

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

**ICANN’S MOTION FOR SUMMARY ADJUDICATION OF CERTAIN CLAIMS
THAT ARE BARRED BY THE STATUTE OF LIMITATIONS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby requests that the Panel dismiss certain claims from this Independent Review Proceeding (“IRP”) and further rule that all discovery targeted to those issues be rejected. In support of its motion, ICANN states as follows:

1. This IRP relates to various claims asserted by Claimants regarding their respective applications to ICANN for the .HOTEL generic top-level domain (“gTLD”). As explained below, Claimants are not happy that non-party Hotel Top Level Domain S.a.r.l’s (“HTLD”) community-based application to operate the .HOTEL gTLD prevailed in Community Priority Evaluation (“CPE”), which means that HTLD’s application was awarded priority over the .HOTEL applications submitted by Claimants (which did not seek community priority), and HTLD will get to operate .HOTEL. Several of the claims that Claimants raise in this IRP, however, are time-barred and should be dismissed, along with any accompanying discovery requests.

2. By way of summary (and as explained in detail below), ICANN requests via this motion that the Panel dismiss any claims related to the following:

- (i) The acquisition of HTLD by Afilias;
- (ii) The decision in the *Despegar* IRP, which constituted Claimants’ challenge to the determination that HTLD’s application for .HOTEL qualifies for “community” treatment, including the decision by ICANN’s vendor, the Economist Intelligence Unit (or “CPE Provider”), that HTLD’s application received a score that gave it priority based on its intended operation for the benefit of a stated “community”;
- (iii) The decision in the *Dot Registry* IRP, including any claim that ICANN should have somehow “revisited” the outcome of the *Despegar* IRP in view of the final

declaration in the *Dot Registry* IRP; and

- (iv) Any challenges to the lack of Ombudsman review on the two Reconsideration Requests (16-11 and 18-6) that Claimants filed concerning these matters. In this respect, and as discussed below, ICANN notes that actions by the Ombudsman are not even subject to review in an IRP.

As discussed below, each of these claims—if in fact Claimants are still pursuing them—are easily time-barred by the limitations period imposed by ICANN’s Bylaws and other applicable rules during the relevant times.

FACTUAL BACKGROUND

3. ICANN received applications for new gTLDs during the Spring of 2012. When new gTLD applicants submitted applications, they were able to designate their applications as either standard or community-based, *i.e.*, “operated for the benefit of a clearly delineated community.”¹ An applicant with a community-based application could elect to proceed with CPE and, if it chose to do so, its application was forwarded to the CPE Provider for review. A panel from the CPE Provider (“CPE Panel”) then evaluated the application against the four criteria set forth in the Applicant Guidebook and issued a report.² If the CPE Panel awarded the application at least 14 out of 16 possible points, the application prevailed in CPE. If an application prevailed in CPE, that application would be given priority over all other applications for the same gTLD that did not seek and prevail in CPE.³

4. ICANN received a total of seven applications for the string .HOTEL, only one of

¹ Applicant Guidebook, § 1.2.3.1. For the Panel’s convenience, relevant provisions of the Applicant Guidebook are included in Exhibit 1.

² *Id.*, § 4.2.3.

³ *Id.*, § 4.2.2.

which (the application submitted by HTLD) sought to represent a community and sought priority. In June 2014, the CPE Provider issued its report indicating that HTLD's .HOTEL application had been awarded 15 points, which was sufficient to prevail in CPE.⁴ As discussed further below, in March 2015, several of the non-prevailing .HOTEL applicants (including some of the Claimants here) initiated an IRP challenging the CPE result on HTLD's .HOTEL application (the "*Despegar* IRP"). In February 2016, the *Despegar* IRP Panel issued its final declaration, rejecting Claimants' claims and finding ICANN to be the prevailing party. On 10 March 2016, the ICANN Board accepted the final declaration of the *Despegar* IRP Panel.⁵

