INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

FEGISTRY, LLC RADIX DOMAIN SOLUTIONS PTE. LTD, AND DOMAIN VENTURES PARTNERS PCC LIMITED, Claimants, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	ICDR CASE NO. 01-19-0004-0808

ICANN'S REPLY IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION OF CERTAIN CLAIMS THAT ARE BARRED BY THE STATUTE OF LIMITATIONS

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits this Reply in support of its Motion for Summary Adjudication ("Motion").

1. In its Motion, ICANN clearly set forth the statute of limitations applicable to the claims ICANN is seeking to dismiss and the dates by which Claimants must have brought those claims. Conspicuously missing from Claimants' Opposition to ICANN's Motion ("Opposition") is a single fact rebutting those deadlines or otherwise demonstrating that any of those IRP claims are timely.

2. Instead, Claimants primarily argue that the statute of limitations for each of Claimants' time-barred claims was somehow extended or restarted based on subsequent—yet completely unrelated—developments. But no subsequent event, including the Community Priority Evaluation ("CPE") Process Review or the *Dot Registry* Final Declaration, has any impact on the statute of limitations for Claimants' claims. What Claimants' Opposition does make clear is that, at bottom, Claimants are trying to use time-barred and collateral issues to relitigate the award of community priority to Hotel Top Level Domain's ("HTLD") .HOTEL application – an issue that Claimants already litigated and lost in the *Despegar* IRP more than six years ago.

3. Claimants also argue that ICANN mischaracterizes their claims, which ICANN disputes. But for the avoidance of doubt, ICANN requests via its Motion that the Panel dismiss any claims or challenges related to the following (with citations to the specific section of the IRP Request):

(i) The acquisition of HTLD by Afilias (including any claim that ICANN should have performed another CPE in August 2016 after Afilias acquired HTLD), as discussed in Section V.2.D of Claimants' IRP Request;

(ii) The decision in the *Despegar* IRP, including both direct and indirect challenges to that Final Declaration and the evidentiary record on which it was based, as well as challenges to the underlying CPE performed by the Economist Intelligence Unit (or "CPE Provider") on HTLD's application, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request;

(iii) The *Dot Registry* Final Declaration, and any alleged relation to the *Despegar* IRP, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request; and

(iv) Ombudsman review of Reconsideration Requests 16-11 and 18-6, as discussed in Section V.1 of the IRP Request.

STANDARD OF REVIEW

4. The law applicable to this IRP is California law, supplemented by U.S. federal law, because ICANN is a California non-profit public benefit corporation organized under the laws of California.[1] Under both California law and federal law, a motion for summary judgment shall be granted where, from the evidence presented, there is "no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[2]

ARGUMENT

I. ICANN'S MOTION IS CONSISTENT WITH THE INTERIM SUPPLEMENTARY PROCEDURES, BYLAWS, ICDR RULES, AND THIS PANEL'S PROCEDURAL ORDER.

5. Claimants argue that ICANN's Motion should be denied because there is "no provision for summary adjudication in the ICANN Bylaws, IRP Supplementary Rules, or the 2014 ICDR International Arbitration Rules."[3] This is demonstrably false. Summary dismissal—which is different from ICANN's Motion in name only—is explicitly allowed by Rule 9 of the Interim Supplementary Procedures: "An IRP PANEL

[1] *See Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4, ¶ 33 (12 June 2020), Ex. R-52. Claimants have acknowledged as much in this IRP because they have cited both to California state law and Ninth Circuit federal law in briefs submitted to this Panel. *See* Claimants' Request for Stay, p. 5 n.6.
[2] Cal. Code Civ. Proc. § 437c(c), Ex. LA-1; *see also* Federal Rule of Civil Procedure 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."), Ex. LA-2.
[3] Opposition ¶ 1.

may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious."[4] Similarly, ICANN's Bylaws provide that an IRP Panel has the authority to "[s]ummarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious."[5] ICANN clearly is asking this Panel to summarily dismiss time-barred claims (i.e., claims that both "lack substance" and are "frivolous").[6]

6. Further, Article 29 of the ICDR Rules allows the Panel to make "interim, interlocutory, or partial awards, orders, decisions, and rulings."[7] And, as part of its authority to "conduct the arbitration in whatever manner it considers appropriate," Article 20 gives the Panel the authority to "decide preliminary issues."[8] Thus, in accordance with that authority, the Panel specifically authorized ICANN to file this Motion in Procedural Order No. 8.[9]

