

Annex 1

COMMERCIAL

Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes



AMERICAN ARBITRATION ASSOCIATION®

Available online at adr.org/commercial

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Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)



Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA[®]. To ensure that you have the most current information, see our web site at www.adr.org.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association[®] (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds \$75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the

arbitration is pending. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- > A highly qualified, trained Roster of Neutrals;
- > A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- > Broad arbitrator authority to order and control the exchange of information, including depositions;
- > A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

- (a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.
- (b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.
- Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.
- (c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least \$500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under \$500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.
- (d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.
- (e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

* Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.

* Beginning June 1, 2021, AAA will apply the Consumer Arbitration Fee Schedule to any dispute between an online marketplace or platform and an individual user or subscriber (using or subscribed to the service as an individual and not incorporated) and the dispute does not involve work or work-related claims.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

- (a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.
- (b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.
 - i. The filing party shall include a copy of the court order.
 - ii. The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
 - iii. The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.
- (c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

- (d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.
- (e) Information to be included with any arbitration filing includes:
 - i. the name of each party;
 - ii. the address for each party, including telephone and fax numbers and e-mail addresses;
 - iii. if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
 - iv. a statement setting forth the nature of the claim including the relief sought and the amount involved; and
 - v. the locale requested if the arbitration agreement does not specify one.
- (f) The initiating party may file or submit a dispute to the AAA in the following manner:
 - i. through AAA WebFile, located at **www.adr.org**; or
 - ii. by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.
- (g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.
- (h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.
- (i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

- (a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

- (b)** A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.
- (c)** If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.
- (d)** If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

- (a)** A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.
- (b)** Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

- (a)** The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- (b)** The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c)** A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds \$75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

- (a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

- (b)** When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.
- (c)** If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

- (a)** The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
- (b)** If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.
- (c)** Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

- (a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.
- (b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.
- (c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.
- (d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

- (a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.
- (b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.
- (c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

- (a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.
- (b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
 - i. partiality or lack of independence,
 - ii. inability or refusal to perform his or her duties with diligence and in good faith, and
 - iii. any grounds for disqualification provided by applicable law.
- (b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.
- (c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

- (a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
- (b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.
- (c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.
- (d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

- (a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.
- (b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- (c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

- (a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.
- (b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

- (a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.
- (b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:
 - i. require the parties to exchange documents in their possession or custody on which they intend to rely;
 - ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
 - iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

- iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

- (a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;
- (b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;
- (c) allocating costs of producing documentation, including electronically stored documentation;
- (d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and
- (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

- (a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.
- (b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.
- (c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.
- (d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

- (a)** The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- (b)** The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
- (c)** When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.
- (d)** The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
- (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
- (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

- (a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.
- (b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.
- (c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

- (a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.
- (b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.
- (c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

- (d)** The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.
- (e)** If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.
- (f)** Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.
- (g)** Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.
- (h)** A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.
- (i)** The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

- (a)** The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
- (b)** If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

- (c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
- (d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
- (e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.
- (f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

- (a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.
- (b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

- (a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.
- (b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

- (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
- (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
- (c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.
- (d) The award of the arbitrator(s) may include:
 - i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
 - ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

- (a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.
- (b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not

empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.
- (e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel

and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

- (a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
- (b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
- (c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

- (a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
- (b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.
- (c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

- (a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.
- (b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

- (c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.
- (d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.
- (e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
- (f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

- (a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.
- (b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

- (a)** In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.
- (b)** Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

- (a)** The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:
 - (i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
 - (ii)** whether all necessary or appropriate parties are included in the arbitration;
 - (iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
 - (iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
 - (v)** which
 - (a)** arbitration rules;
 - (b)** procedural law; and
 - (c)** substantive law govern the arbitration;
 - (vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
 - (a)** any preconditions that must be satisfied before proceeding with the arbitration;
 - (b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
 - (c)** consolidation of the claims or counterclaims with another arbitration; or
 - (d)** bifurcation of the proceeding.

- (vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;
 - (viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;
 - (ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;
 - (x) whether any measures are required to protect confidential information;
 - (xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;
 - (xii) whether, according to a schedule set by the arbitrator, the parties will
 - (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
 - (b) exchange and pre-mark documents that each party intends to submit; and
 - (c) exchange pre-hearing submissions, including exhibits;
 - (d) the date, time and place of the arbitration hearing;
 - (e) whether, at the arbitration hearing,
 - (xiii) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;
 - (xiv) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;
 - (a) whether any procedure needs to be established for the issuance of subpoenas;
 - (b) the identification of any ongoing, related litigation or arbitration;
 - (xv) whether post-hearing submissions will be filed;
 - (xvi) the form of the arbitration award; and
 - (xvii) any other matter the arbitrator considers appropriate or a party wishes to raise.
- (b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds \$75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

- (a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.
- (b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.
- (c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds \$25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

- (a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.
- (b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.
- (c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.
- (d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.
- (e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.
- (f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.
- (g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

- (a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.
- (b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) to obtain conflicts statements from the parties; and
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

- (a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than \$1,000,000, then one arbitrator shall hear and determine the case.
- (b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.
- (c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

- (a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.
- (b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.
- (c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.
- (d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.
- (e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.
- (f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.
- (g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT www.adr.org/feeschedule.

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org**.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- (i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
- (ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
- (iii) A brief statement of the nature of the dispute and the relief requested.
- (iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- (i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
- (ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
- (iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

- (i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- (ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.
- (iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
- (iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
- (v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
- (vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- (ii) Admissions made by a party or other participant in the course of the mediation proceedings;
- (iii) Proposals made or views expressed by the mediator; or
- (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

- (i) By the execution of a settlement agreement by the parties; or
- (ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- (iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- (iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

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GLOSSARY

AGB	gTLD Applicant Guidebook
BAMC formerly known as BGC	Board Accountability Mechanisms Comm. Board Governance Committee
DNS	Domain Name System
EIU	Economist Intelligence Unit
gTLD	Generic Top-Level Domain
FTI	FTI Consultants
ICANN	Respondent, Internet Corporation for Assigned Names and Numbers
ICDR	International Center for Dispute Resolution
ICDR Rules	International Arbitration Rules
Interim Rules	ICANN Interim Supplemental Rules of Procedure for IRP
IRP	Independent Review Process

I. IDENTIFICATION OF THE PARTIES

Claimants each effectively own and/or control independent applications to ICANN to own and operate the generic top-level domain (“gTLD”) .HOTEL.

Respondent is ICANN, a California “public benefit corporation” responsible for governing much of the global domain name system (“DNS”), including whether and how to add new gTLDs to the root zone of the DNS. For example, whether, through whom, and on what terms to allow “.hotel” domain names such as hilton.hotel, best.hotel, austin.hotel, etc., to be registered and used on the internet for commerce, comment or any other legitimate purpose.

II. EXECUTIVE SUMMARY

Preliminarily, Claimants should get Ombudsman review of its RFRs as called for in the Bylaws -- something other than a sham RFR process. And ICANN should get an IRP Standing Panel and Rules of Procedure in place, after six years of minimal progress since required by the Bylaws. Meanwhile, ICANN should be forced to preserve and produce CPE documents as they produced in the *DotRegistry* IRP, and other documents re the CPE Process Review, Portal Configuration investigation and Afilias deal. Only then can Claimants fairly address the BAMC's arguments.

Then, in light of all critical evidence, the following issues must be substantively reviewed by the IRP panel: ICANN subversion of the .HOTEL CPE and first IRP (*Despegar*), ICANN subversion of FTI's CPE Process Review, ICANN subversion of investigation into HTLD theft of trade secrets, and ICANN allowing a domain registry conglomerate to takeover the “community-based” applicant HTLD. The falsely 'independent' CPE processes were in fact subverted by ICANN in violation of Bylaws, HTLD stole trade secrets from at least one

competing applicant, and Afilias is not a representative of the purported community. Thus, this Panel is respectfully requested to declare that ICANN has violated its Bylaws, just as the IRP panel did in the virtually identical *DotRegistry* case, and should take consistent remedial measures now.

III. SUMMARY OF BACKGROUND FACTS AND PROCEDURAL HISTORY

From 2006 to 2012, ICANN and hundreds of DNS community volunteers and industry stakeholders created the authoritative Applicant Guidebook containing the exhaustive rules for ICANN's New gTLD Program ("AGB"). It was adopted by the Board as ICANN policy, and was relied upon by all applicants in assessing their investments in new gTLDs. It included thorough rules to address multiple applications for the same TLD string, such as .HOTEL which had seven applicants in 2012. Whichever satisfied the voluminous and onerous criteria of the AGB, typically would go to an auction to determine the winner of the contract with ICANN.

