

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC,	)	
Radix Domain Solutions Pte. Ltd.,	)	
and Domain Venture Partners PCC Limited,	)	
	)	
Claimants,	)	ICDR Case No. 01-19-0004-0808
	)	
vs.	)	
	)	
Internet Corporation For Assigned Names	)	
and Numbers (ICANN)	)	
	)	
	)	
Respondent	)	

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**STATEMENT OF DECISION**

**ON THE MOTION FOR SUMMARY ADJUDICATION**

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Piotr Nowaczyk, Esq., Chair

Hon. A. Howard Matz (Ret.)

Hon. William J. Cahill (Ret.)

4 April 2023

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## **I. GLOSSARY**

<b>AGB</b>	Applicant Guidebook setting forth the evaluation criteria and process for new gTLD applications
<b>AoI</b>	ICANN's Articles of Incorporation
<b>August 2016 Resolutions</b>	ICANN Approved Board Resolutions 2016.08.09.14 –2016.08.09.15; 2016.08.09.11 – 2016.08.09.13.
<b>BAMC</b>	Board Accountability Mechanisms Committee, formerly known as the BGC
<b>BGC</b>	Board Governance Committee
<b>CEP</b>	Cooperative Engagement Process
<b>Claimants</b>	Fegistry, LLC, Radix Domain Solutions Pte. Ltd., and Domain Venture Partners PCC Limited
<b>CPE</b>	Community Priority Evaluation
<b>CPE Panel</b>	Panel from the CPE Provider
<b>CPE Process Review</b>	Review of the CPE process requested by the ICANN Board as part of the Board's due diligence in the administration of the CPE process
<b>CPE Process Review Reports</b>	Three reports on the CPE Process Review published by ICANN on 13 December 2017
<b>Despegar Claimants</b>	Fegistry LLC, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Radix FZC
<b>Despegar Declaration</b>	Final Declaration issued in the Despegar IRP on 11 February 2016
<b>Despegar IRP</b>	IRP initiated by the Despegar Claimants on 4 March 2015 challenging ICANN's acceptance of the CPE Panel's report awarding priority to HTLD's application for gTLD string .HOTEL.
<b>DIDP</b>	Documentary Information Disclosure Policy
<b>Dot Registry</b>	Dot Registry, LLC

<b>Dot Registry Declaration</b>	Final Declaration in the Dot Registry IRP issued on 29 July 2016
<b>Dot Registry IRP</b>	IRP initiated by Dot Registry on 22 September 2014 challenging the BGC's denial of Dot Registry's reconsideration requests regarding the gTLD strings .INC, .LLC, and .LLP
<b>EIU or CPE Provider</b>	Economist Intelligence Unit
<b>FTI</b>	FTI Consulting, Inc.'s
<b>gTLD</b>	generic top-level domain
<b>HTLD</b>	Hotel Top Level Domain S.a.r.l's
<b>ICDR</b>	International Center for Dispute Resolution
<b>Interim Supplementary Procedures</b>	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process adopted on 25 October 2018
<b>IRP</b>	Independent Review Process
<b>IRP Request</b>	Claimants' Request for this IRP dated December 16, 2019
<b>January 2019 Resolution</b>	ICANN Approved Board Resolution 2019.01.27.23 dated 27 January 2019
<b>Joint Submission</b>	Parties' joint submission dated 9 November 2022 in response to the Procedural Order No. 10 dated 4 October 2022
<b>July 2017 Bylaws</b>	ICANN's Bylaws as amended on 22 July 2017
<b>March 2016 Resolution</b>	ICANN Approved Board Resolutions 2016.03.10.10 – 2016.03.10.11 dated 10 March 2016
<b>March 2018 Resolutions</b>	ICANN Approved Board Resolutions 2018.03.15.08 – 2018.03.15.11 dated 15 March 2018
<b>Motion</b>	Respondent's Motion for Summary Adjudication of certain claims that are barred by the statute of

	limitations filed in this IRP on 21 June 2022
<b>November 2019 Bylaws</b>	ICANN's Bylaws as amended on 28 November 2019
<b>Portal Configuration issue</b>	Security issue related to the privacy configuration of ICANN's new gTLD applicant portal notified to ICANN on 27 February 2015
<b>Request 16-11</b>	Reconsideration Request 16-11 submitted by the Claimants to the Respondent on 25 August 2016
<b>Request 18-6</b>	Reconsideration Request 18-6 submitted by the relevant Claimants to the Respondent on 14 April 2018
<b>Respondent or ICANN</b>	Internet Corporation For Assigned Names and Numbers
<b>Roadmap</b>	Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Place On Hold Pending Competition Of The CPE Process Review posted on 15 February 2018

## II. INTRODUCTION AND PROCEDURAL BACKGROUND

- (1) This is the Panel’s Statement of Decision on the Respondent’s Motion for Summary Adjudication of certain claims that are barred by the statute of limitations (“**Motion**”) filed within the Independent Review Process (“**IRP**”) on 21 June 2022.
- (2) By the Motion supplemented by the Respondent’s Reply in Support of the Motion filed on 5 August 2022, the Respondent requests that the Panel dismiss any claims or challenges related to the following (with citations to the specific section of the Claimants’ Request for IRP dated December 16, 2019 – “**IRP Request**”)<sup>1</sup>:
  - (i) the acquisition of Hotel Top Level Domain S.a.r.l’s (“**HTLD**”) by Afilias [including any claim that ICANN should have performed another Community Priority Evaluation (“**CPE**”) in August 2016 after Afilias acquired HTLD], as discussed in Section V.2.D of the IRP Request;
  - (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 (“**EIU**” 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; and
  - (iv) the Ombudsman review of Reconsideration Requests 16-11 and 18-6, as discussed in Section V.1 of the IRP Request.
- (3) In the conclusion to the Reply in Support of the Motion, the Respondent requests that the Panel dismiss any and all claims or challenges related to: (i) Afilias’ acquisition of HTLD (and the lack of a second CPE); (ii) the Despegar IRP or issues litigated in the Despegar IRP; (iii) the Dot Registry Final Declaration, and its alleged relation to the Despegar IRP; and (iv) Ombudsman review of Request 16-11 and 18-6. The Respondent also requests that the Panel suppress any discovery related to those claims<sup>2</sup>.
- (4) On 22 July 2022, the Claimants filed the Opposition to the Motion. Next, on 19 August 2022, the Claimants filed the Sur-Reply Brief in Opposition to the Motion.
- (5) On 4 October 2022, the Panel issued the Procedural Order No. 10 requesting the Parties to provide responses to the Panel’s questions related to the Motion. On 9 November 2022, the

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<sup>1</sup> The Respondent’s Reply in Support of the Motion, para (3).

<sup>2</sup> The Respondent’s Reply in Support of the Motion, p. 15.

Parties submitted the joint submission in response to the Procedural Order No. 10 (“**Joint Submission**”).

- (6) Having reviewed all the evidence in the present case, the Panel concludes that:
1. the Panel has jurisdiction to address and resolve the Motion;
  2. the Motion is not premature, notwithstanding that discovery may not yet be complete;
  3. the Respondent has established the basis to dismiss the portions of the Claimants’ claims presented in this IRP which are described above in paragraph (2) (i) and (iv);
  4. the Respondent has failed to establish the basis to dismiss the portions of the Claimants’ claims presented in this IRP which are described above in paragraph (2) (ii) and (iii).

### **III. OVERVIEW OF THE PARTIES’ SUBMISSIONS**

#### **A. Respondent’s Motion**

- (7) In the Motion the Respondent requested initially that the Panel dismiss any claims from this IRP (and exclude as irrelevant any discovery related thereto) which concern the following<sup>3</sup>:
- (i) the acquisition of HTLD by Afiliias;
  - (ii) the decision in the Despegar IRP, which constituted the Claimants’ challenge to the determination that HTLD’s application for .HOTEL qualifies for “*community*” treatment, including the decision by the Respondent’s vendor, the EIU (or CPE Provider), that HTLD’s application received a score that gave it priority based on its intended operation for the benefit of a stated “*community*”;
  - (iii) the decision in the Dot Registry IRP, including any claim that the Respondent should have somehow “*revisited*” the outcome of the Despegar IRP in view of the final declaration in the Dot Registry IRP; and
  - (iv) any challenges to the lack of Ombudsman review on the Reconsideration Requests 16-11 and 18-6 that the Claimants filed concerning these matters.
- (8) The Respondent submitted that the above listed claims are time-barred.
- (9) On the other hand, the Respondent does not argue that the following claims covered by this IRP are barred by the statute of limitations:
- (i) Claimants’ claim regarding ICANN’s acceptance of the CPE Process Review Reports. **ICANN has not argued that the challenges in Claimants’**

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<sup>3</sup> Respondent’s Motion, paras. (2); p. 19.

**Reconsideration Request 18-6 to the CPE Process Review, and the Board's acceptance thereof, are time-barred in this IRP.**

(ii) In February 2015, ICANN learned that applicants were able to view certain documents uploaded by other applicants on the new gTLD Internet portal (the "Portal Configuration" issue). ICANN also learned that in 2014, certain individuals associated with HTLD's .HOTEL application had viewed some non-public information submitted with the applications of competing applicants for .HOTEL. ICANN conducted an extensive investigation and, in August 2016, the Board determined that even assuming the individual(s) had obtained non-public information belonging to .HOTEL applicants, it would not have had any impact on the CPE of HTLD's application. **ICANN has not argued that the portions of Claimants' Reconsideration Request 16-11 that specifically challenge the Board resolutions regarding the Portal Configuration, as they relate to .HOTEL, are time-barred.**

(iii) **Claimants argue that ICANN should already have enacted a "Standing Panel" of arbitrators for all IRPs.** While ICANN contends that the issue regarding the timing of establishing a Standing Panel is moot inasmuch as the process for establishing the panel is well underway (with significant community involvement), **ICANN does not contend that this claim is time-barred.**

(10) In support of its Motion, the Respondent submits as follows.

**1. The applicable Statutes of Limitations**

(11) The Respondent alleges that the Claimants did not meet the deadlines established in the ICANN's February 2016 Bylaws, as well as Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted on 25 October 2018 ("**Interim Supplementary Procedures**") with respect to the four claims referred to in the Motion<sup>4</sup>.

**2. The acquisition of HTLD by Afilias**

(12) According to the Respondent, HTLD notified ICANN on 23 March 2016 that Afilias would be acquiring HTLD. A few months later, in August 2016, the Claimants acknowledged the fact of the acquisition in Reconsideration Request 16-11. However, the Claimants did not challenge the acquisition in that request. In fact, the Claimants did not challenge the acquisition until they filed this IRP in December 2019. Thus, any challenge to the Afilias acquisition of HTLD is time-barred<sup>5</sup>.

