg. 6-7.

[218] 1 February 2018 letter from Petillion to BAMC at Pg. 1-2, *available at* https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf.

[219] *See* CPE Process Review Update, 2 June 2017, *available at* https://newgtlds.icann.org/en/applicants/cpe.

[220] *See id*.

[221] *See, e.g.*, FTI Scope 1 Report at Pg. 3, *available at* https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf.

[222] Scope 1 Report at Pgs. 3-6.

[223] *Id.* at Pg. 6.

[224] *See* ICANN organization Response to DIDP Request 20180115-1, at Pg. 21-22, *available at* https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf.

[225] *See* BAMC Recommendation on Request 18-1, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf; *see also* BAMC Recommendation on Request 18-2, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf.

[226] 1 February 2018 letter from Petillion to BAMC at Pg. 2,, *available at* https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf. *See also* Request 18-6, § 7, at Pg. 7.

[227] 1 February 2018 letter from Petillion to BAMC, at Pg. 2.

[228] *See, e.g.*, Scope 2 Report at Pg. 3-9, https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

[229] *See* CPE Process Review Update, 2 June 2017, *available at* https://newgtlds.icann.org/en/applicants/cpe.

[230] *See* Scope 2 Report at Pg. 7-8.

[231] *See* Scope 2 Report at Pg. 7-8.

[232] *See id*. *See also* CPE Provider Consulting Agreement Statement of Work #2 – Application Evaluation Services_12Mar2012, at Pg. 8, *available at* https://newgtlds.icann.org/en/applicants/cpe#process-review.

[233] Scope 1 Report, at Pg. 14, *available at* https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf.

[234] 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing Despegar IRP Panel Declaration, ¶ 146.

[235] *Id.* at Pg. 4

[236] Despegar IRP Panel Declaration, ¶ 146 (emphasis added).

[237] *See* 1 February 2018 letter from Petillion to BAMC, *available at* https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf. *See also* Request 18-6, § 7, at Pg. 7.

[238] *Id.*

[239] Request 18-6, § 7, at Pg. 6-7.

[240] *Id.* § 5, at Pg. 3.

[241] *See* ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[242] Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

[243] https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf.

[244] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[245] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a ("The Board also acknowledges the 22 February 2018 letter from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11).").

[246] Rebuttal, Pg. 2.

[247] In the Rebuttal, the Requestors repeat their challenge ICANN org's response to DIDP Requests submitted by other parties in January 2018. *See* Rebuttal, Pgs. 6-8. The Board finds that this argument has been sufficiently addressed by the BAMC. (*See* BAMC Recommendation, Pgs. 14-15.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

[248] Rebuttal, Pg. 4.

[249] Rebuttal, Pg. 6.

[250] *Id*.

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RESPONDENT'S EXHIBIT

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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FEGISTRY, LLC, RADIX DOMAIN SOLUTIONS PTE. LTD., and DOMAIN VENTURE PARTNERS PCC LIMITED,

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

CASE NO. 20STCV42881

Assigned to Hon. Craig D. Karlan

DEFENDANT ICANN'S NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT OF REGISTRY, LLC, RADIX DOMAIN SOLUTIONS PTE. LTD., AND DOMAIN VENTURE PARTNERS PCC LIMITED; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of Eric P. Enson, Request for Judicial Notice, and [Proposed] Order Filed Concurrently Herewith]

Date: T.B.D.
Time: T.B.D.
Dept: N

Complaint Filed: November 9, 2020

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on a date and time to be set by the Court, in Department N of this Court, located at 1725 Main Street, Santa Monica, CA 90401, defendant Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does demur to Plaintiffs Fegistry, LLC's, Radix Domain Solutions PTE Ltd.'s, and Domain Venture Partners PCC Limited's (collectively, "Plaintiffs") Complaint ("Complaint") in its entirety.

First, Plaintiffs' entire Complaint is barred by a covenant not to sue to which Plaintiffs agreed in 2012. Second, Plaintiffs' Complaint fails to state a claim for any of the eight causes of action, and Plaintiffs lack standing to pursue several of their claims. Accordingly, the Complaint should be dismissed with prejudice.

This motion is based upon this notice of motion, the accompanying memorandum of points and authorities, the declaration of Eric P. Enson, the Request for Judicial Notice and exhibits concurrently filed in support thereof, the papers, pleadings and other records on file herein, and such further evidence and argument as may be presented to the Court.

Dated: January 22, 2021

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

DEMURRER

Defendant the Internet Corporation for Assigned Names and Numbers ("ICANN") hereby demurs to Plaintiffs Fegistry, LLC's, Radix Domain Solutions PTE Ltd.'s, and Domain Venture Partners PCC Limited's (collectively, "Plaintiffs") Complaint ("Complaint") on each of the following grounds:

DEMURRER TO ALL CAUSES OF ACTION

1. All causes of action fail to state facts sufficient to constitute a cause of action against ICANN because the Complaint is barred by a covenant not to sue agreed to by the Plaintiffs in 2012. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO FIRST CAUSE OF ACTION

2. The first cause of action for breach of contract fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO SECOND CAUSE OF ACTION

3. The second cause of action for fraud-in-the-inducement under Civil Code Sections 1709 and 1710, *et seq*. fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO THIRD CAUSE OF ACTION

4. The third cause of action for deceit under Civil Code Sections 1709 and 1710, *et seq*. fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO FOURTH CAUSE OF ACTION

5. The fourth cause of action for grossly negligent misrepresentations fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO FIFTH CAUSE OF ACTION

6. The fifth cause of action for gross negligence fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO SIXTH CAUSE OF ACTION

7. The sixth cause of action for public benefit corporation bylaw enforcement under

California Corporations Code Section 14623 fails to state facts sufficient to constitute a cause of action against ICANN because Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO SEVENTH CAUSE OF ACTION

8. The seventh cause of action for false advertising law under California Business and Professions Code Sections 17500 *et seq.* fails to state facts sufficient to constitute a cause of action against ICANN, and Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO EIGHTH CAUSE OF ACTION

9. The eighth cause of action for unfair competition under California Business and Professions Code Sections 17200 *et seq*. fails to state facts sufficient to constitute a cause of action against ICANN, and Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code § 430.10.

Dated: January 22, 2021

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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INTRODUCTION

Defendant the Internet Corporation for Assigned Names and Numbers ("ICANN") is a non-profit public benefit corporation that oversees the technical coordination of the Internet's domain name system ("DNS"), which converts easily-remembered Internet domain names, such as LACOURT.ORG, into numeric IP addresses recognized by computers. In 2012, ICANN began accepting applications for the right to operate new generic top-level domains ("gTLDs"), in connection with ICANN's New gTLD Program. A gTLD is the portion of a domain name to the right of the last dot, such as ".COM" and ".NET."

Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. Ltd., and Domain Venture Partners PCC Limited (collectively, "Plaintiffs") each applied in 2012 to operate the .HOTEL new gTLD. In their separate applications, Plaintiffs agreed to a covenant not to sue that requires all claims arising out of, based upon, or relating to ICANN's evaluation of their applications be resolved not through litigation, but through ICANN's unique alternative dispute resolution mechanisms, referred to as ICANN's "Accountability Mechanisms." These Accountability Mechanisms include the Independent Review Process ("IRP") under which challenges to ICANN's actions and inactions are resolved by independent panelists administered by the American Arbitration Association's International Center for Dispute Resolution.

Plaintiffs have claimed that ICANN improperly evaluated Plaintiffs' .HOTEL applications. To that end, Plaintiffs filed and are in the midst of an IRP challenging the decisions ICANN made regarding the .HOTEL applications. When Plaintiffs did not get the interim relief they sought in their IRP, they filed this lawsuit against ICANN in direct violation of their agreement not to sue, asking this Court to manage and oversee ICANN's Accountability Mechanisms, including Plaintiffs' currently-pending IRP. Indeed, the relief Plaintiffs seek in this litigation is the exact same interim relief that they requested and were denied in the IRP, which is why they are improperly seeking another venue to plead their case and are asking this Court to intervene in ICANN's Accountability Mechanisms.

Plaintiffs' Complaint, however, is completely barred by the Covenant Not to Sue.

Furthermore, the Complaint fails to sufficiently allege any cause of action against ICANN. Instead, the allegations in the Complaint are contradicted by ICANN's Bylaws[1] or Plaintiffs' own allegations, they are conclusory and devoid of any factual support, or they demonstrate that Plaintiffs lack standing to pursue their claims. Taken together or individually, these key flaws require that the Complaint be dismissed with prejudice.

SUMMARY OF PLAINTIFFS' ALLEGATIONS

ICANN is a California non-profit public benefit corporation that oversees the technical coordination of the Internet's DNS. (Compl. ¶ 7.) In 2012, Plaintiffs each applied to ICANN to operate the .HOTEL gTLD. (*Id*. ¶ 6.) By submitting their applications, Plaintiffs agreed to a set of terms and conditions contained in an Applicant Guidebook ("Guidebook") that ICANN adopted for the New gTLD Program. (*Id*. ¶ 92, RJN Ex. 2, RJN Ex. 4.)[2] A key provision of the Guidebook, the Covenant Not to Sue ("Covenant"), requires applicants to pursue all claims related to ICANN's evaluation of applications through ICANN's Accountability Mechanisms. The Covenant expressly forbids lawsuits against ICANN:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. ***APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN*** WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT OT THE APPLICATION . . . ; ***PROVIDED THAT, APPLICANT MAY***

[1] References to the Bylaws are to those amended on November 28, 2019, unless stated otherwise.

[2] ICANN's concurrently-filed Request for Judicial Notice requests that the following documents, each of which are not subject to dispute, be judicially noticed and considered by the Court in evaluating ICANN's demurrer: (1) ICANN's Bylaws as amended November 28, 2019; (2) the Applicant Guidebook, finalized on June 4, 2012; (3) the Emergency Panelist's decision in the pending IRP; (4) Plaintiffs' IRP Request; and (5) ICANN's Bylaws as amended March 16, 2012.

> ***UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS*** FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.

(RJN Ex. 2, Module 6, § 6.6 (emphasis added, capitalization in original).)

ICANN's Bylaws provide for several Accountability Mechanisms, including Reconsideration Requests and the IRP. (Compl. ¶ 16, 24; RJN Ex. 1, Art. 4, §§ 4.2, 4.3.) A Reconsideration Request allows "any person or entity materially affected by an action or inaction of the ICANN Board or staff" to request "the review or reconsideration of that action or inaction." (RJN Ex. 1, Art. 4, § 4.2(a).) Reconsideration Requests are reviewed by a subset of the ICANN Board, the Board Accountability Mechanisms Committee ("BAMC"), which makes recommendations to the ICANN Board on the merits of the Reconsideration Request. (*Id*. Art. 4, § 4.2(e).) In October 2016, the Bylaws were amended to require that Reconsideration Requests be sent to ICANN's Office of the Ombudsman for review, except that the Ombudsman must recuse itself from matters "for which the Ombudsman has, in advance of filing the Reconsideration Request, taken a position while performing his or her role as the Ombudsman . . . or involving the Ombudsman's conduct in some way." (*Id*., Art. 4, § 4.2(l)(iii).) In the case of such a recusal, the BAMC must "review the Reconsideration Request without involvement by the Ombudsman." (*Id*., Art. 4, § 4.2(l)(iii).) As Plaintiffs allege, they have filed two Reconsideration Requests regarding ICANN's evaluation of their applications, one in August 2016 and one in April 2018. (Compl. ¶ 16, n.4.)

The IRP is an alternative dispute resolution process through which an aggrieved party can ask independent panelists to evaluate whether an ICANN action or inaction was inconsistent with ICANN's Articles of Incorporation ("Articles") and Bylaws. (Compl. ¶ 24; RJN Ex. 1, Art. 4, § 4.3(a).) In 2013, the Bylaws were amended to provide for a Standing Panel of independent panelists to hear and resolve IRPs. (Compl. ¶¶ 12, 27.) The Bylaws require ICANN, "in consultation with the Supporting Organizations and Advisory Committees, [to] initiate a four-step process to establish the Standing Panel," but the Bylaws do not set a deadline by which this extensive process must be complete. (RJN Ex. 1, Art. 4, § 4.3(j)(ii).) Indeed, the Bylaws

specifically contemplated that it would take time to form the Standing Panel, and they provide a method by which IRP Claimants and ICANN are able to appoint an IRP Panel in the absence of a Standing Panel: "the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist." (*Id*., Art. 4, § 4.3(k)(ii).) As Plaintiffs concede, ICANN is in the process of convening the Standing Panel. (Compl. ¶¶ 32, 54, 64, 65.)

Due to another 2016 amendment, the Bylaws now require ICANN to "bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members." (RJN Ex. 1, Art. 4, § 4.3(r).)

In addition to their Reconsideration Requests, Plaintiffs have challenged ICANN's processing of their .HOTEL applications in a currently-pending IRP. (Compl. ¶¶ 13, 16, 32.) In their IRP, Plaintiffs recently moved for emergency relief seeking the exact same relief that Plaintiffs seek in this lawsuit. (Compl. ¶¶ 32, 39.) Specifically, Plaintiffs requested, in part, that an Emergency Panelist order ICANN to "appoint an independent ombudsman" to review Plaintiffs' Reconsideration Requests; "appoint and train a Standing Panel" to hear Plaintiffs' IRP; and "pay all costs of the Emergency Panel and of the IRP Panelists," including IRP initiation fees. (RJN Ex. 3 ¶ 61.) After thorough review of the extensive briefing and argument submitted by the parties, the Emergency Panelist denied Plaintiffs' request for appointment of an Ombudsman, denied Plaintiffs' request for appointment of a Standing Panel, and denied Plaintiffs' request for reimbursement of their initial filing fee. (RJN Ex. 3, ¶ 226(F), (G), (I).)

Hoping to re-litigate that result, Plaintiffs then filed this Complaint seeking the same relief Plaintiffs already sought from and were denied by the Emergency Panelist in the IRP. (Compl. ¶¶ 83–126.) Plaintiffs' Complaint, however, is barred by the Covenant, does not sufficiently state any causes of action against ICANN, and it should be dismissed with prejudice.

LEGAL STANDARD

A demurrer should be sustained "when [t]he pleading does not state facts sufficient to constitute a cause of action." *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505, 512 (2017) (citing Cal. Civ. Proc. Code, § 431.10(e)) (internal quotations omitted). "A general

demurrer searches the complaint for all defects going to the existence of a cause of action and places at issue the legal merits of the action on assumed facts." *Carman v. Alvord*, 31 Cal. 3d 318, 324 (1982) (citing *Banerian v. O'Malley*, 42 Cal. App. 3d 604, 610–11, (1974)). The court "accepts as true all the material allegations of the complaint, but do[es] not assume the truth of contentions, deductions or conclusions of fact or law." *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 512. The court may also consider matters which may be judicially noticed, and a "complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective." *Evans v. City of Berkeley*, 38 Cal. 4th 1, 6 (2006) (citing *Joslin v. H.A.S. Ins. Brokerage*, 184 Cal.App.3d 369, 374, (1986); *see* Code Civ. Proc. § 430.30(a)). A demurrer should be granted without leave to amend where "no amendment could cure the defect in the complaint[.]" *See Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1468 (2014).

ARGUMENT

I. THE COVENANT BARS PLAINTIFFS' CLAIMS.

When Plaintiffs submitted their applications for .HOTEL, they agreed to be bound by the Covenant, which prohibits applicants from suing ICANN in court for any claims that "arise out of, are based upon, or are in any way related to" ICANN's review of the new gTLD application. (RJN Ex. 2, Module 6, § 6.6.) A written release, such as the Covenant, extinguishes any claim covered by its terms. *Skrbina v. Fleming Cos.*, 45 Cal. App. 4th 1353, 1366–67 (1996).

In *Ruby Glen, LLC v. ICANN*, the United States District Court for the Central District of California dismissed a similar lawsuit filed by a gTLD applicant against ICANN on the sole ground that the Covenant bars all "claims related to ICANN's processing and consideration of a gTLD application." No. CV 16-5505 PA (ASx), 2016 U.S. Dist. LEXIS 163710, at *10–11 (C.D. Cal. Nov. 28, 2016); *see also Commercial Connect v. ICANN*, No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at *9–10 (W.D. Ky. Jan. 26, 2016) (holding that the Covenant is enforceable, "clear and comprehensive."). The Ninth Circuit affirmed, finding that the applicant's entire lawsuit was barred by the Covenant. *See Ruby Glen, LLC v. ICANN*, 740 F. App'x 118 (C.D. Cal. Oct. 15, 2018) ("The district court properly dismissed the FAC on the grounds that Ruby Glen's claims are barred by the covenant not to sue contained in the Applicant

Guidebook.").

Here, as in *Ruby Glen,* each of Plaintiffs' claims, no matter how styled, boil down to a challenge of ICANN's review and processing of Plaintiffs' .HOTEL applications. For example, Plaintiffs' Complaint expressly premises each of its causes of action on the pending IRP, in which "Plaintiffs have substantively challenged ICANN's decision-making and review process related to the delegation of the .hotel gTLD." (Compl. ¶ 13; *see also id*. at ¶ 32 (acknowledging that Plaintiffs' pending IRP relates to whether ICANN can "delegate the .hotel gTLD to Plaintiffs' competitor"), ¶ 36 "([I]n the pending IRP, each Plaintiff seeks substantive relief related to ICANN's allegedly improper gTLD delegation decisions and processes.").) Even the injuries Plaintiffs allege, and the relief Plaintiffs seek, relate to ICANN's evaluation of the .HOTEL applications. (Compl. ¶ 75 ("Plaintiffs have not received the benefit of their contractual bargain"); ¶ 80 ("[T]he improper delegation of the .hotel gTLD would cause Plaintiffs inestimable and irreparable financial damage and lost commercial opportunities."); Prayer for Relief 1, Compl. ¶ 29 (seeking "meaningful, independent Ombudsman review of Plaintiffs' Requests for Reconsideration, [and] constitution of the expert, community-chosen Standing Panel to adjudicate Plaintiffs' IRP complaint" both of which are predicated on ICANN's evaluation of Plaintiffs' .HOTEL applications). Regardless of whether Plaintiffs allegedly are asserting "procedural" claims in this lawsuit (Compl. ¶ 13), all of Plaintiffs' claims, both procedural and substantive, "arise out of, are based upon, [and] relate[] to" ICANN's review of Plaintiffs' applications for .HOTEL and are barred by the Covenant. (RJN Ex. 2, Module 6, § 6.6.)

Plaintiffs are likely to argue that the Covenant is not enforceable under Section 1668 of California's Civil Code ("Section 1668") or because it is unconscionable. These arguments should fail. Section 1668 does not apply to the Covenant because that section only invalidates clauses that "***exempt*** anyone from responsibility for his own fraud, or willful injury to the person or property of another[.]" Cal. Civ. Code § 1668 (emphasis added). The Covenant, however, explicitly provides for the use of ICANN's Accountability Mechanisms to resolve disputes regarding ICANN's processing of gTLD applications. (RJN Ex. 2, Module 6.6.) Thus, the Covenant does not exempt ICANN from responsibility, making Section 1668 inapplicable, as

both the District Court and Ninth Circuit found in the *Ruby Glen* matter. *Ruby Glen*, 2016 U.S. Dist. LEXIS 163710, at *10–11 ("Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue."); *Ruby Glen*, 740 F. App'x at 118 ("[T]he covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668.").[3] Nor is the Covenant procedurally or substantively unconscionable, as the *Ruby Glen* courts also confirmed. *Ruby Glen*, 2016 U.S. Dist. LEXIS 163710, at *14 ("Under the totality of the circumstances, the Court concludes that the covenant not to sue is, at most, minimally procedurally unconscionable."); *Ruby Glen*, 740 F. App'x at 118–19 ("Even assuming that the adhesive nature of the Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable.").

Because Plaintiffs' entire lawsuit is barred by the Covenant, leave to amend would be futile. Thus, this court should sustain ICANN's demurrer with prejudice. *See Cansino*, 224 Cal. App. 4th at 1468 (dismissal with prejudice appropriate where "no amendment could cure the defect in the complaint.").

II. EACH OF PLAINTIFFS' CAUSES OF ACTION FAILS TO STATE A CLAIM.

Even if the Covenant did not bar Plaintiffs' entire Complaint, the Complaint must be dismissed for the independent reason that each of Plaintiffs' causes of action fails to state a claim.

A. Plaintiffs' Breach of Contract Claim (Count One) Fails As A Matter Of Law.

"The standard elements of a claim for breach of contract are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage . . . .'" *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008) (citation omitted). Thus, to state a claim for breach of contract, Plaintiffs' Complaint must identify the

[3] Plaintiffs are likely to rely *on DotConnect Africa Trust v. Internet Corp. for Assigned Names and Numbers* ("*ICANN*"), 2017 WL 5956975, at *3 (Cal. Super. Ct. Aug. 9, 2017), in which the Superior Court ruled that the Covenant did not bar fraud claims pursuant to Section 1668. It is ICANN's view, however, that the findings of the *Ruby Glen* courts that the Covenant is not an exculpatory provision, making Section 1668 inapplicable, are the better-reasoned decisions. In any event, Plaintiffs' alleged fraud claims are dressed-up breach of contract claims and deficient as a matter of law, as set forth below.

contract at issue as well as the specific provisions that ICANN allegedly breached. *See Holcomb v. Wells Fargo Bank, N.A.*, 155 Cal. App. 4th 490, 501 (2007) ("Without specifying the nature of the contract, nor the specific terms Holcomb claims the bank had breached, the complaint fails to adequately state a cause of action for breach of contract."); *Donahue v. Apple, Inc.*, 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012) (holding that a "complaint must identify the specific provision of the contract allegedly breached by the defendant." (citing *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 281 (2005))).

