

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Registry, LLC, Radix Domain Solutions Pte. Ltd.,) ICDR CASE NO. 01-19-0004-0808
and Domain Venture Partners PCC Limited)
)
)
Claimants,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S RESPONSE TO CLAIMANTS' AMENDED REQUEST FOR INDEPENDENT
REVIEW PROCESS**

Jeffrey A. LeVee
Kelly M. Watne
Christine E. Cheung
JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071
Tel: +1.213.489.3939

Counsel to Respondent
The Internet Corporation for
Assigned Names and Numbers

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Amended Request for Independent Review Process (“IRP”), dated 5 May 2023, submitted by Claimants.

1. When this IRP began, Claimants alleged four essential claims: (i) challenging ICANN’s decision to accept the IRP Panel’s decision in the *Despegar* IRP in light of the decision of the IRP Panel in the *Dot Registry* IRP; (ii) challenging ICANN’s decision to accept the results of the CPE Process Review; (iii) challenging ICANN’s decision not to disqualify a competing applicant’s application for .HOTEL after learning that an individual associated with that application viewed confidential information on ICANN’s new applicant portal (the “Portal Configuration” issue); and (iv) procedural challenges based on decisions made by ICANN’s Ombudsman and the lack of a Standing Panel for all IRPs.

2. On 4 April 2023, this Panel issued its Statement of Decision on ICANN’s Motion for Summary Adjudication, in which the Panel made clear that Claimants cannot challenge the conclusions reached by the *Despegar* IRP Panel: “The Panel wishes to emphasize the validity and ongoing applicability of the *Despegar* Declaration on the merits” and further concluded that, “while the Claimants may not pursue any claim that intrinsically or inherently could require a finding overturning the *Despegar* Declaration, they may pursue the claims . . . which do not seek or lead to such an unwarranted result.”¹

3. Accordingly, and in light of the Panel’s decision and clarification, the Panel requested that Claimants set forth with some specificity in an Amended IRP Request the nature of their remaining claims and the relief they are seeking. Instead, Claimants merely removed the claims related to the Ombudsman but left in all of their vaguely-worded claims that leave little doubt that Claimants continue to seek to overturn the *Despegar* IRP Panel’s Final Declaration

and upend the Community Priority Evaluation (“CPE”) of the competing applicant’s .HOTEL application.

4. Indeed, the entire thrust of Claimants’ Amended IRP Request continues to be that the CPE Provider should not have given community priority status to the competing applicant’s application for .HOTEL, in particular alleging that ICANN had some form of “improper” communications with the CPE Provider. ICANN has now produced thousands of documents in this IRP, and there is no evidence whatsoever that ICANN communicated improperly with the CPE Provider in any respect, much less with respect to the competing applicant’s .HOTEL application. Moreover, Claimants do not, and cannot, propose any form of feasible relief that this Panel could recommend because a competing application was granted community priority, the ICANN Board accepted that determination, the *Despegar* IRP Panel likewise agreed with that determination, and this Panel has made clear that it will not upset that determination.

5. In short, Claimants have not complied with the Panel’s request to clarify what this Panel should be doing vis-à-vis Claimants’ applications for .HOTEL. So long as the competing application (submitted by Hotel Top-Level Domain S.a.r.l (“HTLD”)) continues to have community priority, there is no means by which .HOTEL will be awarded to Claimants. For this reason, the portion of Claimants’ Amended IRP Request that relates to the community priority awarded to HTLD’s application should be dismissed.

6. Claimants likewise have not demonstrated that ICANN violated its Articles of Incorporation (“Articles”) or Bylaws in accepting the results of the CPE Process Review performed by FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and Technology Practice. Instead, Claimants postulate about what additional investigation the ICANN Board should have done without actually providing any support (legal, factual, or otherwise) for their argument. The evidence clearly demonstrates that FTI conducted a thorough

and comprehensive investigation and that the ICANN Board's decision to accept the results of that investigation was sound.

7. As to Claimants' claims related to the Portal Configuration issue, Claimants disagree with the ICANN Board's decision not to disqualify HTLD's application. But Claimants do not articulate which of ICANN's Articles or Bylaws were violated by the Board's decision. The Board's decision was well-reasoned and followed extensive investigation and analysis; disagreeing with the ICANN Board does not provide grounds for an IRP.

8. Finally, Claimants do not offer any support for their claim that ICANN has violated its Articles and Bylaws simply because the process for convening a Standing Panel has taken longer than Claimants would like. And Claimants continue to ignore the fact that the process and the timeline is driven by the Internet community, not by ICANN. Furthermore, as Claimants are no doubt aware, a Standing Panel may very well be empaneled before this Panel issues its final decision in this IRP.

9. Claimants' claims are not supported and are not supportable, and the Amended IRP Request should be denied.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

10. ICANN is a California non-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as "icann.org" into numeric Internet Protocol ("IP") addresses understood by computers. ICANN's core Mission is to ensure the stability, security, and interoperability of the DNS.² To that end, ICANN contracts with entities that operate generic top-level domains ("gTLDs"), which represent the portion of an Internet domain name to the

right of the final dot, such as “.COM” or “.ORG.”

11. To help ensure that ICANN is serving, and remains accountable to, the global Internet community, ICANN has established Accountability Mechanisms that allow aggrieved parties to challenge or seek review of ICANN actions and decisions that the parties believe violate ICANN’s Articles, Bylaws, the Applicant Guidebook (“Guidebook”), and certain internal policies and procedures.³

12. ICANN’s Bylaws provide for a process by which “any person or entity materially affected by an action or inaction” of ICANN may request review or reconsideration of that action or inaction (“Reconsideration Request”).⁴ A committee of the ICANN Board reviews and considers the requests, and recommends to the Board whether it should accept or deny a Reconsideration Request.⁵

13. Similarly, the Bylaws provide for an Office of the Ombudsman (“Ombudsman”).⁶ The Ombudsman’s main function is “to provide an independent internal evaluation of complaints” alleging that ICANN or an ICANN constituent body has acted unfairly.⁷

14. In addition, the Bylaws create the IRP, under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an “independent third-party” for review.⁸ IRPs are conducted in accordance with the International Centre for Dispute Resolution’s (“ICDR”) International Arbitration Rules, as modified by ICANN’s Bylaws and IRP Interim Supplementary Procedures (“Interim Procedures”).⁹

II. ICANN’S NEW gTLD PROGRAM AND THE .HOTEL CONTENTION SET.

15. ICANN launched the New gTLD Program (“Program”) in 2012 through which any interested party could apply to operate new gTLDs that were not already in use in the DNS. ICANN designed the Program to enhance diversity, creativity, and choice, and to provide the benefits of innovation to consumers via the availability of new gTLDs. There was no cap on the

number of new gTLD applicants, and ICANN received 1,930 applications to operate new gTLDs. Since then, ICANN has delegated over 1,200 new gTLDs into the root zone.¹⁰ The Program has produced ICANN's most ambitious expansion of the Internet's naming system.

16. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. Numerous revisions to the Guidebook were made based on public comments, and multiple versions were drafted. ICANN adopted the operative, 338-page Guidebook in June 2012.¹¹

17. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the applications are placed in a "contention set."¹² The Guidebook then encourages (but does not require) the applicants to agree among themselves on a private resolution of the contention set.¹³ If the applicants cannot resolve the contention set privately, string contentions may be resolved through an ICANN auction of last resort; or, if one of the applications is community-based and prevails in Community Priority Evaluation ("CPE"), then that application would prevail over the rest of the contention set.¹⁴

18. New gTLD applicants may designate their applications as either standard or community-based, *i.e.*, "operated for the benefit of a clearly delineated community."¹⁵ Applicants that designate their applications as community-based are expected to, among other things, "demonstrate an ongoing relationship with a clearly delineated community" and "have applied for a gTLD strongly and specifically related to the community named in the application."¹⁶ An applicant with a community-based application may elect to proceed with CPE. If the applicant proceeds with CPE, its application is forwarded to an independent, third-party provider ("CPE Provider") for review.¹⁷

19. A panel from the CPE Provider ("CPE Panel") evaluates the application against the four criteria set forth in the Guidebook: Community Establishment; Nexus between Proposed

String and Community; Registration Policies; and Community Endorsement.¹⁸ If the CPE Panel awards the application at least 14 out of 16 possible points, the application will prevail in CPE.¹⁹ If the application prevails in CPE – as it did with respect to HTLD’s .HOTEL application – the application is given priority over all other applications for the same gTLD that did not seek and/or prevail in CPE.²⁰

20. ICANN received seven applications for .HOTEL: six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD (“HTLD’s Application”).²¹ The seven applications for .HOTEL were placed into a contention set pursuant to the procedures set forth in the Guidebook.²²

21. On 11 June 2014, HTLD’s Application prevailed in CPE.²³ As a result, pursuant to the Guidebook, HTLD’s Application prevailed over the six other applications for .HOTEL.

III. THE *DESPEGAR* IRP

22. Following the CPE of HTLD’s Application, certain of the .HOTEL applicants (“*Despegar* Claimants”) challenged the HTLD CPE result, and ICANN’s response to Claimants’ Documentary Information Disclosure Policy (“DIDP”) Request, through the Reconsideration process (Requests 14-34²⁴ and 14-39²⁵) and then through an IRP proceeding (“*Despegar* IRP”).²⁶ Notably, the *Despegar* Claimants did not request any documents from ICANN during the *Despegar* IRP, although they had the opportunity to do so.

23. While the *Despegar* IRP was pending, the *Despegar* Claimants also asserted in the IRP that the HTLD Application should be rejected because an individual who was once associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal (“Portal Configuration”) to access confidential data associated with certain *Despegar* Claimants’ .HOTEL applications.²⁷

24. In February 2016, the *Despegar* IRP Panel ruled in favor of ICANN, finding that,

with regard to the CPE of HTLD's .HOTEL application, "the [ICANN Board Governance Committee] acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws, and that the Claimants' complaints have not been made out."²⁸ The IRP Panel declined to consider the *Despegar* Claimants' Portal Configuration argument because it was raised long after the IRP process had commenced and the ICANN Board was still investigating the situation.²⁹

25. The Board accepted the *Despegar* IRP Panel's findings and directed ICANN to: (1) continue processing HTLD's Application; and (2) finish investigating the issues alleged by the *Despegar* Claimants regarding the Portal Configuration ("*Despegar* Resolutions").³⁰

IV. THE PORTAL CONFIGURATION.

26. In late February 2015, ICANN discovered that the privacy settings for the new gTLD applicant portal had been misconfigured, which enabled authorized users of that portal to see certain information of other users without permission.³¹ Pursuant to the Board's directive, as described in detail in the Board Accountability Mechanisms Committee's ("BAMC") Recommendation on Request 16-11, ICANN conducted a thorough forensic investigation of the Portal Configuration and the *Despegar* Claimants' related allegations ("Portal Configuration Investigation").³² The Portal Configuration Investigation confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, and his associates, Oliver Süme and Katrin Ohlmer.³³

27. As part of the Portal Configuration Investigation, ICANN informed the parties whose data was viewed, including certain of the Claimants in this IRP.³⁴ ICANN also contacted Mr. Krischenowski and his associates for an explanation. Mr. Krischenowski acknowledged accessing the confidential information of other users but denied acting improperly or unlawfully.

He claimed that he used the search tool in good faith and did not realize his ability to access other applicants' information involved a misconfiguration of the portal. Mr. Krischenowski and his associates certified to ICANN that they would delete or destroy all information obtained, and they affirmed that they had not used and would not use the information obtained, or convey it to any third party.³⁵

28. Mr. Krischenowski was not an authorized contact, shareholder, director, or officer directly linked to HTLD's Application between March and October 2014; however, his company was a 50% shareholder and managing director of HTLD GMBH at the time, and HTLD GMBH was a 48.8% shareholder of HTLD. During the Portal Configuration Investigation, Richard Grabensee (the Sole Managing Director of HTLD) informed ICANN that Mr. Krischenowski was "not an employee" of HTLD, although he had acted as a consultant for HTLD's Application when it was submitted in 2012. Mr. Grabensee further verified that HTLD "only learned about [Mr. Krischenowski's access to confidential data] on 30 April 2015 in the context of ICANN's investigation." Mr. Grabensee stated that the consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015.³⁶