**3. The Despegar IRP**

(13) The Respondent recalled that in March 2015 Fegistry, Despegar Online SRL, Donuts, Famous Four Media Limited, and Radix FZC ("**Despegar Claimants**") filed an IRP challenging ICANN's acceptance of the CPE Panel's report awarding priority to HTLD's application for .HOTEL ("**Despegar IRP**"). On 11 February 2016, the Despegar IRP Panel issued the Final

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<sup>4</sup> The Respondent's Motion, paras. (12)-(14).

<sup>5</sup> The Respondent's Motion, paras. (15)-(16).

Declaration in ICANN’s favor (“**Despegar Declaration**”). On 10 March 2016, the ICANN Board accepted the final declaration in the Despegar IRP (“**March 2016 Resolutions**”)<sup>6</sup>.

- (14) On 25 August 2016, more than five months after the Board’s resolutions on the Despegar IRP, Claimants submitted the Reconsideration Request 16-11 to ICANN (“**Request 16-11**”). In the Respondent’s view, the Claimants’ claims regarding the Despegar IRP are time-barred<sup>7</sup>.

#### **4. The Dot Registry IRP**

- (15) The Respondent notes that the Final Declaration in the Dot Registry IRP was issued on 29 July 2016 (“**Dot Registry Declaration**”). The ICANN Board accepted this declaration on 9 August 2016 through the resolutions approved on 9 August 2016 (“**August 2016 Resolutions**”)<sup>8</sup>.
- (16) In the Respondent’s view, if and to the extent the Claimants are challenging the outcome of the Dot Registry IRP, such a claim should have been initiated within 15 days (for a reconsideration request) or within 30 days (for an IRP) after the August 2016 Resolutions. Accordingly, any such claim raised in the IRP Request is time-barred. Also, if the Claimants instead are trying to use the Dot Registry IRP to challenge something related to the Despegar IRP, that claim likewise is time-barred<sup>9</sup>.

#### **5. The Ombudsman review of the Requests 16-11 and 18-6**

- (17) The Respondent notes that in their IRP Request the Claimants allege that ICANN’s Ombudsman should have reviewed the Requests 16-11 and 18-6, as well as the Claimants ask the Panel to appoint a “*different*” ombudsman to conduct that review. The Respondent submits that Claimants’ claims with respect to the Ombudsman are time-barred<sup>10</sup>.
- (18) According to the Respondent, at the time the Request 16-11 was submitted, the operative February 2016 Bylaws did not provide for Ombudsman review of reconsideration requests. Moreover, the Claimants were on notice that no such review was part of the process for Request 16-11 at least as of 15 February 2018, when the Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Place On Hold Pending Competition Of The CPE Process Review (“**Roadmap**”) was publicly posted<sup>11</sup>.

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<sup>6</sup> The Respondent’s Motion, para. (20).

<sup>7</sup> The Respondent’s Motion, paras. (21)-(23).

<sup>8</sup> The Respondent’s Motion, para. (27).

<sup>9</sup> The Respondent’s Motion, para. (30).

<sup>10</sup> The Respondent’s Motion, paras. (33)-(34).

<sup>11</sup> The Respondent’s Motion, para. (34).

- (19) As such, this claim is untimely regardless of whether the Panel applies the statute of limitations in the February 2016 Bylaws (30-day deadline) or in Rule 4 of the Interim Supplementary Procedures (120-day deadline). The Claimants did not initiate the cooperative engagement process relating to this IRP until October 2018<sup>12</sup>.
- (20) Next, with regard to Ombudsman review of the Reconsideration Request 18-6 (“**Request 18-6**”), the Ombudsman did not fail to review this request. Rather, the Ombudsman appropriately recused himself on 23 May 2018 from substantively considering it in accordance with the Bylaws. This was publicly posted on ICANN’s website and transmitted to the Claimants on 24 May 2018. Thus, the deadline for filing an IRP challenging the Ombudsman’s recusal would have been late June 2018, which the Claimants did not meet<sup>13</sup>.

***B. Claimants’ Opposition to the Motion***

- (21) On 22 July 2022, the Claimants filed the Opposition to the Motion.

**1. No authority allowing the Motion and no standard of review**

- (22) The Claimants submit that there is neither authority nor precedent for the Motion. Also, the Respondent fails to suggest any standard by which the Motion should be considered. The Claimants have not consented or agreed to the applicability of any body of law in this case, other than the ICANN Bylaws and by reference the IRP Supplementary Rules and the ICDR Rules<sup>14</sup>.
- (23) According to the Claimants, none of those authorities provide for a summary adjudication procedure. Thus, they do not also provide any standard by which the Motion should be considered. In consequence, the Motion must be denied<sup>15</sup>.

**2. The Respondent fails to prove that any claims are time-barred**

- (24) The Claimants then allege that the Respondent refers to the Claimants’ “*claims*” in an incomplete and misleading manner<sup>16</sup>.

***The Claimants request review of whether CPE should evaluate Afiliis***

- (25) The Claimants submit that in their fourth claim Claimants do not generally challenge the “*acquisition of HTLD by Afiliis*” as the Respondent alleges. Instead, as actually stated in the IRP Request: “*Claimants seek review of ICANN’s decision to approve sale of the .HOTEL*”

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<sup>12</sup> The Respondent’s Motion, para. (35).

<sup>13</sup> The Respondent’s Motion, para. (37).

<sup>14</sup> The Claimants’ Opposition to the Motion, paras.(1)-(6).

<sup>15</sup> The Claimants’ Opposition to the Motion, para. (7).

<sup>16</sup> The Claimants’ Opposition to the Motion, para. (9).

*Community-based Applicant to a domain registry conglomerate, without requiring the new Applicant to pass CPE*<sup>17</sup>.

- (26) The Claimants do not challenge the acquisition itself, but rather the Respondent's failure to act since then, in light of such later developments as the Dot Registry declaration, CPE Process Review Reports<sup>18</sup>, and reveal of HTLD trade secret, which were all addressed in the Requests 16-11 and 18-6. By the time those Requests were both denied in January 2019, the Claimants had already requested Cooperative Engagement Process ("CEP") with ICANN as to all issues raised therein. That CEP tolled the time for the Claimants to file an IRP request until it was timely filed in November 2019<sup>19</sup>.

***The Claimants timely stated claims for review of both Requests 16-11 and 18-6***

- (27) The Claimants further submit that the Respondent requests the Panel to dismiss two claims that Claimants have not made<sup>20</sup>. The Claimants explain that in the IRP Request they state two different, specific claims for review as follows:

- 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
- B. Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after Dot Registry<sup>21</sup>.

- (28) According to the Claimants, all three subparts to their first claim for review were addressed in the Request 16-11 and/or Request 18-6. None of those claims could have arisen until after both the Dot Registry Declaration and the completion of the CPE Process Review Reports. In this IRP the Claimants challenge ICANN's denial of the Requests 16-11 and 18-6, including ICANN's refusal to produce evidence. Those claims are not time-barred<sup>22</sup>.

***Claimants are entitled to Ombudsman review of both Requests 16-11 and 18-6***

- (29) The Claimants submit that the Requests 16-11 and 18-6 are intertwined and were considered at the same time. Therefore, to the extent the Request 18-6 is required to have independent Ombudsman review, the Request 16-11 should have the same review<sup>23</sup>.
- (30) Moreover, the Claimants contend that the Respondent was bound to provide Ombudsman review without anyone demanding it. The Bylaws in effect since 2018 are unequivocal about

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<sup>17</sup> The Claimants' Opposition to the Motion, para. (10).

<sup>18</sup> On 13 December 2017, ICANN published three reports on the CPE Process Review.

<sup>19</sup> The Claimants' Opposition to the Motion, paras. (17)-(18).

<sup>20</sup> The Claimants' Opposition to the Motion, para. (19).

<sup>21</sup> The Claimants' Opposition to the Motion, para. (21).

<sup>22</sup> The Claimants' Opposition to the Motion, paras. (22)-(23).

<sup>23</sup> The Claimants' Opposition to the Motion, para. (33).

the right of reconsideration requesters to have their request independently reviewed by the Ombudsman, before consideration by the Board Accountability Mechanisms Committee (“**BAMC**”; formerly known as Board Governance Committee – “**BGC**”). However, in his notice of recusal as to the Request 18-6, the Ombudsman provided no reason for his recusal. The Respondent and the Ombudsman have systemically denied any independent review of any request involving a new generic top-level domain (“**gTLD**”), despite the clear requirement of the Bylaws<sup>24</sup>.

### **3. The relation between the Motion and discovery**

- (31) According to the Claimants, the Motion is premature because discovery is not yet complete in this case. The Respondent only completed its initial document production with delay on 15 July 2022<sup>25</sup>. The Respondent only purports to respond to 12 of the Claimants’ document requests. Still, the Respondent “*dumped*” significant number of documents on Claimants’ counsel. Once those documents are reviewed, the Claimants are likely to have follow-up requests to ICANN for additional documents and to revisit some or all of the Claimants’ outstanding 19 document requests to which ICANN has refused to respond. Until ICANN’s document production is complete, the Claimants are not in position to fully respond to the Motion. For this reason it must be denied<sup>26</sup>.

### **C. The Respondent’s Reply in Support of the Motion**

- (32) In its Reply in Support of the Motion the Respondent submits that the Claimants’ Opposition to the Motion is missing a single fact rebutting the statute of limitations applicable to the claims the Motion is seeking to dismiss. The Claimants have also not otherwise demonstrated that any of those IRP claims are timely<sup>27</sup>.

### **1. The authority for the Motion and standard of review**

- (33) The Respondent disputes the Claimants’ allegation that there is neither authority nor precedent for the Motion. The motion for summary judgment is warranted under both California law and federal law, which are applicable to this IRP. Moreover, the Respondent refers to Rules 5 and 9 of the Interim Supplementary Procedures, ICANN’s Bylaws, Article 29 and 20 of the ICDR Rules, as well as this Panel’s Procedural Order No. 8 to claim that the Panel has authority to

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<sup>24</sup> The Claimants’ Opposition to the Motion, paras. (34)-(36).

<sup>25</sup> The Claimants’ Opposition to the Motion, para. (40).

<sup>26</sup> The Claimants’ Opposition to the Motion, paras. (41)-(42).

<sup>27</sup> The Respondent’s Reply in Support of the Motion, para (1).

rule on the Motion. Finally, the Respondent brings up the Namecheap IRP<sup>28</sup> to support its claim that there has been a precedent for the Motion<sup>29</sup>.