Plaintiffs' Complaint, however, does not sufficiently identify the contract at issue or the provisions that ICANN allegedly breached. Instead, Plaintiffs make vague references to a vast number of Bylaws provisions (some of which have citations, others of which do not) and to the 338-page Guidebook. The most clarity Plaintiffs provide is the assertion that they "each contracted with ICANN to apply for the rights to exclusively operate the new gTLD '.hotel,'" and that "[e]ach such contract incorporates by reference ICANN's bylaw Accountability Mechanisms. . . ." (Compl. ¶ 12.) Plaintiffs also claim that "ICANN's bylaws form part of its contractual terms with each Plaintiff." (Compl. ¶ 84.) But even with these allegations it remains unclear if the alleged contract is found in the .HOTEL applications, the Guidebook, the Bylaws or some combination thereof. As such, ICANN cannot meaningfully respond to the breach of contract claim, and it should therefore be dismissed. *See Holcomb*, 155 Cal. App. 4th at 501 (affirming trial court's order sustaining demurrer where the plaintiff failed to specify the nature of the contracts and the specific terms that the defendant allegedly breached).

To the extent that Plaintiffs are alleging that ICANN's Bylaws formed a contract with Plaintiffs via Plaintiffs' applications for .HOTEL, which is the most generous reading of the Complaint, such a breach of contract claim fails for several reasons. First, the Bylaws provisions that Plaintiffs claim were breached—*i.e.*, those regarding a Standing Panel, Ombudsman review of Reconsideration Requests, and payment of IRP fees—were not in the Bylaws at the time Plaintiffs submitted their .HOTEL applications in 2012, but were added in the 2013 and 2016 amendments to the Bylaws. (Compl. ¶¶ 12, 45, 59; *see generally*, RJN Ex. 5.) Thus, these provisions could not be part of any agreement that ICANN and Plaintiffs entered into in 2012.

Second, Plaintiffs do not sufficiently allege facts indicating that ICANN's Bylaws were expressly incorporated into Plaintiffs' applications for .HOTEL. While the Guidebook does state that ICANN's Accountability Mechanisms must be invoked for disputes about ICANN's evaluation of applications, there is no Guidebook provision stating that the Bylaws are expressly incorporated therein and are part of an agreement between ICANN and applicants. (*See generally* RJN Ex. 2.) The District Court for the Central District of California considered this precise issue and held that ICANN is only contractually bound by the obligations to which it agreed in the application documents, not other extraneous materials, such as Bylaws provisions. *See Image Online Design, Inc. v. ICANN*, No. CV 12-08968 DDP (JCx), 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013).

Third, Plaintiffs lack standing to pursue a claim that ICANN has breached its Bylaws. ICANN is a public benefit corporation, and only officers, directors, the corporation or a member thereof, the attorney general or a person with an interest in an asset the corporation holds in charitable trust have standing to sue for breach of the corporation's foundational documents. Cal. Corp. Code § 5142; *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (1987). Plaintiffs, as gTLD applicants, do not fit into any of these categories.

Fourth, even if the Bylaws did comprise a contract between Plaintiffs and ICANN, which they do not, ICANN has not breached its Bylaws. While Plaintiffs claim that ICANN violated the Bylaws because ICANN: (1) "has not constituted the Standing Panel"; (2) has not provided "for any meaningful Ombudsman review or input into Request for Reconsideration decisions"; and (3) has not "paid IRP fees" (Compl. ¶ 85), each of these claims lacks merit.

As to the Standing Panel, nothing in the Bylaws requires ICANN to convene a Standing Panel by a specific date. Instead, the Bylaws clearly anticipate that a Standing Panel will ***not*** be convened immediately, likely because of the extensive process for convening the Standing Panel, which requires significant involvement of ICANN's Supporting Organizations and Advisory Committees. (RJN Ex. 1, Art. 4, § 4.3(j)(ii).) To the extent there is any doubt on this point, the Bylaws explicitly provide a mechanism for an IRP Claimant and ICANN to appoint an IRP Panel in the absence of a Standing Panel:

> In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist.

(*Id*., Art. 4, § 4.3(k)(ii).) It is therefore impossible for ICANN to have breached the Bylaws by failing to convene a Standing Panel on Plaintiffs' preferred timetable. *See Kim v. Westmorre Partners, Inc.*, 201 Cal. App. 4th 267, 282 (2011) ("When a plaintiff attaches a written agreement to his complaint, and incorporates it by reference into his cause of action, the terms of that written agreement take precedence over any contradictory allegations in the body of the complaint."). In any event, Plaintiffs' own allegations concede, and the Emergency Panelist found, that ICANN is in the process of convening a Standing Panel, and is complying with the required process. (Compl. ¶¶ 32, 54, 64, 65; RJN Ex. 3 ¶ 210.)

Plaintiffs' claim that ICANN violated its Bylaws by not providing Ombudsman review of Plaintiffs' two Reconsideration Requests fails as well, as the IRP Emergency Panelist also found. (Compl. ¶ 23; Decision ¶ 131 ("the Emergency Panelist determines that there has been no violation by the Ombudsman or by the Board of ICANN's Articles, Bylaws or other policies. . . .") As to Plaintiffs' August 2016 Reconsideration Request, the Bylaws operative at that time did not require Ombudsman review of Reconsideration Requests. (RJN Ex. 3 ¶ 122, n.157.) That requirement was not added to the Bylaws until the 2016 amendments. (*Id*.) As to Plaintiffs' April 2018 Reconsideration Request, the Ombudsman recused itself, as the Bylaws require it to do, because the Ombudsman had previously taken a position on the matter. (RJN Ex. 1, Art. 4, § 4.2(l)(iii).) As such, the BAMC "review[ed] the Reconsideration Request without involvement by the Ombudsman" in accordance with the Bylaws (*Id*.; RJN Ex. 3 ¶ 131.)

Finally, Plaintiffs admit that ICANN reimbursed Plaintiffs $18,000 for the Emergency Panelists' fees, but challenge ICANN's decision not to reimburse Plaintiffs for the $3,750 fee to initiate the IRP. ICANN's Bylaws, however, only require ICANN to "bear all the administrative costs of ***maintaining*** the IRP mechanism, including compensation of Standing Panel members." (*Id*., Art. 4, § 4.3(r) (emphasis added).) The Bylaws thus are clear that ICANN is to bear the

administrative costs of maintaining the IRP (*i.e.*, enabling the IRP to continue), not initiating the IRP (*i.e.*, causing an IRP to begin), as the Emergency Panelist found. (RJN Ex. 3 ¶ 225.)

B. Plaintiffs Fail To State A Claim For Fraud, Deceit, And Grossly Negligent Misrepresentation (Counts Two Through Four).

1. Plaintiffs fail to allege specific facts to support their claims for fraud in the inducement and deceit (Counts Two and Three).

To allege a cause of action for fraud in the inducement and deceit, Plaintiffs must allege "(1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages." *Cansino*, 224 Cal. App. 4th at 1469. Fraud in the inducement is a "subset of the tort of fraud" that occurs when the "the promisor knows what he is signing but his consent is induced by fraud[.]" *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 294-95 (2005) (citation omitted). "Undeniably, fraudulent inducement occurs before a contract is signed." *SI 59 LLC v. Variel Warner Ventures, LLC*, 29 Cal. App. 5th 146, 152 (2018), review denied (Feb. 13, 2019).

California case law makes clear that "[f]raud must be pleaded with specificity, to provide the defendants with the fullest possible details of the charge so they are able to prepare a defense to this serious attack. To withstand a demurrer, the *facts* constituting every element of the fraud must be alleged with particularity, and the claim cannot be salvaged by references to the general policy favoring the liberal construction of pleadings." *Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 772, 782 (1994) (emphasis in original); *see also Tindell v. Murphy*, 22 Cal. App. 5th 1239, 1249 (2018) ("[A] general pleading of the legal conclusion of fraud is insufficient."). Additionally, "when a plaintiff asserts fraud against a corporation, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.'" *Cansino*, 224 Cal. App. 4th at 1469 (citation omitted). Plaintiffs' claims do not meet this standard because they fail to allege any element with specificity, and because their own allegations demonstrate that their fraud claims are deficient.

First, Plaintiffs' fraud in the inducement claim fails because each and every alleged misrepresentation identified by Plaintiffs ***occurred after*** Plaintiffs submitted their .HOTEL

applications in 2012. For example, Plaintiffs allege that the Accountability Mechanism Bylaws provisions Plaintiffs are seeking to enforce were "promised by the ICANN Board and bylaws in critical respects since 2013, and in specific detail since 2016." (Compl. ¶ 12.) Likewise, Plaintiffs allege that the Bylaws section providing for a Standing Panel has "been in effect since April 2013," (Compl. ¶ 45), and an ICANN statement about the Standing Panel was made "on April 8, 2013." (Compl. ¶ 50.) Plaintiffs, however, had already submitted their .HOTEL applications, in 2012, long before these alleged misrepresentations were made. Accordingly, these alleged misrepresentations could not have intended to induce, or actually induced, Plaintiffs to enter into any contract with ICANN in 2012. *SI 59 LLC*, 29 Cal. App. 5th at 152 (fraudulent inducement "occurs before a contract is signed.").

Plaintiffs make further vague claims that ICANN has made "repeated and continuing representations" at "varying times," including "very public statements" and "pronouncements" made by ICANN's "experts and attorneys" (Compl. ¶ 82; *see also id*. at ¶ 19, 27, 90, 96); but Plaintiffs absolutely fail to identify what the statements even said, when any of these statements were made, or who made them. These conclusory allegations are thus insufficient to state a claim for fraud or deceit. *Goldrich*, 25 Cal. App. 4th at 782–83 (sustaining demurrer where the "conclusory allegations offer[ed] no facts at all and it is impossible to determine what was said or by whom or in what manner.").

Second, even if the Bylaws provisions that Plaintiffs seek to enforce had been publicized and in effect before Plaintiffs submitted their applications, they still could not be fraudulent or deceitful because ICANN has followed these Bylaws provisions. As demonstrated above, ICANN has complied with each of these Bylaws provisions because: (1) the Bylaws do not require ICANN to convene a Standing Panel by a specific date, and ICANN is in the process of constituting a Standing Panel; (2) Plaintiffs' first Reconsideration Request did not qualify for Ombudsman review and the Ombudsman properly recused itself from the second Reconsideration Request; and (3) the Bylaws require ICANN only to pay IRP fees for maintaining (not initiating) the IRP, which is what ICANN did here. There can be no misrepresentation associated with ICANN's Bylaws when ICANN has acted in accordance with its Bylaws.

Third, while Plaintiffs make the conclusory statement that "ICANN and its agents knew of [the statements'] falsity, in that, *inter alia*, ICANN never intended to implement an effective Ombudsman procedure, the promised Standing Panel, nor to pay IRP fees," (Compl. ¶ 91, 97), Plaintiffs completely fail to allege any facts demonstrating that ICANN knew any statements were false or, even, that such statements were false. Conclusory allegations of this kind are simply insufficient to state a claim for fraud in the inducement or deceit. *See Goldrich*, 25 Cal. App. 4th at 782 (finding that Plaintiffs must plead "the *facts* constituting every element of the fraud . . . with particularity").

Finally, the Complaint makes clear that Plaintiffs' claims for fraud in the inducement and deceit are predicated entirely on the alleged breach of contract claim, and thereby merely re-named as fraud claims. Reframing breach of contract claims "in the traditional words of fraud, without any supporting facts" is "simply not enough" to state a claim for fraud and are just a repeat of Plaintiffs' complaints about ICANN's evaluation of Plaintiffs' .HOTEL applications. *See Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 772, 782 (1994).

2. As with their other fraud claims, Plaintiffs have failed to allege a grossly negligent misrepresentation (Count 4).

The elements of negligent misrepresentation are the same as a cause of action for fraud, "except there is no requirement of intent to induce reliance." *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004). As with a claim for fraud, a cause of action for negligent misrepresentation "must be factually and specifically alleged," and the "policy of liberal construction of pleadings is not generally invoked to sustain a misrepresentation pleading defective in any material respect." *Cadlo*, 125 Cal. App. 4th at 519.

Plaintiffs' claim for grossly negligent misrepresentation is predicated on the same conduct as the claims for fraud and deceit (*see* Compl. ¶¶ 102–106), and therefore fails for the same reasons. And, again, Plaintiffs make only conclusory allegations when reciting the elements of a claim for negligent misrepresentation, which is insufficient to state a claim. *See Cadlo*, 125 Cal. App. 4th at 519 (holding that negligent misrepresentation must be pled with specificity).

C. Plaintiffs Fail To State A Claim For Gross Negligence (Count Five).

Plaintiffs claim that ICANN "was grossly negligent in the performance of its promises

made to Plaintiffs in their contracts." (Compl. ¶ 108.) Plaintiffs' allegations, however, are plainly insufficient to state a cause of action for gross negligence.

Gross negligence "is pleaded by alleging the traditional elements of negligence"—duty, breach, causation, and damages—and alleging that the defendant engaged in "extreme conduct." *Fritelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 52 (2011). Additionally, "[i]t is a well established legal principle that conduct causing a breach of contract becomes tortious only when it also violates a duty wholly independent of the contract." *Venezuela v. ADT Sec. Services, Inc.*, 820 F. Supp. 2d 1061, 1069 (C.D. Cal. 2010) (citing *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999)). Plaintiffs have not alleged that ICANN owed Plaintiffs any legally-recognized duty, and have not alleged that ICANN engaged in any extreme conduct. Plaintiffs' negligence claim should therefore be dismissed.

D. Plaintiffs' Do Not Have Standing To Bring A Public Benefit Bylaws Enforcement Proceeding (Count Six).

Plaintiffs' cause of action for enforcement of ICANN's Bylaws fails as a matter of law because Plaintiffs lack standing to pursue such a claim. The California Corporations Code is clear that only specific individuals can enforce a public benefit corporation's Bylaws: "A benefit enforcement proceeding may be commenced or maintained only" by (1) the benefit corporation; (2) a shareholder or directors; (3) a person that owns 5% or more of equity interests in "an entity of which the benefit corporation is a subsidiary," or (4) "[o]ther persons as have been specified in the articles or bylaws of the benefit corporation." Cal. Corp. Code § 14623.

Plaintiffs claim that because they qualify as IRP Claimants for purposes of ICANN's IRP, they likewise qualify to bring a claim in court for enforcement of ICANN's Bylaws. (Compl. ¶¶ 115–116.) An IRP Claimant, however, is defined under the Bylaws only as an entity that can institute ***an IRP*** against ICANN if that entity "has been materially affected by a Dispute." (RJN Ex. 1, Art. 4, § 4.3(b)(i).) As Plaintiffs concede, the IRP is a separate process "prescribed by the ICANN bylaws that allows for independent third-party review of ICANN Board or staff actions (or inactions)." (Compl. ¶ 24.) An IRP Claimant is ***not*** defined as an entity that can bring a claim in court under Section 14623. In fact, the Guidebook to which Plaintiffs agreed prohibits

Plaintiffs from suing ICANN related to their .HOTEL applications. (RJN Ex. 2, Module 6.6.)

E. Plaintiffs Fail To State A Claim Under California's Business and Professions Code (Counts Seven and Eight).

Plaintiffs allege that ICANN violated California Business and Professions Code Sections 17500 for false advertising, and Section 17200 for unfair competition. (Compl. ¶¶ 120–126.) These causes of action are predicated on the same conduct as the breach of contract, fraud, and gross negligence claims, and they fail for the same reasons.

Additionally, these Business and Professions Code claims fail because Plaintiffs lack standing to pursue them. A plaintiff has standing to bring a claim for false advertising or unfair competition only where it "has suffered economic injury or damage," that "was the result of, i.e., *caused* by, the unfair business practice" or false advertising. *Schaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1137 (2020) (citation omitted). Plaintiffs have not demonstrated that they suffered any economic injury, or that any alleged economic injury was actually caused by ICANN's conduct. For instance, Plaintiffs do not claim that they would not have submitted their .HOTEL applications "but for the allegedly actionable misrepresentation." *Id*. at 1143. Nor can they, as the alleged misrepresentations and unfair conduct occurred nearly a year after Plaintiffs submitted their applications. Plaintiffs' claims should be dismissed.

CONCLUSION

For the foregoing reasons, ICANN respectfully requests that this Court sustain ICANN's demurrer and dismiss Plaintiffs' Complaint with prejudice.

Dated: January 22, 2021

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson

Attorneys for Defendant INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS

R-52

RESPONDENT'S EXHIBIT

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

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

PROCEDURAL ORDER NO. 4

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12 June 2020

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. OVERVIEW

1. This Procedural Order No. 4 (**PO 4**) concerns an application by the Claimant seeking various forms of relief in relation to the Respondent's document production pursuant to the Panel's Procedural Order No. 2 (**PO 2**). For the reasons set out below, the Claimant's application is denied.

II. BACKGROUND

2. In PO 2, dated 27 March 2022, the Panel ruled on a number of outstanding objections to the Parties' respective requests to produce documents. In the case of the Claimant's requests that had been objected to by the Respondent, the Panel granted 12 of the Claimant's 14 outstanding requests.

3. The Panel also granted the Claimant's request that, to the extent ICANN were to take the position that any responsive documents are protected from disclosure by any asserted privilege or other source of protection, those documents should be listed in a privilege log describing, in regard to each document withheld, the type of document, its general subject matter, the date on which it was created, the author(s) of the document, all persons who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law under which the privilege claimed is asserted.

4. On 17 April 2020, the Respondent produced to the Claimant its document production pursuant to PO 2. On 24 April 2020, the date fixed by PO 2, the Respondent transmitted to the Claimant a privilege log identifying documents that the Respondent had withheld from production based on the attorney-client privilege or the attorney work product doctrine under California or U.S. federal law.

5. On 29 April 2020, the Claimant filed the application that is the subject of the present order (**Application**), seeking assistance from the Panel regarding what the Claimant described as the Respondent's "grossly deficient document production and insufficiently detailed Privilege Log" (Application, p. 1).

6. As directed by the Panel, the Respondent responded to the Application by letter dated 6 May 2020 (**Response**), rejecting the Claimant's complaints and asserting that the Respondent had, in all respects, complied with PO 2.

7. On 11 May 2020, the Panel, as had been suggested by the Claimant, held a telephonic hearing in connection with the Application. On that occasion, both Parties had the opportunity to amplify their written submissions orally and to present arguments in reply. Consistent with the Panel's Decision on Phase I, the *Amici* were permitted to attend this procedural hearing as observers, which they did. A transcript of the hearing was prepared, reviewed by the Parties and made available to the Panel on 18 May 2020.

8. It bears noting that while the Claimant initially took the position that the timing of the Application necessarily put in jeopardy not only the agreed dates for the merits hearing but also the deadline for the filing of its Reply (see Application, p. 11), the Claimant subsequently deferred to the Panel's discretion in regard to the filing of its Reply (see Claimant's email dated 30 April 2020). In the event, the Panel directed the Claimant to file its Reply on 4 May 2020, in accordance with the procedural timetable (as slightly amended by agreement of the Parties), but to do so under a reservation of its right subsequently to apply to the Panel for leave to supplement or amend its Reply, or otherwise to file additional submissions, if additional documents were ordered to be produced by the Respondent as a result of the Application. The Claimant's Reply was duly filed on 4 May 2020.

9. On 10 June 2020, while the Application remained under advisement, the Claimant filed a supplemental submission in support of the Application (**Supplemental Submission**). In its Supplemental Submission, the Claimant argued that with the filing of the Respondent's Rejoinder Memorial on 1 June 2020, there is no longer any question that the Respondent has put certain documents for which it claims privilege "at issue" in this

arbitration, thereby waiving any potentially applicable privilege and requiring the Respondent to produce them to the Claimant.

10. By email date 11 June 2020 (corrected on 12 June 2020), the Panel established a briefing schedule in relation to the Supplemental Submission. As noted below, to the extent that the specific waiver argument set out in the Supplemental Submission already formed part of the Application, the Panel reserves this question for determination in a subsequent procedural order, to be issued once the Parties have filed their respective submissions in relation to the Supplemental Submission.

III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

11. The Parties' positions are set out, in the case of the Claimant, in the Application, as amplified in oral argument at the hearing and in Afilias' PowerPoint presentation dated 11 May 2020; and, in the case of the Respondent, in the Response, as amplified in oral argument and in ICANN's PowerPoint presentation, also dated 11 May 2020.

12. These positions are briefly summarized below to provide context for the Panel's analysis. While the Panel refers in its analysis to those parts of the submissions and legal authorities of the Parties found by the Panel to be most pertinent to its analysis, in reaching its conclusions the Panel has considered all of the Parties' submissions and legal authorities.

A. *Claimant*

13. By way of background, the Claimant recalls, relying on early decisions of IRPs, that the Respondent has been vested by the Government of the United States with regulatory authority of vast dimension and global reach. The Claimant insists on the importance of ICANN's obligation of transparency in the conduct of the recently-strengthened Independent Review Process. In such context, the Claimant contends that "ICANN's invocation of privilege must be narrowly-construed and scrutinized to a high standard" (Application, p. 5).

14. The Claimant also asserts that the Respondent cannot hide its decision-making and conduct from the public by delegating all potentially contentious issues to its legal department for resolution, or by copying its in-house lawyers on all documents relevant to a dispute.

15. The Claimant also contends that ICANN must be deemed to have waived its right to invoke privilege insofar as staff communications, including those of ICANN's legal department, are concerned. This is so particularly where, as here, the IRP concerns the conduct of ICANN's legal staff and their involvement in ICANN's business decisions concerning .WEB.

