

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DESPEGAR ONLINE SRL, DONUTS INC., ) ICDR CASE NO. 01-14-0001-5004  
FAMOUS FOUR MEDIA LIMITED, )  
FEGISTRY LLC, AND RADIX FZC, )  
 )  
Claimants, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO CLAIMANTS DESPEGAR ONLINE SRL, DONUTS INC.,  
FAMOUS FOUR MEDIA LIMITED, FEGISTRY LLC, AND RADIX FZC'S  
REQUEST FOR INDEPENDENT REVIEW PROCESS**

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to the Request for Independent Review Process (“IRP Request”) submitted by claimants Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC (collectively, “Claimants”) on 10 March 2015.

1. The Claimants each applied to ICANN for the opportunity to operate the new generic top level domain (“gTLD”) .HOTEL. HOTEL Top-Level-Domain S.a.r.l (“HOTEL TLD”) also submitted an application for .HOTEL (“Application”), which was a “community application,” meaning that it proposes to operate .HOTEL “for the benefit of a clearly delineated community.”<sup>1</sup>

2. Where, as here, a community-based application is in “contention” with other applications for the same proposed new gTLD, the community-based application is invited to participate in Community Priority Evaluation (“CPE”).<sup>2</sup> If the application prevails in CPE, only that application (and any other community-based applicants for the same string that have prevailed in CPE) is permitted to proceed.<sup>3</sup> The New gTLD Applicant Guidebook (“Guidebook”) that ICANN and the community developed in order to evaluate new gTLD applications specifically states that the requirements to prevail in CPE are “very stringent” because a qualifying community-based application “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”<sup>4</sup> In other words, it is intentionally difficult for applications to prevail in CPE.

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<sup>1</sup> Guidebook § 1.2.3.1 (Cls. Ex. RM-5). Claimants submitted two sets of numbered exhibits with their IRP Request: (1) “Annexes”; and (2) “Reference Materials”. Citations to “Cls. Ex. Annex- \_\_\_” refer to exhibits submitted in Claimants’ Annexes, citations to “Cl. Ex. RM-\_\_\_” refer to exhibits submitted in Claimants’ Reference Materials. Citations to “Resp. Ex. \_\_\_” refer to exhibits submitted by ICANN.

<sup>2</sup> *Id.* § 4.2

<sup>3</sup> *Id.* § 4.2.2.

<sup>4</sup> *Id.* § 4.2.3.

3. The CPE panel evaluating HOTEL TLD's Application ("CPE Panel") issued a report (the "Report") finding that the Application met the criteria set forth in the Guidebook to establish priority and therefore prevailed in CPE. Accordingly, the contention for .HOTEL has been resolved and only HOTEL TLD's Application will proceed.

4. Disappointed with this result, Claimants asked ICANN's Board Governance Committee ("BGC") to reconsider the CPE Panel's Report. The BGC denied the Claimants' request for reconsideration because the Claimants did not state a proper basis for reconsideration as defined in ICANN's Bylaws. The BGC also denied a second reconsideration request filed by Claimants, seeking reconsideration of ICANN staff's determination, pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP"), that certain documents related to the CPE Panel's Report were not appropriate for public disclosure under the DIDP criteria.

5. In this IRP, the Claimants challenge the BGC's denial of their two reconsideration requests, as well as ICANN's appointment of the Economist Intelligence Unit ("EIU") as the third party provider to conduct CPEs. Claimants also challenge details of the CPE process set forth in the Guidebook, which Claimants argue violate their rights of "due process."

6. Booking.com (also represented by Claimant's counsel) made nearly identical claims in an IRP proceeding filed against ICANN in 2014. In that IRP, Booking.com, which had applied for the new generic top level domain .HOTELS, argued that ICANN's Board should have intervened with respect to a third-party expert report issued by one of ICANN's vendors in conjunction with the New gTLD Program.<sup>5</sup> Booking.com also challenged the selection of the vendor and ICANN's rules, set forth in the Guidebook, establishing how the vendor would make

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<sup>5</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Determination ("*Booking.com* Final Determination") ¶ 80 (Resp. Ex. 1).

its determination.<sup>6</sup>

7. In its Final Declaration dated March 3, 2015, the Booking.com IRP Panel unanimously rejected Booking.com’s claims, determining that Booking.com improperly sought to challenge the independent judgment of ICANN’s Board and that Booking.com’s challenges to the Guidebook, which was issued in 2012, were time-barred.<sup>7</sup> In this memorandum, ICANN explains why this Panel should reach the same result.

8. IRPs are conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, which provide for a non-binding method of evaluating certain actions of ICANN’s Board of Directors.<sup>8</sup> This IRP Panel has one (and only one) responsibility: to provide a declaration stating the Panels’ opinion as to “whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>9</sup>

9. As explained herein, Claimants’ IRP should be denied because the ICANN Board has not taken any action that violates any provision of ICANN’s Articles or Bylaws. IRPs are not a vehicle to challenge third-party expert reports. Even though such a challenge is undeniably the focus of Claimants’ request, the Board is not involved in the creation of such reports, was not involved in any way in this particular Report, and has no obligation to review (substantively or otherwise) any such report. Claimants essentially propose that the ICANN Board should have conducted a substantive review of the CPE Report (and perhaps all CPE expert reports and all other third-party expert reports that have been issued in conjunction with the New gTLD Program). However, the Board and the ICANN community, in adopting the Guidebook, made clear that the Board would not undertake such a responsibility, and nothing in the Articles or

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<sup>6</sup> *Id.* ¶¶ 71-78.