One way to avoid such a "contention set" and likely a very costly auction, was to file a "Community-based Application" per the terms of the AGB. If the applicant could satisfy ICANN's purportedly rigorous test, scoring at least 14 out of 16 available "points," then that Applicant would get "Community Priority". That means they would win the TLD, and all the others would lose virtually their entire investment -- including \$150,000 in application fees paid to ICANN, and at least that much more in consulting and service provider fees required to satisfy ICANN's incredibly onerous application requirements.

The CPE rules were expressly developed for the purpose to prevent "undue priority [being given] to an application that refers to a 'community' construed merely to get a

sought-after generic word as a gTLD string.”¹ Still, with such strong incentive to do so, at least one applicant gamed the system. A new newly formed LLC, known as HTLD, convinced several hotel chains and associations to support its bid publicly. It is unknown what promises HTLD made in order to secure the support of these commercial entities. None of them explained their support in any detail,² and HTLD has never been forced to provide any such information.

Yet, with just that scant and superficial demonstration of so-called “community support,” HTLD managed to create the sham facade that there is such a thing as a global “hotel community”; at least, sufficiently to fool ICANN’s purportedly “independent evaluators” hired solely to conduct Community Priority Evaluations (“CPE”).³ The “independent evaluators” are meant to substantively review the applications and come to a decision completely independent from ICANN influence. Only that would be consistent with the terms of the AGB, including other AGB resolution methods such as Legal Rights Objections determined by WIPO, and Community Objections determined by ICDR.

The CPE Provider hand-picked by ICANN was the Economist Intelligence Unit (“EIU”), despite it having no relevant experience. In June 2014, the EIU found that HTLD passed the CPE and should be awarded Community Priority.⁴ Effectively, HTLD would be handed the .HOTEL gTLD despite six other fully paid applications, including Claimants’. There was great public outcry against that decision, and other CPE results as well.⁵ The results seemed wildly

¹ Exhibit A, AGB, Module 4.2.3, p.4-9.

² See Exhibit B (Letters of Support for HTLD application -- all virtually identical).

³ Exhibit A, AGB, Module 4.2, p.4-7 (“The community priority evaluation is an independent analysis.”); see also Exhibit C (Community Priority Evaluation website: “The evaluation itself is an independent analysis . . .”).

⁴ Exhibit D, EIU CPE Report re .HOTEL.

⁵ Exhibit E, examples of experts discussing and/or expressing dismay at CPE results, including comprehensive Navigant Economics report commissioned by dotRegistry.

inconsistent, both to casual observers and within the DNS policy community that had developed the AGB and the CPE rules -- including from the former Chair of the BGC and ICANN Board.⁶ A number of Requests for Reconsideration (“RFR”) were filed to challenge the CPE results, including by Claimants. The denial of their first RFR was subject of an IRP proceeding, styled *Despegar v. ICANN*, with a Final Declaration issued in February 2016.⁷

While that IRP was pending, it was revealed that ICANN had misconfigured access rights to gTLD applicants’ (including Claimants’) highly sensitive financial and commercial data, supplied by Claimants to ICANN in confidence under a non-disclosure agreement. ICANN ultimately revealed that HTLD’s personnel were the only people in the ICANN community identified to have accessed competitors’ secret data.⁸ Claimants brought it to the attention of the IRP Panel, which found “a number of serious allegations arising from a portal configuration issue, which ICANN has admitted occurred.”^{9/10} But ICANN said it would complete its investigation and then decide on the request to disqualify HTLD’s application. The Panel concluded this “should remain open to be considered at a future IRP should one be commenced in respect of this issue.”¹¹

Meanwhile, HTLD had also been bought by an industry conglomerate, Afilius, with no apparent ties to the purported “Hotel Community” interests that HTLD had promised they

⁶ Exhibit F - Letter memorializing webinar in which former ICANN chair Cherine Chalaby admitted “In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE.”

⁷ Exhibit G, *Despegar v. ICANN*, Final Declaration.

⁸ Exhibit H, ICANN Board Resolutions.

⁹ *Despegar*, #131.

¹⁰ Exhibit I, ICANN announcements.

¹¹ *Despegar*, #138.

would represent as the .HOTEL TLD operator. Claimants seek review as to why ICANN did not require Afiliias to satisfy another CPE, nor make any promises regarding the Community.

In RFR 16-11,¹² Claimants sought review of ICANN Board Resolutions¹³ that ordered ICANN staff to move forward with processing HTLD's application. The circumstances leading to that RFR and to those Resolutions are discussed at length, *infra*. The main rationale for the BAMC denial of that RFR was incredibly flimsy:

Without evidence that the confidential information was shared, Mr. Krischenowski's corporate holdings alone are not sufficient to demonstrate that HTLD received any of the information that Mr. Krischenowski accessed and/or that HTLD gained some "unfair advantage" from Mr. Krischenowski's access to the information.

And indeed, the unanimous IRP Panel starkly questioned this rationale, bluntly labeling "specious" ICANN's argument that it could not violate its Bylaws by allowing HTLD's application to proceed under the circumstances preliminarily revealed by ICANN as of that time.¹⁴

Six months after the *Despegar* decision, another IRP Panel issued its Final Declaration upon review of another CPE case, and found ICANN had violated its Bylaws in several critical ways. Much more evidence was provided in that case than in the *Despegar* matter, including a sworn Declaration from the EIU stating at the outset: "We are not a gTLD decision-maker but

¹² Exhibit J.

¹³ Exhibit H.

¹⁴ *Despegar*, # 124-138:

130. 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.

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.

simply a consultant to ICANN.”¹⁵ That was quite a different story than what ICANN had trumpeted all along,¹⁶ and which ICANN had told the *Despegar* panel¹⁷ -- that EIU was an “independent” provider “whose determinations are presumptively final.”

Fortunately, ICANN and the EIU’s disingenuous arguments fell on deaf ears, and the unanimous *DotRegistry* panel required ICANN to turn over all relevant internal correspondence and correspondence with the EIU,¹⁸ which ICANN had denied to the *Despegar* panel had even existed. ICANN had also refused to provide its contract with EIU to the *Despegar* Claimants, but was forced to turn it over in this case, including the provision that “ICANN will be free in its complete discretion to decide whether to follow [EIU's]' determination and to issue a decision on that basis or not.”¹⁹ Again, the opposite of what ICANN represented to the *Despegar* panel as to EIU’s purportedly “presumptive” decision-making authority.

The *DotRegistry* Panel decision is discussed in detail, *infra*, as well as ICANN’s responsive actions. So also discussed *infra* are Claimants’ RFRs 16-11 and 18-6,²⁰ the BAMC and ICANN

¹⁵ Exhibit K, EIU Declaration, para. 3, and ICANN’s letter to the IRP Panel re same.

¹⁶ See, e.g., AGB, Module 4.2, p.4-7 - 4-8; Exhibit C (“The evaluation itself is an independent analysis conducted by a panel . . .”).

¹⁷ *Despegar*, para. 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.

¹⁸ Exhibit L, *DotRegistry v. ICANN*, Proc. Order No. 3; see also, Exhibit M, *DotRegistry*., Final Decl., para. 29 -33.

¹⁹ *Exhibit M, DotRegistry*, Final Decl., para. 16.

²⁰ Exhibit J (RFR 16-11) and Exhibit N (RFR 18-6) .

actions in response,²¹ and how those actions have differed despite the substantial similarity of the two cases.

In 2016, the ICANN Board put all of those RFRs “on hold” as it commissioned a purportedly independent review of the CPE administration by ICANN and EIU. ICANN hand-picked a consulting firm called FTI to do that “CPE Process Review.” Their half-hearted, predetermined investigation is discussed at length, *infra*. FTI asked for critical documents, which EIU and ICANN refused to disclose. FTI did not have access to the vast majority of CPE evaluators, as they had already left EIU. Of the interviews that FTI did manage, ICANN has refused to turn over notes or transcripts or even the identity of anyone that was interviewed. ICANN has also refused to disclose either the agreement with FTI, the identity of any of their investigators, or any correspondence with ICANN other than FTI’s final reports.

Meanwhile, FTI’s willfully hamstrung CPE Process Review “investigation” unsurprisingly concluded in December 2017, by finding that ICANN had done nothing to influence EIU’s CPE decisions. This was directly contrary to the *DotRegistry* IRP findings, yet the ICANN Board did not require anything further, accepted the FTI findings, and resolved for the BAMC to then hear the RFRs it had put on hold, including Claimants’.²² The BAMC conducted no independent investigation of its own despite the mandate of the *DotRegistry* decision and the noted failure by FTI to obtain critical evidence from EIU and ICANN staff. Thus, unsurprisingly, the BAMC again rejected Claimant’s RFRs with no new rationale or justification, and no new disclosure of any highly relevant information in ICANN’s control, as ICANN had been ordered to produce and did produce in the *DotRegistry* case.