16. In the course of its counsel's reply submissions at the hearing, the Claimant articulated a different waiver argument. According to the Claimant, by arguing that the Respondent's Board reasonably decided not to make any determination regarding NDC's conduct until after the conclusion of this IRP, as alleged in the Response, the Respondent has in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case. According to the Claimant, the fact that the Board's decision was made on the advice of counsel does not allow the Respondent to shield the basis for, or any discussion of, that decision by claiming privilege over responsive documents that the Respondent has been ordered to produce.[1]

17. The Claimant avers that the Respondent's production was "woefully deficient" and failed to comply with the *Interim Supplementary Procedures* (**Interim Procedures**), the *IBA Rules on the Taking of Evidence in International Arbitration* (2010) (**IBA Rules**) and PO 2. As illustrated in an annotated version of its Redfern Schedule (Attachment A to the Application), the Claimant alleges that the Respondent:

[1] Transcript, pp. 47-48.

(a) refused to produce any document in response to 7 of Afilias' requests;[2]

(b) produced in total a mere 37 unique (i.e., after discounting duplicates) documents;

(c) refused to produce documents that are clearly responsive and not privileged, such as the "request for information" sought by Afilias' request 2(b); and

(d) failed to produce a single document that one would presume to be in the possession of the *Amici*. In this regard, the Claimant avers that it would be unfair for the Respondent to be allowed to select, in consultation with the *Amici*, the evidence on which it would be able to rely all the while denying the Claimant the opportunity to seek discovery of evidence in the *Amici*'s possession, custody or control, a state of affairs that the Claimant describes as "unilateral third party discovery" (Application, p. 3).

18. With respect to the Respondent's privilege log, the Claimant points out that this 58-page log lists nearly 400 documents withheld from production based on unsubstantiated and unparticularized assertions of attorney-client privilege and attorney work product under California and U.S. federal law. In such circumstances, the Claimant contends that the Respondent must either be deemed to have waived its right to invoke privilege or be ordered to provide an amended log that contains sufficient detail to allow the Panel and the Claimant to evaluate the validity of the invoked privilege.

19. By way of relief, the Claimant requested in the Application that the Panel order the Respondent to "(i) supplement and remedy its production by producing those documents that are subject to the Tribunal's production order or ICANN's production agreement; (ii) produce those documents listed on ICANN's Privilege Log that are not privileged; (iii) produce those documents that contain privileged and non-privileged information with appropriate redactions covering only the privileged information; and (iii) (*sic*) for the

[2] Application, p. 2. The Panel notes that on p. 3 of the Application, the Claimant lists 8 requests in response to which, it is alleged, not a single document was produced by the Respondent.

remaining documents, remedy its Privilege Log so that the Panel and Afilias can properly assess the validity of the privilege that ICANN has invoked." (Application, p. 11) In the Application, the Claimant also reserved "its right to request the Panel to conduct an in camera review of documents that ICANN has asserted are covered by privilege" (*Id*., fn 29).

20. The Claimant was more specific in the articulation of its requests for relief at the hearing, and sought various other orders comprehensively set out in the PowerPoint presentation prepared to support its counsel's argument, including that the Respondent produce all communications that are marked either as "Clearly Not Privileged" or "Unlikely Privileged" in Attachment C to the Application. The orders sought by the Claimant as articulated at the hearing did not include a request for an *in camera* review of documents.

B. ***Respondent***

21. The Respondent submits that the Application is based on false factual assumptions and incorrect legal principles. The Respondent avers that it searched for and produced all non-privileged documents responsive to the Claimant's requests to which the Respondent agreed or was directed by the Panel to respond; and that it properly withheld only those documents protected by the attorney-client privilege or work product doctrine. The Respondent contends that it served a privilege log providing, in respect of each withheld document, all of the information necessary to establish privilege.

22. As regards the Claimant's complaints about the sufficiency of its production, the Respondent avers that it collected documents and data from all custodians identified in the Claimant's Redfern schedule, and also independently added custodians likely to have responsive documents in their possession. The documents collected were reviewed and were either produced to the Claimant or were withheld from production based on privilege.

23. The Respondent submits that it was under no duty to search documents in the possession, custody or control of the *Amici*, adding that the Panel has already denied the Claimant's requests to access documents in the possession of the *Amici*.

24. The Respondent responds to the Claimant's specific complaints, noting:

    (a) that many of the documents the Claimant seeks do not exist; and

    (b) that many of the documents the Claimant seeks were in fact produced.

25. Turning to the complaints leveled at its privilege log, the Respondent avers that its log contains all of the information ordered to be provided in PO 2, adding that the requirements of PO 2 reflect the legal requirements under California and U.S. federal law.

26. The Respondent observes that the number of privileged documents should come as no surprise given that litigation and other legal proceedings were ongoing or anticipated during almost the entire period at issue, which necessitated active involvement of the Respondent's in-house and outside counsel. The Respondent also notes that many of the Claimant's requests sought analyses that are inherently legal.

27. The Respondent asserts that the Application is predicated on incorrect legal positions, such that documents protected by attorney-client privilege or work product doctrine should be produced in redacted form to reveal the "unprivileged facts" that they may contain; or that work product protection is limited to documents that reveal legal strategy.

28. Finally, the Respondent submits that the Claimant's contention that the Respondent waived privilege either because its log is inadequate or by committing to be held publicly accountable for its staff's conduct through an IRP have no legal merit, whether it be under California, U.S. federal law, or under Rule 8 of the Interim Procedures. With respect to the contention put forward at the hearing that the Respondent waived privilege by affirmatively putting at issue the reasonableness of the Board's decision not

to make any determination regarding NDC's conduct until after the conclusion of this IRP, the Respondent objects to its late introduction and argues that it is, in any event, without merit since the Respondent has not argued that the Board's decision was valid because it was advised by counsel.

29. As regards the Claimant's reservation of its asserted right to request *in camera* review of documents that the Respondent has asserted are covered by privilege, the Respondent avers, first, that the Claimant by failing to request *in camera* review in the Application waived the issue, and second, that California law affirmatively prohibits *in camera* review of documents over which attorney-client privilege has been claimed.

IV. ANALYSIS

30. The Panel begins its analysis by determining the law applicable to the issues raised by the Application, and by recalling considerations relating to the burden and standard of proof in the context of claims of privilege. The Panel then turns to considering the grounds of the Application, addressing first the complaints directed at the Respondent's privilege log, and considering thereafter those directed at the sufficiency of its production.

A. *Applicable Law*

31. The Parties have relied in their submissions, for the most part, on authorities applying California law and US federal law, although the Claimant also made passing reference to English law, the law of the seat of these proceedings by agreement of the Parties.

32. At the hearing, counsel for the Claimant invited the Panel also to consider transnational law. However, no specifics were given as to the content of transnational law as it relates to the issues of attorney-client privilege or work product arising from the Application, nor as to whether or the extent to which, in relation to those issues, transnational law differs from California law or U.S. federal law.

33. The Respondent is an organization incorporated under the laws of California and the communications and documents at issue in the Application were created by or concern legal advice from California attorneys. In such circumstances, the Panel is of the opinion that the law of California, as supplemented by U.S. federal law, applies to the issues arising from the Application, and it is on the basis of that law that it has determined these issues. As explained in a leading treatise:

> There is substantial support for the proposition that national rules of privilege governing the conduct of legal advisors (or other advisors) – rather than international standards – must be applied. That is because it is national law that provides the basis for privileged claims in the first instance (as discussed above, there being no international body or source of privileged rules). As a consequence, like other substantive rights in international arbitration (*e.g.,* contract rights), the better view is that national law provides the appropriate source of law for privileges.
>
> […]
>
> Where privileges for legal advice are concerned, applying the law of the place where the lawyer is qualified to practice or the client is based is generally the better choice-of-law solution, from the perspective of predictability and conforming to the parties' expectations.[3]

B. *Burden and Standard of Proof*

34. In the case of *Costco Wholesale Corp. v. Superior Court*, the Supreme Court of California said the following on the subject of burden of proof in relation to claims of privilege:

> The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, *i.e.*, a communication made in the course of an attorney-client relationship. […] Once that party establishes facts necessary to support a *prima facie* claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.[4]

35. Applying this holding to the issues presently before the Panel, once the Respondent has alleged, by a sufficiently particularized entry in its privileged log, the facts necessary to support a claim of privilege, the burden then shifts to the Claimant to establish either that

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[3] Gary B. Born, *International Commercial Arbitration*, 2nd ed., Wolters Kluwer, 2014, pp. 2383-2385.

[4] *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, p. *733 (2009) [***Costco***]. See also *Schaeffer v. Gregory Vill. Partners, L.P.*, 2015 WL 166860, p. *3 (N.D. Cal. Jan. 12, 2015) [***Schaeffer***], and Cal. Evid. Code, para. 917.

the communication was not confidential or that the privilege claimed does not for other reasons apply. Thus, and by way of example, it is the party who seeks to challenge a claim of attorney-client privilege who bears the burden to "make some showing" that the communication did not involve the giving of legal advice but related instead, *ex hypothesis*, to business matters or considerations.[5]

36. Because it impedes the full and free discovery of the truth, the attorney client privilege is strictly construed.[6] Accordingly, the Panel accepts the Claimant's above-cited contention that "ICANN's invocation of privilege must be narrowly construed and scrutinized to a high standard".

37. An essential element of the construct resulting from these principles and their application in practice are the ethical obligations of the attorneys involved in the process. Under Rule 3.4 of the California *Rules of Professional Conduct*, it is an ethical fault for an attorney to suppress evidence that the attorney's client has a legal obligation to reveal or produce. Likewise, California lawyers are prohibited by the *Rules of Professional Conduct* from revealing privileged information without the client's informed consent, except where disclosure is necessary to prevent a crime reasonably likely to result in death or substantial bodily harm (Rule 1.6).

C. *PO 2*

38. Some of the issues raised in the Application find their answer in PO 2. The Panel therefore recalls at the outset some of the provisions of that order.

39. As reflected in both Procedural Order No. 1 dated 5 March 2020 (**PO 1**)[7] and PO 2,[8] the Parties agreed during the case management conference of 4 March 2020 that

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5 *Coleman v. Am. Broadcasting Companies, Inc.*, 106 F.R.D. 201, 206 (D.D.C. 1985) [***Coleman***].

6 *Schaeffer*, *supra*, p. *3, quoting *United States v. Graf*, 610 F. 3d 11, 610 F. 3d 1148, 1156 9th Cir. 2010 [***Graf***].

7 PO 1, p. 2.

8 PO 2, para. 5.

document production in this IRP would be governed by Rule 8 of the Interim Procedures, to be applied by the Panel using as non-binding guidelines the IBA Rules.

40. Rule 8 allows IRP Panels to order a party to produce "documents […] [that] are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law" [emphasis added].

41. Consistent with the provisions of Rule 8, and of Arts. 9.2(b) and 9.3(a) of the IBA Rules, in PO 2 the Panel recognized the right of each Party to assert privilege in respect of any document otherwise responsive to a request to produce from the other party:

> 24. Any document otherwise responsive to a document production request that is protected by solicitor-client or legal advice privilege (or professional secrecy), by litigation or attorney work product privilege, or by settlement communications/discussions privilege may be withheld from production. Should a responsive document contain reference to a privileged communication, or to information in respect of which the producing party asserts a claim of confidentiality, the document should be appropriately redacted and produced. By parity of reasoning, the Panel directs that any privileged or confidential document that is inadvertently produced should, upon request, be immediately returned to the producing party.
>
> 25. In principle, matters of confidentiality and/or privilege shall be dealt with on a document-by-document basis and, as already indicated, any document over which either Party asserts a claim of privilege or confidentiality shall be identified in a privilege log, as described above.

42. In the opinion of the Panel, the foregoing suffices to dispose of the Claimant's contention that the Respondent's accountability for its staff's conduct and its commitment to transparency under its Bylaws somehow imply a waiver of its right to invoke privilege. Rule 8 of the Interim Procedures, which governs document production in IRPs, provides otherwise.

43. Moreover, by agreeing that document production would be governed by Rule 8 of the Interim Procedures, to be applied by the Panel using as non-binding guidelines the IBA Rules, the Parties acknowledged that the attorney-client privilege and the work product doctrine would be available to ICANN ─ as well as to Afilias ─ in *this* IRP.

44. Pending receipt of the Parties' full submissions in relation to the Claimant's Supplemental Submission, the Panel expressly reserves - and makes no finding in connection with – the Claimant's waiver argument based on the Respondent's reliance, in this IRP, on the Board's decision not to make any determination regarding NDC's conduct until after the conclusion of this IRP.

45. Second, any discussion of the adequacy of the Respondent's privilege log must likewise begin by considering the provisions of PO 2, paragraph 16 of which reads as follows:

> 16. As a privilege log may prove useful to the Parties and the Panel in addressing issues arising from refusals to produce justified on the basis of privilege, the Panel directs both Parties to prepare a privilege log in the present case. In light of the tight procedural timetable applicable to this case, the Panel directs that each Party shall have until 24 April 2020, that is, one week after the date set for the production, to provide the other Party with a privilege log. The privilege log shall list documents over which a privilege is asserted, and describe in regard to each document withheld, the type of document, the general subject matter thereof, the date on which it was created, the author(s) of the document, all persons who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law under which the privilege claimed is asserted.[emphasis added]

46. The Panel examines below the Claimant's contention that the Respondent's assertions of privilege are "unsubstantiated and unparticularized" (Application, p. 4). However, subject to considering the adequacy, under the applicable law, of the Respondent's description of the claimed privilege, it is apparent that the privilege log prepared by the Respondent, at least *prima facie,* complies with the requirements of PO 2.

47. Third, the Claimant's complaint that "ICANN failed to produce a single responsive document that one would expect to be in the *Amici*'s possession, custody or control" (Application, p. 3), must be evaluated in the light of PO 2 and the Panel's prior pronouncements.

48. In its Decision on Phase I, the Panel wrote:

> 188. ICANN's counsel also suggested, at the hearing, that if the Applicant *Amici* were permitted the type of broad participation they are seeking, then it would be appropriate that both of them be subject to the provisions of the Interim Procedures relating to Exchange of Information.

> This means that they would be subject to document requests, and that Afilias would in turn be subject to document requests by both ICANN and the Applicant *Amici*.
>
> 189. The Panel is unable to reconcile the type of participation rights being sought by the Applicant *Amici* with the terms of the Interim Procedures. (…)
>
> (…)
>
> 195. The conclusions the Panel draws from its review of the provisions of Rule 7, read as a whole, are the following:
>
> (…)
>
> - The provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to Parties, and the Panel can find no basis in Rules 7 or 8 for the submission that Afilias may be subject to motions for exchange of documents by the Applicant *Amici*.
>
> (…) [emphasis added]:

49. In PO 2, the Panel explained as follows its decision to order the production of responsive documents in the possession, custody or control of either Party:

> 10. The Respondent objects to the Claimant's definition of "ICANN", which is stated to include counsel and agents not employed by ICANN. The Claimant counters that both Article 3 of the IBA Rules and Rule 8 of the Interim Procedures require parties to search for documents that are in a party's possession, custody, or *control*.
>
> 11. In the Panel's experience, international arbitral tribunals expect parties to produce documents requested or ordered to be produced even if they are in the possession of third parties – like subsidiaries, agents or advisors – who, because of a legal or relevant contractual relationship with a party, have in their possession documents which, effectively, are under the control of the party. The Panel therefore directs that both Parties should produce responsive documents in their "possession, custody, or control", even if documents a Party knows or reasonably should know are responsive are in the possession of external counsel or agents.

50. According to the foregoing pronouncements, the *Amici* are neither "parties" to this IRP nor "third parties – like subsidiaries, agents or advisors – who, because of a legal or relevant contractual relationship with a party, have in their possession documents which, effectively, are under the control of the party". It follows that the Respondent had no obligation under PO 2 or the Interim Procedures to ask the *Amici* to search for documents responsive to the Claimant's requests to produce. Consequently, the Claimant's claim that the Respondent should have produced responsive documents from

the *Amici* must be rejected. The difficulties associated with the participation of the *Amici* in this IRP -- with the status of *Amici Curiae,* as opposed to that of full parties or interveners – have been the subject of ample submissions by the Parties and the *Amici* since the beginning of this IRP, and most recently gave rise to an application by the Claimant dated 10 June 2020, that is presently pending before the Panel. For present purposes, it suffices to observe that those difficulties are distinct from the issues of attorney client privilege and attorney work product that arise under the Application.

51. Having disposed of those issues that could be determined on the basis of the terms of PO 2 or of other prior pronouncements of the Panel, the Panel now turns to the remaining issues raised by the Application.

D. *Alleged Inadequacy of the Respondent's Privilege Log*

52. The Respondent has cited a number of cases identifying, under the applicable law, the items of information required to be disclosed in a privilege log.[9] These broadly correspond to the items listed in paragraph 16 of PO 2.

53. The Respondent has also cited cases, mostly federal authorities, defining (or applying) the standard to determine the adequacy of a privilege log under the applicable law. In general, the standard is whether, as to each document, the log sets forth specific facts that, if credited, would suffice to establish each element of the privilege or protection from production that is being claimed. The focus is on the specific descriptive portion of the log, rather than on conclusory invocations of the privilege claimed.[10]

54. In its privilege log, the Respondent has listed, in addition to the other items of information required under PO 2, the "Privilege" claimed (e.g., "Attorney-Client", or

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[9] See, e.g., *Hernandez v. Sup. Ct.*, 112 Cal. App. 4th 285, 291 n.6 (2003); *Elat v. Ngoubene*, 2013 WL 4478190, *4 (D. Md. 2013); *Torres v. Kuzniasz*, 936 F. Supp. 1201, 1208 (D.N.J. 1996); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071, 36 Fed. R. Evid. Serv. 860 (9th Cir. 1992).

[10] See *SEC v. Beacon Hill Asset Mgmt.*, LLC, 231 F.R.D. 134 (S.D.N.Y. 2004), pp. 144-145 [***SEC v. Beacon Hill***], citing *Golden Trade, S.r L. v. Lee Apparel, Co.*, 1992 WL 367070 at *5; accord *A.I.A. Holdings, S.A. v. Lehman Bros.*, 97 Civ. 4978(LMM)(HBP), 2002 WL 31385824 at *4 (S.D.N.Y. Oct. 21, 2002); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 223 (S.D.N.Y.2001).

"Attorney-Client; Work Product"[11]) separately from the "Privilege Description". Typical of the latter are the following two entries: "Email seeking legal advice from J. Jeffries* regarding auction rules"; "Email from outside counsel* seeking advice in anticipation of litigation regarding .WEB contention set". A third example of a Privilege Description said to be insufficiently particularized reads as follows: "Memorandum to ICANN counsel* prepared by outside counsel* providing legal advice in anticipation of litigation regarding .WEB contention set." The asterisk, when used in the log, denotes that the person listed is among the Respondent's internal or external counsel.

55. In the opinion of a majority of the Panel, the authorities made available to the Panel establish that, under the applicable law, descriptions such as those used by the Respondent to assert privilege are sufficient.[12] Indeed, privilege was found to have been validly asserted even where, unlike in the present case, the log did not identify the subject matter of the legal advice or litigation. Thus in *Mitre Sports Int'l Ltd. v. Home Box Office, Inc.*, the Court held:

> A review of HBO's log reveals that it provides sufficient information, *i.e.*, document date, author, recipients, persons copied (if any), and a description of redacted information, to permit a judgment that the challenged documents are potentially protected from disclosure. See, *e.g.*, *Allied Irish Banks*, 252 F.R.D. at 167.
>
> In addition, and as Judge Pitman explained in *S.E.C. v. Beacon Hill Asset Management LLC*, identifying e-mails in a privilege log as 'seeking, transmitting or reflecting legal advice'—which is how HBO describes many e-mails—provides a sufficient description to sustain an assertion of privilege. 231 F.R.D. 134, 144-45 (S.D.N.Y. 2004) (explaining that although the subject matter of the legal advice was not described, disclosure of additional information as to the subject matter 'would come perilously close to requiring disclosure of the substance of the privileged communication'); *see also Carl Zeiss Vision Intern. Gmbh v. Signet Armorlite Inc.*, 07-cv-0894-DMS (POR), 2009 WL 4642388, at * 4 (S.D. Cal. Dec. 1, 2009) (citing *Beacon Hill* and finding that although the log did not provide certain 'particulars' to identify the subject matter of the documents, a seeking 'legal advice' description was sufficient).[13] [Emphasis added]

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[11] There seems to be no instance where work product is invoked in the Respondent's log as the sole ground for seeking immunity from production.

[12] *Carl Zeiss Vision Intern. GmbH v. Signet Armorlite Inc.*, 07-cv-0894-DMS (POR), 2009 WL 4642388 (S.D. Cal. Dec. 1, 2009); *Mitre Sports Int'l Ltd. v. Home Box Office, Inc.*, 2010 WL 11594991 (S.D.N.Y. Oct. 14, 2010) [***Mitre Sports***]; *SEC v. Beacon Hill*, *supra*.

[13] *Mitre Sports*, *supra*, pp. 15-16. See also *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 2010 WL 457397, at *2 (D. Ariz. Feb. 5, 2010) ("FWS has made a prima facie showing that the documents are privileged. It has submitted a privilege log identifying the attorney and client involved with each withheld

56. The authorities cited by the Claimant do not support its contention that the Respondent's privilege log is inadequate or that the information provided in the log is insufficient. In *Electronic Frontier Foundation v. Central Intelligence Agency*,[14] the issue was whether the US federal government had sufficiently described documents over which it asserted privilege in a so-called *Vaughn* index issued in connection with its response to a request under the *Freedom of Information Act*. The impugned entries in the index were found to be general and not to provide enough information to demonstrate, on a document by document basis, that the information withheld fell within the scope of the privilege. These entries included: "[a] one-page internal write up from the FBI to the IOB Board regarding IOB Matter 2007-1471. This report concerns the FBI's over-collection of information due to the inputting of the incorrect termination date of surveillance"; "[a] three-page internal write up regarding IOB Matter 2006-307"; and "[a] four-page internal write up from the FBI to the IOB Board regarding IOB Matter 2008-1194. This report concerns a highly sensitive joint investigation of the FBI and U.S. Army". Unlike the entries just quoted, the document descriptions in the Respondent's log are, in the opinion of a majority of the Panel, sufficiently detailed for the Panel to ascertain that the documents listed *prima facie* fall within the scope of the privilege.

