

Claimants hereby reply to ICANN's Opposition to IRP Claimants' Amended Request for Interim Measures of Protection, dated May 12, 2020 ("Opp."). Generally, ICANN fails to address many of Claimants' points and authorities. As to the request for "status quo" relief, ICANN offers only a deceptive and shallow argument that it has never dared to raise in any prior IRP case, ignores the substance and weight of prior IRP decisions, and is patently ridiculous in light of clear contrary evidence. As to Claimants' requests for implementation of procedural rights guaranteed to them by ICANN's Bylaws, ICANN says very little, as it simply has no excuse for failing to meet its Bylaws commitments for so long.

Claimants respond to ICANN's purported points and authorities, as follows:

ICDR Has a Clear Conflict of Interest and Must Recuse From This Request

ICANN argues only that ICDR has no conflict because it only has an "administrative function." (Opp., #64.) But Claimants cited persuasive ICBA Guidelines that apply the same standards to administrators as to panelists. ICANN does not even address those Guidelines. Instead, ICANN's lawyer says that "The mere fact that a Standing Panel is established will not revoke the ICDR's position as the IRP Provider." But that is not evidence. ICANN has not made any such pronouncements, and there is ample room to doubt that ICDR would have any ongoing function. The Bylaws require ICANN to maintain the process and pay for it, they do not mention ICDR. Presumably, ICDR could be ousted in favor of another provider, or an internal ICANN admin function. ICANN's lawyer's bare statement is not evidence that can be considered here.

Claimants have demonstrated a very clear, apparent and material financial conflict of interest. By the very clear ICBA Guidelines, that means ICDR must recuse itself from administering this Request.

ICANN Must Maintain Status Quo as to the .HOTEL Contention Set

ICANN primarily argues that Claimants have failed even to address the elements they supposedly must prove in order to obtain any interim measures of relief, and specifically to obtain an order requiring ICANN to maintain *status quo* as to the .Hotel TLD contention set during pendency of this IRP. Yet, Claimants did address those elements in their brief, p. 6-8, primarily by reference to unanimous IRP precedents on materially identical facts.

Claimants cited and quoted the decisions by ICDR Emergency Panelists in the *Dot Registry* and *DCA Trust* cases. Both involved the identical situation where ICANN threatened to delegate a TLD which was subject to a competing applicant's IRP. In both decisions, the panelist required ICANN to maintain the contention set -- and not delegate the disputed TLD -- until the IRP was resolved.¹ There is no reason for any different result in this case, and indeed any different result would further violate ICANN's Bylaws (e.g., Art. 2.3)² which require equal treatment of similarly situated parties.

Claimants further respond to ICANN's arguments on this critical issue, as follows:

¹ An analogous result was reached in the *GCC* case, and ICANN also admitted to that result in the *Donuts* case. (*Id.*, p.9.)

² **2.3. NON-DISCRIMINATORY TREATMENT**

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

ICANN's Unanimous, Binding IRP Precedents Require This Relief

ICANN's Bylaws require it to respect those decisions as binding precedent (a key point that ICANN does not address).³ ICANN only meekly argues that the situation is different in this case, only because in those cases ICANN failed to argue that TLDs can be assigned to another registry operator.⁴ That is surely not a "substantial and reasonable cause" for ICANN to treat Claimants differently in this case than the claimants in those cases. More substantively, that is an incredibly shallow and deceptive argument, which may have preliminarily convinced a California Superior Court judge with a busy docket, weighing several other highly relevant factors -- but cannot stand scrutiny as a persuasive precedent in this IRP proceeding.

ICANN's Bylaws require that ICANN -- and this panel -- respect binding IRP precedents. The Superior Court did not consider those, nor ICANN's Bylaws, in its very brief analysis. That decision, and the only one it relies upon, is inapposite because the courts each specifically found that the moving party had an adequate remedy at law, for damages.⁵ Moreover, that court found that the intervenor had proved it would suffer specific damages from the delay in proceedings. (*Id.*, p.5.) In this case, Claimants do

³ Instead, ICANN claims it is its "standard practice" to ignore IRP precedents and force IRP claimants to litigate this critical issue, over and over again. (See Opp., #15.) To be sure, there is no such policy (by Board resolution or otherwise) that could conceivably be considered a "standard practice" of ICANN, and their lawyer cites none.