²¹ Exhibit O (BAMC Response 16-11) and Exhibit P (BAMC Response 18-6).

²² Exhibit Q (Letter from BGC Chair Chris Disspain).

Thus, Claimants have been forced to file this IRP Complaint, in order to have real discovery, and real review of ICANN's actions and inactions with respect to the .HOTEL CPE, the CPE Process Review, the HTLD breach, and the sale of HTLD to Afilias.

IV. STANDARD OF REVIEW

Section 11 of the Interim Supplemental Rules states (emphasis added):

Standard of Review. Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

a. With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated ICANN'S Articles or Bylaws.

b. All Disputes shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

V. COVERED ACTIONS OR INACTION TO BE REVIEWED

The stated purposes of the IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).²³ ICANN mouths a boldface "Commitment" in Sec. 1.2(a)(vi) of its Bylaws to "Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness."

²³ These include: (i) Ensure that ICANN ... complies with its Articles of Incorporation and Bylaws. (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)). (iii) Ensure that ICANN is accountable to the global Internet community and Claimants. ... (vi) Reduce Disputes by creating precedent to guide and inform the Board, ... (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes. (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in a court with proper jurisdiction. (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

But it only pays them lip service, having failed to implement key protections for six years, and administering a sham RFR process resulting in no real reconsideration of anything, until an IRP is filed.

1. Preliminary Procedural Issues to Be Decided in this IRP

Claimants intend to promptly seek Interim Measures of Protection pursuant to Section 10 of the Interim Rules, specifically requiring ICANN to: A) immediately appoint an ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6, as required by the Bylaws; B) meanwhile, appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Rules, from which any IRP Panel shall be selected per Section 3 of the Interim Rules, and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the Interim Rules; and, C) meanwhile, preserve and direct HTLD, EIU, FTI and Afiliac to preserve all potentially relevant information for review in this matter.

2. Important Substantive Issues to Be Decided in this IRP

A. *Claimants seek review whether ICANN had undue influence over the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review.*

ICANN admits to having documented conversations with EIU, purporting not to have influenced or interfered in any way, but only that:

These types of communications instead demonstrate that ICANN org protected EIU's independence by focusing on ensuring that EIU's conclusions were clear and well-supported, rather than directing EIU to reach a particular conclusion.

Yet of course, ICANN has refused to disclose them to Claimants, arguing that they promised to EIU that they would not, and EIU expressly has threatened to sue ICANN if they do so.

That is an incredibly inappropriate rationale, as ICANN could control whether they agreed to confidentiality with EIU. What was the public interest in that? Is there any remaining

public interest in that, years later? The EIU's CPE processes, as well as the FTI CPE Process Review, were supposed to be open and independent of ICANN influence. EIU could have no trade secrets in their CPE administration, and nobody has claimed that they did. ICANN has offered no plausible explanation as to how confidentiality of these documents is in the global public interest, or in anyone's interest. They surely cannot withhold them from scrutiny of this IRP. Such documents can fairly be disclosed in this proceeding subject to the protections of a protective order as was the case in *Dot Registry, LLC v. ICANN*²⁴ (requiring that confidential documents exchanged by the parties could not be used for any other purpose and could not be referenced or used in publicly posted documents without appropriate redactions).

a. *ICANN's and EIU's Communications Are Critical, But Have Been Kept Secret.*

ICANN admits unequivocally to helping to write the EIU's CPE decisions, purportedly in order to "protect" the EIU's "independence." It is unclear how that serves ICANN's public service mission, or how that could be a true reason. If ICANN had wanted to protect EIU's independence, it would not have interfered in the CPE Evaluation process. That process was supposed to be independent of any ICANN influence. Yet, the communications and edits appear to have been voluminous and at least in some cases, very substantive. ICANN expects the world to accept their word that they didn't actually "direct" the EIU to make any particular decision. That is an incredibly grey line they want to straddle, and only the relevant documents and interviews can elucidate whether they are being truthful.

²⁴ Exhibit L -- *DotRegistry*, Procedural Order No. 3; see also, Exhibit R, *id.*, Procedural Order No. 2 (ordering ICANN to produce "all non-privileged communications and other documents within its possession, custody or control" concerning the EIUs engagement in the CPE process and the work done by the EIU on complainant's RFR).

But even the ICANN Board has never seen those documents, because ICANN's cherry-picked CPE Review consultant, FTI, was not provided them from EIU or ICANN staff. FTI reported²⁵ that it requested the EIU to provide 1) "internal emails among relevant [EIU] personnel, including evaluators, relating to the CPE process," and 2) "external emails between relevant [EIU] personnel and relevant ICANN personnel related to the CPE process. Yet, astonishingly, "FTI did not receive documents from [EIU] in response to Items 1 or 2."

FTI says that ICANN provided responsive information as to Item 2, though EIU did not. But any reasonable investigator would get the documents from both sides, in particular to see if either side is trying to hide something. And because each side could have different comments and internal distribution. Indeed, FTI acknowledged that it "compared the information obtained from both [ICANN and EIU]" -- at least that very limited information that was provided.

It is inexcusable for FTI's investigation to not have reviewed EIU internal correspondence, which would likely be the best evidence of whether EIU was unduly influenced by ICANN as it would indicate the evaluators' perceptions in real time. Moreover, FTI conducted interviews of "relevant" ICANN and EIU personnel, but no transcripts, notes or summaries of those interviews have been disclosed. Remarkably, it seems that most evaluators had left EIU before FTI started the CPE Process Review. Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process. Surely they could have made a few calls.

²⁵ Exhibit S, FTI Report re Communications, p.XX, XX.

Instead, incredibly, ICANN has admitted that EIU threatens to sue ICANN:²⁶

ICANN organization endeavored to obtain consent from [EIU] to disclose certain information relating to the CPE Process Review, but [EIU] has not agreed to ICANN organization's request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations.²⁷ ICANN organization's contractual commitments must be weighed against its other commitments, including transparency.

²⁸

The Board, at a minimum, ought to want to know what EIU has been hiding from FTI, which still is being hidden from Claimants, and thus which is shielded from any meaningful consideration by the Board, or any Independent Review as required to be available per the Bylaws. Which EIU is threatening to sue to keep secret. In what public interest?

The Board, at a minimum, should have forced EIU and ICANN's lawyers to disclose those documents, and at least for the FTI and the Board itself to consider them, before accepting FTI's report and declaring that nothing bad ever happened. The Board could not have made an

²⁶ Exhibit T, p.9 (ICANN Response to DIDP Request).

²⁷ The contractual argument is dubious, at best. The Board stated in its last Resolution:

FTI requested additional materials from [EIU] such as the internal correspondence between the CPE Provider's personnel and evaluators, but [EIU] refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN, it was only required to produce CPE working papers, and internal and external emails were not "working papers."

Really, it is ludicrous for ICANN -- or any party contracting with ICANN -- to publicly posit that any reasonable definition of "working papers" would not include email.

²⁸ *But see, e.g.,* Exhibit M, *DotRegistry*, Final Decl., #89:

[T]he contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations.

informed decision about the CPE Process Review unless that information was disclosed and considered. At minimum now, for there to be any truly independent review of that Board inaction and action, the Ombudsman, Claimants and the Panel must be able to see EIU internal correspondence relating to the .HOTEL application, referring or relating to ICANN's comments or questions as to EIU's drafts, ICANN staff's work on the CPE and CPE Process Review, as well as all relevant excerpts from the interviews that FTI conducted. FTI's agreement with ICANN also has never been revealed, despite having been repeatedly requested. Only once these documents are disclosed can there be any meaningful review.

b. *DotRegistry IRP and FTI's report reveals a lack of independence of EIU*

The *DotRegistry* IRP Panel reviewed correspondence between EIU and ICANN which was denied to the *Despegar* Claimants, and held:²⁹

EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports,

The *DotRegistry* Panel then further held:³⁰

Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

The Panel then explained how ICANN violated its Bylaws duties of transparency, and due diligence upon reasonable investigation -- by failing to review precisely the information the

²⁹ Exhibit M, *DotRegistry*, Final Decl., #93; see also, #94-99, discussing one egregious example.

³⁰ *Id.*, *DotRegistry*, Final Decl. #111-113 ("An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry RFRs....").