57. The other case relied upon by the Claimant, *Oracle Am., Inc. v. Google, Inc.*,[15] concerned an allegedly privileged email disclosed inadvertently as part of a party's document production. The District Court's decision contains no discussion of the information required to be disclosed in a privilege log in order to validly assert attorney client privilege under California law.

58. It is asserted in the Application that *all* of the privilege descriptions contained in the Respondent's log are inadequate. Having reviewed the Respondent's privilege log in

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document, the nature of each document, the date the document was generated, and information on the subject matter of each document.").

[14] *Electronic Frontier Foundation v. Central Intelligence Agency*, No. C 09-3351 SBA, 2013 WL 5443048, p. *17 (N.D. Cal. Sept. 30, 2013).

[15] *Oracle Am., Inc. v. Google, Inc.*, No. C-10-03561-WHA DMR, 2011 WL 3794892, p. *2 (N.D. Cal. Aug. 26, 2011).

light of the authorities just cited, a majority of the Panel cannot accept that contention. The majority is satisfied, and finds, that the Respondent's log complies with PO 2, and that it provides a description of the privilege or protection asserted that is sufficient for it to be validly claimed under the applicable law.

59. The Claimant also complained, in the Application, that the Respondent's privilege log failed to identify the position and affiliations at the time of the communication of the individuals involved in the various communications listed in the log (Application, p. 4). This information was provided with the Response, to which was attached an appendix containing a list of all individuals who appear on the Respondent's privilege log, along with their corresponding job titles.

60. Finally, the Claimant complained that the Respondent's log did not identify the specific request to which a document that is alleged to be privileged pertains. The Claimant did not cite any authority or principle in support of its request for the inclusion of that information in the Respondent's log, and the Respondent was not specifically required to provide it under the terms of PO 2. It is recalled that in PO 2 the Panel declined the Claimant's invitation to require the Parties to identify, as part of their production, the specific document request(s) to which each produced document was responsive. The Panel did not see much benefit to this information being generated in the present IRP, and found that it would be unduly burdensome for the Respondent to comply with this request in circumstances where many of the Claimant's requests overlapped in their scope (PO 2, paras. 17-18). While this decision was concerned with produced documents, not logged documents, the reasoning also applies to the Claimant's complaint directed at the omission of that item of information from the Respondent's log.

61. For all of these reasons, a majority of the Panel concludes that the Claimant has failed to justify its request that the Respondent be required to revise its privilege log. The request is therefore denied.

62. One member of the Panel would have required disclosure of more detailed information from the Respondent in order to support the latter's claims of privilege. In the view of that Panel member, the applicable standard set out in paragraph 36 of this order requires of the Respondent, for example, not simply to assert that a Memorandum was prepared by "ICANN counsel" (see, e.g. entry no. 90 in the log), but to name the attorney(s) who has(ve) actually authored the document in question. By way of further example, in order to validly assert privilege over a document described as follows: "Transcript of ICANN Board workshop attended by S. Crocker, M. King, C. Disspain, X. Calvez, K. Wu, A. Maemura, A. Grogan*, L. Van der Laan, M. Botterman, S. Eisner*, R. da Silva, T. Swinehart, J. Jeffrey*, G. Marby, C. Chalaby, W. Profit, L. Ibarra, R. Rahim, M. Kummer, S. Bennet, D. Conrad, A. Hemrajani, B. Tonkin, A. Atallah, J. Soininen, D. Burns, D. Olive, S. Costerton, A. Stathos*, and G. Sadowsky, reflecting legal advice provided by ICANN counsel* in anticipation of litigation regarding .WEB contention set" (log entry no. 254), the Respondent should, in the view of that Panel member, be required to be more explicit and to specify that anticipated litigation regarding the .WEB contention set was the only subject-matter of the workshop, as opposed to being one topic, among many others, that may have been discussed in the course of the workshop, in which case the transcript ought to be produced with redactions. In respect of any entry in the log where the Respondent failed to meet the applicable high standard set out in paragraph 36, as that Panel member interprets it, the Panel member would have ordered the Respondent to produce the corresponding document to the Claimant.

63. Beyond alleged defects in the form of the Respondent's privilege log, the Claimant expressed concern at the large number of documents listed in the log. This, to some extent, is a cause of the alleged paucity of the Respondent's production, the subject of the Claimant's second major compliant, to which the Panel now turns.

E. ***Alleged Insufficiency of the Respondent's Production***

64. The Claimant argues that the contrast between the number of entries in the Respondent's privilege log and the number of documents actually produced by the Respondent "by itself" demonstrates that the Respondent has clearly not made a reasonable or good faith effort to comply with its production obligations.[16]

65. In regard to this first line of argument, the Panel finds that there is force to the Respondent's argument in response that the number of entries in its privilege log is a logical consequence of the nature of the requests propounded by the Claimant, many of which directly sought documents most likely to be privileged or otherwise protected,[17] and the fact that throughout the period there was ongoing litigation with Ruby Glen as well as a civil investigation by the Department of Justice, both dealing with subject matters that are the same or closely related to the issues in dispute in this IRP and which required the involvement of the Respondent's in-house and external counsel.

66. Some of the other underlying concerns of the Application were addressed in the Respondent's Response or in oral argument. For example, the Claimant illustrated its concern with the Respondent's production by noting that the Respondent had failed to produce documents that are clearly responsive and yet are not privileged since they are not listed in the privilege log, citing the "request for information" targeted by Claimant's request 2(b). At the hearing, Respondent's counsel clarified that the request for information in question had been made orally, and that the document sought by the Claimant's document request 2 (b) therefore does not exist.

67. Likewise, the Claimant was concerned that the Respondent may have considered, in its document review, that the mere sending of a communication to or from an internal

[16] Application, p. 2.

[17] The Respondent points in this regard to requests no. 3, 4, 6, 9, 10, 11, 12 and 14.

ICANN attorney suffices to render that communication privileged.[18] The Respondent stated clearly in oral argument that it does not take that position, nor did it adopt it when conducting its document review.[19]

68. The Claimant's contention that the Respondent ought to have produced privileged documents in a redacted form, so as to disclose non-protected facts or information, engages the very nature of the attorney client privilege under the applicable law and, therefore, requires careful consideration.

69. The attorney client privilege protects confidential communications between a lawyer and a client.[20] The inclusion of facts in a confidential communication does not affect the privileged nature of the communication.[21] As the Respondent's Response correctly notes (at p. 11): "A fact does not become privileged by being communicated to an attorney, but neither does a privileged communication lose its protected status merely because it includes facts." The Supreme Court of California's decision in *Costco*, already cited, confirms that proposition: "[t]he attorney-client privilege attaches to a confidential communication irrespective of whether it includes unprivileged material."[22]

70. The same goes for documents and tangible things created by an attorney or its representative that are protected by the work product doctrine: while the doctrine affords no protection to facts learned in anticipation of litigation, the work product does not lose its protection by virtue of it containing facts.

71. Some of the cases cited by the Claimant confirm that a party cannot be forced to produce a redacted version of privileged documents in order to reveal "unprivileged"

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18 See Claimant's PowerPoint presentation, p. 14, citing an extract of a procedural order in the *Corn Lake* IRP. It is noted that unlike in the present case, in *Corn Lake* no order for the production of a privilege log had been made by the Panel.

19 See Transcript, p. 24

20 See, generally, the eight-factor test developed by the Ninth Circuit in *Graf*, as cited in *Schaeffer*, *supra*, p. *3.

21 *Kintera, Inc. v. Convio, Inc.,* 219 F.D.R. 503, 509 (S.D. Cal. 2003).

22 *Costco*, *supra*, p. *734.

material. Thus, in *State Farm Fire & Casualty Co. v. Superior Court*,[23] the California Court of Appeal held that while a witness may be questioned regarding unprotected facts, the witness cannot be made to divulge communications of those facts to an attorney. Likewise, in *Upjohn Co. v. United States*,[24] the US Supreme Court explained:

> [T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.[25]

72. Consequently, in the opinion of the Panel, it would violate the attorney-client privilege and work product protection to call upon the Respondent, as requested by the Claimant, to redact privileged communications or work product so as to reveal facts or information contained in those protected documents. This request must therefore be denied.

73. Another substantive point of divergence raised by the Application concerns the possibility for privilege to attach to communications between non-lawyers. In the Application, the Claimant contended that the Respondent cannot withhold documents from production on the ground that they "seek" or "reflect" legal advice or were prepared for counsel (Application, p. 7). However, the California Court of Appeal has held that if legal advice is discussed or contained in a communication between corporate employees, the communication is presumptively privileged even if it took place between non-lawyers.[26]

74. The Claimant submitted that the Respondent cannot assert work product protection or attorney client privilege over documents or communications "created in connection with the non-legal functions of ICANN and outside attorneys acting in a purely administrative

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23 *State Farm Fire & Casualty Co. v. Superior Court*, 62 Cal. Rptr. 2d 834, p. 844 (1997).

24 *Upjohn Co. v. United States*, 449 U.S. 383 (1981) [***Upjohn***].

25 *Ibid*, pp. 395-396, quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).

26 *Zurich American Ins. C. v. Super. Ct.*, 155 Cal. App. 4th 1485, 1502 (2007).

capacity" (Application, p. 6), citing US and English cases in support.[27] The Panel does not understand that proposition to be disputed as a matter of law. However, the Claimant has not alleged any facts, or adduced any evidence, that would support the claim that some of the documents over which the Respondent has claimed privilege may involve communications between lawyers, internal or external, performing non-legal functions or acting in a purely administrative capacity.

75. Consistent with the case law cited earlier in this order, once the Respondent has made a *prima facie* showing that communications relate to legal matters, such as by listing in its log an email by which the author is said to be seeking legal advice from a lawyer regarding ICANN's auction rules, then the burden shifts onto the Claimant "to make some showing that the communications did not involve the giving of legal advice, but rather related to business matters and considerations."[28] The Claimant did not seek to discharge that burden in the Application.

76. The Panel adopts the same reasoning and reaches the same conclusion in respect of the assertion, in the Application, that the Respondent may not "hide its decision making and conduct from the public by delegating all potentially contentious issues to its legal department for resolution or otherwise [copying] its in-house lawyers on all documents that are relevant to the dispute."[29] The Claimant did not allege that this in fact occurs within ICANN, nor did it seek to show that this in fact happened in this case, or that it impacted the Respondent's production.

77. In its Response, and again in oral argument, counsel described the process by which, in seeking to comply with PO 2, the Respondent identified custodians and datasets, collected responsive documents, and reviewed the documents so collected using a team of outside and in-house counsel, first for responsiveness and then for privilege.

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27 *See* cases cited in fn 12 of the Application, p. 7.

28 *Coleman*, *supra*, p. 206.

29 Application, pp. 5-6.

The lawyers involved in this process, it was represented, are all bound by the ethical obligations quoted earlier in these reasons. In the experience of the Panel, the process so described reflects best practices and, in the opinion of the Panel, it complied with PO 2.

78. The Respondent has asserted compliance with PO 2 and that its production was complete. The Respondent is reminded, as is the Claimant, that neither party will be allowed, later in these proceedings, to rely on newly discovered documents that were responsive to the other party's document requests and thus ought to have been produced as part of the party's initial production.

79. The Claimant has impressed upon the Panel that the IRP as an accountability mechanism is the exclusive means by which Afilias, as an applicant for .WEB, can challenge the conduct of the Respondent's Board and staff. The Claimant has characterized as a cardinal principle the Respondent's obligation of transparency under its Bylaws and international law, and emphasized the impact of the Respondent's claims of privilege on the Claimant's ability to challenge the Respondent's decision making process concerning .WEB. While sensitive to these arguments, the Panel cannot accept, as urged by the Claimant, that they outweigh the interests served by the attorney client privilege and the attorney work product under California and US federal law. In *Costco*, cited above, the Supreme Court of California, applying California law, observed:

> The attorney-client privilege, set forth at Evidence Code section 954, confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer..." The privilege "has been a hallmark of Anglo–American jurisprudence for almost 400 years." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642.) Its fundamental purpose "is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.] ... [¶] Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. As this court has stated: 'The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.' [Citations.]" (*Id.* at pp. 599–600, 208 Cal.Rptr. 886, 691 P.2d 642.) "[T]he privilege is absolute and disclosure may not be

> ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557, 65 Cal.Rptr.2d 53.)

80. The relief requested in the Application, were it to be granted, would deprive the Respondent of the protection afforded under the attorney-client privilege and the work product doctrine under the applicable law, and it would undermine their rationale and underlying purpose.

V. CONCLUSION

81. For all of these reasons, the relief sought in the Claimant's Application is denied in its entirety.

82. The Panel has unanimously agreed the terms of this Procedural Order No. 4, which is signed by the Chair on behalf of the Panel at the request of his co-panelists.

Place of the IRP: London, England

Dated: 12 June 2020

Pierre Bienvenu, Ad. E.
Chair
On behalf of the Panel

RLA-2

RESPONDENT'S EXHIBIT

39 Cal.App.5th 1121
Court of Appeal, First District,
Division 3, California.

IN RE ALPHA MEDIA RESORT INVESTMENT CASES.

A150451, A150452
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Filed 09/16/2019

Synopsis

Background: Investors brought separate actions against defendant for fraud, stemming from alleged international investment scheme through which defendant fraudulently induced individuals and organizations to invest in two foreign resort properties. Following order that actions would be coordinated for purposes of discovery but would remain separate for trial, and after motion to dismiss for want of prosecution or, in the alternative, a stay of proceedings was denied, the Superior Court, San Francisco County, No. CGC-08-477832, Mary E. Wiss, J., following bench trial, found in favor of investor and awarded damages and prejudgment interest upon defendant's failure to appear. Following second bench trial, the Superior Court, No. CGC-10-495852, Wiss, J., found in favor of different investor and awarded damages and prejudgment interest upon defendant's failure to appear. Defendant appealed.

Holdings: The Court of Appeal, Wick, J., sitting by assignment, held that:

impracticability exception to five-year rule for bringing actions to trial applied to preclude dismissal of coordinated fraud actions, and

stay of coordinated actions pending resolution of parallel criminal proceedings would not best serve justice in the aggregate.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Want of Prosecution; Motion to Stay Proceedings.

****750** Superior Court of City and County of San Francisco, Mary E. Wiss, J. (CJJP No. CJC-12-004728; City & County of San Francisco Super. Ct. Nos. CGC-08-477832, CGC-10-495852)

Attorneys and Law Firms

Law Offices of Todd B. Rhoads and Todd B. Rhoads, for Defendant and Appellant Derek F. C. Elliott.

Vereschagin Law Firm and Bryan W. Vereschagin, for Plaintiffs and Respondents.

Opinion

Wick, J. [*]

[*] Judge of the Sonoma Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

***1124** This is an appeal from judgment in two coordinated actions [1] in which defendant Derek F. C. Elliott challenges the trial court's

rulings to deny his motion to dismiss for want of prosecution within the five-year statutory period and, alternatively, for a stay of proceedings pending resolution of his parallel criminal case. Elliott contends each of the challenged rulings was an abuse of discretion and asks that we remand to the trial court with instructions to vacate the judgments against him and to dismiss or, alternatively, enter the stay as requested. We affirm.

[1] *Spalding v. Maxim Bungalows Cofresi* (Super. Ct. S.F. City and County, 2016, No. CGC-08-477832, filed July 23, 2008) and *Celovsky v. Catledge* (Super. Ct. S.F. City and County, 2016, No. CGC-10-495852, filed Jan. 7, 2010).

FACTUAL AND PROCEDURAL BACKGROUND

Elliott has been named as a defendant in six civil fraud actions, five of which were filed in the Superior Court of the City and County of San Francisco (including the two at hand).[2] These six actions involve the same basic allegations. Approximately 25 defendants, including Elliott, his father Frederick Elliott, and numerous Elliott-affiliated corporate entities (hereinafter, Elliott entities), pursued an international investment scheme through which they fraudulently induced hundreds of individuals and organizations to invest in two resort properties in the Dominican Republic. One of these resorts, the Sun Village Juan Dolio resort, was not renovated as promised despite defendants' collection of over $91 million in investor funds. The second resort—the Cofresi resort—was operational, yet, as one plaintiff alleged, the Elliotts had no intention of making the new investors "fee simple" owners as promised. Ultimately, this fraud scheme generated a net loss of about $170 million.

[2] There are six coordinated cases in total. In addition to the two cases currently before this court, the four other coordinated actions are as follows: (1) *Aleo v. Elliott* (Super. Ct. L.A. County, No. BC461442); (2) *Alvarez v. Catledge* (Super. Ct. S.F. City and County, No. CGC-09-491529); (3) *The John Christopher Bunting Foundation v. Catledge* (Super. Ct. S.F. City and County, No. CGC-09-491463); and (4) *Avalos v. Catledge* (Super. Ct. S.F. City and County, No. CGC-10-496169).

Based upon these allegations, nearly 230 claims in total were brought against the 25 or so defendants, including fraud, conspiracy to defraud, deceit ***1125** and unjust enrichment claims. General, special and punitive damages were sought, as well as various forms of equitable relief. Applications for ****751** approval of complex designation and single assignment were subsequently granted for the five actions filed in the Superior Court of the City and County of San Francisco, including these two matters.

In June 2012, one of the other named defendants, Alpha Media Publishing, Inc. (formerly known as Dennis Publishing, Inc.), filed a petition for coordination of actions. On November 29, 2012, San Francisco Judge Richard A. Kramer was designated the coordination trial judge and authorized "to exercise all the powers over each coordinated action of a judge of the court in

which that action is pending." Judge Kramer thereafter ordered that all six actions would be coordinated for purposes of discovery but would remain separate for trial absent agreement by the parties.

Meanwhile, criminal charges for mail fraud and conspiracy were brought against Elliott and codefendant James Catledge in the United States District Court for the Northern District of California based essentially on the same facts alleged in our proceedings. Elliott subsequently reached a plea deal in his criminal case in which he admitted engaging in a conspiracy to commit mail fraud and agreed to the truth of numerous facts relating to his intentional efforts to defraud investors in the Sun Village Juan Dolio resort project. In addition, Elliott agreed, among other things, to forfeit his right to claim Fourth and Fifth Amendment protections and to cooperate with the government in codefendant Catledge's criminal trial in exchange for leniency. The parties represented in their appellate briefing that these parallel criminal proceedings involving Elliott and Catledge were ongoing.

On February 3, 2014, based on a joint stipulation between plaintiff and defendants Alpha Media Group, Inc. and Alpha Media Publishing, Inc., the trial court ordered that the five-year statutory period to bring an action to trial set forth in Code of Civil Procedure section 583.310 would run no earlier than June 2, 2014, in the *Spalding* matter.[3] No such stipulation or order was reached with respect to the Elliotts because, despite being served with the summons and complaint, they had not answered at the time this order was entered.[4]

3 The trial court lost jurisdiction over the *Spalding* matter for a 17-month period in 2009 and 2010 while one of the parties appealed an order denying arbitration. In addition, pursuant to an earlier stipulation and order entered in July 2013, the five-year statutory period in *Spalding* had already been extended to run " 'no earlier than February 17, 2014 ....' "

4 Elliott, a resident of Canada, was personally served in Miami, Florida, in the *Spalding* matter in September 2009 and in the *Celovsky* matter on or before May 3, 2010.

Discovery subsequently yielded a wealth of documentary evidence of wrongdoing from various defendants, and plaintiffs were able to successfully ***1126** reach multimillion-dollar settlements with two primary defendant groups (identified herein as the James Catledge/ Impact, Inc. defendant group and the Dennis Publishing, Inc./Maxim defendant group). However, while most parties in the coordinated proceedings were focusing on settlement and judicial efficiency strategies during regular case management conferences with the trial court, Elliott, his father and the Elliott entities were for the most part absent. In fact, it was not until May 4, 2015, that Elliott filed an answer in the *Spalding* and *Celovsky* matters.

In January 2016, the trial court set the *Spalding* and *Celovsky* matters for trial. The day after the trial court issued pretrial scheduling orders on March 28, 2016, the Elliott defendants (including Elliott) ****752** began filing substitution of counsel forms. In doing so, Elliott associated in to represent

himself in a pro se capacity. Elliott's deposition was noticed for April 7, 2016, but he failed to appear. Plaintiffs therefore requested that the *Spalding* trial date be reset from June 20, 2016, to September 6, 2016, which was the date scheduled for the *Celovsky* trial, and proposed a bench trial rather than a jury trial should the Elliotts fail to appear. The court agreed to these requests and set a pretrial conference for July 8, 2016.[5] Meanwhile, plaintiffs reached settlements with all named defendants but the Elliotts, the Elliott entities, and one other defendant in the *Aleo* action.

5 By this time, San Francisco Judge Mary E. Wiss was presiding over the coordinated proceedings.

On August 10, 2016, about four weeks before trial was set to begin in the *Spalding* matter, Elliott and his father first raised the issue of dismissal under Code of Civil Procedure section 583.310. The *Spalding* trial date was thus continued to September 26, 2016, and the Elliotts' motion for dismissal or, in the alternative, a stay of proceedings was heard on September 6, 2016. Following the contested hearing, the court denied the motion in its entirety on September 16, 2016.