## **2. The acquisition of HTLD by Afilias**

- (34) According to the Respondent, any claims relating to the Afilias acquisition (no matter how they are styled) are time-barred because the acquisition occurred in 2016 and this IRP was not filed until 2019. Nowhere in the Opposition do Claimants dispute that they were aware of Afilias' acquisition of HTLD by at least August 2016, and no further CPE had taken place. The Claimants did not raise any such challenge until this IRP<sup>30</sup>.
- (35) Moreover, the Claimants have failed to connect any of new developments such as the CPE Process Review or the Dot Registry Declaration to whether a second CPE was required after Afilias' acquisition of HTLD<sup>31</sup>.
- (36) Finally, the Respondent notes that the Claimants seem to argue that because ICANN's alleged "*failure to require CPE is ongoing*," the statute of limitations has not expired. However, the Claimants offer no support (factual or legal or logical) for such a statement<sup>32</sup>.

## **3. The Despegar IRP**

- (37) The Respondent submits that the Claimants have already challenged the CPE of HTLD's .HOTEL application in the Despegar IRP. The Claimants' argument that their claims related to the Despegar IRP could not have arisen until after both the Dot Registry decision and the completion of the CPE Process Review does not revive their time-barred claims<sup>33</sup>.
- (38) Next, the Respondent argues that the Claimants did not provide any citation to the source of an alleged duty of ICANN to re-open the Despegar IRP in light of the Dot Registry Declaration. The Dot Registry IRP evaluated the denial of community priority to applications for three unrelated gTLDs (.INC, .LLC, and .LLP) which has nothing to do with the grant of community priority to HTLD's application for .HOTEL<sup>34</sup>. Similarly the Claimants still fail to identify a ground explaining how that review brings their claims related to the Despegar IRP within the applicable statute of limitations<sup>35</sup>.

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<sup>28</sup> Namecheap v. ICANN, ICDR Case No. 01-20-0000-6787, Procedural Order No. 6.

<sup>29</sup> The Respondent's Reply in Support of the Motion, paras (4)-(8).

<sup>30</sup> The Respondent's Reply in Support of the Motion, para. (9).

<sup>31</sup> The Respondent's Reply in Support of the Motion, para. (12).

<sup>32</sup> The Respondent's Reply in Support of the Motion, para. (16).

<sup>33</sup> The Respondent's Reply in Support of the Motion, para. (19).

<sup>34</sup> The Respondent's Reply in Support of the Motion, para. (20).

<sup>35</sup> The Respondent's Reply in Support of the Motion, para. (23).

(39) Moreover, the Respondent notes that the Claimants' argument that documents produced in the Dot Registry IRP demonstrate that the Despegar IRP Panel was misled is not valid, as the Despegar Claimants did not propound any requests for production<sup>36</sup>.

#### **4. The Ombudsman review of the Requests 16-11 and 18-6**

(40) The Respondent submits that the Claimants fail to introduce any facts demonstrating that their claims regarding the lack of Ombudsman review of the Request 16-11 are timely. Also, the Claimants do not demonstrate that their claims regarding the Ombudsman's recusal from considering the Request 18-6 are timely<sup>37</sup>.

#### **5. The relation between the Motion and discovery**

(41) The Respondent submits that no discovery could revive any part of the Claimants' claims. There is no basis to require discovery on untimely claims<sup>38</sup>. Furthermore, the Respondent claims that, contrary to the Claimants' allegations, the ICANN's document production was not late and is complete<sup>39</sup>.

### ***D. Claimants' Sur-Reply in opposition to the Motion***

#### **1. No authority allowing the Motion and no standard of review**

(42) The Claimants reiterate that 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. Even under the U.S. law now relied upon by ICANN, a motion for summary judgment has a very high standard. Under this standard, even if it were applicable, the Respondent has not proved that any of the Claimants' claims are time-barred<sup>40</sup>.

#### **2. The acquisition of HTLD by Afilias**

(43) The Claimants argue that they could not have been aware, upon approval of the Afilias acquisition by ICANN, that the Respondent would not require Afilias to undergo a CPE. At that time, the CPE Review was underway and the Respondent was re-evaluating CPE results. It was not until after the CPE Reports were acted upon by the ICANN Board in March 2018, that Claimants' became aware that the Respondent would not re-evaluate the .Hotel CPE in

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<sup>36</sup> The Respondent's Reply in Support of the Motion, para. (21).

<sup>37</sup> The Respondent's Reply in Support of the Motion, paras. (26)-(30)..

<sup>38</sup> The Respondent's Reply in Support of the Motion, para. (37).

<sup>39</sup> The Respondent's Reply in Support of the Motion, paras. (38)-(39).

<sup>40</sup> The Claimants' Sur-Reply in opposition to the Motion, paras. (1)-(5).

light of that review. Then the Claimants timely filed the Request 18-6 challenging that inaction<sup>41</sup>.

- (44) 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 Claimants' Requests 18-6 in 2018 and the Board's denial of Claimants' Request 16-11 in January 2019<sup>42</sup>.

### **3. The Despegar IRP and the Dot Registry IRP**

- (45) The Claimants reiterate that the Respondent materially misled the 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. The Respondent had lied to the Claimants and the Despegar panel about the very existence of such documents. The Claimants could not have known about that evidence until after those publications. The Claimants again timely requested that evidence via the Request 16-11 in light of the Dot Registry revelations, and via the Request 18-6 in light of the CPE Review Reports. It was not until ICANN finally denied the Requests that Claimants became aware that ICANN would not provide the evidence<sup>43</sup>.

### **4. The Ombudsman review of the Requests 16-11 and 18-6**

- (46) The Claimants adds that ICANN's creation of the sham reconsideration process for new gTLD applicants, and the Ombudsman's recusal from every single case, is a violation of ICANN's Bylaws and Articles. The Claimants claims in this respect are not time-barred, as they could not reasonably have arisen until after ICANN finally denied the Requests 16-11 and 18-6<sup>44</sup>.

## **IV. THE PANEL'S DECISION ON THE MOTION**

### **A. Procedural grounds for the Motion**

- (47) The Claimants request that the Motion be denied on the ground that there is neither authority nor precedent allowing the IRP a summary adjudication procedure. In consequence, there is also no standard by which the Motion should be considered<sup>45</sup>.
- (48) The Respondent disagrees<sup>46</sup>. In its view, the Motion is consistent with the Interim Supplementary Procedures, Bylaws, ICDR Rules, this Panel's Procedural Orders, as well as

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<sup>41</sup> The Claimants' Sur-Reply in opposition to the Motion, para. (10).

<sup>42</sup> The Claimants' Sur-Reply in opposition to the Motion, para. (12).

<sup>43</sup> The Claimants' Sur-Reply in opposition to the Motion, paras. (18)-(19).

<sup>44</sup> The Claimants' Sur-Reply in opposition to the Motion, para. (25).

<sup>45</sup> The Claimants' Opposition, paras. (1)-(7).

<sup>46</sup> The Respondent's Reply in Support of the Motion, paras. (5)-(8).

California law supplemented by U.S. federal law which applies in this case<sup>47</sup>. Thus, this Panel has the authority to rule on the Motion. Moreover, the Respondent refers to the *Namecheap* IRP in support of its allegation that ICANN has previously requested that the IRP dismiss certain claims as moot, and the Panel agreed and prohibited discovery related to those claims<sup>48</sup>.

(49) **This Panel finds that the summary adjudication procedure is permissible under the IRP framework and thus, this Panel has an authority to rule on the Motion.**

(50) First, Rule 9 of the Interim Supplementary Procedures, which apply in the present case<sup>49</sup>, provides that:

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

**An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.**

(51) As results from the above, Rule 9 of the Interim Supplementary Procedures warrants dismissal of claims that lack substance. In the Panel's view, a claim that is barred by the statute of limitations is certainly a claim that lacks substance.

(52) Second, the Panel has an inherent authority (and even a duty) to adopt and apply procedures that promote the purposes of the IRP, regardless of whether there is specific precedent on the particular development. In this regard, Rule 5 of the Interim Supplementary Procedures state that:

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

(53) The purposes of the IRP are set forth in Section 4.3 (a) of the ICANN Bylaws as amended 28 November 2019 ("**November 2019 Bylaws**") which govern the present IRP procedure:

The IRP is intended to hear and resolve Disputes for the following purposes ("Purposes of the IRP"):

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<sup>47</sup> Cal. Code Civ. Proc. § 437c(c).

<sup>48</sup> Namecheap v. ICANN, ICDR Case No. 01-20-0000-6787, Procedural Order No. 6.

<sup>49</sup> These procedures apply to all independent review process proceedings filed after 1 May 2018. The Claimants have filed their IRP Request on 19 December 2019.

- (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).
- (iii) Ensure that ICANN is accountable to the global Internet community and Claimants.
- (iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).
- (v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.
- (vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.
- (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.
- (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.
- (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

- (54) The Panel thus considers that it is its duty to resolve IRP matters expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the Purposes of the IRP. This duty also gives the Panel the authority to determine whether a particular claim is barred by the statute of limitations and thus, shall be litigated. In the Panel’s view, litigating claims that are barred by the statute of limitations would contradict the very Purposes of the IRP.
- (55) Third, the Panel considers that the Namecheap IRP might be serving, to a certain extent, as a legitimate precedent to allow this IRP to rule on the Motion. The Panel notes that in the Namecheap IRP the panel granted partially the ICANN’s “*Motion to Dismiss*” on the basis that certain allegations in the IRP request were moot. The Panel noted that the outcome of that “*Motion to Dismiss*” was a fork-in-the-road issue for the further course of the proceedings, including the scope of disclosure<sup>50</sup>. In the present case, similarly, the Motion is a fork-in-the-road issue for the further course of the proceedings, including its subject matter scope, as well as the scope of disclosure.
- (56) The Claimants contend that Namecheap IRP cannot be seen as precedent for ICANN’s Motion, because it was filed early in the case at the pleading stage<sup>51</sup>. The Panel notes that the

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<sup>50</sup> Namecheap v. ICANN, ICDR Case No. 01-20-0000-6787, Procedural Order No. 6, para. (9).

<sup>51</sup> The Claimants’ Sur-Reply to in opposition to the Motion, para. (3).

Motion, being a motion for summary adjudication, inherently follows the pleadings and is made after the pleadings are settled.