Despegar Claimants had requested, but which the *DotRegistry* Panel forced ICANN to disclose.³¹

The Panel then explained how ICANN violated its Bylaws duty of independent judgment, again by failing to disclose documents which could have shown such judgment.³² Instead:

The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.³³

The Panel concluded its analysis by declaring “that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws.”³⁴

Claimants in this IRP have made exactly the same claims to ICANN, and have repeatedly cited this precedential decision. Yet, ICANN has continually refused to provide any information to Claimants, nor to review its RFR decisions in light of the evidentiary requirements of the *DotRegistry* rulings. That ruling is binding and precedential per the Bylaws.³⁵ Yet ICANN ignores it's obvious relevance to Claimant's similarly situated RFRs subject to review in this IRP. This Panel must consider that precedent per the Bylaws' “Standard of Review” quoted *supra*.

³¹ *Id.*, #114-125 (concluding: “It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.”).

³² *Id.*, # 126-150 (concluding: “And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC ..., the BGC has put itself in contravention of Bylaws ... requiring that ICANN staff work on which it relies be made public.”)

³³ *Id.*, #128.

³⁴ *Id.*, #151.

³⁵ Bylaws, Art. IV, Sec. 4.3(a)(vi) and (viii) (purposes of the IRP: “Reduce Disputes by creating precedent to guide and inform the Board” and “Lead to binding, final resolutions”).

Furthermore, FTI's report reveals that abundant phone calls were made between EIU and ICANN to discuss "various issues".³⁶ It also reveals that ICANN advised at times that EIU's conclusions were not supported by sufficient reasoning.³⁷ FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by EIU, (ii) that those drafts were discussed at length between EIU and ICANN, and (iii) that the working of EIU and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus EIU".³⁸ It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or EIU.

The abundant phone calls between ICANN and EIU, and ICANN's influence on EIU's drafting and rationale demonstrate that EIU was not free from external influence from ICANN. One can only conclude from these findings that EIU was not independent from ICANN. Any influence by ICANN in the CPE was contrary to settled ICANN policy, and therefore undue. FTI's report confirms ICANN's intimate involvement in the CPE, as found by the *DotRegistry* Panel. It also confirms the fact that the *Despegar* IRP Panel was given incomplete and false information by ICANN which was material to its decision.

c. *ICANN Materially Misled Claimants and the Despegar IRP Panel.*

The *Despegar* IRP Panel's conclusion that the inconsistencies of the CPE process did not amount to a violation of ICANN's Bylaws and core values was based upon the false premise that the EIU was not mandated to apply ICANN's core values, and upon the false premise that the

³⁶ The report makes mention of weekly conference calls between ICANN and EIU. Exhibit S, FTI Scope 1 Report, p. 12-14.

³⁷ *Id.*, p. 12.

³⁸ *Id.*, pp. 15-16.

EIU's determinations are presumptively final and are made independently by the EIU, without ICANN's active involvement.

In this respect, ICANN 'informed' Claimants and the IRP Panel that "[b]ecause 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 of any individual CPE"-- and the Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist".³⁹ The IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result]," and that "ICANN staff supplied continuing and important input on the CPE reports."⁴⁰ As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs. That is also clear from the examples of such communications referenced in the *DotRegistry* Final Declaration. So, ICANN lied in writing to the Panel.

Moreover, ICANN's description in the *Despegar* IRP of the EIU as the independent evaluator, making "presumptively final" determinations was false. The EIU contract, finally divulged in the *DotRegistry* IRP after ICANN refused to divulge it to Claimants, proved otherwise as discussed *supra*. The findings of the *Dot Registry* IRP Panel reveal that the EIU -- by its own measure -- was "simply a consultant to ICANN", and that ICANN had agreed with the EIU that the EIU "would operate largely in the background, and that ICANN would be solely responsible

³⁹ *Despegar*, #95.

⁴⁰ *DotRegistry*, #93, 101.

of all legal matters pertaining to the application process".⁴¹ ICANN was "solely responsible to applicants ... for the decisions it decide[d] to issue", and "each decision [had to] be issued by ICANN in its own name only."⁴²

Moreover, the fact that material information was hidden from Claimants and the *Despegar* Panel is a violation of ICANN's obligations to conduct its operations in a transparent matter. Claimants specifically and repeatedly asked for all communications, agreements between ICANN and the CPE Panel and the CPE Review Panel. Claimants and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was non-existent and/or could not be disclosed. That was wrong.

The *DotRegistry* IRP Panel forced ICANN to reveal that it did possess all of that information, and to turn it over to the Panel and to DotRegistry. Claimants had explicitly asked for and been denied this information, and the *Despegar* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Claimants and the Panel at that time -- or since -- that it had disclosed such material information to DotRegistry and to that IRP Panel.

Instead, Claimants and their prior IRP Panel always were denied access to essential documents kept by ICANN, such as for example, communications between ICANN and HTLD with respect to the Community Application, between ICANN and EIU with respect to the CPE Evaluation, and between ICANN and FTI with respect to the CPE Process Review. Claimants have not been given anywhere near a fair opportunity to contest the arguments and evidence

⁴¹ *Id.*, #91.

⁴² *Id.*, #92.

adduced by the BAMC, because Claimants have been denied the underlying documents core to most of the BAMC's factual arguments.

Claimants and this Panel have every reason to be suspicious, as ICANN has materially and plainly lied about the existence of these documents, directly to the prior IRP Panel. Indeed, ICANN made a clear and comprehensive statement that it did not have any communications with the evaluators that identify the scoring of any individual CPE.⁴³ However, both the *DotRegistry* IRP and the FTI report revealed that ICANN had frequently been commenting on and questioning the reasoning behind assigning one score or another and provided feedback to EIU's draft reports.⁴⁴ ICANN could not have made such comments without access to communications that identify the scoring of individual CPEs.

Certainly, a principal even "questioning" a contractor's reasoning about a score can be seen at least as implicit "direction" to change that score, or at least to consider changing it. Such direction could even be quite explicit from the context and/or content of the "questioning." Without full transparency about the CPE and CPE Review, as ordered by the *DotRegistry* panel and desired by ICANN's own FTI Consultants, we cannot know. The ICANN Board also does not know, because it failed to meet its Bylaws obligations of transparency, due diligence upon reasonable investigation, and independent judgment by not requiring disclosure by EIU and ICANN Staff, to Claimants and the *Despegar* Panel. Now, such disclosure is required to provide opportunity for any meaningful review by this Panel and Claimants herein.

B. Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after DotRegistry.

⁴³ *Despegar*, #95.

⁴⁴ Exhibit S, FTI Report, Scope 1.

Bylaws, Sec. 1.2(a)(v) require ICANN to:

Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).

A previous IRP Panel has explained:⁴⁵

The requirement for discrimination is not that it was malicious or even intentional, Rather, the requirement for discrimination is that a party was treated differently from others in its situation without “substantial and reasonable” justification. The IRP Panel does find that this standard was met.

Claimants were discriminated against in the CPE, as argued in its first RFR which was subject to the *Despegar* IRP. That was proved by the *DotRegistry* IRP after appropriate discovery, as argued in both of Claimants’ RFRs since. ICANN provides almost no rationale in support of its position that they were not. The Bylaws clearly prohibit discrimination among similarly situated parties. ICANN’s weak effort to explain this part of their decision must be reviewed by the IRP Panel.

In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”⁴⁶ Yet as it turned out, EIU did not employ any comparative process as to their decisions, and had no relevant experience making any such decisions. And ICANN was constantly interfering with comments and “questions” about EIU draft decisions, which its

⁴⁵ Exhibit U, *Corn Lake LLC v. ICANN*, Final Decl. #8.65.

⁴⁶ Exhibit V, CPE Guidelines, at 22.

“contractor” EIU had no power to ignore. So, there was significant inconsistency in the CPE decisions, as shown by many commentators and an expert economist hired by DotRegistry.⁴⁷

ICANN has not disputed this, but instead has tried to hide the ball, saying they didn’t make the decisions. But in fact, they had ultimate control such that their contractor could not be independent, they heavily influenced some of those “presumptive” decisions, and have hidden information that would be relevant to explain why. The *DotRegistry* IRP proved that, because the CPE results in fact were unduly influenced by ICANN staff, which conduct the BGC could and should have investigated before rubber-stamping its own prior decision to approve the CPE results. That certainly leads to an inference that they have exercised undue influence in the .HOTEL CPE -- discriminating against Claimants.

