

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC, Minds + Machines Group, Ltd.,) ICDR CASE NO. 01-19-0004-0808
Radix Domain Solutions Pte. Ltd., and Domain)
Ventures Partners PCC Limited)
)
Claimants,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S RESPONSE TO REQUEST FOR INDEPENDENT REVIEW PROCESS

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Request for Independent Review Process (“IRP”), dated 16 December 2019, submitted by Registry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited (“Claimants”).

1. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as “icann.org” into numeric IP addresses understood by computers. ICANN’s core Mission is to ensure the stability, security, and interoperability of the DNS.¹ To that end, ICANN contracts with entities that operate generic top-level domains (“gTLDs”), which represent the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.”

2. ICANN’s New gTLD Program (“Program”) has produced ICANN’s most ambitious expansion of the Internet’s naming system. Through it, entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. ICANN designed the Program to enhance diversity, creativity, and choice, and to provide the benefits of innovation to consumers via the availability of new gTLDs. Indeed, the Program has already resulted in the introduction of over 1,200 new gTLDs to the Internet.

3. This IRP proceeding calls for a determination of whether ICANN complied with its Articles of Incorporation (“Articles”), Bylaws and internal policies and procedures in evaluating Claimants’ Requests for Reconsideration concerning non-party Hotel Top Level Domain S.a.r.l.’s (“HTLD”) community-based application to operate the .HOTEL gTLD. Despite Claimants’ redundant rhetoric in the IRP Request, the claims against ICANN are entirely

unsupported. Notably, although Claimants purport to challenge the ICANN Board’s actions on Reconsideration Requests 16-11 (“Request 16-11”) and 18-6 (“Request 18-6”), references to those Board actions are conspicuously rare in the IRP Request. Instead, Claimants rely on baseless, hyperbolic accusations. Ignoring the rhetoric, Claimants primarily raise time-barred issues and, even if those issues were not time-barred, Claimants never address ICANN’s thorough, reasoned responses to Requests 16-11 and 18-6.

4. Claimants, four of the seven applicants for .HOTEL, and they refuse to accept that HTLD’s application achieved community priority over the other applications for .HOTEL. Instead, Claimants want to force an auction for control of .HOTEL, even though HTLD’s application properly prevailed under the terms of the New gTLD Applicant Guidebook (“Guidebook”). To be clear, ICANN’s interest in this matter is not in picking winners and losers, but in completing the rollout of the .HOTEL gTLD pursuant to the terms of the Guidebook and consistent with ICANN’s Articles, Bylaws, and policies and procedures.

SUMMARY OF RELEVANT FACTS

I. ICANN’S ACCOUNTABILITY MECHANISMS.

5. To help ensure that ICANN is serving, and remains accountable to, the global Internet community, ICANN has established Accountability Mechanisms that allow aggrieved parties to challenge or seek review of ICANN actions and decisions that the parties believe violate ICANN’s Articles, Bylaws, the Guidebook, and certain internal policies and procedures.²

6. ICANN’s Bylaws provide for a process by which “any person or entity materially affected by an action or inaction” of ICANN may request review or reconsideration of that action or inaction (“Reconsideration Request”).³ A committee of the ICANN Board hears, considers, and recommends to the Board whether it should accept or deny a Reconsideration Request.⁴

7. Similarly, the Bylaws provide for an Office of the Ombudsman (“Ombudsman”).⁵

The Ombudsman’s main function is “to provide an independent internal evaluation of complaints” that ICANN or an ICANN constituent body has acted unfairly.⁶ In addition, since 1 October 2016, the Ombudsman has also been tasked with evaluating Reconsideration Requests unless he recuses himself.⁷ The Ombudsman provides to ICANN an evaluation of the Reconsideration Request before ICANN’s Board Accountability Mechanisms Committee (“BAMC”) makes a recommendation to the Board.⁸ The Ombudsman does not investigate complaints while “one of the other formal accountability mechanisms” considers the same issue.⁹

8. In addition, the Bylaws create the IRP, under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an “independent third-party” for review.¹⁰ IRPs are conducted in accordance with the International Centre for Dispute Resolution’s (“ICDR”) International Arbitration Rules, as modified by ICANN’s Bylaws and IRP Interim Supplementary Procedures (“Interim Procedures”).¹¹

9. Under the Bylaws in effect prior to October 2016, an IRP had to be commenced within 30 days of the posting of the minutes of the Board meeting that the claimant contends demonstrates that ICANN violated its Bylaws or Articles.¹² Since October 2016, an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute provided; however, an IRP may not be filed more than twelve months from the date of such action or inaction.¹³

II. ICANN’S NEW gTLD PROGRAM.

10. Under the New gTLD Program, any interested party could apply to operate new gTLDs that were not already in use in the DNS; there was no cap on the number of new gTLD applicants. Approximately 1,200 new gTLDs have been delegated under the Program.¹⁴

11. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. Numerous

revisions to the Guidebook were made based on public comments, and multiple versions were drafted. ICANN adopted the operative, 338-page Guidebook in June 2012.¹⁵

12. New gTLD applicants must disclose in their applications the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares.”¹⁶ Applicants must inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”¹⁷

13. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the applications are placed in a “contention set.”¹⁸ The Guidebook then encourages (but does not require) the applicants to agree among themselves on a private resolution of the contention set.¹⁹ If the applicants cannot resolve the contention set privately, string contentions may be resolved through an ICANN auction of last resort; or, if one of the applications is community-based and prevails in Community Priority Evaluation (“CPE”), then that application would prevail over the rest of the contention set.²⁰

14. New gTLD applicants may designate their applications as either standard or community-based, *i.e.*, “operated for the benefit of a clearly delineated community.”²¹ Applicants that designate their applications as community-based are expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD strongly and specifically related to the community named in the application.”²² An applicant with a community-based application may elect to proceed with CPE. If the applicant proceeds with CPE, its application is forwarded to an independent, third-party provider (“CPE Provider”), for review.²³

15. A panel from the CPE Provider (“CPE Panel”) evaluates the application against four criteria: Community Establishment; Nexus between Proposed String and Community;

Registration Policies; and Community Endorsement.²⁴ If the CPE Panel awards the application at least 14 out of 16 possible points, the application will prevail in CPE.²⁵

16. If the application prevails in CPE, the applicant’s application is given priority over all other applications for the same gTLD that did not seek and prevail in CPE.²⁶

17. ICANN’s contract with the CPE provider requires ICANN to maintain the CPE Provider’s proprietary, secret, or confidential information or data relating to the CPE Provider’s operations, products or services, and personal information, in confidence and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own” confidential information.²⁷

III. THE .HOTEL CONTENTION SET.

18. ICANN received seven applications for .HOTEL — six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD (“HTLD’s Application”).²⁸ The seven applications for .HOTEL were placed into a contention set pursuant to the procedures set forth in the Guidebook.²⁹

A. HTLD’s Application

19. Since its submission in 2012, HTLD’s Application has listed Afilias PLC or Afilias Ltd. (collectively, “Afilias”) as one of two shareholders with at least 15% of HTLD’s shares. The second major shareholder was HOTEL Top-Level-Domain GmbH (“HTLD GMBH”).³⁰ On 17 June 2016, HTLD updated its application and replaced Johannes Lenz-Hawliczek and Katrin Ohlmer as “officers and partners” of and contacts for HTLD, with Philipp Grabensee, Managing Director of HTLD; Grabensee’s email address ends in “@afilias.info.”³¹

20. On 11 June 2014, HTLD’s Application prevailed in CPE.³² Pursuant to the Guidebook, HTLD’s Application prevailed over the six other applications for .HOTEL.

