

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC, Minds + Machines Group, Ltd.,)
Radix Domain Solutions Pte. Ltd., and Domain)
Ventures Partners PCC Limited)
)
Claimants,)
) ICDR CASE NO. 01-19-0004-0808
)
and)
)
)
Internet Corporation for Assigned Names and)
Numbers (“ICANN”))
)
Respondent.)

DECISION ON REQUEST FOR

INTERIM MEASURES OF PROTECTION

August 7, 2020

Emergency Panelist:
Christopher S. Gibson

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. This is the Decision on a Request for Interim Measures of Protection in this Independent Review Process (“IRP”) case, administered by the International Centre for Dispute Resolution (“ICDR”) under its International Arbitration Rules, amended and effective June 1, 2014 (“ICDR Rules”), as supplemented by the Interim Supplementary Procedures for Internet

Corporation for Assigned Names and Numbers Independent Review Process, adopted October 25, 2018 ("Interim Supplementary Procedures").

2. Claimants are Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited ("Claimants"). Claimants state that they each effectively own and/or control independent applications to own and operate the generic top-level domain ("gTLD"), .HOTEL.¹ Mike Rodenbaugh and Marie Richmond of Rodenbaugh Law appeared on behalf of the Claimants.
3. Respondent Internet Corporation for Assigned Names and Numbers ("Respondent" or "ICANN") is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community.² Jeffrey A. LeVee and Sarah Podmaniczky McGonigle of Jones Day appeared on behalf of ICANN. Amy Stathos, Deputy General Counsel for ICANN, and Cassandra Furey, Associate General Counsel for ICANN, attended the telephonic hearing on June 3, 2020.
4. The Emergency Panelist, Christopher S. Gibson, was duly appointed by the ICDR in accordance with the ICDR Rules (Article 6) and the Interim Supplementary Procedures (Rule 10) to consider Claimants' request for interim measures. The ICDR formalized the appointment of the Emergency Panelist, notified all parties of the appointment, and gave the parties an opportunity to object to the appointment in writing. No objection was made, and the appointment was duly finalized.
5. Claimants' IRP questions whether ICANN breached its Articles of Incorporation ("Articles"), Bylaws and internal policies and procedures through actions or inactions by ICANN's Board of Directors ("Board") in relation to the community-based application of Hotel Top-Level Domain S.a.r.l ("HTLD") for the .HOTEL gTLD, which was submitted to ICANN under the New gTLD Program and given "Community Priority" status over the other .HOTEL applications.

¹Request for Independent Review Process by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated December 16, 2019 ("IRP Request"), p.4.

² ICANN'S Response to Request for Independent Review Process, dated February 3, 2020 ("ICANN's IRP Response"), ¶ 1.

6. In a prior related IRP, *Despegar et al. v. ICANN* (the “*Despegar* IRP”),³ the claimants there previously requested review of whether ICANN had breached its Articles, Bylaws and the Applicant Guidebook (“Guidebook”) in relation to HTLD's application for .HOTEL. Those claimants requested, among other things, that ICANN should reject the decision that HTLD's application for .HOTEL be granted Community Priority over the claimants’ applications.⁴ The IRP panel in the *Despegar* IRP denied the claimants’ requests and designated ICANN as the prevailing party, while raising several issues of concern, as discussed below.⁵
7. The present IRP concerns decisions (“actions or failures to act”) taken by ICANN’s Board *after* the *Despegar* IRP – including the Board’s decisions on Claimants’ Reconsideration Request 16-11 (“Request 16-11”)⁶ and Reconsideration Request 18-6 (“Request 18-6”)⁷ – both of which concern HTLD’s community-based application to operate the .HOTEL gTLD. Claimants have also brought a Request for Interim Measures of Protection in this IRP, which is the impetus for this Decision.

II. PROCEDURAL BACKGROUND

8. On December 19, 2019, following a failed Cooperative Engagement Process (“CEP”)⁸ with ICANN, Claimants submitted a Request for Independent Review Process (“IRP Request”), with supporting exhibits, in relation to ICANN's treatment of the gTLD string, .HOTEL.
9. On 30 December 2019, ICANN notified the ICDR Administrator that, consistent with ICANN’s standard practice and “as Claimants are aware, without emergency measures of protection, ICANN will proceed with the contracting phase for the prevailing .HOTEL application, after which the gTLD will move to the delegation phase.”⁹

³ *Despegar et al. v. ICANN*, Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016 (“*Despegar* IRP Declaration”), at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

⁴ *Id.*, ¶ 41.

⁵ *Id.*, ¶¶ 154, 155 & b 158.

⁶ Reconsideration Request 16-11 (“Request 16-11”), dated August 25, 2016 seeking reconsideration of the ICANN Board’s August 2016 Resolutions.

⁷ Reconsideration Request 18-6 (“Request 18-6”), dated April 14, 2018, at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

⁸ The CEP was commenced on October 2, 2018. See Ex. R-34 (Cooperative Engagement and Independent Review Processes Status Update (Dec. 23, 2019)).

⁹ Ex. RE-2.

10. On January 30, 2020, Claimants submitted their Request for Interim Measures of Protection (“Claimants’ IM Request”), with supporting exhibits, “essentially under protest”¹⁰ pursuant to the Interim Supplementary Procedures, Article 10 (Interim Measures of Protection). Among the interim measures sought, Claimants request that ICANN be required maintain the *status quo* as to the .HOTEL gTLD (i.e., keep it out of the delegation phase) during the pendency of this IRP.
11. On February 3, 2020, ICANN submitted its Response to Request for Independent Review Process (“ICANN’s IRP Response”), with supporting exhibits.
12. The Emergency Panelist convened a telephonic preparatory conference call with the parties on April 7, 2020 for the purpose of discussing the dispute between them and related organizational matters, including a timetable for further written submissions and oral arguments.
13. On April 24, 2020, Claimants submitted their Brief in Support of Request for Interim Measures (“Claimants’ Brief”), with supporting exhibits.¹¹
14. On May 12, 2020, ICANN submitted its Opposition to Claimants' Amended Request for Emergency Measures (“ICANN’s Opposition”), with supporting exhibits.
15. On May 20, 2020, Claimants submitted their Reply in Support of Request for Interim Measures (“Claimants’ Reply”), with supporting exhibits.
16. The Emergency Panelist conducted a telephonic hearing with the parties on May 26, 2020. Shortly before the hearing, on May 26th ICANN submitted a copy of a PowerPoint slide deck to be used in support of its presentation at the hearing. Claimants objected to use of the slide deck. Having heard the parties, and with their agreement, the Emergency Panelist issued Procedural Order No. 2 scheduling a further telephonic hearing with the parties on June 3, 2020, and providing a schedule for the submission of slide decks to be used in support of the parties’ respective hearing presentations.

¹⁰ Request for Interim Measures of Protection by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated January 30, 2020 (“Claimants’ IM Request”), p.2.

¹¹ Brief in Support of Request for Interim Measures by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated April 24, 2020 (“Claimants’ Brief”).

17. On June 1, 2020, Claimants submitted their slide deck in support of their interim measures request (“Claimants’ Slide Deck”).
18. On June 2, 2020, ICANN submitted its revised slide deck in support of ICANN’s opposition to Claimants’ request for interim measures (“ICANN’s Slide Deck”).
19. The Emergency Panelist conducted a telephonic hearing with the parties on June 3, 2020 (the “June 3rd Hearing”), at which the parties’ representatives made their substantive submissions. An audio recording of this hearing was made with the agreement of the parties and the Emergency Panelist.
20. During the hearing on June 3rd, counsel for ICANN provided an undertaking on behalf of ICANN that it had already sent letters to The Economist Intelligence Unit (“EIU”) and FTI Consulting, Inc. (“FTI”) requesting that they preserve relevant documents related to this IRP case.¹² The Emergency Panelist requested that ICANN supply copies of these letters. On June 4, 2020, ICANN submitted copies of the letters that it had sent to EIU and FTI, each dated May 22, 2020. The letters are discussed below in Part VI, Section C(2) below.
21. On June 11, 2020, ICANN submitted a letter in response to a question that had been posed by the Emergency Panelist during the June 3, 2020 hearing. At the hearing, the Emergency Panelist asked counsel for ICANN why should ICANN not be required to cover the administrative costs of this IRP, as provided by ICANN’s Bylaws Article 4, § 4.3(r) (providing that “ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members”), despite the fact that the Standing Panel has not yet been constituted? ICANN’s June 11th letter is discussed in Part VI, Section C(6) below.
22. On June 15, 2020, the Emergency Panelist acknowledged receipt of ICANN’s June 11th letter and directed a further question to ICANN. During ICANN’s presentation at the June 3rd hearing, counsel had stated “that the claimants have never addressed [ICANN’s] repeated point that about three-quarters of their claims are time-barred, and not time-barred by a day or two, time barred by months and in some instances, two years.” The Emergency Panelist thus asked,

¹² See ICANN’s Slide Deck, slide 29.

“Can you please clarify this point by identifying which claims ICANN considers are time barred, and which claims, if any, may not be time barred?”

23. On June 16, 2020, Claimants submitted an email in which they stated their position on the issue of the IRP administrative costs. Claimants’ email is discussed in Part VI, Section C(6) below.
24. On June 16, 2020, ICANN submitted a letter responding to the Emergency Panelist’s question (in the Emergency Panelist’s email of June 15th), requesting that ICANN clarify which of Claimants’ claims ICANN considers to be time barred. In its letter, ICANN provided a chart (included in Part VI, Section B(1) below) with detailed explanations addressing ICANN’s position on whether or not the various challenges brought by Claimants in this IRP are time-barred.¹³
25. On June 17, 2020, the Emergency Panelist acknowledged receipt of ICANN’s June 16th letter and declared the hearing closed, while reserving the right to ask further questions of the parties.
26. On June 18, 2020, ICANN sent a letter to Claimant, while copying the Emergency Panelist, in which ICANN responded to the questions in Claimant’s email of June 16th concerning the IRP administrative costs. ICANN’s June 18th letter is discussed in Part VI, Section C(6) below.

III. BACKGROUND

A. Prior Related Proceedings and ICANN Board Decisions

27. ICANN oversees the technical coordination of the DNS on behalf of the Internet community. To that end, ICANN contracts with entities that operate gTLDs, that is, the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.”¹⁴ ICANN’s launched a New gTLD Program for the expansion of the DNS, with the adoption of the Guidebook in June 2011 to facilitate implementation of the Program and the opening of applications for new gTLDs in January 2012.

¹³ ICANN Counsel’s Letter dated June 16, 2020.

¹⁴ ICANN’s IRP Response, ¶ 1.

28. The final version of the Guidebook was published on June 4, 2012, setting out detailed instructions to gTLD applicants and procedures for evaluating new gTLD applications.¹⁵ The Guidebook provides that applicants may designate their applications as either “standard” or “community-based”, with the latter to be “operated for the benefit of a clearly delineated community.”¹⁶ Various entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. The New gTLD Program has thus far resulted in the introduction of over 1,200 new gTLDs into the DNS.¹⁷
29. The relevant history related to the applications, challenges, and ICANN’s processes and decisions pertaining to the .HOTEL gTLD extends for almost eight years, and the early background is set forth in the *Despegar* IRP Declaration.¹⁸ That history adds a degree of complexity to this IRP case and to this Decision on Claimants’ request for interim measures of protection.
30. ICANN received seven applications for the .HOTEL gTLD – six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD, a non-party to this IRP case. Only one applicant can be awarded a particular gTLD, so the seven applications were placed into a contention set pursuant to the procedures in the Guidebook.
31. If a community-based application is made for a gTLD, such as HTLD’s application for .HOTEL, that applicant is invited to elect to proceed to Community Priority Evaluation (“CPE”), whereby its application is evaluated by a CPE Panel in order to establish whether the application met the CPE criteria.¹⁹ If an applicant prevails in CPE, it will proceed to the next

¹⁵ *Despegar* IRP Declaration, ¶ 17.

¹⁶ Guidebook § 1.2.3.1.

¹⁷ ICANN’s IRP Response, ¶ 2.

¹⁸ *Despegar* IRP Declaration, ¶¶ 16-40.

¹⁹ *Id.*, ¶ 19. The Guidebook, § 1.2.3.1 (Definitions) provides in relevant part:

“Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.

stage of evaluation and the other standard applications for the same gTLD will not proceed; the community-based application will be considered to have achieved Community Priority.²⁰ ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”), to act as the CPE Panel to evaluate CPEs.

32. On June 11, 2014, the EIU found that HTLD’s .HOTEL application should be awarded Community Priority, meaning that HTLD’s application, as a community-based application, would be given priority over the other .HOTEL applications.²¹
33. In 2014, certain of the applicants for .HOTEL submitted Reconsideration Requests (“RFR”) 14-34 and 14-39 challenging (i) the CPE result awarding HTLD’s application Community Priority, and (ii) ICANN’s response to requests for documents relating to the CPE,²² respectively. Both RFRs were denied by the Board Governance Committee (“BGC”).²³ Thereafter, some of the applicants for the .HOTEL gTLD filed an IRP in March 2015 (the *Despegar* IRP) challenging the BGC’s decisions on the Reconsideration Requests. The Final Declaration for the *Despegar* IRP was issued in February 2016.²⁴

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3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
 4. Have its application endorsed in writing by one or more established institutions representing the community it has named.”

The CPE Panel can award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points, the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).

²⁰ *Despegar* IRP Declaration, ¶ 19 (citing Guidebook § 4.2.2).

²¹ IRP Request, p.6, n.4 (Ex. D).

²² ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control.” *Despegar* IRP Declaration, ¶ 22. In response to the document requests, “ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.” *Id.*, ¶ 32.

²³ On 22 July 2017, ICANN’s Bylaws were amended re-designating the responsibilities for Reconsideration Requests from the BGC to the Board Accountability Mechanisms Committee (“BAMC”). The Board confirmed this shift and adopted the revised charters for the BCG and BAMC in its September 2017 Resolution. Board Resolution 2017.09.23.12 – 2017.09.23.14, dated September 23, 2017, at <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en>.

²⁴ *Despegar et al. v. ICANN* Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016, at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

34. While the *Despegar* IRP was pending, the claimants in that case added 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 (the “Portal Configuration issue”).²⁵

35. The IRP panel in the *Despegar* IRP Declaration declared ICANN to be the prevailing party,²⁶ stating:

“Although the 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 and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIOP [Documentary Information Disclosure Policy] Process in rejecting the Claimants' DIOP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.”²⁷

36. As to the CPE process, the *Despegar* IRP panel observed that

“Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by EIU in considering community based applications, and the provisions of the Guidebook. However, *the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.*

Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.”²⁸

37. While recognizing that the New gTLD Program was near its end and that “there is little or nothing that ICANN can do now,” the IRP panel recommended that a system should be put in place to ensure that CPE evaluations are conducted “on a consistent and

²⁵ In February 2015, ICANN discovered that the privacy settings for the new gTLD applicant and related portals had been misconfigured, which resulted in authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) being able to see information belonging to other users without permission. See Portal Configuration Notice (<https://www.icann.org/news/announcement-2015-03-01-en>); New gTLD Applicant and GDD Portals Q&A (<https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf>).

²⁶ *Despegar* IRP Declaration, ¶ 154.

²⁷ *Id.*, ¶ 155.

²⁸ *Id.*, ¶¶ 143-144 (italics added).

predictable basis by different individual evaluators,”²⁹ and that ICANN's core values “flow through...to entities such as the EIU.”³⁰

38. With respect to the Portal Configuration issue, the *Despegar* IRP panel found that “serious allegations”³¹ had been made and that the “approach taken by the ICANN Board *so far* in relation to this issue does not, in the view of the Panel, comply with [Article III(1) of ICANN’s Bylaws]”³² in effect at that time, providing that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”³³ However, the *Despegar* IRP panel also noted that “at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board,”³⁴ and that ICANN “also gave an undertaking... that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.”³⁵ The *Despegar* IRP panel thus declined to make a finding on the Portal Configuration issue, indicating “that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.”³⁶

39. On March 10, 2016, ICANN’s Board (the “Board”) accepted the findings in the *Despegar* IRP Declaration and directed, among other things, that ICANN:

(i) “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” and

(ii) “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.”³⁷

²⁹ Id., ¶ 147.

³⁰ Id., ¶ 150.

³¹ Id., ¶ 131.

³² Id., ¶ 134 (italics added).

³³ ICANN Bylaws, Art. III.1, as amended July 30, 2014.

³⁴ *Despegar* IRP Declaration, ¶ 135.

³⁵ Id., ¶ 137.

³⁶ Id., ¶ 138.

³⁷ ICANN Board Resolutions 2016.03.10.10 –2016.03.10.11, at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

40. ICANN conducted a forensic investigation of the Portal Configuration issues and the related allegations by the *Despegar* IRP claimants. ICANN’s Portal Configuration investigation found, among other things, that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, Katrin Ohlmer and Oliver Süme.³⁸
41. On August 9, 2016, the Board passed two resolutions (“August 2016 Resolutions”) concluding, among other things, that the cancellation of HTLD’s .HOTEL application was not warranted, and directing ICANN to move forward with processing HTLD’s application.³⁹ In particular, the Board concluded that “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.”⁴⁰
42. Request 16-11: On August 25, 2016, Claimants submitted a Reconsideration Request 16-11 seeking reconsideration of, among other things, the August 2016 Resolutions.⁴¹ Request 16-11 claimed, among other things, that ICANN violated its Articles, Bylaws and policies “by giving undue priority to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.”⁴² Request 16-11 was placed on hold by ICANN for more than a year while a review was conducted of the CPE process and the related interactions of ICANN’s staff with the CPE provider.

³⁸ ICANN’s IRP Response, ¶ 24. See Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>); ICANN Board Resolutions 2016.08.09.14 –2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

³⁹ ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (“August 2016 Resolutions”), at <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en>.

⁴⁰ Id.

⁴¹ Reconsideration Request 16-11 (“Request 16-11”), dated August 25, 2016, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

⁴² Id.

43. On January 27, 2019, the Board accepted the Board Accountability Mechanisms Committee’s (“BAMC”) recommendation to deny Request 16-11 (“January 2019 Resolution”).⁴³ While Claimants in Request 16-11 had requested reconsideration of the Board’s August 2016 Resolutions concerning the Portal Configuration issues because ICANN had allegedly failed to properly investigate those issues, the January 2019 Resolution found that the Board had adopted August 2016 Resolutions after considering all material information and without reliance on false or inaccurate material information.⁴⁴ Further, the January 2019 Resolution found that any claims with respect to the *Despegar* IRP Declaration were time-barred, or alternatively, that statements made by one IRP panel (e.g., in the *Dot Registry* IRP Declaration) cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP.⁴⁵
44. Request 16-11 and the Board’s January 2019 Resolution 11 are discussed in detail in Part VI, Section B(2)(a) below.
45. Request 18-6: While Request 16-11 was pending, in September 2016 the Board directed ICANN “to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider”⁴⁶ The BGC further determined that the review should include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (“CPE Process Review”).⁴⁷ FTI’s Global Risk and Investigations Practice and Technology Practice were retained by counsel for ICANN to conduct the CPE Process Review.⁴⁸ Meanwhile, the BGC also decided that pending Reconsideration Requests

⁴³ Ex. R-29; ICANN Board Resolution 2019.01.27.23 (“January 2019 Resolution”), § 2(f), at <https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f.rationale>.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ ICANN Board Resolution 2016.09.17.01, at <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁴⁷ See <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁴⁸ See Recommendation of BAMC dated June 14, 2018, at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf>.

relating to CPEs, including Request 16-11, would be placed on hold until the CPE Process Review was completed.⁴⁹

46. On December 13, 2017, ICANN published three reports on the CPE Process Review (“CPE Process Review Reports”).⁵⁰ On March 15, 2018, the Board passed several resolutions (“March 2018 Resolutions”), which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that there would be no overhaul or change to the CPE process for the current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.⁵¹
47. On April 14, 2018, several of the applicants for .HOTEL submitted Request 18-6, challenging the Board’s March 2018 Resolutions.⁵²
48. On May 19, 2018, Request 18-6 was sent to the Ombudsman for review and consideration. The Ombudsman recused himself from this matter on May 23, 2018 pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.⁵³
49. On July 18, 2018, the Board denied Request 18-6 (“July 2018 Resolution”), concluding that the Board considered all material information and that the Board’s March 2018 Resolutions concerning the CPE Process Reviews are consistent with ICANN’s mission, commitments, core values, and policies.⁵⁴
50. Request 18-6 and the Board’s July 2018 Resolution are discussed in detail in Part VI, Section B(2)(b) below.