The Board has not looked at the issue because it did not require EIU to provide it, nor ICANN staff to publicize its work. That violated ICANN’s Bylaws as to the *DotRegistry* claimants and equally as to these Claimants. Same as re the sham RFR process, whereby the BAMC thoughtlessly “reconsidered” ICANN’s own prior decisions to accept purportedly independent CPE results in both cases, without doing any reasonable investigation of the claims of inconsistency and undue influence.⁴⁸ Those failures also violated ICANN’s Bylaws as to the *DotRegistry* claimants and equally as to these Claimants.

Yet, the ICANN Board has fully addressed the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants.⁴⁹ The ICANN Board agreed to refund Dot Registry's IRP costs of

⁴⁷ See *supra*, note 5.

⁴⁸ See Exhibit W (“Specifically, the BGC is only authorized to determine if any policies or processes were violated during CPE. The BGC has no authority to evaluate whether the CPE results are correct.”).

⁴⁹ Exhibit H (ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12).

more than \$200,000 -- as the IRP Panel had ordered. The ICANN Board also ordered the BGC to reconsider the DotRegistry RFRs in light of the IRP Final Declaration. The BGC refused to provide any additional information to Claimants or do any further due diligence or reasonable investigation, by which it could make any independent judgment. Instead they summarily denied the RFR, and forced Claimants to file this IRP in order to get any real review.

Claimants suffered from the same violations as the *DotRegistry* claimants, and the *DotRegistry* IRP decision is a binding precedent. However, ICANN refuses to produce any documents to these Claimants, and refuses any other remedy to Claimants. It must be forced to produce now, so that there can be a meaningful review in this case as there was in that case. ICANN has not and cannot provide any justification why it treats Claimants differently, although they are and always have been situated similarly to the *DotRegistry* claimants. Claimants request that ICANN take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, and of these Claimants' RFRs -- at least to ensure consistency of approach with its handling of the *Dot Registry* case.

ICANN also provided a completely new CPE for an applicant for .gay, merely because of a "procedural error" whereby some of its letters of support were not 'verified' by EIU, even though they were still considered in their scoring. The BAMC Recommendation re RFR 14-44 concluded for that flimsy reason that "the CPE Panel Report shall be set aside, and EIU shall identify two different evaluators to perform a new CPE".⁵⁰ Again that was clearly discriminatory because Claimants have raised much more substantial issues and been rebuffed.

C. Claimants seek review of ICANN's "Portal Configuration" investigation and refusal to penalize HTLD's willful accessing of Claimant's confidential, trade secret info.

⁵⁰ Exhibit X, p. 2.

Clearly the *Despegar* IRP Panel left this issue open for future scrutiny, and found ICANN's early defensive argument "specious".⁵¹ As explained in Claimant's later RFRs and letters to ICANN, HTLD's theft of competitor Claimants' private trade secret data was unique and stunning. And deserving not only of thorough investigation as ICANN purported to do, but also of some consequence to HTLD once the scope, frequency and significance of its misconduct was revealed. ICANN refused to produce key information underlying its reported bare conclusions, couching each with equivocal language such as "at a minimum," etc.

This purported "rationale" for BAMC denial of RFR 16-11 is facially flimsy, particularly in light of the *Despegar* Panel's statements on this issue⁵² which question it:

Without evidence that the confidential information was shared, Mr. Krischenowski's corporate holdings alone are not sufficient to demonstrate that HTLD received any of the information that Mr. Krischenowski accessed and/or that HTLD gained some "unfair advantage" from Mr. Krischenowski's access to the information.

There is little doubt under US law that such misdeeds of any major shareholder or other decision maker would be imputed to their closely held corporation that benefitted therefrom.⁵³ This is hornbook law in the Ninth Circuit, for example. *CITES*. Katrin Otrin (at least) was also a shareholder in Krischenowski's shareholding company, and she also had access to the confidential competitive data, so their collective holdings were closer to 50% and controlling

⁵¹ *See supra*

⁵² *Despegar*, #124-138.

⁵³ *See e.g., Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996) ("Moreover, "[a] corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf".").

interest – further supporting the argument to impute their actions to HTLD.⁵⁴ Therefore, the Board action to ignore such facts and law is a violation of Bylaws.

It is also self-evident that ICANN and HTLD, in conducting their investigation, were each embarrassed parties with strong incentive to find nothing wrong with HTLD's conduct. In other words, it can be inferred that either of them would have said anything -- or hid anything -- to save themselves from further embarrassment. At minimum, that circumstance should require further discovery in the IRP, of all documents concerning ICANN's investigation of HTLD's breach. ICANN has no privilege or other valid reason for withholding those documents to date, and ought not be allowed to stymie Independent Review of its decision by withholding any such documents now. It violates the duty of transparency to withhold them. To the extent the BAMC and/or Board failed to have such information before deciding to ignore HTLD's breach, that violated their duty of due diligence upon reasonable investigation, and their duty of independent judgment.

D. Claimants seek review of ICANN's decision to approve sale of the .HOTEL Community-based Applicant to a domain registry conglomerate, without requiring the new Applicant to pass CPE.

In 2016, the purported "Community Applicant" HTLD was purchased by one of the largest gTLD registry operators, Afilias, which per their website operates no less than 25 TLDs including .info, .global, .asia, .vegas and .adult.⁵⁵ None of the letters of support reviewed by the CPE panel were in support of Afilias owning the .HOTEL gTLD.⁵⁶ They were in support of an entirely different, single-TLD operator with purported ties to the so-called, obviously contrived

⁵⁴Exhibit H (ICANN Board Resolutions).

⁵⁵ Exhibit Y - Afilias Products and Services.

⁵⁶ See *supra*, note 2.

“Hotel Community”. They contained little detail as to the reasons for their superficial expression of support, in particular as to what they were assured from HTLD in exchange.

And it was that sole operator, HTLD -- the only one among hundreds of applicants -- that had violated the trust of the ICANN community by accessing its competitors’ confidential, trade secret information, repeatedly. The only people in the entire ICANN community to access that sort of private information -- in a universe of hundreds of persons having access to the data -- were principals of HTLD.

That was clearly embarrassing for ICANN to have permitted anyone, let alone each and every one of the hundreds of applicants’ representatives, to access private trade secret data for weeks on end -- which it had explicitly promised to keep strictly confidential. Yet just one company took advantage of that ill-begotten access, causing a lot of further embarrassment and expense to ICANN.⁵⁷ HTLD took the extraordinary step of writing to ICANN to admit to Krischenowski’s misconduct, while purporting to distance from it.⁵⁸ While ICANN and Afiliis may be very happy to be rid of Mr. Krischenowski from HTLD, what about the rights of the so-called “Hotel Community” which supported HTLD’s bid, not Afiliis’ bid? What about the rights of the six other applicants for the .HOTEL gTLD, including Claimants?

Claimants in RFR 16-11 argued that ICANN gave “undue priority to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.” When did ICANN approve assignment of the HTLD application to Afiliis, and on what terms? Was there any public comment period, outreach to the other .HOTEL applicants, and/or the purported “Hotel

⁵⁷ See, e.g., Exhibit Z (articles discussing data breach and HTLD misconduct).

⁵⁸ Exhibit ZZ (Afiliis letter to ICANN re Krischenowski).

Community” at all? Why did ICANN not recognize HTLD as an “unreliable applicant”, when they were the only one of many hundreds of applicants who cheated the ICANN system and stole its competitors’ secret information? Did ICANN analyze whether Afilias would be any more “reliable”? Did ICANN analyze whether the Afilias purchase would be in the global public interest? What was the Board Resolution that approved that transaction, transparently, with due diligence upon reasonable investigation, and in exercise of its independent judgment?

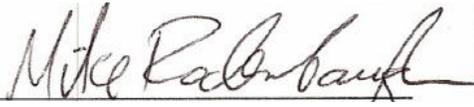
Those are all questions that ICANN must answer in discovery in this IRP. As otherwise it appears that the transaction did not get Board review or approval, and there was no public comment or outreach either to competing applicants or the purported “Hotel Community”. The Board should demand full disclosure of all relevant documents related to the transaction, and that the public interest is served by it. Claimants aver that HTLD’s application should be denied, or at least its purported Community Priority relinquished, as a consequence not only for HTLD’s spying on its competitors’ secret information, but also because HTLD is no longer the same company that applied for the .HOTEL TLD. It is now just a registry conglomerate with no ties to the purported, contrived “Community” that it claims entitled to serve. So it should not benefit from Community Priority over six other fully qualified, fully paid applicants -- e.g. Claimants.

VI. CONCLUSION

For all of the foregoing reasons, an honorable IRP Panel should 1) grant the Interim Measures sought by Claimants; 2) order appropriate discovery from ICANN; 3) independently review ICANN’s actions and inactions as aforesaid; 4) render a Final Declaration that ICANN has violated its Bylaws, and 5) require that ICANN provide appropriate remedial relief.