B. The Despegar IRP

21. Following the CPE of HTLD's Application, certain of the .HOTEL applicants ("Despegar Claimants") challenged the HTLD CPE result, and ICANN's refusal to produce to them documents relating to the HTLD CPE, through the Reconsideration process (Requests 14-34³³ and 14-39³⁴) and an IRP proceeding ("Despegar IRP").³⁵ While the Despegar IRP was pending, Despegar Claimants asserted in the IRP that the HTLD Application also should be rejected because an individual who was once associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal ("Portal Configuration") to access confidential data associated with certain Despegar Claimants' .HOTEL applications.³⁶

22. In February 2016, the Despegar IRP Panel ruled in favor of ICANN.³⁷ The IRP Panel declined to consider the Despegar Claimants' Portal Configuration argument because it was raised long after the IRP process had commenced and the ICANN Board was still investigating the Portal Configuration.³⁸

23. The Board accepted the Despegar IRP Panel's findings and directed ICANN to: (1) continue processing HTLD's Application; and (2) finish investigating the issues alleged by the Despegar Claimants regarding the Portal Configuration ("Despegar Resolutions").³⁹

C. The Portal Configuration

24. In late February 2015, ICANN discovered that the privacy settings for the new gTLD applicant portal had been misconfigured, which enabled authorized users of that portal to see certain information of other users without permission.⁴⁰ Pursuant to the Board's directive, as described in detail in the BAMC's Recommendation on Request 16-11, ICANN conducted a thorough forensic investigation of the Portal Configuration and the Despegar Claimants' related allegations ("Portal Configuration Investigation").⁴¹ The Portal Configuration Investigation confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records,

were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, and his associates, Oliver Süme and Katrin Ohlmer.⁴²

25. As part of the Portal Configuration Investigation, ICANN informed the parties whose data was viewed, including certain Claimants.⁴³ ICANN also contacted Krischenowski and his associates for an explanation. Krischenowski acknowledged accessing the confidential information of other users but denied acting improperly or unlawfully. He claimed that he used the search tool in good faith and did not realize his ability to access other applicants' information involved a misconfiguration of the portal. Krischenowski and his associates certified to ICANN that they would delete or destroy all information obtained, and they affirmed that they had not used and would not use the information obtained, or convey it to any third party.⁴⁴

26. Krischenowski was not an authorized contact, shareholder, director, or officer directly linked to HTLD's Application between March and October 2014; however, his company was a 50% shareholder and managing director of HTLD GMBH at the time, and HTLD GMBH was a 48.8% shareholder of HTLD. During the Portal Configuration Investigation, Grabensee informed ICANN that Krischenowski was "not an employee" of HTLD, although he had acted as a consultant for HTLD's Application when it was submitted in 2012. Grabensee further verified that HTLD "only learned about [Krischenowski's access to confidential data] on 30 April 2015 in the context of ICANN's investigation." Grabensee stated that the consultancy services between HTLD and Krischenowski were terminated as of 31 December 2015.⁴⁵

27. ICANN did not uncover any evidence that the information Krischenowski obtained through the Portal Configuration: (i) was used to support HTLD's Application; or (ii) enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Krischenowski's first instance of unauthorized access to any confidential information was in

early March 2014; his searches relating to other .HOTEL applicants occurred on 27 March, 29 March, and 11 April 2014.⁴⁶

28. At HTLD’s request, Krischenowski stepped down as a managing director of HTLD GMBH effective 18 March 2016 and transferred his company’s 50% shares in HTLD GMBH to a company wholly owned by Ohlmer.⁴⁷ Further, HTLD announced on 23 March 2016 that HTLD GMBH would transfer its shares in HTLD to Afilias, “the majority shareholder of [HTLD].”⁴⁸ This severed HTLD’s corporate relationship with HTLD GMBH.⁴⁹

29. In March 2016, counsel for the Despegar Claimants asked ICANN to cancel HTLD’s Application because Krischenowski accessed the Despegar Claimants’ confidential information without authorization.⁵⁰ On 9 August 2016, after the Portal Configuration Investigation concluded, the Board determined that, even assuming that Krischenowski obtained confidential information belonging to .HOTEL applicants, it would not have had any impact on the CPE of HTLD’s Application.⁵¹ Whether HTLD’s Application met the CPE criteria was based on the application materials submitted in May 2012, or when HTLD uploaded the last documents amending its application on 30 August 2013⁵² – all of which occurred before Krischenowski or his associates accessed any confidential information. HTLD did not amend its application during CPE or submit any documents during CPE that the CPE Panel could have considered.⁵³ The Board also concluded that there was no evidence that the CPE Panel interacted with Krischenowski or HTLD during CPE.⁵⁴ The Board declined to cancel, and directed ICANN to continue processing, HTLD’s Application (“Portal Resolutions”).⁵⁵

D. The CPE Process Review

30. Claimants submitted Request 16-11 (described in detail below) in August 2016, regarding the Portal Resolutions and Despegar Resolutions. While Request 16-11 was pending, and in response to concerns raised by Claimants and others about how ICANN interacted with

the CPE Provider, the Board directed ICANN to review the CPE process to determine whether those concerns had merit (“Scope 1” of the “CPE Process Review”).⁵⁶ The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.⁵⁷ FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review.⁵⁸

31. ICANN asked the CPE Provider to consent to disclose to FTI a variety of documentary information requested by FTI, but the CPE Provider did not agree to provide everything requested, and threatened litigation if ICANN did so, which the CPE Provider claimed would be a breach of ICANN’s contractual confidentiality obligations.⁵⁹ FTI did “receive and review[] documents from ICANN” that were responsive to certain of FTI’s requests for documents.⁶⁰ FTI also interviewed “relevant” ICANN and the CPE Provider personnel.⁶¹

32. On 13 December 2017, ICANN published three reports on the CPE Process Review (“CPE Process Review Reports”).⁶² Relevant here, FTI concluded that “there is no evidence that ICANN . . . had any undue influence on the CPE Provider . . . or engaged in any impropriety in the CPE process,”⁶³ and that ICANN “had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN[’s] . . . comments.”⁶⁴

33. On 15 March 2018, the Board acknowledged and accepted the findings in the CPE Process Review Reports, declared that the CPE Process Review was complete, and directed the BAMC to consider the remaining Reconsideration Requests that were placed on hold pending completion of the CPE Process Review (“CPE Review Resolutions”).⁶⁵