- (57) Fourth, the Panel cannot also agree with the Claimants' argument that there is no standard for review applicable to the Motion. The Interim Supplementary Procedures, or the relevant ICANN's Bylaws applicable to the determined Claimants' actions, including the submission of the IRP Requests and other procedural measures taken by the Claimants prior to initiating this IRP, provide for clear deadlines for initiating those actions by the Claimants. They serve as a guidance to this Panel to assess whether the claims contained in the IRP Request have been filed timely and thus, whether the Motion shall be granted or not.
- (58) In consideration of the foregoing, **the Panel DENIES the Claimants' request to deny the Motion in its entirety based on the lack of the authority, precedent and standard of review allowing the Motion.**

***B. The relation between the Motion and discovery***

- (59) According to the Claimants, the Motion is premature now because discovery is not yet complete in this case<sup>52</sup>.
- (60) **The Panel disagrees.** In this regard, the Panel will leave aside the question of whether ICANN's document production was late and/or incomplete which is not crucial for assessing the maturity of the Motion.
- (61) The Panel considers that the finding that some of the Claimants' claims included in the IRP Request are barred by the statute of limitations implies that no discovery should be required with respect to these claims. The Panel reiterates that it shall consider efficiency (both as to time and cost) in its conduct of the IRP<sup>53</sup>.
- (62) Moreover, the Panel agrees with the Respondent stating that no discovery could revive the claims that are barred by the statute of limitations<sup>54</sup>. The Panel finds no basis to require discovery on such claims.
- (63) Given the above, **the Panel the Panel DENIES the Claimants' request to deny the Motion based on the alleged incomplete discovery.**

***C. Facts of the case***

- (64) The Panel will now move to assessing the Motion as to its merits. In the first place, the Panel established the following facts of the case relevant for such an assessment of the Motion.

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<sup>52</sup> The Claimants' Opposition to the Motion, paras. (41)-(42).

<sup>53</sup> Rule 5 of the Interim Supplementary Procedures.

<sup>54</sup> The Respondent's Reply in Support of the Motion, para. (37).

- (65) In 2012, the Respondent launched the New gTLD Program through which interested entities could apply for the right to operate new gTLDs. Only one entity could secure the right to operate a given new gTLD<sup>55</sup>.
- (66) The Respondent received applications for new gTLDs during the Spring of 2012. When new gTLD applicants submitted applications to the Respondent, they were able to designate their applications as either standard or community-based. A community-based application is “operated for the benefit of a clearly delineated community,”<sup>56</sup> and thus only members of that community would be able to acquire second-level domain names in that TLD. Applicant who has submitted a community-based application must then proceed with the CPE. The application is reviewed by a third-party CPE Provider during the CPE to determine if the application meets the CPE criteria<sup>57</sup>.
- (67) If an applicant chose to proceed with a CPE, its community-based application was forwarded to the EIU, which was the CPE Provider retained by ICANN to conduct the independent CPE analyses. A panel from the CPE Provider (“**CPE Panel**”) then evaluated the application against four criteria set forth in the Applicant Guidebook for community-based applications and issued a report. If an application prevailed in CPE, that application would be given priority over the other standard (non-community) applications for the same gTLD, none of which would proceed<sup>58</sup>.
- (68) The Respondent received seven applications for .HOTEL. Only one of the applicants, HTLD, elected to submit its application as community-based on behalf of the “*hotel community*,” and thus proceeded to a CPE. In June 2014, the CPE Provider issued its report indicating that HTLD’s .HOTEL application had been awarded 15 points, which was sufficient to prevail in CPE under the Guidebook<sup>59</sup>.
- (69) Thus, HTLD’s application was given priority over all other .HOTEL applications – including Claimants’ .HOTEL applications. The next step under the Guidebook would have been for ICANN to execute a Registry Agreement with HTLD to operate .HOTEL. Because HTLD’s application was given priority, this meant that the Claimants’ standard applications for .HOTEL would not proceed<sup>60</sup>.
- (70) On 4 March 2015, following a failed CEP with ICANN, the Despegar Claimants submitted the Request for IRP in relation to ICANN's treatment of the gTLD string .HOTEL in the Despegar

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<sup>55</sup> The Joint Submission, para. (2).

<sup>56</sup> Applicant Guidebook, § 1.2.3.1.

<sup>57</sup> The Joint Submission, para. (3).

<sup>58</sup> The Joint Submission, para. (4); Applicant Guidebook, § 4.2.2.

<sup>59</sup> The Joint Submission, para. (5).

<sup>60</sup> The Joint Submission, para. (5).

IRP<sup>61</sup>. That IRP sought review of ICANN’s denial of prior requests, ICANN’s response to a Documentary Information Disclosure Policy (“**DIDP**”) request relating to the CPE of HTLD’s .HOTEL application, as well as the award of community priority to HTLD. The Despegar Declaration was issued on 11 February 2016.

- (71) The Despegar Claimants also raised a claim that HTLD’s application should be rejected because individuals associated with HTLD allegedly exploited the privacy configuration of ICANN’s new gTLD applicant portal to access confidential data of other applications, including data of the other applicants for the .HOTEL. This resulted from the fact that on 27 February 2015, ICANN had been notified about the security issue related to the privacy settings for the new gTLD applicant. The related portals had been misconfigured. In result, authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) were able to see information belonging to other users without permission (the “**Portal Configuration issue**”)<sup>62</sup>.
- (72) The panel in the Despegar IRP declared ICANN to be the prevailing party. However, the panel noted that the Despegar Claimants raised a number of serious issues, in particular with respect to the CPE process and the Portal Configuration issue, which the Despegar IRP panel considered the Board needed to address<sup>63</sup>.
- (73) On 10 March 2016, ICANN Board approved the March 2016 Resolutions which accepted the findings of the Despegar IRP<sup>64</sup>.
- (74) On 9 August 2016, the Board approved August 2016 Resolutions which related to, *inter alia*, Portal Configuration issue. The Board concluded that cancellation of HTLD’s application for .HOTEL was not warranted and processing HTLD’s application for .HOTEL shall move forward<sup>65</sup>. Separately, the ICANN Board resolved to accept in the August 2016 Resolutions certain findings of the Dot Registry IRP Declaration dated 29 July 2016 in which the Panel declared that Dot Registry was the prevailing party<sup>66</sup>.

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<sup>61</sup> Despegar et al. v. ICANN Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016, para. (2), available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>

<sup>62</sup> New gTLD Applicant and GDD Portal Update dated 1 March 2015 available at: <https://www.icann.org/news/announcement-2015-03-01-en>; New gTLD Applicant and GDD Portal Issue: Questions & Answers / Information for RySG available at: <https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf>.

<sup>63</sup> Despegar Declaration, para. (158).

<sup>64</sup> The ICANN Approved Board Resolutions 2016.03.10.10 – 2016.03.10.11 dated 10 March 2016, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-10-03-2016-en>

<sup>65</sup> The ICANN Approved Board Resolutions 2016.08.09.14 –2016.08.09.15, available at: <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>.

<sup>66</sup> The ICANN Approved Board Resolutions 2016.08.09.11 – 2016.08.09.13, available at: <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>.

- (75) On 25 August 2016, relevant Claimants submitted the Request 16-11<sup>67</sup>. The Claimants sought reconsideration of both actions and inactions of ICANN's Board related to the August 2016 Resolutions published on 11 August 2016<sup>68</sup>.
- (76) While the Request 16-11 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the “**CPE Process Review**”). On 26 April 2017, the BGC determined that the pending requests relating to CPEs, including the Request 16-11, would be placed on hold until the CPE Process Review was completed<sup>69</sup>. FTI Consulting, Inc.’s (“**FTI**”) was retained by Jones Day to conduct the independent CPE Process Review<sup>70</sup>.
- (77) On 26 April 2017, ICANN provided an “*Update on the Review of the New gTLD Community Priority Evaluation Process*” to the Internet community and specifically to relevant Claimants, informing them that consideration of certain reconsideration requests (including the Request 16-11) is on hold pending the completion of the CPE Process Review by FTI<sup>71</sup>.
- (78) On 13 December 2017, ICANN published three CPE Process Review Reports.
- (79) On 15 February 2018, ICANN published the Roadmap which informed that:
- Each of the foregoing requests [including Request 16-11] was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed. Under the Bylaws that were in effect prior to October 2016, the Board delegated to the BGC with the authority to make a final determination on requests regarding staff action...<sup>72</sup>.
- (80) On 15 March 2018, the Board passed the resolutions 2018.03.15.08 through 2018.03.15.11 (“**March 2018 Resolutions**”), which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that (as a result of the findings in the CPE Process Review Reports) there would be no overhaul or change to the CPE process for the then- current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining reconsideration

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<sup>67</sup> The Reconsideration Request 16-11 dated 25 August 2016, available at: <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf> (“**Request 16-11**”)

<sup>68</sup> The Request 16-11, p. 5.

<sup>69</sup> ICANN’s letter dated 26 April 2017 on the update on the Review of the New gTLD Community Priority Evaluation Proces, available at: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

<sup>70</sup> The Joint Submission, para. (16).

<sup>71</sup> The Joint Submission, para. (16).

<sup>72</sup> The Joint Submission, para. (16).

requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review<sup>73</sup>.

- (81) On 27 January 2019, the Board approved the resolution 2019.01.27.23 in which it adopted the BAMC Recommendation to deny the Request 16-11 (“**January 2019 Resolution**”)<sup>74</sup>. There was allegedly no evidence supporting the claim that the Board failed to consider the purported “*unfair advantage*” HTLD obtained as a result of the Portal Configuration issue, nor was there evidence that the Board discriminated against the Claimants. The Board also noted that although the Request 16-11 challenged the Board’s conduct related to the 2016 Resolutions, the Claimants also challenged the Board’s acceptance of the Despegar IRP Declaration. In this regard, the Board agreed with the BAMC’s conclusion that this claim was time-barred<sup>75</sup>.
- (82) In the meantime, on 14 April 2018 relevant Claimants had submitted the Request 18-6, challenging the Board’s March 2018 Resolutions<sup>76</sup>. In addition to the request made in the framework of the Request 16-11, the Claimants requested that – unless ICANN decides to cancel HTLD’s application – ICANN reconsiders the March 2018 Resolutions and reverses the decisions in which the Board (i) accepted the findings of the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for then-current round of the New gTLD Program was necessary, (iii) declared that the CPE Process Review was completed. The Claimants proposed that the Request 18-6 be handled together with the Request 16-11<sup>77</sup>.
- (83) On 19 May 2018, the Request 18-6 was sent to the Ombudsman for review and consideration. On 23 May 2018, the Ombudsman recused himself from considering this Request<sup>78</sup>.
- (84) On 18 July 2018, the ICANN Board approved the resolution 2018.07.18.09 which adopted the BAMC Recommendation to deny the Request 18-6<sup>79</sup>.

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<sup>73</sup> The ICANN Approved Board Resolutions 2018.03.15.08 through 2018.03.15.11 dated 15 March 2018, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-15-03-2018-en#2.e>

<sup>74</sup> The ICANN Approved Board Resolution 2019.01.27.23 dated 27 January 2019, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

<sup>75</sup> The ICANN Approved Board Resolution 2019.01.27.23 dated 27 January 2019.