5. Separately, the applicant for the .INC, .LLC, and .LLP gTLDs (Dot Registry, LLC) initiated an IRP in September 2014, challenging the fact that Dot Registry's applications did not prevail in CPE (the "*Dot Registry* IRP"). In July 2016, the *Dot Registry* IRP Panel issued its final declaration, with the majority of the Panel finding Dot Registry to be the prevailing party. On 9 August 2016, the ICANN Board accepted the final declaration of the *Dot Registry* IRP Panel.⁶

6. In September/October 2016, following the *Dot Registry* IRP, and in response to concerns raised by certain members in the community regarding the CPE process and resulting reports, the ICANN Board directed ICANN organization to undertake a review of certain aspects of the CPE process, which included: (i) an evaluation of the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE

⁴ Exhibit 2, HOTEL Top-Level-Domain s.a.r.l. New gTLD Program Community Priority Evaluation Report.

⁵ The ICANN Board's Resolution accepting the final declaration in the *Despegar* IRP may be found here: <https://features.icann.org/consideration-eco-and-hotel-irp-declaration>.

⁶ The ICANN Board's Resolution accepting the final declaration in the *Dot Registry* IRP may be found here: <https://features.icann.org/consideration-dot-registry-v-icann-irp-final-declaration>.

Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider, to the extent such material existed, for the evaluations which were the subject of pending Reconsideration Requests (Scope 3). Scopes 1, 2, and 3 are collectively referred to as the “CPE Process Review.” FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and Technology Practice was retained (by Jones Day on behalf of its client ICANN) to conduct the CPE Process Review, and FTI ultimately issued three reports.

7. On 13 December 2017, ICANN published the three reports on the CPE Process Review (“CPE Process Review Reports”).⁷ Relevant here, FTI concluded that “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”⁸ In addition, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE provider applied the CPE criteria in an inconsistent manner.”⁹

8. On 15 March 2018, the ICANN Board acknowledged and accepted the findings in the CPE Process Review Reports, declared that the CPE Process Review was complete, and directed the Board Accountability Mechanisms Committee (“BAMC”) to consider the remaining

⁷ The reports may be found here: <https://newgtlds.icann.org/en/applicants/cpe>. They are also attached as Exhibits 3, 4 and 5.

⁸ Exhibit 3 at 3, 15.

⁹ Exhibit 4 at 3.

Reconsideration Requests that were placed on hold pending completion of the CPE Process Review.¹⁰ At that time, Reconsideration Request 16-11, submitted by Claimants in August 2016, remained pending. After careful review as well as further written and verbal submissions from Claimants, the ICANN Board denied Reconsideration Request 16-11 on 27 January 2019.¹¹

9. In their Request for IRP, dated December 16, 2019 (the “IRP Request,” attached as Exhibit 7), Claimants again seek to challenge the CPE results regarding HTLD’s .HOTEL application and, in doing so, assert a number of claims that are barred by the applicable statute of limitations. In particular, Claimants assert the four claims set forth above in paragraph 2.¹² As set forth below, each of these claims was raised well beyond the deadline permitted under the relevant Bylaws or the Interim Supplemental Procedures. Notably, the Emergency Panelist agreed with ICANN that each of these claims is barred by the statute of limitations, and Claimants have never explained how these particular claims are not time-barred. (For the Panel’s convenience, the Emergency Panelist’s decision, dated August 7, 2020, is attached as Exhibit 8.) Via this motion, ICANN seeks to remove these time-barred claims from this IRP,¹³ and seeks to prevent any discovery associated with these requests as wholly irrelevant so that discovery may be focused on what is actually and properly at issue in this IRP.

10. What remains in this IRP are Claimants’ core claims, and an ancillary claim,

¹⁰ Exhibit 6, Approved Board Resolutions of the 15 March 2018 Regular Meeting of the ICANN Board, may be found here: <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

¹¹ The ICANN Board’s Resolution denying Reconsideration Request 18-6 may be found here: <https://features.icann.org/consideration-reconsideration-request-18-6-travel-reservations-srl-minds-machines-group-limited>.

¹² Exhibit 7, IRP Request, at 12 (Ombudsman), 16-21 (*Dot Registry* IRP), 21-24 (*Despegar* IRP), 26-28 (*Afilias* acquisition of HTLD).