A bench trial began in the *Spalding* matter shortly thereafter, with no appearance from the Elliotts. At its conclusion, the trial court found in favor of the plaintiff and against the Elliotts, jointly and severally, on the following causes of action: fraud (concealment), fraud (false representation and concealment) and civil conspiracy. In addition, the court found they acted with malice, oppression and fraud such that punitive damages were warranted. Accordingly, the court awarded the *Spalding* plaintiff $984,575 in damages for the fraud causes of action, $1,476,862.50 in punitive damages, and $564,957 in prejudgment interest.

A bench trial in the *Celovsky* matter followed on November 7, 2016, again with no appearance from the Elliotts. At its conclusion, the trial court found ***1127** the Elliotts jointly and severally liable for fraud (concealment) and fraud (fraud and conspiracy to defraud based upon concealment and misrepresentation). The court also found they acted with malice, oppression and fraud such that punitive damages were again warranted. Accordingly, the court awarded to plaintiffs Samuel Celovsky and John R. Young, cotrustees of The John and Dorothy Johnson Missionary Foundation, a total of $7,715,518.41 in damages, punitive damages, and prejudgment interest; to plaintiff Samuel Celovsky a total of $511,192.65 in damages, punitive damages, and prejudgment interest; to plaintiff Debra Celovsky a total of $104,480.25 in damages, punitive damages, and prejudgment interest; and to plaintiff John R. Young a total of $254,063.73 in damages, punitive damages, and prejudgment interest.

This timely appeal of the judgments followed.[6]

6 Elliott's father has not joined in this appeal.

DISCUSSION

Elliott challenges on appeal the trial court's order denying his motion to dismiss under Code

of Civil Procedure section 583.310 et seq. [7] for want of prosecution, and, alternatively, for a stay pending resolution of his related criminal case in order to protect his Fifth Amendment rights. We address each contention in turn below.

[7] Unless otherwise stated, all statutory citations herein are to the Code of Civil Procedure.

****753 I. Motion To Dismiss for Failure To Bring the Action to Trial Within Five Years.**

Under section 583.310, an action must "be brought to trial within five years after the action is commenced against the defendant." (§ 583.110, subd. (a) [" 'Action' includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief"].) If not, "dismissal of the action is 'mandatory and ... not subject to extension, excuse, or exception except as expressly provided by statute.' (§ 583.360, subd. (b).)" (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 721, 122 Cal.Rptr.3d 331, 248 P.3d 1185 (*Bruns*).) Here, the trial court relied on the "impracticability" exception to the five-year rule set forth in section 583.340, subdivision (c). [8]

[8] Section 583.340 provides: "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] (a) The jurisdiction of the court to try the action was suspended. [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

Defendant contends the trial court's decision was an abuse of discretion. In particular, he challenges the court's key finding that it was impractical for plaintiffs to bring these actions to trial within the statutory five-year period.

***1128** We begin by taking a closer look at the law. "Sections 583.310 and 583.360 subserve the purpose of 'encourag[ing] the expeditious disposition of litigation.' [Citation.] The aim of the statutes is not to have trials, but to bring cases to a conclusion, to secure for plaintiffs the relief, and to defendants, the repose, to which the law entitles them, and to free the court's resources for the efficient adjudication of other claims. The statutes focus upon the detriment to the judicial system, as well as to a defendant, that results from 'tardy litigation of a claim.' [Citation.]" (*Hughes v. Kimble* (1992) 5 Cal.App.4th 59, 69–70, 6 Cal.Rptr.2d 616.)

"Under 583.340(c), the trial court must determine what is impossible, impracticable, or futile 'in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citations.] The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.' [Citations.] A plaintiff's reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility. [Citation.] ' "[E]very period of

time during which the plaintiff does not have it within his power to bring the case to trial is not to be excluded in making the computation." [Citation.]' [Citation.] 'Time consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of these exceptions.' [Citation.] Determining whether the subdivision (c) exception applies requires a fact-sensitive inquiry and depends 'on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles.' [Citation.] ' "[I]mpracticability and futility" involve a determination of " '*excessive* and *unreasonable* difficulty or expense,' " in light of all the circumstances of the particular case.' [Citation.]" (*Bruns*, *supra*, 51 Cal.4th at pp. 730–731, 122 Cal.Rptr.3d 331, 248 P.3d 1185.)

****754** "The plaintiff bears the burden of proving that the circumstances warrant application of the section 583.340(c) exception. [Citation.] ... The trial court has discretion to determine whether that exception applies, and its decision will be upheld unless the [appellant] has proved that the trial court abused its discretion." (*Bruns*, *supra*, 51 Cal.4th at p. 731, 122 Cal.Rptr.3d 331, 248 P.3d 1185.)

Here, the trial court relied upon the following facts when finding it impractical under section 583.340, subdivision (c) for plaintiffs to bring this action to trial before the five-year deadline. First, the court noted: "These coordinated cases involve the claims of nearly 230 plaintiffs against approximately 25 defendants for an alleged fraud scheme with an estimated loss, according to plaintiffs, of $170,000,000. The Elliotts are just two of the ***1129** named defendants." In fact, the court noted, the prior trial judge, Judge Kramer, determined when coordinating these actions that *each one* qualified as complex under California Rules of Court, rule 3.400.

Moreover, the parties had several times discussed the impending five-year deadline under section 583.310 and, with respect to some of the defendants, had secured orders or entered into stipulations to prevent dismissal. However, these strategies did not work with the Elliott defendants because, despite being personally served with the summons and complaint, the Elliotts did not answer the complaint or otherwise appear in the *Spalding*, *Celovsky* and *Alvarez* matters until May 4, 2015, after which their attorney of record immediately withdrew from representation.

In addition, the trial court referenced in the order its loss of jurisdiction in the *Spalding* matter for 17 months (from Aug. 12, 2009, to Jan. 20, 2011) while another defendant appealed an order denying arbitration.

And lastly, the trial court found that, with respect to all six coordinated cases, plaintiffs had diligently and consistently pursued resolution, participating in "regular Case Management Conferences in which the Court and the parties discussed settlement, strategies for reducing discovery and trial costs, and joint or separate trials." Moreover, plaintiffs' persistent effort had for the most

part paid off. As the court concluded: "[Plaintiffs'] efforts have resulted in settlements with most defendants; the claims against the Elliotts are among the few that remain. Based on the record, the Court is satisfied that bringing these actions to trial within five years of their commencement would have been impracticable, and plaintiffs have exercised reasonable diligence in prosecuting their cases."

Elliott does not challenge the veracity of these individual facts cited by the trial court in its order. Rather, he argues that, notwithstanding these facts, the record establishes plaintiffs failed to use reasonable diligence in prosecuting these actions for one reason: plaintiffs could have obtained, but did not obtain, a default judgment against him within the five-year period.

Even assuming Elliott is correct that this fact weighs against plaintiffs in the reasonable diligence inquiry, the law is clear that applicability of the section 583.340, subdivision (c) exception "is generally fact specific, depending on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles." (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 438, 41 Cal.Rptr.2d 362, 895 P.2d 469; accord, *Bruns*, *supra*, 51 Cal.4th at p. 731, 122 Cal.Rptr.3d 331, 248 P.3d 1185 [impracticability is determined in light of all relevant ****755** circumstances in the particular case tending to show " ' " 'excessive and *unreasonable* difficulty or ***1130** expense' " ' "].) For this reason, "[t]he question of impossibility, impracticability, or futility is best resolved by the trial court, which 'is in the most advantageous position to evaluate these diverse factual matters in the first instance.' [Citation.]" (*Bruns*, *supra*, at p. 731, 122 Cal.Rptr.3d 331, 248 P.3d 1185.) And, based on the record set forth above, we find no reason to override the trial court's reasoned judgment that plaintiffs met their burden to prove impracticability in this case. Notwithstanding plaintiffs' failure to secure a default judgment, there were indeed extenuating circumstances that justified their delay in getting these cases ready for trial in a timely manner, including, as the trial court noted, the undisputed complexity of the cases and the Elliotts' apparent reluctancy to engage themselves in any of the other parties' resolution efforts. [9]

9 As noted in Elliot's authority, *Hughes v. Kimble*, *supra*, 5 Cal.App.4th 59, 6 Cal.Rptr.2d 616, "former section 581a, subdivision (c) provided that a separate ground for mandatory dismissal existed if more than three years passed from the service of summons, and a default judgment was not obtained. (16 West's Ann. Code Civ. Proc. (1976 ed.) § 581a, subd. (c).) See also 6 Witkin, Cal. Procedure [(3d ed. 1985)] Proceedings Without Trial, § 87.) Section 581a was repealed in 1984. (Stats. 1984, ch. 1705, § 3, p. 6176.) The provisions of subdivisions (a) and (b) of the repealed statute were reenacted in sections 583.210 through 583.250. Subdivision (c) was not continued. Respecting subdivision (c), the Assembly Legislative Committee commented as follows: 'Subdivision

> (c) is not continued. The provision was not well understood, was unduly inflexible, and was subject to numerous implied exceptions in the case law. *Whether a default must be entered or judgment taken within a particular time is a matter for judicial determination pursuant to inherent authority*....' (Legis. Committee Com., 16 West's Ann. Code Civ. Proc., § 581a (1992 pocket supp.), p. 19.) The foregoing explanation is consistent with our conclusion that the trial court should determine on the basis of particular facts and circumstances of a case whether the plaintiff's time to bring the case to trial should run during all, or some, or none of any time in which the defendant is in default." (*Id.* at p. 70, fn. 6, italics added.) We agree with our appellate colleagues' analysis on this point, as we find it most consistent with the California Supreme Court's longstanding instruction, referenced in other authority above, that "the applicability of the [impracticability] exception must be judged 'in light of *all* the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves.' (Italics added.) [Citations.]" (*Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 553, 86 Cal.Rptr. 297, 468 P.2d 553.)

In so concluding, we recognize the principle that each individual defendant, including Elliott, " 'is entitled to have his right to dismissal determined as to himself alone.' [Citations.]" (*Brunzell Constr. Co. v. Wagner*, *supra*, 2 Cal.3d at p. 555, 86 Cal.Rptr. 297, 468 P.2d 553.) And in complex, multiparty proceedings such as the coordinated proceedings presently before us, " '[i]mpracticability' may vary not only as to different proceedings but as to different parties within the same proceeding. Each individual is entitled to have his [former] section 583 [now section 583.310] claim evaluated with respect to his own particular role in the litigation.' " (*Ibid.*) As our state's highest court made clear in a case like ours involving multiple defendant groups with divergent procedural and substantive objectives, the impracticability exception ultimately "involves a judgment of practical realities, and artificial distinctions between participating ***1131** litigants should be avoided." (*Ibid.*) It is the trial court, however, that is "in the most advantageous position to evaluate these diverse factual matters," (Bruns, supra, at p. 731) and, here, as we have concluded, the trial court appropriately did so. (Cf. ****756** *Brunzell Constr. Co. v. Wagner*, *supra*, at pp. 548, 555–556, 86 Cal.Rptr. 297, 468 P.2d 553 [reversing orders dismissing the action against certain defendants where the trial court relied on the sole fact that the causes of action against the instant defendants were legally severable from the causes of action involving the other defendants, and did not consider (as it should have) "whether, pragmatically, it was 'impracticable and futile' for plaintiff to proceed to trial against the instant defendants during the five-year period succeeding the filing of the complaint"].)

Lastly, the trial court found it unnecessary to consider other possible statutory grounds for excusing plaintiffs from the five-year deadline

in light of its finding of impracticability under section 583.340, subdivision (c). We reach the same conclusion. Accordingly, we affirm the court's ruling without addressing the parties' alternative arguments. (See *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 802, 71 Cal.Rptr.3d 885 ["On appeal, '[w]e do not review the trial court's reasoning, but rather its ruling.' [Citation.] Thus, we may affirm the trial court's ruling 'on any basis presented by the record' "].)

II. Motion To Stay Pending Resolution of Parallel Criminal Proceedings.

Elliott next challenges the trial court's refusal to stay these actions pending resolution of his federal criminal case in order to protect his Fifth Amendment privilege against self-incrimination. He acknowledges the trial court's decision to deny his motion to stay is reviewed for abuse of discretion and not subject to reversal unless it falls outside the bounds of reason. (See *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881–882, 94 Cal.Rptr.2d 505 (*Avant!*) [affirming the denial of an order to stay discovery pending the outcome of a related criminal case while noting that, under the deferential standard of review, "[w]e could ... disagree with the trial court's conclusion, but if the trial court's conclusion was a reasonable exercise of its discretion, we are not free to substitute our discretion for that of the trial court"].)

Several California courts have acknowledged under similar circumstances the wisdom of a Ninth Circuit case, *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322 (*Keating*). There, the court explained: "The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. [Citations.] 'In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence.' [Citation.] 'Nevertheless, a court may decide in its discretion to stay civil ***1132** proceedings ... "when the interests of justice seem[ ] to require such action." ' [Citation.]" (*Id.* at p. 324; accord, *Avant!*, *supra*, 79 Cal.App.4th at pp. 885–886, 94 Cal.Rptr.2d 505; *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 305–306, 104 Cal.Rptr.2d 525 (*Fuller*).)

Noting the decision whether to stay civil proceedings pending the outcome of a parallel criminal case should be made in light of the particular circumstances and interests at hand, the *Keating* court adopted the following test: "[T]he decisionmaker should consider 'the extent to which the defendant's fifth amendment rights are implicated.' [Citation.] In addition, the decisionmaker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the ****757** court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation." (*Keating*, *supra*, 45 F.3d at pp. 324–325; see also *Avant!*, *supra*, 79 Cal.App.4th at p. 882, 94 Cal.Rptr.2d 505 [" ' "The court, in

its sound discretion, must assess and balance the nature and substantiality of the injustices claimed on either side" ' "].)

The record reflects the trial court in this case acknowledged and carefully weighed the specific interests asserted by each side before denying Elliott's stay request, just as the law set forth above requires. In particular, the trial court found the interests of both plaintiffs and the court weighed against a stay in this case: "The first complaint in this consolidated action was filed over eight years ago, and the cases are approaching final resolution. The *Spalding* and *Celovsky* actions are presently set for trial [on dates fewer than two months away]. A stay would further delay resolution of these cases until at least some period of time *after* January 2018, a period of more than one year. Even assuming the trial of James Catledge proceeds in January 2018, the possibility of an appeal may further delay resolution of this case."

The trial court's concerns about delaying these proceedings for at least one more year were well founded: " '[C]onvenience of the courts is best served when motions to stay proceedings are discouraged.' " (*Avant!*, *supra*, 79 Cal.App.4th at p. 888, 94 Cal.Rptr.2d 505.) Indeed, California courts are "guided by the strong principle that any elapsed time other than that reasonably required for pleadings and discovery 'is unacceptable and should be eliminated.' (Cal. Stds. Jud. Admin., § 2.) [To that end, c]ourts must control the pace of litigation, reduce delay, and maintain a current docket so as to enable the just, expeditious, and efficient resolution of cases. (Gov. Code, § 68607; Cal. Stds. Jud. Admin., § 2.)" (*Fuller*, *supra*, 87 Cal.App.4th at pp. 306–307, 104 Cal.Rptr.2d 525; accord, ***1133** *Avant!*, *supra*, at p. 887, 94 Cal.Rptr.2d 505 [delay " 'would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party' "].)

In addition, the trial court noted the fact that Elliott's guilty plea in the parallel criminal case involving the same basic allegations in our cases "diminishes to a certain degree the likelihood that any testimony he might offer might further incriminate him.... If during discovery or at trial the Elliotts are presented with one or more questions that might implicate their Fifth Amendment privileges, they are free to make an objection, which this Court will rule on accordingly."

The trial court's reasoning was again proper. As plaintiffs note, when Elliott and the government executed the plea deal, both parties were aware of these civil matters. And one of the negotiated terms of the plea deal was the government's promise "not to file any additional charges against [Elliott] that could be filed as a result of the investigation that led to the captioned Indictment" so long as he complied with the deal's other terms. We agree with the trial court these circumstances helped to minimize any burden on Elliott from allowing these civil matters to go forward.

Moreover, "a party is not entitled to decide for himself or herself whether the privilege against self-incrimination may be invoked. ' "Rather, this question is for the court to decide after conducting '*a particularized inquiry, deciding, in connection with each specific area that the* ****758** *questioning party seeks to*

explore, whether or not the privilege is well founded.' [Citation.]" [Citations.]' [Citation.] This principle applies in both civil and criminal proceedings, and under both the federal and state Constitutions. [Citations.] Only after the party claiming the privilege objects with specificity to the information sought can the court make a determination about whether the privilege may be invoked." (*Fuller*, *supra*, 87 Cal.App.4th at p. 305, 104 Cal.Rptr.2d 525; see also *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 952, 154 Cal.Rptr.3d 443 ["Although there were concerns that the criminal defendants might seek to obtain information unavailable through criminal discovery by means of civil discovery ... none of these issues had yet manifested and the trial court could resolve them with appropriate orders if and when they arose"].) Based on these principles, the trial court properly found the better course of action was for Elliott's civil trials to go forward, with the understanding that he could object on Fifth Amendment grounds to any particular question or line of questioning, at which time the court would issue a ruling.

According to Elliott, the trial court's refusal to grant him a stay ended up costing him "large sums of money in damages and pre-judgment interest," ***1134** as he was "prevented ... from offering testimony at the civil trial in [his] defense." Of course, any loss he sustained under these judgments is irrelevant to our analysis given that it occurred after the challenged ruling and, thus, was not part of the trial court's reasoning. Moreover, it was Elliott's decision not to appear for trial in *Spalding* or *Celovsky*. As the trial court indicated in its written order, Elliott could have elected instead to testify in his own defense and to object to any particular question implicating his Fifth Amendment right. The trial court could then have ruled on his objection appropriately. However, " ' "the fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter. Justice is meted out in both civil and criminal litigation...." [Citation.]' " (*Avant!*, *supra*, 79 Cal.App.4th at p. 882, 94 Cal.Rptr.2d 505.) Here, the trial court found after balancing the appropriate factors that a stay of these proceedings would *not* best serve justice in the aggregate. [10] We find no grounds to overturn the court's decision.

10 Elliott faults the trial court for relying "heavily" on *Fuller*, *supra*, 87 Cal.App.4th 299, 104 Cal.Rptr.2d 525, because "*Fuller* and cases with similar holdings are strongly distinguishable ...." According to Elliott, the proper standard is instead the five-factor *Keating* test set forth above. (*Ante*, pp. 755–56.) However, whatever factual differences *Fuller* may have, the reviewing court there cites the five-factor *Keating* test and discusses three of the factors at length (to wit, the interests of both sides of the litigation and the court), which is exactly what the trial court did in this matter. (See *Fuller*, *supra*, at pp. 306–307, 308–310, 104 Cal.Rptr.2d 525.) To the extent Elliott is faulting the trial court for focusing on only three *Keating* factors in its written order, he directs us to no case, nor are we aware of one, that *requires* a trial court to explicitly address all five factors. Rather, the relevant case law uniformly

holds that, when deciding whether to grant or deny a stay, the court, in its sound discretion, " ' "must assess and balance the nature and substantiality of the injustices claimed on either side." ' " (*Avant!*, *supra*, 79 Cal.App.4th at p. 882, 94 Cal.Rptr.2d 505.) The trial court here did exactly that.

DISPOSITION

The judgments are affirmed. Costs on appeal are awarded to respondents.

Siggins, P. J., and Fujisaki, J., concurred.

All Citations

39 Cal.App.5th 1121, 252 Cal.Rptr.3d 746, 19 Cal. Daily Op. Serv. 9237, 2019 Daily Journal D.A.R. 8937

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RLA-3

RESPONDENT'S EXHIBIT

Commer. Connect, LLC v. Internet Corp.

United States District Court for the Western District of Kentucky, Louisville Division

January 26, 2016, Decided; January 26, 2016, Filed

CIVIL ACTION NO. 3:16CV-00012-JHM

Reporter
2016 U.S. Dist. LEXIS 8550 *; 2016 WL 319879

COMMERICAL CONNECT, LLC, PLAINTIFF v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, DEFENDANTS

Core Terms

gTLD, withdraw, preliminary injunction, merits, shop, application process, likelihood of success, auction

Counsel: [*1] Commercial Connect, LLC, Plaintiff, Pro se.

For Commercial Connect, LLC, Plaintiff: Paul R. Schurman, Jr., LEAD ATTORNEY, Avery & Schurman, PLC, Louisville, KY.

For Internet Corporation for Assigned Names and Numbers, Defendant: Michael W. Oyler, LEAD ATTORNEY, Reed Weitkamp Schell & Vice PLLC, Louisville, KY.

Judges: Joseph H. McKinley, Jr., Chief United States District Judge.

Opinion by: Joseph H. McKinley, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion by Plaintiff, Commercial Connect, LLC, for an injunction seeking to preliminarily enjoin Defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"), from proceeding with the January 27, 2016 auction of the gTLD ".shop" [DN 3] and a motion by Plaintiff's counsel to withdraw as attorney of record [DN 7]. The Court conducted a telephonic conference January 22, 2016. The Defendant, ICANN, filed a response to the motion for preliminary injunction [DN 10]. Fully briefed, these matters are ripe for decision.

I. MOTION TO WITHDRAW AS COUNSEL

On January 18, 2016, Paul R. Schurman, Jr., counsel for Plaintiff, filed a motion to permit him to withdraw as counsel of record pursuant to Local Rule 83.6. Counsel represents that since the filing **[*2]** of the complaint, Commercial Connect has expressed a desire to pursue a legal course of action with which counsel fundamentally disagrees. Counsel argues that this course of action has rendered continued representation unreasonably difficult. Specifically, counsel cites a 2012 release/waiver executed by Commercial Connect in connection with this case. At the telephonic conference on January 22, 2016, corporate representative Jeffrey Smith objected to the withdrawal of counsel. The Court provided Smith the opportunity to file a written objection to the motion to withdraw. On Monday, Smith informed the Court that he would not file any written objections.