29. ICANN did not uncover any evidence that the information Mr. Krischenowski obtained through the Portal Configuration: (i) was used to support HTLD's Application; or (ii) enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski's first instance of unauthorized access to any confidential information was in early March 2014; his searches relating to other .HOTEL applicants occurred on 27 March, 29 March, and 11 April 2014.³⁷

30. At HTLD's request, Mr. Krischenowski stepped down as a managing director of HTLD GMBH effective 18 March 2016 and transferred his company's 50% shares in HTLD

GMBH to a company wholly owned by Ms. Ohlmer.³⁸ Further, HTLD announced on 23 March 2016 that HTLD GMBH would transfer its shares in HTLD to Afiliias, “the majority shareholder of [HTLD].”³⁹ This severed HTLD’s corporate relationship with HTLD GMBH.⁴⁰

31. In March 2016, counsel for the *Despegar* Claimants asked ICANN to cancel HTLD’s Application because Mr. Krischenowski accessed the *Despegar* Claimants’ confidential information without authorization.⁴¹ On 9 August 2016, after the Portal Configuration Investigation concluded, the Board determined that, even assuming that Mr. Krischenowski obtained confidential information belonging to certain .HOTEL applicants, it would not have had any impact on the CPE of HTLD’s Application.⁴² The CPE Provider’s determination that HTLD’s Application met the CPE criteria was based on the application materials submitted in May 2012, and HTLD uploaded the last documents amending its application on 30 August 2013⁴³ – all of which occurred more than five months before Mr. Krischenowski or his associates accessed any confidential information. HTLD did not amend its application during CPE or submit any documents during CPE that the CPE Panel could have considered.⁴⁴ The Board also concluded that there was no evidence that the CPE Panel interacted with Mr. Krischenowski or HTLD during CPE.⁴⁵ As a result, the Board declined to cancel, and directed ICANN to continue processing, HTLD’s Application (“Portal Resolutions”).⁴⁶

V. THE CPE PROCESS REVIEW

32. While Request 16-11 was pending, and in response to concerns raised by Claimants and others about how ICANN interacted with the CPE Provider, the Board directed ICANN to review the CPE process to determine whether those concerns had merit (“Scope 1” of the “CPE Process Review”).⁴⁷ The Board Governance Committee (“BGC”) determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.⁴⁸ FTI was retained to conduct

the CPE Process Review.⁴⁹

33. During its review process, FTI requested a variety of documentary information from ICANN and from the CPE Provider. ICANN produced a significant amount of documents to FTI in response to their requests. ICANN also asked the CPE Provider to provide documents to FTI; the CPE Provider agreed to produce some but not all of the information requested.⁵⁰ FTI also interviewed personnel from ICANN and from the CPE Provider.⁵¹

34. On 13 December 2017, ICANN published three reports on the CPE Process Review (“CPE Process Review Reports”) provided by FTI after it conducted its review.⁵² Relevant here, FTI concluded that “there is no evidence that ICANN . . . had any undue influence on the CPE Provider . . . or engaged in any impropriety in the CPE process,”⁵³ and that ICANN “had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN[’s] . . . comments.”⁵⁴

35. On 15 March 2018, the Board acknowledged and accepted the findings in the CPE Process Review Reports, declared that the CPE Process Review was complete, and directed the BAMC to consider the remaining Reconsideration Requests that were placed on hold pending completion of the CPE Process Review (“CPE Review Resolutions”).⁵⁵

VI. CLAIMANTS’ RECONSIDERATION REQUESTS

36. On 25 August 2016, Claimants⁵⁶ submitted Reconsideration Request 16-11, seeking reconsideration of the Portal Resolutions and criticizing the *Despegar* Resolutions.⁵⁷ On 27 January 2019, consistent with the BAMC’s recommendation, the Board denied Request 16-11.⁵⁸ The Board concluded that Claimants had not identified any false or misleading information that the Board relied upon, or material information that the Board failed to consider, in adopting the Portal Resolutions.⁵⁹ In particular, the Board concluded that there was no evidence that the

Board failed to consider the purported “unfair advantage” that Claimants alleged HTLD had obtained as a result of the Portal Configuration, and there was no evidence that the Board discriminated against Claimants.⁶⁰ After citing the evidence set forth in the Portal Resolutions (see above), the Board agreed with the BAMC that ICANN had: (1) verified Mr. Krischenowski’s affirmations “that he and his associates did not and would not share the confidential information that they accessed” with HTLD; and (2) “confirmed with HTLD that it did not receive any confidential information” from Mr. Krischenowski or his associates.⁶¹ Based on its review of the materials, including the timing of Mr. Krischenowski’s access to the information, the Board concluded that Mr. Krischenowski’s unauthorized access did not affect HTLD’s Application or the HTLD CPE result.⁶²

37. The Board also concluded that: (1) if Claimants were challenging the *Despegar* Resolutions, those challenges were time-barred because they were submitted “over five months after the Board’s acceptance of the *Despegar* IRP Panel’s Declaration, and well past the 15-day time limit to seek reconsideration of Board action”⁶³; and (2) Claimants’ assertions that other IRP Panel Declarations stated that the *Despegar* IRP Declaration revealed a misunderstanding of the relationship between ICANN and the CPE Provider, did not support reconsideration because each IRP involved “distinct considerations specific to the circumstances” in the respective IRP.⁶⁴

38. On 14 April 2018, several .HOTEL applicants submitted Request 18-6 challenging the CPE Review Resolutions.⁶⁵ The Board denied Reconsideration Request 18-6, concluding that the Board considered all material information and the CPE Review Resolutions are consistent with ICANN’s Mission, Commitments, Core Values, and policies.⁶⁶

STANDARD OF REVIEW

39. An IRP Panel is asked to evaluate whether an ICANN action or inaction is consistent with ICANN’s Articles, Bylaws, and internal policies and procedures.⁶⁷ But with

respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.⁶⁸ Rather, the core task of an IRP Panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁶⁹

ARGUMENT

40. Claimants' arguments suffer from a systemic problem: although the purpose of an IRP is to identify actions of the Board that are inconsistent with ICANN's Articles and Bylaws (or the Guidebook), Claimants do not actually identify what was wrong with the BAMC's Recommendations or the Board's actions on Requests 16-11 and 18-6. Instead, Claimants literally ignore the only relevant question here: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? The answer is no, which is why Claimants instead attempt to re-litigate claims already decided by another IRP Panel and cast unfounded aspersions on ICANN.