⁴⁹ BGC Letter dated April 26, 2017, at <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁵⁰ See <https://www.icann.org/news/announcement-2017-12-13-en>.

⁵¹ ICANN Board Resolutions 2018.03.15.08 - 2018.03.15.11, at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁵² Request 18-6, dated April 14, 2018, at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

⁵³ See Ex. R-37 (email chain of ICANN’s request to ICANN’s Ombudsman Herb Waye and Mr. Waye’s response dated May 23, 2018), at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

⁵⁴ ICANN Board Resolution 2018.07.18.09, at <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g> (“July 2018 Resolution”).

B. Overview of Claimants' IRP Claims and ICANN's Responses

51. The standards for granting interim measures of protection under Rule 10 of the Interim Supplementary Procedures (discussed in Parts V and VI below) require that a claimant establish, *inter alia*, a “likelihood of success on the merits” or “sufficiently serious questions related to the merits.” Both parties refer to their submissions in the underlying IRP case,⁵⁵ including Claimants' IRP Request, ICANN's IRP Response, and the respective accompanying exhibits, all of which were provided to the Emergency Panelist. Moreover, the issues in the underlying IRP were discussed at the June 3rd Hearing. As a preliminary point, the Emergency Panelist acknowledges ICANN's arguments that Claimants' briefs in support of their request for interim measures give meagre attention to the underlying merits of this IRP. Claimants argued that there needs to be further briefing and discovery, which would take place in the main IRP proceedings.⁵⁶ However, the materials, submissions and arguments presented to the Emergency Panelist, including those submissions in the underlying IRP and those targeted to Claimants' request for interim measures, are sufficient to enable the Emergency Panelist to apply the standards of Rule 10.
52. A summary of the parties' claims and arguments in the IRP is provided below.

1) Claimants' Submissions

53. Claimant's IRP Request states that the following issues must be substantively reviewed: (i) “ICANN subversion of the .HOTEL CPE and first IRP (*Despegar*)”; (ii) “ICANN subversion of FTI's CPE Process Review”; (iii) “ICANN subversion of investigation into HTLD theft of trade secrets”; and (iv) “ICANN allowing a domain registry conglomerate to takeover the ‘community-based’ applicant HTLD.”⁵⁷ Claimants make references to Request 16-11 and Request 18-6 in their IRP Request and briefs, and confirmed during the June 3rd Hearing that their focus is on these Reconsideration Requests, and on the Board's action (or failure to act)

⁵⁵ See Claimants Reply, p. 11 (“Claimants' rely upon their IRP Complaint and the voluminous evidence presented thus far, to raise sufficient questions in this IRP to permit the interim relief that they request”); Claimants' Slide Deck, slides 5-8; ICANN Opposition, ¶ 23 (“As discussed in detail in ICANN's IRP Response, dated 3 February 2020, Claimants literally ignore the key question in this IRP: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? As set forth in the ICANN's IRP Response, the answer is a categorical ‘no’.”); ICANN's Slide Deck, slides 8-15.

⁵⁶ June 3rd Hearing, audio transcript (2:11:30 – 2:12:50; 2:17:12 – 2:17:27).

⁵⁷ IRP Request, p. 4.

in accepting the BAMC's recommendations concerning these requests.⁵⁸ The allegations in Claimants' IRP Request align, at least in large part (excluding (iv) concerning the sale of HTLD to Afiliás), with issues addressed in the Board's July 2018 Resolution and January 2019 Resolution, accepting the BAMC's recommendations in each case and denying, respectively, Claimants' Request 18-6 and Request 16-11.

54. Claimants also submit that they should be entitled to Ombudsman review of Request 16-11 and Request 18-6 as called for in the Bylaws,⁵⁹ that "ICANN should get an IRP Standing Panel and Rules of Procedure in place, after six years of minimal progress since required by the Bylaws," and that "ICANN should be forced to preserve and produce CPE documents as they produced in the *Dot Registry* IRP, and other documents re [sic] the CPE Process Review, Portal Configuration investigation and Afiliás deal. Only then can Claimants fairly address the BAMC's arguments."⁶⁰ These last points are also the subject of Claimants' request for interim relief.

55. Claimants have stated the following specific claims in their IRP Request:

(a) Claimants seek review of whether ICANN had undue influence over the EIU with respect to EIU's CPE decisions, and over FTI with respect to the CPE Process Review, alleging that (i) ICANN's and EIU's communications are critical to this inquiry, but have been kept secret; (ii) the *Dot Registry* IRP Declaration and FTI's report reveal a lack of independence of the EIU, and relevant documents have not been disclosed; and (iii) ICANN materially misled Claimants and the *Despegar* IRP panel in relation to these issues, (iv) that the Board has failed to meet Bylaws obligations of transparency, due diligence upon reasonable investigation, and independent judgment by not requiring disclosure of relevant documents to Claimants to provide opportunity for any meaningful review by this IRP Panel and Claimants.⁶¹

(b) Claimants seek review whether they were discriminated against in violation of Bylaws, as ICANN allegedly reconsidered other CPE results but not those for the .HOTEL. Claimants

⁵⁸ June 3rd Hearing, audio transcript (2:14:20 – 2:15:05).

⁵⁹ Id., pp. 4 & 12.

⁶⁰ Id., p. 4.

⁶¹ IRP Request, pp. 12-21.

allege the Board addressed the violations of its Bylaws in the CPE for *Dot Registry*, but not for Claimants. Claimants request that ICANN be required to take the necessary steps to ensure a meaningful review of the CPE regarding .HOTEL, and of the Claimants' RFRs – at least to ensure consistency of approach with ICANN's handling of the *Dot Registry* IRP case.⁶²

(c) Claimants seek review of ICANN's Portal Configuration investigation and refusal to penalize HTLD's willful accessing of Claimants' confidential, trade secret information. Claimants contend, among other things, that the alleged misdeeds of a major shareholder or other decision makers should be imputed to their closely held corporation, and this argument supports imputing to HTLD the actions of those persons affiliated with HTLD who accessed Claimants' private trade secret data. Claimants allege ICANN refused to produce key information underlying its reported conclusions in the investigation, and it violates the duty of transparency to withhold them. Claimants claim the Board action to ignore such facts and law is also violation of Bylaws. At minimum, Claimants contend the circumstances require further discovery in this IRP of all documents concerning ICANN's Portal Configuration investigation of the data breach. Further, to extent the BAMC and/or Board failed to have such information before deciding to ignore HTLD's breach, that violated their duty of due diligence upon reasonable investigation, and their duty of independent judgment.⁶³

(d) Claimants seek review of ICANN's decision to approve the sale of HTLD, the .HOTEL community-based applicant, to Afilias, a domain registry conglomerate (operating no less than 25 TLDs including .INFO, .GLOBAL, .ASIA, .VEGAS and .ADULT), without requiring Afilias to satisfy a new CPE nor make any promises regarding the community. Claimants contend HTLD is no longer the same company that applied for the .HOTEL; instead, it is now a registry conglomerate with no ties to the purported, contrived community that it claims to serve.⁶⁴

⁶² Id., pp. 21-24.

⁶³ Id., pp. 24-26.

⁶⁴ Id., pp. 26-28.

56. Claimants aver that HTLD's .HOTEL application should be denied, or at least its Community Priority relinquished, as a consequence not only for HTLD's alleged spying on competitors' secret information, but also because HTLD is no longer the same company that applied for the .HOTEL gTLD. Claimants requests the following relief in the IRP:

- grant the interim measures of protection sought by Claimants;
- order appropriate discovery from ICANN;
- independently review ICANN's actions and inactions as set out in Claimants' IM Request;
- render a Final Declaration that ICANN has violated its Bylaws; and
- require that ICANN provide appropriate remedial relief.⁶⁵

2) ICANN's Submissions

57. ICANN has submitted the following contentions in opposition to Claimants' IRP Request:

(a) ICANN states that this IRP proceeding calls for a determination of whether ICANN complied with its Articles, Bylaws and internal policies and procedures in evaluating Claimants' Reconsideration Requests concerning HTLD's community-based application to operate the .HOTEL gTLD.⁶⁶ ICANN argues that Claimants want to force an auction for control of .HOTEL, even though HTLD's application properly prevailed under the terms of the Guidebook.⁶⁷

(b) ICANN contends that Claimants' arguments suffer from a systemic problem – they do not identify what was wrong with the BAMC's Recommendations or the Board's actions on Request 16-11 and Request 18-6. ICANN claims that Claimants ignore the key question: were any of the Board's actions on Request 16-11 and Request 18-6 inconsistent with the Articles, Bylaws or Guidebook?⁶⁸

⁶⁵ Id., p. 28.

⁶⁶ ICANN's IRP Response, ¶ 3.

⁶⁷ Id., ¶ 4.

⁶⁸ Id., ¶ 38.

- (c) ICANN contends that the Board’s actions on Request 16-11 complied with ICANN’s Articles, Bylaws and established policies and procedures, which is why Claimants are attempting to re-litigate time-barred disputes and cast unfounded aspersions on ICANN.
- (d) ICANN contends that Claimants requests for an Ombudsman to be assigned in relation to Request 16-11 and 18-6 are untimely and baseless. While Claimants seek Ombudsman review of the BAMC’s decision on Request 16-11, ICANN contends that neither the current Bylaws nor the Bylaws that governed Request 16-11 require the Ombudsman to review BAMC recommendations on RFRs. Further, the Ombudsman does not investigate complaints that are simultaneously being addressed by one of the other formal accountability mechanisms.⁶⁹ In addition, the Bylaws in effect when the BAMC and Board acted on Request 18-6, which are the same Bylaws in effect today in all relevant aspects, did not require the Ombudsman to review the BAMC’s recommendation or the Board’s action, and the Ombudsman does not investigate complaints subject to other pending accountability mechanisms, such as this IRP.⁷⁰ The issues concerning appointment of an Ombudsman for Request 16-11 and 18-6 are subject to Claimants’ request for interim measures of protection, addressed below.
- (e) ICANN states that Claimants’ challenge to the Board’s resolutions accepting the *Despegar* IRP Declaration is untimely and lacks merit. Claimants’ challenge to the Board’s action accepting the *Despegar* IRP Declaration was untimely when Claimants submitted Request 16-11. Further, ICANN contends that Claimants have not identified any incorrect statement or conclusion regarding the *Despegar* IRP issues in the Board’s denial of (or the BAMC’s Recommendation to deny) Request 16-11. As to Claimants’ argument that ICANN should have produced the documents Claimants sought in the *Despegar* IRP because they were the same documents ultimately produced in the *Dot Registry* IRP, ICANN states that the key difference is that the panel in the *Dot Registry* IRP ordered ICANN to produce the requested documents, while the panel in the *Despegar* IRP did not.⁷¹

⁶⁹ Id., ¶¶ 40-41.

⁷⁰ Id., ¶ 63.

⁷¹ Id., ¶¶ 42-49.

- (f) ICANN contends it did not discriminate against Claimants by reviewing other CPE results but not reviewing the .HOTEL CPE result. While Claimants suggest this was a violation of ICANN's commitment to make decisions by applying documented policies consistently without singling out any particular party for discriminatory treatment, ICANN responds that Claimants are not similarly situated to the *Dot Registry* IRP claimants. ICANN evaluated the different circumstances of the cases and acted differently according to those circumstances, including that the *Dot Registry* IRP panel found in favor of the claimant there, while the panel in the *Despegar* IRP did not.⁷²
- (g) ICANN contends that it handled the Portal Configuration investigation and consequences in a manner fully consistent with the Articles, Bylaws, and established policies and procedures. The Portal Configuration investigation shows that ICANN investigated the issues with efficiency, operating with transparency by providing regular updates to the public.⁷³
- (h) ICANN claims that the Board's action on Request 18-6 complied with ICANN's Articles, Bylaws and established policies and procedures. ICANN states that while Claimants argue ICANN should have reconsidered Board resolutions concerning the CPE Review because FTI was unable to review the EIU's internal correspondence, Claimants do not challenge any of the Board's (or BAMC's) conclusions in response to Request 18-6. Further, while ICANN did not produce documents in response to Claimants' document request in the *Despegar* IRP, ICANN has been contractually barred from disclosing these documents and no Article, Bylaws provision, policy or procedure requires ICANN to breach its contractual duties. Further, contrary to the *dicta* in the *Dot Registry* IRP Declaration, the EIU affirmed that it never changed the scoring or results of a CPE based on ICANN's comments, and FTI concluded that ICANN (i) never questioned or sought to alter the EIU conclusions; and (ii) never dictated that the EIU take a specific approach to a CPE. Moreover, the Board was entitled to accept FTI's conclusion that it had sufficient information for its review. Finally, Claimants' requests for FTI and EIU documents are premature.⁷⁴

⁷² Id., ¶¶ 50-57.

⁷³ Id., ¶¶ 58-61.

⁷⁴ Id., ¶¶ 62-78.

- (i) ICANN contends that the challenges to ICANN’s inaction concerning HTLD’s ownership are untimely and without merit. These claims are time-barred as Claimants waited for over three years before bringing them; and they are meritless because no Article, Bylaws provision, or policy required the Board to approve the transaction or to submit it for public comment.⁷⁵
- (j) ICANN submitted a chart (see Part VI, Section B(1) below) in response to the Emergency Panelist’s request, in which it acknowledged that challenges to the Board’s decisions to deny Request 16-11 and Request 18-6 are timely, but claimed that Claimants’ challenges to the following points are untimely: (a) that ICANN should re-evaluate the HTLD CPE result; (b) that ICANN’s Board should not have accepted the *Despegar* IRP Declaration; (c) that ICANN should have taken action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration; (d) that the Ombudsman should have reviewed Request 16-11 and Request 18-6, respectively. Further, ICANN indicated in the chart that Claimants’ request that ICANN should produce FTI’s and the CPE Provider’s (EIU) documents is premature.

IV. CLAIMANTS’ REQUESTED INTERIM MEASURES OF PROTECTION

58. Claimants in their IM Request have requested (i) as a preliminary matter, that the ICDR must recuse itself due to an alleged conflict of interest, and (ii) *six* interim measures of protection. Claimants demands can be grouped into *three* categories as to which it appears that the requests in categories I and III raise issues of first impression, in that this type of relief has never before been requested in other IRPs or by means of interim relief:

59. **I – Request ICDR’s recusal due to alleged conflict of interest:**

- (i) Claimants object to the ICDR’s administrative role in this IRP, alleging a conflict of interest, and request that the “ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request.”⁷⁶ At minimum, Claimants

⁷⁵ Id., ¶¶ 79-88.

⁷⁶ Claimants’ Brief, p.7.

request that the ICDR and ICANN must “fully disclose the terms of their financial relationship”⁷⁷ so that the issue can be properly considered and resolved.

60. **II – Request protective measures for the main IRP proceedings:**

Claimants request that ICANN be required:

- (ii) to “not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP”⁷⁸;
- (iii) to “preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review”⁷⁹ in this IRP;

61. **III – Request that ICANN be ordered to implement procedural rights as allegedly required by ICANN’s Bylaws:**

Claimants request that ICANN be required:

- (iv) to “appoint an independent ombudsman to review the BAMC’s decisions in RFRs 16-11 and 18-6”;⁸⁰
- (v) to “appoint and train a Standing Panel of at least seven members as defined in the Bylaws and [Interim Supplementary Procedures], from which any IRP Panel shall be selected...and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the [Interim Supplementary Procedures]”;⁸¹
- (vi) to “adopt final Rules of Procedure”;⁸² and
- (vii) to “pay all costs of the Emergency Panel and of the IRP Panelists.”⁸³

V. STANDARDS FOR REVIEW

62. The Interim Supplementary Procedures, as adopted on October 25, 2018, provide in their introductory paragraph that “[t]hese procedures apply to all independent review process

⁷⁷ Id., p.5.

⁷⁸ Id., p.7.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

proceedings filed after 1 May 2018.” Further, these procedures, in Rule 2 (Scope), provide in relevant part that

“[i]n the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.”

63. Claimants filed their IRP Request on December 19, 2019. At that time, the Interim Supplementary Procedures of October 25, 2018 were in effect – they apply to the proceedings in this IRP, including Claimants’ request for interim measures of protection.

64. The applicable Articles for purposes of this IRP are ICANN’s current Articles, as approved by the Board’s on August 9, 2016, and filed with the California Secretary of State on October 3, 2016. The Articles provide in Article III, as follows:

“The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.”

65. The applicable Bylaws for this IRP – necessary to consider, *inter alia*, the merits of Claimants’ substantive claims in this IRP (e.g., whether the Board’s action or failure to act breached any Articles, Bylaws or other policies or commitments in effect at the relevant time) as directed by Rule 10 of the Interim Supplementary Procedures (discussed below) – may be determined by reference to the date on which Claimants submitted their challenges to ICANN’s Board decisions (e.g., through Reconsideration Requests). For example, issues related to Request 16-11 are assessed under ICANN’s Bylaws of February 11, 2016 in effect at the time when Request 16-11 was submitted in August 2016. Similarly, ICANN’s Bylaws of July 22, 2017 were in effect when Claimants submitted Request 18-6 in April 2018. Questions concerning whether Claimants’ IRP claims are timely are also considered, for purposes of completeness, under both the Bylaws and the Interim Supplementary Procedures, in effect for this case.

66. The standards for assessing whether to grant interim measures of protection in an IRP are set out expressly in Rule 10 of the Interim Supplementary Procedures and in the ICANN Bylaws.⁸⁴ The parties agree that Rule 10 applies,⁸⁵ although Claimants – by referencing *interchangeably* the words “harm” and “hardships” from the Rule 10 standard in their briefing and by citing several previous IRP cases where interim relief was sought – at times assert standards that might not be fully consistent with the current Rule 10 standards. The Emergency Panelist confirms, in any event, that in accordance with Rule 2 of the Interim Supplementary Procedures,⁸⁶ the standards set forth in Rule 10 apply.

67. Rule 10 provides in relevant part as follows:

“10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief.^[87] Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

⁸⁴ The standard for interim relief provided in Rule 10 of the Interim Supplementary Procedures is identical to the standard in ICANN’s Bylaws, Art. IV, § 4.3(p), as amended November 28, 2019. This standard was first implemented in ICANN’s Bylaws dated October 1, 2016.

⁸⁵ Claimants’ IM Request, p. 4 (as stated in their IM Request, “Claimants respectfully seek Interim Measures of Protection pursuant to Section 10 [Rule 10] of the Interim Rules [Interim Supplementary Procedures]”); ICANN’s Opposition, ¶ 18.

⁸⁶ Interim Supplementary Procedures, Rule 2 (“These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.”)

⁸⁷ “Emergency Panelist” is defined in Rule 1 of the Interim Supplementary Procedures as follows:

“EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).”

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.”

68. Rule 5 of the Interim Supplementary Procedures provides that “[i]n the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief..., the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.”

69. Rule 11 of the Interim Supplementary Procedures⁸⁸ provides further general guidance on the standards to be applied, stating in relevant part:

“11. Standard of Review

Each IRP PANEL shall conduct an objective, *de novo* examination of the DISPUTE⁸⁹].

a. With respect to COVERED ACTIONS⁹⁰], the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.

b. All DISPUTES shall be decided in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.

d. . . . ”

⁸⁸ Rule 11 of the Interim Supplementary Procedures matches the language in ICANN’s Bylaws, Art. IV, § 4.3(i).

⁸⁹ "Disputes" are defined to including the following relevant circumstances:

“(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws;

. . . . ”

Bylaws, Art. IV, § 4.3(b)(iii).

⁹⁰ "Covered Actions" are defined as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.” Bylaws, Art. IV, § 4.3(b)(ii).