7. Claimants are also incorrect that "ICANN has never before attempted to file such a motion in any previous IRP case."[10] In a recent IRP brought by Namecheap, Inc., ICANN specifically requested that the Panel dismiss certain claims as moot, and the Panel agreed and prohibited discovery related to those claims.[11]

8. Furthermore, litigating time-barred claims is nonsensical and inefficient. Indeed, as stated in Rule 5 of the Interim Supplementary Procedures, "[i]t is in the best interests of

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[4] Interim Supplementary Procedures, Rule 9, Exhibit 11.
[5] Bylaws, Art. 4, § 4.3(o)(i), Ex. R-1.
[6] That ICANN is requesting dismissal of only certain of Claimants' claims and not the entire IRP Request does not somehow render these provisions inapplicable, nor do Claimants articulate why that would make sense.
[7] International Dispute Resolution Procedures, Including Mediation and Arbitration Rules (1 June 2014), Art. 29(1), Exhibit 15
[8] *Id.,* Art. 20(1), (3).
[9] Procedural Order No. 8.
[10] Opposition ¶ 5.
[11] *Namecheap v. ICANN*, ICDR Case No. 01-20-0000-6787, Procedural Order No. 6 ¶ 5, (*available at* https://www.icann.org/en/system/files/files/irp-namecheap-procedural-order-6-12feb21-en.pdf).

ICANN and of the ICANN Community for IRP matters to be resolved expeditiously," which includes avoiding undue time and expense litigating claims barred by the statute of limitations.[12]

II. CLAIMANTS FAIL TO REBUT THAT ANY CLAIMS ARISING OUT OF AFILIAS' ACQUISITION OF HTLD ARE TIME-BARRED.

9. Claimants attempt to revive their claims regarding the Afilias acquisition of HTLD by arguing that they are not directly challenging the acquisition, but instead are challenging ICANN's failure to conduct a second CPE once Afilias acquired HTLD. Notwithstanding that this claim lacks merit,[13] it still suffers from the fatal flaw that any claims relating to the Afilias acquisition—no matter how they are styled—are clearly time-barred because the acquisition occurred in 2016 and this IRP was not filed until 2019.

10. Importantly, nowhere in the Opposition do Claimants dispute that they were aware of Afilias' acquisition of HTLD by at least August 2016 (if not sooner), and no further CPE had taken place, yet Claimants did not raise any such challenge until three years later in this IRP. This, alone, is dispositive.

11. Rather than disputing that Claimants were aware of the material facts giving rise to this dispute in August 2016 (because they cannot), Claimants instead raise a number of bizarre arguments, none of which revives their time-barred claims.

12. First, Claimants argue that their claims are timely because they are challenging ICANN's failure to conduct a CPE, "in light of the findings of the CPE Process Review, the *Dot*

[12] Claimants' counsel acknowledged as much at the 31 May 2022 status conference: "We're fine with the summary judgment briefing. I think it's well past time that we get those issues out of the way, and from there, we can talk about what's left to be discovered." 31 May 2022 Hr'g Tr. 16:24-17:3, Exhibit 16.

[13] Although not relevant to the issue of whether these claims are time-barred, Claimants incorrectly argue that the Applicant Guidebook required a CPE of "Afilias." Opposition ¶ 12. However, the CPE process "determine[s] whether any of the community-based ***applications*** fulfill[] the community priority criteria." Guidebook, § 4.2.2, Exhibit 1. The CPE process does not evaluate the ***applicant***, and there is no Guidebook provision requiring a second CPE if the applicant's ownership changes years after the CPE process was completed.

Registry Final Declaration, and the revelation of HTLD's illegal behavior."[14] Yet Claimants have utterly failed to connect any of these so-called "critical developments" to whether a second CPE was required in 2016, after Afilias' acquisition of the applicant. Nor can they. Each of these "developments" relates to the CPE of HTLD's application (or the CPE of other new gTLD applications), which Claimants concede.[15]

13. For example, there is no conceivable way that the purported "revelation of ***HTLD's*** illegal behavior" has any impact on, or relation to, the statute of limitations for a CPE related to ***Afilias's*** acquisition of the applicant. Similarly, the CPE Process Review does not relate whatsoever to the absence of another CPE of the .HOTEL application once Afilias acquired HTLD. The CPE Process Review evaluated the CPEs performed as of that date, and it did not examine whether another CPE is required when an entity acquires an applicant whose application already was awarded community priority.[16]

14. Second, Claimants argue that they timely challenged issues related to Afilias' acquisition in Request 16-11. But the paragraph in Request 16-11 that Claimants quote relates only to HTLD's application; it says absolutely nothing about the subsequent acquisition of HTLD by Afilias.[17] The fact is that Claimants never challenged Afilias' acquisition of HTLD, or the absence of another CPE upon the Afilias acquisition, in the context of Request 16-11.