⁴ Claimants aver that this is another circumstance showing the benefits of a Standing Panel, composed of experts trained in ICANN matters -- experts who from their experience and/or training would understand how shallow and deceptive this argument truly is.

⁵ RELA-2, p.4 (*quoting Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.*, 255 Cal. App. 2d 300, 307, 63 Cal. Rptr. 148 (Ct. App. 1967)).

not seek damages, they seek only injunctive relief; and there is no intervenor nor any other party that would suffer any calculable damage. Also, that court found public interest in launching the .Africa TLD (*id.*, p.5), which does not exist as to the .hotel TLD as discussed below (both .hoteles and .hotels TLDs have been delegated for years, with zero registrations to date). Therefore, that preliminary decision of that court cannot override the unanimous body of IRP precedent that binds ICANN and this panel.

ICANN's Transition Policy Is an Extremely Uncertain and Inadequate Remedy

ICANN pretends that TLD registry transition is some sort of simple process; that TLDs are fungible assets like second-level domain names (i.e. example.com). But that is a fanciful argument, as clearly evidenced by the complex Transition Policy itself, and especially with respect to so-called "Community TLDs."

Most certainly, Claimants would be irreparably and severely harmed if ICANN proceeded to delegate the disputed TLD to Claimants' competitor, particularly under the guise of a so-called "Community TLD." As a most certain practical matter, any leverage that Claimants have in this case, if any, will be eliminated -- without any sort of full or fair adjudication of their Complaint. ICANN would have a complete victory at the outset, and thus would be incented to delay the IRP proceeding as long as possible since its chosen winner will be free to speedily launch the disputed TLD. Indeed, ICANN is already positing that this IRP is likely to take another "year to eighteen months". (Opp. p. 2.) But the ICANN Bylaws, Art. 4.3(s), state that IRPs should be resolved in six months. ICANN should not be incented to delay matters so greatly.

As a practical matter, HTLD could effectively drive the TLD into the ground, ruining the market for it before it can be assigned away. That is far less speculative than the notion that HTLD would simply assign over the TLD if Claimants prevail herein. ICANN's lawyers say that ICANN "will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP." (Opp., #30.) But they provide no evidence of that, no sworn statement from ICANN -- nothing binding on ICANN at all.

Note ICANN's lawyer's careful statement that ICANN will "preserve the option"...; obviously, that is no promise that they would exercise such an option. They cite no precedent for such a clause in any registry agreement -- as there is none. They cannot assure that HTLD will accept such a clause. They also cannot assure that HTLD would later abide by it, even if they do accept it. ICANN provides no statement from HTLD. ICANN's lawyer's bare assurance surely cannot be trusted.

Indeed, ICANN has recently been involved in a highly analogous dispute over the proposed assignment of the .org TLD, operated on behalf of the non-profit organizational community. That non-profit operator ISOC sought to assign the TLD to a private equity firm run by domain industry veterans (including a former ICANN CEO). Many in the non-profit community objected to the sale, and found support from the California Attorney General. That pressure caused ICANN to recently reject the assignment.⁶ That is real evidence that ICANN cannot guarantee any smooth registry transition in this matter, either.

⁶ Ex. I -- ICANN's Board Resolution on the matter, including a lengthy analysis of the factors it must consider in any registry transition proposal.

Glaringly, ICANN's lawyers do not discuss what would happen to all of the so-called "Hotel Community" members who will have purchased .hotel domains by the time of any proposed assignment, putting them to use for websites, email, etc. The Transition Policy would require the successor registry operator to accept all of those legacy registrations. That would constitute certain, irreparable harm to the successor, who might have sold any or all of those registrations to different parties, for higher prices and/or longer registration terms -- and certainly without restrictions as to use. In essence, the successor would be forced to accept the legacy customers and policies of HTLD, even if many of them are unsavory to the successor for whatever reason.