RESPECTFULLY SUBMITTED,

DATED: December 16, 2019

By: 

Mike Rodenbaugh
RODENBAUGH LAW

Attorneys for Claimants

Annex 3

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requesters Information

Requesters are represented by:

Name: Flip Petillion, Crowell & Moring LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number: Contact Information Redacted

Requesters are:

Requester #1

Name: Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #2

Name: Spring McCook, LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #3

Name: Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #4

Name: Famous Four Media Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #5

Name: Radix FZC
Address: Contact Information Redacted
Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Inc.
Address: Contact Information Redacted
Email: Contact Information Redacted

Requester #6

Name: Fegistry LLC
Address: Contact Information Redacted
Email: Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Requesters seek reconsideration of both actions and inactions of ICANN's Board of Directors. The specific actions/inactions of the Board are set forth in more detail below, specifically in response to Questions 8 and 10, and relate to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016, published on 11 August 2016 and communicated to Requesters on 15

August 2016 (hereinafter, the 'Decision').

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

4. Date of action/inaction:

On 11 August 2016, the Board published the Decision apparently taken on 9 August 2016.

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

5. On what date did you become aware of the action or that action would not be taken?

Requesters learned of the Decision on 15 August 2016, when ICANN informed Requesters of the Decision.

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

6. Describe how you believe you are materially affected by the action or inaction:

As the ICANN Board did not offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the Decision prevented Requesters – who had applied for the gTLD string .hotel (application IDs 1-927-25198; 1-1249-36568; 1-1500-16803; 1-1181-77853; 1-1059-97519; 1-1913-57874) themselves – from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to

operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for an RfR and ultimately an IRP. Requesters suffered from the same violations of ICANN's Articles of Incorporation (Aol) and Bylaws, as recognized in other cases¹ and as acknowledged by the ICANN Board².

However, in contrast with other cases³, Requesters were materially affected by these violations as, without those violations, Requesters would have prevailed in their actions against HTLD's application for .hotel.

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

In the case of .hotel, ICANN violated its Aol and Bylaws and policy by giving

¹ See *e.g.*, ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*; 38. Board Governance Committee determination on Request for Reconsideration 14-44 of 20 January 2015.

² In accepting the Dot Registry IRP Declaration, the Board acknowledged it had violated its Aol and Bylaws in the CPE.

³ Mentioned in footnotes 1 and 2.

undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.

ICANN's actions required, and still require, Requesters to incur unnecessary costs to guarantee observance of ICANN's Aol, Bylaws and policies. As will be shown below, the ICANN Board agreed to refund these costs to parties who did not show material harm.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, and the Affirmation of Commitments creates inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole. The Decision creates unequal treatment between applicants, and creates uncertainty for both existing and future gTLD applicants. ICANN had clear policies to deny community priority to mere industries, and to disqualify applicants who were not trustworthy. As ICANN fails to abide by these policies, the Decision creates a dangerous precedence that will encourage third parties who seek to game the application process and who vigorously defend positions that are unattainable in an attempt to discourage third parties that play by the book.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

In addition, the Decision goes against the core objectives of the new gTLD

program: a competitive process for opening up the top level of the Internet's namespace to foster diversity and to encourage competition to the benefit of Internet users across the globe. In its consideration of violations of its Aol, Bylaws and policies, ICANN must do more than perform a purely procedural review; it must perform a meaningful review with due respect for an applicant's fundamental rights, and ICANN's core mission.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for

reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

As will be demonstrated in greater detail below, the Board (1) disregarded material information, (2) relied on false and inaccurate material information, (3) failed to take material action, and (4) took action in violation of GNSO-created policy and ICANN's own Articles of Incorporation, Bylaws and Affirmation of Commitments.

I. The ICANN Board disregarded material information

A. The ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case

On 29 July 2016, the IRP Panel in the matter between Dot Registry, LLC and ICANN issued its final IRP Declaration (the "*Dot Registry* IRP Declaration"). On 9 August 2016, the ICANN Board accepted the *Dot Registry* IRP Declaration, naming Dot Registry the prevailing party because the ICANN Board "failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations" in ICANN's handling of the CPE process.

The ICANN Board's acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board's acceptance of the IRP Declaration regarding the .hotel gTLD (the "*Despegar et al.* IRP Declaration"). Both IRPs criticized the insufficiencies of ICANN's handling of the CPE process. But the *Dot Registry* IRP Panel considered that these insufficiencies amounted to a violation of ICANN's Aol and Bylaws, whereas the *Despegar et al.* IRP Panel came to the

opposite conclusion. The ICANN Board cannot accept both conclusions, as they are incompatible. The close relationship between these two IRP Declarations makes them an indivisible whole, which requires the ICANN Board to consider them together to avoid the risk of irreconcilable decisions.

The Board could only have accepted both IRP Declarations if it had addressed the insufficiencies of the CPE process, as recommended in the *Despegar et al.* IRP Declaration, that is 1) to put “a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators”⁴, 2) “to ensure consistency, both of approach and marking”⁵, and 3) to affirm that “transparency and administrative due process” are applicable⁶. “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.” Para. 158.

The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information. (see below under II.)

B. The ICANN Board failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of competing prospective registry operators

In the Decision, the ICANN Board decided not to cancel HTLD’s application,

⁴ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.

⁵ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.

⁶ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 145.

based on the fact that ICANN had not “uncovered 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 for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE.” The rationale also states that the ICANN Board had “the opportunity to consider all of the materials submitted relating to the .HOTEL Claimants' request for cancellation of HTLD's .HOTEL application. Following consideration of all relevant information provided and for the reasons set forth in the Resolution and Rationale, the Board has determined that cancellation of HTLD's .HOTEL application is not warranted, and the .HOTEL Claimants' request is therefore denied.”

The mere statement that the Board had “the opportunity to consider” all of the materials submitted by Requesters and that it did consider “all relevant information” does not show that all relevant information – submitted by Requesters or third parties – was actually considered. As a matter of fact, the Decision is based on findings which Requesters showed to be irrelevant. The arguments brought forward by Requesters have not been addressed in the Decision. More specifically, the ICANN Board did not address the unfair competitive advantage HTLD obtained via the illegal access of sensitive business information of its direct competitors. The ICANN Board also failed to address the argument that it is inappropriate – and contrary to ICANN's Aol, Bylaws and GNSO policy – to allocate a critical Internet resource to a party that has been cheating (or acquiesced in fraudulent actions). Finally, the ICANN Board did not

address the fact that the CPE result on HTLD's application was seriously criticized for being inconsistent with other CPE results and unreasonable, and that it would be discriminatory not to address these inconsistencies, whereas the Board has addressed inconsistency issues in similar situations. In its consideration of the *Dot Registry* IRP Declaration, the ICANN Board increased the disparate treatment towards Requesters.

Requesters explained to the ICANN Board – but the Board failed to consider – that it is of no relevance whether or not HTLD has used this information in the framework of ICANN's evaluation of .hotel. What matters is that the information was accessed with the obvious intent to obtain an unfair advantage over direct competitors. The future registry operator of the .hotel gTLD will compete with other registry operators. In the unlikely event that HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of its access to sensitive business information of Requesters. HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information of its direct competitors.

II. The ICANN Board relied on false and inaccurate material information

The *Despegar et al.* IRP Panel's conclusion that the insufficiencies of the CPE process did not amount to a violation of ICANN's Aol, Bylaws and core values was based upon the premise that the EIU was not mandated to apply ICANN's

core values⁷, and upon the false premise that the EIU's determinations are presumptively final⁸ and are made independently by the EIU, without ICANN's active involvement. In this respect, ICANN 'informed' Requesters and the IRP Panel that "[b]ecause 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 of any individual CPE".⁹ The IRP Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist"¹⁰, and the IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result]"¹¹ "The ICANN staff supplied continuing and important input on the CPE reports."¹² As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs. Moreover, ICANN's description in the *Despegar et al.* IRP of the EIU as the "panel firm" or independent evaluator, making "presumptively final" determinations was misleading. Because of ICANN's staff intimate involvement in the process, the EIU cannot be qualified as a "panel firm" or independent evaluator. The findings of the *Dot Registry* IRP Panel also reveal that the EIU was "simply a consultant to ICANN", and that ICANN had agreed with the EIU

⁷ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.

⁸ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.

⁹ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.

¹⁰ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.

¹¹ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 93, 101.