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[14] Opposition ¶¶ 12, 16.
[15] *See, e.g.*, Opposition ¶ 11 ("Those investigations each revealed substantial inconsistencies and misconduct in ICANN's handling of the CPE processes for HTLD's .Hotel application and other applications for other gTLD strings. . . .").
[16] It is also unclear how the *Dot Registry* Final Declaration is related to the Afilias acquisition, and Claimants have not offered any explanation.
[17] Opposition ¶ 14 ("ICANN is requested to refrain from executing the registry agreement with HTLD, and to provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the EIU and third parties (including but not limited to individuals and entities supporting HLD's application) regarding HTLD's application for .hotel.").

15. Claimants are also wrong that ICANN "acknowledge[d] that Claimants raised such issues with ICANN within Reconsideration Request 16-11."[18] In its Motion, ICANN merely acknowledged that Claimants were aware of the acquisition by Afilias in 2016 when they filed Request 16-11 because Claimants referenced—but did not challenge—the acquisition in that Request.[19] ICANN never agreed that Claimants timely pursued their claims related to the Afilias acquisition.

16. Finally, Claimants seem to argue that because ICANN's alleged "failure to require CPE is ongoing," the statute of limitations has not expired.[20] Claimants offer literally no support (factual or legal or logical) for this contention because there is none. Indeed, such an argument circumvents the entire purpose of the statute of limitations.[21] It is tantamount to allowing Claimants to sit on their hands for years following an alleged inaction and still pursue an IRP against ICANN on their own unilateral timetable (which is exactly what Claimants are attempting to do here).

17. Accordingly, because it is undisputed that Claimants waited over three years to challenge any conduct associated with Afilias' acquisition of HTLD, this claim (however Claimants frame or reframe it) is barred by the statute of limitations.

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[18] Opposition ¶ 14.
[19] Reconsideration Request 16-11, at p. 19 ("The sale to Afilias of shares (or Afilias' promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds. The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed."), Claimants' Annex 3.
[20] Opposition ¶ 13.
[21] *Grell v. Laci Le Beau Corp.*, 73 Cal. App. 4th 1300, 1304–05 (1999), ("Two major purposes underlie statutes of limitations: protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits, and requiring plaintiffs to diligently pursue their claims."), Exhibit LA-3.

III. ANY CLAIMS RELATING TO THE *DESPEGAR* IRP, AND ISSUES LITIGATED IN THAT IRP, ARE TIME-BARRED.

18. Claimants explicitly challenged the CPE of HTLD's .HOTEL application in the *Despegar* IRP. That issue was fiercely litigated, and the IRP Panel declared ICANN to be the prevailing party. The ICANN Board adopted the Panel's Final Declaration in March 2016. In this IRP, Claimants belatedly challenge that Final Declaration, as well as the underlying CPE, by lodging collateral attacks that are not only meritless, but fail to demonstrate that any such claims are timely.[22]

19. Claimants all but admit that these claims are now time-barred. In their Opposition, they state that "ICANN notes that the *Despegar* decision was published in March 2016, and RFR 16-11 was submitted in August 2016," well past the 15-day deadline to file Reconsideration Requests.[23] Nonetheless, Claimants argue that their claims related to the *Despegar* IRP could not have arisen until "after both the *Dot Registry* decision and the completion of the CPE Process Review."[24] This argument does not revive their time-barred claims.[25]

20. As to the *Dot Registry* IRP, Claimants first seem to argue that ICANN was under some sort of affirmative duty to re-open the *Despegar* IRP in light of the *Dot Registry* Final Declaration, but Claimants do not provide any citation to the source of such an alleged duty. The

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[22] This includes the following claims repeated in paragraph 21 of Claimants' Opposition: (1) "Claimants seek review whether ICANN had undue influence over the EIU with respect to its CPE decisions"; (2) "ICANN Materially Misled Claimants and the *Despegar* IRP Panel"; and (3) "Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after Dot Registry." Opposition ¶ 21.

[23] Opposition ¶ 27.

[24] Opposition ¶ 22.