<sup>7</sup> *Id.* ¶¶ 129, 138, 146.

<sup>8</sup> ICANN’s Bylaws (“Bylaws”), Art. IV, § 3 (Cls. Ex. RM-2), *also available at* <http://www.icann.org/en/about/governance/bylaws>.

<sup>9</sup> *Id.*, Art. IV, § 3.4.

Bylaws requires the Board to do so.

10. ICANN understands that Claimants are disappointed that their applications for .HOTEL will not proceed due to the fact that HOTEL TLD's Application prevailed in CPE. However, as recommended by ICANN's Generic Names Supporting Organization ("GNSO"), which is the part of the ICANN community designated by the Bylaws as "responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains,"<sup>10</sup> those applications representing a community are given priority in string contention. The Guidebook makes this clear, and there is no basis to conclude that such a preference is somehow a violation of ICANN's Articles or Bylaws.

11. When an applicant submits a community-based application, it is not, as the Claimants imply, simply seeking to "game the application process." As set forth in the Guidebook, community-based applicants agree to operate the applied-for gTLD "for the benefit of a clearly delineated community."<sup>11</sup> This involves implementing "dedicated registration and use policies for registrants in [the applied-for gTLD],"<sup>12</sup> policies that substantially restrict the sorts of domain name registrations a gTLD may accept and thereby might significantly limit the potential profitability of a gTLD.

12. Ultimately, neither the creation nor the acceptance of the CPE Panel's Report regarding HOTEL TLD's Application for .HOTEL constitutes ICANN Board action; nor does the appointment of the EIU by ICANN staff following a public request for proposals from interested firms. Moreover, ICANN's retention of the EIU was announced in 2011, meaning that any IRP challenge to that selection would have had to be filed within 30 days thereafter pursuant to ICANN's Bylaws. Just as in the Booking.com IRP, Claimants are years late in challenging

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<sup>10</sup> *Id.*, Art. X, § 1 .

<sup>11</sup> Guidebook, § 1.2.3.1 (Cls. Ex. RM-5).

<sup>12</sup> *Id.*

the retention of the EIU or the provisions of the Guidebook.

13. The only Board actions at issue here are the Board’s acceptance of the Guidebook and the decisions by the Board to reject Claimants’ two Reconsideration Requests. As discussed herein, in making those decisions, the Board followed ICANN Articles and Bylaws.

## **BACKGROUND FACTS**

### **Background Information On ICANN**

14. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the domain name system (“DNS”).<sup>13</sup>

15. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors and over 300 staff members. Yet, ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and an Ombudsman,<sup>14</sup> the ICANN community includes a Nominating Committee,<sup>15</sup> three Supporting Organizations,<sup>16</sup> four Advisory Committees,<sup>17</sup> a group of technical expert advisors,<sup>18</sup> and a large, globally distributed group of community members who participate in ICANN’s processes.

16. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers (“registrars”). ICANN also focused on expanding, although more slowly, the number of

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<sup>13</sup> Bylaws, Art. I, § 1 (Cls. Ex. RM-2).

<sup>14</sup> *Id.*, Art. V.

<sup>15</sup> *Id.*, Art. VII.

<sup>16</sup> *Id.*, Arts. VIII-X.

<sup>17</sup> *Id.*, Art. XI.

<sup>18</sup> *Id.*, Art. XI-A, § 2.

companies that operate gTLDs (“registries”). In 2000, ICANN approved seven gTLDs in a “proof of concept” phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. In 2004 and 2005, ICANN approved a handful of additional TLDs.

### **Background Information On The New gTLD Program**

17. The New gTLD Program (the “Program”) constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII gTLDs and new non-ASCII, internationalized domain name (“IDN”) gTLDs.<sup>19</sup> In developing the Program with the ICANN community, numerous versions of the Guidebook were prepared, distributed for public comment, and then revised as a result of the public input received. That process repeated many times and over many years until ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures as to how new gTLD applications would be evaluated. As a result, the Program has been a great success at achieving its goals: ICANN received 1,930 gTLD applications, and as of this writing, almost 600 new gTLDs have been added to the Internet, with hundreds more to come.

18. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community-based, *i.e.*, “operated for the benefit of a clearly delineated community.”<sup>20</sup> Applicants for community-based gTLDs are expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have

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<sup>19</sup> IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

<sup>20</sup> Guidebook, § 1.2.3.1 (Cls. Ex. RM-5).

applied for a gTLD string strongly and specifically related to the community named in [their] application.”<sup>21</sup> The Guidebook provides that “community-based applications are intended to be a narrow category, for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string.”<sup>22</sup>

19. If two or more applicants apply for identical or “confusingly similar” new gTLDs and complete all preliminary stages of evaluation, they are placed in a “contention set.”<sup>23</sup> A community-based applicant that is placed in a contention set may elect to proceed with Community Priority Evaluation.<sup>24</sup> If the applicant elects to proceed with CPE, its application is forwarded to an independent, third-party provider—the EIU—for review.<sup>25</sup>

20. A panel constituted of EIU panelists (known as a “CPE Panel”) then evaluates the application.<sup>26</sup> If the applicant is found to meet the CPE criteria—meaning, if the CPE Panel awards the application at least 14 out of 16 possible points on those criteria—the applicant will prevail in CPE.<sup>27</sup> ICANN selected the EIU to handle CPEs following a public request for applications from firms interested in performing the various third party evaluations of new gTLD applications.<sup>28</sup> ICANN’s Board had no role in selecting the EIU (much less the individual EIU panelists), nor does the Board have any role in the analysis of each of the criterion by a panel or in the scoring of an application.

21. If the applicant prevails in CPE, it (and any other community-based applications

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<sup>21</sup> *Id.*, § 1.2.3.1.

<sup>22</sup> *Id.*, § 1.2.3.2.

<sup>23</sup> *Id.*, § 4.1.

<sup>24</sup> *Id.*, § 4.2.

<sup>25</sup> See <http://newgtlds.icann.org/en/applicants/cpe>.

<sup>26</sup> CPE Panel Process Document (Cls. Ex. RM-15).

<sup>27</sup> Guidebook, § 4.2.2 (Cls. Ex. RM-5). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points. *Id.* § 4.2.3.

<sup>28</sup> See “Preparing Evaluators for the New gTLD Application Process,” available at <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>.

in the contention set that prevail in CPE) will proceed to the next stage of evaluation.<sup>29</sup> Other standard applications in the contention set (such as those submitted by Claimants) will not proceed because the community-based applications will have achieved priority.<sup>30</sup> As discussed further below, this outcome is consistent with the recommendation of the GNSO that applications representing communities be awarded priority in string contention.<sup>31</sup>

### **Background Information Regarding the DIDP**

22. A principal element of ICANN’s approach to transparency and information disclosure is its commitment to make publicly available on its website a comprehensive set of materials concerning ICANN’s operational activities. In that regard, ICANN has identified various categories of documents that are made public as a matter of due course.<sup>32</sup> In addition, ICANN’s Documentary Information Disclosure Policy (DIDP) allows community members to request that ICANN make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control” that is not already publicly available.<sup>33</sup>

23. In responding to a request submitted pursuant to the DIDP, ICANN adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests.”<sup>34</sup> ICANN staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP’s Nondisclosure Conditions, which include, among others: (i) “[i]nternal information that, if

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<sup>29</sup> Guidebook, § 4.2.2.

<sup>30</sup> *Id.*

<sup>31</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (“ICANN Board Rationales”) at 94 (Cls. Ex. RM-11).

<sup>32</sup> See Documentary Information Disclosure Policy (Resp. Ex. 2), also available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>33</sup> *Id.*

<sup>34</sup> Process for Responding to DIDP Requests (Resp. Ex. 3), also available at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process”; and (ii) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates.”<sup>35</sup> If the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>36</sup>

### **Relevant Facts Regarding the Applications for .HOTEL**

24. The Claimants each submitted an application for .HOTEL. Their applications were placed in a contention set with HOTEL TLD’s Application, which sought community-based treatment.

25. On 19 February 2014, HOTEL TLD’s Application for .HOTEL was invited to participate in CPE for .HOTEL, and was forwarded to the EIU for evaluation.<sup>37</sup> On 11 June 2014, the CPE Panel from the EIU issued its Report.<sup>38</sup> The Panel determined that the Application received fifteen out of sixteen possible points on the CPE criteria (tying for the highest score any application has received in CPE), and thereby prevailed in CPE.<sup>39</sup> Pursuant to the procedures set forth in the Guidebook, because the Application prevailed in CPE, the .HOTEL contention set was resolved and only the Application will proceed to contracting.<sup>40</sup>

26. On 28 June 2014, the Claimants filed Reconsideration Request 14-34, seeking reconsideration of the Report (“First Reconsideration Request”).<sup>41</sup> On 4 August 2014, Claimants filed a DIDP request seeking the publication of documents relating to the CPE

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<sup>35</sup> Documentary Information Disclosure Policy (Resp. Ex. 2).

<sup>36</sup> *Id.*

<sup>37</sup> See <http://newgtlds.icann.org/en/applicants/cpe>.

<sup>38</sup> CPE Report (Cls. Ex. Annex-8).

<sup>39</sup> *Id.*

<sup>40</sup> Guidebook, § 4.2.2 (Cls. Ex. RM-5).

<sup>41</sup> Request 14-34 (Cls. Ex. Annex-9).