70. Finally, the ICDR Rules, Article 6 (Emergency Measures of Protection), section (5) provides in relevant part that

“The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.”

71. In view of Article 6(5), it is clear that this Decision of the Emergency Panelist concerning interim relief can be reconsidered, modified or vacated by the IRP Panel, and does not resolve the merits to be fully addressed by the Panel. For any request for interim relief that is denied by the Emergency Panelist, Claimants may renew their request and present their full case on the merits to the IRP Panel.

VI. DISCUSSION AND ANALYSIS

72. This Part addresses first whether the ICDR should be ordered to recuse itself in this case due to an alleged conflict of interest (Section A). After addressing that preliminary issue, the Emergency Panelist turns to assess whether Claimants have satisfied the second element in the standard for interim measures under Rule 10 of the Interim Supplementary Procedures (Section B). The section then addresses the parties’ submissions on each of the issues for which Claimants request interim measures of protection, with the Emergency Panelist’s analysis under the first and third elements of Rule 10 and a decision on each issue (Section C).

A. Request for ICDR’s Recusal Due to Alleged Conflict of Interest

73. Claimants object to the ICDR’s role in this IRP, alleging a conflict of interest and requesting that the “ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request.”⁹¹ At minimum, Claimants request that the ICDR and ICANN must “fully disclose the terms of their financial relationship”⁹² so that the issue can be properly considered and resolved.

⁹¹ Claimants’ IM Request, p. 4; Claimants’ Brief, p.7.

⁹² Claimants’ Brief, p.5.

74. Claimants contend that ICDR has a financial conflict of interest as to this request for interim measures, or, at minimum, there is an *apparent* conflict because ICDR is the sole provider of IRP services to ICANN.⁹³ Claimants maintain that if an IRP Standing Panel is created, the ICDR could lose cases and fees that it otherwise would maintain. Claimants allege that ICDR will face competition for its role as facilitator of the new Standing Panel.⁹⁴ That conflict must be subject to proper disclosure.⁹⁵
75. Claimants further contend that each case generates initial filing fees for the ICDR, and the New gTLD Program is expected to expand in coming years, with a proportionate share of additional disputes reasonably expected to arise. Claimants argue that this should be enough of a “significant financial interest,” under the IBA Guidelines (see below), to raise justifiable doubts as to the ICDR’s impartiality and independence as to Claimants’ demand for the immediate imposition of the Standing Panel. Claimants also state that ICANN’s Bylaws regarding Conflicts of Interest, Article IV, § 4.3(q)(ii), require: “(ii) The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.”⁹⁶ Moreover, Claimants contend that the ICDR has demonstrated bias in favor of ICANN specifically with respect to Claimants’ request for interim measures in this case and presumably in other cases. Claimants explain that typically in IRP proceedings, the ICDR requires the parties make equal monetary deposits to secure the IRP panelists’ time. However, with respect to requests for interim measures, ICDR requires that claimants pay 100% of the deposit and ICANN to pay nothing.
76. Claimants, in emails to the ICDR case administrator in this IRP (dated March 24, 2020 and March 31, 2020), challenged the ICDR on this approach and asked for clarification of what “ICDR procedure” requires that the filing party must submit the full initial deposit for an Emergency Panelist.⁹⁷ The ICDR replied by email dated April 1, 2020 as follows:

“The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR. It was developed after many years of processing emergency applications in an effort to

⁹³ Claimants’ IM Request, p. 2.

⁹⁴ Claimants Brief, p. 3.

⁹⁵ Claimants’ IM Request, p. 2.

⁹⁶ Claimants’ Brief, pp. 5-6.

⁹⁷ Ex. E.

insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently outlined in the rules but it will be addressed in our next revision. It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy.”⁹⁸

77. Claimants cite to the IBA Guidelines on Conflicts of Interest in International Arbitration.⁹⁹ Claimants contend the Guidelines are applicable to this situation, and should be deemed authoritative. General Standard 2(a) provides: “An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.” General Standard 2(c) provides an objective “reasonable person” test to analyze such conflicts. General Standard 2(d) further provides: “Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations described in the Non-Waivable Red List.” That list includes in paragraph 1.3: “The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.”¹⁰⁰ General Standard 3(a) provides: “If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties,... prior to accepting his or her appointment.” Further, General Standard 3(d) provides: “Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.” Finally, Claimants contend that General Standard 5(b) provides that ICDR as administrator is bound by the same rules as set forth above, and “it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected.” Claimants thus request that ICDR and ICANN disclose the terms of their financial relationship, particularly as it relates to ICANN activities to create the IRP Standing Panel that has been required by ICANN’s Bylaws.¹⁰¹ At the June 3rd hearing, Claimants stated that the

⁹⁸ Id.

⁹⁹ IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by IBA Council in 2014 (“IBA Guidelines”), at file:///C:/Users/cgibson/AppData/Local/Temp/IBAGuidelinesonConflictOfInterest2014.pdf.

¹⁰⁰ IBA Guidelines, Non-Waivable Red List, ¶1.3.

¹⁰¹ Claimants claims they are entitled to see all contracts between ICANN and ICDR, as well as a summary of payments made by ICANN to ICDR each year since inception of the relationship. In addition, Claimants claims they are entitled to see all correspondence between ICANN and ICDR relating to the Standing Panel.

analysis of conflict of interest for an administrator such as the ICDR is the same as that for an arbitrator.¹⁰²

78. ICANN, on the other hand, contends that nothing in the ICDR’s actions as the IRP Provider in this proceeding demonstrates a violation of ICANN’s Bylaws or a conflict of interest. According to ICANN, Claimants misunderstand ICDR’s role in this proceeding and its relation to the IRP Standing Panel. ICANN claims that (i) the ICDR is not “adjudicating” this request for interim relief; instead, the ICDR has an administrative function; (ii) the fact that a Standing Panel will be established will not automatically revoke the ICDR’s position as the IRP Provider; (iii) the ICDR has no financial interest in selecting panelists – it receives no portion of the panelist fees and its only revenue comes from administrative fees, which any other dispute resolution provider would also charge; (iv) the Bylaws direct the IRP Provider to “function independently from ICANN”;¹⁰³ (v) Claimants’ challenge ignores explicit provisions in the Bylaws directing the administration of the IRP in this manner until the IRP Standing Panel is established;¹⁰⁴ (vi) pursuant to the ICDR’s longstanding policy (which applies to all cases administered by the ICDR and not just to IRPs), the ICDR requires the party requesting emergency relief to pay the initial deposit for the emergency arbitrator, and this does not demonstrate any bias toward ICANN; (vii) the ICDR has already disclosed the terms of its financial relationship with ICANN – that is, the only revenues the ICDR receives from IRP proceedings are the standard filing fees for non-monetary claims; and (viii) in light of this last point, Claimants already have the relief they seek (disclosure). ICANN also contends that the IBA Guidelines are not referenced in ICANN’s Bylaws, the Interim Supplementary Procedures or the ICDR Rules, and therefore there is no basis to enforce the IBA Guidelines here.¹⁰⁵
79. The Emergency Panelist observes, as an initial matter, that Claimants challenge against the ICDR does not prevent the ICDR from administering this case. Rule 2 of the Interim Supplementary Procedures provides that the “Interim Supplementary Procedures, *in addition to the ICDR RULES*,” apply “in all cases submitted to the ICDR in connection with Article 4,

¹⁰² June 3rd Hearing, audio transcript (8:40 – 8:50).

¹⁰³ ICANN Bylaws, Art. 4, § 4.3(m).

¹⁰⁴ *Id.*, Art. 4, § 4.3(k)(ii) (IRP Panel); *id.* § 4.3(p) (Emergency Panelist).

¹⁰⁵ June 3rd Hearing, audio transcript (54:45 – 55:20).

Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect.” The ICDR Rules, in turn, in Article 19.4 provide in relevant part:

“Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator [ICDR] from proceeding with administration and shall be referred to the tribunal for determination once constituted.”

80. The Emergency Panelist finds that the ICDR has not been compromised in its role as administrator of this IRP, even in view of Claimants’ interim relief request that ICANN be ordered to appoint the IRP Standing Panel. As indicated by Article 19.4, the Emergency Panelist, not the ICDR, will rule on issues directed to jurisdiction in this case, including whether the ICDR can administer this IRP. Moreover, the Emergency Panelist, not the ICDR, will determine whether or not to grant Claimants’ interim relief request that ICANN be ordered to appoint the IRP Panel.¹⁰⁶
81. Furthermore, the Emergency Panelist recognizes that the ICDR “has been designated and approved by ICANN’s Board of Directors as the IRP Provider...under Article 4, Section 4.3 of ICANN’s Bylaws.”¹⁰⁷ This designation has not been withdrawn, even while the process is underway for the appointment of members of the IRP Standing Panel. The Emergency Panelist finds that the ICDR meets or exceeds the standard set forth in the current Bylaws that “[a]ll IRP proceedings shall be administered by a well-respected international dispute resolution provider (‘IRP Provider’).”¹⁰⁸ The Bylaws require that the ICDR, as the IRP Provider, “shall function independently from ICANN”¹⁰⁹ Claimants have not provided any evidence that the ICDR has failed to act independently in its administration functions. In addition, ICANN’s Bylaws, in the Conflict of Interest provision for IRPs, Article IV, § 4.3(q)(ii), provide:

¹⁰⁶ The Emergency Panelist also notes that to the extent Claimants’ challenge against the ICDR can be considered an indirect challenge to the jurisdiction of the Emergency Panelist (appointed by the ICDR under the ICDR Rules), the Emergency Panelist refers to the ICDR Rules, Art. 19.1 providing that:

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s)....”

¹⁰⁷ See Interim Supplementary Procedures, Rule 1 (Definitions): “ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the IRP Provider (IRPP) under Art. 4, Section 4.3 of ICANN’s Bylaws.”

¹⁰⁸ Bylaws, Art. 4, § 4.3(m)(i).

¹⁰⁹ ICANN Bylaws, Art. 4, § 4.3(m).

“The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.”¹¹⁰

82. Here, the ICDR, when requested by Claimants, disclosed the relevant information concerning its relationship with ICANN, the source of any revenue received by the ICDR in connection with IRP cases, and the basis for requesting that Claimants pay the full deposit for the Emergency Panelist’s fees. The ICDR case administrator, in an email dated March 20, 2020 stated:

“In furtherance to our email of February 28, 2020 and pursuant to our fee schedule found here, filing fees are paid by the party that brings a claim before the ICDR. Should a Respondent file a counterclaim, they would be responsible for the appropriate filing fees at the time of filing.

. . . .

The compensation and expenses for the Panelist are disclosed and set at the time of appointment. The ICDR will process invoices upon receipt and disburse payment to the Arbitrator from the deposits made by the parties. The itemized invoices will be available for the parties to view online through AAAWebfile. *The ICDR does not withhold or receive any portion of the compensation paid to the panelists. The ICDR’s only revenue is the amounts described in the above-reference fee schedule or possibly a room rental fee for a hearing conducted in one of our facilities.*

Lastly, in 2006, the ICDR was designated by ICANN as the Independent Review Panel Provider (IRPP) pursuant to their bylaws. *There were no payments made by ICANN to the ICDR in relation to this designation.*”

83. Regarding the approach taken by the ICDR requiring Claimants to pay the full deposit for the fees of the Emergency Panelist – discussed in Part VI, Section (C)(6) below, with ICANN changing its position and now committing to pay such fees – the ICDR case administrator, in an email dated April 1, 2020, stated:

“The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR. It was developed after many years of processing emergency applications in an effort to insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently not outlined in the rules but it will be addressed it in our next revision. It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules.

¹¹⁰ Claimants’ Brief, pp. 5-6.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy.”¹¹¹

84. The role for the ICDR since its designation by the ICANN Board as the IRP Provider has not changed over the years, even as ICANN’s Bylaws have called for the establishment of an IRP Standing Panel. As ICANN has indicated, the appointment of a Standing Panel does not mean that IRP cases will no longer need to be administered by a dispute resolution provider, or that the ICDR will be replaced.¹¹² Moreover, the Interim Supplementary Procedures envisage circumstances where, if the Standing Panel is not in place *or even if it is in place*, the ICDR will have a role to play. For example, Rule 3 of the Interim Supplementary Procedures provides in relevant part:

“In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist.”

85. Claimants argue that, because their request for interim measures calls for the immediate appointment of the Standing Panel, the ICDR faces a conflict of interest and cannot administer this case. The Emergency Panelist disagrees. Here, the Emergency Panelist determines that Claimants have not demonstrated a conflict of interest or any bias on the part of the ICDR, and the ICDR has already provided Claimants disclosure of “any material relationship with ICANN” under Article IV, § 4.3(q)(ii). It appears from the evidence before the Emergency Panelist that – even if a Standing Panel is constituted in the near future – this will not alter the ICDR’s status as the IRP Provider. Any decision to consider whether to replace the ICDR would be the subject of a separate ICANN initiative, one that ICANN has not called for and that currently does not exist.

¹¹¹ Ex. E.

¹¹² ICANN cites to the transcript of a meeting of the IRP Implementation Oversight Team (“IRP-IOT”), a committee constituted to oversee the IRP. The Chair of the IRP-IOT explains that as to the IRP Provider and the Standing Panel, “the two are separate,” and even as a Standing Panel is appointed, “ICDR will stand and continue their administrative work throughout.” Ex. RE-9, pp. 13-14. Moreover, another committee member stated that after the 2016 Bylaw revisions, “there has not been a switch from the ICDR as the administrator.” Moreover, “[t]he existence of the [S]tanding [P]anel will not change the fact that all of the parties to an arbitration need an administrative force behind it.” *Id.*, p. 14. ICANN thus reports that the IRP-IOT discussed this issue with ICANN after the Board approved the October 2016 Bylaws revisions, but decided it was not necessary at that time “to change service providers.” ICANN’s Opposition, ¶ 65 (citing Ex. RE-9).

86. Finally, to the extent the IBA Rules might apply,¹¹³ the Emergency Panelist disagrees with Claimants contention that the analysis of conflict of interest for an administrator such as the ICDR is the same as that for an arbitrator. The provisions of the IBA rules cited by Claimants, with the exception of General Standard 5(b), refer to arbitrators, not to a dispute resolution administrative provider such the ICDR. In particular, General Standard 5 (Scope) confirms that “[t]hese Guidelines apply equally to tribunal chairs, sole arbitrator and co-arbitrators, howsoever appointed.” Further, General Standard 5(b), cited by Claimants, provides that

“Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.”

87. General Standard 5(b) does not apply to the ICDR in its role as the administrator of IRP cases, because the ICDR does not act as an “arbitral or administrative secretary” or “assistant” to IRP Panelists or to the Emergency Panelist.

88. All of this is not to say that there could never be circumstances indicating bias or conflict of interest on the part of an institution such as ICDR. However, in this case, the record establishes that the ICDR, in requesting from Claimants the payment of the full deposit for the Emergency Panelist fees, was following its standard practices for all commercial arbitration cases involving requests for interim relief – this is not evidence of bias. Further, as noted above, there is no indication that the ICDR will be removed from its role as the IRP Provider, even if a Standing Panel is ordered to be appointed. Finally, it is not for the ICDR to determine whether ICANN has violated its Bylaws by declining to pay the deposit for fees of the Emergency Panelist (although as discussed in Part VI, Section C(6) below, ICANN has changed its position on this issue).¹¹⁴

89. For all of the above reasons, the Emergency Panelist denies Claimants’ request that the ICDR be ordered to recuse itself from this IRP. As with the entirety of this Decision, this finding

¹¹³ The Emergency Panelist need not decide in this case whether the IBA Guidelines apply, and recognizes that neither the Bylaws, Interim Supplementary Procedures, nor ICDR Rules incorporate the IBA Guidelines. The Emergency Panelist does observe that ICANN’s Bylaws, Art. 4, § 4.3(n)(ii), indicate that the “Rules of Procedure shall be informed by international arbitration norms.”

¹¹⁴ See ICANN’s Bylaws, Art. 4, § 4.3(r) (“ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members.”).

does not bind the IRP Panel. The Emergency Panelist leaves Claimants to reassert this request in the main IRP proceedings, should Claimants wish to do so.

B. Sufficiently Serious Questions Related to the Merits

90. Rule 10 of the Interim Supplementary Procedures requires that “[i]nterim relief may *only* be provided if the EMERGENCY PANELIST determines that the Claimant has established *all* of the [three] factors” listed in Rule 10.¹¹⁵ As emphasized by ICANN at the June 3rd Hearing, the burden under this rule is on Claimant to satisfy these three factors. However, the second factor (ii) is expressed in the disjunctive: “(A) likelihood of success on the merits; *or* (B) sufficiently serious questions related to the merits.”¹¹⁶
91. Claimants at the June 3rd Hearing contended that the focus, at this point, should be on the standard set out in (B), “sufficiently serious questions related to the merits.”¹¹⁷ Claimants argue that a “detailed analysis of the merits is inappropriate at this stage of the proceeding” and “[s]ubstantive issues are for the full panel, not this Emergency Panel.”¹¹⁸ ICANN contends, on the other hand, that “an analysis of the merits is not just appropriate but essential.”¹¹⁹ The Emergency Panelist agrees with ICANN on this point. The Emergency Panelist must review the merits of the underlying IRP, at least to the extent necessary to determine whether Claimant has established that there are “sufficiently serious questions related to the merits.”
92. The Emergency Panelist will address the “sufficiently serious questions” issue first to determine if that standard is met; if it is not met, there is no need to evaluate each of Claimants’ individual requests for interim relief under factors (i) (“A harm for which there will be no adequate remedy in the absence of such relief”) and (iii) (“A balance of hardships tipping decidedly toward the party seeking relief”).

1) ICANN Alleges Time-Bar Against Some of Claimants’ IRP Claims

¹¹⁵ Interim Supplementary Procedures, Rule 10 (italics added).

¹¹⁶ *Id.* (italics added).

¹¹⁷ Claimants’ Slide Deck, slide 5 (“Claimants have raised ‘sufficient questions’”); June 3rd Hearing, audio transcript (2:13:45 – 2:13:60).

¹¹⁸ See Claimants’ Slide Deck, slides 3 & 5.

¹¹⁹ June 3rd Hearing, audio transcript (1:01:25 – 1:02:30).

93. ICANN contends that a number of Claimants’ IRP claims are time-barred and stressed at the June 3rd Hearing that this was an important point.¹²⁰ In doing so, ICANN has characterized and classified Claimants’ IRP claims, as listed in the chart in paragraph 94 below.¹²¹ Claimants during the June 3^d Hearing objected to ICANN’s classification of its IRP claims, arguing that Claimants’ “arguments are as stated in our Complaint.”¹²² Indeed, the Emergency Panelist has summarized Claimants’ claims in Part III, Section B(1) above. The Emergency Panel decides, however, that it is useful, before further review of the IRP merits, to consider whether one or more of Claimants’ IRP claims is time-barred. If a claim is time-barred, that finding would defeat the possibility that the particular claim raises “sufficiently serious questions related to the merits.” The Emergency Panelist reiterates, however, that the preliminary assessment made here, regarding issues of any time-barred claims, does not finally resolve the merits of these issues, which are to be fully addressed by the IRP Panel.
94. As noted in paragraph 24 above, ICANN submitted a letter on June 16, 2020 responding to a question from the Emergency Panelist requesting that ICANN clarify which of Claimants’ claims ICANN contends are time barred.¹²³ In its letter, ICANN provided the following chart setting forth Claimants’ claims (as framed by ICANN); ICANN’s position on the timeliness of each claim; the date of any allegedly relevant ICANN Board action; and the alleged deadline that would have applied for filing an IRP claim¹²⁴:

Claim	ICANN’s Position on Timeliness	Date of ICANN Action (if any)	Deadline for Filing IRP (Governing Rule)
[1] ICANN should have re-evaluated the HTLD CPE Result	Untimely (and meritless)	22 Aug. 2014	20 Sept. 2014 (30 July 2014 Bylaws)
[2] The Board should not have accepted the <i>Despegar</i> IRP Final Declaration	Untimely (and meritless)	10 Mar. 2016	8 Apr. 2016 (11 Feb. 2016 Bylaws)

¹²⁰ ICANN’s Opposition, ¶ 23 (“Claimants barely *reference* the Board’s actions (on Requests 16-11 and 18-6 in their IRP Request, instead attempting to re-litigate the underlying claims, which are long since time-barred.”); June 3rd Hearing, audio transcript (54:00 – 54:15).