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

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

A. Claimants' Challenge to the *Despegar* Resolutions Lacks Merit.

42. Claimants' challenge to the Board's conclusion that the *Despegar* Resolutions are consistent with ICANN's Articles, Bylaws, and policies and procedures lacks merit. As a preliminary matter, Claimants have not identified any issue with the Board's action (or the BAMC's Recommendation) on Request 16-11, and instead focus entirely on the underlying

Despegar Resolutions. For this reason alone, review of this claim should be denied.

43. Claimants assert that, in the *Despegar* IRP, “ICANN ‘informed’ Claimants and the IRP Panel that . . . ‘ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE’”; but, according to Claimants, the 2 August 2016 IRP Panel declaration in *Dot Registry, LLC v. ICANN* (the “*Dot Registry* IRP Declaration”) “has clearly shown this turned out to be false.”⁷⁰ Claimants misconstrue ICANN’s statement and blatantly misrepresent the *Dot Registry* IRP Declaration and supporting documents.

44. The *Despegar* IRP Panel concluded that ICANN’s statement that it had no communications with evaluators identifying CPE scores was “a clear and comprehensive statement that such documentation does not exist.”⁷¹ At the same time, the *Despegar* IRP Panel recognized “that ICANN [could have] communications with persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.”⁷²

45. Further, the *Dot Registry* IRP Declaration did not conclude that ICANN staff communicated with the CPE evaluators, as Claimants misrepresent. The *Dot Registry* IRP Declaration states in relevant part that “ICANN staff was intimately involved” in the CPE process, supplying “continuing and important input on the CPE reports.”⁷³ But *Dot Registry*’s Exhibit C-050 demonstrates that ICANN’s communications specifically were not with the CPE evaluators.⁷⁴ In that exhibit, ICANN’s Russ Weinstein asked his contact at the CPE Provider to “help us understand the pairings of [the] evaluators on each app[lication].”⁷⁵ ICANN did not even know who the evaluators were, much less communicate with them. This is consistent with ICANN’s statement, cited in the *Despegar* IRP Declaration, that it may have communicated with “persons from [the CPE Provider] who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE.”⁷⁶ And, in fact, in this IRP, ICANN has produced thousands of

documents, yet not one reflects a communication between ICANN and the CPE evaluators identifying or discussing the CPE scores.

46. Claimants argue that the documents they sought in the *Despegar* IRP were the same documents ultimately produced in the *Dot Registry* IRP, and complain that ICANN should have produced those documents to the *Despegar* Claimants.⁷⁷ But Claimants' foundational premise is false because Claimants never sought any documents in the *Despegar* IRP (a point that has been reiterated numerous times in both the Reconsideration process and this IRP proceeding). With regard to Reconsideration Request 16-11, the BAMC identified this key difference between the *Dot Registry* and *Despegar* IRPs: the *Dot Registry* IRP Panel ordered ICANN to produce certain documents; whereas the *Despegar* Claimants never requested any documents in the IRP and the *Despegar* IRP Panel never ordered production of any documents.⁷⁸

47. Inexplicably, Claimants refuse to even acknowledge the fact that they never sought documents in the *Despegar* IRP. Their failure to obtain documents in the *Despegar* IRP is their own. However, as has been demonstrated through the thousands of documents produced in this IRP, there is no evidence to support Claimants' accusation that ICANN communicated with or had some form of undue influence on the CPE evaluators. As a result, even had Claimants requested documents in the *Despegar* IRP, Claimants would still have failed to prove their contention that ICANN exercised some form of undue influence over the CPE results.

48. Claimants' constant retort that ICANN is "still refusing" to produce relevant documents in this IRP is simply false. ICANN has produced thousands of documents in this IRP, and there are no other material documents to produce related to the CPE of HTLD's .HOTEL application.

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

49. Claimants make the nonlinear and nonsensical argument that certain statements

made by the *Dot Registry* IRP Panel somehow support Claimants' claim that ICANN should have publicly disclosed "documented conversations with [the CPE Provider]" in response to Claimants' request under ICANN's Documentary Information Disclosure Policy ("DIDP") in 2014 and/or should have produced such documents in the *Despegar* IRP in 2015 even though no documents were requested in that IRP.

50. At the outset, it is important to understand the significant difference between the DIDP process and the IRP discovery process. The DIDP is a mechanism, developed through community consultation, to ensure that information contained in documents concerning ICANN organization's operational activities, and within ICANN org's possession, custody or control, is made available *to the public* unless there is a compelling reason for confidentiality.⁷⁹ The DIDP is not a litigation tool and is not a means by which to obtain early discovery; rather, it is a way in which to request that certain documents be publicly posted on ICANN's website. Indeed, there are several conditions for nondisclosure listed in the policy, one of which is confidentiality of the material.⁸⁰ Thus, it is nonsensical for Claimants to argue that ICANN should have publicly posted confidential materials in response to Claimants' DIDP Request. Such an action would be antithetical to the entire purpose of the DIDP. And nothing that the *Dot Registry* IRP Panel said about documents in an IRP (which is an entirely different process with different parameters, including protective orders to protect confidentiality) has any bearing whatsoever on whether ICANN should have publicly disclosed documents in response to Claimants' DIDP Request in September 2014.

51. With regard to lack of document production the *Despegar* IRP, that is on Claimants. Claimants did not request any documents in the *Despegar* IRP. So, again, nothing that the *Dot Registry* IRP Panel may have said about communications with the CPE Provider has any bearing whatsoever on the fact that ICANN did not produce documents in the *Despegar* IRP

because no documents were requested.

52. Moreover, this has been repeatedly explained to Claimants. Indeed, the Board specifically addressed this argument when it considered Request 16-11:

Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter. In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce [the referenced documents].⁸¹

Claimants, however, do not even address (much less properly challenge) the Board’s reasoning.