<sup>76</sup> The Reconsideration Request 18-6 dated 14 April 2018, available at: <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf> (“**Request 18-6**”).

<sup>77</sup> The Request 18-6, p. 7.

<sup>78</sup> Email correspondence between ICANN and Ombudsman Herb Waye, available at: <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

<sup>79</sup> The ICANN Approved Board Resolution 2018.07.18.09, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

- (85) On 2 October 2018, the Claimants initiated the CEP with ICANN as a precursor to instituting an IRP<sup>80</sup>.
- (86) On 27 January 2019, the ICANN Board approved the resolution 2019.01.27.23 adopting the BAMC Recommendation to deny the Request 16-11<sup>81</sup>.
- (87) On 18 November 2019, the CEP was closed<sup>82</sup>.
- (88) On 16 December 2019, the Claimants initiated this IRP<sup>83</sup>.

**D. *The Panel’s decision on the merits of the Motion***

- (89) The Panel will now move to the analysis of the particular Claimants’ claims in the view of the Respondent’s arguments that they are time-barred.

**1. The acquisition of HTLD by Afilias**

- (90) The Respondent requests in the first place that the Panel dismiss any Claimants’ claims or challenges related to 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<sup>84</sup>.
- (91) In Section V.2.D of Claimants’ IRP Request the 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*”.
- (92) The Claimants have disputed the manner in which the Respondent cited (summed up) in the Motion the Claimants’ claims included in the IRP Request. The Claimants clarifies that:

in their fourth claim for review, Claimants did not and do not generally challenge the “acquisition of HTLD by Afilias” as ICANN says. (...) In other words, and in context of Claimants’ first three IRP claims for review, **the Claimants specifically challenge that ICANN has not required a new Community Priority Evaluation as to Afilias’.Hotel application**, as part of or since ICANN’s acceptance of the CPE Review and/or the Dot Registry Final Declaration, or after revelation of HTLD’s theft of Claimants’ and other competitors’ highly confidential trade secrets. Those investigations each revealed substantial inconsistencies and misconduct in ICANN’s handling of the CPE processes for HTLD’s .Hotel application and other applications for other gTLD strings, the CPE Process Review, and the HTLD theft investigation -- as alleged throughout Claimants’ IRP Request<sup>85</sup>.

- (93) The Claimants further argue that this claim is not time barred, because:

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<sup>80</sup> The Joint Submission, para. (16).  
<sup>81</sup> The ICANN Approved Board Resolution 2019.01.27.23.  
<sup>82</sup> The Joint Submission, para. (16).  
<sup>83</sup> The Joint Submission, para. (16).  
<sup>84</sup> The Respondent’s Reply in Support of the Motion, para. (3).  
<sup>85</sup> The Claimants’ Opposition, paras. (10)-(11).

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<sup>86</sup>.

(94) The Panel considers that it does not result from the case evidence that at any time prior to this IRP the Claimants indeed challenged "*that ICANN has not required a new Community Priority Evaluation as to Afilias'.Hotel application*".

(95) By the letter dated 23 March 2016 HTLD notified ICANN that Afilias would be acquiring HTLD<sup>87</sup>:

Afilias plc, the majority shareholder of Applicant, and the GmbH have agreed that the GmbH shall transfer its shares in Applicant to Afilias plc. (...) Afilias plc will in the near future be the sole shareholder of Applicant, and there will not be any corporate relationship between Applicant and the GmbH. (...)

(96) The Board informed in its August 2016 Resolutions, which were made publicly available on 11 August 2016, that:

Lastly, Mr. Grabensee noted the following recent changes to HTLD's relationship with Mr. Krischenowski: (i) the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015; (ii) Mr. Krischenowski stepped down as a managing director of GmbH Berlin effective 18 March 2016; (iii) Mr. Krischenowski's wholly-owned company transferred its 50% shares in GmbH Berlin to Ms. Ohlmer (via her wholly-owned company); (iv) **GmbH Berlin will transfer its shares in HTLD to Afilias plc**; and (v) Mr. Grabensee is now the sole Managing Director of HTLD<sup>88</sup>.

(97) The Claimants challenged 2016 Resolutions in the Request 16-11 dated 25 August 2016. However, the Claimants did not directly formulate any claim related to the acquisition of HTLD by Afilias or specifically, any claim "*that ICANN has not required a new Community Priority Evaluation as to Afilias'.Hotel application*". The following part of the Reconsideration Request 16-11 relate, to the certain extant, to this matter:

C. The ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application

HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. It seems that ultimately HTLD was

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<sup>86</sup> The Claimants' Sur-Reply Brief in Opposition to the Motion, para. (7).

<sup>87</sup> The letter from HTLD to ICANN dated 23 March 2016 available at: <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>

<sup>88</sup> The August 2016 Resolutions, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-special-meeting-of-the-icann-board-09-08-2016-en>

paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afilias.

After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.

One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).

The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. **The sale to Afilias of shares (or Afilias' promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds. The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed.**

Moreover, the ICANN Board cannot ignore the fact that HTLD made these changes only after it was informed that ICANN was taking the matter seriously, and more than two years after it had obtained illegal access to trade secrets of competitors. HTLD claims that it only learned about Mr. Krischenowski's illegal actions on 30 April 2015. This claim — however doubtful it may be — cannot be made for the illegal actions of HTLD's CEO, Ms. Ohlmer. Moreover, HTLD kept Mr. Krischenowski on as a consultant until 31 December 2015. He also remained the managing director of a HTLD-related company and a major shareholder. Ms. Ohlmer remained CEO until long after her misdeeds, and she even acquired shares in HTLD after ICANN had informed HTLD it was taking the situation seriously. The ICANN Board now turning a blind eye to HTLD's misdeeds contradicts that ICANN is taking the situation seriously<sup>89</sup>.

- (98) As results from the above, the Claimants indeed refer in the Request 16-11 to the acquisition of HTLD by Afilias. However, the Claimants did not directly challenge “*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*”, as stated in the IRP Request. The Claimants have rather formulated in the Request 16-11 the arguments supporting its allegation that, *i.a.*, “*ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application*”. Then, the Claimants made the following request:

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<sup>89</sup> The Request 16-11, pp. 18-19.

ICANN to reverse the Decision. **The ICANN Board is requested to declare that HTLD’s application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary.** (...) In the unlikely event that the ICANN Board does not decide to cancel HTLD's application immediately, **Requesters request that the ICANN Board takes the necessary steps to ensure a meaningful review of the CPE regarding .hotel,** ensuring consistency of approach with its handling of the Dot Registry case.

(99) In addition to the requests made in the Request 16-11, the Claimants requested in the Request 18-6, *i.a.*, that:

– **unless ICANN finally decides to cancel HTLD’s application** – ICANN reconsiders the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 and reverses the decisions in which the ICANN Board (i) accepted the findings set forth in the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary, (iii) declared that the CPE Process Review has been completed.

(100) Thus, the Claimants indeed requested in the Request 16-11, as well as in the Request 18-6, that the Respondent reviews its decision regarding the HTLD's application for .hotel. The Claimants have not, however, specifically challenged “*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*” in those Requests. In consequence, the Panel concludes that the Claimants bring up this challenge for the first time in this IRP.

(101) The Panel recalls that the Board informed the public about the acquisition of HTLD by Afiliis in the August 2016 Resolutions published on 11 August 2016<sup>90</sup>. At the time the 2016 Resolutions were adopted and published on 11 August 2016, and further, at the time the Claimants submitted the Request 16-11 on 25 August 2016, the February Bylaws 2016 applied. In accordance with Art. IV.2.5:

**All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:**

- a. **for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution**, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
- b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
- c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

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<sup>90</sup> The August 2016 Resolutions, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-special-meeting-of-the-icann-board-09-08-2016-en>

- (102) Given that the Panel concluded that the Claimants have not challenged “*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*” prior to this IRP, and particularly in the Requests 16-11 and 18-6, **this claim is time-barred.**
- (103) Next, pursuant to Art. IV.3.2 and 3.3 of the February Bylaws 2016:
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
  3. **A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.** Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
- (104) In the present case the Claimants submitted the IRP Request on 19 December 2019, following the failed CEP initiated on 2 October 2018. Again, given that the Panel concluded that the Claimants have not challenged “*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*” prior to this IRP, the deadlines for filing a request for independent review established in Art. IV. 3.2 and 3.3 of the February Bylaws 2016 **have not been met.**
- (105) The Panel reaches the same conclusions applying Rule 4 of the Interim Supplementary Procedures which states that:
- An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. 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. (...)
- (106) In the present case the IRP Request challenging for the first time “*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*” was submitted more than 120 days after the August 2016 Resolutions were published on 11 August 2016 informing the public about the acquisition of HTLD by Afilias.
- (107) The Claimants argue 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*"<sup>91</sup>.

- (108) **The Panel disagrees.** The Claimants could have or at least, should have become aware of the acquisition of HTLD by Afilias as soon as the August 2016 Resolutions were published on 11 August 2016. In no part of these Resolutions does ICANN discuss a new CPE (or even a possibility thereof) with respect to Afilias' .Hotel application, even though it informs the public about the transfer of the shares in HTLD to Afilias<sup>92</sup>. Moreover, the Claimants challenged 2016 Resolutions in the Request 16-11 dated 25 August 2016. Thus, at least on 25 August 2016 the Claimants were aware of the acquisition of HTLD by Afilias, as well as of the lack of declaration on the part of ICANN that it would require Afilias to pass CPE. The Claimants did not, however, challenge "*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*" prior to this IRP.
- (109) Finally, the Claimants argue that "*ICANN's failure to require CPE is ongoing, and violates its Bylaws as alleged in the IRP Request*"<sup>93</sup>. This, as Panel understands, forms also the argument to support the statement that the Claimants' claim at hand is not time-barred. However, as also noted by the Respondent<sup>94</sup>, the Claimants do not present any legal ground for the contention that statute of limitation does not run in the case of "*ongoing*" violations of ICANN.
- (110) Given the above, **the Panel GRANTS** the Respondent's request to dismiss any Claimants' claims or challenges related to 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.

## 2. The decision in the Despegar IRP

- (111) Second, the Respondent requests that the Panel dismiss any claims or challenges related to 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 EIU on HTLD's application, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request<sup>95</sup>.

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<sup>91</sup> The Claimants' Sur-Reply in Opposition to the Motion, para. (7).

<sup>92</sup> The August 2016 Resolutions, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-special-meeting-of-the-icann-board-09-08-2016-en>

<sup>93</sup> The Claimants' Opposition to the Motion, para. (13).