¹²¹ See also ICANN’s Slide Deck, slides 12-14, ICANN’s Opposition ¶¶ 23-24, and ICANN’s IRP Response, ¶¶ 43-44, 51, 58, 64, 75-76, and 80-82.

¹²² June 3rd Hearing, audio transcript (2:12:00 – 2:12:40).

¹²³ ICANN Counsel’s Letter dated June 16, 2020.

¹²⁴ ID. ICANN’s chart was provided with a number of footnotes providing references and further explanation. Those footnotes have been omitted in this copy of the chart. The Emergency Panelist also added numbering in square brackets “[]” to each of the claims listed in the chart.

[3] ICANN should not have allowed Afilias to acquire HTLD	Untimely (and meritless)	None, but information public since at least 23 March 2016	N/A or 21 Apr. 2016 (11 Feb. 2016 Bylaws)
[4] ICANN should have taken some (unspecified) action concerning the Despegar IRP in light of the Dot Registry IRP Declaration	Untimely (and meritless)	9 Aug. 2016	7 Sept. 2016 (11 Feb. 2016 Bylaws)
[5] The Ombudsman should have reviewed Request 16-11	No such requirement and/or Untimely	N/A and/or 15 Feb. 2018	N/A (11 Feb. 2016 Bylaws) and/or 15 June 2018 (Interim Procedures)
[6] The Ombudsman should have evaluated Request 18-6	Untimely (and meritless)	N/A or 23 May 2018	N/A or 20 Sept. 2018 (Interim Procedures)
[7] The Board should not have denied Request 18-6	Timely (but meritless)	18 July 2018	N/A (IRP timely filed)
[8] The Board should not have denied Request 16-11	Timely (but meritless)	27 Jan. 2019	N/A (IRP timely filed)
[9] ICANN should produce FTI's and the CPE Provider's Documents	Premature request	None	N/A (request premature)

95. ICANN indicated in its chart that different versions of the Bylaws (with different deadlines for filing IRP claims) apply to Claimants' claims made in this IRP. ICANN also stated that

“Even if all of the ICANN actions identified in this chart are evaluated under the time for filing set forth in Rule 4 of the Interim Supplementary Procedures, which became effective 25 October 2018..., those claims would still be untimely. Under the Interim Procedures, Claimants had 120 days (instead of 30) to initiate a CEP or IRP, and they did not do so. Nor did they file this IRP within the 12-month outside limit for filing IRP claims set forth in Rule 4 of the Interim Procedures.”¹²⁵

96. The Interim Supplementary Procedures, Rule 4 (Time for Filing) provides in relevant that:

“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.”

97. Referring to ICANN's list of claims above, the Emergency Panelist notes that ICANN has acknowledged Claimants' claims in this IRP related to the Board's denial of Request 18-6 [7]

¹²⁵ ICANN acknowledges that when Claimants initiated CEP on October 2, 2018, it tolled the statute of limitation on potential claims. ICANN Counsel's Letter dated June 16, 2020, p. 3, n. 10 and n. 12.

and Request 16-11 [8] were filed in a timely fashion. To the extent Claimants' IRP claims are based on the Board's decisions (and BAMC's recommendations) to deny Claimants' Request 18-6 and Request 16-11, such claims are timely. Further, ICANN has not challenged the timeliness of Claimants' current request that ICANN should be required to produce FTI's and the CPE Provider's (EIU) documents [9], but instead contends that the request is premature.

98. The Emergency Panel has reviewed claims [1] through [6], as classified and listed by ICANN, in view of both the Bylaws in effect at the relevant time and the deadlines in Rule 4 of the Interim Supplementary Procedures. Items [1], [2], [3] and [4] can be addressed first, followed by items [5] and [6], which are addressed together to consider both timeliness and the merits in relation to appointment of an Ombudsman:

99. [1] ICANN should have re-evaluated the HTLD CPE Result: The Emergency Panelist observes that this claim, as stated by ICANN, is similar to a claim that was considered by the *Despegar* IRP panel: "The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered."¹²⁶ As discussed in relation to item [2] and [4] below, to the extent Claimants seek to bring a "[d]irect challenge to the HTLD CPE result"¹²⁷ outside of the matters covered by Request 16-11 (and the subsequent BAMC recommendation and Board decision to deny Request 16-11), that claim would be untimely under both the July 30, 2014 version of the Bylaws¹²⁸ and Rule 4 of the Interim Supplementary Procedures.¹²⁹

100. [2] The Board should not have accepted the *Despegar* IRP Final Declaration: Claimants did not directly challenge the Board's acceptance of the *Despegar* IRP Declaration – the Board accepted that Final Declaration on March 10, 2016. As discussed in paragraph 43 above, ICANN's Board in its January 2019 Resolution found that claims with respect to the *Despegar*

¹²⁶ *Despegar* IRP Declaration, ¶ 55(i).

¹²⁷ ICANN's Slide Deck, slide 12.

¹²⁸ Under ICANN's Bylaws, as amended July 30, 2014, Art. IV, § 3(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" (italics added).

¹²⁹ Under Rule 4 of the Interim Supplementary Procedures, a challenge would have to be brought "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."

IRP Declaration were time-barred. If Claimants are attempting to bring an outright challenge to the Board’s acceptance of the *Despegar* IRP Declaration now, the challenge would be untimely under both the February 11, 2016 Bylaws¹³⁰ in effect at the relevant time, and under Rule 4 of the Interim Supplementary Procedures.¹³¹

101. However, when the Board accepted the *Despegar* IRP Declaration, it directed that ICANN:

(i) “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” and

(ii) “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.”

102. As to the first of these issues, the *Despegar* IRP panel noted that while many general complaints were made by the Claimants as to the CPE process, “the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.”¹³² As to the second of these directives, the *Despegar* IRP panel declined to make a finding on the Portal Configuration issue, indicating “that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.”¹³³

103. It appears that Claimants, instead of directly challenging the Board’s acceptance of the *Despegar* IRP Declaration, waited (i) to submit Request 16-11, after ICANN had completed an investigation of the Portal Configuration issues, and the Board had acted upon the findings of that investigation by passing its two August 2016 Resolutions (on August 9, 2016), concluding, among other things, that the cancellation of HTLD’s .HOTEL application was not warranted, and directing ICANN to move forward with processing HTLD’s application;¹³⁴ and (ii) to submit Request 18-6 after the completion of the CPE Process Review and the Board’s acceptance of the results in its March 2018 Resolutions, where the Board concluded that no

¹³⁰ In terms identical to the July 2014 Bylaws, ICANN’s Bylaws as amended February 11, 2016, provide in Art. IV, § 3(3) that an IRP must be filed within 30 days of the posting of the minutes of the relevant Board meeting.

¹³¹ Under Rule 4 of the Interim Supplementary Procedures, if they apply, a challenge against the *Despegar* IRP Declaration would have to be brought “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.”

¹³² *Despegar* IRP Declaration, ¶ 143.

¹³³ *Id.*, ¶ 138.

¹³⁴ August 2016 Resolutions.

overhaul or change to the CPE process for the current round of the New gTLD Program is necessary. As noted above, the IRP claims regarding Request 16-11 and Request 18-6 were timely submitted; however, to the extent Claimants' IRP claims directly challenge the Board's acceptance of the *Despegar* IRP Declaration, they are untimely and therefore do not raise "sufficiently serious questions related to the merits."

104. [3] ICANN should not have allowed Afilias to acquire HTLD: ICANN contends Claimants' claim – that ICANN should *not* have allowed Afilias to acquire HTLD – is untimely. The Emergency Panelist observes that Claimants in their IRP Request challenged "ICANN allowing a domain registry conglomerate [Afilias] to takeover the 'community-based' applicant HTLD" and that "HTLD is no longer the same company that applied for the .HOTEL TLD."¹³⁵

105. ICANN in its June 16, 2020 letter to the Emergency Panelist contends that

"There was no Board action or inaction in conjunction with this matter, and thus under the Bylaws in effect at that time, Claimants could not have filed an IRP. Even if there was a viable argument regarding Board action or inaction (which there is not), information regarding Afilias' acquisition of HTLD was publicly available as of 23 March 2016, which would have resulted in an IRP filing deadline of 21 April 2016."¹³⁶

106. ICANN refers to a letter dated March 23, 2016¹³⁷, which was available on ICANN's website in its correspondence files, in which Philipp Grabensee, Managing Director of HTLD, informed ICANN that, among other things "Afilias will in the near future be the sole shareholder of Applicant." Further on the issue of timeliness, ICANN in its IRP Response stated that

"These claims accrued no later than 25 August 2016, when Claimants acknowledged in Request 16-11 (but did not challenge) that Afilias was acquiring all shares of HTLD. Claimants did not assert that the Board should have taken any action as a result of Afilias' acquisition of the remaining shares of HTLD until submitting their IRP Request in December 2019, more than three years later."¹³⁸

107. The Emergency Panelist observes that the Board's August 2016 Resolutions (dated August 9, 2016), which were the basis for Claimants' Request 16-11, stated in relevant part:

¹³⁵ IRP Request, p. 4.

¹³⁶ ICANN Counsel's Letter dated June 16, 2020, p. 2, n. 5.

¹³⁷ Claimants' Ex. ZZ (23 March 2016 Letter), p. 2.

¹³⁸ ICANN's IRP Response, ¶ 80.

“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.”¹³⁹

108. The Emergency Panelist further observes that Claimants in Request 16-11 did not directly challenge the sale of HTLD to Afilias. However, Request 16-11 contains the following passages relevant to the issue of whether Claimants were aware of the sale of HTLD shares to Afilias:

“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 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.¹⁴⁰

¹³⁹ August 2016 Resolutions (italics added).

¹⁴⁰ Request 16-11, pp. 18-19 (italics added). Further, Claimants in Ex. Z have submitted a copy of an article dated May 12, 2016, publicly available, stating that “Afilias will become the sole shareholder of HTLD.” Claimants’ Ex. Z.

109. At the June 3rd Hearing, Claimants argued there is insufficient evidence to determine when Claimants learned “about ICANN’s inaction as to the Afilias transaction,” and that further briefing is needed on this issue.¹⁴¹ ICANN, on the other hand, stated at the hearing that the sale of HTLD to Afilias “was public,” that “ICANN posts these things on its website,” and that ICANN permits these transfers to occur, usually through a “staff action” without Board involvement.¹⁴²
110. In view of all of the above evidence, the Emergency Panel determines that an attempt by Claimants to bring an outright challenge to an action or failure to act by the ICANN Board concerning the transfer of ownership interests from HTLD to Afilias is time-barred. The evidence indicates that, at least as of August 25, 2016 when Claimants submitted Request 16-11, Claimants were aware of relevant facts concerning this transfer. Even if no Board action was involved (as alleged by ICANN), and therefore there were no “minutes of the relevant Board meeting” from which the 30-day limitation of the February 2016 Bylaws could be tallied, nonetheless, Rule 4 of the Interim Supplementary Procedures provides that a claim should be asserted, at the latest, no “more than twelve (12) months from the date of such action or inaction.” Here, it appears that Claimants claim challenging the transfer of ownership interest from HTLD to Afilias was first asserted, at the earliest, on October 2, 2018 when Claimants initiated the CEP with ICANN, and more than two years after Request 16-11 was submitted.
111. In determining that this claim is untimely, the Emergency Panelist concludes that it does not raise “sufficiently serious questions related to the merits.” However, this decision on untimeliness concerning a claim directly challenging the transfer of ownership interest from HTLD to Afilias does not prevent Claimants from raising the factual circumstances of that transfer – as Claimants referenced in Request 16-11 – in support of their contentions concerning the Portal Configuration issue (discussed below).
112. Moreover, the Emergency Panelist recognizes that Claimants claim directly challenging the transfer of ownership interest from HTLD to Afilias is one of Claimants’ principal claims in this IRP. The Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

¹⁴¹ June 3rd Hearing, audio transcript (2:12:15 – 2:13:15).

¹⁴² June 3rd Hearing, audio transcript (1:35:32 – 1:38:47).

113. [4] ICANN should have taken some (unspecified) action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration: ICANN contends that Claimants’ IRP claim is untimely to the extent it challenges that ICANN should have taken some action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration. The Emergency Panelist disagrees. ICANN in its June 16, 2020 letter indicates that the Board action (accepting the *Dot Registry* IRP Declaration) was taken on August 9, 2016,¹⁴³ and that under the February 2016 Bylaws the deadline for making a challenge would have been September 7, 2016. Further, at the June 3rd Hearing, ICANN’s counsel explained that there is a “new IRP decision [*Dot Registry* IRP] and Board action on that decision, and if there was an argument to make, the time to make that argument was after the *Dot Registry* IRP and the Board action on the *Dot Registry* IRP, and Claimants did not make that here.”¹⁴⁴

114. The *Dot Registry* IRP Declaration was issued on July 29, 2016 and the Board accepted that declaration on August 9, 2016. Claimants filed Request 16-11 on August 25, 2016, 16 days after the Board’s August 2016 resolution accepting the *Dot Registry* IRP. Request 16-11 asserts claims that (i) “[t]he ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case”¹⁴⁵ and (ii) the Board’s acceptance of the *Dot Registry* IRP Declaration is incompatible with the Board’s acceptance of the *Despegar* IRP Declaration.¹⁴⁶ In particular, Request 16-11 sets out:

“The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information.”¹⁴⁷

115. Request 16-11 asserted that ICANN breached its transparency obligations based on information that only became clear after the *Dot Registry* Final Declaration was issued:

“The *Despegar et al.* Panel’s reliance on false information that the EIU served as an independent panel (i.e., without intimate involvement of ICANN staff) was material

¹⁴³ See ICANN August 2016 Resolutions 2016.08.09.11-2016.08.09.13, at <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

¹⁴⁴ June 3rd Hearing, audio transcript 1:22:30 – 1:24:03.

¹⁴⁵ Request 16-11, p. 8.

¹⁴⁶ Id. (“The ICANN Board’s acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board’s acceptance of the IRP Declaration regarding the .hotel gTLD (the ‘*Despegar et al.* IRP Declaration’)”).

¹⁴⁷ Id., p. 9

to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.

Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information.”¹⁴⁸

116. Request 16-11 also alleges that the “ICANN Board discriminated against Requesters by accepting *Dot Registry* IRP Determination and refusing to reconsider its position on the CPE determination re .hotel.”¹⁴⁹ In view of these arguments made in reference to the Board’s decision to accept the *Dot Registry* IRP, as well as other claims asserted, Claimants in Request 16-11 sought several measures of relief, including “[t]he ICANN Board is requested to declare that HTLD’s application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary.”

117. The Emergency Panelist determines that, to the extent Claimants in this IRP raise a claim in Request 16-11 based on the Board’s decision to accept the *Dot Registry* IRP Declaration on August 9, 2016 (at which time Claimants would have been put on notice of the impact of any action or failure to action by the Board giving rise to alleged harm to Claimants), that claim is timely under the February 2016 Bylaws and Rule 4 of the Interim Supplementary Procedures.¹⁵⁰

¹⁴⁸ Id., pp. 13-14.

¹⁴⁹ Id., p. 18.

¹⁵⁰ Under Rule 4, the claim is brought “no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE.”

118. [5] and [6] The Ombudsman should have reviewed Request 16-11 and Request 18-6: The Emergency Panelist reviews Claimants’ Ombudsman claims both as to timeliness and the merits.
119. Claimants’ IRP Request seeks that the IRP Panel “immediately appoint an ombudsman to review the BAMC’s decisions in RFRs 16-11 and 18-6, as required by the Bylaws,”¹⁵¹ and Claimants’ IM Request correspondingly seeks the same relief by way of interim measures.¹⁵² ICANN contends that to the extent Claimants assert IRP claims that Request 16-11 and Request 18-6 should have been reviewed by the Ombudsman, these claim are untimely and without merit.
120. Ombudsman for Request 16-11: ICANN claims that “the Ombudsman had no role in Reconsideration Requests when Request 16-11 was submitted.”¹⁵³ In its June 16, 2020 letter, ICANN explains that at the time when Request 16-11 was submitted, the “operative Bylaws (11 Feb. 2016 Bylaws) did not provide for Ombudsman review of Reconsideration Requests.”¹⁵⁴ ICANN also contends that even if there was a viable argument regarding Ombudsman review, Claimants were on notice that no such review was part of the process for Request 16-11 as of February 15, 2018, when the Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Placed On Hold Pending Completion Of The CPE Process Review (“Roadmap”) was publicly posted.¹⁵⁵
121. Claimants contend, on the other hand, that “as to RFR-16-11, even though the BAMC decided to consider that RFR in 2018, it failed to refer it to the Ombudsman as required by the Bylaws *then in effect*.”¹⁵⁶ Claimants essentially argue that Request 16-11 – at least with respect to the

¹⁵¹ IRP Request, p. 12.

¹⁵² Claimants’ IM Request, p. 4.

¹⁵³ ICANN’s IRP Response, pp. 11-12; ICANN’s Opposition, p. 10, n. 42.

¹⁵⁴ ICANN Counsel’s Letter dated June 16, 2020, p.2 n. 7 (citing BAMC Recommendation on Request 16-11, p 18, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf>; and Board Resolution 2019.01.27.23, at <https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f>).

¹⁵⁵ *Id.* The Roadmap specifically states 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.” The Roadmap provides detail on the steps to be taken for each of the Reconsideration Requests; those steps do not include reference to the Ombudsman.

¹⁵⁶ IM Request, p.7; Claimants’ Brief, p. 14 (*italics added*).

question of whether Claimants' request was entitled to Ombudsman review – should have been considered under Bylaws in effect at the time when ICANN lifted the “hold” that had been placed on Request 16-11 (and several other Reconsideration Requests), rather than under the February 2016 Bylaws in effect when Request 16-11 was filed. As noted above, the hold had been ordered by the BGC until the CPE Process Review was completed.

122. The Emergency Panelist disagrees with Claimants' view. Request 16-11 was filed on August 25, 2016, alleging that certain action or inaction by ICANN violated its Articles, Bylaws or other policies and commitments in effect at that time. When Request 16-11 was filed, there was no procedure in place for the Ombudsman to review Reconsideration Requests.¹⁵⁷ Further, a claim to request Ombudsman review is untimely in view of the Roadmap published by ICANN on February 15, 2018. Under the February 2016 Bylaws, although they did not provide for Ombudsman review, if there had been such a procedure, an IRP claim would have been required to be made within 30 days of the publication of the Roadmap. Further, under Rule 4 of the current Interim Supplementary Procedures governing this IRP, Claimants would have 120 days from the date Claimants became aware of publication of the Roadmap (“aware of the material effect of the action or inaction giving rise to the DISPUTE”) to bring their IRP claim (or engage in the CEP). Claimants, in response to ICANN's contentions, have not alleged that they were unaware of the publication of the Roadmap, with its specific steps for moving forward on the several Reconsideration Requests that had been placed on hold, including Request 16-11. As noted above, Claimants did not initiate the CEP until October 2, 2018. The Emergency Panelist finds that Claimants IRP claim that Request 16-11 should have been reviewed by the Ombudsman is without merit because there was no such requirement in the February 2016 Bylaws and is also untimely; it therefore fails to raise “sufficiently serious questions related to the merits.”

123. Ombudsman for Request 18-6: With respect to Request 18-6, Claimants contend that they are entitled to what the Bylaws allegedly require – an independent Ombudsman review of Reconsideration Requests, prior to any decision by the BAMC.¹⁵⁸ Claimants state that the Board has never once rejected a BAMC (or BGC) recommendation on any Reconsideration

¹⁵⁷ The Ombudsman's role was incorporated into the version of the Bylaws in effect as of October 1, 2016.

¹⁵⁸ Claimants' Reply, p. 12.