[25] Claimants also make the perplexing argument that ICANN should have brought a motion for Summary Dismissal if it thought Claimants were trying to re-litigate the *Despegar* IRP. Opposition ¶ 20. But that is exactly what ICANN is doing with this Motion. That it is titled a motion for summary ***adjudication*** as opposed to ***dismissal*** mistakes semantics for substance.

Dot Registry IRP evaluated the **denial** of community priority to applications for three unrelated gTLDs (.INC, .LLC, and .LLP), which has absolutely nothing to do with the **grant** of community priority to HTLD's application for .HOTEL. The *Dot Registry* Panel evaluated different facts, different gTLDs, a different evidentiary record, and different legal arguments.

21. Second, Claimants argue that documents produced in the *Dot Registry* IRP demonstrate that the *Despegar* IRP Panel was misled and that documents should have been produced in that IRP. Claimants are again wrong. Unlike the *Dot Registry* Claimants, the *Despegar* Claimants **did not propound any requests for production** in the *Despegar* IRP, so there was no requirement on either party to produce any documents. Thus, to the extent there were documents that Claimants argue could have been material to the outcome of that IRP (which ICANN doubts), they should have requested such documents in the *Despegar* IRP. That Claimants wish they would have done so is not grounds for reopening an IRP that was fully and finally decided.

22. Third, Claimants argue that they "repeatedly notified ICANN of the inter-relationship between the *Despegar* and *Dot Registry* decisions" after the *Dot Registry* Final Declaration was issued.[26] Notwithstanding the fact that there is no such "inter-relationship," this argument does not explain how Claimants' current challenge to issues raised in the *Despegar* IRP is somehow timely. As stated above, there is no basis to reopen an IRP that concluded years ago simply because Claimants proclaim that the decision is "related to" a subsequently issued Final Declaration that was based on different gTLDs and concerned a different evidentiary record.

[26] Opposition ¶ 28.

23. As to the completion of the CPE Process Review, Claimants still fail to identify a single fact explaining how that review brings their claims related to the *Despegar* IRP within the applicable statute of limitations. Again, Claimants seem to argue that following the review, ICANN had an affirmative duty to revisit the CPE of HTLD's application. This argument is perplexing, given that the independent consultant retained to evaluate the CPE process concluded that "there is no evidence that the ICANN organization 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."[27] Nothing about the CPE Process Review warrants reevaluating the CPE of HTLD's .HOTEL application. Claimants' challenges to that CPE, and the *Despegar* Final Declaration, are untimely.

24. Similarly, ICANN's suspension of considering Request 16-11 while the CPE Process Review was underway does not somehow mean that all claims contained therein were timely filed. Indeed, the Board Accountability Mechanisms Committee ("BAMC") explicitly found that these claims were time-barred in the context of the Reconsideration Request, a finding that the ICANN Board accepted in January 2019.[28] There are other claims in Request 16-11 that were timely raised, and ICANN does not dispute that those claims are properly before this Panel (albeit that they lack merit, as ICANN intends to argue in its briefing on the merits). But challenges to the *Despegar* IRP, including the underlying CPE of HTLD's application, are barred by the statute of limitations.

[27] CPE Process Review Scope 1 Report, at p. 3, Exhibit 3.
[28] ICANN Approved Board Resolutions | Regular Meeting of the ICANN Board (27 Jan. 2019), p. 34, Exhibit 14.

IV. CLAIMANTS FAIL TO REBUT THAT ALL CLAIMS RELATED TO OMBUDSMAN REVIEW OF REQUESTS 16-11 AND 18-6 MUST BE DISMISSED.

25. Claimants again fail to introduce any facts demonstrating that their claims regarding Ombudsman review of Reconsideration Requests 16-11 and 18-6 are timely. Instead, Claimants spend much of their Opposition arguing the merits of their claims, which has no bearing on whether Claimants are allowed to bring these claims in this IRP. The simple fact is that Claimants had every opportunity to timely challenge the Ombudsman review of their Reconsideration Requests, but Claimants failed to do so.

A. Request 16-11 Was Not Entitled To Ombudsman Review, Which Claimants Were Aware Of Long Before October 2018.

26. Claimants argue that because Request 16-11 and Request 18-6 are "intertwined" and were "decided on the same day," an Ombudsman was required to review Request 16-11 (even if the applicable Bylaws did not provide for Ombudsman review).[29] This argument fails both on the merits and as to the statute of limitations.

