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Claimants FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS PTE. LTD., and DOMAIN VENTURE PARTNERS PCC LIMITED (“Claimants”) hereby provide their Sur-Reply Brief in Opposition to ICANN’S Motion for Summary Adjudication (“Motion”).

## **I. STANDARD OF REVIEW**

1. Claimants dispute that California or U.S. law govern any ICANN IRP proceeding. The ICANN Bylaws specifically state that decisions are to be “consistent with international arbitration norms” and that the IRP is designed specifically “as an alternative to legal action in the courts of the United States or any other jurisdiction.”<sup>1</sup> The Bylaws also repeatedly state that the IRP is intended to “[e]mpower the global internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws” and “[e]nsure that ICANN is accountable to the global internet community and Claimants.” Thus, the Bylaws specifically require that international arbitration norms apply for benefit of the global internet community.

2. There is no provision for summary adjudication in the ICANN Bylaws, IRP Supplementary Rules, or the 2014 ICDR International Arbitration Rules in effect for this proceeding. The Bylaws and Supplementary Rules both provide for Summary Dismissal – at the pleading stage – but do not provide for summary adjudication of well-pled factual issues prior to hearing. As further evidence that no such procedure was intended by ICANN or its Community when drafting the Bylaws or the Supplementary Rules, the Bylaws also state that IRP proceedings shall be completed and a final decision issued “no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.”<sup>2</sup> Indeed it would have been, and is, impossible for any claim to be pled, answered, discovered and heard in

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<sup>1</sup> ICANN Bylaws, Art. 4.3(a)(viii), (ix).

<sup>2</sup> *Id.*, Art. 4.3(s).

six months, if the proceeding could otherwise be disrupted by a summary adjudication briefing schedule and decision – which is not mentioned in or otherwise permitted by the applicable Rules of Procedure (i.e., the Supplementary Rules).

3. ICANN attempts to mislead the Panel by citing to Procedural Order No. 3 in the *Namecheap* IRP, purportedly as precedent for ICANN’s motion for summary adjudication.<sup>3</sup> In fact, that was styled a “Motion to Dismiss” and was filed early in the case at the pleading stage, expressly to *challenge the claimant’s standing*, and also to find some of claimant’s claims moot. There have since been 15 other procedural orders in that case, and none of them involved summary adjudication of any claim. Such a “Motion to Dismiss” is expressly contemplated by the Bylaws and Supplementary Rules at the pleading stage, but a motion for summary adjudication at such a late stage as in this case, on the cusp of the hearing on the merits, is not.

4. ICANN also argues that the 2014 ICDR Rules for International Arbitration provide some basis for such a procedure.<sup>4</sup> But ICANN does not address Claimant’s argument<sup>5</sup> that the ICDR had several examples of other rule sets in 2014, which included such a procedure. But ICDR adopted the applicable Rules in this case without providing any such procedure. Clearly, AAA’s omission of such a rule in the ICDR Rules was not by mistake then, nor was ICANN’s omission of such rule from its own Bylaws and Supplementary Rules. Neither ICANN nor this Panel has any authority to read such a rule into the IRP now. Neither ICANN nor any previous IRP panel has ever imposed such a process, and it cannot be forced upon Claimants’ now

5. Therefore, there is no basis in the Bylaws or Supplementary Rules for this Panel to impose a summary adjudication procedure upon Claimants, based on U.S. law or otherwise. But

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<sup>3</sup> ICANN Reply, #7, n.11.

<sup>4</sup> *Id.*, #6.

<sup>5</sup> Claimant’s Opp., #3, n.2.

even under the U.S. law now relied upon by ICANN, a motion for summary judgment has a very high standard. The moving party on summary judgment bears the burden of proof on all issues, and must “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citations omitted). Any fact that may affect the outcome of the case is material. *Id.* The court must “view all facts and draw all reasonable inferences in favor of the nonmoving party.” *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004). If a reasonable inference from any evidence may be drawn in the nonmoving party’s favor, “the moving party simply cannot obtain a summary judgment.” *Celotex*, 477 U.S. at 330 n.2. Under this standard, even if it were applicable, ICANN has not proved that any of Claimants’ actual claims are time-barred.

## II. SUPPLEMENTARY IRP RULE 4

6. ICANN bases its motion on an alleged “statute of limitations”, but of course there is no such “statute” governing IRP claims under ICANN’s Bylaws. Instead, the Bylaws refer to the Supplemental Rules, which states the following Rule 4 (emphasis supplied):

### 4. Time for Filing

... A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days **after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE**; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

7. Claimants argued in their Opposition and again here, that they did not and could not become aware of the material effects of ICANN’s challenged decisions until the CPE Review was complete in 2018 and the Claimants’ RFRs were decided in 2019. It was only then could Claimants know that ICANN would not re-evaluate the .Hotel CPE in light of the Claimants’ RFRs, the *Dot Registry* revelations, the revelations of HTLD’s theft of Claimants’ trade secrets, and the Afilias acquisition of HTLD.