<sup>94</sup> The Respondent's Reply in Support of the Motion, para. (16).

<sup>95</sup> The Reply in Support of the Motion, point 3.

- (112) In the Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request the Claimants list the following actions or inaction to be reviewed in this IRP<sup>96</sup>:

*2. Important Substantive Issues to Be Decided in this IRP*

*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.*

*(...)*

*b. DotRegistry IRP and FTI's report reveals a lack of independence of EIU*

*c. ICANN Materially Misled Claimants and the Despegar IRP Panel*

*B. Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after DotRegistry*

- (113) In their Opposition to the Motion, the Claimants elaborate:

22. Claimants state three subparts to their first claim for review, all of which were addressed in RFR 16-11 and/or RFR 18-6. **None of those claims could have arisen until after both the *Dot Registry* decision and the completion of the CPE Process Review.** As Claimants have specifically alleged in their IRP Request, 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. That existence of such evidence was not ultimately disclosed until the Dot Registry Final Declaration and publication of the CPE Review Reports, only after ICANN had lied to the Dot Registry panel about the very existence of such evidence.

23. Claimants simply could not have known about that evidence until after those publications. Claimants timely requested that info via RFR 16-11, but ICANN refused to provide it and still refuses to provide it. **It was not until ICANN denied the RFR that Claimants became aware that ICANN would not provide the evidence -- unless and until an IRP panel (again) orders them to produce it. In this IRP, Claimants challenge ICANN's denial of those RFRs, including ICANN's refusal to produce evidence.** Those claims are not time-barred. (...)

30. Then later the RFR 16-11 was put 'on hold' by ICANN for two years, and not decided until January 2019, along with RFR 18-6. **Claimants then timely sought Cooperative Engagement with ICANN as to ICANN's refusal of both RFRs – in their entirety. The CEP tolled Claimants' time to file a Request for IRP until that Request was timely filed in November 2019.** Therefore, no claims made within Claimants' RFR 16-11 are time-barred.

- (114) The Panel will start with recalling the basic facts of the case surrounding the above-referred Claimants' claims.

- (115) The Despegar Declaration was issued on 11 February 2016. The Despegar panel declared ICANN to be the prevailing party. However, the panel noted that the Despegar Claimants raised a number of serious issues, in particular with respect to the CPE process and the Portal Configuration issue, which gave cause for concern and which the Despegar IRP panel considered the Board needed to address<sup>97</sup>.

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<sup>96</sup> The IRP Request, p. 2.

<sup>97</sup> Despegar Declaration, para. (158).

- (116) In particular, the Despegar panel noted that many general complaints were made by the Despegar Claimants as to such issues as ICANN's selection process in appointing EIU as the CPE Panel, the process followed by EIU in considering community based applications, or the provisions of the Applicant Guidebook. However, the Despegar Claimants agreed at the hearing that relief was not being sought in respect of these issues<sup>98</sup>. Moreover, the Despegar panel submitted that it felt strongly that there needs to be a consistency of approach in making CPE evaluations<sup>99</sup>.
- (117) The panel in the Despegar IRP then decided that although the Despegar Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the reconsideration request. Moreover, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the claimants' DIDP request in the .hotel IRP, the IRP in relation to that rejection was also going to fail given the clarification by the BGC, in its denial of the reconsideration request, of the process that was followed<sup>100</sup>.
- (118) With respect to the Portal Configuration issue, the panel in the Despegar IRP noted that the approach taken by the ICANN Board in relation to this issue did not comply with the Bylaws:

134. (...) It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

**135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.**

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

**(...) 138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue<sup>101</sup>.**

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<sup>98</sup> Despegar Declaration, para. (143).

<sup>99</sup> Despegar Declaration, para. 147.

<sup>100</sup> Despegar Declaration, para. 155.

<sup>101</sup> Despegar Declaration, paras. (134)-(138).

- (119) On 10 March 2016, ICANN’s Board approved the March 2016 Resolutions which accepted the findings of the Despegar Declaration. The Board noted the Despegar panel’s suggestions, and: (1) directed the President and CEO, or his designee(s), to ensure that the New gTLD Program Reviews take into consideration the issues raised by the Despegar IRP Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations; (2) encouraged ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents; (3) affirmed that, as appropriate, ICANN will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of ICANN’s Articles of Incorporation (“**AoI**”); and (4) directed the President and CEO, or his designee(s), to complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation<sup>102</sup>.
- (120) On 29 July 2016, the Final Declaration in another IRP was issued, namely in the Dot Registry IRP. This IRP was initiated by Dot Registry, LLC (“**Dot Registry**”) who challenged the BGC’s denial of Dot Registry’s reconsideration requests regarding the CPE reports finding that Dot Registry’s applications for .INC, .LLC, and .LLP, respectively, did not prevail in CPE<sup>103</sup>.
- (121) The Dot Registry requested that the panel makes a declaration:
- a) that the Board breached its Articles, its Bylaws and the AGB<sup>104</sup> including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry’s applications;
  - b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry’s CPE applications for .inc, .llc, and .llp and by treating Dot Registry’s applications discriminatorily;
  - c) that Dot Registry’s CPE applications for the .inc, llc, and .llp strings satisfy the CPE criteria set forth in the AGB and that Dot Registry’s applications are entitled to community priority status (...)<sup>105</sup>
- (122) The Dot Registry Panel majority concluded under the circumstances of that case that:
93. Moreover, **EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process.** The ICANN staff supplied continuing and important input on the CPE reports. (...)

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<sup>102</sup> The March 2016 Resolutions, available at: <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

<sup>103</sup> Dot Registry Declaration, available at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

<sup>104</sup> Applicant Guidebook setting forth the evaluation criteria and process for new gTLD applications (“**AGB**”).

<sup>105</sup> Dot Registry Declaration, available at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

111. Indeed, **the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations.** It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it. (...)

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws.

152. (...) Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. (...)

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. (...) <sup>106</sup>.

- (123) The ICANN Board accepted the Dot Registry Declaration on 9 August 2016 through the August 2016 Resolutions. The Board noted the Panel majority's statements with respect to the standard of review for reconsideration requests, and declared that it would consider next steps in relation to Dot Registry's reconsideration requests or the relevant new gTLDs before the Board takes any further action <sup>107</sup>.
- (124) On 25 August 2016, relevant Claimants submitted the Request 16-11.
- (125) The Claimants sought reconsideration of both actions and inactions of ICANN's Board related to the August 2016 Resolutions <sup>108</sup>. The Claimants claimed that ICANN violated its AoI, Bylaws and policy by giving undue priority to HTLD's application for .hotel that refers to a "community" and by awarding the .hotel gTLD to an unreliable applicant <sup>109</sup>. According to the Claimants, the ICANN Board failed to consider the impact of the Dot Registry Declaration and did not offer the Claimants a meaningful review of their complaints regarding HTLD's application for .hotel. Meanwhile, the Claimants suffered from the same violations of ICANN's AoI and Bylaws, as recognized in the Dot Registry case <sup>110</sup>.

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<sup>106</sup> Dot Registry Declaration, available at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

<sup>107</sup> The August 2016 Resolutions, available at: <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>

<sup>108</sup> The Request 16-11, p. 5.

<sup>109</sup> The Request 16-11, p. 6.

<sup>110</sup> The Request 16-11, p. 8.

- (126) In the Claimants' view, the Board's acceptance of the Dot Registry Declaration was incompatible with the Board's acceptance of the Despegar Declaration. The Board could only have accepted both IRP Declarations if it had addressed the insufficiencies of the CPE process, as recommended in the Despegar Declaration. The reason why the Dot Registry Panel came to the opposite conclusion to the Despegar IRP Panel, is because (as revealed in the Dot Registry IRP Declaration) the Despegar Panel relied on false and inaccurate material information. When the ICANN Board accepted the Despegar Declaration, it relied on the same false and inaccurate material information<sup>111</sup>.
- (127) The Claimants further submitted that the Despegar Panel's conclusion that the insufficiencies of the CPE process did not amount to a violation of ICANN's AoI, Bylaws and core values was based upon the premise that the EIU was not mandated to apply ICANN's core values, and upon the false premise that the EIU's determinations are presumptively final and are made independently by the EIU, without ICANN's active involvement. In this respect, ICANN informed the Claimants and the Despegar Panel that because of the EIU's role as the panel firm, ICANN does not have any communications with the evaluators that identify the scoring of any individual CPE. The Despegar Panel proceeded upon this premise. However, the Dot Registry Declaration has shown that this was false. The Dot Registry Declaration revealed that ICANN staff was intimately involved in the CPE. Thus, the EIU cannot be qualified as a panel firm or independent evaluator<sup>112</sup>.
- (128) Moreover, the Claimants submitted in the Request 16-11 that the fact that the above material information was hidden from the Claimants and the Despegar Panel is a transparency violation. The Claimants specifically asked for all communications, agreements between ICANN and the CPE Panel. The Claimants and the Despegar Panel were told by ICANN staff and the ICANN Board that this information was non-existent and/or could not be disclosed. However, the Dot Registry Declaration revealed that ICANN did possess information that was afterwards disclosed to Dot Registry<sup>113</sup>.
- (129) Moreover, the Claimants submitted that the Board failed to consider and properly investigate the illegal access of sensitive business information and unfair competitive advantage HTLD obtained by accessing trade secrets of competing prospective registry operators through the Portal Configuration issue<sup>114</sup>.
- (130) The Claimants asked ICANN, *i.a.*, to reverse its decision and declare that HTLD's application for .hotel is cancelled. In the event that the Board does not decide to do that, the Claimants

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<sup>111</sup> The Request 16-11, p. 9.

<sup>112</sup> The Request 16-11 p. 12.

<sup>113</sup> The Request 16-11 p. 14.

<sup>114</sup> The Request 16-11, p. 9; 14.

requested that the Board takes the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the Dot Registry case<sup>115</sup>.

- (131) This Panel will start with the observation that, in its view, the Claimants' claims discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request were indeed referred to in the Request 16-11.
- (132) On 27 January 2019, the Board approved the January 2019 Resolution in which it adopted the BAMC Recommendation to deny the Request 16-11<sup>116</sup>. The Board noted, *inter alia*, that Request 16-11 challenged the Board's acceptance of the Despegar Declaration. The Board agreed with the BAMC's conclusion that this claim was time-barred, as the Request 16-11 was submitted on 25 August 2016, over five months after the Board's acceptance of the Despegar Declaration on 10 March 2016, and well past the 15-day time limit to seek reconsideration of a Board action.
- (133) **The Panel disagrees with the BAMC's and Board's finding that the Claimants' claims discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request, covered by the Request 16-11, is time-barred.**
- (134) At the time that the August 2016 Resolutions were published on 11 August 2016 and the relevant Claimants submitted the Request 16-11 dated 25 August 2016, the February Bylaws 2016 applied. In accordance with Art. IV.2.5:

All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:

- a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
  - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
  - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
- (135) The Claimants sought in the Request 16-11 reconsideration of both actions and inactions of ICANN's Board of Directors related to the August 2016 Resolutions published on 11 August

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<sup>115</sup> The Request 16-11, p. 20.