Moreover, any "community" TLD must operate with defined "community restrictions" intended to limit usage to the so-called community. This is one of the elements of the CPE, which is at the core of this IRP case. Claimants argue that there is no legitimate hotel community, and instead .hotel domains should be made available to anyone without restriction -- just like many hundreds of other top-level domains including .hoteles, .travel, .voyage, .viajes, .vacations, .tours, .holiday, .theater and .theatre, etc. If the disputed .hotel TLD launches with restrictions, that is likely to create market stigma, poisoning the TLD. This is what has happened with several restricted TLDs to date, as their registry operators realized they needed to "open" their restricted registries in order to survive. (Ex. J is a 2018 industry press article re just such a situation as to the longstanding .travel TLD.)

There are also many other technical and business concerns addressed in the Transition Policy, which have no certainty as to outcome. Ultimately the ICANN Board

would need to approve the assignment, which would have to be proposed by HTLD/Afilias -- and neither of those actions can be guaranteed by ICANN now. Claimants present real evidence of likely harm to any successor TLD operator such as Claimants each hope to be. It is clear that future registry transition is inherently uncertain in myriad ways, and certainly cannot cure the irreparable harm that is demonstrably likely to result from delegation during pendency of this IRP.

Neither ICANN Nor Any Third Party Has Shown Any Harm From the Status Quo

There would be no apparent benefit to anyone if ICANN delegated to HTLD now. ICANN touts the so-called “Hotel Community” purportedly represented by a limited liability company HTLD -- owned by Afilias, a domain industry titan -- and the harm to that purported community alleged to be happening as we speak. (*Id.*, #3, 5.) Yet further down the page, ICANN lays out an egregious argument that Claimants can later be “made whole” by transfer of the TLD straight out of the hands of that so-called community, presumably even after many .hotel domains have been registered. (*Id.*, #6.) That is a purely deceptive and shallow argument, as aforesaid.

ICANN provides no evidence whatsoever as to any urgency or other potential hardship in this matter, which ICANN itself unilaterally delayed for many years while it internally reviewed and reported on its own admitted failures underlying Claimants’ IRP Complaint. The matter has been active since 2012 when Claimants filed their applications, and each of them paid ICANN \$185,000 to process those applications. Claimants are far more prejudiced than anyone, as their respective investments -- each worth at least a half million dollars when considering consultants’ fees (not to mention

executive time and other resources, the time value of money, etc....) -- sit idly worthless as this matter continues.

Despite the unsupported assertions of its counsel, ICANN cannot conceivably be prejudiced by maintaining the *status quo* until this case is resolved. ICANN delegated the .Hoteles (Spanish/plural) TLD in 2015, and it has not even launched yet -- five years later. Similarly, ICANN delegated the .Hotels (plural) TLD in 2017, and it also has not launched yet.⁷ Those facts prove there are two available, nearly identical TLDs already delegated by ICANN, with market demand apparently so weak that they are not even launched for any use at all -- after several years.

Indeed, HTLD has had an opportunity to try to intervene in this matter if it avers that its rights might be prejudiced, but they have said and done nothing. So, it appears that ICANN is simply lying about any potential harm to the purported hotel community. At best, it is speculating without any evidence, and contrary to clear evidence presented by Claimants herein.

Furthermore, ICANN argues that just one party might be harmed, HTLD; and perhaps some members of the so-called "Hotel Community" (who clearly have not been clamoring for relevant domain names). But Claimants allege that ALL members of the ICANN community are harmed by ICANN's intransigent, willful failures to adopt key procedural rights required by its Bylaws for more than six years. Claimants also allege

⁷ Ex. K contains ICANN's IANA delegation information pages for those TLDs, showing delegation dates, the "Coming Soon" page at nic.hoteles, and the error page at nic.hotels. NOTE: ICANN's Registry Agreement requires a page at nic.TLD for every delegated TLD, meaning that the .hotels TLD operator appears to be in breach of their Registry Agreement. In any event, that TLD has not launched with any live domains.

in their IRP Complaint that the CPE process was fatally flawed, such that many other applicants who have suffered from those results also may get relief if Claimants win this case. The active, broader community harm is exponentially greater than any speculative harm to ICANN, HTLD and/or the phony 'Hotel Community' that they have concocted.