Request. The independent Ombudsman is supposed to provide a check on that, but has inexplicably recused himself from every single relevant case. Claimants argue ICANN has no excuse for this, and offers no explanation as to why a substitute Ombudsman could not have been appointed. Claimants assert that ICANN could hire a substitute now, and Claimants could have that independent check in this case. Claimants argue they have been irreparably harmed because they have been denied that independent check, required by the Bylaws.¹⁵⁹

124. ICANN contends that conduct by the Ombudsman is not subject to challenge in a Reconsideration Request or an IRP, which is why ICANN put “N/A” in the chart included in its letter of June 16, 2020 (see paragraph 94 above).¹⁶⁰ ICANN further states that the Ombudsman made the decision to recuse himself on May 23, 2018.¹⁶¹ The Ombudsman’s recusal letter is posted on ICANN’s website, along with all of the other relevant submissions and links to ICANN’s BAMC recommendation and Board decision in connection with Request 18-6.¹⁶² Given the May 2018 date, ICANN contends that September 20, 2018 would have been the applicable deadline (under the Interim Supplementary Procedures, Rule 4) for the filing of an IRP, if Ombudsman action could be the subject to an IRP.¹⁶³

125. The Emergency Panelist agrees with ICANN and determines that Claimants’ IRP claim is untimely regarding the appointment of an Ombudsman for Request 18-6. By comparison, as noted above, the claims in this IRP with respect to Request 16-11 and Request 18-6 *are* timely. However, neither Request 18-6 nor Request 16-11 included any claim as to the appointment of an Ombudsmen. The earliest date from which to assess timeliness of Claimants’ Ombudsman claim is October 2, 2018, when Claimants initiated the CEP. Under the Interim Supplementary Procedures, Rule 4, Claimants would have had 120 days to bring an IRP claim (or engage in the CEP) from May 23, 2018, the date when the Ombudsman recused himself.¹⁶⁴ Claimants have not contended that they were unaware of the Ombudsman’s recusal in May 2018. For this

¹⁵⁹ Id., pp. 12-13.

¹⁶⁰ ICANN Counsel’s Letter dated June 16, 2020, p.2 n. 8.

¹⁶¹ See Ex. R-37 (email chain of ICANN’s request to ICANN’s Ombudsman Herb Waye and Mr. Waye’s response dated May 23, 2018 regarding Request 18-6), at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

¹⁶² See ICANN’s Request 18-6 webpage, with links to documents, resources and ICANN decisions, at <https://www.icann.org/resources/pages/reconsideration-18-6-trs-et-al-request-2018-04-17-en>.

¹⁶³ ICANN Counsel’s Letter dated June 16, 2020, p.2 n. 8.

¹⁶⁴ See R-33 (The provisions for extending the time to file an IRP while Claimants participated in the CEP); Ex. R-34 (Claimants did not enter CEP until October 2, 2016, more than 120 days after the Ombudsman recused himself).

reason of untimeliness, Claimants have failed to raise “sufficiently serious questions related to the merits.”

126. Moreover, the Emergency Panelist determines that, regarding the merits of Claimants’ claim that an Ombudsmen should have been appointed for Request 18-6, Claimants have also failed to raise “sufficiently serious questions related to the merits.”

127. Claimants have contended that

“ICANN has subverted this check on its decisions by failing to provide a non-conflicted Ombudsman, not just in this case but in every single case concerning the new gTLD program at least since 2017. Indeed, it appears the Ombudsman has recused itself in 15 out of 18 cases, including 14 of 14 cases involving New gTLD applicants.”¹⁶⁵

128. Further, Claimants argue that “[i]t clearly violates ICANN’s Bylaws to systematically refuse to provide this important, purportedly neutral and independent check prior to consideration and adoption by the BAMC or Board.”¹⁶⁶ Without this mechanism, Claimants allege that the accountability process involving Reconsideration Requests is a sham.

129. ICANN has explained that the “Ombudsman provides to the BAMC an evaluation of the Reconsideration Request before the BAMC makes a recommendation to the Board.” The Ombudsmen is supposed to serve as “an objective advocate for fairness and ”to provide an “independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”¹⁶⁷

¹⁶⁵ Claimants’ IM Request, p. 9.

¹⁶⁶ Id.

¹⁶⁷ Art. 5, § 5.2 provides:

“The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2, the Ombudsman shall serve the function expressly provided for in Section 4.2.”

130. Claimants’ concerns, if correct, serve to reveal a deficiency in the current approach for ICANN’s Ombudsmen system: due to the Ombudsmen’s informal role under the Bylaws, Article 5, that same Ombudsmen is frequently required to exercise recusal in relation to duties for Reconsideration Requests, as set forth in the Bylaws, Article 4, Section 4.2(l). The Emergency Panelist recommends that ICANN should, as Claimants propose, consider engaging more than one Ombudsmen to avoid recurrent recusals.

131. Even so, the Ombudsman correctly recused himself under the Bylaws in effect for Request 18-6, and the Emergency Panelist determines that there has been no violation by the Ombudsman or by the Board of ICANN’s Articles, Bylaws or other policies, that would give rise to “sufficiently serious questions related to the merits.” The Ombudsman letter of recusal stated: “*Pursuant to Article 4, Section 4.2(l)(iii)*, I am recusing myself from consideration of Request 18-6.”¹⁶⁸ Article 4, Section 4.2(l)(iii) of the July 22, 2017 Bylaws, in effect when Request 18-6 was submitted, which are identical to ICANN’s current Bylaws on this point, provides:

“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.”

132. ICANN asserts in relation to Article 4, Section 4.2(l)(iii) that:

“it is entirely proper – indeed, required – for the Ombudsman to recuse himself in any Reconsideration Request involving matters for which the Ombudsman took a position before the Reconsideration Request was filed. Moreover, this provision provides the ‘specific reasons’ Claimants seek as to the Ombudsman’s recusal from Request 18-6: he recused himself ‘[p]ursuant to Article 4, Section 4.2(l)(iii)’ of the Bylaws, meaning the ICANN Ombudsman took a position concerning the subject of Request 18-6, before Request 18-6 was filed.”¹⁶⁹

133. The Emergency Panelist also observes that under the July 2017 Bylaws (and the current Bylaws), Article 5, Section 5.3(a), the Ombudsman only investigates complaints “which have not otherwise become the subject of either a Reconsideration Request or Independent Review

¹⁶⁸ Ex. R-37 (italics added).

¹⁶⁹ ICANN’s Opposition, ¶ 25.

Process.”¹⁷⁰ ICANN has argued that the lack of Ombudsman review does not create “any possibility of irreparable harm to Claimants.”¹⁷¹ Given that Claimants have initiated this IRP and will receive a fair decision on their claims from the independent IRP Panel, the Emergency Panelist finds that under Rule 10 of the Interim Supplementary Procedures, Claimants have not established “harm for which there will be no adequate remedy in the absence of such relief.”

134. Claimants’ request for interim measures of protection that an Ombudsman be appointed with respect to Request 16-11 and Request 18-6 is denied. However, as previously noted, in determining that interim relief is not appropriate at this time with respect to the appointment of the Ombudsman, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

2) Sufficiently Serious Questions Related to the Merits of Claimants’ Claims (that are not Time-Barred)

135. From the analysis above, it remains to be determined whether Claimants have, pursuant to Rule 10 of the Interim Supplementary Procedures, established “sufficiently serious questions related to the merits” as to any of Claimants’ claims that are not time-barred. The Emergency Panelist considers Requests 16-11 and Request 18-6, which ICANN has acknowledged are not time-barred, as well as relief requested in relation to the ICANN Board’s decision to accept the *Dot Registry* IRP Declaration, insofar as that relief is requested in Request 16-11. As discussed above, the Emergency Panelist as determined that Claimants claim regarding the sale of HTLD to Afilias is untimely.

136. (a) Request 16-11: Request 16-11 alleged, among other things, that the Board (i) failed to take into account the impact of the *Dot Registry* IRP Declaration,¹⁷² a case that had been decided in July 2016 (after the *Despegar* IRP Declaration issued in February 2016), and that the Board’s acceptance of the *Dot Registry* IRP Declaration on August 9, 2016 is incompatible with the

¹⁷⁰ Bylaws, Art. 5, § 5.3(a); see ICANN’s IRP Response, ¶ 40; ICANN’s Opposition, ¶ 9. See also Ex. E (email dated March 16, 2020 from the Ombudsman to Claimants’ counsel, in response to Claimants’ request for assistance “in all of these ways, with respect to ICANN’s apparently willful failure to implement basic procedural rights required by Bylaws since 2013.” The Ombudsman, noting that an IRP had already been filed and citing the Bylaws, Art. 5, § 5.3, stated: “Note that my powers end where IRPs begin.”).

¹⁷¹ ICANN’s Opposition, ¶ 39.

¹⁷² *Dot Registry LLC v. ICANN*, Declaration of the Independent Review Panel, ICDR Case No. 01-14-0001-5004, dated July 29, 2016 (“*Dot Registry*” IRP Declaration”), at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

Board's acceptance of the *Despegar* IRP Declaration; (ii) failed to consider the unfair competitive advantage HTLD obtained by accessing trade secrets of competing prospective registry operators; (iii) relied on false and inaccurate material information regarding the EIU's CPE results; (iv) failed to take material action to investigate and address allegedly illegal actions attributable to HTLD (including allegations that one of the individuals who had accessed the data, Ms. Ohlmer, was "the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information");¹⁷³ (v) failed to remedy violations of ICANN's Articles and Bylaws while doing so for other for other applicants; (vi) unjustifiably refused to cancel HTLD's application in violation of ICANN's core obligations; and (vii) discriminated against the .HOTEL gTLD applicants by accepting the *Dot Registry* IRP Declaration while refusing to reconsider the Board's position on the CPE determination for .HOTEL. Request 16-11 requested that the Board cancel HTLD's .HOTEL application and take other necessary steps, and if the application is not canceled, refrain from executing the registry agreement with HTLD and provide full transparency about communications between ICANN, ICANN's Board, HTLD, EIU and third parties (including individuals supporting HTLD's application), and in any event, (viii) asked the Board to conduct a meaningful review of the .HOTEL CPE to ensure consistency of approach with its handling of the *Dot Registry* IRP case and the CPE results there.¹⁷⁴

137. On January 27, 2019, the Board accepted the BAMC's recommendation to deny Request 16-11 in its January 2019 Resolution.¹⁷⁵ While Claimants in Request 16-11 had requested reconsideration of the Board's August 2016 Resolutions concerning the Portal Configuration issues because ICANN had allegedly failed to properly investigate those issues, the January 2019 Resolution found that the Board had adopted August 2016 Resolutions after considering all material information and without reliance on false or inaccurate material information.¹⁷⁶

¹⁷³ Request 16-11, pp. 15-16. According to Request 16-11, Ms. Ohlmer "was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Board's decision is based on Mr. Krischenowski's actions and affiliation to HTLD only." *Id.*

¹⁷⁴ Request 16-11.

¹⁷⁵ Ex. R-29.

¹⁷⁶ *Id.*

138. On one of the issues, the BAMC recommendation focused primarily on one of the three individuals who accessed the data, Mr. Krischenowski, who had “acted as a consultant for HTLD’s Application at the time it was submitted in 2012,”¹⁷⁷ stating that

“Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN that they would delete or destroy all information obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party.”

and

“Mr. Krischenowski was not directly linked to HTLD’s Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD.”¹⁷⁸

139. The BAMC recommendation further states that

“In its investigation, ICANN org did not uncover 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; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski’s first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL applicants did not occur until 27 March, 29 March and 11 April 2014.”¹⁷⁹

140. Further, the BAMC recommendation states:

“Specifically, whether HTLD’s Application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013 – all of which occurred before Mr. Krischenowski or his associates accessed any confidential information, which occurred from March 2014 through October 2014.”¹⁸⁰

141. In a footnote, the BAMC addressed the allegation concerning access to the data by Ms. Ohlmer, who was alleged by Claimants in Request 16-11 to be the CEO of HTLD:

¹⁷⁷ See Recommendation of BAMC on Request for Reconsideration 16-11, dated November 16, 2018, p. 10, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf>.

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id., pp. 11-12.

“The BAMC concludes that Ms. Ohlmer’s prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 §8, at Pg. 15) does not support reconsideration *because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD’s Application in CPE.*”¹⁸¹

142. The January 2019 Resolution concluded, in particular, that there was no evidence that the Board did not consider the alleged “unfair advantage” HTLD obtained as a result of the Portal Configuration issues, and that there was no evidence the Board discriminated against Claimants. The January 2019 Resolution agreed with the BAMC that Krischenowski’s unauthorized access did not affect HTLD’s application, including the CPE result.¹⁸² As to allegation concerning Ms. Ohlmer, the Board considered and addressed a rebuttal submission that had been made by Claimants. In the rebuttal submission, Claimants alleged that they were “given no access to essential documents kept by ICANN and are therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC” on these issues.¹⁸³ Further, as to Ms. Ohlmer, one of the individuals alleged to have had access to the private data, the rebuttal states:

“The BAMC ignores that this material information was not considered by the ICANN Board and should, along with the other facts in this matter, have led to the disqualification of HTLD as an applicant. The Recommendation mentions Ms. Ohlmer’s unauthorized involvement in a footnote, (i) alleging that Requesters acknowledge that Ms. Ohlmer’s prior association with HTLD had ended no later than 17 June 2016, and (ii) concluding that her prior association with HTLD *does not support reconsideration ‘because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD’s Application in CPE.’*”

Both the BAMC’s allegation and its conclusion are incorrect. First, Requesters’ statement that Ms. Ohlmer was listed as CEO in HTLD’s application until 17 June 2016 is not an acknowledgment that Ms. Ohlmer’s prior association with HTLD had ended by then. Second, *Ms. Ohlmer illegally accessed confidential information at a time when she was CEO of HTLD. Through her access of this confidential information as CEO, the information was automatically provided to HTLD. Indeed, the individual who manages (or managed) HTLD was informed of competitors’ trade secrets as from the moment Ms. Ohlmer accessed the confidential information. HTLD acknowledged that she was (i) principally responsible for representing HTLD, (ii) highly involved in the process of*

¹⁸¹ Id., p. 10, n. 44 (italics added).

¹⁸² January 2019 Resolution, § 3(D)(3).

¹⁸³ Rebuttal to the BAMC Recommendation in Reconsideration Request 16-11, dated November 30, 2018, p. 1, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-requestor-rebuttal-bamc-recommendation-30nov18-en.pdf>.

organizing and garnering support for the .hotel application, and (iii) responsible for the day-to-day business operations of HTLD. The fact that unauthorized access occurred on more than one occasion by different individuals associated to HTLD and that information contained in the applications of direct competitors was targeted, shows that the unauthorized access by HTLD's executives was made willfully and with intent.

. . . .
In any event, given Ms. Ohlmer's position with HTLD at the time of illegal access, it is impossible for her to make an affirmative statement that she did not and would not share the confidential information with HTLD. As a result, it is also impossible for HTLD to confirm that it did not access the confidential information.”¹⁸⁴

143. In response to this rebuttal allegation concerning Ms. Ohlmer, the ICANN Board in its January 2019 Resolution acknowledged that “The Requestors claim that Ms. Ohlmer was CEO of HTLD when she accessed the confidential information of other applicants, and that she had been CEO from the time HTLD submitted HTLD's Application until 23 March 2016.” The Board however concludes:

“The Board finds that this argument does not support reconsideration as the Board did consider Ms. Ohlmer's affiliation with HTLD when it adopted the 2016 Resolutions. Indeed, the Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 notes that: (1) Ms. Ohlmer was an associate of Mr. Krischenowski; (2) Ms. Ohlmer's wholly-owned company acquired the shares that Mr. Krischenowski's wholly-owned company had held in GmbH Berlin (itself a 48.8% minority shareholder of HTLD); and (3) Ms. Ohlmer (like Mr. Krischenowski) "certified to ICANN [org] that [she] would delete or destroy all information obtained, and affirmed that [she] had not used and would not use the information obtained, or convey it to any third party." As the BAMC noted in its Recommendation, Mr. Grabensee affirmed that GmbH Berlin would transfer its ownership interest in HTLD to another company, Afiliac plc. Once this transfer occurred, Ms. Ohlmer's company would not have held an ownership interest in HTLD.”¹⁸⁵

144. The Emergency Panelist determines that Claimants have raised “sufficiently serious questions related to the merits” in relation to the Board’s denial of Request 16-11, with respect to the allegations concerning the Portal Configuration issues in Request 16-11. This conclusion is made on the basis of all of the above information, and in view of Claimants’ IRP Request claim that ICANN subverted the investigation into HTLD’s alleged theft of trade secrets.¹⁸⁶ In particular, Claimants claim that ICANN refused to produce key information underlying its reported conclusions in the investigation; that it violated the duty of transparency by

¹⁸⁴ Id., pp. 3-4 (italics added).

¹⁸⁵ January 2019 Resolution, § 3(D)(3).

¹⁸⁶ Claimants IRP Request, p. 4.

withholding that information; that the Board’s action to ignore relevant facts and law was a violation of Bylaws; and further, to extent the BAMC and/or Board failed to have such information before deciding to disregard HTLD’s alleged breach, that violated their duty of due diligence upon reasonable investigation, and duty of independent judgment.¹⁸⁷

145. The Emergency Panelist echoes concerns that were raised initially by the *Despegar* IRP Panel regarding the Portal Configuration issues, where that Panel found that “serious allegations” had been made¹⁸⁸ and referenced Article III(1) of ICANN’s Bylaws in effect at that time,¹⁸⁹ but declined to make a finding on those issues, indicating “that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.”¹⁹⁰ Since that time, ICANN conducted an internal investigation of the Portal Configuration issues, as noted above; however, the alleged lack of disclosure, as well as certain inconsistencies in the decisions of the BAMC and the Board regarding the persons to whom the confidential information was disclosed and their relationship to, or position with HTLD, as well as ICANN’s decision to ultimately rely on a “no harm no foul” rationale when deciding to permit the HTLD application to proceed, all raise sufficiently serious questions related to the merits of whether the Board breached ICANN’s Article, Bylaws or other policies and commitments.

146. Further, Claimants have raised sufficiently serious questions in their IRP Request whether ICANN materially misled Claimants and the *Despegar* IRP Panel, which allegedly relied on false and inaccurate material information, as subsequently revealed by the IRP Panel’s findings in (and the Board’s acceptance of) the *Dot Registry* IRP Declaration.¹⁹¹ Claimants allege that “the fact that material information was hidden from Claimants and the *Despegar* Panel is a violation of ICANN’s obligations to conduct its operations in a transparent [manner].”¹⁹² Claimants consequently seek review whether they were discriminated against in violation of Bylaws, as Claimants allege that the Board addressed alleged violations of its Bylaws in the CPE for *Dot Registry*, but not for Claimants.¹⁹³ If (as Claimants allege) ICANN materially

¹⁸⁷ *Id.*, pp. 24-26.

¹⁸⁸ *Despegar* IRP Declaration, ¶ 131.

¹⁸⁹ Article III(1) of ICANN’s Bylaws provided that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”

¹⁹⁰ *Despegar* IRP Declaration, ¶ 138.

¹⁹¹ Claimants IRP Request, pp. 18-21.

¹⁹² *Id.*, p. 20.

¹⁹³ *Id.*, pp. 21-24.

misled Claimants and the *Despegar* IRP Panel, as later revealed by the *Dot Registry* IRP Declaration, then it is not a sufficient justification, as asserted by ICANN, that the key difference in relation to the disputed disclosure issues in the *Dot Registry* IRP and *Despegar* IRP cases, respectively, is that the IRP Panel in the *Dot Registry* case ordered ICANN to produce the requested documents, while the IRP Panel in the *Despegar* case did not.¹⁹⁴

147. (b) Request 18-6: Request 18-6 claimed that ICANN’s March 2018 Resolutions are contrary to ICANN commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner. In addition, Request 18-6 claims that the Board failed to offer a meaningful review of Claimants’ complaints regarding HTLD’s application for .HOTEL. Request 18-6 requests that, unless ICANN cancels HTLD’s .HOTEL application, the Board should reverse its decisions in which it (i) accepted the findings in the CPE Process Review Reports; (ii) concluded that no overhaul or change to the CPE process for the current round of the New gTLD Program is necessary; and (iii) declared that the CPE Process Review has been completed. In the event that ICANN does not reverse its decisions, Request 18-6 asks that ICANN organize a hearing on these issues and that, prior to the hearing, ICANN provide full transparency regarding all communications between ICANN, the Board and ICANN’s counsel, on the one hand, and the CPE Process Reviewer (FTI), on the other hand, and provide transparency on its consideration of the CPE Process and the CPE Process Review and give access to all material the BAMC and Board considered during its meetings on the CPE Process and the CPE Process Review.