53. As noted above, there is nothing in the *Dot Registry* IRP Declaration that changes the fact that ICANN was not required to publicly disclose confidential information in response to a DIDP Request, nor was ICANN required to produce documents in an IRP wherein the Claimants never requested any documents. Regardless, the statements that Claimants rely on from the *Dot Registry* IRP do not even support their alleged position:

- The *Dot Registry* IRP statements that “ICANN staff was intimately involved in the process” and “supplied continuing and important input on the CPE efforts”⁸² are *dicta*. Dot Registry did not challenge ICANN’s involvement with the CPE Provider; it challenged the manner in which the BGC evaluated Dot Registry’s Reconsideration Requests.
- Contrary to the *dicta* in the *Dot Registry* IRP Declaration, the CPE Provider affirmed that it “never changed the scoring or results [of a CPE] based on ICANN[’s] . . . comments,” and FTI concluded that: (1) ICANN “never questioned or sought to alter the CPE Provider’s conclusions”; and (2) ICANN “never dictated that the CPE provider take a specific approach” to a CPE.⁸³ Claimants ignore these findings, which is based on all of the evidence FTI obtained.
- The *Dot Registry* IRP statement that ICANN should have “compared what the ICANN staff and [the CPE Provider] did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the [CPE Provider] treated the requestor in a fair and non-discriminatory manner”⁸⁴ Is precisely what FTI evaluated in the CPE Process Review.

54. This claim is even more baffling because ICANN has produced in this IRP the documents FTI considered during its CPE Process Review, which includes ICANN's communications with the CPE Provider. Thus, Claimants have the documents, they are just unhappy that the documents disprove their undue influence claim. In light of the above, this claim should be denied.

C. ICANN Did Not Discriminate Against Claimants.

55. Claimants' claims regarding alleged discrimination are so vague and meandering that it is difficult to determine exactly what actions or inactions they are challenging. The Amended IRP Request states that Claimants seek review of "whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL,"⁸⁵ and suggest this was a violation of ICANN's Commitment to "[m]ake decisions by applying documented policies consistently . . . without singling out any particular party for discriminatory treatment."⁸⁶ ICANN addresses each of Claimants' wandering arguments below, none of which amounts to discriminatory treatment.

56. Claimants seem to first argue that the outcome of the *Dot Registry* IRP "proved" that the *Despegar* Claimants "were discriminated against in CPE."⁸⁷ Claimants argue that the Board's decision to "fully address[] the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants" by "refund[ing] Dot Registry's IRP costs" and ordering the BGC to reconsider the Dot Registry Reconsideration Requests without doing the same for the *Despegar* Claimants discriminated against Claimants.⁸⁸

57. As an initial matter, ICANN notes that, contrary to Claimants' suggestion, the *Dot Registry* IRP Declaration did not conclude that ICANN's relationship with the CPE Provider was, in itself, inconsistent with ICANN's Bylaws, policies, or procedures. Instead, the *Dot*

Registry IRP Declaration found that the BGC did not adequately investigate Dot Registry’s allegations that the relationship was inconsistent with the Bylaws, policies and/or procedures with respect to the way the .LLC, .LLP, and .INC CPE applications were handled.

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

- The *Dot Registry* IRP Panel found in favor of Dot Registry, whereas the *Despegar* Claimants lost their IRP.
- Dot Registry sought independent review of ICANN’s denial of its requests for Community Priority status; the *Despegar* Claimants sought review of a decision to grant Community Priority status to a third party, HTLD.
- The *Dot Registry* IRP Panel ordered ICANN to reimburse Dot Registry’s IRP fees⁸⁹ consistent with the Bylaws provision that the “party not prevailing” (ICANN, in the *Dot Registry* IRP) is “ordinarily” responsible for bearing the IRP Provider’s costs.⁹⁰ The *Despegar* Claimants were the “part[ies] not prevailing” in the *Despegar* IRP,⁹¹ so the Panel did not order ICANN to reimburse the *Despegar* Claimants for their IRP fees.

59. Accordingly, the *Despegar* Claimants were treated differently, but appropriately, because they are not similarly situated to the *Dot Registry* Claimants; thus, the fact that the *Despegar* Claimants lost their IRP does not mean that ICANN discriminated against them.

60. In any event, through the CPE Process Review, Claimants essentially obtained the relief they are seeking. FTI reviewed all CPEs, including the CPE of .HOTEL. FTI specifically evaluated whether ICANN had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process, and concluded that ICANN did not have any such influence.⁹² FTI also evaluated whether the CPE criteria were applied consistently throughout each CPE report and concluded that they were.⁹³

61. Claimants next seem to argue that the IRP Panel Declaration in *Corn Lake, LLC v. ICANN* (“*Corn Lake* IRP Declaration”) somehow supports their arguments here. The *Corn Lake*

IRP Declaration, however, “stresse[d] that this is a unique situation and peculiar to its own unique and unprecedented facts.”⁹⁴ And the facts here are not even slightly analogous to those in the *Corn Lake* IRP: Corn Lake challenged ICANN’s process for evaluating gTLD application objection proceeding results, not a CPE determination. The *Corn Lake* IRP Declaration noted that Corn Lake was the only applicant in its particular circumstances, that no other party would be prejudiced by requiring ICANN to include Corn Lake in its review of objection proceeding results, and that the unique timing of relevant key events justified unique findings.⁹⁵ Nothing about the *Corn Lake* IRP Declaration supports Claimants’ arguments here.

62. Finally, Claimants make a vague reference to the .GAY CPE. However, Claimants’ reliance on the BGC’s decision on Reconsideration Request 14-44 regarding the CPE of .GAY is wholly misplaced. The BGC determined that a second CPE of the .GAY application was warranted because the CPE Provider had “inadvertently neglected to verify some of the letters submitted in support of the Application.”⁹⁶ It had absolutely nothing to do with ICANN’s communications or relationship with the CPE Provider, which is far different from Claimants’ allegations here.

63. Accordingly, no matter how Claimants style their claims, there is no evidence that ICANN discriminated against Claimants.

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

64. Claimants ask the Panel to review “ICANN’s ‘Portal Configuration’ investigation and refusal to penalize HTLD’s willful accessing of Claimant’s [sic] confidential, trade secret info.”⁹⁷ Claimants assert that ICANN “violate[d]” its “duty of transparency” by failing to disclose “all documents concerning ICANN’s investigation of HTLD’s breach” during either the Portal Configuration or the Board’s action on Request 16-11.⁹⁸ Claimants’ challenges to the

Board's action on Request 16-11 are invalid for two reasons.