<sup>116</sup> The January 2016 Resolution, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

2016. These August 2016 Resolutions accepted, among others, certain findings of the Dot Registry Declaration dated 29 July 2016<sup>117</sup>.

- (136) What is of particular importance, in the Request 16-11 the Claimants referred to the facts and documents that were previously unknown to the Despegar Panel and were disclosed as a result of the Dot Registry IRP, as well as to the inconsistency in the Board's acceptance of the Despegar Declaration and Dot Registry Declaration, which could also only occur after the Board accepted the Dot Registry Declaration. These documents and facts, such as revealed involvement of ICANN in the CPEs and lack of independence on the part of the EIU, could potentially have had the impact on the ICANN's decision on the HTLD's application for .hotel, in which the Claimants have interest. Thus, number of arguments and allegations could have been brought by the Claimants only after the Dot Registry Declaration and its acceptance by the Board through the August 2016 Resolutions published on 11 August 2016.
- (137) Thus, **the Panel agrees with the Claimants arguing that none of the claims discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request could have arisen until after the Dot Registry decision**<sup>118</sup>.
- (138) Moreover, in the March 2016 Resolutions which accepted the findings of the Despegar IRP, the Board noted the Despegar panel's suggestions, and resolved that it:

(1) directs the President and CEO, or his designee(s), to ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations; (2) encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents; (3) affirms that, as appropriate, ICANN will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of ICANN's Articles of Incorporation; and (4) **directs the President and CEO, or his designee(s), to complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation.**

- (139) It was in the August 2016 Resolutions that the Board confirmed that "*cancellation of HTLD's application for .HOTEL is not warranted*" and "*the Board directs the President and CEO, or his designee(s), to move forward with processing HTLD's application for .HOTEL*", given that:

(...)ICANN's forensic investigation of the portal issue determined that Mr. Krischenowski's unauthorized access to confidential information did not occur until after HTLD submitted its application in 2012 and after HTLD elected to participate in CPE on 19 February 2014.

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<sup>117</sup> The Request 16-11, p. 5.

<sup>118</sup> The Claimants' Opposition to the Motion, para. (22).

Whereas, ICANN has not uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE.

- (140) In sum, given that the August 2016 Resolutions were published on 11 August 2016 and the relevant Claimants submitted the Request 16-11 challenging these Resolutions on 25 August 2016, the Request 16-11 was submitted timely. **The Panel considers that any claims or challenges related to the decision in the Despegar IRP contained therein, including both direct and indirect challenges to that Final Declaration and the evidentiary record on which it was based, as well as all the challenges to the underlying CPE performed by the EIU on HTLD's application, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request, were also submitted timely.**
- (141) Next, on 15 March 2018, the Board passed and published the March 2018 Resolutions which, *i.a.*, accepted the findings set forth in the CPE Process Review Reports and declared that the CPE Process Review was complete<sup>119</sup>. On 14 April 2018 relevant Claimants submitted Request 18-6, challenging the Board's March 2018 Resolutions.
- (142) As of April 14, 2018 the ICANN's Bylaws as amended 22 July 2017 ("**July 2017 Bylaws**") were in force. Article IV, Section 4.2 (g) thereof state that:
- (g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Accountability Mechanisms Committee:
  - (i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:
    - (A)for requests challenging Board actions, **within 30 days after the date on which information about the challenged Board action is first published in a resolution**, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;
    - (B)for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or
    - (C)for requests challenging either Board or Staff inaction, **within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.**
  - (ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.
- (143) Thus, given that the March 2018 Resolutions were published on 15 March 2018, and the relevant Claimants submitted Request 18-6 on 14 April 2018 challenging these March 2018

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<sup>119</sup> The March 2018 Resolutions, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-15-03-2018-en#2.e>

Resolutions “*in addition to the Request, made in the framework of Reconsideration Request 16-11*”, the Request 18-6 was submitted timely within 30 days deadline established in Article IV.4.2 (g)(A) of the July 2017 Bylaws.

- (144) On 18 July 2018, the ICANN Board approved the resolution 2018.07.18.09 which adopted the BAMC Recommendation to deny the Request 18-6<sup>120</sup>. On 27 January 2019, the Board approved the January 2019 Resolution in which it adopted the BAMC Recommendation to deny also the Request 16-11<sup>121</sup>.
- (145) In the meantime, on 2 October 2018, the Claimants initiated the CEP with ICANN as a precursor to instituting an IRP<sup>122</sup>. The Panel notes the Claimants’ clarification that the CEP was already pending when the Request 16-11 was denied on 27 January 2019, as the CEP discussions between ICANN and the Claimants were intertwined as to both Requests 16-11 and 18-6<sup>123</sup>.
- (146) In the Panel’s view, **the Claimants timely initiated the CEP with ICANN as a precursor to instituting an IRP**. Under Rule 4 of the Interim Supplementary Procedures:

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. 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. (...)

- (147) In accordance with Art. IV, § 3.14 of the ICANN’s February 2016 Bylaws which applied at the time when the relevant Claimants submitted the Request 16-11:

14. Prior to initiating a request for independent review, **the complainant is urged to enter into a period of cooperative engagement with ICANN** for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. (...)

- (148) Next, in accordance with Art. IV.3(e)(i) of the July 2017 Bylaws which applied when the relevant Claimants submitted Request 18-6 on 14 April 2018:

(e) Cooperative Engagement Process

(i) Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, **the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("CEP")** for the purpose of attempting to resolve and/or narrow the Dispute.

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<sup>120</sup> The ICANN Approved Board Resolution 2018.07.18.09, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

<sup>121</sup> The January 2019 Resolution, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

<sup>122</sup> The Joint Submission, para. (16).

<sup>123</sup> The Respondent’s Reply in Support of the Motion, para. (20).

CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.

- (149) Thus, the CEP was initiated by the Claimants timely on 2 October 2018. In consequence, it tolled the statute of limitations on the Claimants' claims submitted in this IRP. The CEP was closed on 18 November 2019 and then, the Claimants initiated this IRP on 16 December 2019. Given the above, the claims discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request are not time-barred.
- (150) The Panel wishes to emphasize the validity and ongoing applicability of the Despegar Declaration on the merits. Accordingly, what this Panel concludes in this IRP is 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 discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request which do not seek or lead to such an unwarranted result.
- (151) Having considered the above, the Panel DENIES the Respondent's request to dismiss any claims or challenges related to the decision in the Despegar IRP, as well as challenges to the underlying CPE performed by the EIU on HTLD's application, as discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request, subject to paragraph (150) above.

### **3. The Dot Registry Final Declaration**

- (152) Third, the Respondent requests that the Panel dismiss any claims or challenges related to the Dot Registry 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<sup>124</sup>.
- (153) The Panel reiterates that in the Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request the Claimants list the following actions or inaction to be reviewed in this IRP:

*2. Important Substantive Issues to Be Decided in this IRP*

*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.*

*(...)*

*b. DotRegistry IRP and FTI's report reveals a lack of independence of EIU*

*c. ICANN Materially Misled Claimants and the Despegar IRP Panel*

*B. Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after DotRegistry<sup>125</sup>.*

- (154) As recalled above, the Dot Registry Declaration was issued on 29 July 2016. In that IRP the Panel declared that Dot Registry was the prevailing party. The Dot Registry Panel majority

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<sup>124</sup> The Respondent's Reply in Support of the Motion, para. (3).

<sup>125</sup> The IRP Request, p. 2.

found that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the determined actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws<sup>126</sup>.

- (155) In particular, the Dot Registry Panel majority found that the EIU did not act on its own in performing the CPEs, but ICANN staff was intimately involved in the process<sup>127</sup>. Also, the Dot Registry Panel majority found the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations<sup>128</sup>. The Panel majority further concluded that the evidence did not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions<sup>129</sup>. The Panel, however, declined to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority<sup>130</sup>. The ICANN Board accepted the Dot Registry Declaration on 9 August 2016 through the August 2016 Resolutions.
- (156) On 25 August 2016, relevant Claimants submitted the Request 16-11 challenging the August 2016 Resolutions. The Claimants submitted that the ICANN Board failed to consider the impact of the Dot Registry Declaration on their case. According to the Claimants, the ICANN Board did not offer them a review of their complaints regarding HTLD's application for .hotel, while the Claimants suffered from the same violations of ICANN's AoI and Bylaws, as recognized in the Dot Registry Declaration<sup>131</sup>.
- (157) In the Claimants' view, the ICANN Board's acceptance of the Dot Registry Declaration was incompatible with the acceptance of the Despegar Declaration. The reason why the Dot Registry Panel came to the opposite conclusion to the Despegar IRP Panel, is because (as revealed in the Dot Registry Declaration) the Despegar Panel relied on false and inaccurate material information<sup>132</sup>. Moreover, the Claimants submitted that the Board failed to consider the unfair competitive advantage HTLD obtained in the consequence of the Portal Configuration issue and failed to take material action in respect thereof<sup>133</sup>.
- (158) As noted above, the Claimants asked ICANN, *i.a.*, to declare that HTLD's application for .hotel is cancelled. In the event that the Board does not decide to do that, the Claimants requested that the Board takes the necessary steps to ensure a meaningful review of the CPE

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<sup>126</sup> Dot Registry Declaration, para. (151).

<sup>127</sup> Dot Registry Declaration para. (93).

<sup>128</sup> Dot Registry Declaration para. (111).

<sup>129</sup> Dot Registry Declaration, para. (152).

<sup>130</sup> Dot Registry Declaration para. (153).

<sup>131</sup> The Request 16-11, p. 8.

<sup>132</sup> The Request 16-11, p. 9.

<sup>133</sup> The Request 16-11, p. 9; 14.

regarding .hotel, ensuring consistency of approach with its handling of the Dot Registry case<sup>134</sup>.

- (159) The Panel recalls again that as of 9 August 2016, when the Board approved the August 2016 Resolutions accepting certain findings of the Dot Registry Declaration, the February Bylaws 2016 applied. In accordance with Art. IV.2.5:

All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:

- a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
- b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
- c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

- (160) The relevant Claimants submitted the Request 16-11 challenging the August 2016 Resolutions on 25 August 2016, thus within the established in Art. IV, § 2.5(a) of the ICANN's February Bylaws 2016.

