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12 **INDEPENDENT REVIEW PROCESS**
13 **INTERNATIONAL CENTER FOR DISPUTE RESOLUTION**

15 FEGISTRY, LLC; MINDS + MACHINES
16 GROUP, LTD.; RADIX DOMAIN
17 SOLUTIONS PTE. LTD.; DOMAIN
18 VENTURE PARTNERS PCC LIMITED,

19 Claimants,

20 vs.

21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND NUMBERS,

23 Respondent.

ICDR CASE NO. 01-19-0004-0808

**DENIAL OF CLAIMANTS' MOTION
FOR STAY**

24 For the following reasons, this Independent Review Panel DENIES Claimants'
25 "Request For Stay of Proceedings."

26 **A. PROCEDURAL BACKGROUND**

27 1. The parties are familiar with the lengthy and tangled history of this
28 dispute, so there is no need to recite it in detail. It is sufficient to note the following.

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1 2. Claimants are among seven applicants who sought from ICANN the
2 authority to operate a gTLD string under the name “.HOTEL.” There were several years
3 of extensive proceedings conducted under ICANN’s procedures for evaluating the Top
4 Level Domain applicants, including an evaluation by a Community Priority Evaluation
5 Panel. Ultimately, in 2014 ICANN awarded Community Priority to Hotel Top Level
6 Domain S.a.r.l. (“HTLD”). That determination did not result in HTLD actually operating
7 the .HOTEL domain. HTLD must still successfully complete other stages of approval
8 before that can happen. In any event, for the five years or so following the Community
9 Priority award to HTLD, Claimants and other unsuccessful applicants pursued internal
10 ICANN review of that decision.

11 3. Claimants formally initiated this Independent Review Process (“IRP”)
12 on or about December 16, 2019, contending that ICANN had breached its Articles,
13 Bylaws and the Applicant Guidebook in its handling of HTLD’s application. ICANN filed
14 its Response to that initial request on February 3, 2020.

15 4. On January 30, 2020, even before ICANN had filed its responsive
16 pleading in this IRP, Claimants filed a Request For Interim Measures of Protection,
17 pursuant to the Interim Supplementary Procedures of ICANN. On August 7, 2020, the
18 Emergency Panelist who was appointed to handle Claimants’ Request For Interim Relief
19 granted their request for a stay of the Contention Set, which means that ICANN may not
20 enter into the delegation phase for .HOTEL. [Decision on Request For Interim Measures
21 of Protection, ¶¶, 182-183.] However, the Emergency Panelist denied Claimants’ request
22 that ICANN be ordered to immediately appoint the IRP Standing Panel. [*Id.*, ¶ 226 (G).]
23 The Emergency Panelist declined to designate a prevailing party or to award fees and
24 administrative costs to any party.

25 5. On September 3, 2020, Claimants filed a lawsuit against ICANN in
26 Los Angeles Superior Court. *Fegistry et al., v. Internet Corporation For Assigned Names
27 And Numbers*, No. 20STCv4288. (Hereafter, the “State Court Lawsuit.”) Claimants
28 brought their suit “to force ICANN to implement dispute resolution procedural

1 mechanisms and safeguards specifically required by the Accountability Mechanisms and
2 Ombudsman articles of its bylaws....” *Id.*, ¶ 1. They alleged that those bylaws (a) require
3 Ombudsman Review of Plaintiffs’ Requests for Reconsideration, (b) create an expert
4 Standing Panel “to hear and decide the merits of Plaintiffs’ disputes with ICANN pursuant
5 to its bylaws,” and (c) require ICANN to pay all the administrative costs of the IRP. The
6 State Court Lawsuit asserts eight different California-based causes of action, including for
7 breach of contract, gross negligence, enforcement of the California Public Benefit
8 Corporation Code, false advertising, and unfair competition. It asks the Superior Court to
9 issue a mandatory public injunction and an award of specific performance that would
10 require ICANN to undertake various measures for administering its own rules and
11 procedures. In the Request For Stay that is the subject of this ruling, Claimants admitted
12 that they filed the State Court Lawsuit “in light of the ICDR Emergency Panelist’s
13 decision.”