The balance of harms squarely weighs against ICANN, as Claimants clearly would suffer demonstrable and irreparable market harm, per evidence they have presented. Registry transition would be both a frighteningly uncertain and woefully insufficient remedy, which ICANN has not guaranteed and cannot promise. And neither ICANN nor any other party has shown any evidence or potential harm whatsoever from the *status quo*. Therefore, the Emergency Panelist must follow unanimous, binding IRP precedents and order ICANN to preserve that *status quo* until this case is finally resolved.

Claimants Have Raised Sufficiently Serious Questions on the Merits

The Emergency Panelist in the highly analogous *Dot Registry* case (at para. 60) found that claimant to have raised sufficiently substantial questions as to the merits of that case. Among the five exemplar issues listed by the panelist, three were nearly identical issues again raised in this case, specifically: “i) ... whether the standard the BGC applied to its Reconsideration Request is consistent with ICANN's Bylaws”, iii) whether “Board action” includes EIU actions, and especially [sic, v)] “whether each of Dot Registry's applications was independently evaluated to the extent required by the AGB and whether EIU made sufficient disclosure in relation to its independent research

to enable Dot Registry to obtain a meaningful review of its findings at the Reconsideration stage.” Each of those issues is presented directly by Claimants’ IRP Complaint. So again, that decision is a binding precedent indicating that Claimants have raised sufficient questions relating to the merits of this IRP.

Surely, the Emergency Panelist is not supposed to substantively examine the merits of the case, as that is the job of the full IRP Panel (really, the Standing Panel). Unless the Emergency Panelist has a strong conviction that Claimants’ IRP Complaint is wholly frivolous, which it simply has no basis to find, then this element cannot preclude an award of interim relief per Claimants’ Request. Claimants’ rely upon their IRP Complaint and the voluminous evidence presented thus far, to raise sufficient questions in this IRP to permit the interim relief that they request. ICANN cannot simply wave away the IRP Complaint or Request for Interim Measures, by having their lawyer call it frivolous. They have forced Claimants to pay some \$25,000 to ICDR to date, even though Bylaws have required ICANN to pay for a Standing Panel to adjudicate these disputes -- for more than six years now. At least, Claimants are entitled to a reasoned decision both from this Emergency Panelist, and from a three-person IRP Panel -- ideally one that is compliant with ICANN’s own Bylaws, picked from a specially trained Standing Panel.

ICANN Must Implement Bylaws Procedural Safeguards For These Claimants Now

Claimants Are Entitled to Independent Ombudsman Review

ICANN offers no excuse whatsoever as to why its Ombudsman has recused himself from every single case involving the New gTLD Program -- which is more than 90% of Reconsideration cases. At bare minimum, Claimants and the broader ICANN Community are entitled to some reasoning as to why ICANN pays the Ombudsman to do essentially nothing, and as to why Reconsideration claimants are ubiquitously denied this important check on ICANN's decisions.

But Claimants deserve more than that explanation, they deserve what the Bylaws require -- purportedly independent ombudsman review of Reconsideration matters, prior to any decision by the BAMC. This is particularly, acutely important in New gTLD cases, where the BAMC (and/or its predecessor BGC) have made all of the relevant decisions underlying the Reconsideration Requests.

ICANN's lawyer deceptively asserts that the Board has always reconsidered its own decisions. (Opp. #26.) That is true, the 22-person Board ultimately reviews all decisions -- but they have never once rejected a BAMC (or BGC) recommendation on any Reconsideration Request. It is those five people, reconsidering their own underlying decisions and recommending Board action, that is the problem. The purportedly independent Ombudsman is supposed to provide a check on that, but has inexplicably recused himself from EVERY SINGLE RELEVANT CASE since he was hired more than five years ago.

ICANN has no excuse for this, and offers no explanation as to why a substitute ombudsman could not have been appointed since their hiree could not do the job. Certainly, ICANN could hire a substitute now, and Claimants could have that

independent check in this case -- potentially saving them, ICANN and ICDR a lot of time and money going forward. Claimants have been irreparably harmed because they have been denied that independent check, required by the Bylaws.