Panel's Report ("DIDP Request").<sup>42</sup>

27. On 22 August 2014, the BGC denied Claimants' First Reconsideration Request, finding that the Claimants had "failed to demonstrate that the [CPE] Panel acted in contravention of established policy or procedure" in rendering the Report."<sup>43</sup> On 3 September 2014, ICANN responded to DIDP Request ("DIDP Response").<sup>44</sup> ICANN identified documents responsive to the DIDP Request that were already publicly available, and noted that many of the requested documents, such as "CVs for the CPE Panel," "documentation regarding the appointment of the specific CPE Panel for the .HOTEL CPE," and "communications . . . with the evaluators that identify the scoring for any individual CPE," did not exist or were not in ICANN's possession.<sup>45</sup> With respect to those requested documents that were in ICANN's possession and were not already publicly available, ICANN explained that those documents would not be made publicly available because they were subject to various DIDP Nondisclosure Conditions, including the nondisclosure conditions protecting "information exchanged, prepared for, or derived from the deliberative and decision-making process" and "confidential business information and/or internal policies and procedures."<sup>46</sup>

28. On 22 September 2014, Claimants filed Reconsideration Request 14-39, seeking reconsideration of the DIDP Response ("Second Reconsideration Request").<sup>47</sup> On 11 October 2014, the BGC denied the Second Reconsideration Request, finding that the Claimants had "failed to demonstrate that ICANN staff acted in contravention of established policy or procedure in responding to the DIDP Request."<sup>48</sup>

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<sup>42</sup> DIDP Request (Cls. Ex. Annex-10).

<sup>43</sup> BGC Determination on Request 14-34 at 2 (Cls. Ex. Annex-11).

<sup>44</sup> DIDP Response (Cls. Ex. Annex-12).

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.* at 2-3.

<sup>47</sup> Reconsideration Request 14-39 (Cls. Ex. Annex-13).

<sup>48</sup> BGC Determination on Request 14-39 at 2 (Cls. Ex. Annex-14).

29. Claimants then initiated a Cooperative Engagement Process (“CEP”) with ICANN,<sup>49</sup> and then subsequently filed this IRP.

### STANDARD OF REVIEW

30. The IRP is a unique, non-binding process available under ICANN’s Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, and only to the extent that Board action was inconsistent with ICANN’s Articles or Bylaws.<sup>50</sup> The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN’s Articles or Bylaws.<sup>51</sup> ICANN’s Bylaws specifically identify the standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>52</sup>

31. The IRP Panel is not to substitute its judgment for that of the Board.<sup>53</sup> As the IRP panel in *Booking.com v. ICANN* explained:

[s]o long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN [...]. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws, and, in

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<sup>49</sup> Bylaws, Art. IV, § 3.14 (Cls. Ex. RM-2). Claimants are encouraged to enter into CEP with ICANN prior to filing IRP requests in order to resolve or narrow the issues that are contemplated to be brought to the IRP. *See* Cooperative Engagement Process, *available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.

<sup>50</sup> *Id.*, Art. IV, §§ 3.1, 3.2.

<sup>51</sup> *See id.* Art. IV, §§ 3.2, 3.4.

<sup>52</sup> *Id.*, Art. IV, § 3.4.

<sup>53</sup> *See id.*

this case, with the policies and procedures established by the Guidebook.”<sup>54</sup>

32. ICANN has appointed the International Centre for Dispute Resolution (“ICDR”) as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures that the ICDR has adopted specifically for ICANN IRP proceedings apply here.<sup>55</sup> The Bylaws provide that the IRP be conducted via “email and otherwise via the Internet to the maximum extent feasible.”<sup>56</sup> The IRP Panel may also hold meetings via telephone where necessary, and “[i]n the unlikely event that a telephone or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”<sup>57</sup>

33. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.<sup>58</sup> The Board will give serious consideration to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.<sup>59</sup>

## ARGUMENT

34. Although they contend otherwise, it is apparent that Claimants are challenging the Report’s substantive determination that HOTEL TLD’s Application prevailed in CPE. For example, Claimants compare the Report to reports issued by other CPE panels and conclude that the Panel that resolved the HOTEL TLD Application must have erred because there are alleged inconsistencies in the various CPE reports. Further, Claimants’ requested relief—that the IRP

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<sup>54</sup> *Booking.com* Final Declaration, ¶¶ 108-109 (Resp. Ex. 1).

<sup>55</sup> Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. *Id.*, Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”) § 2, (Resp. Ex. 4), *also available at* <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

<sup>56</sup> Bylaws, Art. IV, § 3.12 (Cls. Ex. RM-2).

<sup>57</sup> *Id.*, Art. IV, § 3.12; Supplementary Procedures ¶ 10 (Resp. Ex. 4).

<sup>58</sup> Bylaws, Art. IV, § 3.18 (Cls. Ex. RM-2).

<sup>59</sup> *Id.*, Art. IV, § 3.21.

Panel “[d]eclare that ICANN must reject the determination that [HOTEL TLD’s] application for .hotel be granted community priority”—confirms that this IRP is nothing more than an attack on the Report issued by the EIU.<sup>60</sup> Nevertheless, as discussed herein and made clear in ICANN’s Bylaws, IRPs are not a forum for challenging third party expert reports, which involve no Board action whatsoever.

35. Claimants identify only two Board actions—the approval of the criteria set forth in the Guidebook and the denial of Claimants’ Reconsideration Requests—but in each instance, the Board’s actions were consistent with and in accordance with ICANN’s Articles and Bylaws.