E. Reconsideration Request 16-11

34. On 25 August 2016, Claimants⁶⁶ submitted Request 16-11, seeking

reconsideration of the Portal Resolutions and criticizing the Despegar Resolutions.⁶⁷ On 27 January 2019, consistent with the BAMC’s recommendation, the Board denied Request 16-11.⁶⁸ The Board concluded that Claimants had not identified any false or misleading information that the Board relied upon, or material information that the Board failed to consider, in adopting the Portal Resolutions.⁶⁹ In particular, the Board concluded that there was no evidence that the Board did not consider the purported “unfair advantage” HTLD obtained as a result of the Portal Configuration, and no evidence that the Board discriminated against Claimants.⁷⁰ After citing the evidence set forth in the Portal Resolutions (see above), the Board agreed with the BAMC that ICANN had: (1) verified Krischenowski’s affirmations “that he and his associates did not and would not share the confidential information that they accessed” with HTLD; and (2) “confirmed with HTLD that it did not receive any confidential information” from Krischenowski or his associates.⁷¹ The Board concluded that Krischenowski’s unauthorized access did not affect HTLD’s Application, including its CPE result.⁷²

35. The Board also concluded that: (1) if Claimants were challenging the Despegar Resolutions, those challenges were time-barred because they were submitted “over five months after the Board’s acceptance of the Despegar IRP Panel’s Declaration, and well past the 15-day time limit to seek reconsideration of Board action”⁷³; and (2) Claimants’ assertions that other IRP Panel Declarations stated that the Despegar IRP Declaration revealed a misunderstanding of the relationship between ICANN and the CPE Provider, did not support reconsideration because each IRP involved “distinct considerations specific to the circumstances” in the IRP.⁷⁴

F. Reconsideration Request 18-6

36. On 14 April 2018, several .HOTEL applicants submitted Request 18-6 challenging the CPE Review Resolutions.⁷⁵ The Board denied Request 18-6, concluding that the Board considered all material information and the CPE Review Resolutions are consistent with

ICANN's Mission, Commitments, Core Values, and policies.⁷⁶

STANDARD OF REVIEW

37. An IRP Panel is asked to evaluate whether an ICANN action or inaction is consistent with ICANN's Articles, Bylaws, and internal policies and procedures.⁷⁷ But with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.⁷⁸ Rather, the core task of an IRP Panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁷⁹

ARGUMENT

38. Claimants' arguments suffer from a systemic problem: they do not actually identify what was wrong with the BAMC's Recommendations or the Board's actions on Requests 16-11 and 18-6. Instead, Claimants literally ignore the key question here: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? The answer is no, which is why Claimants instead attempt to re-litigate time-barred disputes and cast unfounded aspersions on ICANN.

IV. THE BOARD'S ACTION ON REQUEST 16-11 COMPLIED WITH ICANN'S ARTICLES, BYLAWS & ESTABLISHED POLICIES & PROCEDURES.

39. Claimants argue that ICANN violated its Articles, Bylaws, or policies in denying Request 16-11, but they make so few references to that Request (or ICANN's response) that the exact nature of the alleged violation is unclear. Whatever the allegations, there is no doubt that ICANN's denial of Request 16-11 was consistent with its Articles, Bylaws and policies.

A. Claimants' Request For Ombudsman Review Is Baseless.

40. Claimants seek Ombudsman review of the BAMC's "decision[]" on Request 16-11 "as required by the Bylaws."⁸⁰ But neither the current Bylaws nor the Bylaws that governed Request 16-11 require the Ombudsman to review BAMC recommendations on Reconsideration

Requests.⁸¹ Further, the Ombudsman “do[es] not investigate complaints that are simultaneously being addressed by one of the other formal accountability mechanisms.”⁸² This includes pending Reconsideration Requests and IRPs such as this one.⁸³

41. Accordingly, the fact that the Ombudsman did not review either the BAMC’s Recommendation on Request 16-11 or the Board’s action on that Request is entirely consistent with the Bylaws. Claimants’ suggestion that ICANN should be required to appoint “an ombudsman” (ICANN already has an Ombudsman) to “review the BAMC’s decision” in Request 16-11 (when in fact the BAMC made a recommendation, and it is the Board that took the final action on Request 16-11) has no basis in ICANN’s Articles, Bylaws, and policies.

B. Claimants’ Challenge to the Despegar Resolutions Lacks Merit.

42. According to the Bylaws in place on 12 February 2016, an IRP had to be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action.⁸⁴ According to the Interim Procedures under ICANN’s Bylaws adopted in October 2016, an IRP must be filed within 120 days after the claimant becomes aware “of the material effect of the action or inaction” giving rise to the dispute but no later than 12 months from the date of such action or inaction.⁸⁵ Under either measure, Claimants’ challenge to the Board’s action accepting the Despegar IRP Declaration was untimely when Claimants submitted Request 16-11. Moreover, this challenge lacks merit.

(1) Claimants’ Challenge to the Despegar Resolutions Was Untimely.

43. The Board concluded that Claimants’ challenges to the Despegar Resolutions in Request 16-11 were untimely because Claimants submitted Request 16-11 on 25 August 2016, more than five months after the Board adopted the Despegar Resolutions and well past the 15-day time limit for seeking reconsideration of the Despegar Resolutions.⁸⁶ Incredibly, Claimants’ IRP Request does not even address the Board’s determination that their request was not timely.

Accordingly, this request for review of the Despegar Resolutions should be denied.

44. If Claimants are instead challenging the Board's 10 March 2016 Despegar Resolutions directly (rather than challenging the Board's denial of *reconsideration* of the Despegar Resolutions), this challenge also is time-barred. Claimants' claims regarding the Board's Despegar Resolutions accrued on 10 March 2016, when ICANN posted the minutes reflecting the Board's adoption of the Despegar Resolutions.⁸⁷ Claimants needed to file an IRP by 9 April 2016 under the Bylaws in place on 10 March 2016, or by 7 August 2016 under the Interim Procedures (if they had been applicable at the time). Claimants instead initiated the Cooperative Engagement Process on 2 October 2018 and filed their IRP on 19 December 2019, missing the above deadlines by more than two years.⁸⁸ Therefore, Claimants' direct challenges to the Despegar Resolutions should be denied.

(2) The Despegar Resolutions Are Consistent with ICANN's Articles, Bylaws and Established Policies and Procedures.

45. Claimants' challenge to the Board's conclusion that the Despegar Resolutions are consistent with ICANN's Articles, Bylaws, and policies and procedures also lacks merit. As a preliminary matter, although Claimants presumably are challenging the Board's denial of reconsideration of the Despegar Resolutions (if they were not, their arguments would be time-barred, as explained above), Claimants have not identified a single statement or conclusion concerning this issue in the Board's action (or the BAMC's Recommendation) on Request 16-11 that Claimants assert was incorrect, focusing entirely on the underlying Despegar Resolutions. For this reason alone, review of this claim should be denied.

46. Even if we were to assume that the claim is timely (which it is not), this claim fails. Claimants assert that in the Despegar IRP, "ICANN 'informed' Claimants and the IRP Panel that . . . 'ICANN does not have any communications (nor does it maintain any

communications) with the evaluators that identify the scoring of any individual CPE”); but, according to Claimants, the 2 August 2016 IRP Panel declaration in *Dot Registry, LLC v. ICANN* (the “Dot Registry IRP Declaration”) “has clearly shown this turned out to be false.”⁸⁹ Claimants blatantly misrepresent the Dot Registry IRP Declaration and supporting documents.