148. On July 18, 2018, the Board denied Request 18-6 in its July 2018 Resolution, concluding that the Board considered all material information and that the Board’s March 2018 Resolutions concerning the CPE Process Reviews are consistent with ICANN’s mission, commitments, core values, and policies.¹⁹⁵ The Board found that Claimants provided no evidence

¹⁹⁴ ICANN’s IRP Response, ¶¶ 42-49. Claimants in their IRP Request claim that “Claimants had explicitly asked for and been denied this information, and the *Despegar* Panel had expressly questioned ICANN about this information at the IRP hearing. Claimants’ IRP Request, p. 20. Claimants allege that “the unanimous *Dot Registry* panel required ICANN to turn over all relevant internal correspondence and correspondence with the EIU, which ICANN had denied to the *Despegar* panel had even existed. Id., p. 9. Claimants allege that “[i]t is inexcusable that ICANN did not inform Claimants and the Panel at that time – or since – that it had disclosed such material information to *Dot Registry* and to that IRP Panel. Claimants IRP Request, p. 20.

¹⁹⁵ ICANN Board Resolution 2018.07.18.09, at <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g> (“July 2018 Resolution”).

demonstrating how the March 2018 Resolutions concerning the CPE Process Review violated ICANN's commitment to fairness, or that the Board's actions were inconsistent with ICANN's commitments to transparency, multi-stakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.¹⁹⁶ In particular, the Board's July 2018 Resolution found that the CPE Process Review satisfied applicable transparency obligations, and that challenges to FTI's methodology and to the scope of the CPE Process Review did not warrant reconsideration.

149. Claimants in their IRP Request claim that (i) ICANN subverted FTI's CPE Process Review¹⁹⁷ and exercised undue influence over both EIU (with respect to EIU's CPE decisions) and FTI (with respect to the CPE Process Review); (ii) ICANN's, EIU's and FTI's communications are critical to this inquiry, but have been kept secret; and (iii) the FTI's report reveals a lack of independence of the EIU, and relevant documents have not been disclosed.¹⁹⁸ Claimants claim the BAMC conducted no independent investigation of its own despite the mandate of the *Dot Registry* decision and the noted failure by FTI to obtain critical evidence from the EIU and ICANN staff.

150. ICANN, on the other hand, responds that the Board's action on Request 18-6 complied with ICANN's Articles, Bylaws and established policies and procedures. ICANN states that while Claimants argue ICANN should have reconsidered Board resolutions concerning the CPE Review because FTI was unable to review the EIU's internal correspondence, Claimants do not challenge any of the Board's (or BAMC's) conclusions in response to Request 18-6. Further, the Board was entitled to accept FTI's conclusion that it had sufficient information for its review.¹⁹⁹

151. The Emergency Panelist finds, as to Request 18-6, that Claimants have failed to raise "sufficiently serious questions related to the merits." There is insufficient evidence in the record, despite Claimants' assertion that FTI was ICANN's "hand-picked a consulting firm,"

¹⁹⁶ Id.

¹⁹⁷ IRP Request, p. 4.

¹⁹⁸ IRP Request, pp. 12-21.

¹⁹⁹ ICANN's IRP Response, ¶¶ 62-78.

to impugn the independence and integrity of FTI and its methodology and the scope of work in relation to the CPE Review Process. As ICANN’s Board indicated in its July 2018 Resolution, “[t]he Board selected FTI because it has ‘the requisite skills and expertise to undertake’ the CPE Process Review, and relied on FTI to develop an appropriate methodology.”²⁰⁰ Moreover, although EIU refused FTI’s request to produce certain categories of documents, the Board found there is no policy or procedure that would require ICANN to reject FTI’s CPE Process Review Reports because the EIU did not produce certain internal emails.²⁰¹

152. Rule 11 of the Interim Supplementary Procedures provides in relevant part that “the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.” In view of the evidence submitted in relation to Request 18-6, the Emergency Panelist determines that the Board’s decision to accept FTI’s CPE Process Review Reports was within the realm of reasonable business judgment.

C. Harm for Which There will be No Adequate Remedy in the Absence of Relief and Balance of Hardships Tipping Decidedly Toward Party Seeking Relief

153. In light of the Emergency Panelist’s decision that Claimants have raised sufficiently serious questions related to the merits with respect to the BAMC’s recommendation for, and Board’s acceptance of, Request 16-11, the Emergency Panelist will assess Claimants requests for interim relief under the remaining two factors of Rule 10 of the Interim Supplementary Procedures. As discussed above, Rule 10 requires that Claimants must establish – in addition to (A) likelihood of success on the merits or (B) sufficiently serious questions related to the merits – each of the following two factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

154. The Emergency Panelist will now address each of the Claimants’ requests for interim measures while applying these two standards.

²⁰⁰ July 2018 Resolution, Analysis and Rationale, Section 3.A.2.

²⁰¹ Id.

1) Claimants' request that ICANN be required to not change the status quo as to the .HOTEL Contention Set during the pendency of this IRP

155. Claimants allege that ICANN proposes to award the .HOTEL gTLD registry agreement to HTLD, thereby eliminating Claimants' applications from contention for award of that contract. Claimants claim that ICANN's threatened action would make this IRP meaningless, and a complete waste of time and money, because Claimants would have no recourse even if they prevail. ICANN will have already awarded the contract, and the .HOTEL gTLD could be operational by HTLD before this IRP concludes. That would leave Claimants with no possible redress.²⁰²

156. Claimants contend that ICANN shows no respect for unanimous IRP precedent prohibiting ICANN from changing the *status quo* as to any gTLD Contention Set during the pendency of an IRP that could materially affect that Contention Set. ICANN takes this position despite its own Bylaws, which state that prior IRP decisions must be respected by ICANN as binding precedent.²⁰³

157. Claimants further contend that in all prior and relevant cases, IRP Emergency Panels have held that ICANN could not change the *status quo* as to a Contention Set under such circumstances.²⁰⁴ In particular, Claimants cite to the interim decisions by emergency panelists in the *Dot Registry, LLC v. ICANN* and *DCA Trust v. ICANN* cases, alleging both involved the

²⁰² Claimants IM Request, p. 5.

²⁰³ Claimants' Brief, p. 8.

²⁰⁴ *Id.*; see Ex. RELA-5: *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist's Order on Request for Emergency Measures for Protection (Dec. 23, 2014) ("*Dot Registry* Interim Decision") (ordering ICANN to refrain from proceeding with Contention Set resolution, stating that "... the need for interim measures is urgent to prevent the imminent dissipation of substantial rights."; also stating that if ICANN was allowed to proceed with the auction, Dot Registry would potentially suffer an "irrevocable loss" that "would not be compensable by monetary damages."); Ex. RELA-4: *DCA Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (May 7, 2014) ("*DCA* Interim Decision") (ordering "ICANN [to] immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same."; "In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review."); Ex. RELA-6: *GCC v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (Feb. 12, 2015) ("*GCC* Interim Decision") (ordering ICANN to "refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted"); see also, *Donuts v. ICANN*, ICDR Case No. 01-14-0000-1579, Resolution of Request for Emergency Relief (Nov. 21, 2014) (after forcing Claimant to file a Request for Emergency Relief, ICANN voluntarily agreed to a stay as to three new gTLD applications, in exchange for Claimant withdrawing that Request).

identical situation where ICANN threatened to delegate a TLD, which was subject to a competing applicant's IRP. In both decisions, the panelists required ICANN to maintain the contention set and not delegate the disputed TLD until the IRP was resolved. Claimants argue that here is no reason for any different result in this case, and that any different result would violate ICANN's Bylaws, Article 2, §2.3,²⁰⁵ which requires equal treatment of similarly situated parties.²⁰⁶

158. In the *Dot Registry* IRP, the Emergency Panelist stated in relevant part:

“While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.”²⁰⁷

159. Claimants allege that ICANN's Bylaws provide that prior IRP decisions must be respected by ICANN as binding precedent. Article 4, §4.3(a)(vi), provides that one of the “Purposes of the IRP” is to

“Reduce Disputes *by creating precedent* to guide and inform the Board, Officers[], Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.”

160. In addition, Article 4, §4.3(i)(ii) provides that: “All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law *and prior relevant IRP decisions.*” And furthermore, Article 4, §4.3(v) states (emphasis added):

“[A]ll IRP decisions ... shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue*, and norms of applicable law.”

²⁰⁵ Art. 2, § 2.3(Non-Discriminatory Treatment): “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.”

²⁰⁶ Claimants' Brief, p. 3.

²⁰⁷ *Dot Registry* Interim Decision, ¶ 54.

161. Claimants contend that ICANN has no justification for ignoring the prior, binding precedents. The Bylaws do not materially differ from those in the prior cases. The facts and Bylaws as to the *Dot Registry* case, in particular, are relevantly virtually identical. Therefore, Claimants state that the Emergency Panelist must order ICANN to stay all action as to the .Hotel Contention Set, until such time as the IRP is resolved.²⁰⁸
162. ICANN, on the other hand, claims that Claimants will not suffer irreparable harm if .HOTEL is delegated.²⁰⁹ ICANN contends that Claimants' argument incorrectly assumes that once a gTLD is contracted for and delegated, the registry agreement (and operation of the gTLD) can never be assigned to another registry operator. However, ICANN states there is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a registry agreement is in place or even after a gTLD has been delegated. Rather, ICANN's registry agreements specifically contemplate transition of control of gTLDs, and ICANN has a process for transitioning to a prospective successor.²¹⁰ ICANN states it will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP.²¹¹ Even if the IRP Panel determines that ICANN violated its Articles or Bylaws, and the ICANN Board then determines (based upon the Board's review of the IRP Panel's conclusions and recommendations) that .HOTEL should be subject to auction that results in another applicant being awarded the right to operate .HOTEL, ICANN states it would have the right to enter into a registry agreement with a new prevailing party. Emergency relief is unnecessary because any harm to Claimants can be adequately remedied.²¹²
163. ICANN contends that Claimants do not submit actual evidence supporting their claim that they will suffer irreparable harm if .HOTEL proceeds to contracting and delegation. Instead, Claimants rely on decisions on requests for interim relief in other IRP proceedings. In addition to those other proceedings being distinguishable, ICANN states the California Superior Court has found that any harm caused by delegation of a gTLD is not irreparable and therefore cannot support a request for interim relief. In 2017, in *DotConnectAfrica Trust v. ICANN*, an applicant

²⁰⁸ Claimants' Brief, p. 10.

²⁰⁹ ICANN's Opposition, ¶ 29.

²¹⁰ ICANN's Opposition, ¶ 29.

²¹¹ *Id.*, ¶ 30.

²¹² *Id.*

for .AFRICA (“DCA”) moved for a preliminary injunction to prevent ICANN from entering into a registry agreement for .AFRICA with a competing applicant.²¹³ The California Superior Court denied the motion, finding “no potential for irreparable harm” to DCA.²¹⁴ The court explained that the “gTLD can be re-[assigned] to DCA in the event DCA prevails.”²¹⁵ The court further noted that re-assigning gTLDs “is not uncommon and has occurred numerous times,” acknowledging ICANN’s established procedure for assigning registry agreements.²¹⁶

164. ICANN claims that the same is true here. ICANN states that it will contractually preserve the option of effecting an assignment of .HOTEL to another registry operator pending the outcome of this IRP. Then, if the IRP Panel agrees with Claimants, and the ICANN Board determines (based on its review of the IRP Panel’s declaration) that HTLD should not operate .HOTEL, ICANN can effect an assignment of .HOTEL to another registry operator.²¹⁷

165. ICANN claims that neither the *Dot Registry* Interim Decision nor the *DCA* Interim Decision considered the fact that the registry agreements for the gTLDs at issue could be assigned to another registry operator.²¹⁸ In addition, the *GCC* Interim Decision, cited by Claimants, is different in a critical respect from the dispute here: in that case, the claimants opposed the existence of the .PERSIANGULF gTLD because “the GCC and its members are extremely sensitive to use of the term ‘Persian Gulf’ in virtually any context, including its use as a top level domain.”²¹⁹ Thus, ICANN states the delegation (and “operation” by any entity) of .PERSIANGULF was the harm – not the operation of the gTLD by one applicant rather than another. Here, the delegation of .HOTEL in itself is not the harm; Claimants allege harm related to the identity of the registry operator, but this harm can be adequately remedied through the registry transfer process.

²¹³ Ex. RELA-2: Order Denying Plaintiff’s Motion for Preliminary Injunction, *DotConnectAfrica Trust v. ICANN*, Case No. BC607494 (Super. Ct. Cal. 3 Feb. 2017) (“*DCA Trust* Superior Court Decision”).

²¹⁴ *Id.*, p. 4.

²¹⁵ *Id.*

²¹⁶ *Id.* Similarly, ICANN claims that in 2016, the District Court for the Central District of California denied an application to prevent the .WEB contention set from proceeding to “auction [to] award the rights to operate the registry to the winning bidder.” Order Denying Plaintiff’s Ex Parte Application for Temporary Restraining Order, at Pg. 1, *Ruby Glen, LLC v. ICANN*, Case No. CV 16-5505 PA (C.D. Cal. 26 July 2016), Ex. RELA-3. “[B]ecause the results of the auction could be unwound, Plaintiff ha[d] not met its burden to establish that it will suffer irreparable harm” if the auction proceeded. *Id.* at p. 4.

²¹⁷ ICANN’s Opposition, ¶ 33.

²¹⁸ See *DCA* Interim Decision, ¶¶ 39-50; *Dot Registry* Interim Decision, ¶¶ 50-52.

²¹⁹ *GCC* Interim Decision, ¶ 10.

166. ICANN concludes that while the older IRP interim decisions did not consider whether the harm identified here can be remedied by transferring the registry agreement after delegation, the more recent California Superior Court decision addressed exactly this issue and concluded that there was no irreparable harm under the circumstances. ICANN urges that the Emergency Panelist should do the same here because the same remedy will be available when this IRP concludes: ICANN would be able to terminate the registry agreement with HTLD and enter into a registry agreement with another party, if required by the circumstances.²²⁰
167. Claimants, in their Reply Brief, emphasize that ICANN’s Bylaws require it to respect the prior IRP interim decisions as binding precedent, a key point that ICANN does not address. Claimants have cited the *Dot Registry* Interim Decision and the *DCA* Interim Decision – both involved the identical situation where ICANN threatened to delegate a TLD that was subject to a competing applicant’s IRP. In both decisions, the emergency panelist required ICANN to maintain the contention set and not delegate the disputed TLD until the IRP was resolved.²²¹
168. Claimants state that the California Superior Court decision denying the preliminary injunction did not consider prior IRP precedents and ICANN’s Bylaws in its analysis.²²² In addition, Claimants here, unlike in that case, do not seek damages and seek only injunctive relief. Further, there is no intervener in this case that would suffer any damage. Also, the California court found a public interest in launching the .AFRICA gTLD; such an interest that does not exist as to .HOTEL, as both the .HOTELES and .HOTELSs gTLDs have been delegated for SEVERAL years with zero registrations to-date.²²³ Therefore, the California Superior Court preliminary decision cannot override unanimous IRP precedent that binds ICANN and this panel.²²⁴
169. Claimants allege that reliance on ICANN’s Transition Policy is an extremely uncertain and inadequate remedy. Claimants state that while ICANN presents that TLD registry transition is a simple process and that gTLDs are fungible assets (like second-level domain names, e.g., “example.com”), ICANN’s argument is fanciful, as clearly evidenced by the complex

²²⁰ ICANN’s Opposition, ¶ 36.

²²¹ Claimants’ Reply, pp. 3-4.

²²² *Id.*, p. 4.

²²³ Ex. K.

²²⁴ Claimants’ Reply, p. 4.

Transition Policy itself, especially with respect to Community TLDs.²²⁵ Claimants contend they would be irreparably harmed if ICANN proceeded to delegate the .HOTEL gTLD to Claimants' competitor, HTLD, particularly as a "community" TLD. HTLD would be permitted to launch .HOTEL and could ruin the market before it can be assigned to another applicant. Claimants argue this is far less speculative than the notion that HTLD would simply assign over the gTLD if Claimants prevail in this IRP. While ICANN states that it "will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP," it has provided no sworn statement to that effect. Moreover, a statement to "preserve the option" is not a promise that ICANN would exercise such option. Claimants state that ICANN cites no precedent for such a clause in any registry agreement, as there is none. ICANN cannot confirm that HTLD would accept such a clause, and cannot confirm that HTLD would abide by such a clause, even if HTLD did accept it.²²⁶ Moreover, Claimants allege there are other technical and business concerns addressed in the Transition Policy, which have no certainty as to outcome. The ICANN Board would need to approve the assignment, which would have to be proposed by HTLD – and neither of those actions can be guaranteed by ICANN. Future registry transition is inherently uncertain, and cannot cure the irreparable harm that is demonstrably likely to result from delegation during pendency of this IRP.²²⁷

170. Claimants argue that ICANN does not address what would happen to all of the "hotel community" members who have purchased .HOTEL domains by the time of any proposed assignment and put them to use (e.g., for websites, email). The Transition Policy would require the successor registry operator to accept those legacy registrations. That would constitute certain, irreparable harm to the successor, who might have sold any or all of those registrations to different parties, for higher prices and/or longer registration terms, and without restrictions as to use. Claimants allege the successor would be forced to accept the legacy customers and

²²⁵ Id., p. 5; Ex. RE-5 (Registry Transition Processes).

²²⁶ Id., p. 6.

²²⁷ Id., p. pp. 7-8. Claimants claim ICANN has recently been involved in an analogous dispute over the proposed assignment of the .ORG gTLD, operated on behalf of the non-profit organizational community. The non-profit operator sought to assign the gTLD to a private equity firm run by domain industry veterans (including a former ICANN CEO). Many in the non-profit community objected to the sale, and found support from the California Attorney General. That pressure caused ICANN to recently reject the assignment. Ex. I (ICANN's Board Resolution on the matter, including analysis of the factors considered in registry transition proposal). Claimants contend this is real evidence that ICANN cannot guarantee a smooth registry transition in this matter.

policies of HTLD.²²⁸ Moreover, a community gTLD must operate with defined “community restrictions” intended to limit usage to the community.²²⁹ If the disputed .HOTEL gTLD launches with restrictions, that is likely to create market stigma, poisoning the gTLD.²³⁰ This is allegedly what has happened with several restricted gTLDs to-date, as their registry operators realized they needed to open their restricted registries to survive.²³¹

171. Claimants allege, as to balance of hardships, that neither ICANN nor any third party has shown any harm from maintaining the *status quo*. ICANN refers to the so-called “hotel community” purportedly represented by HTLD and the alleged harm to HTLD and that community.²³² However, Claimants claim that ICANN provides no evidence as to any urgency or other potential hardship in this matter, which ICANN itself unilaterally delayed for years while it internally reviewed and reported on the CPE. This matter has been active since 2012 when Claimants filed their applications and each paid US\$ 185,000 to ICANN to process those applications. Claimants are far more prejudiced than anyone else, as their respective investments (including consultants’ fees, executive time and other resources) remain idle while this matter continues.²³³ Claimants also allege that ICANN delegated the .HOTELES (Spanish/plural) gTLD in 2015, and it has not even launched yet. Similarly, ICANN delegated the .HOTELS (plural) gTLD in 2017, and it has also not launched.²³⁴ Claimants contend these facts prove there are two available, nearly identical gTLDs already delegated by ICANN, with market demand apparently so weak that they have not been launched for any use at all.²³⁵ Claimants also assert that HTLD has had an opportunity to attempt to intervene in this matter to aver that its rights might be prejudiced, but has done nothing. At best, ICANN is speculating without any evidence, and contrary to evidence presented by Claimants.