8. ICANN admits that at least some of Claimants' claims arising from the RFRs and all of their claims arising from the CPE Review are not time-barred. Yet ICANN tries to rewrite just certain parts of Claimants' claims so that somehow those parts might be time-barred. All this is doing is confusing the issues, and likely is confusing the Panel. Even under ICANN's proposed U.S. summary judgment standard, the Panel must resolve all genuine issues of fact in favor of Claimants. Claimants have proved that there are genuine issues of fact as to when Claimants became aware of the adverse material effects of the decisions that Claimants now challenge.

### **III. CLAIMANTS' CLAIM THAT AFILIAS' COMMUNITY APPLICATION SHOULD BE SUBJECT TO CPE IS NOT TIME-BARRED**

9. Fundamentally, the actual text of Claimants' claims cannot be disputed. One of Claimants' IRP requests was stated as follows:<sup>6</sup>

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

ICANN again misstates that actual IRP claim, this time as follows (emphasis supplied):<sup>7</sup>

The acquisition of HTLD by Afilias (including any claim that ICANN should have performed another CPE **in August 2016** after Afilias acquired HTLD), as discussed in Section V.2.D of Claimants' IRP Request;

10. ICANN argues that Claimants' should immediately have been aware, upon approval of the Afilias acquisition by ICANN, that ICANN would not require Afilias to undergo a CPE. However, ICANN made no such pronouncement then. At that time, the CPE Review was underway and ICANN was re-evaluating CPE results. And indeed, Claimants filed their first RFR 16-11 in August 2016, arguing therein that the .Hotel CPE should be re-evaluated in light of the *Dot Registry* revelations and in light of HTLD's theft of trade secrets.<sup>8</sup> It was not until after

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<sup>6</sup> Annex 2, Claimants' Request for Independent Review, p.2.

<sup>7</sup> ICANN Reply, #3(i).

<sup>8</sup> Annex 3, p.20 (Request for Reconsideration 16-11).

the CPE Reports were acted upon by the ICANN Board in March 2018, that Claimants' became aware that ICANN would not re-evaluate the .Hotel CPE in light of that Review. Claimants then timely filed RFR 18-6 challenging that inaction.

11. It was not until Claimants' RFR 18-6 was denied in July 2018, that Claimants were aware that ICANN would not reconsider that decision. Claimants then timely filed a request for CEP in 2018, tolling the time to file an IRP to challenge that decision. Claimants' RFR 16-11 was then denied in January 2019, when Claimants' became aware that ICANN would not re-evaluate the .Hotel CPE in light of the *Dot Registry* and HTLD trade secret theft investigations.

12. Thus, Claimants' could not have known the adverse material effect of ICANN's approval of the Afilias acquisition in August 2016, until the Board's denial of Claimant's RFR 18-6 in 2018 and the Board's denial of Claimants RFR 16-11 in January 2019. In those RFRs, Claimants repeatedly and timely argued that the .Hotel CPE should be re-evaluated in light of material subsequent events -- such that Afilias should have to be evaluated as the Community Applicant at that time, not HTLD which since its CPE had stolen Claimants' trade secrets and had sold itself to Afilias. Only when those RFRs were denied did Claimants know that ICANN would not conduct a re-evaluation to determine if Afilias' Community Application satisfies the public interest. Claimants had filed a timely CEP in October 2018 to challenge those RFR decisions, tolling the time to file their timely IRP Request in 2019.

13. Claimants do not challenge the Afilias acquisition itself, at all. Claimants only challenge that ICANN has not required Afilias to be evaluated as the Community Applicant for .Hotel, in light of the CPE Review, the *Dot Registry* revelations, the HTLD trade secret theft, and Claimants' RFRs. At minimum, it is a triable issue of fact as to when Claimants' "became aware of the material effects" of ICANN's approval of the Afilias acquisition, as those material effects

involved the potential re-evaluation of the .Hotel CPE which was subject to ICANN’s CPE Review and was central to both of Claimants’ RFRs. And Claimants could not know that re-evaluation would be denied until those RFRs were denied. Therefore, ICANN falls far short of proving beyond any issue of fact that any of Claimants’ claims relating to Afiliias and the CPE are time-barred.