¹² ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 93.

that the EIU “would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process”.¹³

ICANN was “solely responsible to applicants ... for the decisions it decide[d] to issue”, and “each decision [had to] be issued by ICANN in its own name only.”¹⁴

The intimate involvement of ICANN staff, and the fact that ICANN had to issue decisions in its own name is material to the IRP Determinations in the *Despegar et al.* and *Dot Registry* cases. Both IRP Panels agreed¹⁵, and ICANN acknowledged¹⁶, that ICANN staff is bound to conduct itself in accordance with ICANN’s Aol and Bylaws. The *Despegar et al.* IRP Panel considered:

“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.”¹⁷

The *Despegar et al.* Panel’s reliance on false information that the EIU served as an independent panel (*i.e.*, without intimate involvement of ICANN staff) was material to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.

¹³ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 91.

¹⁴ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 92.

¹⁵ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104; ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 88, 100

¹⁶ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 100.

¹⁷ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104.

Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information.

III. The ICANN Board failed to take material action

A. The ICANN Board failed to properly investigate and address illegal actions that are attributable to HTLD

The Decision's rationale shows that the ICANN Board relied on unverified and implausible statements that Mr. Krischenowski "did not inform HTLD's personnel about 'his action,' 'did not provide any of the accessed information' to HTLD or its personnel, and HTLD 'personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it.'"¹⁸. ICANN does

¹⁸ See rationale to the Decision.

not show it has done anything to check the veracity of these statements.

Moreover, for the very first time in this matter, Requesters learnt from the Decision that Mr. Krischenowski was not the only individual affiliated to HTLD, who violated Requesters' trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer (identified in the Decision as Mr. Krischenowski's associates) were also "responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information, which occurred from March through October 2014"¹⁹. Again, this is new information for Requesters and Requesters have not been able so far to perform a thorough check on Mr. Süme and Ms. Ohlmer's background. But summary research shows that ICANN and its Board have not done any check at all. Ms. Ohlmer was the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information. She was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Decision is based on Mr. Krischenowski's actions and affiliation to HTLD only. While Mr. Krischenowski's actions, combined with HTLD's inaction towards him, are a sufficient reason to disqualify HTLD as an applicant, the fact that HTLD's CEO committed the same violations is an even stronger reason for disqualification. As HTLD's CEO, Ms. Ohlmer would have been able to use the illegally obtained information to HTLD's benefit. While the information may not have directly impacted HTLD's position as an applicant, it is clear that the information could have been used to improve its position towards

¹⁹ See rationale to the Decision.

competing registry operators, both existing ones and prospective ones. It would be completely incredible if a CEO were to obtain unauthorized access to confidential information on numerous occasions without the intention to use this information to its advantage. Moreover, the competitive advantage obtained via this information allowed HTLD to improve its market value. HTLD's shareholders must have benefited from it, when selling their shares.

B. The ICANN Board failed to remedy the violations of its Aol and Bylaws in the CPE process for Requesters, while the ICANN Board is addressing these issues for other applicants

The ICANN Board is addressing the violations of its Aol and Bylaws in the CPE for Dot Registry (cfr. ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12).

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

Requesters suffered from the same violations. However, the ICANN Board did not remedy these violations for Requesters.

IV. The ICANN Board took action in violation of GNSO-created policy and ICANN's Aol, Bylaws and Affirmation of Commitments

A. The ICANN Board's refusal to cancel HTLD's application for .hotel is unjustified and a violation of ICANN's core obligations

Allowing HTLD's application to proceed goes against everything that ICANN stands for. It amounts to an acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence is contrary to ICANN's obligations under its Articles of Incorporation and Bylaws and to ICANN's mandate to 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 through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN's duty "to protect the public interest in the allocation of critical Internet resources" (gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24). In this respect, ICANN made clear that "applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or the Internet to facilitate the commission of crimes" were going to be "automatically disqualified from the program" (gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22).

In the case at hand, ICANN caught not one, but multiple representatives of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information of a competing applicant. It is clearly not in the public interest, and the public interest will not be protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accord with any of the core values that should guide the decisions and actions of ICANN. It goes against ICANN's mandate to act in conformity with, *inter alia*, open and transparent processes that enable competition and open entry in Internet-related markets.

B. The ICANN Board discriminated against Requesters by accepting Dot Registry IRP Determination and refusing to reconsider its position on the CPE determination re .hotel

As already explained under section III.B above, the ICANN Board is addressing the violations of its Aol and Bylaws in the CPE for Dot Registry, and has provided a remedy to Dot Registry. ICANN also provided remedies for the applicant for .gay. Moreover, ICANN disclosed information to Dot Registry, but not to Requesters, although Requesters had asked for the same or similar information. ICANN did not provide a justification why it treats Requesters differently, although Requesters are situated similarly.

C. The ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application

HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afilias.

After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.

One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and

fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).

The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. The sale to Afiliias of shares (or Afiliias' 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.

Moreover, the ICANN Board cannot ignore the fact that HTLD made these changes only after it was informed that ICANN was taking the matter seriously, and more than two years after it had obtained illegal access to trade secrets of competitors. HTLD claims that it only learned about Mr. Krischenowski's illegal actions on 30 April 2015. This claim – however doubtful it may be – cannot be made for the illegal actions of HTLD's CEO, Ms. Ohlmer. Moreover, HTLD kept Mr. Krischenowski on as a consultant until 31 December 2015. He also remained the managing director of a HTLD-related company and a major shareholder. Ms. Ohlmer remained CEO until long after her misdeeds, and she even acquired shares in HTLD after ICANN had informed HTLD it was taking the situation seriously. The ICANN Board now turning a blind eye to HTLD's misdeeds contradicts that ICANN is taking the situation seriously.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Requesters ask ICANN to reverse the Decision. The ICANN Board is requested to declare that HTLD's application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary. The ICANN Board is also requested to take all necessary steps to ensure that Requesters' applications for .hotel remain in contention until Requesters have self-resolved the contention set, or until Requesters have resolved the contention set in an auction, organized by ICANN.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organized. In such event, 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 HTLD's application) regarding HTLD's application for .hotel.

In the unlikely event that the ICANN Board does not decide to cancel HTLD's application immediately, Requesters request that the ICANN Board takes the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* case.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

The Decision directly harms the Requesters, as it blocks the Requesters from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's Aol and Bylaws. As a result of ICANN's acceptance of this advice, the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses most of the harm in that the relief would allow Requesters to proceed with fairly competing for the .hotel gTLD.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Requesters' harm is identical, as explained in section 6 above.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

At this stage, all relevant documents are believed to be in ICANN's possession.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Fly Petition

Signature

25 August 2016

Date

Annex 4



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.

Los Angeles 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 USA T +1 310 301 5800 F +1 310 823 8649
Offices: Beijing • Brussels • Geneva • Istanbul • Montevideo • Seoul • Singapore • Washington

<http://icann.org>



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, which appears to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain
Chair, ICANN Board Governance Committee

Annex 5

**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**

Pending Reconsideration Requests

The Board Governance Committee (BGC) previously determined that the following Reconsideration Requests relating to the CPE process that were pending at the time the CPE Process Review commenced would be on hold until the CPE Process Review was completed.¹

- Request 14-30: Dot Registry, LLC (.LLC), filed 25 June 2014, withdrawn 7 December 2017;
- Request 14-32: Dot Registry, LLC (.INC), filed 16 June 2016, withdrawn 11 December 2017;
- Request 14-33: Dot Registry, LLC (.LLP), filed on 26 June 2014, withdrawn on 15 February 2018.
- Request 16-3: dotgay LLC (.GAY), filed on 17 February 2016;
- Request 16-5: DotMusic Limited (.MUSIC), filed on 24 February 2016;
- Request 16-8: CPA Australia Limited (.CPA), filed on 15 July 2016;
- Request 16-11: Travel Reservations SRL, Spring McCook, LLC, Minds + Machines Group Limited, Famous Four Media Limited, dot Hotel Limited, Radix FZC, dot Hotel Inc., Fegistry, LLC (.HOTEL), filed on 25 August 2016; and
- Request 16-12: Merck KGaA (.MERCK), filed on 25 August 2016

Each of the foregoing requests 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 that the requests were filed. Under the Bylaws that were in effect prior to October 2016, the Board delegated to the BGC with the authority to make a final determination on requests regarding staff action; Board consideration of the BGC's determination was not required, but optional if the BGC deemed it appropriate for a full Board determination. As noted above, Requests 14-30, 14-32, and 14-33 were withdrawn on 7 December 2017, 11 December 2017, and 15 February 2018, respectively. Of the remaining five pending requests, the following relate to staff action and would not require Board action: 16-5, 16-8, and 16-12. However, given the public nature of the CPE Process Review, the Board Accountability Mechanisms Committee

¹ See Letter from Chris Disspain to All Concerned Parties, 17 April 2017, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

(BAMC) may choose to make recommendations to the Board rather than make Final Determinations.