**I. THE BOARD DID NOT SELECT THE EIU, AND ANY CHALLENGE TO THE SELECTION OF THE EIU IS TIME-BARRED IN ALL EVENTS.**

36. Claimants argue that the Board “did not provide transparency” in its selection of the EIU to act as independent provider for CPE reviews and “never demonstrated” that the EIU met the stated requirements for serving as ICANN’s CPE provider.<sup>61</sup> Yet the Board was not involved in the selection of the EIU; it was ICANN staff that selected the EIU via a public solicitation for Expressions of Interest.<sup>62</sup> Because the Board played no role in the selection of the EIU, there simply is no basis for Independent Review of this matter because ICANN’s Bylaws limit IRPs to the review of actions of the Board.

37. Even if the ICANN staff’s selection of the EIU were a basis for Independent Review, Claimants’ argument is time-barred. ICANN’s call for Expressions of Interest was issued in 2009, and ICANN announced that it had selected the EIU in October 2011. Both the selection process and the criteria for selection (set forth in detail in the call for Expressions of Interest)

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<sup>60</sup> IRP Request ¶¶ 70. The IRP Panel has no authority to grant affirmative relief. Rather, the IRP Panel is limited to stating its opinion by “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and *recommending* that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

<sup>61</sup> IRP Request ¶¶ 43-47.

<sup>62</sup> See ICANN Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (Cls. Ex. Annex-18); see also <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>.

were made public.<sup>63</sup> If Claimants had concerns with the selection process or with the selection of the EIU, they were obligated to have raised those concerns at the time, not years later and only after the issuance of a CPE Report with which they disagree. ICANN’s Bylaws require that IRPs be initiated within 30 days of the Board decision to be reviewed, not over four years later.<sup>64</sup>

38. Finally, even if the selection of the EIU could be deemed Board action (which it is not), and even if the Claimants’ argument were not time-barred (which it is), the Claimants offer no evidence that the EIU failed to meet the criteria set forth in ICANN’s solicitation for Expressions of Interest—specifically, that interested firms have a plan for “ensuring fairness, nondiscrimination, and transparency” and “ensuring that evaluation teams . . . consist of qualified individuals.”<sup>65</sup> Rather, since there is no such evidence, the Claimants claim that various CPE panels have had “failures,” and that this should create a “strong presumption that appropriate selection criteria were not met.”<sup>66</sup> However, the mere fact that Claimants disagree with the substantive conclusion of a CPE panel does not demonstrate any “failure,” much less constitute evidence that the EIU failed to meet the criteria set forth in ICANN’s solicitation for Expressions of Interest.

## **II. CLAIMANTS’ CHALLENGES TO THE GUIDEBOOK’S CPE PROCEDURES ARE UNSUPPORTED AND TIME BARRED.**

39. Claimants argue that the CPE process set forth in the Guidebook is flawed because it does not provide for: (1) a substantive review or appeals mechanism; and (2) the identification of the specific EIU evaluators who constituted the CPE Panel.<sup>67</sup> Again, Claimants’

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<sup>63</sup> Details and announcements regarding each stage of the selection process were posted on ICANN’s website. *See* <http://newgtlds.icann.org/en/about/evaluation-panels-selection-process>.

<sup>64</sup> Bylaws, Art. IV, § 3.3 (30-day limitation period for IRP claims) (Cls. Ex. RM-2).

<sup>65</sup> ICANN Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel at 6 (Cls. Ex. Annex-18).

<sup>66</sup> IRP Request ¶ 47.

<sup>67</sup> *Id.* ¶¶ 57-62.

arguments find no support in the Articles or the Bylaws, and the time for Claimants to have objected to the procedures set forth in the Guidebook has long since passed.

40. As detailed in the Board's Rationales for the Approval of the Launch of the New gTLD Program, issued in June 2011, the application evaluation procedures, including the CPE procedure (and the decision to grant successful community-based applications priority in cases of string contention), were adopted by the ICANN Board after years of rigorous policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal counsel, numerous ICANN committees, Internet stakeholders, and community members from around the world, all in compliance with ICANN's Articles and Bylaws.<sup>68</sup>

41. Specifically, in 2005, ICANN's GNSO began a policy development process to consider the widespread introduction of new gTLDs. Two years later, again in accordance with the ICANN Bylaws, the GNSO issued a set of policy recommendations regarding the New gTLD Program, which included a recommendation that applications representing communities be awarded priority in string contention.<sup>69</sup> In June 2008, the ICANN Board approved the GNSO's policy recommendations regarding the New gTLD Program, including its recommendation regarding community priority (as the Board is required to do under the Bylaws unless a supermajority of the Board believes that the recommendations are not in the best interests of the ICANN community or ICANN).<sup>70</sup>

42. Between October 2008, when ICANN issued its first version of the Guidebook, and June 2012, when the current version of the Guidebook was issued, ICANN engaged with legal counsel, held numerous public comment sessions, and considered advice from ICANN

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<sup>68</sup> ICANN Board Rationales at 93-105 (Cls. Ex. RM-11).

