

**SUMMARY DISMISSAL
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 20-2
16 JULY 2020**

The Requestor, the Emily Rose Trust, seeks reconsideration of a decision issued in a proceeding that was conducted pursuant to the Uniform Domain Name Dispute Resolution Policy (UDRP).¹ The Requestor asserts that the decision contradicts the ICANN Bylaws, which provide that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”²

I. Brief Summary.

The Requestor was the registrant of the domain name UglyHousesRI.com until HomeVestors of America, Inc. (HomeVestors) successfully prevailed in a UDRP decision against the Requestor, resulting in the transfer of UglyHousesRI.com to HomeVestors (the UDRP Decision).³ The Requestor seeks reconsideration of the UDRP Decision. The Requestor claims that the decision contradicts ICANN’s Bylaws concerning disparate treatment,⁴ and that the Requestor was harmed by the transfer of UglyHousesRI.com to HomeVestors.⁵

Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, ICANN’s Board Accountability Mechanisms Committee (BAMC) is to review the request “to determine if it is sufficiently stated.”⁶ The BAMC has evaluated Request

¹ Request 20-2, § 3, at Pg. 1; *id.* § 8, at Pg. 2; *see also* Decision, *HomeVestors of Am., Inc. v. Emily Rose/NCRS*, Claim No. FA200300188990, 20 May 2020, <https://www.adrforum.com/DomainDecisions/1889990.htm> (UDRP Decision).

² ICANN Bylaws, 28 November 2019, Art. 2, § 2.3.

³ *See* UDRP Decision.

⁴ ICANN Bylaws, 28 November 2019, Art. 2, § 2.3.

⁵ Request 20-2, § 6, at Pg. 2; *id.* § 10, at Pg. 4.

⁶ ICANN Bylaws, Art. 4, § 4.2(k).

20-2 under this standard and concludes that it is not sufficiently stated because the Requestor is not challenging any action or inaction of the ICANN Board or Staff. The BAMC therefore summarily dismisses Request 20-2.⁷

II. Facts.

A. Background Facts.

The Requestor was the registrant of the domain name UglyHousesRI.com. HomeVestors filed a UDRP complaint with The Forum (formerly known as the National Arbitration Forum or NAF), which is one of the dispute resolution service providers responsible for hearing and resolving UDRP disputes.⁸ The UDRP applies to disputes between registrants and third parties over the registration and use of domain names.⁹ HomeVestors asserted that UglyHousesRI.com was confusingly similar to: (i) its slogan “We Buy Ugly Houses,” and (ii) a suite of trademark registrations containing the phrase “ugly houses.”¹⁰ The Requestor opposed the complaint, arguing that the “ugly houses” trademarks are not registered in HomeVestors’ name, and that “ugly house” is a generic phrase not eligible for trademark protection.¹¹ The Forum appointed a panelist to resolve the dispute (the Forum Panelist).¹²

The UDRP Decision, dated 20 May 2020, stated that: (1) UglyHousesRI.com is confusingly similar to HomeVestors’ slogan and registered trademarks; (2) the Requestor had no rights or legitimate interest in the phrase “ugly houses”; and (3) the Requestor was “clearly aware of [HomeVestors] and of its trademarks prior to registration of [UglyHousesRI.com], and

⁷ A substantive review of the merits of the Requestor’s claims is beyond the scope of this Determination. The BAMC’s conclusion is limited to only the preliminary procedural assessment of whether the Requestor’s claim meets the requirements for bringing a reconsideration request.

⁸ See List of Approved UDRP Dispute Resolution Service Providers, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>.

⁹ See UDRP, <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

¹⁰ UDRP Decision.