**IV. CLAIMANTS’ CLAIMS THAT ICANN HAD UNDUE INFLUENCE OVER EIU AND FTI, MISLED THE *DESPEGAR* PANEL, AND MUST PRODUCE CRITICAL EVIDENCE NOW, ARE NOT TIME-BARRED**

14. ICANN next makes a second attempt to rewrite Claimants’ claims relating in any way to the *Despegar* or *Dot Registry* IRP cases. Claimants’ relevant IRP Request states:

- A. *Claimants seek review whether ICANN had undue influence over the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review.*
1. *ICANN’s and EIU’s Communications Are Critical, But Have Been Kept Secret*
  2. *DotRegistry IRP and FTI’s report reveals a lack of independence of EIU*
  3. *ICANN Materially Misled Claimants and the Despegar IRP Panel*

Yet, ICANN asks for summary judgment as to “any claims or challenges related to”:

- (ii) The decision in the *Despegar* IRP, including both direct and indirect challenges to that Final Declaration and the evidentiary record on which it was based, as well as challenges to the underlying CPE performed by the Economist Intelligence Unit (or “CPE Provider”) on HTLD’s application, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request;
- (iii) The *Dot Registry* Final Declaration, and any alleged relation to the *Despegar* IRP, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request;

15. So, ICANN now asserts that *eight entire pages* of Claimants’ IRP Request (p.16-24; fully one-third of the document text) discusses topics that are time-barred. However, to be clear, again, Claimants are not challenging “the decision in the *Despegar* IRP” nor any issues that were raised therein – other than ICANN’s deception about evidence pertinent thereto, and still



pertinent hereto. That deception did not become apparent until later, after the *Dot Registry* and CPE Process Report revelations.

16. Claimants do not seek redoing of the “CPE of HTLD’s .HOTEL application” as ICANN asserts.<sup>9</sup> Indeed, that would be impossible since HTLD is no longer the Community Applicant. Instead, Claimants have been clear and consistent that they seek re-evaluation of the Afilias .Hotel Community Application, in light of 1) that acquisition, 2) revelations of HTLD’s trade secret theft, 3) revelations in the *Dot Registry* case, and 4) revelations in the CPE Process Reports. Those issues were timely raised in Claimants’ RFRs, each denied by ICANN, which decisions Claimants have timely challenged in this IRP.

17. Claimants’ IRP Request speaks for itself. Each of the three subsections that ICANN cites as time-barred are sub-arguments in support of Claimants’ first IRP claim that “*ICANN had undue influence over the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review.*” Claimants could not have known about that undue influence until after the *Dot Registry* revelations, and after the CPE Process Review. Prior to those publications, and the disclosure of evidence therein, ICANN had consistently lied to both the *Despegar* and *Dot Registry* claimants and IRP panels about the existence of critical documents that prove that undue influence. That undue influence was not squarely at issue in the *Despegar* IRP, as it was unknown.

18. As Claimants have specifically alleged in their IRP Request,<sup>10</sup> ICANN materially misled Claimants, the community, and both the *Despegar* and *Dot Registry* panels, specifically as to the existence of critical documents proving ICANN’s undue influence over purportedly “independent” CPE decisions of the EIU. In their IRP Request, Claimants cite to and quote

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<sup>9</sup> ICANN Reply, #18.

<sup>10</sup> Annex 2, p. 18-21.

specific sections of the *Despegar* decision, showing clearly that ICANN had lied to Claimants and the *Despegar* panel about the very existence of such documents.<sup>11</sup> Claimants simply could not have known about that evidence until after those publications.

19. Claimants again timely requested that evidence via RFR 16-11 in light of the *Dot Registry* revelations, and via RFR 18-6 in light of the CPE Review Reports. But ICANN refused to provide it and still refuses to provide it. It was not until ICANN finally denied the RFRs that Claimants became aware that ICANN would not provide the evidence -- unless and until an IRP panel (again) orders them to produce it. ICANN's denial of this evidence violates the transparency and accountability provisions of its Bylaws, as alleged. ICANN's documented lies to previous IRP Panels also violate ICANN's Bylaws in myriad ways.

20. In this IRP, Claimants timely challenge ICANN's denial of both RFRs, including ICANN's refusal to produce that evidence requested therein. RFR 18-6 was not decided until July 2018. Claimants timely requested CEP in October 2018, tolling the time for Claimants to file an IRP to challenge the denial of the RFR. That CEP was pending when RFR 16-11 was also denied in January 2019, tolling the time for Claimants to challenge the denial of that RFR too, as the CEP discussions between ICANN and Claimants were intertwined as to those RFRs. The claims that ICANN inappropriately denied the RFRs, and continues to refuse to provide material evidence in this IRP, are not time-barred.

21. ICANN certainly has failed to prove that there are no genuine issues of material fact that should result in final judgment on any of Claimant's IRP Requests. Claimants are entitled to prove that ICANN had undue influence over the EIU and the FTI with respect to their CPE

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<sup>11</sup> *Id.*, p. 18-19, n.39 (citing and quoting *Despegar* #95 ("Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE.")).

evaluations, that undue influence violated ICANN’s Bylaws and Articles. Further, Claimants are entitled to show that undue influence is proved by evidence that ICANN lied about repeatedly, including without limitation to two different IRP panels, further violating ICANN’s Bylaws and Articles.