<sup>69</sup> *Id.* at 94.

<sup>70</sup> Board Resolutions 2008.06.26.02-03 (Cls. Ex. RM-8); Bylaws, Annex A, § 9(a) (Cls. Ex. RM-2).

supporting organizations and advisory committees.<sup>71</sup> ICANN repeatedly revised the CPE process to reflect public comments received on each version of the Guidebook. For example, due to public comments on an early version of the Guidebook expressing “desire for greater clarity around the standards to be used for [community priority] evaluation,” ICANN added “detailed explanatory notes for each of the [CPE] criteria to give additional guidance to applicants” into the Guidebook.<sup>72</sup>

43. Ultimately, the Board and the community approved the CPE process contained in the Guidebook, which specifically does not set forth either: (1) an appeals or substantive review mechanism; or (2) any requirement that the identities of individual evaluators be made public. This was based in part on the Board’s finding that the process was sufficient to “validate the designation given to community-based applications” and “assess a preference for community-based applications in a contention set.”<sup>73</sup>

44. All of the policy development work, implementation, and decision-making that culminated in the current version of the Guidebook was open, fair and transparent; it led to clear and predictable procedures. All of this work and the results of this work are fully consistent with ICANN Articles and Bylaws.

45. Claimants’ attack on the CPE process is also deficient because the current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts, as set forth above.<sup>74</sup> Despite having ample opportunity to do so, Claimants did not object to CPE process at the time the Guidebook was

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<sup>71</sup> ICANN Board Rationales at 95-97 (Cls. Ex. RM-11).

<sup>72</sup> *Id.* at 96.

<sup>73</sup> The Board approved the then-current version of the Guidebook in June 2011. *See* <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en>. There are no substantive differences between the version of the Guidebook approved at that time and the current 4 June 2012 version of the Guidebook.

<sup>74</sup> *See* Guidebook, Preamble (Cls. Ex. RM-5).

implemented. If Claimants had concerns related to these issues, they were properly pursued at the time.

46. As the IRP Panel in *Booking.com v. ICANN* found:

the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws.<sup>75</sup>

47. While the expert determination process at issue in this IRP is different—namely, the CPE process rather than the string similarity review process—the *Booking.com* IRP Panel’s reasoning applies equally. Because both processes were developed years ago and incorporated into a Guidebook issued in 2012, challenges to both are “long since” time-barred.

**III. ICANN’S BOARD PROPERLY DENIED CLAIMANTS’ FIRST RECONSIDERATION REQUEST AND HAD NO OBLIGATION TO INTERVENE FURTHER WITH RESPECT TO THE EXPERT PANEL’S DETERMINATION.**

48. Claimants argue that they are entitled to independent review because the Board “should have corrected” what Claimants view to be “the mistakes in the CPE process” leading to the CPE Report.<sup>76</sup> Claimants correctly note that the Guidebook provides that, in “exceptional circumstances,” such as when accountability mechanisms such as reconsideration or independent review are invoked, “the Board might individually consider an application.”<sup>77</sup> Indeed, that is precisely what occurred in this case. Claimants sought reconsideration of the CPE Report.<sup>78</sup> The BGC, which is delegated with the authority to make such determinations on behalf of the Board,

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<sup>75</sup> *Booking.com.com* Final Declaration ¶ 129 (Resp. Ex. 1).

<sup>76</sup> IRP Request ¶ 64.

<sup>77</sup> Guidebook § 5.1 (Cls. Ex. RM-5).

<sup>78</sup> Reconsideration Request 14-34 (Cls. Ex. Annex-9).

individually considered HOTEL TLD's Application in order to assess whether the CPE Panel had violated any established policy or procedure in rendering the CPE Report.<sup>79</sup>

49. Claimants' First Reconsideration Request challenged the substance of the CPE Report. Claimants argued, as they do in their IRP Request, that the CPE Panel incorrectly applied the CPE criteria in determining that HOTEL TLD's Application prevailed in CPE. However, as the BGC pointed out in its Determination, "the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports,"<sup>80</sup> which would involve exactly the sort of comprehensive appellate review that the Board (and the community) determined it would not undertake. The BGC did, however, address each of Claimants' complaints with the CPE Panel's scoring of HOTEL TLD's Application, noting that in each case, Claimants' complaint was that the number of points awarded by the Panel was "wrong," not that the CPE Panel had violated any ICANN policy or procedure in scoring the Application.<sup>81</sup>

50. The BGC also examined each of Claimants' contentions regarding the process followed by the CPE Panel, including that: "(1) the standard applicants are not given enough information regarding the identity or qualifications of the Panelist to assess potential conflicts; (2) the materials considered by the Panel are not publicly posted; and (3) the Panel provided insufficient 'analysis and reasons' for its conclusions."<sup>82</sup> The BGC correctly noted that the Guidebook process "does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application," and that allowing late-asserted challenges to the Guidebook process would "undermine the stability of the New gTLD Program and ICANN's

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<sup>79</sup> BGC Determination on Request 14-34 (Cls. Ex. Annex-11).

<sup>80</sup> *Id.* at 7.