47. The Despegar IRP Panel concluded that ICANN’s statement that it had no communications with evaluators identifying CPE scores was “a clear and comprehensive statement that such documentation does not exist.”⁹⁰ At the same time, the Despegar IRP Panel recognized “that ICANN [could have] communications with persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.”⁹¹

48. The Dot Registry IRP Declaration did not conclude that ICANN staff communicated with the CPE evaluators. The Dot Registry IRP Declaration states in relevant part that “ICANN staff was intimately involved” in performing CPEs, supplying “continuing and important input on the CPE reports.”⁹² But Dot Registry’s Exhibit C-050 demonstrates that ICANN’s communications were not with the evaluators.⁹³ There, ICANN’s Russ Weinstein asked his contact at the CPE Provider to “help us understand the pairings of [the] evaluators on each app[lication].”⁹⁴ ICANN did not even know who the evaluators were, much less communicate with them. This is consistent with ICANN’s statement, cited in the Despegar IRP Declaration, that it may have communicated with “persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.”⁹⁵

49. Claimants argue that the documents they sought in the Despegar IRP were the same documents ultimately produced in the Dot Registry IRP, and complain that ICANN should have produced those documents to the Despegar Claimants.⁹⁶ But when Claimants made this argument in Request 16-11, the BAMC identified the key difference between the Dot Registry and Despegar IRPs: the Dot Registry IRP Panel ordered ICANN to produce the requested

documents; the Despegar IRP Panel did not⁹⁷ (and it does not appear that Claimants ever asked the Despegar IRP Panel to issue such an order).⁹⁸ Claimants have not disputed or otherwise addressed this distinction.

C. ICANN Did Not Discriminate Against Claimants By Reviewing Other CPE Results But Not Reviewing The .HOTEL CPE Result.

50. Next, citing the Dot Registry IRP Declaration, Claimants seek review of “whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL.”⁹⁹ Claimants suggest this was a violation of ICANN’s Commitment to “[m]ake decisions by applying documented policies consistently . . . without singling out any particular party for discriminatory treatment.”¹⁰⁰

51. It is not clear what Claimants mean by “reviewed other CPE results.” If they seek review of Request 14-34 (seeking reconsideration of the HTLD CPE result), it is plainly time-barred. If they instead challenge the Board’s denial of Request 16-11, they fail on the merits.

52. Claimants argue that the outcome of the Dot Registry IRP “proved” that the Despegar Claimants “were discriminated against in CPE.”¹⁰¹ Claimants argue that the Board’s decision to “fully address[] the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants” by “refund[ing] Dot Registry’s IRP costs” and ordering the BGC to reconsider the Dot Registry Reconsideration Requests without doing the same for the Despegar Claimants discriminated against Claimants.¹⁰²

53. As an initial matter, ICANN notes that, contrary to Claimants’ suggestion, the Dot Registry IRP Declaration did not conclude that ICANN’s relationship with the CPE Provider was, in itself, inconsistent with ICANN’s Bylaws, policies, or procedures. The Dot Registry IRP Declaration merely found that the BGC did not adequately investigate Dot Registry’s allegations that the relationship was inconsistent with the Bylaws, policies and/or procedures with respect to the way the .LLC, .LLP, and .INC CPE applications were handled.

54. Moreover, Claimants are not similarly situated to the Dot Registry claimants; ICANN evaluated the different circumstances of both cases and acted differently—and appropriately—according to those circumstances. Those different circumstances include:

- The Dot Registry IRP Panel found in favor of Dot Registry; not so for the Despegar Claimants. And for the reasons given above, the Dot Registry IRP Declaration does not undermine the Despegar IRP Declaration.
- Dot Registry sought independent review of ICANN’s denial of its application for Community Priority status; Despegar Claimants sought review of a decision to grant Community Priority status to a third party, HTLD.
- The Dot Registry IRP Panel ordered ICANN to reimburse Dot Registry’s IRP fees¹⁰³ consistent with the Bylaws, provision that the “party not prevailing” (ICANN, in the Dot Registry IRP) is “ordinarily” responsible for bearing the IRP Provider’s costs.¹⁰⁴ The Despegar Claimants were the “part[ies] not prevailing” in the Despegar IRP.¹⁰⁵

55. Indeed, ICANN treated the Despegar Claimants the same as Dot Registry by accepting the IRP Panels’ Declarations in both IRPs.

56. Because Claimants are not similarly situated to the Dot Registry Claimants, ICANN’s actions during and in response to the Dot Registry IRP by no means “prove” that ICANN discriminated against Claimants.

57. Likewise, and again contrary to Claimants’ assertions, the IRP Panel declaration in *Corn Lake, LLC v. ICANN* (“Corn Lake IRP Declaration”) does not support Claimants’ arguments here. The Corn Lake IRP Declaration “stresse[d] that this is a unique situation and peculiar to its own unique and unprecedented facts.”¹⁰⁶ And the facts here are not even slightly analogous to those in the Corn Lake IRP: Corn Lake challenged ICANN’s process for evaluating gTLD application objection proceeding results, not a CPE determination. The Corn Lake IRP

Declaration noted that Corn Lake was the only applicant in its particular circumstances, that no other party would be prejudiced by requiring ICANN to include Corn Lake in its review of objection proceeding results, and that the unique timing of relevant key events justified unique findings.¹⁰⁷ Nothing about the Corn Lake IRP Declaration supports Claimants' arguments here.

D. ICANN Handled the Portal Configuration Investigation and Consequences In A Manner Fully Consistent With the Articles, Bylaws, and Established Policies and Procedures.

58. Claimants ask the Panel to review "ICANN's 'Portal Configuration' investigation and refusal to penalize HTLD's willful accessing of Claimant's [sic] confidential, trade secret info."¹⁰⁸ Claimants assert that ICANN "violate[d]" its "duty of transparency" by failing to disclose "all documents concerning ICANN's investigation of HTLD's breach" during either the Portal Configuration or the Board's action on Request 16-11.¹⁰⁹ Claimants' arguments are plainly time-barred to the extent they challenge the Portal Resolutions directly; their challenges to the Board's action on Request 16-11 are invalid for two reasons:

(1) Claimants' Request for Review of ICANN's Refusal to Reconsider its Investigation of the Portal Configuration is Meritless.

59. Claimants assert that the Despegar IRP Panel "starkly questioned" the BAMC's rationale for recommending denial of Request 16-11.¹¹⁰ But the BAMC's Recommendation on Request 16-11 post-dated the Despegar IRP declaration by more than two years, so the Despegar IRP Panel could not possibly have questioned the BAMC's conclusions.¹¹¹ The language that Claimants quote from the Despegar IRP Declaration referred to ICANN's argument in the IRP that Claimants had not identified Board action or inaction (necessary to initiate an IRP);¹¹² the quoted language does not, as Claimants allege, refer to the BAMC's recommendation regarding Request 16-11 or the BAMC's conclusion that there was no evidence that HTLD ultimately received the information that Krischenowski accessed via the Portal Configuration.

(2) Claimants’ Request for Review of ICANN’s Refusal to Reconsider Allowing HTLD’s Application to Proceed is Meritless.

60. Claimants assert that “HTLD’s theft of competitor Claimants’ private trade secret data was . . . 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.”¹¹³ This argument conflates actions by officers of HTLD’s minority shareholder with actions by HTLD itself. Claimants argue that Krischenowski’s and Ohlmer’s actions should be imputed to HTLD.¹¹⁴ The sole case that Claimants cite for this proposition does not support their argument. That case, *Yost*, holds only that even if a corporate officer or director “acted as an agent of the corporation and not on his own behalf,” he may nonetheless be personally liable for torts he authorizes, directs, or participates in.¹¹⁵ *Yost* says nothing about when a corporate officer’s acts may be attributed to the corporation, much less when the acts of a corporate officer of a minority shareholder of a corporation may be attributed to the corporation.

