

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOT REGISTRY LLC,) ICDR CASE NO. 01-14-0001-5004
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S POST-HEARING SUBMISSION

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The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the questions that the Panel posed immediately following the 29 March 2016 hearing:

I. IRP PANELS ARE NOT TO SUBSTITUTE THEIR INDEPENDENT JUDGMENT FOR THE JUDGMENT OF ICANN’S BOARD.

1. The Panel has asked the parties to address the issue of what California’s business judgment rule provides and whether the rule is applicable to corporations like ICANN. In California:

The common law “business judgment rule” refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. The business judgment rule is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is one which is “ . . . helpful to the conduct of corporate affairs or expedient for the attainment of corporate purposes . . . ,” and establishes a presumption that directors' decisions are based on sound business judgment.¹

Accordingly, in addition to shielding individual directors from personal liability for exercising their independent business judgment, the business judgment rule also requires deference to actions of a corporate board of directors so long as the board acted “upon reasonable investigation, in good faith and with regard for the best interests of” the corporation, and “exercised discretion clearly within the scope of its authority.”² Courts will therefore scrutinize the decisions of a corporate board only where there are allegations of facts that tend to show that

¹ *Gaillard v. Natomas Co.*, 208 Cal. App. 3d 1250, 1263 (1989) (quoting *Eldridge v. Tymshare, Inc.*, 186 Cal. App. 3d 767, 776 (1986)).

² *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 265 (1999); see also *Lee v. Interinsurance Exchange of Auto. Club of S. Cal.*, 50 Cal. App. 4th 694, 714 (1996) (business judgment rule “insulate[s] from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization’s best interest”); *Frances T. v. Village Green Owners Ass’n*, 42 Cal. 3d 490, 508 n.14 (1986) (noting that judicial deference to corporate boards “exists in one form or another in every American jurisdiction”).

the board's conclusions were made with inadequate information or in bad faith.³ This rule also applies to the boards of non-profit corporations such as ICANN.⁴

2. Only one prior IRP panel has considered the issue of the applicability of the business judgment rule in the context of an independent review proceeding under an earlier version of ICANN's Bylaws. In 2009, in *ICM Registry, LLC v. ICANN* ("ICM IRP"), two of the three members of the panel concluded that:

In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN – as in the RFP – that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.”⁵

The third panelist, the Honorable Dickran Tevrizian (a retired U.S. federal judge), dissented and explained that, in his view, the business judgment rule did apply in independent review proceedings.⁶

3. Following the *ICM* IRP, ICANN (with extensive community input) amended its Bylaws, effective in 2013, in order to specify a “defined standard of review” pursuant to which IRP panels are asked to assess whether contested Board actions are consistent with ICANN's Articles and Bylaws by “focusing on” whether the Board acted “without conflict of interest,” with “due diligence and care in having a reasonable amount of facts in front of them,” and

³ *Lee*, 50 Cal. App. 4th at 715-16 (presumption of sound business judgment is only rebutted by “allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts”).

⁴ *See, e.g., Harvey v. Landing Homeowners Ass'n*, 162 Cal. App. 4th 809, 821-22 (2008).

⁵ *ICM v. ICANN*, Final Determination ¶ 136 (Ex. R-11). *See* <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

⁶ *Id.* at 74-75, 78-79.

“exercis[ing] independent judgment in taking the decision, believed to be in the best interests of the company[.]”⁷

4. This defined standard of review explicitly reflects the principles behind the business judgment rule: where ICANN’s Board has acted “upon reasonable investigation, in good faith and with regard for the best interests of” ICANN,⁸ IRP panels should respect the Board’s exercise of its business judgment. As a result, since the amendment of ICANN’s Bylaws, IRP panels have consistently held that, while the standard of review of Board actions is *de novo*, “it is not for [IRP] [p]anel[s] to opine on whether the Board could have acted differently than it did,”⁹ and IRP panels are “neither asked to, nor allowed to, substitute [their] judgment for that of the Board.”¹⁰

II. ICANN DID NOT REQUIRE THE ECONOMIST INTELLIGENCE UNIT, A THIRD-PARTY PROVIDER, TO ADHERE TO ICANN’S BYLAWS.

5. As explained in ICANN’s Response to Dot Registry’s IRP Request, ICANN staff selected third-party providers to perform the evaluation processes for the New gTLD Program, including the Economist Intelligence Unit (“EIU”), via a public solicitation of expressions of interest.¹¹ The Panel has also asked the parties to provide the “Call for Expressions of Interest” (“EOI”) document issued for a Community Priority Evaluation (“CPE”) provider, and to explain whether that document contained a statement that the selected provider would have to comply with ICANN’s Articles of Incorporation, Bylaws, and/or other ICANN policies and procedures.

⁷ Bylaws, Art. IV, § 3.4.

⁸ *Lamden*, 21 Cal. 4th at 265.

⁹ *Booking.com v. ICANN*, Final Declaration ¶ 115 (Ex. R-5).

¹⁰ *Vistaprint Ltd. v. ICANN*, Final Declaration ¶ 124 (Ex. R-8); *see also Merck kGaa v. ICANN*, Final Declaration ¶¶ 21-22 (Ex. R-9) (IRP panel’s “mandatory focus” in assessing objected-to Board actions are the three elements set forth in Article IV, Section 3.4 of the Bylaws; and “the Panel may not substitute its own view of the merits of the underlying dispute.”).

¹¹ IRP Response ¶ 26.

6. The EOI is attached to this brief as Exhibit R-12. When soliciting expressions of interest, ICANN was concerned that its New gTLD Program providers be aware of ICANN's unique position, and be sensitive to the responsibilities that ICANN bears to its community and to new gTLD applicants. For this reason, the EOI states that the CPE process (which is referred to as "comparative evaluation," the name used in prior versions of the New gTLD Applicant Guidebook) will "respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination,"¹² and the EOI asks that candidates include a "statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency."¹³

7. The language of the EOI did not, however, obligate the EIU, an independent, third-party provider, to adhere to ICANN's Articles or Bylaws. Indeed, the EIU does not reference the Articles or Bylaws. Instead, each candidate was required to "*warrant* that the candidate, if selected, will operate under ICANN's non-disclosure agreement and standard consulting agreement, and that neither the candidate nor any individual who might be engaged to work on this project . . . has a known conflict of interest."¹⁴

8. Similarly, ICANN's contract with the EIU does not contain any statement requiring the EIU to comply with ICANN's Articles or Bylaws or with the values or principles contained therein, however it does explicitly require that the EIU ensure that its panelists comply with ICANN's Conflict of Interest and Code of Conduct Guidelines.¹⁵ Accordingly, nothing in either the EOI or ICANN's contract with the EIU required the EIU to comply with ICANN's Articles or Bylaws.

¹² Call for Expressions of Interest at 5 (Ex. R-12).

¹³ *Id.* at 6.

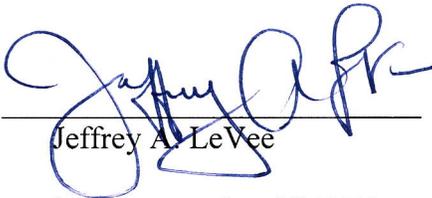
¹⁴ *Id.* (emphasis added)

¹⁵ 12 March 2012 Statement of Work ¶ 4 (Ex. C-40).

Respectfully submitted,

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