Claimants Are Entitled to a Trained Standing Panel to Hear Their Case, and to Complete Rules of Procedure

ICANN admits that implementation of the Standing Panel (and also, presumably, the Final Rules) will take no more than six to twelve months longer than if it does not implement the Standing Panel. (*Compare*, Opp. p.2 (“until this IRP concludes, likely another year to eighteen months”), *with*, Opp. p.2 (“for perhaps two more years”), p.23 (“total delay could be two years”). Claimants aver that is a minimal, additional wait period given there is absolutely no evidence of ongoing harm to anyone, whatsoever, from delay in processing these applications submitted in 2012. Moreover, ICANN offers absolutely no excuse whatsoever for its willful failure to implement those safeguards which it so clearly required itself to implement -- at behest of its broader Community -- more than six years ago.

ICANN offers absolutely no excuse whatsoever for entirely ignoring the ICDR Emergency Panelist’s very clear admonition (more than five years ago) that ICANN had already materially violated its Bylaws by failing (at that point...) to have even begun to implement the Standing Panel. ICANN offers absolutely no evidence of any effort whatsoever to implement its Bylaws in that respect prior to March 31, 2020 (RE-10) -- more than four months after Claimants raised this issue in their IRP Complaint.

ICANN falsely claims that Claimants seek measures of relief beyond ICANN’s control. (Opp., #52 *et seq.*) They claim that implementation of the Standing Panel

“depends on work from across ICANN’s community, including the IRP-IOT, representatives of ICANN’s [SO’s and AC’s]. (*Id.*, # 54.) However, ICANN’s lawyer has explicitly admitted, on the record, that all such entities are ICANN “constituent bodies” which are bound also to the Bylaws.⁸ ICANN does, in fact, control the work of its constituent bodies. ICANN has sole control over those bodies’ staff support and budgets, and regularly imposes timelines on the work of those bodies. For example,

⁸ From the *DCA Trust* Final Declaration:

¶ 100. According to DCA Trust, ICANN itself asserts that the GAC is a “constituent body.” The exchange between the Panel and counsel for ICANN at the in-person hearing in Washington, D.C. is a living proof of that point.

HONORABLE JUDGE CAHILL:

Are you saying we should only look at what the Board does? The reason I'm asking is that your -- the Bylaws say that ICANN and its constituent bodies shall operate, to the maximum extent feasible, in an open and transparent manner. Does the constituent bodies include, I don't know, GAC or anything? What is "constituent bodies"?

MR. LEVEE:

Yeah. What I'll talk to you about tomorrow in closing when I lay out what an IRP Panel is supposed to address, the Bylaws are very clear.

Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board. They don't apply to the GAC. They don't apply to supporting organizations. They don't apply to Staff.

HONORABLE JUDGE CAHILL:

So you think that the situation is a -- we shouldn't be looking at what the constituent -- whatever the constituent bodies are, even though that's part of your Bylaws?

MR. LEVEE:

Well, when I say not -- when you say not looking, part of DCA's claims that the GAC did something wrong and that ICANN knew that.

HONORABLE JUDGE CAHILL:

So is GAC a constituent body?

MR. LEVEE:

It is a constituent body, to be clear -- . . .

¶ 101. The Panel is unanimously of the view that the GAC is a constituent body of ICANN. This is not only clear from the above exchange between the Panel and counsel for ICANN, but also from Article XI (Advisory Committees) of ICANN’s Bylaws and the Operating Principles of the GAC. Section 1 (General) of Article XI of ICANN’s Bylaws states: . . .

ICANN recently resolved to require both a Working Group and another Advisory Committee to complete their respective projects on specified timelines.^{9/10}

There is no reason ICANN could not prioritize the IRP-IOT work with more staffing and a Board-requested timeline. But they have never sought to do so, for more than six years running. They have never even asked for a timeline, much less sought to impose one. It's just not important to ICANN, especially since its bottom line benefits from the *status quo* -- claimants paying many hundreds of thousands of dollars in ICDR fees that ICANN has promised in its Bylaws to pay, for more than six years running.