¹³ Exhibit 9, 2 June 2022 Bylaws, Art. 4, § 4.3(o) provides that IRP Panels shall have the authority to: “(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious.”

which ICANN has not argued are barred by any statute of limitations:

- (i) Claimants' claim regarding ICANN's acceptance of the CPE Process Review Reports. ICANN has not argued that the challenges in Claimants' Reconsideration Request 18-6 to the CPE Process Review, and the Board's acceptance thereof, are time-barred in this IRP.¹⁴
- (ii) In February 2015, ICANN learned that applicants were able to view certain documents uploaded by other applicants on the new gTLD Internet portal (the "Portal Configuration" issue). ICANN also learned that in 2014, certain individuals associated with HTLD's .HOTEL application had viewed some non-public information submitted with the applications of competing applicants for .HOTEL. ICANN conducted an extensive investigation and, in August 2016, the Board determined that even assuming the individual(s) had obtained non-public information belonging to .HOTEL applicants, it would not have had any impact on the CPE of HTLD's application.¹⁵ ICANN has not argued that the portions of Claimants' Reconsideration Request 16-11 that specifically challenge the Board resolutions regarding the Portal Configuration, as they relate to .HOTEL, are time-barred.
- (iii) Claimants argue that ICANN should already have enacted a "Standing Panel" of arbitrators for all IRPs. While ICANN contends that the issue regarding the

¹⁴ The Board denied Reconsideration Request 16-11 on 27 January 2019 (*see* <https://features.icann.org/consideration-reconsideration-request-16-11-travel-reservations-srl-famous-four-media-limited-and> – and denied Reconsideration Request 18-6 on 18 July 2018 (*see* <https://features.icann.org/consideration-reconsideration-request-18-6-travel-reservations-srl-minds-machines-group-limited>).

¹⁵ *See* <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en>.

timing of establishing a Standing Panel is moot inasmuch as the process for establishing the panel is well underway (with significant community involvement), ICANN does not contend that this claim is time-barred.

11. In short, ICANN urges the Panel to issue an order dismissing the four claims set forth above in paragraphs 2 that are undoubtedly barred by the statute of limitations. Doing so would be much more efficient than continuing to litigate moot issues, would allow the parties and the Panel to focus on the core issues, would assist in resolving various disputes regarding document production, and would facilitate the final resolution of this matter.

THE APPLICABLE STATUTES OF LIMITATIONS

12. ICANN's February 2016 Bylaws (which were the operative Bylaws at the time Claimants submitted Reconsideration Request 16-11) provided that, in order to submit a reconsideration request to ICANN, a claimant needed to submit that request within fifteen (15) days after the date on which information about the challenged Board action was first published.¹⁶ The Bylaws also provided that a claimant had to file an IRP within thirty (30) days of the challenged Board action.¹⁷

13. ICANN has since amended its Bylaws (several times) and, in October 2018, ICANN adopted the "Interim Supplementary Procedures" that continue to govern IRPs to this

¹⁶ See Exhibit 10, 11 February 2016 Bylaws, Art. IV, § 2.5: "All Reconsideration Requests must be submitted within fifteen days after: (a) for request challenging Board actions, the date on which information about the challenged Board action is first published in a resolution; (b) for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or (c) for requests challenging Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner."

¹⁷ See, e.g., Exhibit 10, Art. IV, § 3.3: "A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."

date.¹⁸ Further, the deadline to submit a reconsideration request became thirty (30) days.¹⁹ Under Rule 4 of the Interim Supplementary Procedures, which became effective on 25 October 2018, claimants have 120 days to initiate an IRP (or a cooperative engagement process, otherwise known as a “CEP”).²⁰

14. As set forth below, Claimants did not come anywhere close to meeting these deadlines with respect to the four claims discussed in more detail below. Accordingly, each of these four claims should be dismissed from this IRP, and any discovery requests associated with these requests should be suppressed as irrelevant.