Roadmap for Consideration of Pending Reconsideration Requests

1. Offer the requestors of the pending Reconsideration Requests the opportunity to submit additional information relating to their requests, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. Allow two weeks for requestors to submit any such supplemental materials.
2. Offer the requestors of the pending Reconsideration Requests the opportunity to make an oral presentation to the BAMC, including the requestors who previously presented to the BGC.
3. Consider the pending requests once the requestors have presented to the BAMC (or provided confirmation that they do not intend to present to the BAMC) and have provided their additional submissions (or provided confirmation that they do not intend to submit additional materials in support of their Requests related to the CPE Process Review Reports). The pending requests should be considered in the order in which the requests were filed, if possible. The following is a proposed schedule:
 - a. Schedule two presentations per BAMC meeting, perhaps by setting a couple of meetings as soon as possible after ICANN61.
 - b. Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions (as outlined in para. 1, above), materials presented in the oral presentations (as outlined in para. 2, above), any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.

Annex 6

Reconsideration Request Form

Version of 1 October 2016

ICANN's Board Governance Committee (BGC) is responsible for receiving requests for review or reconsideration (Reconsideration Request) from any person or entity that believes it has been materially and adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requester.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Requesters are represented by:

Name: Flip Petillion, Jan Janssen, PETILLION bvba

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

Requesters are:

Requester #1

Name: Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #2

Name: Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #3

Name: Radix FZC

Address: Contact Information Redacted

Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Inc.

Address: Contact Information Redacted

Contact Information Redacted

Email: Contact Information Redacted

Requester #4

Name: Fegistry LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

2. Description of specific action you are seeking to have reconsidered.

ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11, taken on 15 March 2018 (hereinafter, the 'Decision').

3. Date of action/inaction:

15 March 2018

4. On what date did you become aware of the action or that action would not be taken?

Requesters became aware of the Decision on 20 March 2018. ICANN informed Requesters via email on 19 March 2018 at 11:04 pm CET.

5. Describe how you believe you are materially and adversely affected by the action or inaction:

Through its ICANN, the ICANN Board failed to offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process.

The Decision makes a meaningful review of main arguments expressed by Requesters impossible. Indeed, Requesters urged the ICANN Board to address

Requesters' concerns and to hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Unless the ICANN Board simply decides to cancel HTLD's application – which it ought to do for the reasons set out in Reconsideration Request 16-11 – the ICANN Board must address the fatal flaws of the CPE and the CPE Process Review, as identified by Requesters in the framework of Reconsideration Request 16-11. These fatal flaws cannot be addressed if the ICANN Board were to uphold its Decision, in which it accepts the findings of the CPE Process Review and finds that no overhaul or change to the CPE process is necessary. Unless the ICANN Board decides to cancel HTLD's application, upholding the Decision would preclude the ICANN Board from granting the remedies requested by Requesters in the framework of Reconsideration Request 16-11 and unjustly deprive Requesters from a meaningful review.

Without a meaningful review of Requesters' complaints, Requesters – who had applied for the gTLD string .hotel themselves – risk being prevented from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for a Request for Reconsideration (RfR) and ultimately an IRP.

6. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, Commitments and Core values creates

inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

7. Detail of the ICANN Action/Inaction

ICANN's challenged action is (i) contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies); and (ii) taken without consideration of material information.

Since 27 July 2017 already, Requesters are asking for more transparency about the community priority evaluation (CPE) process and the CPE Process Review.

On 16 January 2017, Requesters informed ICANN that the concerns about the lack of transparency remained unaddressed despite ICANN's publication of the report of the CPE process reviewer. Requesters reiterated and further substantiated their concerns in their letters of 1 February 2018 and 22 February 2018.

Requesters asked that ICANN and the ICANN Board address Requesters' concerns and hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Requesters made clear that, in addition to the lack of transparency in the CPE process and the CPE Process Review, they were concerned about the methodology used by the CPE Process

reviewer, and about the due process and policy violations, disparate treatment and inconsistencies that had not been considered.

On 15 March 2018, the ICANN Board accepted the findings set forth in the CPE Process Review Reports and decided that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary. In doing so, the ICANN Board simply rubberstamped the BAMC's recommendation to accept the CPE Process Reviewer's findings concerning the CPE Process Review. No explanation whatsoever is given as to why the ICANN Board accepted the BAMC's recommendation.

Moreover, both the BAMC's recommendation and the ICANN Board's acceptance of this recommendation were made without considering Requester's well-substantiated arguments against accepting the findings set forth in the CPE Process Review Reports. The BAMC and the ICANN Board failed to address any of the fatal flaws of the CPE process and of the CPE Process Review.

As these flaws have already been explained in the framework of Reconsideration Request 16-11, Requesters will not repeat them here. In sum, Requesters have clearly established that:

- i. ICANN's organisation of the CPE Process Review lacked transparency
- ii. The CPE Process Review itself was not transparent and has been executed without the necessary diligence and care
- iii. The CPE Process Review revealed a lack of independence of the CPE provider

- iv. The CPE Process Reviewer failed to analyse the consistency issues of CPE decisions

Accepting the results of the CPE Process and of the CPE Process Review without addressing these flaws is inconsistent with ICANN's Mission, Commitments and Core Values. ICANN's acceptance of the results of the CPE Process and of the CPE Process Review is not a consistent, neutral, objective and fair application of ICANN's documented policies.

In addition, the lack of transparency surrounding the CPE Process Review made it impossible for anyone, including the ICANN Board, to assess the weight of the conclusions made by the CPE Process Reviewer. Although the scope of the CPE Process Review was too limited, the review revealed that the CPE Provider was not independent. The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not discuss or consider the various fairness, nondiscrimination and consistency objections. The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not ask whether the criteria the CPE Panel claimed to apply were the criteria laid out in the Applicant Guidebook and GNSO Policy. The approach followed by the CPE Process Reviewer was a "description" of the CPE Panel's reports, but not an "evaluation" to determine whether the CPE Panel's reports were actually following the applicable guidelines in a neutral and nondiscriminatory manner.

8. What are you asking ICANN to do now?

In addition to the Request, made in the framework of Reconsideration Request 16-11, Requesters request that – unless ICANN finally decides to cancel HTLD’s application – ICANN reconsiders the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 and reverses the decisions in which the ICANN Board (i) accepted the findings set forth in the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary, (iii) declared that the CPE Process Review has been completed.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organised. In such event, Requesters request that, prior to the hearing, ICANN provides full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer. Requesters ask ICANN to provide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process Reviews.

For reasons of procedural economy, Requesters propose that this request for reconsideration be handled together with Reconsideration Request 16-11 that was put on hold pending completion of the CPE Process Review.

9. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.

Maintaining the Decision would mean that the ICANN Board fails to offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the CPE process and the CPE Review Process made in the framework of Reconsideration Request 16-11. The lack of a meaningful review directly harms the Requesters, as they are not offered a fair chance to defend their applications for .hotel. Without a meaningful review of Requesters' complaints, Requesters – who had applied for the gTLD string .hotel themselves – risk being prevented from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's Articles of Incorporation and Bylaws. As a result of (i) ICANN's acceptance of this advice in contravention of its Mission, Commitments, Core Values and policies Mission, and (ii) ICANN's failure to address the insufficiencies of this advice and the review of the advice (also in contravention of ICANN's Mission, Core Values and policies), the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses the harm that would

result from not being given a fair opportunity to defend their application for .hotel. Unless ICANN finally decides to cancel HTLD's application, a reversal of the Decision is necessary to ensure a meaningful review of Requesters' pending Reconsideration Request 16-11.

10. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

10a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

Requesters' harm is identical, as explained in section 5 above and in Reconsideration Request 16-11.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

At this stage, all relevant documents are believed to be in ICANN's possession.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction.

The Board Governance Committee may dismiss a Reconsideration Requests if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BGC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BGC shall be documented and promptly (i.e., as soon as practicable) posted on the ICANN Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BGC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BGC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BGC. The ICANN Board's decision on the BGC's recommendation is final and not subject to a Reconsideration Request.



Signature

14 April 2018

Date

Annex 7

Subject: Re: [Reconsideration Request] Reconsideration Requests 18-6
Date: Wednesday, May 23, 2018 at 1:59:16 PM Pacific Daylight Time
From: Herb Wayne (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 Wayne
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