**V. THE CLAIMS FOR OMBUDSMAN REVIEW ARE NOT TIME-BARRED**

22. In their IRP Request and more fully in their Request for Interim Measures of Protection, Claimants have sought an order requiring ICANN to “immediately appoint an ombudsman to review the BAMC’s decisions in RFRs 16-11 and 18-6, as required by the Bylaws.”<sup>12</sup>

23. By unilaterally suspending its consideration of RFR 16-11 for two years, then deciding it together with RFR 18-6 – when the Bylaws required independent Ombudsman review – ICANN bound itself to provide that review for both RFRs. Indeed, the RFRs were heavily intertwined, with the latter repeatedly referencing the former, and with many overlapping issues including their respective requests for critical evidence tending to prove ICANN’s undue influence over EIU and FTI.

24. ICANN had, and has, no reason for refusing to provide a critical independent check on the BAMC’s reconsideration – a check that is all the more critical in context of the New gTLD Program because the BAMC was separately tasked with making ALL DECISIONS relating to that Program in the first instance. ICANN created a sham reconsideration process for new gTLD applicants, in two glaring ways. First, by appointing a small subcommittee of the Board (5 of 22 members) to make all decisions arising from the Program, which subcommittee was already tasked with handling all Reconsideration Requests. And second, by appointing an Ombudsman

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<sup>12</sup> E.g., Annex 2, IRP Request, p.12.

who was required to be “independent” and review all Reconsideration Requests, but who in fact recused himself from every single case relating to the Program.

25. Regardless whether Ombudsman review is provided now, as Claimants have requested, Claimants still argue that ICANN’s creation of the sham process, and the Ombudsman’s recusal from every single case, is a violation of ICANN’ Bylaws and Articles. Those claims are not time-barred, as they could not reasonably have arisen until after ICANN finally denied Claimants’ RFRs. Until then, Claimants could not have known if the BAMC might have engaged another ICANN staff member, or another independent expert to review the RFRs, as the Bylaws provide for ICANN to do.<sup>13</sup> Until then, Claimants could not have known what process the BAMC would follow, or what evidence and argument they would rely on, until their decision was made public because the RFR process was entirely opaque to Requestors (now Claimants).

26. ICANN cannot alter its Bylaws to eliminate Ombudsman review, merely by omitting that step from a later contrived “Roadmap.” Moreover, Claimants should not have had an obligation to file a separate and independent IRP – at significant legal expense and incurring hefty ICDR filing fees – merely to demand Ombudsman review, while its two RFRs remained pending. And while ICANN could have and should have appointed another independent expert to review the matter after the Ombudsman recused himself. ICANN several times has hired independent experts to review various reconsideration matters arising from the New gTLD Program, including in the .Amazon gTLD matters.<sup>14</sup> At minimum, it is ICANN’s obligation to explain why its appointed Ombudsman recused himself from 100% of the cases arising out of the New

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<sup>13</sup> Bylaws, Art. 4.2(m), 4.2(o).

<sup>14</sup> *E.g.*, ICANN commissioned the report of expert Jerome Passa to review issues relating to the .Amazon gTLD dispute. Report at <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>.

gTLD Program – thereby uniformly denying an important and potentially dispositive procedural step guaranteed by the ICANN Bylaws.

27. Again, ICANN fails to prove there are no genuine issues of material fact as to this claim for review. Claimants are entitled to prove that ICANN decided to consider the Claimants’ RFRs together, after the Bylaws required independent Ombudsman review of RFRs. Further, Claimants are entitled to prove that it would have been unreasonable to file an IRP seeking Ombudsman review, while the RFRs remained pending. Finally, Claimants are entitled to prove that ICANN’s complete systemic denial of Ombudsman review to all New gTLD Applicants, and provision of a sham reconsideration process to all New gTLD Applicants, violate ICANN’s Bylaws and Articles.

## **VI. CONCLUSION**

28. The Panel should deny ICANN’s motion because it is unprecedented and not allowed in the applicable ICANN Bylaws, ICDR Rules or IRP Supplementary Rules. Even if the Panel finds some such authority for such a motion, it should be denied under the U.S. law because genuine issues of material fact abound as to all of the purported, concocted claims that ICANN asserts should be dismissed.

29. Discovery remains ongoing, and the Final Hearing is now imminent. Even if the Panel had the authority to summarily dismiss claims long after the pleading stage in an IRP, the Panel has no reason to do so here and now. Instead, the Panel should allow Claimants’ claims to proceed to the Final Hearing, after which the Panel can make any and all appropriate rulings on ICANN’s defenses -- in light of a fully developed factual record.

Respectfully submitted, August 19, 2022.

*/Mike Rodenbaugh/*

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Mike Rodenbaugh

RODENBAUGH LAW

Counsel for Claimants