²²⁸ Id., p. 7.

²²⁹ According to Claimants, this is one of the elements of the CPE that is at the core of this IRP case. Claimants argue that there is no legitimate hotel community, and instead .HOTEL domains should be made available to anyone without restriction – just like hundreds of other top-level domains including .HOTELES, .TRAVEL, .VOYAGE, .VIAJES, .VACATIONS, .TOURS, .HOLIDAY, .THEATER and .THEATRE.

²³⁰ Claimants’ Reply Brief, p. 7.

²³¹ Ex. J (2018 industry press article regarding .TRAVEL gTLD).

²³² Claimants’ Reply Brief, p. 8 (citing ICANN’s Opposition at ¶¶ 3, 5).

²³³ Claimants’ Reply Brief, pp. 8-9.

²³⁴ Ex. K.

²³⁵ Claimants’ Reply Brief, p. 9.

172. In sum, Claimants contend that the balance of hardships weighs against ICANN, as Claimants would suffer demonstrable and irreparable market harm, as per the evidence Claimants have presented. Registry transition would be an uncertain and insufficient remedy, which ICANN has not guaranteed and cannot promise. Neither ICANN nor any other party has shown any evidence of potential harm from the *status quo*. Therefore, Claimants request that the Emergency Panelist must follow unanimous, binding IRP precedents and order ICANN to preserve that *status quo* until this IRP case is resolved.
173. At the June 3rd Hearing, Claimants added as to the issue of “harm,” that if ICANN delegated .HOTEL to Claimants’ competitor, “that harm is obvious.” Claimants additionally referred to ICANN’s Transition Policy, alleging it is complicated and that many factors go into the transition analysis; the ICANN Board resolution with respect to the potential transaction of .ORG from one registry operator to another, reflecting the complexity and uncertainty involved;²³⁶ and concerns that there is no declaration from ICANN or Afilias as to any language that might be included in a registry contract if delegation occurred; and no declaration from Afilias alleging any harm.
174. Decision: The Emergency Panelist finds that this issue presents a close call. Claimants have cited to prior IRP precedents granting interim relief to maintain the *status quo* and involving similar facts and related concerns (i.e., ICANN moving to delegate a gTLD that was subject to a competing applicant’s IRP). Claimants argue that these prior IRP cases must be respected as binding precedent. ICANN has attempted to distinguish those IRP cases and cited to a California Superior Court case denying a request for injunctive relief to enjoin ICANN from delegating the rights to the .AFRICA gTLD, in another case involving a competing applicant.
175. The Emergency Panelist observes that each of these prior decisions was decided under standards that differ from the express standard now codified in Rule 10 of the Interim Preliminary Procedures, discussed above. The prior IRP cases, although raising similar concerns to those now faced by Claimants and providing “persuasive precedent” in terms of their analysis of certain policies, interests and issues, relied on prior versions of the ICANN Bylaws, before the standard set forth in Rule 10 of the Supplementary Procedures was in effect.

²³⁶ Ex. I (ICANN’s Board Resolution on the matter, including analysis of the factors considered in registry transition proposal).

They also relied on the ICDR Rules, Article 6 (Emergency Measures of Protection) and general arbitration practice to identify standards for granting interim relief. While the ICDR Rules remain in effect, the Interim Supplementary Procedures provide, in Rule 2, that “[i]n the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern.”

176. The California Superior Court did not reference ICANN’s Bylaws and relied on standards drawn from California court precedent for the issuance of preliminary injunctions. One prong of that analysis was “likelihood of success on the merits”; however, the court did not include or consider the alternative standard of Rule 10, “sufficiently serious questions related to the merits,” on which Claimants rely in this IRP. Moreover, the court found the plaintiff was unlikely to prevail on the merits in that case because, in accordance with the terms of its gTLD application – which included a covenant barring all court-based lawsuits against ICANN arising from ICANN’s evaluation of new gTLD applications – the plaintiff was not supposed to be before the court in the first place.²³⁷ This merits-based analysis by the court had nothing to do with any underlying claims by the plaintiff about whether or not the action or failure to act by ICANN Board might be in breach of ICANN’s Article, Bylaws or other policies and commitments.

177. The Supplementary Procedures, Rule 10, which applies to Claimants’ request for interim measures in this case, has articulated specific standards that supersede criteria considered by the panelists and the judge in those prior cases. Rule 10 requires that Claimants must establish *all* of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

178. The Emergency Panelist has already addressed factor (ii) above (“finding there were sufficiently serious questions related to the merits), leaving factors (i) and (iii) to be considered here. In view of all of the submissions, evidence, and arguments made in this case, and in view

²³⁷ *DCA Trust* Superior Court Decision, p. 6.

of the finding above that there are sufficiently serious questions related to the merits, the Emergency Panelist determines that Claimants have established “[a] harm for which there will be no adequate remedy in the absence of such relief” and that the “balance of hardships tip[] decidedly toward [Claimants] seeking relief.”

179. Addressing the third (iii) factor first, given the long delays in this case that have already occurred (some due to processes convened by ICANN, which ICANN has acknowledged) and ICANN’s further acknowledgement that the only harm to ICANN is “to not be able to continue its processes,”²³⁸ the Emergency Panelist finds the balance of hardships tip decidedly toward Claimants. There is no evidence before the Emergency Panelist of harm to a “hotel community” caused by the additional delay in delegating .HOTEL until this IRP is decided. In addition, the non-party, HTLD (now Afiliás), has not sought to intervene in this case (or submit a declaration) to assert that any of its rights might be prejudiced. Further, there is no evidence of a public interest in favor of delegation, as was found by the California Superior Court in the case involving the delegation of the .AFRICA gTLD. As stated well by the Emergency Panelist in the *Dot Registry* IRP:

“While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.”²³⁹

180. The closer question relates to factor (i), “[a] harm for which there will be no adequate remedy in the absence of such relief.” ICANN has alleged that there is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a gTLD has been delegated; that it can contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome this IRP; and that Claimants have not submitted sufficient evidence supporting their claim that they face the requisite harm if .HOTEL proceeds to contracting and delegation.

²³⁸ June 3rd Hearing, audio transcript (1:01:45 – 1:02:20).

²³⁹ *Dot Registry* Interim Decision, ¶ 54.

181. The Emergency Panelist determines that Claimants have provided sufficient evidence, in part in view of the prior IRP interim decisions decided on similar issues, that the harm Claimants faces is one for which there will be no adequate remedy in the absence of such relief. Claimants have raised concerns as to the impact on the market for .HOTEL domain names if it is initially delegated as a “community” gTLD; the legacy concerns associated with domain name registrations subject to use restrictions intended to limit use to a community and potential conflicts with domain names registered by a new operator; and transition concerns involving uncertainty and the complexity of attempting to effectuate the transition from one registry operator to another, particularly if the incumbent registry operator is being forced to involuntarily relinquish its operation of the .HOTEL gTLD to a competitor. Although the Emergency Panelist does not question ICANN’s undertaking that it would seek to include a new contract clause in its registry agreement with Afilias requiring transfer in the specific situation where a decision in this IRP is issued in favor of Claimants, there is no specific language as to the scope of this clause in evidence and there are uncertainties associated with Afilias willingness (or unwillingness) to agree to such a restriction. Concerns between potential registry operators as competitors accentuate all of these points.
182. For all of the above reasons, and in view of all of the matters considered in this Decision, the Emergency Panelist decides to grant Claimants’ request that ICANN be required to maintain the *status quo* as to the .HOTEL Contention Set (i.e., do not enter into a registry contract with Afilias and do not enter into the delegation phase for .HOTEL) during the pendency of this IRP.²⁴⁰
183. In determining that interim relief is appropriate at this time with respect to maintaining the *status quo* as to the .HOTEL Contention Set, the Emergency Panelist makes clear that this decision does not finally resolve this issue. As discussed in paragraph 78 above, the decision of the Emergency Panelist concerning interim relief on this point can be reconsidered, modified or vacated by the IRP Panel, and does not resolve the merits to be fully addressed by the Panel.

²⁴⁰ The Emergency Panelist notes that, to the extent it is relevant to distinguish between prohibitory and mandatory injunctions and the corresponding degree of scrutiny for each, this order to maintain the *status quo* is prohibitory. Cf. Ex. RELA-1: Emergency Panelist’s Decision on Claimant’s Request for Interim Measures of Protection, *Namecheap, Inc. v. ICANN*, ICDR Case No. 01-20-0000-6787 (Mar. 20, 2020), ¶ 97.

2) Claimants' request that ICANN be required to preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP

184. Claimants request an order requiring ICANN to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP. Although Claimants indicated that they would “shortly will make a detailed request to ICANN pursuant to its so-called Document Disclosure Policy (“DIDP”), and incorporate[] that DIDP request by reference herein,” no such DIDP request was submitted to the Emergency Panelist.²⁴¹

185. Claimants have provided in their IM Request some detailed information about the documents sought and indicate that many of those categories of documents were required to be disclosed by ICANN to the *Dot Registry* IRP panel, even after ICANN’s alleged repeated denial as to the existence of some of them.²⁴² Claimants contend they are entitled to a preservation order so that the IRP Panel in this case will have the same documents available to it from ICANN, the EIU and FTI, as the IRP panel forced ICANN to disclose in the *Dot Registry* IRP case involving nearly identical facts, parties and documents. Claimants also seek additional documents from HTLD and Afilias in this matter, that were not relevant in the *Dot Registry* IRP case, and thus seek a preservation order as to those parties as well.²⁴³

186. Claimants contend that such an order is needed; otherwise, there would be no way for Claimants to have necessary documents that could be destroyed before this matter proceeds to discovery and adjudication. Claimants assert that ICANN offers no reasoning against imposition of such an order, but instead claims that it might be ineffective for various reasons. To the extent ICANN claims such documents are not relevant, Claimants vigorously dispute this claim and again refer to the *Dot Registry* IRP case, where such documents were allegedly hidden by ICANN, but the IRP panel forced their disclosure and found them to be relevant. Claimants and IRP panel in this case must have available all of the pertinent documents already produced in that highly analogous case involving many of the very same core issues.²⁴⁴

²⁴¹ Claimants’ IM Request, pp. 12-13.

²⁴² Claimants’ Brief, p. 11.

²⁴³ *Id.*, p. 12.

²⁴⁴ Claimants’ Reply, pp. 16-17.

187. ICANN states that it will comply with its obligations to preserve documents in its possession, custody, or control.²⁴⁵ ICANN contends, however, that Claimants' requests are more properly raised as discovery requests during the course of the main IRP proceedings, not as a request for interim relief. The Interim Supplementary Procedures provide for certain types of document discovery, and ICANN states that Claimants will have a full opportunity to request documents during the course of the IRP; they do not need interim relief for this purpose.²⁴⁶
188. During the hearing on June 3rd, counsel for ICANN, as noted above, provided an undertaking that he had already sent letters to the EIU and FTI requesting that they preserve relevant documents related to this IRP. The Emergency Panelist requested that ICANN supply copies of these letters, and on June 4, 2020, ICANN submitted copies of the letters, each dated May 22, 2020. In the letter to EIU, ICANN asked EIU "to retain any notes, drafts, and other work product in its possession, custody, or control relating to the Community Priority Evaluation ("CPE") of HTLD's .HOTEL application (and relating to any gTLD applications for .HOTEL." In the letter to FTI, ICANN "instruct[ed] FTI to retain any notes, drafts, and other work product in its possession, custody, or control relating to the Community Priority Evaluation ("CPE") of HTLD's .HOTEL application, the CPE Process Review conducted by FTI, and any gTLD applications for .HOTEL.
189. ICANN also indicated, however, that its contractual relationship with the EIU does not give ICANN control over documents in the EIU's possession, and the EIU was only required to retain documents for five years. The EIU completed the HTLD CPE Evaluation more than five years before Claimants initiated this IRP.²⁴⁷ Further, ICANN states that Afiliias and HTLD are third parties with no duty to ICANN to preserve or provide documents. ICANN lacks the "right, authority, or practical ability to obtain...documents" from them or force them to preserve material.²⁴⁸ ICANN notes that Claimants offered to "propose a list of specific categories of documents" that they would like preserved, but (despite having raised this issue in the IRP Request more than five months ago) have not identified those categories.²⁴⁹

²⁴⁵ ICANN's Opposition, ¶ 47.

²⁴⁶ Id.

²⁴⁷ Id., ¶¶ 47-48.

²⁴⁸ Id., ¶ 61.

²⁴⁹ Id., ¶ 46.

190. Although Claimants cite procedural orders from prior IRPs in support of this request for emergency measures, ICANN claims those orders concerned ICANN’s production of documents – they were not preservation orders, did not grant interim relief, and did not extend to third parties. Finally, ICANN contends that Claimants do not even attempt to argue that the balance of hardships tips decidedly in their favor. Claimants must establish this element to obtain interim relief, and they have not even tried to do so.²⁵⁰

191. In view of all of the above circumstances, including (i) ICANN’s undertaking that it will comply with its obligations to preserve documents in its possession, custody, or control; (ii) ICANN’s letters to the EIU and FTI, (iii) that Afilias and HTLD are non-parties to this IRP, and (iv) that Claimants did not provide a copy of any DIDP request, the Emergency Panelist determines that Claimants have failed to establish “[a] harm for which there will be no adequate remedy in the absence of such relief” and that the “balance of hardships” tip decidedly toward Claimants.

192. In determining that interim relief is not appropriate at this time with respect to the requested interim order to preserve documents, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

193. For all of these reasons, Claimants’ request for interim relief that ICANN be required to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IR, is hereby denied.

3) Claimants’ request that ICANN be required to appoint an Ombudsman to review the BAMC’s decisions in RFRs 16-11 and 18-6

194. This request was addressed above in Part VI, Sections B(1)[5] and [6].

4) Claimants’ request that ICANN be required to appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Supplementary Procedures, from which an IRP Panel shall be selected and to which Claimants might appeal, *en banc*, any IRP Panel decision per Rule 14 of the Interim Supplementary Procedures

²⁵⁰ Id., ¶¶ 49-51.

195. Claimants contend that ICANN has continued to violate its Bylaws by failing to make any real progress to adopt an IRP Standing Panel of specially trained panelists, chosen with broad community input – for some eight years – and through several iterations of ICANN Bylaws and a prior IRP declaration requiring them to do so.²⁵¹

196. Claimants state that ICANN’s Bylaws expressly have required the creation of a Standing Panel since 2013,²⁵² as follows:

“There shall be an omnibus standing panel of at least seven members (the ‘Standing Panel’) each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training....”²⁵³

197. Claimants assert that ICANN’s own Interim Supplementary Procedures, Rule 3 (since 2016) begins “[t]he IRP Panel will comprise three panelists selected from the Standing Panel.” Moreover, Rule 10 provides that the Emergency Panel shall be selected from the Standing Panel, and Rule 14 provides for the right of appeal of IRP panel decisions to the Standing Panel, *en banc*.

198. Claimants contend that they are deprived of these important procedural rights because of ICANN’s willful inaction, refusing to create a Standing Panel for some eight years now, and refusing to make much progress towards even beginning to establish one.²⁵⁴ Claimants argue this is particularly outrageous because ICANN was admonished by a previous IRP Panel for exactly this same reason, more than five years ago, in the *DCA Trust v. ICANN*²⁵⁵ case:

“29. First, the Panel is of the view that this IRP could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel [with] “knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected.”

²⁵¹ Claimants IM Request, p. 10.

²⁵² *Id.*

²⁵³ ICANN Bylaws dated April 11, 2013, Art. IV, § 3.6.

²⁵⁴ *Id.*, p. 11.

²⁵⁵ Decision on Interim Measures of Protection, *DCA Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13, dated May 12, 2014.

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an IRP as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.”

199. Claimants contend ICANN has “thumbed its nose” at the *DCA Trust* IRP decision for five years, despite the purposes of the IRP to provide binding decisions and guide ICANN actions to remedy Bylaws violations.²⁵⁶ Claimants request that ICANN be deemed to have violated its Bylaws by failing to implement the Standing Panel despite a long passage of time; indeed, by failing to make any substantial progress over that time. Claimants further request that such a Standing Panel be implemented to adjudicate this case, and to provide Claimants their critical right to appeal – per the Bylaws – that they otherwise will be deprived of for so long as ICANN refuses to implement the Standing Panel.²⁵⁷

200. Claimants contend it has also directly benefited ICANN’s finances, saving perhaps more than US\$ 1 million per year on fees paid by IRP claimants, which ICANN should be paying to maintain a Standing Panel, as clearly required by its Bylaws since 2013.²⁵⁸ Claimants contend that it harms them to not have the benefit of appointments from a Standing Panel with the specialized training, resultant expertise, and community backing that the Bylaws required ICANN to provide to all IRP claimants, more than six years ago. And Claimants will be denied the basic *en banc* appeal mechanism provided by ICANN’s Interim Supplementary Rules, which ICANN purportedly implemented more than three years ago. Claimants allege that ICANN has violated its Bylaws by taking so long to implement the Standing Panel, causing direct harm to Claimants and to all parties who would seek independent review of ICANN conduct.²⁵⁹ At the June 3rd Hearing, Claimants indicated that they are being denied a trained panel selected by community, denied an option to have a mediator from the IRP Standing Panel, and denied rights of an *en banc* appeal, probably most important right; and that Claimants are forced to pay fees up front, whereas the Bylaws require that IRP Panel should be in place and paid by ICANN.

²⁵⁶ Id.

²⁵⁷ Claimants’ Brief, p. 3.

²⁵⁸ Claimants’ IM Request, p. 12.

²⁵⁹ Claimants’ IM Request, p. 12.

201. ICANN contends that the establishment of the Standing Panel is a process that is driven, in the first instance, by ICANN’s “community,” and ICANN does not control their progress.²⁶⁰ ICANN contends that Claimants argument of harm is speculative and premature: the panelists for this IRP have not been selected; and pursuant to the Bylaws, Claimants may nominate one of the panelists, and that panelist will be involved in selecting (along with the panelist that ICANN chooses) the chair.²⁶¹ Claimants may select a panelist with as much specialized experience and expertise as they wish, and this process is set forth in the Bylaws, which were subject to public comment.²⁶²
202. ICANN contends that as to Claimants’ purported right to an appeal mechanism, the concern is premature and not appropriate for emergency relief.²⁶³ ICANN states that Claimants can only possibly be harmed if this IRP concludes; if the IRP Panel (which has not yet been selected) makes a final determination against Claimants; Claimants decide to appeal the decision; and, at that point, the Standing Panel has not been established. Until then, there is no risk of harm – much less irreparable harm – associated with this argument.²⁶⁴
203. ICANN states that even if it were appropriate to order ICANN to implement the Standing Panel, ICANN cannot “snap its proverbial fingers and do this.”²⁶⁵ The establishment of the Standing Panel depends on contributions and work from across ICANN’s community, including the IRP Implementation Oversight Team (“IRP-IOT”), representatives of ICANN’s Supporting Organizations (“SOs”) and Advisory Committees (“ACs”), and others. ICANN cannot unilaterally complete these processes. An order that ICANN do so before this IRP may proceed could halt the IRP for six months or more, while the community, ICANN, and the Board work to complete the processes.²⁶⁶ The process for establishing a Standing Panel is set forth in the Bylaws. The Bylaws require ICANN to work with SOs, ACs, and the Board to identify, solicit, and vet applications for Standing Panel membership. This process has begun: on March 31, 2020, ICANN opened a call for expressions of interest for panelists to serve on the Standing

²⁶⁰ ICANN’s Opposition, ¶ 42.

²⁶¹ Id., ¶ 43.

²⁶² Id.

²⁶³ Id, ¶ 44.

²⁶⁴ Id., ¶ 44.

²⁶⁵ ICANN’s Opposition, ¶ 54.

²⁶⁶ Id.