ARGUMENT

I. Claimants’ Claims Regarding the Acquisition of HTLD by Afilias Should be Summarily Dismissed.

15. During the last video conference with the Panel, Claimants stated that they do not challenge the acquisition by Afilias of HTLD’s application for .HOTEL. This was news to ICANN because Subsection 2D of the IRP Request states: “Claimants seek review of ICANN’s decision to approve [the] sale of the .HOTEL Community-based Application [sic] to a domain registry conglomerate [Afilias], without requiring the new Applicant to pass CPE.” Exhibit 7 at 26. ICANN notes that applications, not applicants, are reviewed by the CPE Provider, but, in all events, if Claimants have abandoned this claim as they now state, then there should be no issue

¹⁸ The Interim Supplementary Procedures, which are attached hereto as Exhibit 11, may also be found here: <https://www.icann.org/en/system/files/files/irp-interim-supplementary-procedures-25oct18-en.pdf>.

¹⁹ See Exhibit 12, 30 September 2016 Bylaws, Article IV, § 4.2(g)(i). Per Article IV, § 4.2(g), for example, reconsideration requests must be filed within 30 days “after the date on which information about the challenged Board action is first published in a resolution,” or “for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.”

²⁰ Exhibit 11 at 5.

with dismissing the claim from this IRP. Regardless, the claim is time-barred, as set forth below.

16. First, HTLD notified ICANN on 23 March 2016 that Afilias would be acquiring HTLD.²¹ A few months later, in August 2016, Claimants acknowledged the fact of the acquisition in Reconsideration Request 16-11,²² but they did not challenge the acquisition in that request. Indeed, Claimants did not challenge the acquisition until they filed this IRP in December 2019, more than three years later. Under the Bylaws in effect in 2016, Claimants had 15 days to submit a reconsideration request challenging the Afilias acquisition, and they did not do so. In fact, they never submitted a reconsideration request on this matter and first raised the challenge in an IRP three years later. Accordingly, Claimants' challenge to the acquisition is clearly time-barred.

17. The Emergency Panelist agreed:

In view of all the above evidence, the Emergency Panelist determines that an attempt by Claimants to bring an outright challenge to an action or failure to act by the ICANN Board concerning the transfer of ownership shares from HTLD to Afilias is time-barred.

Exhibit 8 at ¶ 112.²³

18. Accordingly, ICANN seeks an order from the Panel that any challenge to the Afilias acquisition of HTLD is dismissed and that any requests for production associated with the

²¹ The notification letter from HTLD may be found here: <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>.

²² Reconsideration Request 16-11 at 19 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

²³ The Emergency Panelist also “recognize[d] that Claimants claim directly challenging the transfer of ownership interest from HTLD to Afilias is one of Claimants’ principal claims in this IRP.” Exhibit 8 at ¶ 112.

challenge should be suppressed.²⁴

II. Claimants' Claims Regarding the *Despegar* IRP are Time-Barred.

19. Claimants know that their *Despegar* IRP claims are time-barred. In the Board's 27 January 2019 resolution denying Reconsideration Request 16-11, the Board explicitly informed Claimants that such claims were time-barred at the reconsideration request step. Later filing an IRP does not somehow cure the existing time bar:

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

Approved Board Resolutions of the 27 January 2019 Regular Meeting of the ICANN Board.²⁵

20. In March 2015, Fegistry, *Despegar* Online SRL, Donuts, Famous Four Media Limited, and Radix FZC ("*Despegar* Claimants") filed an IRP challenging ICANN's acceptance of the CPE Panel's report awarding priority to HTLD's application for .HOTEL (*Despegar* IRP).²⁶ On 11 February 2016, the *Despegar* IRP Panel found in ICANN's favor: "The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC [Board Governance Committee] acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws, and that the Claimants' complaints have not

²⁴ In particular, Claimants' Document Requests 7 and 33 seek documents related to this issue and should be suppressed.

²⁵ Exhibit 14, Approved Board Resolutions of the 27 January 2019 Regular Meeting of the ICANN Board, may be found here: <https://www.icann.org/resources/board-material/resolutions-2019-01-27-en>.