61. Claimants then assert—with literally no evidentiary support—that ICANN “would have said anything—or hid anything—to save [itself] from further embarrassment.”¹¹⁶ But the Portal Configuration Investigation shows the opposite: ICANN investigated the issue with efficiency, operating with transparency by providing regular updates to the public.¹¹⁷

V. THE BOARD’S ACTION ON REQUEST 18-6 COMPLIED WITH ICANN’S ARTICLES, BYLAWS AND ESTABLISHED POLICIES AND PROCEDURES.

62. Claimants appear to argue that ICANN should have reconsidered the CPE Review Resolutions because FTI was unable to review the CPE Provider’s internal correspondence.¹¹⁸ Yet, Claimants do not challenge any of the Board’s (or BAMC’s) well-reasoned conclusions in response to Request 18-6. Claimants also assert that ICANN should be required to disclose confidential correspondence with the CPE Provider so that Claimants and the IRP Panel can assess the Board’s decision to accept the CPE Process Review Reports.¹¹⁹ These claims fail.

A. Claimants' Request For Ombudsman Review Is Untimely and Baseless.

63. ICANN incorporates all of its arguments in Section IV.A above concerning the Ombudsman. The Bylaws in effect when the BAMC and Board acted on Request 18-6, which are the same Bylaws in effect today in all relevant aspects, did not require the Ombudsman to review the BAMC's recommendation or the Board's Action, and the Ombudsman does not investigate complaints subject to other pending accountability mechanisms.

64. On 30 January 2020, Claimants an emergency panelist to replace the Ombudsman and review the Ombudsman's recusal from Request 18-6 pursuant to Bylaws Article 4, § 4.2(1)(iii).¹²⁰ ICANN will address this argument more fully in response to the Request for Interim Relief, but in short, this challenge is untimely because it was brought more than 120 days after the Ombudsman recused himself from Request 18-6, which he did on 23 May 2018.¹²¹ For reasons that will be set forth in ICANN's response to the Request for Interim Relief, the request for a new Ombudsman is also baseless.

B. Claimants' Reliance on the Dot Registry IRP Declaration to Challenge the CPE Process is Meritless.

65. Claimants rely on two statements from the Dot Registry IRP Declaration to argue that ICANN should disclose its confidential communications with the CPE Provider. Neither supports Claimants' position.

66. First, Claimants cite the Dot Registry IRP Panel's comments that "ICANN staff was intimately involved in the process" and "supplied continuing and important input on the CPE reports."¹²² These statements are *dicta*. Dot Registry did not challenge ICANN's involvement with the CPE Provider; it challenged the manner in which the BGC evaluated Dot Registry's Reconsideration Requests.

67. Contrary to the *dicta* in the Dot Registry IRP Declaration, the CPE Provider affirmed that it "never changed the scoring or results [of a CPE] based on ICANN[']s . . .

comments,” and FTI concluded that: (1) ICANN “never questioned or sought to alter the CPE Provider’s conclusions”; and (2) ICANN “never dictated that the CPE provider take a specific approach” to a CPE.¹²³ Claimants ignore these findings.

68. Second, Claimants point to the Dot Registry IRP Panel’s conclusion that ICANN should have “compared what the ICANN staff and [the CPE Provider] did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the [CPE Provider] treated the requestor in a fair and non-discriminatory manner.”¹²⁴ This is precisely what was evaluated via the CPE Process Review.

69. In this IRP, Claimants fault ICANN for not disclosing “documented conversations with [the CPE Provider]” in the Despegar IRP or in response to their prior document request. The Board addressed this argument when it considered Request 16-11:

Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter. In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce [the referenced documents].¹²⁵

Claimants do not address—and therefore do not properly challenge—the Board’s reasoning.

70. Further, ICANN has always been contractually barred from disclosing these documents, and need not breach its contract, risking litigation, simply because Claimants asked for the documents in a document request and complained about the response in the Despegar IRP. As the IRP Panel in *Amazon E.U. S.a.r.l. v. ICANN* has explained, “[b]oth ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information . . . may contain information that is appropriately protected against disclosure.”¹²⁶

ICANN's Documentary Information Disclosure Policy protects from disclosure, among other things,

Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or a nondisclosure provision within an agreement.¹²⁷

ICANN did not produce in response to the Claimants' document request and Despegar IRP complaints given the nondisclosure condition; further, complying with the terms ICANN's contract with the CPE Provider supports ICANN's Core Value of operating with efficiency and excellence.¹²⁸

71. No Article, Bylaws provision, policy, or procedure requires ICANN to breach its contractual duties. Claimants' request for independent review of the Board's action regarding the relationship with the CPE Provider should be denied.

C. Claimants' Challenges to the Board's Action and BAMC's Recommendation Concerning the CPE Provider's Documents Regurgitate Arguments from Request 16-11 Without Addressing the Board's Responses.

72. Claimants challenged ICANN's relationship with the CPE Provider in Request 16-11. The BAMC concluded that the CPE Process Review Scope 1 Report showed that ICANN did not have any undue influence on the CPE Provider.¹²⁹

73. Claimants then challenged the Board's acceptance of the CPE Process Review Reports in Request 18-6. The BAMC and Board concluded that the Board's action was consistent with the Bylaws, and that the "Board considered all material information when it adopted the [CPE Review] Resolutions."¹³⁰

74. Here Claimants argue the Board "ought to want to know what [the CPE Provider] has been hiding," and "should have forced [the CPE Provider] and ICANN's lawyers to

disclose” documents before accepting FTI’s reports.¹³¹ But no Article, Bylaws provision, or established policy required ICANN to reject the CPE Process Review Reports simply because the CPE Provider refused to disclose certain documents to the reviewer.¹³² The Board was entitled to accept FTI’s conclusion that it had sufficient information for its review. That Claimants disagree with the Board’s decision does not render that action inconsistent with the Articles or Bylaws.

D. Claimants’ Requests for FTI and CPE Provider Documents are Premature.

75. Claimants assert that they and the IRP Panel “must be able to see . . . all relevant excerpts from the interviews that FTI conducted” and “FTI’s agreement with ICANN” in order to review the Board’s acceptance of the FTI CPE Process Review Reports.¹³³ Likewise, Claimants assert that documents reflecting ICANN’s correspondence with the CPE Provider “can fairly be disclosed in this proceeding subject to the protections of a protective order” like the one entered in the Dot Registry IRP.¹³⁴

76. ICANN will respond to Claimants’ document requests and any Procedural Orders concerning the production of documents at the appropriate time during these proceedings, but as a preliminary matter, ICANN notes that, with respect to Claimants’ request for excerpts from FTI’s interviews, the IRP’s role is not to conduct its own CPE Process Review. Its role is to determine whether the Board should have reviewed interview excerpts—if any even exist¹³⁵—in the course of deciding whether to accept the CPE Process Review Reports. The Board was not required to do so. There is, therefore, no reason for the IRP Panel or Claimants to do so.

E. The Board’s Acceptance of the CPE Process Review Reports was Consistent with the Articles, Bylaws and Established Policies and Procedures.