¹¹ *Id.*

¹² *Id.*

has made use of the Domain Name in bad faith under paragraph 4(b)(iv) of the [UDRP].”¹³ Accordingly, the UDRP Decision ordered that UglyHousesRI.com be transferred from the Requestor to HomeVestors.¹⁴ The Requestor learned of the UDRP Decision on 21 May 2020.¹⁵

The Requestor submitted Request 20-2 on 29 May 2020, asserting that the UDRP Decision contradicts ICANN’s Bylaws concerning disparate treatment,¹⁶ and that it is harmed because the decision resulted in the transfer of UglyHousesRI.com from Requestor to HomeVestors.¹⁷

B. Relief Requested.

The Requestor asks ICANN org to:

1. Vacate the UDRP Decision; or
2. Review the UDRP proceeding pleadings and “render[] [ICANN’s] own decision”; or
3. “[A]ppoint an unbiased Panelist[] who upholds all the core values of ICANN [and who will] render[] [a new] unbiased decision.”¹⁸

III. Issue.

The issue is whether Request 20-2 meets the requirements for bringing a reconsideration request in accordance with the reconsideration criteria set forth in the Bylaws.

IV. The Relevant Standards For Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity “may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Request 20-2, § 5, at Pg. 1.

¹⁶ ICANN Bylaws, 28 November 2019, Art. 2, § 2.3.

¹⁷ Request 20-2, § 10, at Pg. 4.

¹⁸ *Id.* § 9, at Pg. 4.

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”¹⁹

Pursuant to Article 4, Section 4.2(k) of the Bylaws, the BAMC reviews each reconsideration request upon its receipt to determine if the claims meet the requirements for bringing a reconsideration request.²⁰ The BAMC may summarily dismiss a reconsideration request if the BAMC determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.²¹ If a reconsideration request is not summarily dismissed, it shall be sent to the Ombudsman, who shall either recuse himself in accordance with Article 4, Section 4.2(l)(iii) of the Bylaws or shall review and consider the reconsideration request.²² If the Ombudsman accepts review of a reconsideration request, he must submit to the BAMC his substantive evaluation of the request within 15 days of the Ombudsman’s receipt of the request.²³ The BAMC shall then promptly proceed to review and consider the reconsideration request.²⁴ As noted above, this Determination only evaluates Request 20-2 to determine if it should proceed through the Reconsideration process.

¹⁹ ICANN Bylaws, 18 June 2018, Art. 4 §§ 4.2(a) and (c).

²⁰ *Id.* at § 4.2(k).

²¹ *Id.*

²² *Id.* at § 4.2(l).

²³ *Id.* at § 4.2(l)(ii).

²⁴ *See id.* Where the Ombudsman has recused himself from consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman. *See id.* at § 4.2(l)(iii).

V. Analysis and Rationale.

In evaluating whether a reconsideration request is sufficiently stated, the BAMC considers the following factors: (1) is the reconsideration request timely; and (2) do the requestor's claims "meet the requirements for bringing a reconsideration request"?²⁵ The BAMC concludes that while Request 20-2 would have been timely if properly asserted, it does not meet the requirements for bringing a reconsideration request. The Requestor has not identified an action or inaction of the ICANN Board or Staff, and therefore has not sufficiently alleged and cannot allege that it has been adversely affected *by Board or Staff action or inaction*. Accordingly, the BAMC concludes that the Requestor has not met the criteria for bringing a reconsideration request and, therefore, summarily dismisses Request 20-2.²⁶

A. Request 20-2 Would Be Timely.

Pursuant to ICANN's Bylaws, a reconsideration request challenging Staff action must be submitted "within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action,"²⁷ and a reconsideration request challenging Board action must be submitted "within 30 days after the date on which information about the challenged Board action is first published in a resolution."²⁸

The Requestor asserts that it learned of the UDRP Decision on 21 May 2020.²⁹ The Requestor submitted Request 20-2 on 29 May 2020, eight days after the Requestor learned of the UDRP Decision. Accordingly, if Request 20-2 did challenge Staff or Board action, it would have been timely. However, for the reasons set forth below, the challenged action is not an

²⁵ *Id.*, Art. 4, § 4.2(k); *see also id.* § 4.2(e)(ii) (the BAMC has the power to "[s]ummarily dismiss insufficient or frivolous Reconsideration Requests").