²⁶ The Request for IRP may be found here: <https://www.icann.org/en/system/files/files/irp-request-redacted-10mar15-en.pdf>.

been made out.”²⁷ On 10 March 2016, the ICANN Board accepted the final declaration in the *Despegar* IRP.²⁸

21. On 25 August 2016, more than five months after the Board’s resolutions on the *Despegar* IRP, Claimants submitted Reconsideration Request 16-11 to ICANN.²⁹ In that request, Claimants made various claims, most of which focus on the fact that .HOTEL was awarded community priority, whereas the applicants for .INC, .LLP, and .LLC were not awarded community priority, yet the IRP Panel in the *Despegar* IRP did not find a violation of ICANN’s Bylaws, whereas the IRP Panel in the *Dot Registry* IRP did. Claimants also argued that the ICANN Board’s acceptance of the *Dot Registry* IRP final declaration was “incompatible” with the ICANN Board’s prior acceptance of the *Despegar* IRP final declaration. In denying Reconsideration Request 16-11, on 27 January 2019 (eleven months before Claimants filed the current IRP), the Board explicitly noted that the requestors’ claims regarding the *Despegar* IRP final declaration and the related Board resolutions were time-barred.³⁰

22. Nevertheless, Claimants now contend that “ICANN materially mislead Claimants and the *Despegar* IRP Panel.” Exhibit 7 at 18. Claimants also assert that, in the *Despegar* IRP, Claimants should have been entitled to certain discovery— even though Claimants did not seek discovery during the *Despegar* IRP. Claimants further assert that such discovery, while never sought, might (or might not) have caused the *Despegar* IRP Panel to reach a different result.

²⁷ The Final Declaration of the *Despegar* IRP Panel may be found here: <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>. The quoted portion is from ¶ 151.

²⁸ *Supra* fn. 5.

²⁹ Reconsideration Request 16-11 may be found here: <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

³⁰ *Supra* fn. 14.

Claimants then ask this Panel to issue an order that the Board's acceptance of the *Despegar* IRP final declaration, which occurred on March 10, 2016, was a violation of ICANN's Articles of Incorporation or Bylaws (although Claimants do not explain which ones).

23. In addition to being an inappropriate attempt to re-litigate an issue that an IRP panel has already adjudicated, these claims are time-barred. These claims were time-barred at the reconsideration request stage (in 2016), and they remained time-barred when Claimants filed this IRP three years later.

24. And the Emergency Panelist agreed: "If Claimants are attempting to bring an outright challenge to the Board's acceptance of the *Despegar* IRP Declaration now, the challenge would be untimely under both the February 11, 2016 Bylaws in effect at the relevant time, and under Rule 4 of the Interim Supplementary Procedures." Exhibit 8 at ¶ 100. The Emergency Panelist continued: "to the extent Claimants' IRP claims directly challenge the Board's acceptance of the *Despegar* IRP Declaration, they are untimely and therefore do not raise sufficiently serious questions related to the merits." Exhibit 8 at ¶ 103.

25. Accordingly, ICANN seeks an order from the Panel that any claims relating to the *Despegar* IRP are dismissed and that any document requests associated with those claims should be suppressed.³¹

III. Claimants' Claims Regarding the *Dot Registry* IRP are Time-Barred.

26. To the extent that Claimants are making claims regarding or relating to the *Dot Registry* IRP, such claims are time-barred. And to the extent that Claimants are trying to use the *Dot Registry* IRP in order to make claims regarding the *Despegar* IRP, such claims are also time-

³¹ In particular, Claimants' Document Requests for production 19, 20, and 31 seek documents related to this issue and should be suppressed.

barred (as explained above).