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

65. Claimants assert that the *Despegar* IRP Panel “starkly questioned” the BAMC’s rationale for recommending denial of Request 16-11.⁹⁹ This assertion is patently false: the BAMC’s Recommendation on Request 16-11 (in November 2018) post-dated the *Despegar* IRP Declaration (in February 2016) by more than two years, so the *Despegar* IRP Panel could not possibly have questioned, or even mentioned, the BAMC’s conclusions.¹⁰⁰ Claimants made a misstatement in their Amended IRP Request. The language that Claimants quote from the *Despegar* IRP Declaration in fact referred to ICANN’s argument in the *Despegar* IRP that Claimants had not identified Board action or inaction (necessary to initiate an IRP).¹⁰¹ The language quoted by Claimants does not refer to, and could not possibly refer to, the BAMC’s recommendation regarding Request 16-11 or the BAMC’s conclusion that there was no evidence that HTLD received or benefited from the information accessed by Mr. Krischenowski via the Portal Configuration.

(2) Claimants' Request for Review of ICANN's Decision to Allow HTLD's Application to Proceed is Meritless.

66. Claimants assert that “HTLD’s theft of competitor Claimants’ private trade secret data was . . . deserving not only of thorough investigation as ICANN purported to do, but also of some consequence to HTLD once the scope, frequency, and significance of its misconduct was revealed.”¹⁰² This argument conflates actions by officers of HTLD’s minority shareholder with actions by HTLD itself, and is an attempt to substitute Claimants’ judgment for that of the ICANN Board. Claimants argue that Mr. Krischenowski’s and Ms. Ohlmer’s actions should be imputed to HTLD.¹⁰³ The sole authority that Claimants cite for this proposition, the Restatement (Second) of Agency (1958), does not support their argument. That Restatement states only that

“A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” It says nothing about whether a corporate officer’s acts may be attributed to the corporation, much less when the acts of a corporate officer of a minority shareholder of a corporation may be attributed to the corporation.

67. Claimants then assert—with literally no evidentiary support—that ICANN “would have said anything—or hid anything—to save [itself] from further embarrassment.”¹⁰⁴ But the Portal Configuration Investigation shows the opposite. ICANN investigated the issue thoroughly, operating with transparency by providing regular updates to the public, and provided specific details to the affected applicants regarding the instances of unauthorized access.¹⁰⁵ Pursuant to the Bylaws, it is not the place of Claimants or this Panel to substitute their judgment about ICANN’s ultimate decision to allow HTLD’s application to proceed after having conducted a thorough investigation; rather, the Panel’s authority is to determine whether ICANN violated its Articles or Bylaws.

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

68. Claimants appear to argue that ICANN should have reconsidered the CPE Review Resolutions because FTI was unable to review the CPE Provider’s internal correspondence,¹⁰⁶ but Claimants provide no concrete reason for such a demand. Further, Claimants do not actually challenge any of the Board’s (or the BAMC’s) well-reasoned conclusions in response to Request 18-6.

69. Claimants challenged ICANN’s relationship with the CPE Provider in Request 16-11. The BAMC concluded that the CPE Process Review Scope 1 Report demonstrated that ICANN did not have any undue influence on the CPE Provider.¹⁰⁷ Claimants then challenged the Board’s acceptance of the CPE Process Review Reports in Request 18-6. In the Board’s resolution regarding Request 18-6, the BAMC and Board concluded that the Board’s action was

consistent with the Bylaws, and that the “Board considered all material information when it adopted the [CPE Review] Resolutions.”¹⁰⁸

70. Here, Claimants argue that the Board “ought to want to know what [the CPE Provider] has been hiding,” and “should have forced [the CPE Provider] to disclose” documents before accepting FTI’s reports.¹⁰⁹ But Claimants offer nothing but their personal opinions that the Board should have done more. And no Article, Bylaws provision, or established policy required ICANN to reject the CPE Process Review Reports simply because the CPE Provider refused to disclose certain documents during the CPE Process Review.¹¹⁰ FTI had ICANN’s documents, which included its communications with the CPE Provider, as well as documents from the CPE Provider and interviews of personnel from ICANN and from the CPE Provider. FTI determined that it had more than sufficient information for its review and the Board was entitled to accept FTI’s review and its conclusions. That Claimants disagree with the Board’s decision does not render that action inconsistent with the Articles or Bylaws.

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

IX. ICANN’S PROCESS FOR IMPLEMENTING THE STANDING PANEL COMPLIES WITH ITS ARTICLES AND BYLAWS.

72. With regard to Claimants’ claim regarding the IRP Standing Panel, Claimants primarily argue that ICANN has not convened an IRP Standing Panel within Claimants’ desired timetable. That argument, however, does not amount to an actionable claim against ICANN for two reasons. First, the process for convening the Standing Panel is driven by the Internet community, not ICANN. The establishment of the Standing Panel depends on key contributions and work from across ICANN’s community, including representatives of ICANN’s Supporting

Organizations (“SOs”) and Advisory Committees (“ACs”), and others. Indeed, the Bylaws require ICANN, “in consultation with the Supporting Organizations and Advisory Committees, [to] initiate a four-step process to establish the Standing Panel.”¹¹¹ ICANN cannot unilaterally complete these processes. Under the current Bylaws, ICANN does not even have the power to complete the Standing Panel process on its own because of the important roles of the SOs and ACs. Accordingly, ICANN cannot snap its proverbial fingers and convene a Standing Panel.

73. Second, the Bylaws do not set a deadline for ICANN to convene a Standing Panel. To the contrary, the Bylaws specifically anticipate that IRPs will be initiated before a Standing Panel is convened and the Bylaws provide a process by which ICANN and an IRP claimant are to appoint a Panel. It is therefore impossible for ICANN to have violated its Bylaws by failing to convene a Standing Panel simply because it does not comply with Claimants’ preferred timetable.

74. Even so, with the community’s assistance, ICANN is now in the final phase of constituting the Standing Panel. In all events, Claimants have not identified and cannot identify any Article or Bylaws provision that ICANN violated with respect to the Standing Panel.¹¹²

CONCLUSION

75. ICANN complied with its Articles, Bylaws, policies and procedures relating to the CPE Process Review, HTLD’s .HOTEL Application, and the Standing Panel. Accordingly, Claimants’ IRP Request should be denied.

Respectfully submitted,

JONES DAY

Dated: May 19, 2023

By: /s/ Jeffrey A. LeVee

Jeffrey A. LeVee

Counsel for Respondent ICANN

¹ Statement of Decision on ICANN’s Motion for Summary Adjudication, ¶ 150.