²⁶ ICANN Bylaws, Art. 4, § 4.2(l).

²⁷ ICANN Bylaws, Art. 4, § 4.2(g)(i)(B).

²⁸ *Id.* § 4.2(g)(i)(A).

²⁹ Request 20-2, § 5, at Pg. 1.

ICANN Staff or Board action and therefore the Requestor does not meet the requirements for bringing a reconsideration request.

B. The Requestor Does Not Meet the Requirements Set Forth Under Article 4, Section 4.2 of the ICANN Bylaws for Bringing a Reconsideration Request.

Request 20-2 challenges a decision rendered in a UDRP proceeding. But UDRP proceedings and decisions do not involve actions or inactions of the ICANN Board or Staff. UDRP proceedings are administered by independent administrative dispute resolution providers, not by ICANN. The UDRP proceeding at issue here was administered by The Forum. The Forum Panelist was appointed by The Forum and the case coordinator and staff for the proceeding were associated with The Forum, not with ICANN.³⁰ Further, the UDRP provides mechanisms for resolving disputes after an administrative proceeding has concluded, if a party (such as the Requestor) disagrees with the outcome.³¹ Such mechanisms do not involve ICANN.

The Requestor incorrectly asserts that the Forum Panelist is a member of ICANN's Staff,³² or that The Forum is an "ICANN Forum."³³ As explained above, UDRP proceedings are administered by independent dispute resolution providers. ICANN is not a part of the dispute proceedings. ICANN is not involved in the selection of panelists, nor is ICANN involved in the merit determination of UDRP proceedings. In short, the Requestor is not challenging ICANN Board or Staff action (or inaction); rather, the Requestor is challenging the decision of the Forum Panelist in the UDRP proceeding administered by The Forum.

³⁰ See UDRP, <https://www.icann.org/resources/pages/policy-2012-02-25-en>; List of Approved UDRP Dispute Resolution Service Providers, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>. See also <https://www.adrforum.com/assets/resources/UDRP/Final%20UDRP%20Supplemental%20Rules%20eff%202019.docx>; Request 20-2, Exhibit A (copy of email from "Michelle S," Lead Case Coordinator for The Forum, to Requestor, concerning the UDRP proceeding between HomeVestors and Requestor); *id.* Exhibit B (procedural order in UDRP proceeding between HomeVestors and Requestor, reflecting letterhead of The Forum).

³¹ UDRP § 4(k).

³² Request 20-2, § 3, at Pg. 1.

³³ *Id.* § 6, at Pg. 2.

The reconsideration process is not intended to be a mechanism for parties to challenge third-party actions or inactions. To do so would undermine the purpose of the reconsideration process as set forth in Article 4, Section 4.2(a) of the Bylaws, which is to provide “a process by which any person or entity materially affected by an action or inaction *of the ICANN Board or Staff* [to] request . . . the review or reconsideration of *that action or inaction* by the Board, . . . to the extent that the Requestor has been adversely affected by” *Board or Staff action or inaction*.³⁴

Because ICANN played no role in the UDRP proceeding at issue in Request 20-2, there is no action or inaction that was taken by the ICANN Board or Staff for the BAMC to reconsider. Further, the Requestor has not been affected—materially, adversely, or otherwise—by a purported challenged action or inaction of the ICANN Board or Staff (because there has been no ICANN action or inaction). Accordingly, the Requestor’s request for review of the Forum Panelist’s decision does not meet the requirements for bringing a request for reconsideration.

VI. Determination.

A substantive review of the merits of the Requestor’s claims is beyond the scope of the BAMC’s procedural evaluation. The BAMC’s conclusion is limited to only the preliminary assessment of whether the Requestor’s claims meet the requirements for bringing a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 20-2 does not meet the requirements for bringing a reconsideration request and therefore summarily dismisses Request 20-2.

³⁴ ICANN Bylaws, Art. 4, § 4.2(a), (c) (emphasis added).