"[The] Court has broad discretion to determine

whether and under what terms to allow an attorney to withdraw as counsel of record." *McGraw-Hill Global Education, LLC v. Griffin, 2015 U.S. Dist. LEXIS 167876, 2015 WL 9165965, *1 (W.D. Ky. Dec. 16, 2015)*. See also *Wiggins v. Daymar Colleges Grp., LLC, 2015 U.S. Dist. LEXIS 173575, 2015 WL 9480472, *2 (W.D. Ky. Dec. 29, 2015)*; *Brandon v. Blech, 560 F.3d 536 (6th Cir. 2009)*. Local Rule 83.6(b) provides that an attorney of record may withdraw from a case if "[t]he attorney files a motion, certifies the motion was served on the client, makes a showing of good cause, and the Court consents to the withdrawal on whatever terms the Court chooses to impose." After hearing the argument of counsel, the Court finds that Plaintiff's counsel has made an adequate showing of good cause for withdrawal. **[*3]** Good cause exists where an attorney's continued representation of a client could subject counsel to *Rule 11* sanctions. See *Model Rules of Professional Conduct 1.16(b)(3)*(withdrawal proper where client "insists upon pursuing an objective that the lawyer considers . . . imprudent."). Accordingly, counsel's motion to withdraw is granted. Plaintiff shall have thirty (30) days in which to secure replacement counsel. It is settled law that a corporation must appear in federal court through licensed counsel. *Rowland v. California Men's Colony, 506 U.S. 194, 202, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993)*; see also *State Auto Ins. Co. v. Thomas Landscaping & Constr., Inc., 494 Fed. Appx. 550, 2012 WL 3326310, *5 (6th Cir. 2012)*.

II. MOTION FOR PRELIMINARY INJUNCTION

A. BACKGROUND

Plaintiff, Commercial Connect, offers domain name registry services to the e-commerce market. In 2000, Commercial Connect began the application process to operate a top-level domain ("TLD") name registry, ".shop." Defendant, ICANN, is a California non-profit public benefit corporation tasked with administering the internet's Domain Name System ("DNS"). ICANN manages key aspects of internet infrastructure, including the coordination of domain names, internet protocol addresses, protocol port, and parameter numbers. Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS. According to Plaintiff, ICANN **[*4]** expanded the DNS from the original six gTLDs (".com"; ".org"; ".net"; ".edu"; ".gov"; and ".mil") to 22 gTLDs and approximately 250 country-code TLDs.

In 2000, ICANN opened an application process for the ".shop" gTLD. Commercial Connect submitted its application. According to Plaintiff, ICANN never approved nor rejected Commercial Connect's application. Instead, ICANN informed Commercial Connect that its original application would be held until the next round of consideration for the TLD applications to be held in 2004. Plaintiff alleges that ICANN did not consider Commercial Connect's application in 2004.

In 2012, ICANN launched the "New gTLD Program" which resulted in nearly 2,000 applications for new gTLDs, such as the ".shop" gTLD. Commercial Connect submitted its application to ICANN to operate the ".shop" gTLD and actively participated in the procedures set forth in the Application Guidebook. Pursuant to these procedures, Commercial Connect filed string confusion objections against 21 applications that Plaintiff claimed to be confusingly similar to its application for ".shop." Under the Application Guidelines, in the event that such a dispute could not be resolved through dispute **[*5]** resolution, the right to operate the gTLD in question proceeds to an ICANN-facilitated

auction. Plaintiff's 2012 Application, along with eight other applications for ".shop," is currently in a contention set that is set to be resolved in a January 27, 2016 auction.

Plaintiff filed suit on January 6, 2016, alleging breach of contract, fraudulent misrepresentation, and breach of the covenant of good faith and fair dealing. Plaintiff contends that due to ICANN's missteps in the application process, ICANN never awarded the promised registry-operator agreement to any of the applicants, instead designating the ".shop" gTLD rights be sold at auction on January 27, 2016. In an effort to prevent the auction, Plaintiff filed the motion for a preliminary injunction.

B. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is an extraordinary remedy that is generally used to preserve the status quo between the parties pending a final determination of the merits of the action. In determining whether to issue a preliminary injunction, the Court considers four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury **[*6]** without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2007)* (quoting *Tumblebus Inc. v. Cranmer, 399 F.3d 754, 760 (6th Cir. 2005)*). It is unnecessary for the Court to make findings regarding each factor if "fewer are dispositive of the issue." *In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985)* (citing *United States v. School Dist. of Ferndale, Mich., 577 F.2d 1339, 1352 (6th Cir. 1978)*); "The party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success." *McNeilly v. Land, 684 F.3d 611, 615 (6th Cir. 2012)*(internal quotation marks omitted).

C. DISCUSSION

The Court must first consider whether the Plaintiff has demonstrated a strong likelihood of success on the merits. *Tenke, 511 F.3d at 543*. To satisfy this burden, a plaintiff must show "more than a mere possibility of success" on the merits; he must raise "questions . . . so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." Id. (quotations omitted).

Plaintiff alleges three claims against ICANN for fraudulent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. First, Plaintiff claims that ICANN fraudulently misrepresented its gTLD application process in order **[*7]** to induce registry operators to partake in the process and then failed to honor its explicit and implicit obligations. Second, with respect to its breach of contract claim, Plaintiff argues that ICANN developed a contractual relationship with Commercial Connect whereby Commercial Connect paid valuable consideration to ICANN in exchange for the right to participate in ICANN's new gTLD Application Process. Plaintiff maintains that ICANN breached its contractual obligations set forth in its Application Guidebook when it failed to comply with the pre-published application process. Third, Plaintiff alleges that ICANN breached its implied covenant of good faith and fair dealing when it acted in a way that deprived Commercial Connect of the benefits of the agreement as set forth in the Applicant Guidebook, namely, a gTLD application, evaluation, and selection process founded on

the principles of fairness, transparency, and non-discrimination. Defendant maintains that Plaintiff failed to establish a likelihood of success on the merits because all of Plaintiff's claims are barred by the releases Plaintiff accepted in connection with both its 2012 and 2000 Applications.

"A release is a discharge **[*8]** of a claim or obligation and surrender of a claimant's right to prosecute a cause of action, statutory or otherwise." *PNC Bank, Nat. Ass'n v. Seminary Woods, LLC, 2015 U.S. Dist. LEXIS 86383, 2015 WL 4068380, *21 (W.D. Ky. July 2, 2015)*(citing *Humana, Inc. v. Blose, 247 S.W.3d 892, 896 (Ky. 2008)*). The interpretation of a release is governed by the same rules of construction as contracts. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., 174 S.W.3d 440, 448 (Ky. 2005)*. Under Kentucky law, "'[t]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court.'" *Dynalectric Co. v. Whittenberg Constr. Co., 2010 U.S. Dist. LEXIS 110136, 2010 WL 4062787 (W.D. Ky. Oct. 15, 2010)* (quoting *Frear v. P.T.A. Indus. Inc., 103 S.W.3d 99, 105 (Ky. 2003)*).

The record reflects that in pursuing its application for the ".shop" gTLD, Plaintiff accepted and agreed to several releases discharging ICANN from all liability arising out of Plaintiff's application and/or ICANN's evaluation of that application. Most recently, by submitting its 2012 Application, Plaintiff agreed to the terms and conditions set forth in Module 6 of the Application Guidebook:

> 6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or **[*9]** the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . .

(Oyler Decl. Ex. C, Module 6, ¶ 6.) The release is clear and comprehensive. All of Plaintiff's claims arise out of ICANN's review of Plaintiff's 2012 Application and the decision by ICANN to not recommend the approval of the applicant's gTLD application. Accordingly, Plaintiff's claims appear to be barred by the release set forth in the 2012 Application. Plaintiff has neither challenged the language of the release, nor made any allegations that Commercial Connect was fraudulently induced into executing the release. In fact, Plaintiff currently lacks counsel to address the implications of the release on Plaintiff's claims.

Additionally, in as much as Plaintiff asserts **[*10]** claims based on its 2000 Application, Plaintiff's claims also appear to be barred by the terms and conditions of both the 2000 Application and the 2012 Application. Specifically, the 2000 Application provided that the applicant agreed to "release[] and forever discharge[] ICANN . . . from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the

establishment or failure to establish a new TLD." (Oyler Decl. Ex. A, 2000 Application, ¶B14.2.) Additionally, upon Plaintiff's request that ICANN apply a credit to Plaintiff's 2012 Application, Plaintiff confirmed that it "has no legal claims arising from the 2000 proof-of-concept process." (Oyler Decl. Ex. B.)

For these reasons, the Court finds that Plaintiff has not demonstrated a likelihood of success on the merits of its claims. Plaintiff's failure to meet its burden on this factor is dispositive. Even if the Court were to find in favor of Plaintiff on the remaining factors, such findings would not overcome Plaintiff's failure to show a likelihood of success on the merits. See *Gonzales v. National Bd. of Med. Exam'rs, 225 F.3d 620, 625 (6th Cir. 2000)* (finding it unnecessary to analyze the other factors because "a **[*11]** finding that there is simply no likelihood of success on the merits is usually fatal"); see also *Mich. State AFL—CIO v. Miller, 103 F.3d 1240, 1249 (6th Cir. 1997)* ("[W]hile, as a general matter, none of [the] four factors are given controlling weight, a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed."). Accordingly, Plaintiff's motion for preliminary injunction is denied.

III. CONCLUSION

IT IS HEREBY ORDERED that the motion by Paul R. Schurman, Jr., to withdraw as counsel of record on behalf of Commercial Connect, LLC [DN 7] is **GRANTED**. Plaintiff shall have thirty (30) days in which to secure replacement counsel.

IT IS FURTHER ORDERED that the motion by Plaintiff for preliminary injunction [DN 3] is **DENIED**.

/s/ Joseph H. McKinley, Jr.

Joseph H. McKinley, Jr., Chief Judge

R

United States District Court

January 26, 2016

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RLA-4

RESPONDENT'S EXHIBIT

2017 WL 5956975 (Cal.Super.) (Trial Order)
Superior Court of California.
Los Angeles County

DOTCONNECT AFRICA TRUST,
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.

No. BC607494.
August 9, 2017.

Order Re: ICANN's Motion for Summary Judgment

Howard L. Halm, Judge.

Department 53 Law and Motion Rulings

***1** Tentative rulings are sometimes, but not always, posted. The purpose of posting a tentative ruling is to to help focus the argument. The posting of a tentative ruling is not an invitation for the filing of additional papers shortly before the hearing.

Defendant Internet Corporation for Assigned Names and Numbers' motion for summary judgment is **GRANTED IN PART** AND **DENIED IN PART.**

BACKGROUND

This action involves the award and delegation of the generic top-level domain name ("gTLD") [1] ".Africa." Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet's domain name system. In 2012, ICANN launched the "New gTLD program," in which it invited interested parties to apply to be designated the operator of their chosen gTLD. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses.

1 Examples of gTLDs are .com, .gov, and .org

In March 2012, Plaintiff DotConnectAfrica Trust ("DCA") applied to ICANN for the delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC ("ZACR") also applied to be the operator of .Africa. ZACR is a South African non-profit company which was formed to promote open standards and systems in computer hardware and software.

The competition for the .Africa gTLD came down to DCA and ZACR. In 2013, ICANN's Government Advisory Committee ("GAC") issued advice that DCA's application should not proceed due to issues with regional endorsements. ICANN rejected DCA's application based on the GAC advice, while ZACR's application continued. Thereafter, DCA challenged ICANN's decision and filed a request for review by an Independent Review Process ("IRP") Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

On July 9, 2015, the IRP Panel issued a "Final Declaration" finding in favor of DCA and concluding that ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." In July 2015, ICANN placed DCA's application back in the geographic names evaluation phase. ICANN later concluded that DCA's application was insufficient to proceed past this phase.

In January 2016, after learning that ICANN would reject its application, DCA filed suit against ICANN. ICANN then removed the case to the Central District of California. While this case was pending before the district court, DCA moved for and was granted a temporary restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the preliminary injunction order which ICANN joined. The motion for reconsideration was denied. On October 19, 2016, the district court remanded the case to this Court due to lack of jurisdiction.

***2** DCA asserts causes of action for: (1) breach of contract; (2) intentional misrepresentation; (2) negligent misrepresentation; (4) fraud and conspiracy to commit fraud; (5) unfair competition (violation of Cal. Bus. & Prof. Code § 17200); (6) negligence; (7) intentional interference with contract; (8) confirmation of IRP award; (9) declaratory relief; (10) declaratory relief; and (11) declaratory relief.

ICANN now moves for summary judgment, arguing that the entire action is barred by a covenant not to sue and judicial estoppel. DCA opposes.

EVIDENTIARY OBJECTIONS

DCA's evidentiary objections are overruled.

DISCUSSION

A. *Legal Standard*

"[A] motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (CCP §437c (c).) A defendant moving for summary judgment must show either: "that one or more elements of the cause of action … cannot be established"; or "that there is a complete defense to that cause of action." (CCP § 437c(p)(2).) To prevail, the defendant need not "conclusively negate" a required element of the plaintiff's claim; "all that is required is a showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Wall St. Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176 (internal quotations omitted).)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the moving party carries this burden, the burden shifts to the opposing party to make a prima facie showing that a triable issue of material fact exists. (*Id.*)

B. *Covenant Not to Sue*

ICANN argues that the entire action is barred because DCA acknowledged and accepted a covenant not to sue and release (the "Covenant") which bars all the claims in the FAC because they "arise out of, are based upon, or are in [some] way related to, any action, or failure to act, by ICANN" in connection with ICANN's review, investigation or verification of, or its decision not to, approve or recommend DCA's application. DCA argues in opposition that the Covenant is unenforceable under Cal. Civ. Code § 1668 and because it is both procedurally and substantively unconscionable. The Court considers each of these arguments in turn.

a. *Cal. Civ. Code § 1668*

Cal. Civ. Code § 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." ICANN argues that this section does not apply to the Covenant because ICANN is not exempt from responsibility under the Covenant: instead, a complaining party may use alternative dispute resolution mechanisms, of which ICANN used two, winning one. (SUF 18). ICANN further argues that it did not cause a "willful injury" to DCA in its denial of DCA's application.

DCA, on the other hand, argues that the alternative dispute resolution mechanisms provided for in alternative to judicial remedies by ICANN's bylaws are limited to determining whether ICANN "acted consistently with the provisions of the Articles of Incorporation and Bylaws." (SUF 70.) DCA further argues that, by excluding "any and all claims" arising out of ICANN's processing of applications, it necessarily bars claims for fraud or intentional injury arising out of the process.

***3** The Court finds that acts of fraud or those that cause "willful injury" do not arise out of ICANN's processing of applications in that they are extra-procedural: they are not related to the processing itself, but are acts that take ICANN outside of the process governed by its bylaws. Moreover, the Court finds that claims reviewable in the alternative mechanisms provided for in the bylaws do not exclude fraud claims, as committing fraud and causing willful injury certainly is not consistent with ICANN's Articles of Incorporation and Bylaws. Therefore, the Court does not find the Covenant unenforceable as it does not exclude claims for fraud or acts causing willful injury. What this means in this case, therefore, is that any claims that do not lie in fraud or willful injury are barred by the Covenant. Those that do, are not. The first cause of action for breach of contract, sixth cause of action for negligence, eighth cause of action for confirmation of IRP reward, ninth cause of action for declaratory relief, and eleventh cause of action for declaratory relief, are thus barred by the Covenant. The second, third, fourth, fifth, seventh, and tenth causes of action, all of which relate to fraudulent actions or those causing willful injury, are not.

ICANN cites *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers* and states that the district court there found the Covenant was enforceable. (2016 WL 6966329 * 1 (CD Cal. Nov. 28, 2016.) The court there stated: "Because the covenant not to sue only applies to claim related to ICANN's processing and consideration of a gTLD application, it is not clear that such a situation would ever create a possibility for ICANN to engage in the type of intentional conduct to which [Section 1668] applies." (*Id.* at *4.) However, upon further review and reflection, the Court reads that, in that case, the plaintiff was not making any claims for fraud, willful injury, or gross negligence. (*Id.*) Indeed, the court later stated: *"[I]n the circumstances alleged in the FAC*, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue." (*Id.*) The court does not, therefore, consider a situation such as the one here, where DCA in fact alleges fraudulent conduct. Accordingly, the case is inapposite to the facts at bar.

b. *Unconscionability*

DCA also argues that the Covenant should not apply because it is procedurally and substantively unconscionable. Procedural unconscionability concerns the manner in which the contract was negotiated and the parties' circumstances at that time. It focuses on the factors of oppression or surprise. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) Substantive unconscionability focuses on the terms of the agreement and whether those terms

are "overly harsh or one-sided." (*See Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.)

> In general, California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion.... In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract. The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney....
>
> The California Supreme Court has defined the term "contract of adhesion" to mean (1) a standardized contract (2) imposed and drafted by the party of superior bargaining strength (3) that provides the subscribing party only the opportunity to adhere to the contract or reject it.

(*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App. 4th 1332, 1348-1350) (internal quotations and citations omitted.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to 'shock the conscience.'" (*Carmona, supra*, 226 Cal.App.4th at 85 (quotations and citations omitted).) "The paramount consideration in assessing [substantive] unconscionability is mutuality." (*Id.* (brackets in original).)

***4** DCA argues that the Covenant was unconscionable because the Guidebook containing it was not negotiated, allows ICANN to change the terms of the application and alternative dispute resolution process, and is one-sided in that it does not require ICANN to waive court remedies.

In this regard, the Court agrees with the analysis in *Ruby Glenn.* The court there found that "even if the [Covenant] is a contract of adhesion, the nature of the relationship between ICANN and [the plaintiff] the sophistication of [the plaintiff], the stakes involved in the gTLD application process, and the fact that the [Guidebook] is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period, militates against a conclusion that

the [Covenant] is procedurally unconscionable." (2016 WL 6966329 at *5) (internal quotations omitted.) Furthermore, ICANN "is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation." (*Id.*) (internal quotations omitted.) Similarly, DCA, like the plaintiff in *Ruby Glenn* "is a sophisticated entity that paid a $185,000 fee to participate in the application process." (*Id.*)

Moreover, as the court in *Ruby Glenn* points out, "[w]ithout the [Covenant], any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the [Covenant]." (*Id.*) To the extent, therefore, that the Court finds above that the Covenant is not barred by Section 1668 as to claims not lying in fraud or for "willful injury," so too does the Court find that the Covenant is not barred as to those claims for unconscionability.

C. *Judicial Estoppel*

ICANN also argues that the FAC is barred in its entirety because DCA argued in the IRP process that the IRP decision was binding because it was the sole forum to challenge ICANN's actions as applicants waive their right to sue in the judicial system. (SUF 41.) ICANN contends that, by making this argument in the IRP forum, DCA is now estopped from holding a contrary position, which is that the IRP was not the sole forum to seek independent review.

Judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. Cty. of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) "Judicial estoppel is an extraordinary remedy that should be applied with caution." (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 85-86.) Even where all elements are present, its application is discretionary. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.* (2005) 36 Cal.4th 412, 422.)

DCA, in opposition, argues that the position it took before the IRP is not "totally inconsistent" with its position now. It states that it never took the position that the waiver was valid or enforceable, but that *if* the waiver was enforceable, IRP must "provide a final and binding resolution of disputes between ICANN and persons affected by its decisions. (AMF 122.) Thus, DCA argues, it has consistently maintained that it is wrong for ICANN to be "effectively judgment proof (AMF 122) and that DCA should be able to seek "final and binding" adjudication against ICANN (*Id.*)

***5** The evidence is unclear whether DCA ever voiced its position that the waiver was void and unenforceable. Neither party points to direct evidence in the record of DCA arguing that the waiver was enforceable or otherwise. The portion of DCA's response to the panel's questions merely states that the IRP decision must be binding for ICANN not to be "effectively judgment-proof."(*Id.*) DCA does not qualify its position by arguing the decision must be binding only if the Covenant is enforceable. (*See id.*)

While ICANN argues there "is no evidence" DCA's position was taken due to mistake or ignorance, DCA argues the burden is on ICANN to produce evidence of intent or bad faith. Indeed, *Kelsey v. Waste Management of Alameda County* held that because the moving party there "failed to provide evidence negating the possibility that [opposing party's] failure … was the result of ignorance or mistake, it [had] not met its burden on summary judgment of showing that there is a complete defense to" the causes of action. ((1999) 76 Cal.App. 4th 590, 599.) Given the caution required in applying the "extraordinary remedy" of judicial estoppel, the Court, in its discretion, denies ICANN's request to apply it here.

D. *Fraud or Willful Injury*

The only remaining question, therefore, is whether there is a triable question of material fact regarding whether ICANN committed fraud or caused "willful injury" in denying DCA's application. DCA argues that ICANN committed fraud and caused "willful injury" by intentionally rejecting DCA's application based upon pretext and by not telling DCA that it could ignore the IRP findings. DCA states that, had it known ICANN would choose ZACR's application regardless of what DCA did, and the fact that the IRP process "had no teeth," it would not have gone through the lengthy and expensive process of applying. (AMF 77, 78 and AMF 24.)