27. To be clear, Claimants do not dispute that the Bylaws at the time Request 16-11 was filed did **not** provide for any Ombudsman review of Reconsideration Requests. Nor do they dispute that, in its Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Placed on Hold Pending Completion of the CPE Process Review ("Roadmap")—which was publicly displayed for the entire Internet community and specifically communicated to Claimants[30]—ICANN informed the parties to the pending Reconsideration Requests (including Claimants):

[29] Opposition ¶ 33.

[30] Claimants contend that "ICANN provides no evidence this Roadmap was communicated to Claimants" (Opposition ¶ 38), yet it was publicly available on ICANN's website and sent via email to Claimants' counsel at the time. Email from Reconsideration to F. Petillion (19 March 2018), Exhibit 17.

> Each of the foregoing requests [including Request 16-11] was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time the requests were filed.[31]

28. There is no exception for Reconsideration Requests that are so-called "intertwined with," or decided on the same day as, later-submitted Reconsideration Requests. ICANN could not have been more clear that Request 16-11 would be decided under the Bylaws applicable at the time it was filed, which **did not include Ombudsman review**.

29. Claimants' argument also fails to establish that any claims related to Ombudsman review of Request 16-11 are timely. Indeed, Claimants cannot refute that they did not challenge the lack of Ombudsman review: (i) when Request 16-11 was filed in August 2016 (when surely they were aware that there would be no Ombudsman review); (ii) when the Roadmap was published in February 2018; or (iii) when they received notice of the Ombudsman decision on Request 18-6 in May 2018 (thereby at least putting them on notice that the Ombudsman did not review Request 16-11). There is no excuse for why Claimants waited until the Cooperative Engagement Process ("CEP") in October 2018 to challenge the absence of Ombudsman review.

30. Accordingly, any claims regarding Ombudsman review of Request 16-11 should be dismissed as untimely (and fail on the merits in all events).

B. The Ombudsman Properly Recused Himself From Considering Request 18-6, And Any Challenges In This IRP Are Untimely.

31. Claimants do not demonstrate that their claims regarding the Ombudsman's recusal from considering Request 18-6 are timely, and (although irrelevant at this procedural juncture) these claims fail on the merits as well.

[31] Claimants' Annex 5.

32. As to the merits, Claimants allege that the Ombudsman provided "no reason whatsoever for his recusal" from considering Request 18-6.[32] Yet the Ombudsman very clearly stated that he was recusing himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.[33] That Claimants wish there was more detail in the Ombudsman's recusal notice does not somehow amount to a violation of ICANN's Articles or Bylaws.[34]

33. As to the statute of limitations, Claimants contend that the statute began to run from the time Requests 16-11 and 18-6 were denied in January 2019, not when the Ombudsman recused himself from considering Request 18-6 in May 2018. Claimants further argue that "[u]ntil that time, Claimants could not have known if the BAMC might have engaged another ICANN staff member, or another independent expert to review the RFRs."[35] There literally is no factual or legal support for this contention. And the Ombudsman could not have been more clear in his recusal, which was provided to Claimants and posted on ICANN's website.

34. In addition, the Bylaws anticipate that the Ombudsman may need to recuse himself or herself and explicitly provide a procedure for the BAMC to follow in the case of Ombudsman recusal (which Claimants conveniently omitted from their Opposition (*see* paragraph 34)):

> 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

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[32] Claimants also argue that ICANN "was bound to provide review without anyone demanding it." Opposition, Section III.C.2. ICANN literally has no idea what Claimants are trying to convey here.
[33] Claimant's Annex 7 ¶ 34. Article 4, Section 4.2(l)(iii) of the Bylaws provides, "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 any involvement by the Ombudsman." Bylaws, Art. 4, Section 4.2(l)(iii), Exhibit 13.
[34] Claimants also allege that "the Ombudsman recused himself from every single RFR involving the new gTLD Program." Opposition ¶ 5. Again, this argument does not demonstrate a violation of the Bylaws and in no way renders this claim timely.
[35] Opposition ¶ 37.

> 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***.[36]

Nowhere do the Bylaws provide for review by an "ICANN staff member" or an "independent expert" in the alternative. Claimants' purported arguments are simply unsupportable.[37]

35. Claimants further blame their delay on the anticipated "significant legal expense" and "hefty ICDR filing fees" associated with instituting an IRP in May 2018.[38] But potential legal expense cannot excuse a party from bringing their claims within the applicable statute of limitations, and Claimants cite no authority for their proposition.