77. Claimants argue that the Board should have “forced [the CPE Provider] and ICANN’s lawyers to disclose” additional documents before accepting FTI’s CPE Process Review Reports.¹³⁶ Claimants offer nothing but their personal opinions that the Board should

have done more.

78. The BAMC and the Board addressed Claimants' arguments in the BAMC Recommendation on Request 18-6 and the Board action on Request 18-6, but Claimants do not even cite the Recommendation, despite claiming to challenge it here. Claimants have not shown that review of the Board's denial of Request 18-6 is warranted.

VI. CHALLENGES TO ICANN'S INACTION CONCERNING HTLD'S OWNERSHIP ARE UNTIMELY AND WITHOUT MERIT.

79. Claimants suggest that ICANN somehow violated its Articles, Bylaws, or established policies because Afilias' acquisition of HTLD GMBH's shares in HTLD "did not get Board review or approval, and there was no comment or outreach" concerning the transaction.¹³⁷ Claimants contend that ICANN should instead have cancelled HTLD's Application or withdrawn HTLD's Community Priority status because "HTLD is no longer the same company that applied for the .HOTEL TLD."¹³⁸ These claims are time-barred as Claimants waited for well over three years before bringing them; and they are meritless; no Article, Bylaws provision, or policy required the Board to approve the transaction or to submit it for public comment.

80. These claims accrued no later than 25 August 2016, when Claimants acknowledged in Request 16-11 (but did not challenge) that Afilias was acquiring all shares of HTLD. Claimants did not assert that the Board should have taken any action as a result of Afilias' acquisition of the remaining shares of HTLD until submitting their IRP Request in December 2019, more than three years later.

81. Afilias' ownership interest in HTLD has been public since HTLD submitted its Application, which disclosed that Afilias and HTLD GMBH (and no other entities) each owned 15% or more of HTLD.¹³⁹ In March 2016, Grabensee disclosed that "Afilias will in the near future be the sole shareholder of Applicant."¹⁴⁰ Then, on 9 August 2016, after concluding the Portal Configuration Investigation, which considered Grabensee's March 2016 notice that Afilias

would become HTLD's sole shareholder, the ICANN Board published minutes concluding that it would not cancel HTLD's application for .HOTEL.¹⁴¹

82. Claimants even acknowledged the transfer of ownership to Afilias in Request 16-11, submitted on 25 August 2016,¹⁴² making an IRP on such claims due no later than 24 September 2016. Claimants missed this deadline by over three years.

83. Even if Claimants' arguments concerning HTLD's ownership were timely (which they are not), they fail on the merits. Claimants ask when "ICANN approve[d] assignment of the HTLD application to Afilias, and on what terms," and whether there was a public comment period concerning the "assignment" of the application.¹⁴³ Claimants also complain that HTLD, not Afilias, prevailed in CPE, but Afilias is unfairly reaping the benefits of HTLD's success.¹⁴⁴

84. These questions are based on three false assumptions: first, they are based on the incorrect assumption that Afilias did not originally have an interest in HTLD's Application, and therefore it was necessary to "assign" or transfer the application from some other applicant to Afilias. But this is not the case. Afilias has been a major shareholder in HTLD since HTLD submitted its Application.

85. Second, they are based on the incorrect assumption that HTLD's shareholders were evaluated in CPE. HTLD's shareholders (Afilias, and originally HTLD GMBH) have never been the applicants for .HOTEL; HTLD is the applicant. None of the CPE criteria considers the applicant's ownership.¹⁴⁵

86. Third, HTLD's application for .HOTEL, not HTLD itself, is the subject of the CPE.¹⁴⁶ If and when HTLD completes the contracting phase and the .HOTEL gTLD is delegated into the root zone, HTLD will still be bound by all of the requirements of a community gTLD. This—not the corporate structure—is the key element of community priority: HTLD, as a registry operator to the Hotel community, will be required to:

- Establish registration policies that conform to the requirements promised in its CPE;
- Establish procedures for enforcing registration policies for the gTLD and resolution of disputes over compliance with gTLD registration policies, and enforce the policies;
- “allow[] the TLD community to discuss and participate in the development and modification of policies and practices for the TLD”;
- “implement and be bound by the Registry Restrictions Dispute Resolution Procedure” and “implement and comply with the community registration policies set forth [in] Specification 12,”¹⁴⁷ which will require HTLD to implement and comply with all community policies it set out in its application for community priority.¹⁴⁸

87. Afilias’ acquisition of the remaining shares of HTLD has no effect on HTLD’s obligations to comply with the above provisions.

88. There is another problem with Claimants’ argument: while assignments and transfers of Registry Agreements must be approved by ICANN,¹⁴⁹ no policy or procedure requires ICANN to reject CPE results based on changes to the corporate structure of new gTLD applicants. For this reason, Claimants do not cite any ICANN Bylaws or established policies or procedures in this section of the IRP Request. Instead, Claimants speculate about ICANN’s “embarrass[ment]” over the Portal Configuration and ascribe a (fabricated) motive to ICANN to “be rid of Mr. Krischenowski” by authorizing Afilias to acquire more shares of HTLD.¹⁵⁰ This argument merely attempts to distort the fact that no ICANN Articles, Bylaws provision, policies or procedures dictated ICANN’s response to Afilias’ acquisition of all shares of HTLD.

CONCLUSION

89. ICANN complied with its Articles, Bylaws, policies and procedures relating to HTLD’s Application. Moreover, many of Claimants’ claims are time-barred. Accordingly, Claimants’ IRP Request should be denied.

Respectfully submitted,

JONES DAY

Dated: February 3, 2020

By:  ^{ISP}

Jeffrey A. LeVee

Counsel for Respondent ICANN

¹ Ex. R-1 (ICANN Bylaws (as amended 28 Nov. 2019) (“Bylaws”)) Art. 1, § 1.1.

² *Id.*, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2.

³ *Id.*, Art. 4, § 4.2.

⁴ *Id.* Today, that committee is the Board Accountability Mechanisms Committee (“BAMC”). Previously, it was the Board Governance Committee (“BGC”).

⁵ *Id.*, Art. 5.

⁶ *Id.*, Art. 5, § 5.2.

⁷ *Id.*, Art. 4, § 4.2(1).

⁸ *Id.*

⁹ Ex. R-3 (Email from H. Waye, ICANN Ombudsman, to M. Rodenbaugh, 30 January 2020); *see also* Ex. R-2 (ICANN Bylaws (as amended 11 Feb. 2016)) Art. V, § 2, Ex. R-2 (Ombudsman’s charter is limited to matters for which neither the Reconsideration policy nor the IRP have been invoked); Ex. R-1 (Bylaws) Art. 5, § 5.2 (Ombudsman’s charter is limited to matters for which IRP has not been invoked; Ombudsman’s role in IRP is limited to the role “expressly provided for in Section 4.2” of the Bylaws).

¹⁰ Ex. R-1 (Bylaws) Art. 4, § 4.3.

¹¹ Ex. R-4 (IRP Interim Supplementary Procedures (25 Oct. 2018) (“Interim Procedures”)).

¹² Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

¹³ Ex. R-4 (Interim Procedures) Rule 4. The deadlines in the Interim Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” *Id.* Rule 4, n.3.

¹⁴ Ex. R-5 (Program Statistics, ICANN New gTLDs).