The Court finds DCA raises a triable question of material fact as to whether ICANN committed fraud by indicating it would follow its Bylaws and Articles of Incorporation and the IRP's decision in processing application. DCA points to evidence that ICANN subjected DCA to an extra set of questioning regarding its endorsements, and denied its application based on the pretextual reason that its responses to this questioning were insufficient. (Bekele Decl. ¶ 22-4, Exs. 10-12.) The pretext, DCA argues, is evident, when viewed in light of ICANN continuing to process ZACR's application despite its lacking endorsements in order to meet ICANN's requirements. (AMF 82-83.) DCA also submits evidence that ICANN ghostwrote an endorsement for ZACR. (AMF 84.) The Court cannot, therefore, find as a matter of law that ICANN did not defraud DCA by stating on the one hand it would follow its Bylaws and Articles of Incorporation in processing DCA's application, while on the other hand giving preference to ZACR's application throughout the process.

CONCLUSION

For the foregoing reasons, ICANN's motion for summary judgment is denied as to the second, third, fourth, fifth, and tenth causes of action. The motion is granted as to the remaining causes of action.

DCA to provide notice of this Order.

DATED: August 9, 2017

<<signature>>

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RLA-5

RESPONDENT'S EXHIBIT

398 F.3d 1098
United States Court of Appeals,
Ninth Circuit.

Bill LOCKYER, Attorney General of the State of California; The State of California, ex rel, Plaintiffs–Appellants,
and
Department of Water Resources, Plaintiff,
v.
MIRANT CORPORATION; Mirant Americas, Inc.; Mirant California Investments, Inc.; Mirant California, L.L.C.; Mirant Americas Energy Marketing LP; Mirant Delta, L.L.C.; Mirant Potrero, L.L.C., Defendants–Appellees.

No. 04–15024.
|
Argued and Submitted Sept. 14, 2004.
|
Filed Feb. 10, 2005.

Synopsis
Background: California Attorney General's brought action against Chapter 11 debtor under Clayton Act, seeking divestiture of three electrical generating plants. The United States District Court for the Northern District of California, Vaughn R. Walker, Chief Judge, granted a stay pending the resolution of the Chapter 11 case, and Attorney General appealed.

Holdings: The Court of Appeals, William A. Fletcher, Circuit Judge, held that:

order constituted a final order under *Moses H. Cone* doctrine;

district court had jurisdiction to decide whether Bankruptcy Code's automatic stay applied;

suit came within the exception to the automatic stay for "police or regulatory power"; and

Landis stay was not justified.

Vacated and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1100** Thomas Greene, Ken Alex, Damon M. Connolly, Paul Stein, Catherine A. Jackson, and Tamar Pachter (argued), Office of the California Attorney General, San Francisco, CA, for the plaintiffs-appellants.

Bryan A. Merryman, Robert P. Pongetti, and John A. Sturgeon, White & Case, Los Angeles, CA; Robert B. Pringle (argued), Thelen Reid & Priest, San Francisco, CA, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. No. CV–02–01787–VRW.

Before: William A. FLETCHER, FISHER, Circuit Judges, and WINMILL,* District Judge.

* The Honorable B. Lynn Winmill, Chief United States District Judge, District of Idaho, sitting by designation.

Opinion

WILLIAM A. FLETCHER, Circuit Judge:

The Attorney General of California, Bill Lockyer, sues under section 16 of the Clayton Act, 15 U.S.C. § 26, seeking divestiture by the Mirant defendants (collectively, "Mirant") of three electrical generating plants. The district court granted a stay pursuant to *Landis v. North American Co.,* 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936), pending the resolution of Mirant's Chapter 11 petitions in a bankruptcy court in Texas. We hold that the district court had jurisdiction to determine whether the automatic stay of the Texas bankruptcy court applied to the Attorney General's suit, and that the Attorney General's suit comes within the "police or regulatory power" exception of 11 U.S.C. § 362(b)(4) to the automatic stay. We further hold, in the circumstances of this case, that a *Landis* stay is not justified. Accordingly, we vacate the stay and remand to allow the Attorney General's suit to proceed on the merits.

I. Background

In 1996, California passed Assembly Bill 1890, which required large investor-owned utilities to divest certain electrical generating plants as part of the state's deregulation of its electrical generation industry. Pursuant to this mandatory divestiture, Pacific Gas & Electric in 1999 sold its Pittsburg and Contra Costa Power Plants in Contra Costa County, as well as its Potrero Power Plant in San Francisco, to Mirant Delta, LLC and Mirant Potrero, LLC. The Attorney General alleges that the combined generating capacity of these three plants amounts to approximately 44 percent of the northern California wholesale spot electricity market.

On April 15, 2002, the Attorney General sued Mirant in federal district court, alleging that Mirant's ownership of the plants gives it the incentive and ability to exercise market power in violation of section 7 of the Clayton Act. *See* 15 U.S.C. § 18. The Attorney General sought equitable relief and damages under both the Clayton Act and California Business & Professions Code § 17204. The district court dismissed the claims for violation of California Business & Professions Code § 17204 and for damages under the Clayton Act, but found that the allegations in the complaint were sufficient to state a claim for injunctive relief under section 16 of the Clayton Act. *See* 15 U.S.C. § 26.

On July 14 and July 15, 2003, Mirant filed voluntary petitions to reorganize under ***1101** Chapter 11 in the United States Bankruptcy Court for the Northern District of Texas. Subsequently, Mirant moved in the bankruptcy court for an order modifying the automatic stay to allow three suits, including two brought by the Attorney General (both separate from this suit), to proceed in the Ninth Circuit, where they were then pending on appeal. [1] The bankruptcy court granted the motion, but did not determine whether the appeals were, in fact, subject to the automatic stay. Instead, it granted

the motion and modified the stay only "to the extent necessary and applicable."

[1] None of these suits was related to the present suit, although all involved issues of energy regulation. The Attorney General's two suits concerned, respectively, Mirant's sale of "ancillary services" (a type of wholesale energy capacity), and the question of whether Mirant had properly filed its wholesale electricity rates with the Federal Energy Regulatory Commission. These cases were consolidated, and the Ninth Circuit affirmed their dismissal on preemption grounds. *See California v. Transcanada Power,* 110 Fed. Appx. 839 (9th Cir.2004) (unpublished disposition). The third suit concerned allegations by the Public Utility District of Snohomish County that Mirant and other entities manipulated wholesale energy markets. It was also dismissed. *See Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.,* 384 F.3d 756 (9th Cir.2004).

On the same day that Mirant moved in the bankruptcy court to allow the Ninth Circuit appeals to proceed, it also filed a "Suggestion of Stay" in district court in this case, advising the court to "take ... notice that ... actions taken in violation of the [automatic] stay are void" and may result in the "imposition of sanctions by the Bankruptcy Court." The "Suggestion of Stay" did not explicitly argue that the Attorney General's Clayton Act suit was subject to the automatic stay, nor did it request that the district court determine the automatic stay's applicability.

The district court invited a noticed motion in which the parties could present their positions on whether the automatic stay was applicable. The Attorney General moved for a determination that the suit was exempt from the automatic stay because it sought to enforce California's "police or regulatory power" within the meaning of 11 U.S.C. § 362(b)(4). Without taking a position on the applicability of § 362(b)(4), Mirant urged the district court to exercise its discretionary power to stay the action. The district court declined to decide whether the Attorney General's suit came within § 362(b)(4). Citing *Mediterranean Enterprises, Inc. v. Ssangyong Corp.,* 708 F.2d 1458 (9th Cir.1983), it granted the discretionary stay requested by Mirant.

The court relied on three factors in granting the stay. First, it found that its jurisdiction to determine the scope of the "police or regulatory power" exception under § 362(b)(4), and hence the applicability of the automatic stay, was doubtful under *Celotex Corp. v. Edwards,* 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), and *In re Gruntz,* 202 F.3d 1074 (9th Cir.2000) (en banc). Second, it found that the applicability of § 362(b)(4) raised unsettled questions of law. Third, it found that the stay was "efficient for [its] docket," and that it was "the fair and practical course for the parties." The Attorney General timely appealed. We now vacate and remand.

II. Our Jurisdiction to Review the Stay

Before considering the merits, we must first decide whether we have jurisdiction under 28

U.S.C. § 1291 to review the district court's stay. We hold that we have jurisdiction over the appeal because the order puts the Attorney General "effectively out of court" within the meaning of *Moses H. Cone Memorial Hospital v. Mercury* ***1102** *Construction Corp.,* 460 U.S. 1, 9, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), and *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713, 715 n. 2, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962), and because the stay is an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

A. "Effectively Out of Court"

We first hold that the stay order in the district court is final under what has come to be known as the *Moses H. Cone* doctrine. In *Moses H. Cone,* a hospital had sued in state court seeking a declaration that a contract to which it was a party did not confer a right to arbitration. The other party to the contract then filed suit in federal district court seeking an order compelling arbitration. The hospital successfully moved for a stay in federal court pending resolution of the arbitration question in state court. Relying on its earlier decision in *Idlewild,* the Supreme Court held that the district court's stay order was appealable under § 1291. As a result of the stay, there would be "no further litigation in the federal forum" and the state's judgment on the arbitration issue would be res judicata, leaving the contractor "effectively out of court." *Moses H. Cone,* 460 U.S. at 9–10, 103 S.Ct. 927.

In *Idlewild,* plaintiff Idlewild Liquor had sought a declaratory judgment in federal district court that the New York Alcoholic Beverage Law was unconstitutional. Rather than convene a three-judge district court, the one-judge court stayed the action under *Railroad Commission v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), to give the New York state courts the opportunity to address the issue. The Supreme Court held that the stay order was appealable, even though it was entirely possible that Idlewild Liquor would be able to return to federal district court after the state court dealt with state-law questions. *Moses H. Cone,* 460 U.S. at 10, 103 S.Ct. 927. Even in that circumstance, where the case might well come back to federal district court, Idlewild Liquor was "effectively out of court" for purposes of appealability of the stay order. *Idlewild,* 370 U.S. at 715 n. 2, 82 S.Ct. 1294.

The stay in this case is much like the stay in *Idlewild.* In dealing with Mirant's Chapter 11 petitions, the bankruptcy court may well order divestiture of the three power plants as part of a reorganization plan under Chapter 11. If Mirant's Chapter 11 proceeding in the bankruptcy court results in divestiture of the plants, the Attorney General's Clayton Act case in the district court will be mooted, just as Idlewild's federal constitutional claims in the district court would have been mooted if the New York state courts had granted relief on state-law grounds. *See Terra Nova Ins. Co. v. 900 Bar, Inc.,* 887 F.2d 1213, 1219–21 (3d Cir.1989) (concluding that the danger that a stay would render a claim moot was equivalent to res judicata for the purposes of applying the *Moses H. Cone* test).

Because the bankruptcy court has not yet determined whether Mirant's plants will be divested as a result of the reorganization, we cannot say with certainty that the Attorney General's district court suit will be moot. However, as *Idlewild* establishes, absolute certainty is not required in order to put a party "effectively out of court" within the meaning of the *Moses H. Cone* doctrine. *See United States v. General Dynamics Corp.,* 828 F.2d 1356, 1361–62 (9th Cir.1987) (where a possibility existed that application of the collateral estoppel doctrine might result in dismissal, the stay was appealable under *Moses H. Cone*). Although the mooting of Attorney General Lockyer's Clayton Act claim is not inevitable, both parties and ***1103** the district court appear to view it as a substantial possibility. Indeed, the district court explicitly anticipated the possibility of mootness, citing the potential waste of "significant judicial and party resources" if the bankruptcy proceedings mooted the plaintiff's claims before the district court rendered judgment. This case is thus distinguishable from situations in which the district court clearly foresees and intends that proceedings will resume after the stay has expired. *See Cofab, Inc. v. Philadelphia Joint Bd.,* 141 F.3d 105, 109 (3d Cir.1998) (*Moses H. Cone* did not apply where district court had no intention to " 'deep six' the suit").

If the Attorney General's Clayton Act claim comes within the § 362(b)(4) exception to the automatic stay, no legal barrier exists, apart from the district court's stay order itself, to his pursuit of his suit in the district court in California. In such circumstances, the stay puts him "effectively out of court," and we have appellate jurisdiction to determine the propriety of the stay.

B. Collateral Order

Even if the stay did not constitute a final order under *Moses H. Cone,* we would have jurisdiction under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), under which certain collateral orders of the district court may be immediately appealed. To be included among "the small class of decisions excepted from the final-judgment rule by *Cohen,*" an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (internal quotation marks omitted; bracketed numbers added).

In *Moses H. Cone,* the Supreme Court held in the alternative that the district court's stay was an appealable collateral order under *Cohen.* 460 U.S. at 11–12, 103 S.Ct. 927. The Court concluded that the first criterion was satisfied because, although the stay was technically open to reconsideration, "there is no basis to suppose that the District Judge contemplated any reconsideration of the decision to defer to the parallel state-court suit." *Id.* at 12–13, 103 S.Ct. 927. It also concluded that the second and third *Cohen* criteria were met, since "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits" and, because of the

possibility of res judicata, "this order would be entirely unreviewable if not appealed now." *Id.* at 12, 103 S.Ct. 927. *See also General Dynamics,* 828 F.2d at 1360 n. 4 ("Where a district court enters a stay that can effectively end the litigation in that court, the court's ability to lift the stay if it chooses would seem to be irrelevant.")

We hold that the *Cohen* criteria are also satisfied here. The first criterion is satisfied because, even though the stay order could theoretically be modified, the district court did not impose a time limit on the stay or note circumstances that might result in its modification. *See Moses H. Cone,* 460 U.S. at 13, 103 S.Ct. 927 (stay order was conclusive where there was "no basis to suppose that the District Judge contemplated any reconsideration of his decision to defer to the parallel ... suit"); *Burns v. Watler,* 931 F.2d 140, 144 (1st Cir.1991) (even where stay was nominally modifiable, there was "no indication in the record" that the district court intended to take further action). The second criterion is satisfied because the district court's central justification for issuing the stay was the desirability of avoiding two analytically distinct determinations: the applicability of the "police or regulatory power" exception ***1104** to § 362(b)(4) and the legality of Mirant's ownership of the three power plants. Finally, the third criterion is satisfied. Either the bankruptcy proceedings will moot the Clayton Act claim, in which case the district court suit will be dismissed; or the bankruptcy proceedings will *not* moot the Clayton Act claim, in which case the district court will lift the stay on its own and proceed with the suit. In either event, the propriety of the stay will be unreviewable on appeal. *See Marchetti v. Bitterolf,* 968 F.2d 963, 966 (9th Cir.1992) (unreviewability factor was met where it was likely that case would be mooted). We therefore conclude that the stay is reviewable under *Cohen* as a collateral order.

C. Aggrieved by the Stay

Mirant argues that, even if the stay order is final under *Moses H. Cone* or a reviewable collateral order under *Cohen,* the Attorney General cannot appeal because he is not "aggrieved" by the stay. In *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), the Court held that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." (Citations omitted.) Mirant contends that the Attorney General is not aggrieved because either he will receive the divestiture remedy he seeks from the bankruptcy court; or, if the bankruptcy court does not order divestiture and the district court stay is lifted, he will be allowed to seek divestiture in his Clayton Act litigation in the district court. Mirant argues that the two outcomes—divestiture pursuant to the bankruptcy proceedings and divestiture ordered by the district court—are equivalent.

Mirant's argument fails to recognize two things. First, while it is possible that Mirant will eventually be ordered to divest itself of the three power plants, the sequence of events envisioned by Mirant may entail considerable delay. This is particularly so if the bankruptcy court does not order divestiture and the Attorney General must await the conclusion

of the bankruptcy proceedings before being allowed to resume his Clayton Act suit in the district court. If Mirant's ownership of the three power plants in fact violates the Clayton Act, northern California purchasers of electricity will have been unnecessarily injured by the delay resulting from the stay.

Second, Mirant's argument fails to recognize that a divestiture order to cure a Clayton Act violation is different from a divestiture order entered pursuant to a bankruptcy reorganization. The Clayton Act could possibly be raised as an issue in the Texas bankruptcy proceeding, for any confirmable reorganization plan must have been "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). *See also Pacific Gas & Electric Co. v. California,* 350 F.3d 932 (9th Cir.2003) (addressing preemption of non-bankruptcy laws under 11 U.S.C. §§ 1123(a)(5) and 1142(a)); *In re Texas Extrusion Corp.,* 844 F.2d 1142, 1157–58 (5th Cir.1988) (opponents to reorganization plan contended that the plan violated the federal antitrust laws; court declined to reach the issue on the ground that the objection had been raised too late). But there is no guarantee (or even likelihood) that the bankruptcy court will consider the effect of the Clayton Act; nor is there a guarantee, even if it does, that it will entertain briefing or hold hearings, or that it will justify or explain the reorganization plan in terms of the Clayton Act. If divestiture of the three power plants is ordered by the bankruptcy court on some basis other than the Clayton Act, the Attorney General will not have received, in the relevant legal sense of the term, "all that he has sought." *Roper,* 445 U.S. at 333, 100 S.Ct. 1166. That the alleged Clayton Act ***1105** violation by Mirant might incidentally be cured in the course of the bankruptcy proceedings is not equivalent to a binding legal determination by the district court that Mirant violated the Clayton Act and a divestiture order by that court. The difference is more than theoretical. For example, without a binding decision on the merits of the Attorney General's Clayton Act claim, a single entity could acquire the three plants from Mirant. The Attorney General would then be required to bring another Clayton Act suit, now against the new entity instead of Mirant.

Regardless of how events ultimately transpire, the stay order has deprived the Attorney General—at least temporarily and perhaps permanently—of the legal remedy he seeks against Mirant. He has thus been aggrieved within the meaning of *Roper,* and we have jurisdiction over this appeal.

III. The District Court's *Landis* Stay

We review a district court's stay order for abuse of discretion, but this standard is "somewhat less deferential" than the abuse of discretion standard used in other contexts. *Yong v. INS,* 208 F.3d 1116, 1119 (9th Cir.2000); *Intel Corp. v. Advanced Micro Devices, Inc.,* 12 F.3d 908, 912 (9th Cir.1993). A district court abuses its discretion if it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

The district court gave three reasons for granting a *Landis* stay. First, it believed that its jurisdiction to determine whether the

automatic stay applied to the suit before it was questionable. Second, it believed that the applicability of "police or regulatory power" exception to the automatic stay under 11 U.S.C. § 362(b)(4) was also questionable. Third, in light of the foregoing, it held that granting the stay was "efficient for [its] docket and is the fair and practical course for the parties." We consider these reasons in turn.

A. Jurisdiction to Determine the Applicability of the Automatic Stay

Relying on *Celotex Corp. v. Edwards,* 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), and *In re Gruntz,* 202 F.3d 1074 (9th Cir.2000) (en banc), the district court expressed concern that it did not have jurisdiction to determine the applicability of the automatic stay. The district court's concern was unfounded.

In *Celotex,* the bankruptcy court issued a § 105 injunction preventing plaintiffs who had won a district court suit against the debtor from executing on a supersedeas bond that would have satisfied their judgment. *See* 11 U.S.C. § 105(a). The district court allowed plaintiffs to execute on the bond despite the bankruptcy court's § 105 injunction, on the ground that the judgment had been affirmed on appeal and the bond had become due before the bankruptcy filing. The decision of the district court was appealed to the Fifth Circuit, which affirmed. The Supreme Court reversed. Without deciding whether the § 105 injunction was properly issued, the Court held that the district court acted improperly in disregarding it. If plaintiffs wanted relief from the injunction, wrote the Court, they should have sought modification in the bankruptcy court that issued the injunction. 514 U.S. at 313, 115 S.Ct. 1493.

In *Gruntz,* Gruntz had twice been convicted in state court of failure to pay child support. He filed for bankruptcy prior to sentencing in the first criminal proceeding, and prior to the institution of the second criminal proceeding. He brought an adversary proceeding in bankruptcy court ***1106** seeking a declaration that the state criminal proceedings violated the automatic stay. The bankruptcy court denied relief, holding that it was collaterally estopped by the state court's decision that the automatic stay did not apply. On appeal, we held that the state court has the power to decide whether the automatic stay applies to its proceedings. 202 F.3d at 1087 ("Thus, unless a specific § 105 injunction applies, state trial courts need not seek bankruptcy court approval before commencing criminal proceedings."). But a state court makes such a decision at its peril, for the bankruptcy court is not precluded by the state court's decision. If the bankruptcy court later decides that the state court was incorrect, the state court proceedings in violation of the stay are void. *See, e.g., In re Schwartz,* 954 F.2d 569 (9th Cir.1992); *In re Shamblin,* 890 F.2d 123 (9th Cir.1989). On the other hand, if the state court is correct in deciding that the stay does not apply, the state court proceedings are not void. *Gruntz,* 202 F.3d at 1087. We ultimately affirmed the result reached by the bankruptcy court based on our determination, independent of the state court's decision, that the state criminal proceedings were not within the scope of the stay.

Celotex and *Gruntz* both stand for familiar propositions in bankruptcy law. Neither case

casts doubt on a district court's ability to decide for itself whether proceedings pending before it are subject to an automatic stay. *Celotex* tells us that a district court has no authority to modify or to disregard a § 105 injunction. Only the bankruptcy court that issued the injunction has the authority to modify the injunction, and until the injunction is modified the district court is bound by it. *Gruntz* tells us that a state court has the authority to decide whether its proceeding is within the scope of the automatic stay, but the state court's holding is not entitled to preclusive effect in the bankruptcy court.