Panel and published a “Summary of Comments Received from Supporting Organizations and Advisory Committees on qualifications for Standing Panelists, and Next Steps.”²⁶⁷ Once they are received, SOs and ACs – not ICANN’s Staff or Board – are responsible for nominating a slate of Standing Panel members, which the ICANN Board will then consider. ICANN cannot mandate the speed at which the community process will occur.²⁶⁸ If the Board has questions on that proposal, it will need time to seek clarification. The selected Standing Panel members will also need training.²⁶⁹

204. ICANN argues that with respect to Claimants reference to the 2014 *DCA Trust* IRP – which stated that “[h]ad ICANN timely constituted the standing panel, the panel could have addressed DCA Trust’s request for an IRP as soon as it was filed in January 2014” – this was not a determination that ICANN violated its Articles, Bylaws, policies or procedures, and it does not apply to the current circumstances because the process for selecting a Standing Panel changed when ICANN enacted its new Bylaws in October 2016. Under the current Bylaws,²⁷⁰ ICANN does not have the power to complete the Standing Panel process on its own because of the roles of the SOs and ACs. Since the Bylaws were amended to provide for a process for establishing the Standing Panel, ICANN (with the SOs and ACs) has worked toward establishing a Standing Panel, including most recently by opening a call for expressions of interest for Standing Panel membership. Accordingly, the *DCA Trust* decision should not provide guidance, and is not binding precedent here.²⁷¹

205. Claimant in their Reply Brief claim that ICANN admits that implementation of the Standing Panel will take no more than six to twelve months longer than if it does not implement the Standing Panel. Claimants aver that this is a minimal, additional wait period given there is no evidence of ongoing harm to anyone from the delay in processing the .HOTEL applications submitted in 2012. Moreover, Claimants argue that ICANN offers no excuse for its willful failure to implement the Standing Panel, which it required itself to implement – at behest of its

²⁶⁷ Expressions of Interest were due in July 2020, but the deadline has been extended to the end of August 2020.

²⁶⁸ *Id.*, ¶ 55.

²⁶⁹ *Id.*, ¶ 56.

²⁷⁰ Bylaws, Art. 4, § 4.3(j).

²⁷¹ *Id.*, ¶¶ 57-58.

broader Community – more than six years ago. ICANN offers no evidence of any effort to implement its Bylaws in that respect prior to March 31, 2020.²⁷²

206. Claimants contend that ICANN falsely claims the implementation of the Standing Panel is beyond its control. Claimants state ICANN controls the work of its constituent bodies, and has control over those bodies’ staff support and budgets, and regularly imposes timelines on work.²⁷³ There is no reason why ICANN could not prioritize the IRP-IOT work with more staffing and a Board-requested timeline. Claimants argue that it is not important to ICANN, especially since ICANN benefits from bottom line benefits from the *status quo* – claimants paying hundreds of thousands of dollars in fees that ICANN has promised in its Bylaws to pay, for more than six years. Claimants argue that neither Claimants nor the Emergency Panelist, nor the broader ICANN Community, can have confidence that ICANN will fulfill its Bylaws obligations with any diligence, unless ordered to do so.²⁷⁴ ICANN says that the process for selecting the Standing Panel changed in 2016; however, that does not excuse their inaction up to that date, or since. Claimants allege ICANN has provided no evidence of any real effort to appoint a Standing Panel, under any process, until just two months ago. Claimants request that ICANN needs a clear order to implement the safeguards guaranteed by Bylaws to these Claimants and to the entire ICANN community. Only then can this dispute be resolved fairly, in accord with ICANN’s 2013 Bylaws. Only then will Claimants have their ICANN-given right to a specially trained Standing Panel, including Claimants’ right to *en banc* appeal of any decision of the panel.

207. The Emergency Panelist finds that Claimants have raised serious concerns about the delays associated with implementation of the Standing Panel, first recognized by the Emergency Panelist in the *DCA Trust v. ICANN* case. ICANN’s Bylaws from 2013, as noted above, provide that “[t]here shall be an omnibus standing panel of at least seven members (the ‘Standing Panel’) each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration.” Although this Bylaw is expressed in the future tense (“*there shall be*”), more than seven years have passed since enactment of that Bylaw.

²⁷² Claimants’ Reply Brief, p. 13.

²⁷³ *Id.*, pp. 13-14.

²⁷⁴ *Id.*

Moreover, ICANN’s October 2016 Bylaws, referenced by ICANN above, provide identical language in Article 4, § 4.3(j)(i), and more than three years have passed since the enactment of the 2016 Bylaws. These delays raise the prospect that ICANN, by not moving forward for such a long period, has risked breaching the commitment that it made through its Bylaws on this point, starting with the 2013 Bylaws.

208. Claimants have also pointed to important procedural rights, including in particular the right to an appeal before an *en banc* panel comprised of members of the Standing Panel, as set forth in the Interim Supplementary Procedures, Rule 14, and the Bylaws, Article 4, §4.3(x)(i).²⁷⁵ Moreover, Claimants have pointed to the costs imposed on Claimants and on other claimants, given ICANN’s position that it does not pay for IRP panelist fees and the ICDR’s fees when the Standing Panel has not yet been established. As to this last point, the Emergency Panelist has addressed separately Claimants’ request that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists in Section VI.C(6) below, noting that ICANN has now changed its position and has committed to pay IRP panelist and emergency panelist fees, in accordance with the Bylaws, Article 4, § 4.3(r).²⁷⁶
209. Even in view of the legitimate concerns raised above, the Emergency Panelist nonetheless finds that Claimants’ interim relief request – that ICANN be required to appoint immediately the Standing Panel – is premature. As noted by ICANN, Claimants, through the appointment process for the IRP panel in this case, have the opportunity to nominate a panelist with the relevant expertise, and ICANN can do the same. Accordingly, on the present record, Claimants have limited, if any, immediate risk of harm during the course of this IRP.
210. Moreover, the formal process for appointing the IRP Standing Panel is now underway with the solicitation of expressions of interest for panel members. Thus, the risk of harm to Claimants (“for which there will be no adequate remedy in the absence of such relief”) – which is *not* zero – is dependent upon not only (i) the assumption that ICANN’s will not continue with the new-

²⁷⁵ Rule 14 of the Interim Supplementary Procedures provides in relevant part: “An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting *en banc* within 60 days of the issuance of such decision. The *en banc* STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard....”

²⁷⁶ Art. 4, § 4.3(r) provides that: “ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members”.

found momentum to get the Standing Panel constituted, but also on (ii) the possibility that the IRP Panel in this case makes a final determination *against* Claimants, that Claimants decide to appeal the decision; and that, at that point, the Standing Panel has not yet been established. Given the process involved in constituting the Standing Panel, including involvement of committees and the ICANN community, as described by ICANN above, the balance of hardships, on the whole and as of the time of this Decision, do not tip decidedly toward Claimants on this request.

211. In determining that interim relief is not appropriate at this time with respect to the appointment of the Standing Panel, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel. The Emergency Panelist leaves Claimants to reassert this relief in the main IRP proceedings, in order to preserve rights under the Bylaws to an appeal to the Standing Panel, sitting *en banc*, should Claimants need (and wish) to do so.

212. For all of these reasons, Claimants request for interim relief that ICANN be ordered to immediately appoint the IRP Standing Panel is denied.

5) Claimants request that ICANN be required to adopt final Rules of Procedure

213. Claimants contend that ICANN has failed to adopt final IRP rules of procedure – for some six years – despite the Bylaws that have clearly required ICANN to do so; instead, Claimants argue that “we have incomplete, improper ‘Interim’ rules in place for more than three years now, with no apparent timeline or plan to complete the actual Rules.”²⁷⁷ Claimants state that ICANN has failed to come close to finalizing the Interim Supplementary Rules imposed more than three years ago, promised by the Bylaws six years ago. That failure in adopting final rules, which should have been a priority for ICANN, likely will cause much to be argued by the parties and decided by the Panel – which should have been the focus of ICANN-driven community consensus, and set in the rules by now.²⁷⁸

214. ICANN contends that just as in the case of the Standing Panel, the development of updated procedural rules is a process that is driven by ICANN’s community and ICANN does not

²⁷⁷ Claimants’ IM Request, p. 10.

²⁷⁸ *Id.*, pp. 11-12.

control the progress.²⁷⁹ Further, the Bylaws specifically contemplate that, while these community driven processes move forward, there are operative rules that will govern this IRP proceeding – the ICDR’s International Arbitration Rules (which will continue to control once updated procedures are implemented), the Interim Supplementary Procedures, which apply in this case and about which the Claimants make no complaints, and the Bylaws provisions for selecting panelists in the absence of a Standing Panel. Claimants have not even argued that they will suffer irreparable harm if the Interim Supplementary Procedures are used, just as they are being used in other IRPs currently pending.²⁸⁰

215. ICANN argues that Claimants’ request that the IRP be delayed until ICANN has finalized the procedures rules is unreasonable. ICANN has already adopted interim procedures – the Interim Supplementary Procedures – that govern this proceeding, and Claimants have used those procedures, as have claimants in two other IRPs that are currently proceeding. The Bylaws delegate responsibility for developing updated procedures to the IRP-IOT “comprised of members of the global Internet community.”²⁸¹ As Claimants know (because Claimants’ counsel is on the IRP-IOT), the IRP-IOT is actively working to finalize updated procedures, but was stalled because the membership was unable to commit the necessary time. The ICANN Board, when it was clear that the IRP-IOT was stalled, coordinated with the ICANN community and re-comprised the IRP-IOT so that updated procedures can be finalized. The re-comprised IRP-IOT is meeting regularly. Additionally, consistent with the Bylaws’ commitment to seeking broad, informed participation from the public, the IRP-IOT has invited multiple rounds of public comment in the course of developing updated procedures, and further public comment will be needed prior to Board consideration of a finalized set of procedures.²⁸² Ordering ICANN to complete these processes before the IRP proceeds will pause the IRP for an extended time.

216. The Emergency Panelist, having reviewed the arguments present by the parties, finds that Claimants have failed to establish “[a] harm for which there will be no adequate remedy in the absence of such relief” and the a “balance of hardships tipping decidedly toward [Claimants] seeking relief.” Claimants have provided no evidence, nor argument, to suggest that they are

²⁷⁹ ICANN’s Opposition, ¶ 42.

²⁸⁰ *Id.*, ¶ 42.

²⁸¹ ICANN Opposition, ¶ 59.

²⁸² *Id.*

harmful by having to proceed in this case under the Interim Supplementary Procedures. For all of these reasons, Claimants' request for interim relief that ICANN be ordered to adopt final rules of procedure is denied.

6) Claimants request that ICANN be required to pay all costs of the Emergency Panelist and IRP Panelists

217. Claimants IM Request includes a demand that ICANN be required to pay all of the costs of the Emergency Panelist in this IRP, and the costs of the other IRP panelists to be appointed in this matter, because this approach is required by ICANN's Bylaws. In particular, the Bylaws, Article 4, § 4.3(r), provide that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members."

218. Claimants allege that "ICANN has intentionally refused to implement the Standing Panel, as it then would be required to pay millions of dollars in fees annually to the Standing Panel members, much of which is paid by Claimants to the ICDR now – and for the past six-plus years since the Standing Panel was to be implemented."²⁸³ Claimants argue ICANN cannot be allowed to ignore its Bylaws and concomitant financial obligations for so long and at such great cost to the broader community and to Claimants.²⁸⁴ In particular, Claimants contend there is no basis for ICDR to require Claimants to pay 100% of the Emergency Panel fees, rather than an equal split of Emergency Panel fees, as is the case for the other IRP panelist fees. Claimants state the Emergency Panelist has the ability to apportion all fees to-date to ICANN, which is in accord with the Bylaws, so that costs are placed where ICANN's Bylaws require them to be placed – with ICANN.²⁸⁵

219. ICANN in its Opposition Brief initially contended that Claimants' request – that ICANN be required to pay Claimants' portion of IRP and panelist fees now, rather than allow the IRP Panel to apportion fees at the conclusion of the IRP – is by definition not irreparable harm. ICANN states Claimants' demand will be redressed by the IRP Panel in conjunction with its final award, where the Panel may allocate fees based on the outcome of the IRP.²⁸⁶

²⁸³ Claimants' Brief, p. 20.

²⁸⁴ Id.

²⁸⁵ Claimants' Reply, p. 16.

²⁸⁶ ICANN's Opposition, ¶ 45.

220. ICANN in its letter of June 11, 2020 to the Emergency Panelist subsequently amended its position on these issues. In its letter, ICANN stated as follows:

“In light of your question during the hearing, ICANN has further analyzed Article 4, Section 4.3(r), taking into consideration the spirit of the Bylaws as a whole since they were significantly revised in 2016. As a result, ICANN has decided to revise its response to your question as follows: ICANN will pay 100% of IRP panelists’ deposits upon appointment. This applies to Emergency Panelists and to the members of the full IRP Panel. Although ICANN maintains that this issue is not properly raised in a request for interim relief (because there is an adequate remedy for any harm through the IRP Panel’s re-apportionment of costs at the conclusion of the proceeding (see Bylaws Art. 4, § 4.3(p)(i))), ICANN has decided to reimburse Claimants ... for the Emergency Panelist’s initial deposit. Additionally, ICANN will bear 100% of the full Panel’s fees, when the Panel is selected. We note, however, that apportionment of these fees may be adjusted by the IRP Panel pursuant to Section 4.3(r), which provides: “the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.

We understand that the only other costs that Claimants have paid to date is the filing fee charged by the ICDR to commence an IRP. ICANN does not interpret Bylaws Section 4.3(r) to require ICANN to pay the ICDR’s filing fees. As I noted during the hearing, the IRP Provider will continue to play a critical role in the IRP process even after the Standing Panel is established. (Bylaws Art. 4, § 4.3(i).) Thus, ICANN does not anticipate that the IRP Provider filing fees will be eliminated with the establishment of the Standing Panel.”

221. On June 16, 2020, Claimants submitted an email in which they responded to ICANN’s June 11th letter and stated their position on the issue of the IRP administrative costs. Claimants indicated they appreciated ICANN’s revised position to pay 100% of IRP panelists deposits upon appointment, including those of the Emergency Panelist and members of the full IRP Panel. However, Claimants also state in relevant part that:

“ICANN must also pay the ICDR filing fees. The Bylaws require ICANN to pay all administrative costs of the IRP. So there is no justification for forcing claimants to pay a ... filing fee for ICDR administrative costs. We ask that ICANN reconsider and explain why it feels justified in forcing claimants to make that payment, else also reimburse Claimants in this case their ICDR filing fee....

Also, what is ICANN's position as to past ICDR fees paid by claimants since enactment of the Bylaws re the Standing Panel, including some of these Claimants? By ICANN's own reasoning (at last, and at least), all of those fees also should be reimbursed by ICANN, including [amount omitted] to the claimants in the previous .Hotel IRP (*Despegar*, including these Claimants).”

222. On June 18, 2020, ICANN sent a letter to Claimant, while copying the Emergency Panelist, in which ICANN responded to the questions in Claimant’s email of June 16th concerning the IRP administrative costs. ICANN’s June 18th letter states in relevant part that:

“Second, you ask ICANN to “explain” why ICANN does not interpret Bylaws Article 4, Section 4.3(r) to require ICANN to pay the ICDR’s filing fees. I provided that explanation in my 11 June 2020 letter to Mr. Gibson: “As I noted during the hearing, the IRP Provider will continue to play a critical role in the IRP process even after the Standing Panel is established. (Bylaws Art. 4, § 4.3(i).) Thus, ICANN does not anticipate that the IRP Provider filing fees will be eliminated with the establishment of the Standing Panel.” Furthermore, the ICDR filing fees are for the initiation of an IRP (not its administration) and do not fall within the definition of Section 4.3(r).

Third, you ask about “ICANN’s position as to past ICDR fees paid by claimants” in prior IRPs, and specifically about the *Despegar et al. v. ICANN* IRP claimants. You, of course, are well aware that the Bylaws were amended substantially in October 2016, and Section 4.3(r) was added at that time. As a result, ICANN has now agreed that it will reimburse/pay the administrative fees, including panelist fees, for IRPs adjudicated under the Bylaws in effect on 1 October 2016 or later. As you also know, there are currently only three such IRPs.

The Despegar claimants plainly have no basis to even suggest they meet these requirements because *Despegar et al. v. ICANN* was filed and decided well before the 1 October 2016 Bylaws took effect. Neither the Bylaws in effect when the Despegar IRP Request was filed, nor the Bylaws that were in effect when the Despegar Final Declaration was issued, directed ICANN to bear the administrative costs of the IRP under any circumstances. Instead, those Bylaws provided that:

‘The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances.’

The Despegar claimants were the “part[ies] not prevailing” in that IRP, and the Panel ordered them to bear 50% of the IRP panelists’ fees, consistent with the relevant Bylaws.”

223. The Emergency Panelist refers to ICANN’s statement in its June 11th letter that it has “further analyzed Article 4, Section 4.3(r), taking into consideration the spirit of the Bylaws as a whole since they were significantly revised in 2016.” Further, the Emergency Panelist acknowledges ICANN’s undertaking, stated in its letter, that

“ICANN will pay 100% of IRP panelists’ deposits upon appointment. This applies to Emergency Panelists and to the members of the full IRP Panel.”

224. In view of these undertakings, the Emergency Panelist determines that there is no longer a concern that Claimants, in connection with the administrative costs for this IRP case and in the

absence of interim relief, face a “harm for which there will be no adequate remedy in the absence of such relief.” Claimants, by virtue of ICANN’s undertakings, will received most of the relief demanded in their IM Request on this point. As to the additional question, raised by Claimants in their June 16th letter, concerning whether ICANN should reimburse them for their payment of the ICDR initial filing fee,²⁸⁷ Claimants have not shown that they will incur harm or decided hardship as to the requirement to pay this fee.

225. Claimants’ request for interim measures of protection that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists is largely moot in view of ICANN’s amended position on these issues. As to Claimants request that ICANN should be required to reimburse Claimants for the ICDR initial filing fee, Claimants’ request for interim relief is denied, but this issue can be fully addressed by the IRP Panel in the main IRP proceedings. As stated previously, in determining that interim relief is not appropriate at this time, the Emergency Panelist makes clear that this decision does not finally resolve this issue (or the other issues decided), which can be fully addressed by the IRP Panel.

VII. DECISION

226. For the reasons stated above, the Emergency Panelist decides as follows:

- A. Claimants’ request that the ICDR be ordered to recuse itself from this IRP is denied.
- B. Claimants have raised sufficiently serious questions related to the merits in relation to the Board’s decision to deny Request 16-11.
- C. Claimants have failed to raise sufficiently serious questions related to the merits in relation to the Board’s decision to deny Request 18-6.
- D. Claimants’ request for interim measures that ICANN be required to maintain the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP is granted.

²⁸⁷ The Emergency Panelist understands that the ICDR’s Initial Filing Fee, under the ICDR’s standard International Arbitration Fee Schedule, is set at US\$ 3750.00 for cases like this IRP involving Non-Monetary claims. The ICDR administrator for this case referenced the ICDR’s fee schedule in his email to the parties dated March 20, 2020. See Ex. E. Claimants refer to this amount in their IM Request, p. 7.

- E. Claimants' request for interim measures that ICANN be required to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP is denied.
- F. Claimants' request for interim measures that an Ombudsman be appointed with respect to Request 16-11 and Request 18-6 is denied.
- G. Claimants request for interim measures that ICANN be ordered to immediately appoint the IRP Standing Panel is denied.
- H. Claimants' request for interim measures that ICANN be ordered to adopt final rules of procedure is denied.
- I. Claimants' request for interim measures that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists is largely moot in view of ICANN's amended position on these issues (discussed above). As to Claimants request that ICANN should be required to reimburse Claimants for the ICDR initial filing fee, that request is denied.

227. In accordance with Rule 15 (Costs) of the Interim Supplementary Procedures, each party shall bear its own legal expenses. The Emergency Panelist makes no order to award any administrative costs and fees at this time, leaving that question to be decided by the IRP Panel.

This Decision is an Interim Order and does not constitute an IRP Final Declaration or settlement of the claim submitted in this IRP. In accordance with the ICDR Arbitration Rules, this Decision may be accepted, rejected or revised by the duly appointed IRP Panel.



Christopher S. Gibson
Emergency Panelist

August 7, 2020

Date