¹⁵ Ex. R-6 (Guidebook) Preamble.

¹⁶ *Id.*, Attachment to Module 2, at Pgs. A-6 – A-7.

¹⁷ *Id.*, § 1.2.7.

¹⁸ *Id.*, § 4.1.1.

¹⁹ *Id.*, § 4.1.3.

²⁰ *Id.*, § 4.3. The proceeds of a public auction are provided to ICANN but are earmarked for purposes consistent with ICANN’s Mission, Core Values and non-profit status. *Id.*, § 4.3, n.1.

²¹ *Id.*, § 1.2.3.1.

²² *Id.*

²³ *See* Ex. R-7 (Community Priority Evaluation). ICANN selected the Economist Intelligence Unit to handle CPEs following a public request for applications from firms interested in

performing the various third party evaluations of new gTLD applications. *See* Ex. R-8 (“Preparing Evaluators for the New gTLD Application Process”).

²⁴ Ex. R-9 (CPE Panel Process Document).

²⁵ Ex. R-6 (Guidebook) § 4.2.2.

²⁶ Ex. R-10 (ICANN Provides Update on Review of the CPE Process).

²⁷ Ex. R-32 (New gTLD Program Consulting Agreement between ICANN and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011).

²⁸ *See* Ex. R-11 (HTLD application details).

²⁹ *See* Ex. R-12 (Contention Set Diagram, HOTEL).

³⁰ Ex. R-13 (HTLD Application, 17 June 2016, question 11(c)); *see also* Ex. R-14 (HTLD Application Update history).

³¹ *See* Ex. R-14 (HTLD Application Update history) 24 December 2014 update to application questions 6, 11; *compare* Ex. R-13 (HTLD Application, 17 June 2016, questions 6 and 11(b)) *with* Ex. R-44 (HTLD Application, 24 December 2014, questions 6 and 11(b)).

³² *See* Claimants’ Ex. D (HTLD CPE Report).

³³ Ex. R-15 (Request 14-34).

³⁴ Ex. R-16 (Request 14-39).

³⁵ *See* Claimants’ Ex. G (Final Declaration, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, 12 Feb. 2016 (“Despegar IRP Declaration”). Claimant Minds + Machines Group, Ltd. attempted to join the other claimants in the Despegar IRP, but the IRP Panel concluded that Minds + Machines Group was time-barred from doing so. *Id.* at ¶¶ 139-142.

³⁶ *Id.* ¶ 49.

³⁷ *Id.* ¶ 151.

³⁸ *Id.* ¶¶ 134-38.

³⁹ Ex. R-17 (ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11).

⁴⁰ Ex. R-18 (Portal Configuration Notice); Ex. R-19 (New gTLD Applicant and GDD Portals Q&A).

⁴¹ *See* Claimants’ Ex. O (BAMC Recommendation on Request 16-11, at Pgs. 3-4).

⁴² *See* Ex. R-20 (Announcement: New gTLD Applicant and GDD Portals Update); Ex. R-21 (Response to Documentary Information Disclosure Policy (“DIDP”) Request No. 20150605-1); Claimants’ Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

⁴³ *See* Ex. R-22 (Letter from ICANN to Despegar, 23 February 2016).

⁴⁴ Claimants’ Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

⁴⁵ Claimants’ Ex. ZZ (Letter from Philipp Grabensee to ICANN, 23 March 2016). In Request 16-11, Requestors asserted that Ohlmer has also been associated with HTLD. *See* Claimants’ Ex. J (Request 16-11) § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Claimants’ Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 –

2016.08.09.15). The BAMC concluded that Ohlmer’s prior association with HTLD, which the Requestors acknowledged ended no later than 17 June 2016 (Claimants’ Ex. J (Request 16-11) § 8, at Pg. 15) did not support reconsideration because there was no evidence that any of the confidential information that Ohlmer (or Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD’s Application in CPE.

⁴⁶ Claimants’ Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

⁴⁷ *Id.* Lenz-Hawliczek and Ohlmer replaced Krischenowski as Managing Directors of HTLD GMBH. *Id.*

⁴⁸ Claimants’ Ex. ZZ (23 March 2016 Letter).

⁴⁹ *Id.*

⁵⁰ *See* Ex. R-40 (Letter from Flip Petillion to ICANN, 8 March 2016); *see also* Ex. R-41 (Letter from Flip Petillion to ICANN, 1 March 2016).

⁵¹ Claimants’ Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

⁵² *Id.*

⁵³ Ex. R-22 (Letter from ICANN to Despegar, 23 February 2016).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Ex. R-23 (ICANN Board Resolution 2016.09.17.01). The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (“Scope 2”); and (ii) compilation of the research relied on by the CPE Provider to the extent such research exists for the evaluations which were the subject of certain then-pending Reconsideration Requests relating to the CPE process (“Scope 3”). Ex. R-24 (Minutes, BGC Meeting). Scopes 2 and 3 are not relevant to this IRP Request.

⁵⁷ Ex. R-25 (Update on the Review of the New gTLD Community Priority Evaluation Process, 26 April 2017). The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁵⁸ *Id.*

⁵⁹ Claimants’ Ex. T (ICANN’s Response to DIDP Request No. 20180110-1); *see also* ¶ 17, *supra*.

⁶⁰ Ex. R-26 (CPE Process Review Scope 1 Report (“Scope 1 Report”)) at Pg. 6.

⁶¹ *Id.* at Pgs. 6-7.

⁶² *See* Ex. R-27 (ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process).

⁶³ Ex. R-26 (Scope 1 Report) at Pg. 2.

⁶⁴ *Id.* at Pgs. 9, 15.

⁶⁵ Ex. R-28 (Board Resolutions 2018.03.15.08-2018.03.15.11).

⁶⁶ Two other .HOTEL applicants joined with Claimants to submit Request 16-11. *See* Claimants' Ex. J (Request 16-11) at Pgs. 1-3.

⁶⁷ Claimants' Ex. J (Request 16-11).

⁶⁸ Ex. R-29 (Board Action on Request 16-11).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Claimants' Ex. N (Request 18-6, § 2, at Pg. 3). Neither Claimant Domain Ventures Partners PCC Limited nor its subsidiary dot Hotel Limited (nor Famous Four Media Limited, which has also been associated with dot Hotel Limited's application for .HOTEL) were Requestors in Request 18-6. *Id.*

⁷⁶ Ex. R-30 (Board Action on Request 18-6).

⁷⁷ Ex. R-1 (Bylaws) Art. 4, § 4.3.

⁷⁸ *Id.*, § 4.3(h)(i)(iii); *see also* Ex. R-31 (Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 ("Booking.com Final Declaration") 3 March 2015) ¶ 115.

⁷⁹ Ex. R-1 (Bylaws) Art. 4, § 4.3(b).

⁸⁰ IRP Request at Pg. 12.

⁸¹ *See* Ex. R-1 (Bylaws, Art. 4, § 4.2(1)) (Ombudsman shall review and consider Reconsideration Requests *before* the BAMC makes a recommendation on the Reconsideration Requests); *id.* Art. 5 (describing Ombudsman's role); *see also* Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. V § 2 (Ombudsman is "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.*" (emphasis added)).

⁸² Ex. R-3 (Email from H. Wayne (ICANN Ombudsman) to M. Rodenbaugh, 30 January 2020).