There is no reason why a federal court should have less power than a state court to decide whether its proceeding comes within the scope of the automatic stay. Indeed, there are a number of cases, in this circuit and elsewhere, in which a federal court has decided whether the automatic stay applies to a proceeding pending before it. *See, e.g., NLRB v. Continental Hagen Corp.,* 932 F.2d 828 (9th Cir.1991) (NLRB enforcement proceeding in the court of appeals comes within the § 362(b)(4) exception to the automatic stay); *NLRB v. Twin Cities Elec.,* 907 F.2d 108 (9th Cir.1990) (same); *Commodity Futures Trading Comm'n v. Co Petro Marketing Group, Inc.,* 700 F.2d 1279 (9th Cir.1983) (Commodities Exchange Act proceeding in the district court comes within the § 362(b)(5) exception to the automatic stay); *Chao v. Hospital Staffing Servs., Inc.,* 270 F.3d 374, 384–85 (6th Cir.2001) (suit under the federal Fair Labor Standards Act in the district court does not come within the § 362(b)(4) exception to the automatic stay, but the district court has authority to decide the applicability of the exception); *NLRB v. Edward Cooper Painting, Inc.,* 804 F.2d 934 (6th Cir.1986) (NLRB enforcement proceeding in the court of appeals comes within the § 362(b)(4) exception to the automatic stay); *Hunt v. Bankers Trust Co.,* 799 F.2d 1060, 1069 (5th Cir.1986) (" 'Whether the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending ... and the bankruptcy court.' " (citation omitted)); *In re Baldwin–United Corp.,* 765 F.2d 343, 347 (2d Cir.1985) ("The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic ***1107** stay."); *SEC v. First Fin. Group of Texas,* 645 F.2d 429 (5th Cir.1981) (civil enforcement action under the federal securities laws in the district court comes within the § 362(b)(4) exception to the automatic stay). We are aware of no case holding to the contrary.

We therefore hold, in accordance with established law, that a district court has jurisdiction to decide whether the automatic stay applies to a proceeding pending before it, over which it would otherwise have jurisdiction. Specifically, as applied to this case, we hold that the district court has jurisdiction to decide whether the Attorney General's section 16 Clayton Act suit comes within the exception to the automatic stay for "police or regulatory power" under § 362(b)(4).

B. Exception from the Automatic Stay under § 362(b)(4)

The applicability of the automatic stay, and the extent of the "police or regulatory power" exception under § 362(b)(4), are questions of law that we consider de novo. *In re Hines,* 198 B.R. 769 (9th Cir. BAP 1996), *rev'd on other grounds by* 147 F.3d 1185 (9th Cir.1998) (whether an act falls within statutory exception to the stay is reviewed de novo). The record is sufficiently complete that we may decide the question even though the district court did not. *Chang v. United States,* 327 F.3d 911, 928 (9th Cir.2003).

Section 362(b)(4) provides that the filing of a bankruptcy petition does not operate as an automatic stay "of the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police or regulatory power." 11 U.S.C. § 362(b)(4). A government unit need not affirmatively seek relief from the automatic stay to initiate or continue an action subject to the exemption. *Edward Cooper Painting,* 804 F.2d at 939. The theory of the exception is that bankruptcy should not be " 'a haven for wrongdoers.' " *Universal Life Church, Inc. v. United States* (*In re Universal Life Church*), 128 F.3d 1294, 1297 (9th Cir.1997) (citations omitted).

The "police or regulatory power" exception allows the enforcement of laws affecting health, welfare, morals, and safety despite the pendency of the bankruptcy proceeding. The exception applies, for example, to suits to determine a federal income tax exemption, *see id.;* to enforce federal labor laws, *see Twin Cities Electric,* 907 F.2d at 109; to enforce state bar disciplinary rules, *see Wade v. State Bar of Arizona,* 948 F.2d 1122 (9th Cir.1991); to enforce federal employment discrimination laws, *see EEOC v. Hall's Motor Transit Co.,* 789 F.2d 1011 (3rd Cir.1986); and to enforce state consumer protection laws, *see In re First Alliance Mortgage,* 263 B.R. 99 (9th Cir. BAP 2001).

Mirant did not argue in the district court that the Attorney General's Clayton Act suit fell outside the § 362(b)(4) exception. In its initial briefing before us, Mirant similarly did not argue that the suit fell outside the exception, even though the Attorney General had briefed the question. After oral argument, we asked the parties to submit supplemental briefing in order to be sure that Mirant had been given a full opportunity to address the question.

Mirant now makes two arguments to us. First, it argues that the § 362(b)(4) exception does not apply because the statutory reference to "such government unit's police or regulatory power" means that the government in question must be suing in furtherance of its *own* police and regulatory power. Mirant contends that the state Attorney General is not doing so in this case because his only remaining claim is for injunctive relief under section 16 of the federal Clayton Act, which authorizes ***1108** "[a]ny person, firm, corporation, or association" to seek injunctive relief "against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26.

Mirant suggests in its argument that a suit by a California official to enforce the federal Clayton Act would not be a suit within its own authority, and that only a suit by the United States Attorney to enforce the Clayton Act would come within § 362(b)

(4). This suggestion is without foundation in the case law. A number of cases make clear that the § 362(b)(4) exception extends to a government's enforcement of laws enacted by other governments. *See, e.g., City of New York v. Exxon Corp.,* 932 F.2d 1020, 1024–25 (2d Cir.1991) (municipality enforcing federal environmental law); *In re Commonwealth Oil Refining Co.,* 805 F.2d 1175, 1186, 1188 & n. 5 (5th Cir.1986) (United States enforcing Puerto Rico law); *New York v. Mirant New York, Inc.,* 300 B.R. 174, 178–79 (S.D.N.Y.2003) (state enforcing federal environmental law); *Herman v. Brown,* 160 B.R. 780, 781 (E.D.La.1993) (state enforcing federal racketeering law); *People of the State of Illinois v. Electrical Utilities,* 41 B.R. 874, 876–77 (N.D.Ill.1984) (state enforcing federal environmental law); *In re Canarico Quarries, Inc.,* 466 F.Supp. 1333, 1334 (D.Puerto Rico 1979) (commonwealth enforcing federal Clean Air Act); *In re Pincombe,* 256 B.R. 774, 781–83 & n. 3 (Bankr.N.D.Ill.2000) (state enforcing federal employment discrimination law); *In re New York Trap Rock Corp.,* 153 B.R. 642, 643 (Bankr.S.D.N.Y.1993) (county enforcing federal environmental law).

Mirant argues explicitly that because section 16 of the Clayton Act authorizes suits by private parties, a government unit suing to enforce that section cannot be acting as a government within the meaning of § 362(b)(4). This argument is also without foundation. While section 16 does authorize suits by private entities, it also authorizes suits by state governments. *See California v. Am. Stores Co.,* 495 U.S. 271, 275–76, 110 S.Ct. 1853, 109 L.Ed.2d 240 (1990) (upholding injunctive relief awarded to state in suit brought under section 16 of the Clayton Act). When the Attorney General seeks to enforce this law on behalf of the citizens of California, he is acting within the police power of the California government. His suit is authorized by the state, is in furtherance of the state's authority, and uses state resources. We are aware of no authority, and Mirant cites none, holding that a government suit that would otherwise be within the "police or regulatory power" exception of § 362(b)(4) ceases to come within that exception whenever the provision of law under which the government sues also authorizes suits by private entities.

Second, Mirant argues that the Attorney General's suit does not satisfy either of the two established tests for the "police or regulatory powers" exception of § 362(b)(4). The two tests are the related, and somewhat overlapping, "pecuniary purpose" and "public purpose" tests. A suit comes within the exception of § 362(b)(4) if it satisfies either test. *See Universal Life Church,* 128 F.3d at 1297 ("The question in this case is whether [the government action] meets *either* test.") (emphasis added). We hold that the Attorney General's Clayton Act suit satisfies both tests.

Under the "pecuniary purpose" test, "the court determines whether the [government] action relates primarily to the protection of the government's pecuniary interest in the debtors' property or to matters of public safety and health." *Continental Hagen,* 932 F.2d at 828 (internal quotation marks and modifications omitted). *See also Edward Cooper Painting,* 804 F.2d at 942; ***1109** *In re State of Missouri,* 647 F.2d 768, 776 (8th Cir.1981). If the suit seeks to protect the government's pecuniary interest, the § 362(b)(4) exception

does not apply. On the other hand, if the suit seeks to protect public safety and welfare, the exception does apply. The purpose of the "pecuniary purpose" test is to prevent suits that would allow a governmental unit to obtain an advantage over creditors or potential creditors in the bankruptcy proceeding.

The Attorney General's section 16 Clayton Act suit clearly satisfies the "pecuniary purpose" test. After having been trimmed down by the district court, the suit now seeks only divestiture. The Attorney General does not seek a monetary recovery, and asserts no interest of the state in the three power plants that are the subject of his suit. Rather, the Attorney General seeks only an injunction that would require Mirant to divest itself of the plants. There is nothing in this relief that would allow the Attorney General to gain an advantage over creditors in the bankruptcy proceeding. If granted, the only effect of the remedy would be to require that the plants be sold, with the entire proceeds going to the bankruptcy estate. Further, it is clear that the suit seeks to protect the welfare of electricity consumers in northern California by protecting them from the excessive charges that might result from an undue concentration of market power.

Under the "public purpose" test, the court determines whether the government seeks to "effectuate public policy" or to adjudicate "private rights." *NLRB v. Continental Hagen,* 932 F.2d at 833. If the government seeks the former, the exception applies; if the government seeks the latter, it does not. *Id.; see also In re State of Missouri,* 647 F.2d at 776. A suit does not satisfy the "public purpose" test if it is brought primarily to advantage discrete and identifiable individuals or entities rather than some broader segment of the public. *See, e.g., Chao,* 270 F.3d at 378 (suit to recover unpaid wages under the Fair Labor Standard Act does not come within § 362(b)(4)). The Attorney General's suit clearly satisfies the "public interest" test, for it is brought to protect the interest of all electricity consumers in northern California.

We therefore hold that the Attorney General's section 16 Clayton Act suit comes within the "police or regulatory power" exception under § 362(b)(4), and that the automatic stay does not apply.

C. *Landis* Stay

A district court has discretionary power to stay proceedings in its own court under *Landis v. North American Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936). In *Landis,* two holding companies sued the Securities and Exchange Commission ("SEC") in the District Court for the District of Columbia to enjoin enforcement of the Public Utility Holding Company Act of 1935 on the ground that it was unconstitutional. Numerous similar suits were filed, in the District of Columbia and elsewhere, against the SEC. The SEC filed a complaint in the district court for the Southern District of New York to compel other holding companies to comply with the terms of the Act. The District of Columbia district court stayed its suit, indicating that the stay would last until the New York district court suit was decided on appeal by the Supreme Court or was otherwise finally resolved.

The Supreme Court reversed:

> [A party seeking] a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant ***1110** in another settles the rule of law that will define the rights of both.

Id. at 255, 57 S.Ct. 163. The Court noted that resolution of the New York district court suit could help narrow the issues considerably:

> True, a decision in the cause then pending in New York may not settle every question of fact and law in suits by other companies, but in all likelihood it will settle many and simplify them all.

Id. at 256, 57 S.Ct. 163. Nonetheless, the Court held that a stay lasting until the New York district court suit was finally resolved exceeded "the limits of a fair discretion." *Id.* It then held that, in the circumstances now confronting it, where the New York district court had already had its case for a year, a stay lasting only until the New York district court decided the case might be appropriate. *Id.* at 256–57, 57 S.Ct. 163. It therefore remanded to the District of Columbia district court to consider whether to grant a stay of what was now likely to be fairly short duration. *Id.* at 259, 57 S.Ct. 163.

We have sustained, or authorized in principle, *Landis* stays on several occasions. In *CMAX, Inc. v. Hall,* 300 F.2d 265 (9th Cir.1962), CMAX, a common carrier by air, sued Drewry, a shipper, in federal district court to recover $12,696.00, contending that Drewry had not paid the full amount of the government-approved tariff. At least a dozen other suits were later filed in the same district court, in which CMAX sued shippers on the same ground. The Civil Aeronautics Board ("CAB") then instituted an administrative enforcement proceeding against CMAX, contending that CMAX had charged numerous shippers, including Drewry, more than the approved tariff. The district court stayed CMAX's suit against Drewry. CMAX sought mandamus.

Citing *Landis,* we set out the following framework:

> Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity

> which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Id. at 268. We denied mandamus. Applying the framework, we noted that CMAX sought only damages. It alleged no continuing harm and sought no injunctive or declaratory relief. Delay of CMAX's suit would result, at worst, in a delay in its monetary recovery, with possible (though by no means certain) loss of prejudgment interest. Further, we noted that the CAB proceeding would provide considerable assistance in resolving CMAX's suit against Drewry, as well as CMAX's other suits in the district court:

> [A]t the very least, the [CAB] proceeding will provide a means of developing comprehensive evidence bearing upon the highly technical tariff questions which are likely to arise in the district court case. Moreover, if that proceeding should result in a revocation of CMAX's operating authority, the district court will be enabled to explore the effect thereof on that carrier's standing to collect past undercharges.
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> ...
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> To these considerations must be added the fact that several other similar cases are now pending in the same district court, and more are likely to be filed in the near future. In the interests of uniform treatment of like suits there is ***1111** much to be said for delaying the front runner.

Id. at 269.

In *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857 (9th Cir.1979), truck drivers sued their employer for unpaid wages under the federal Fair Labor Standards Act ("FLSA") (count I), and under their collective bargaining agreement (count II). The district court stayed both counts under the Federal Arbitration Act. On appeal, we held that the collective bargaining count was subject to arbitration, but that the FLSA count was not. We nonetheless held that a stay of the FLSA count might be justified under *Landis* and related cases:

> [S]ound reasons may exist ... to support the district court's determination to stay the action under the powers to control its own docket and to provide for the prompt and efficient determination of the cases pending before it.
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> * * *
>
> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.

Id. at 863–64.

We noted that the resolution of the collective bargaining count in arbitration had the potential to advance significantly the resolution of the FLSA count:

> [T]he arbitrator would no doubt make findings as to what contract documents are controlling, the hours and work pattern of the claimants, and the amount of wages paid to them.... These findings, as well as the documents and testimony produced during the arbitration hearing, may be of valuable assistance to the court in resolving the Fair Labor Standards Act claims presented in count I of the complaint, even under the assumption that the court is not bound and controlled by the arbitrator's conclusions, a point we decline to address.

Id. at 863. We remanded to allow the district court to determine whether the stay of the FLSA count was proper. In so doing, however, we instructed the district court to take into account "the urgent nature of the statutory right to minimum compensation" under the FLSA, and suggested that a stay might be appropriately conditioned on assurance that the arbitration proceedings was going forward "with diligence and efficiency." *Id.* at 864. We wrote, "A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Id.*

Finally, in *Mediterranean Enterprises, Inc. v. Ssangyong Corp.,* 708 F.2d 1458 (9th Cir.1983), Mediterranean sued to enforce a contract forming a joint venture with Ssangyong. The contract contained an arbitration clause. The district court held that the clause applied to some but not all of the counts in Mediterranean's complaint. It stayed the entire suit pending arbitration, not limited to the counts subject to arbitration. The arbitrable and non-arbitrable counts in the complaint overlapped a great deal both factually and legally. Citing *Landis* and *Leyva,* we sustained the stay of the entire proceeding as within the discretion of the district court. *Id.* at 1465.

In the case now before us, the district court stayed proceedings based in substantial part on its belief that its jurisdiction to decide the scope of the automatic stay was in doubt, and that the applicability ***1112** of the § 362(b)(4) exception to the stay was also in doubt. We have now resolved both of these questions, holding that the district court does have jurisdiction to decide the scope of the stay and that the § 362(b)(4) exception applies. If we believed, after resolving these questions, that a *Landis* stay might still be appropriate, we would remand to allow the district court to exercise its discretion. However, we conclude that a *Landis* stay cannot be justified and therefore vacate the stay.

On the facts of this case, neither the balance of hardships between the parties, nor the prospect

of narrowing the factual and legal issues in the other proceeding, justifies a stay. Unlike the plaintiffs in *CMAX* and *Leyva,* who sought only damages for past harm, the Attorney General seeks injunctive relief against ongoing and future harm. *Landis* cautions that "if there is even a fair possibility that the stay ... will work damage to some one else," the party seeking the stay "must make out a clear case of hardship or inequity." 299 U.S. at 255, 57 S.Ct. 163. There is more than just a "fair possibility" of harm to the Attorney General, and to the interests of the electricity consumers of northern California whose interest he seeks to protect. If the Attorney General's Clayton Act claim has merit, Mirant's ownership of the three power plants is an ongoing illegal concentration of market power that threatens economic harm to electricity consumers. For its part, Mirant has not made out a "clear case of hardship or inequity." To be sure, if the stay is vacated Mirant must proceed toward trial in the suit in the district court, but being required to defend a suit, without more, does not constitute a "clear case of hardship or inequity" within the meaning of *Landis*.

Further, it is highly doubtful that the bankruptcy court in Texas will provide a legal resolution to the Attorney General's Clayton Act claim. First, we note that neither the Attorney General nor Mirant has instituted an adversary action in the bankruptcy court seeking a determination whether the ownership of the plants by a single entity, such as Mirant, constitutes a Clayton Act violation. Second, the bankruptcy court is unlikely to consider, as part of its approval or disapproval of a Chapter 11 reorganization plan, whether ownership of the plants by a single entity is legal under the Clayton Act. Indeed, it may well approve a reorganization plan permitting Mirant to sell off the three power plants to a single entity, on the rationale that the plants are worth more when owned by a single entity.

We are aware of no case, other than this one, in which a district court has entered a *Landis* stay of a suit falling within the "police or regulatory power" exception to the automatic stay, and counsel has cited none. The very terms of the exception provide that the suit be brought by a governmental unit in furtherance of its "police or regulatory power," thereby indicating that a suit qualifying under the exception will be brought to protect an important governmental interest. Further, the "pecuniary interest" and "public interest" tests under which the exception is allowed are designed to ensure that a suit qualifying under § 362(b)(4) does not interfere with the ongoing bankruptcy proceeding. Because a suit permitted under § 362(b)(4) is thus distinct from the bankruptcy proceeding, it is relatively unlikely that resolution of the bankruptcy proceeding will significantly assist the district court in the decision of the factual and legal issues before it.

We recognize the importance of the district court having the ability to control its own docket, particularly in this time of scarce judicial resources and crowded dockets. We do not intend that this opinion be read to restrict unduly the ability of ***1113** the district court, in appropriate cases, to issue *Landis* stays, or to issue stays under other doctrines, such as *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). We hold only that a *Landis*

stay is improper in the circumstances of this case—where the power of the district court to decide whether the automatic stay applies is clear, where the inapplicability of the automatic stay is also clear, and where the proceeding in the bankruptcy court is unlikely to decide, or to contribute to the decision of, the factual and legal issues before the district court.

Conclusion

We hold that the district court has jurisdiction to decide whether the suit before it is stayed by the automatic stay of the bankruptcy court. We hold, further, that the suit qualifies under the exception to the automatic stay for "police or regulatory power" under 11 U.S.C. § 362(b)(4). Finally, we hold that a *Landis* stay is not justified under the circumstances of this case. We therefore VACATE the stay and REMAND to allow the Attorney General's suit to go forward on the merits of his Clayton Act claim.

VACATED and REMANDED.

All Citations

398 F.3d 1098, 2005-1 Trade Cases P 74,694, 44 Bankr.Ct.Dec. 70, Bankr. L. Rep. P 80,282, 05 Cal. Daily Op. Serv. 1227, 2005 Daily Journal D.A.R. 1675

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RESPONDENT'S EXHIBIT

740 Fed.Appx. 118 (Mem)
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

RUBY GLEN, LLC, Plaintiff-Appellant,
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS and Does, 1-10, Defendants-Appellees.

No. 16-56890
|
Argued and Submitted October 9, 2018 Pasadena, California
|
Filed October 15, 2018

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Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding, D.C. No. 2:16-cv-05505-PA-AS

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

MEMORANDUM [*]

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Ruby Glen, LLC ("Ruby Glen") appeals the district court's dismissal of its First Amended Complaint ("FAC") against Internet Corporation for Assigned Names and Numbers ("ICANN"). We have jurisdiction under 28 U.S.C. § 1291. "We review de novo dismissals for failure to state a claim under Rule 12(b)(6)." *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed the FAC on the ground that Ruby Glen's claims are barred by the covenant not to sue contained in the Applicant Guidebook. As the district court found, the covenant not to sue is not void under California Civil Code section 1668. Ruby Glen is not without recourse—it can challenge ICANN's actions through the Independent Review Process, which Ruby Glen concedes "is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." Thus, the covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668. *See* Cal. Civ. Code. § 1668 ("All contracts which have for their object ... *to exempt* anyone from responsibility for his own fraud, or willful

injury ..., or violation of law ... are against the policy of the law." (emphasis added)); *see also Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (holding that an "exculpatory clause" does not violate California Civil Code section 1668 where the clause bars suit, but "[o]ther sanctions remain in place"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) ("By agreeing to arbitrate ..., a party does not forgo [its] substantive rights ...; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The district court also properly rejected Ruby Glen's argument that the covenant not to sue is unconscionable. Even assuming that the adhesive nature of the ***119** Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910, 190 Cal.Rptr.3d 812, 353 P.3d 741 (2015) (explaining that procedural and substantive unconscionability "must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability" (emphasis in original) (internal quotation marks omitted)); *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48, 182 Cal.Rptr.3d 235 (2015) (holding that procedural unconscionability "may be established by showing the contract is one of adhesion"). Because Ruby Glen may pursue its claims through the Independent Review Process, the covenant not to sue is not "so one-sided as to shock the conscience." *See Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–48, 114 Cal.Rptr.3d 449 (2010) (internal quotation marks omitted).

Finally, the district court did not abuse its discretion in denying Ruby Glen leave to amend because any amendment would have been futile. *See Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011). [1]

1 Ruby Glen raises several additional arguments that it failed to raise below. We decline to consider those arguments because they were raised for the first time on appeal. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

AFFIRMED.

All Citations

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