27. The *Dot Registry* IRP was filed in September 2014, challenging ICANN's denial of a reconsideration request regarding the fact that the requestor's .INC, .LLC, and .LLP applications did not prevail in CPE. The IRP Panel issued its final declaration in July 2016, and the ICANN Board accepted the *Dot Registry* IRP final declaration on 9 August 2016.³²

28. Claimants apparently do not directly challenge the outcome of the *Dot Registry* IRP, presumably because the Panel found in favor of the claimants in that case. As noted above, the *Dot Registry* matter involved three gTLDs— .INC., .LLC, and .LLP—that did not prevail in CPE. While the Panel majority determined that Dot Registry was the prevailing Party, the Panel emphasized that they were not assessing whether ICANN staff or the CPE Provider failed to comply with obligations under the Articles of Incorporation, Bylaws or Applicant Guidebook, nor was the Panel substituting its judgment for that of the CPE Provider as to whether Dot Registry was entitled to community priority.³³

29. Notwithstanding that Claimants were not parties to the *Dot Registry* IRP, in their IRP Request, Claimants discuss the *Dot Registry* IRP at some length and appear to claim that ICANN should have taken some (unspecified) action to re-address the prior *Despegar* IRP Panel final declaration and the Board's prior acceptance of that final declaration in light of the *Dot Registry* IRP final declaration (on unrelated gTLDs).³⁴

30. If and to the extent Claimants are challenging the outcome of the *Dot Registry* IRP, such a claim should have been initiated within 15 days (for a reconsideration request) or

³² *Supra* fn. 6.

³³ The Final Declaration of the Dot Registry IRP Panel may be found here: <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>. The conclusions of the Panel are contained in Paragraphs 151-155 of the Final Declaration.

³⁴ *See, e.g.*, Exhibit 7, Claimants' IRP Request, at 21-24.

within 30 days (for an IRP) after the Board’s 9 August 2016 resolutions.³⁵ Accordingly, any such claim raised in Claimants’ December 2019 IRP Request (more than three years later) is time-barred. And, as noted in the previous section, if Claimants instead are trying to use the *Dot Registry* IRP to challenge something related to the *Despegar* IRP, that claim likewise is time-barred, as explained above.

31. In addition, there is no basis to be seeking documents from or relating the *Dot Registry* IRP. That IRP is long over—the ICANN Board accepted that Panel’s findings in August 2016, and Claimants never asserted claims regarding the *Dot Registry* IRP final declaration prior to bringing their IRP Request in December 2019.

32. Accordingly, ICANN seeks an order from the Panel that any claims relating to the *Dot Registry* IRP are dismissed and that any document requests associated with those claims shall be suppressed.³⁶

IV. Claimants’ Claims Regarding the “Failure” of the ICANN Ombudsman to Review Reconsideration Requests 16-11 and 18-6 are Time-Barred and Contrary to the Bylaws.

33. In their IRP Request, Claimants allege that ICANN’s Ombudsman should have reviewed Reconsideration Requests 16-11 and 18-6, and Claimants ask the Panel to appoint a “different” ombudsman to conduct that review.³⁷

34. Claimants’ claims with respect to the Ombudsman are both time-barred and

³⁵ See Exhibit 10, 11 February 2016 Bylaws, Art 4, § 4. As previously noted, the relevant provisions for Reconsideration Requests are found in Section 4.2, and the relevant provisions for IRPs are found in Section 4.3.

³⁶ In particular, Claimants’ Document Requests 21 and 30 seek documents related to this issue and should be suppressed.

³⁷ Exhibit 7 at 12.

contrary to the actual Bylaws.³⁸ With regard to Ombudsman review of Reconsideration Request 16-11, Claimants' claim is "without merit" and "is also untimely," as confirmed by the Emergency Panelist. Exhibit 8 at ¶ 122. Indeed, at the time Reconsideration Request 16-11 was submitted, the operative Bylaws (11 Feb. 2016 Bylaws) did not provide for Ombudsman review of reconsideration requests; therefore, there certainly was no *requirement* for Ombudsman review. Moreover, Claimants were on notice that no such review was part of the process for Request 16-11 at least as of 15 February 2018, when the Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Place On Hold Pending Competition Of The CPE Process Review ("Roadmap") was publicly posted.³⁹

35. As such, this claim is untimely regardless of whether the Panel applies the statute of limitations in the operative February 2016 Bylaws (30-day deadline/March 2018 at the latest) or in Rule 4 of the Interim Supplementary Procedures (120-day deadline/June 2018 at the latest). Claimants did not initiate the cooperative engagement process relating to this IRP until October 2018.