<sup>81</sup> *Id.* at 5-9.

<sup>82</sup> *Id.* at 10-11.

accountability mechanisms.”<sup>83</sup> As discussed above, the evaluation procedures set forth in the Guidebook were developed as part of an extended, transparent process involving the reasoned judgment of ICANN’s Board and the Internet community. Nothing about those procedures violates ICANN’s Articles or Bylaws, and the Claimants’ time to challenge those procedures has long since passed.

51. Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their First Reconsideration Request. Claimants simply object to the BGC’s adherence to the standard for Reconsideration Requests, which calls for the BGC to review only whether the actions of the third-party evaluators “contradict[ed] established ICANN policy(ies).”<sup>84</sup> The BGC plainly did not violate any Article or Bylaws provision in adhering to the Bylaws standard for Reconsideration Requests.

52. Claimants similarly have identified no Article or Bylaws provision violated by the ICANN Board in exercising its independent judgment not to intervene further with respect to the CPE Report. As the *Booking.com* IRP Panel found, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant].”<sup>85</sup>

53. It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators. The decision not to have ICANN (much less ICANN’s Board) perform substantive reviews of third party evaluators’

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<sup>83</sup> *Id.* at 10.

<sup>84</sup> Bylaws, Art. IV, § 2.2(a) (Cls. Ex. RM-2). The Bylaws make reconsideration available only to challenge actions of ICANN’s staff or Board, but the BGC has determined that “the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its procedures or policies in accepting that determination.” BGC Determination on Request 14-34 at 4 (Cls. Ex. Annex-11).

<sup>85</sup> *Booking.com* Final Determination ¶ 138 (Resp. Ex. 1).

reports reflects a considered decision of ICANN’s Board, made after significant public input and comment, that third party experts (and not ICANN) should be resolving these types of issues with respect to the hundreds of gTLD applications that were expected and the 1,930 applications that ICANN in fact received.

**IV. CLAIMANTS’ CONTENTION THAT THE CPE PANEL ERRED IS IRRELEVANT, BUT IS IN ANY EVENT WITHOUT MERIT.**

54. In evaluating HOTEL TLD’s Application, the CPE Panel applied the CPE criteria and found that the community as defined in the Application, the “global Hotel Community,” was clearly defined, had numerous entities dedicated to it, had documented evidence of community activities, and was active prior to September 2007.<sup>86</sup> The CPE Panel further found that that community was of considerable size and that its pursuits were of a “lasting, non-transient nature.”<sup>87</sup> The CPE Panel also evaluated the nexus between the applied-for string, .HOTEL, and the community the Application is meant to serve, and found that “the string both “identify[d] the name of the community as defined in the application” and “h[ad] no other significant meaning beyond identifying [that] community.”<sup>88</sup> Next, the CPE Panel determined that the Application included the required registration policies—restricting registrations in .HOTEL to community members and “includ[ing] rules for content and use for registrants that are consistent with the articulated community-based purpose” of the gTLD—as well as the required enforcement and appeals mechanisms.<sup>89</sup> Finally, the CPE panel determined that the Application had documented support from recognized community institutions, and opposition only from groups of “negligible size” or that did not have an “association with the applied for string.”<sup>90</sup> The CPE Panel therefore

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<sup>86</sup> CPE Report at 1-3 (Cls. Ex. Annex-8).

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.* at 3-4.

<sup>89</sup> *Id.* at 4-5.

<sup>90</sup> *Id.* at 5-6.

awarded the Application 15 out of 16 possible points, concluding that the Application “met the requirements specified in the [ ] Guidebook” for community priority.<sup>91</sup>

55. Claimants disagree with those findings, and their IRP Request seeks to challenge the merits of the CPE Report. However, there was no Board action with respect to the CPE Report, and the Claimants’ disagreement with that report is not a basis for independent review. Moreover, Claimants’ only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE<sup>92</sup> then .HOTEL TLD’s Application also should not have prevailed. Claimants’ argument is baseless. The outcome of those completely unrelated CPEs have no bearing on the outcome of the CPE regarding .HOTEL TLD’s Application.

56. Furthermore, Claimants’ argument relies on inaccurate characterizations of the CPE Panel’s Report. For example, Claimants argue that the CPE did not “take[] up” the requirement, set out in the CPE criteria, that a community be “represented by at least one entity that encompasses the entire community as defined by the applicant.”<sup>93</sup> In fact, the CPE Panel found that there were “several entities [ ] mainly dedicated to the community” as defined by .HOTEL TLD, including the International Hotel and Restaurant Association, Hospitality Europe, the American Hotel & Lodging Association, and the China Hotel Association.<sup>94</sup> Similarly, Claimants argue that the CPE Panel incorrectly concluded that .HOTEL TLD’s Application included an appeals mechanism if a registration is denied. In fact, as noted by the CPE Panel, the Application does include such an appeals mechanism—a registrant has the “right

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<sup>91</sup> *Id.* at 1.

<sup>92</sup> IRP Request ¶¶ 49-52.

<sup>93</sup> *Id.* ¶ 51.