- (161) As already established by this Panel, the Claimants' claims discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request were indeed referred to in the Request 16-11.

- (162) In this Request 16-11, as indicated above, the Claimants referred to the facts and documents that were disclosed only in the Dot Registry IRP. The findings of the Panel in the Dot Registry IRP could potentially have had the impact on the ICANN's decision on the HTLD's application for .hotel (including the question of assessment of the CPE regarding .hotel), in which the Claimants have interest. Thus, number of arguments and allegations could have been brought by the Claimants only after the Dot Registry Declaration and its acceptance by the Board in through the August 2016 Resolutions published on 11 August 2016. In sum, given that the relevant Claimants submitted the Request 16-11 challenging the August 2016 Resolutions on 25 August 2016, that Request was submitted timely.

- (163) Moreover, on 15 March 2018, the Board passed and published the March 2018 Resolutions which, *i.a.*, accepted the findings set forth in the CPE Process Review Reports and declared that the CPE Process Review was complete<sup>135</sup>. On 14 April 2018, relevant Claimants submitted timely the Request 18-6 challenging the Board's March 2018 Resolutions. For the

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<sup>134</sup> The Request 16-11, p. 20.

<sup>135</sup> The March 2018 Resolutions, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-15-03-2018-en#2.e>

relevant analysis of the legal provisions establishing the deadline for the Claimants to submit the Request 18-6, the Panel refers to the paras. (141)-(143) of the present Decision.

- (164) On 18 July 2018, the ICANN Board approved Resolution 2018.07.18.09 which adopted the BAMC Recommendation to deny the Request 18-6<sup>136</sup> challenging the March 2018 Resolutions “*in addition to the Request, made in the framework of Reconsideration Request 16-11*”. Moreover, on 27 January 2019, the Board approved the January 2019 Resolution in which it adopted the BAMC Recommendation to deny also the Request 16-11<sup>137</sup>.
- (165) In the meantime, on 2 October 2018, the Claimants initiated the CEP with ICANN as a precursor to instituting an IRP<sup>138</sup>. As noted above, in the Panel’s view, the Claimants timely initiated the CEP with ICANN as a precursor to instituting an IRP. In consequence, it tolled the statute of limitation on the Claimants’ claims submitted in this IRP. The CEP was closed on 18 November 2019 and then, the Claimants initiated this IRP on 16 December 2019. For the relevant analysis of the legal provisions establishing the deadlines for the Claimants to initiate the CEP with ICANN and the IRP, the Panel refers to the paras. (145)-(149) of the present Decision.
- (166) Given that Panel considers that any claims or challenges related to the Dot Registry 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<sup>139</sup>, could have been submitted only after the Dot Registry Declaration and its acceptance by the Board in through the August 2016 Resolutions published on 11 August 2016, and given that the Claimant submitted timely the Requests 16-11 and 18-6, those claims and challenges discussed in Sections V.2.A.b, V.2.A.c, and V.2.B of the IRP Request have been submitted timely.
- (167) Having considered the above, the Panel **DENIES** the Respondent’s request to dismiss any claims or challenges related to the Dot Registry 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.

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<sup>136</sup> The ICANN Approved Board Resolution 2018.07.18.09, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

<sup>137</sup> The ICANN Approved Board Resolution 2019.01.27.23 dated 27 January 2019, available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-27-01-2019-en#note1>

<sup>138</sup> The Joint Submission, para. (16).

<sup>139</sup> The Respondent’s Reply in Support of the Motion, para. (3).

#### 4. The Ombudsman review of Reconsideration Requests 16-11 and 18-6

- (168) Fourth, the Respondent requests that the Panel dismiss any claims or challenges related to the Ombudsman review of the Request 16-11 and 18-6, as discussed in Section V.1 of the IRP Request<sup>140</sup>.
- (169) In the Sections V.1 of the IRP Request the Claimants list the following actions or inaction to be reviewed in this IRP: “*V. COVERED ACTIONS OR INACTION TO BE REVIEWED 1. Preliminary Procedural Issues to Be Decided in this IRP*”<sup>141</sup>. In this section of the IRP Request the Claimants submit that they sought Interim Measures of Protection pursuant to Section 10 of the Interim Rules requiring ICANN to, inter alia, immediately appoint an ombudsman to review the BAMC’s decisions in the Requests 16-11 and 18-6, as required by the Bylaws<sup>142</sup>.
- (170) The Claimants maintain that their claim for Ombudsman review is not time-barred, as they have timely filed this IRP after both the Request 16-11 and the Request 18-6 were denied in January 2019. Until that time, it was ICANN’s obligation to provide the Ombudsman review without a request from the Claimants or anyone else. Moreover, until that time, the Claimants could not have known if the BAMC might have engaged another ICANN staff member, or another independent expert to review the Requests<sup>143</sup>.
- (171) The Panel will now recall the basic facts surrounding those Claimants’ claims.
- (172) The relevant Claimants submitted the Request 16-11 on 25 August 2016. At this time, the February 2016 Bylaws applied. Article V.3 provides for the following core duties of the Ombudsman:

##### Section 3. OPERATIONS

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN’s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any

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<sup>140</sup> The Respondent’s Reply in Support of the Motion, para. (3).

<sup>141</sup> The IRP Request, p. 2.

<sup>142</sup> The Claimants’ IRP Request, p. 12.

<sup>143</sup> The Claimant’s Opposition to the Motion, para. (37)

way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN);

4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability;

5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and

6. comply with all ICANN conflicts-of-interest and confidentiality policies.

(173) There is no provision in the February 2016 Bylaws which provide for the ICANN's obligation to provide the Ombudsman review of the reconsideration requests.

(174) Moreover, in addition to the lack of ICANN's obligation to provide the Ombudsman review of the Request 16-11 under the February 2016 Bylaws, the Panel agrees with the Respondent pointing out that the Claimants should have been aware that no such review was part of the process for the Request 16-11 at least as of 15 February 2018, when the Roadmap was publicly posted<sup>144</sup>.

(175) Next, on 14 April 2018, the relevant Claimants submitted the Request 18-6. At that time, the July 2017 Bylaws applied. Those Bylaws, in turn, establish in Article V.3 the following tasks of the Ombudsman:

#### Section 5.3. OPERATIONS

The Office of Ombudsman shall:

(a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;

**(b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;**

(c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

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<sup>144</sup> The Respondent's Motion, para. (34)

- (d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN);
- (e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability;
- (f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and
- (g) comply with all ICANN conflicts of interest and confidentiality policies.

(176) Thus, the July 2017 Bylaws provide explicitly for the review and consideration of the reconsideration requests by the Ombudsman.

(177) In accordance with Article IV.2 (l) of the July 2017 Bylaws:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, **the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.**

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

**(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.**

(178) As results from the above, under Article IV.2 (l)(i) of the July 2017 Bylaws, the Ombudsman shall promptly proceed to review and consider the reconsideration requests which are sent thereto. However, Article IV.2 (l)(iii) of the July 2017 Bylaws foresees the Ombudsman's obligation to recuse himself or herself with respect to those reconsideration requests involving matters for which the Ombudsman has, in advance of the filing of the reconsideration request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way.

- (179) Thus, the Ombudsman obligation to review and consider the reconsideration request is not absolute. There are instances foreseen in the July 2017 Bylaws which prevent the Ombudsman from this review and consideration.
- (180) In the present case, the Request 18-6 submitted on 14 April 2018 was sent to the Ombudsman for review and consideration on 19 May 2018. As results from the email correspondence between ICANN and Ombudsman Herb Waye, the latter recused himself from consideration of the Request 18-6 pursuant to Article IV.4.2(l)(iii) of the July 2017 Bylaws<sup>145</sup>.
- (181) Article IV.2(l) of the July 2017 Bylaws do not require the Ombudsman to state the justification of his or her recusal. On the other hand, it established such a duty in the case that there are grounds for the recusal set forth in Article IV.2(l)(iii) of the July 2017 Bylaws. Given the above, the Panel considers that the Ombudsman recused himself from the consideration of the Request 18-6 in accordance with the Bylaws.
- (182) According to the Claimant, the Requests 16-11 and 18-6 are intertwined. ICANN ceased consideration of the Request 16-11 for about two years, and then considered it at the same time as the Request 18-6. As the Claimants allege, both requests seek much of the same information from ICANN, which was only disclosed and then found dispositive in the Dot Registry Declaration. Therefore, to the extent the Request 18-6 is required to have independent Ombudsman review, the Claimants aver that the Request 16-11 should have the same review<sup>146</sup>.
- (183) **The Panel disagrees.** In this regard, the Panel does not encounter any procedural provision which would back up the statement that the Request 16-11 should be subject to the same Ombudsman review as the Request 18-6 due to the fact that it was put on hold, and then considered at the same time as the Request 18-6, even though at the time the Request 16-11 was submitted no such Ombudsman review was required.
- (184) Having considered the above, the Panel **GRANTS** the Respondent's request that the Panel dismiss any claims or challenges related to the Ombudsman review of the Requests 16-11 and 18-6, as discussed in Section V.1 of the IRP Request.

### ***E. Operative Part***

- (185) Based on the foregoing, the Panel hereby decides that:
1. the Panel has jurisdiction to address and resolve the Motion;
  2. the Motion is not premature;

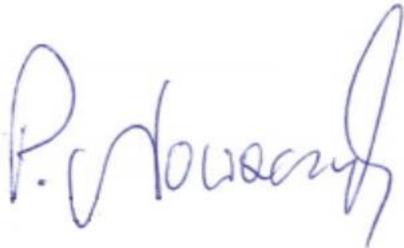
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<sup>145</sup> Email correspondence between ICANN and Ombudsman Herb Waye, available at: <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

<sup>146</sup> The Claimant's Opposition to the Motion, para. (33).

3. the Respondent's request that the Panel dismiss any Claimants' claims or challenges related to 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, IS GRANTED;
4. the Respondent's request that the Panel dismiss any Claimants' claims or challenges related to the decision in the Despegar IRP, 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, IS DENIED;
5. the Respondent's request that the Panel dismiss any Claimants' claims or challenges related to the Dot Registry 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, is DENIED;
6. the Respondent's request that the Panel dismiss any Claimants' claims or challenges related to the Ombudsman review of the Requests 16-11 and 18-6, as discussed in Section V.1 of the IRP Request, IS GRANTED.

Date: 4 April 2023

A handwritten signature in blue ink, appearing to read 'P. Nowaczyk', with a large, stylized flourish extending from the end of the name.

**Piotr Nowaczyk**

*Presiding Panelist, on behalf of the full Panel*