² Ex. R-1 (ICANN Bylaws (as amended 28 Nov. 2019) (“Bylaws”)) Art. 1, § 1.1.

³ *Id.*, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2.

⁴ *Id.*, Art. 4, § 4.2.

⁵ *Id.* Today, that committee is the Board Accountability Mechanisms Committee (“BAMC”). Previously, it was the Board Governance Committee (“BGC”).

⁶ *Id.*, Art. 5.

⁷ *Id.*, Art. 5, § 5.2.

⁸ Ex. R-1 (Bylaws) Art. 4, § 4.3.

⁹ Ex. R-2 (IRP Interim Supplementary Procedures (25 Oct. 2018) (“Interim Procedures”)).

¹⁰ Ex. R-3 (Program Statistics, ICANN New gTLDs).

¹¹ Ex. R-4 (Guidebook) Preamble.

¹² *Id.*, § 4.1.1.

¹³ *Id.*, § 4.1.3.

¹⁴ *Id.*, § 4.3. The proceeds of an ICANN-facilitated auction are provided to ICANN but are earmarked for purposes consistent with ICANN’s Mission, Core Values and non-profit status. *Id.*, § 4.3, n.1.

¹⁵ *Id.*, § 1.2.3.1.

¹⁶ *Id.*

¹⁷ *See* Ex. R-5 (Community Priority Evaluation). ICANN selected the Economist Intelligence Unit to handle CPEs following a public request for applications from firms interested in performing the various third party evaluations of new gTLD applications. *See* Ex. R-6 (“Preparing Evaluators for the New gTLD Application Process”).

¹⁸ Ex. R-7 (CPE Panel Process Document).

¹⁹ Ex. R-4 (Guidebook) § 4.2.2.

²⁰ Ex. R-8 (ICANN Provides Update on Review of the CPE Process). ICANN’s contract with the CPE provider requires ICANN to maintain the CPE Provider’s proprietary, trade secret, or confidential information or data relating to the CPE Provider’s operations, products or services, and personal information, in confidence and use at least the same degree of care in maintaining its confidentiality as ICANN uses in maintaining its own confidential information. Ex. R-9 (New gTLD Program Consulting Agreement between ICANN and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011).

²¹ *See* Ex. R-10 (HTLD application details).

²² *See* Ex. R-11 (Contention Set Diagram, HOTEL).

²³ *See* Claimants’ Ex. D (HTLD CPE Report).

²⁴ Ex. R-12 (Request 14-34).

²⁵ Ex. R-13 (Request 14-39).

²⁶ *See* Claimants’ Ex. G (Final Declaration, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, 12 Feb. 2016 (“Despegar IRP Declaration”)). Claimant Minds + Machines Group, Ltd. attempted to join the other claimants in the Despegar IRP, but the IRP Panel concluded that Minds + Machines Group was time-barred from doing so. *Id.* at ¶¶ 139-142.

²⁷ *Id.* ¶ 49.

²⁸ *Id.* ¶ 151.

²⁹ *Id.* ¶¶ 134-38.

³⁰ Ex. R-14 (ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11).

³¹ Ex. R-15 (Portal Configuration Notice); Ex. R-16 (New gTLD Applicant and GDD Portals Q&A).

³² *See* Claimants' Ex. O (BAMC Recommendation on Request 16-11, at Pgs. 3-4).

³³ *See* Ex. R-17 (Announcement: New gTLD Applicant and GDD Portals Update); Ex. R-18 (Response to Documentary Information Disclosure Policy ("DIDP") Request No. 20150605-1); Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

³⁴ *See* Ex. R-19 (Letter from ICANN to Despegar, 23 February 2016).

³⁵ Claimants' Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

³⁶ Claimants' Ex. ZZ (Letter from Philipp Grabensee to ICANN, 23 March 2016). In Request 16-11, Requestors asserted that Ms. Ohlmer has also been associated with HTLD. *See* Claimants' Ex. J (Request 16-11) § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Claimants' Ex. H (Rationale for ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15). The BAMC concluded that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledged ended no later than 17 June 2016 (Claimants' Ex. J (Request 16-11) § 8, at Pg. 15), did not support reconsideration because there was no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE.

³⁷ Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

³⁸ *Id.* Mr. Lenz-Hawliczek and Ms. Ohlmer replaced Mr. Krischenowski as Managing Directors of HTLD GMBH. *Id.*

³⁹ Claimants' Ex. ZZ (23 March 2016 Letter).

⁴⁰ *Id.*

⁴¹ *See* Ex. R-20 (Letter from Flip Petillion to ICANN, 8 March 2016); *see also* Ex. R-41 (Letter from Flip Petillion to ICANN, 1 March 2016).

⁴² Claimants' Ex. H (ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15).

⁴³ *Id.*

⁴⁴ Ex. R-19 (Letter from ICANN to Despegar, 23 February 2016).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ex. R-22 (ICANN Board Resolution 2016.09.17.01). The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report ("Scope 2"); and (ii) compilation of the research relied on by the CPE Provider to the extent such research exists for the evaluations which were the subject of certain then-pending Reconsideration Requests relating to the CPE process ("Scope 3"). Ex. R-23 (Minutes, BGC Meeting). Scope 3 is not relevant to this IRP.

⁴⁸ Ex. R-24 (Update on the Review of the New gTLD Community Priority Evaluation Process, 26 April 2017). The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁴⁹ *Id.*

⁵⁰ Ex. R-25 (CPE Process Review Scope 1 Report ("Scope 1 Report")), at Pg. 6.

⁵¹ *Id.* at Pgs. 6-7.

⁵² *See* Ex. R-26 (ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process).

⁵³ Ex. R-25 (Scope 1 Report) at Pg. 2.

⁵⁴ *Id.* at Pgs. 9, 15.

⁵⁵ Ex. R-27 (Board Resolutions 2018.03.15.08-2018.03.15.11).

⁵⁶ Two other .HOTEL applicants joined with Claimants to submit Request 16-11. *See* Claimants' Ex. J (Request 16-11) at Pgs. 1-3.

⁵⁷ Claimants' Ex. J (Request 16-11).