<sup>94</sup> CPE Report at 2 (Cls. Ex. Annex-8).

to request a review of [a] denial [of the registrant's right to hold a domain name on .HOTEL].”<sup>95</sup>

57. As described in detail in the BGC's denial of the Requesters' First Reconsideration Request, the CPE Panel did not deviate from any of the required CPE criteria in evaluating .HOTEL TLD's Application.<sup>96</sup> Claimants' opinion that there is not sufficient awareness and self-recognition in the community defined in .HOTEL TLD's Application does not mean that the CPE Panel erred. And, contrary to what Claimants state, while the majority of applications have not prevailed in CPE, some in fact have, including European Broadcasting Union's application for .RADIO, which seeks to represent the radio industry.<sup>97</sup>

## **V. THE BGC PROPERLY DENIED CLAIMANTS' SECOND RECONSIDERATION REQUEST**

58. Finally, Claimants argue that the BGC violated ICANN's Articles and Bylaws in denying Claimants' Second Reconsideration Request, which sought reconsideration of the ICANN staff's determination, pursuant to the DIDP, that certain documents related to the CPE Report were not appropriate for publication.<sup>98</sup> Again Claimants fail to identify any Article or Bylaws provision that the BGC violated in denying the Second Reconsideration Request.

59. The BGC's determination on the Second Reconsideration Request addressed each of Claimants' arguments and concluded that ICANN staff had followed the DIDP in determining that certain documents related to the CPE Report were subject to Nondisclosure Conditions, and that the public interest in disclosing those documents did not outweigh the harm that might be caused by such disclosure.<sup>99</sup>

60. ICANN considers the principle of transparency to be a fundamental safeguard in

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<sup>95</sup> .HOTEL TLD Application § 20(e) (Cls. Ex. Annex-7); *see also* CPE Report at 5 (Cls. Ex. Annex-8).

<sup>96</sup> BGC Determination on Request 14-34 at 5-9 (Cls. Ex. Annex-11).

<sup>97</sup> CPE Report on .RADIO (Resp. Ex. 5).

<sup>98</sup> IRP Request ¶ 65.

<sup>99</sup> BGC Determination on Request 14-39 at 7-11 (Cls. Ex. Annex-14).

assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision making are in the public benefit and are derived in a manner accountable to all stakeholders. As the BGC noted in its determination, the DIDP is not a litigation tool designed to “make pieces of information available to specific interested parties.”<sup>100</sup> Rather, it is “intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>101</sup>

61. Not every document in ICANN’s possession is properly disclosed to the wider public. As discussed in the DIDP Response, Claimants’ DIDP Request sought documents containing confidential business information and documents, the public disclosure of which could compromise the integrity of ICANN and/or the EIU’s deliberative process.<sup>102</sup> The BGC correctly determined that ICANN staff followed the DIDP in weighing the public interest in the disclosure of those documents and ultimately determining that the documents were not properly made public; no breach of any obligation under ICANN’s Articles or Bylaws occurred.

## **VI. RESPONSE TO THE CLAIMANTS’ REQUESTED RELIEF.**

62. Claimants’ IRP Request should be denied in its entirety, including its request for relief. Claimants request that this IRP Panel issue a declaration that “ICANN must reject the determination that [HOTEL TLD’s] application for .hotel be granted community priority.”<sup>103</sup> An IRP Panel, however, is explicitly limited to stating its opinion as to “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending, if requested, that the Board stay any action or decision or take any interim action

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<sup>100</sup> *Id.* at 11.

<sup>101</sup> *Id.* (quoting the Documentary Information Disclosure Policy).

<sup>102</sup> DIDP Response at 1-3 (Cls. Ex. Annex-12).

<sup>103</sup> IRP Request at 25.

until such time as the Board reviews and acts upon the opinion of the IRP Panel.<sup>104</sup> Even if there were a basis for some kind of relief here (which there is not), neither this Panel nor any IRP panel has the authority to award affirmative relief.<sup>105</sup>

### CONCLUSION

63. The thrust of Claimants' IRP filing is that the EIU wrongly granted community priority status to one of Claimants' competitors. The EIU's substantive decision, however, did not involve – and was never intended to involve – any ICANN Board conduct. As such, it is not subject to independent review. The fact that the Claimants disagree with the CPE Panel's Report does not properly give rise to an IRP because the ICANN Board does not perform substantive reviews of such reports, and ICANN's Articles and Bylaws do not require it to do so. In addition, Claimants' belated challenge to the CPE process set forth in the Guidebook is both time-barred and unsupported.

64. Further, ICANN's conduct with respect to its evaluation of both of the Claimants' Reconsideration Requests was fully consistent with ICANN's Articles and Bylaws—Claimants provide no argument otherwise. For these reasons, ICANN urges the Panel to declare that ICANN's Board acted consistently with ICANN's Articles and Bylaws with respect to the issues raised in Claimants' IRP Request.

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<sup>104</sup> Bylaws, Art. IV, §§ 3.4, 3.11(c-d) (Cls. Ex. RM-2).

<sup>105</sup> Indeed, the IRP Panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 133, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

Respectfully submitted,

JONES DAY

Dated: April 17, 2015

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