36. The Emergency Panelist agreed:

Request 16-11 was filed on August 25, 2016, alleging that certain action or inaction by ICANN violated its Articles, Bylaws or other policies and

³⁸ Exhibit 12, 1 October 2016 Bylaws, Art. 5 (emphasis added): The "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV *have not been invoked*."

³⁹ The Roadmap may be found here: <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>. In particular, and as noted by the Emergency Panelist, the Roadmap specifically stated that: "Each of the foregoing requests [including Request 16-11] was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed." The Roadmap further provided detail on the steps to be taken for each of the Reconsideration Requests; and those steps did not include reference to Ombudsman review.

commitments in effect at that time. When Request 16-11 was filed, there was no procedure in place for the Ombudsman to review Reconsideration Requests. Further, a claim to request Ombudsman review is untimely in view of the Roadmap published by ICANN on February 15, 2018. . . . The Emergency Panelist finds that Claimants IRP claim that Request 16-11 should have been reviewed by the Ombudsman is without merit because there was no requirement in the February 2016 Bylaws and is also untimely; it therefore fails to raise ‘sufficiently serious questions related to the merits.’

Exhibit 8 at ¶ 122.

37. With regard to Ombudsman review of Reconsideration Request 18-6, the Ombudsman did not “fail” to review Reconsideration Request 18-6; rather, the Ombudsman appropriately recused himself from substantively considering it in accordance with the Bylaws.⁴⁰ More to the point, the Ombudsman recused himself on 23 May 2018,⁴¹ which was publicly posted on ICANN’s website and transmitted to Claimants on 24 May 2018. Thus, the deadline for filing an IRP challenging the Ombudsman’s recusal would have been late June 2018, which Claimants did not meet.

38. The Emergency Panelist agreed:

Under the Interim Supplementary Procedures, Rule 4, Claimants would have had 120 days to bring an IRP claim (or engage in the CEP) from May 23, 2018, the date when the Ombudsman recused himself. Claimants have not contended that they were unaware of the Ombudsman’s recusal in May 2018. For this reason of untimeliness, Claimants have failed to raise ‘sufficiently serious questions relate to the merits.’

⁴⁰ See Exhibit 13, 22 July 2017 Bylaws, Article 4, Section 4.2(1)(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.”

⁴¹ The letter by which the Ombudsman recused himself from Request 18-6 may be found here: <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

Exhibit 8 at ¶ 125.⁴²

39. In sum, any claims related to the Ombudsman’s review of Reconsideration Requests 16-11 or 18-6 are time-barred and contrary to the Bylaws.⁴³ Accordingly, ICANN seeks an order from the Panel that any claims relating to Ombudsman review are dismissed and that any document requests associated with those claims shall be suppressed.⁴⁴

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⁴² The Emergency Panelist continued: “Moreover, the Emergency Panelist determines that, regarding the merits of Claimants’ claim that an Ombudsman should have been appointed for Request 18-6, Claimants have also failed to raise ‘sufficiently serious questions related to the merits.’” Exhibit 8 at ¶ 126. Further, irrespective of the statute of limitations, the Ombudsman correctly and properly recused himself under the Bylaws in effect for Request 18-6, as the Emergency Panelist confirmed. *Id.* at ¶ 131.

⁴³ ICANN further notes that there is no basis for Claimants to challenge in this IRP anything that the ICANN Ombudsman might or might not have done. Nothing in Section 4.3 of the ICANN Bylaws, which contains quite a lengthy list of the purposes and proper scope of an IRP, permits a claimant to seek review of Ombudsman conduct. See <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

⁴⁴ In particular, Claimants’ Document Requests 10, 11, and 37 seek documents related to this issue and should be suppressed.

CONCLUSION

For the reasons set forth above, ICANN requests that the Panel dismiss the four claims that are the subject of this motion and exclude as irrelevant any discovery related to those claims as specifically noted in each of the Argument sections above.

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Respectfully submitted,

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