⁸³ Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. V, § 2 (Ombudsman's charter is limited to matters for which neither the Reconsideration policy nor the IRP have been invoked); Ex. R-1 (Bylaws) Art. 5, § 5.2 (Ombudsman's charter is limited to matters for which IRP has not been invoked; Ombudsman's role in IRP is limited to the role "expressly provided for in Section 4.2" of the Bylaws).

⁸⁴ Ex. R-2 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

⁸⁵ Ex. R-4 (Interim Procedures) Rule 4.

⁸⁶ *See* Ex. R-29 (Board Action on Request 16-11, Jan. 27, 2019); Ex. R-2 (Bylaws, (as amended 11 Feb. 2016)) Art. IV, § 2.5.

⁸⁷ Ex. R-17 (Board Resolutions 2016.03.10.10-2016.03.10.11).

⁸⁸ The provisions for tolling the time to file an IRP while Claimants participated in CEP (Ex. R-33) do not save Claimants here, because they did not enter CEP until 2 October 2018, more than two years after ICANN posted the minutes reflecting the Board’s adoption of the Despegar Resolutions. Ex. R-34.

⁸⁹ IRP Request, at Pg. 19.

⁹⁰ Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 96, quoting ICANN’s Response to DIDP No. 20140804-01.

⁹¹ *Id.* at ¶ 97.

⁹² Claimants’ Ex. M (Final Declaration, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 29 Jul. 2016 (“Dot Registry IRP Declaration”)) ¶¶ 93, 101.

⁹³ Ex. R-35 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 13 July 2015 (Ex. C-050)).

⁹⁴ *Id.*

⁹⁵ Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 96.

⁹⁶ IRP Request at Pg. 20.

⁹⁷ Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31.

⁹⁸ *See* Ex. R-36 (Despegar IRP documents) (reflecting only one Procedural Order, which did not order production of any documents).

⁹⁹ IRP Request, at Pg. 21.

¹⁰⁰ Ex. R-1 (ICANN Bylaws, Art. 1, § 1.2(a)(v)).

¹⁰¹ IRP Request, at Pg. 22.

¹⁰² IRP Request at Pgs. 23-24.

¹⁰³ Claimants’ Ex. M (Dot Registry IRP Declaration) at ¶ 154.

¹⁰⁴ ICANN Bylaws (as amended 11 Feb. 2016) Art. 4, § 3.18, Ex. R-2.

¹⁰⁵ Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 158. In light of the “serious issues” that the Despegar Claimants raised, the Panel decided not to require the Despegar Claimants to reimburse ICANN’s IRP costs. *Id.*

¹⁰⁶ Claimants’ Ex. U (Final Declaration, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-002-9938, 17 Oct. 2016) at ¶ 8.98.

¹⁰⁷ *Id.*

¹⁰⁸ IRP Request at Pg. 24.

¹⁰⁹ *Id.* at Pg. 24-25.

¹¹⁰ *Id.* at Pg. 8.

¹¹¹ *See id.*

¹¹² *See id.* at Pg. 8 n.14.

¹¹³ *Id.* at Pg. 25.

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- ¹¹⁴ *Id.* at Pg. 25, citing Ex. R-LA-1 (Comm. for *Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996)).
- ¹¹⁵ Ex. R-LA-1 (*Yost*, 92 F.3d at 823).
- ¹¹⁶ IRP Request at Pg. 26.
- ¹¹⁷ Claimants’ Ex. O (BAMC Recommendation on RR 16-11) at Pgs. 8-12.
- ¹¹⁸ IRP Request, at Pg. 14.
- ¹¹⁹ *Id.* at 16-21.
- ¹²⁰ Claimants’ Request for Interim Measures, 30 January 2020.
- ¹²¹ Ex. R-37 (Ombudsman Action on Request 18-6). IRP Request. The provisions for extending the time to file an IRP while Claimants participated in ICANN’s Cooperative Engagement Process (CEP) (Ex. R-33), do not save Claimants here, because they did not enter CEP until 2 October 2016, more than 120 days after the Ombudsman recused himself (Ex. R-34).
- ¹²² Claimants’ Ex. M (Dot Registry IRP Declaration) ¶ 93; *see also id.* ¶ 101; Ex. R-35 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004 (Exs. C-42 - C-50, C-53)).
- ¹²³ Ex. R-26 (Scope 1 Report) at Pgs. 14-15.
- ¹²⁴ Claimants’ Ex. M (Dot Registry IRP Declaration) ¶ 125.
- ¹²⁵ Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31; adopted in Ex. R-29 (Board Action on Request 16-11).
- ¹²⁶ Ex. R-38 (*Amazon EU S.a.r.l. v. ICANN*, ICDR Case No. 01-16-0007056, Procedural Order No. 3 (7 June 2017)) at Pg. 3.
- ¹²⁷ Ex. R-39 (DIDP).
- ¹²⁸ Ex. R-1 (Bylaws) Art. 1, § 1.2(b)(v); *see also* Claimants’ Ex. T (ICANN Response to DIDP No. 20180110-1) at Pgs. 8-9.
- ¹²⁹ Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 29-30.
- ¹³⁰ Ex. R-30 (Board Action on Request 18-6).
- ¹³¹ IRP Request at Pg. 15.
- ¹³² Claimants’ Ex. P (BAMC Recommendation on Request 18-6) at Pg. 16. Claimants offer no support for their argument that the Board “ought to” want additional information before accepting the CPE Process Review Reports. *See* IRP Request at Pg. 15. This argument should be disregarded.
- ¹³³ IRP Request at Pg. 16
- ¹³⁴ *Id.* at Pg. 13.
- ¹³⁵ ICANN “does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to” FTI’s interviews. Claimants’ Ex. T (ICANN’s Response to DIDP No. 20180110-1, 9 Feb. 2019).
- ¹³⁶ IRP Request at Pg. 15.

¹³⁷ *Id.* at Pg. 28.

¹³⁸ *Id.* at Pg. 28.

¹³⁹ Ex. R-13 (HTLD new gTLD application) response to question 11.c.

¹⁴⁰ Claimants' Ex. ZZ (23 March 2016 Letter) at Pg. 2.

¹⁴¹ Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14-2016.08.09.15).

¹⁴² Claimants' Ex. J (Request 16-11, § 8) at Pg. 18 (“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, Afiliias. . . . One interest-holder cannot disclaim responsibility for another interest-holders actions by buying him out.”).

¹⁴³ IRP Request, at Pg. 27.

¹⁴⁴ *Id.* at Pgs. 26-27.

¹⁴⁵ Ex. R-6 (Guidebook Module 4, § 4.2.3, at Pg. 4-17). CPE Criterion 4, Community Endorsement, considers whether the applicant—here, HTLD—is the recognized community institution (or has support from or authority to represent the community). *Id.* It does not require the CPE Provider or ICANN to consider the applicant’s corporate ownership.

¹⁴⁶ *See* Ex. R-6 (Guidebook) § 4.3.

¹⁴⁷ Ex. R-42 (Base generic TLD Registry Agreement updated on 31 July 2017 (“Base Registry Agreement”)) Art. 2, § 2.19.

¹⁴⁸ *Id.*, Spec. 12.

¹⁴⁹ *See* Ex. R-43 (Registry Transition Processes).

¹⁵⁰ *See* IRP Request, at Pg. 27.