Neither Claimants nor the Emergency Panelist, nor the broader ICANN Community, can have any confidence that ICANN will actually fulfill its Bylaws obligations with any diligence whatsoever, unless they are ordered to do so. They have already ignored their own Bylaws for more than six years, and an ICDR Emergency Panelist's admonition for more than five years. They say that the "process for selecting

⁹ Ex. L (ICANN Board Resolution 2018.10.25.18):

Resolved (2018.10.25.15), the Board requests that ATRT3 adopt its Terms of Reference and Work Plan within 60 days of convening its first meeting, and submit these documents to the Board and to the leadership of the Supporting Organizations and the Advisory Committees, to confirm that the team's scope and timeline are consistent with the requirements of the ICANN Bylaws and ICANN community expectations.

¹⁰ Ex. M (ICANN Board Resolution 2019.05.03.20):

Resolved (2019.05.03.20), the detailed implementation plan shall be submitted to the Board as soon as possible, but no later than six (6) months after the adoption of this resolution. The implementation plan should contain a realistic timeline for the implementation, a definition of desired outcomes, an explanation of how the implementation addresses underlying issues identified in the final report, and a way to measure current state as well as progress toward the desired outcome.

the Standing Panel changed” in 2016. (Opp., #57.) But that could not excuse their inaction up to that date, or since. They provide no evidence of any real specific effort to appoint a Standing Panel, under any process, until just two months ago.

Now, they need a clear order to implement the safeguards guaranteed by Bylaws to these Claimants and the entire ICANN Community. Only then can this dispute be resolved fairly, in accord with ICANN’s own 2013 Bylaws. Only then will Claimants have their ICANN-given right to a specially trained Standing Panel, with fully developed Rules of Procedure, including without limitation their right to *en banc* appeal of any decision of such panel.

ICANN Must Pay All IRP Admin and Panel Fees, as Required by Bylaws

On the issue of panel fees, ICANN again offers no reasoning whatsoever in response to Claimants’ argument. ICANN simply cannot justify that it has forced claimants (and these Claimants) to pay ICDR fees for more than six years, when all the while ICANN’s Bylaws have required it to have a Standing Panel and pay all those administrative and panelists’ fees. The Emergency Panelist has the ability to apportion all fees to date to ICANN, which it should do in accord with the Bylaws, so that costs are placed where ICANN’s own Bylaws require them to be placed -- with ICANN.

ICANN and Its Contractors Must Be Ordered to Preserve Documents

On the issue of document preservation, such an order is needed from the Emergency Panelist. Otherwise, there would be no way for ICDR or Claimants to have

necessary documents that could be destroyed before this matter proceeds to discovery and adjudication (either by a Standing Panel, ICDR, or a court). ICANN offers no reasoning against imposition of such an order, but instead merely claims that it might be ineffective for various reasons. (Opp., #47-48.) It also claims such documents are not relevant, which Claimants vigorously dispute, and again refer to the *Dot Registry* case where such documents were hidden by ICANN, but the panel forced their disclosure and found them highly relevant. At minimum, the Claimants and panel that decide this case, must have available to it all of the pertinent documents already produced in that highly analogous case involving many of the very same core issues.

CONCLUSION

For all of the foregoing reasons, Claimants respectfully request an order pursuant to Section 10 of the Interim Rules, specifically requiring ICANN to: A) not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP; B) preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this matter; and, C) provide to Claimants the procedural rights required by ICANN's Bylaws for more than six years; namely, 1) appoint an independent ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6; 2) appoint and train a Standing Panel as defined in the Bylaws and Interim Rules, from which any IRP Panel shall be selected per Section 3 of the Interim Rules, and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the Interim Rules; 3) adopt final Rules of Procedure as required by ICANN Bylaws; and, 4) pay all costs of the Emergency Panel and of the IRP Panelists.

RESPECTFULLY SUBMITTED,

DATED: May 19, 2020

By: 

Mike Rodenbaugh
RODENBAUGH LAW

Attorneys for Claimants