⁵⁸ Ex. R-28 (Board Action on Request 16-11).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Claimants' Ex. N (Request 18-6, § 2, at Pg. 3). Neither Claimant Domain Ventures Partners PCC Limited nor its subsidiary dot Hotel Limited (nor Famous Four Media Limited, which has also been associated with dot Hotel Limited's application for .HOTEL) were Requestors in Request 18-6. *Id.*

⁶⁶ Ex. R-29 (Board Action on Request 18-6).

⁶⁷ Ex. R-1 (Bylaws) Art. 4, § 4.3.

⁶⁸ *Id.*, § 4.3(h)(i)(iii); *see also* Ex. R-30 (Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 ("Booking.com Final Declaration") 3 March 2015) ¶ 115.

⁶⁹ Ex. R-1 (Bylaws) Art. 4, § 4.3(b).

⁷⁰ Amended IRP Request, at Pg. 16.

⁷¹ Claimants' Ex. G (Despegar IRP Declaration) at ¶ 96, quoting ICANN's Response to DIDP No. 20140804-01.

⁷² *Id.* at ¶ 97.

⁷³ Claimants' Ex. M (Final Declaration, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 29 Jul. 2016 ("Dot Registry IRP Declaration")) ¶¶ 93, 101.

⁷⁴ Ex. R-31 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004, 13 July 2015 (Ex. C-050)).

⁷⁵ *Id.*

⁷⁶ Claimants' Ex. G (Despegar IRP Declaration) at ¶ 96.

⁷⁷ Amended IRP Request at Pg. 17.

⁷⁸ *See* Claimants' Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31; Ex. R-32 (Despegar IRP documents) (reflecting only one Procedural Order, which did not order production of any documents).

⁷⁹ <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁸⁰ As the IRP Panel in *Amazon E.U. S.a.r.l. v. ICANN* has explained, "[b]oth ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information . . . may contain information that is appropriately protected against disclosure." Ex. R-33 (*Amazon EU S.a.r.l. v. ICANN*, ICDR Case No. 01-16-0007056, Procedural Order No. 3 (7 June 2017)) at Pg. 3.

⁸¹ Claimants' Ex. O (BAMC Recommendation on Request 16-11) at Pg. 31; adopted in Ex. R-29 (Board Action on Request 16-11).

⁸² Claimants’ Ex. M (Dot Registry IRP Declaration) ¶ 93; *see also id.* ¶ 101; Ex. R-31 (Additional Submission of Dot Registry, LLC, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-001-5004 (Exs. C-42 - C-50, C-53)).

⁸³ Ex. R-25 (Scope 1 Report) at Pgs. 14-15.

⁸⁴ Claimants’ Ex. M (Dot Registry IRP Declaration) ¶ 125.

⁸⁵ Amended IRP Request, at Pg. 18.

⁸⁶ Ex. R-1 (ICANN Bylaws, Art. 1, § 1.2(a)(v)).

⁸⁷ Amended IRP Request, at Pg. 18.

⁸⁸ Amended IRP Request at Pgs. 20.

⁸⁹ Claimants’ Ex. M (Dot Registry IRP Declaration) at ¶ 154.

⁹⁰ ICANN Bylaws (as amended 11 Feb. 2016) Art. 4, § 3.18, Ex. R-34.

⁹¹ Claimants’ Ex. G (Despegar IRP Declaration) at ¶ 158. In light of the “serious issues” that the Despegar Claimants raised, the Panel decided not to require the Despegar Claimants to reimburse ICANN’s IRP costs. *Id.*

⁹² Ex. R-25, at Pg. 3

⁹³ Ex. R-35, Scope 2 Report, at Pgs. 3, 47.

⁹⁴ Claimants’ Ex. U (Final Declaration, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-002-9938, 17 Oct. 2016) at ¶ 8.98.

⁹⁵ *Id.*

⁹⁶ Determination of the Board Governance Committee (BGC) Reconsideration Request 14-44 (20 January 2015), at Pg. 32, Ex. R-36.

⁹⁷ Amended IRP Request at Pg. 21.

⁹⁸ *Id.* at Pg. 21-22.

⁹⁹ *Id.* at Pg. 7.

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at Pg. 8 n.14.

¹⁰² *Id.* at Pg. 25.

¹⁰³ *Id.* at Pg. 25, citing Ex. R-LA-1 (*Comm. for Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996)).

¹⁰⁴ Amended IRP Request at Pg. 21.

¹⁰⁵ Claimants’ Ex. O (BAMC Recommendation on RR 16-11) at Pgs. 8-12.

¹⁰⁶ Amended IRP Request, at Pg. 12.

¹⁰⁷ Claimants’ Ex. O (BAMC Recommendation on Request 16-11) at Pg. 29-30.

¹⁰⁸ Ex. R-30 (Board Action on Request 18-6).

¹⁰⁹ Amended IRP Request at Pg. 13.

¹¹⁰ Claimants’ Ex. P (BAMC Recommendation on Request 18-6) at Pg. 16. Claimants offer no support for their argument that the Board “ought to” want additional information before accepting the CPE Process Review Reports. *See* Amended IRP Request at Pg. 13. This argument should be disregarded.

¹¹¹ Eisner Affidavit ¶ 3, submitted in conjunction with ICANN’s Response to Claimants’ Request for Stay of Proceedings (31 Aug. 2021).

¹¹² Claimants continue to cite to a 2014 order granting interim relief in the *DCA Trust* IRP, which stated that “[h]ad ICANN timely constituted the standing panel, the panel could have addressed *DCA Trust’s* request for an IRP as soon as it was filed in January 2014.” See Amended Emergency Request, at p. 18 (quoting Decision on Interim Measures of Protection, *DCA Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13). This was not a determination that ICANN violated its Articles, Bylaws, policies, or procedures. Moreover, the parties in the *DCA Trust* IRP did not even brief this issue. Instead, their discussion of the Standing Panel concerned whether claimant could seek emergency relief under the then-governing ICDR Supplementary Procedures before the Standing Panel was established. See *DCA Request for Interim Relief* at Pg. 2 n.1, Ex. RE-13. This order also does not apply to the current circumstances in all events because the process for selecting a Standing Panel changed when ICANN revised its Bylaws in October 2016. The Bylaws in effect in 2014, when *DCA Trust* filed its IRP and when the *DCA Trust* IRP Panel issued the quoted statement, did not describe the process for establishing the Standing Panel. Accordingly, the *DCA Trust* order does not provide guidance—and is not binding precedent—here.