36. In sum, Claimants have not rebutted that the statute of limitations expired on all claims related to Ombudsman review of Requests 16-11 and 18-6. All such claims should be dismissed.

V. NO DISCOVERY COULD REINSTATE CLAIMANTS' TIME-BARRED CLAIMS.

37. As a final Hail Mary, Claimants argue that ICANN's Motion is premature "because discovery is not yet complete in this case."[39] This is a circular argument. Given the glaring deficiencies outlined above and in ICANN's Motion, no discovery could revive any part of Claimants' claims. Indeed, ICANN's Motion very clearly sets forth the dates by which Claimants were required to bring certain claims, and Claimants' Opposition does not dispute a

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[36] Bylaws, Art. 4, § 4.2(l)(iii), Exhibit 13 (emphasis added).
[37] The Emergency Panelist agreed: "Under the Interim Supplementary Procedures, Rule 4, Claimants would have had 120 days to bring an IRP claim (or engage in the CEP) from May 23, 2018, the date when the Ombudsman recused himself. Claimants have not contended that they were unaware of the Ombudsman's recusal in May 2018. For this reason of untimeliness, Claimants have failed to raise 'sufficiently serious questions relate to the merits.'" Exhibit 8 ¶ 125.
[38] Opposition ¶ 38. Moreover, Claimants' counsel is certainly aware that ICANN pays all IRP Panelist and Emergency Panelist fees, meaning that the only expense for which Claimants are responsible is the initial modest filing fee (excluding their own attorneys' fees, of course).
[39] Opposition ¶ 40.

single one. There is no basis to require discovery on untimely claims. Indeed, as stated by the Panel, one of the purposes of this Motion is to narrow and focus the discovery on the remaining viable claims.[40]

38. Claimants also make the non sequitur argument that ICANN's document production was late and is incomplete. Although irrelevant to ICANN's Motion or the statute of limitations issue, ICANN is compelled to correct the record. In Procedural Order No. 8, the Panel ordered that "not later than on June 21, 2022 the Respondent will produce all documents it has agreed to produce. If the Respondent is unable to produce all document[s] by this date, it will provide the binding last date to do so."[41] On 10 June 2022, ICANN produced a list of links to publicly available documents that may be responsive to Claimants' requests for production. Then, on 21 June 2022, ICANN produced hundreds of documents and informed Claimants that it would complete its production on 15 July 2022, which in fact ICANN did.[42] On 15 July, ICANN also produced a second list of links to publicly available documents. Accordingly, ICANN's production was in no way "late."

39. ICANN's production is also complete. ICANN identified for Claimants and the Panel what ICANN would produce in response to Claimants' requests for production that are relevant to the timely claims in this IRP, and ICANN has fully responded, as set forth above. To the extent Claimants intend to pursue additional requests for production, the IRP Panel was clear that Claimants must "satisfy Rule 8 of the Interim Supplemental Procedures (as the IRP already

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[40] *See* Exhibit 17, at 10:8-20 ("What you just said is kind of what the Panel expected and anticipates and I think is inclined to approve. We know that this statute of limitations issue is or isn't in the course of discovery, but our view is if you are right that there is no relevance in the material that's being sought because it can't provide admissible or relevant evidence on this particular IRP, because the claims would be barred even if they were irrelevant [*sic*], then you won't have to produce those documents if we find that your contention is correct.").
[41] Procedural Order No. 8 ¶ 2.b.
[42] When preparing its privilege log, ICANN identified five additional documents that inadvertently were withheld as privileged and produced those documents to Claimants on 1 August 2022.

has been doing). In particular, Claimants must demonstrate that such additional requests 'are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE.'"[43] Claimants are highly unlikely to be able to meet that standard, and certainly cannot meet that standard for discovery related to its time-barred claims.

CONCLUSION

For the reasons set forth above and in ICANN's Motion, ICANN requests that the Panel dismiss any and all claims or challenges related to: (i) Afilias' acquisition of HTLD (and the lack of a second CPE); (ii) the *Despegar* IRP or issues litigated in the *Despegar* IRP; (iii) the *Dot Registry* Final Declaration, and its alleged relation to the *Despegar* IRP; and (iv) Ombudsman review of Request 16-11 and 18-6. ICANN also requests that the Panel suppress any discovery related to those claims.

Dated: August 5, 2022

Respectfully submitted,

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[43] Procedural Order No. 8 ¶ 4 (emphasis omitted).