14 6. On or about January 22, 2021—more than nine months ago—ICANN
15 filed a demurrer in the State Court Lawsuit. As of now, the hearing on the demurrer is
16 scheduled for some time in December, 2021.

17 7. The party-designated panelists in this proceeding were appointed by
18 the ICDR in early December 2020. For several months those panelists consulted with each
19 other and separately with counsel for the respective parties in an unsuccessful effort to
20 select a Panel Chair. When that proved impossible, the ICDR appointed the Chair.

21 8. On or about August 4, 2021, Claimants filed the Request For Stay of
22 Proceedings that is the subject of this ruling. That Request asks this Panel to altogether
23 stay this IRP.

24 “until either (1) ICANN implements the Standing Panel as
25 required by Bylaws since 2013 and provides Ombudsman
26 review of Claimants’ RFRs [i.e., Requests for Reconsideration]
27 or (2) the Superior Court matter is either resolved or ICANN
28 obtains an order from that court directing the IRP to proceed

1 before this panel.”

2 9. ICANN filed its response and opposition to the Request for Stay on or
3 about August 31, 2021.

4 **B. CLAIMANTS’ POSITION ON THE REQUEST FOR STAY**

5 10. In both their State Court Lawsuit and their Stay Motion, Claimants
6 argue that only after ICANN adopts procedures for and appointment of an Ombudsman
7 and a Standing Panel can this IRP be administered properly. They argue in both
8 documents that because such procedures are not yet formally in place, they have been
9 denied independent review of their challenges to ICANN’s handling of HTLD’s
10 application for the .HOTELS domain. Claimants explicitly acknowledge that they seek to
11 stay this IRP “in order to preserve their right to challenge ICANN’S intransigence in
12 court.”

13 11. Claimants’ Stay Motion relies heavily on their characterization of
14 prior proceedings and pronouncements in another, entirely separate IRP (*DCA Trust*), in
15 which case the panel criticized ICANN for its delay in constituting a Standing Panel.

16 12. Claimants maintain that ICANN will not be prejudiced if this IRP is
17 stayed. They assert that ICANN “has provided no evidence whatsoever as to any urgency
18 or other potential hardship in this matter, which ICANN itself unilaterally delayed for
19 many years” and they blame ICANN for the difficulty in “find[ing] an appropriate chair
20 available to handle [this] matter.”

21 13. Claimants go on to contend that “there would be no apparent benefit
22 [underlining in original] to anyone, even if ICANN quickly won this IRP case and then
23 immediately delegated the .hotel TLD to HTLD.”

24 **C. RESPONDENT’S POSITION ON THE REQUEST FOR STAY**

25 14. The starting point of Respondent’s opposition is that Claimants
26 wrongfully try to shift the fundamental question of burden of persuasion to ICANN.
27 Claimants are the moving parties, ICANN points out, and as such they have the burden to
28 establish that they will be harmed if this IRP is permitted to proceed. Claimants have

1 failed to meet that burden, Respondent argues. Claimants merely state that the money they
2 expended in seeking the right to operate .HOTEL “will sit idly worthless as this matter
3 continues.” That does not constitute hardship, argues Respondent, and in any event the
4 delays in achieving a final resolution of ownership of .HOTEL are not attributable to
5 ICANN. Claimants also complain that they “operate many other TLDs under contract
6 from ICANN which have a vested interest in ICANN complying with its own bylaws and
7 accountability mechanisms.” Respondent points out that what is or is not going on with
8 respect to other gTLDs is not within the scope of this IRP.

9 15. As to whether a stay would create harm, Respondent argues that it
10 would create further “harm to HTLD, the prevailing .HOTEL applicant, given that the
11 Emergency Panelist ruled that ICANN may not delegate the gTLD in dispute during the
12 pendency of this IRP.” HTLD has not been able to effectuate the victory it achieved in
13 2014, so this contention is meant to directly contradict Claimants’ view that no one would
14 benefit if .HOTEL were conclusively granted to HTLD.

15 16. In addition, Respondent asserts, both the Internet community
16 generally and ICANN itself would be harmed by any delay of this IRP, because ICANN
17 has been trying to complete the resolution of all the gTLD applications that it received
18 nearly ten years ago.

19 17. For the reasons set forth above, Respondent claims that the Request
20 For Stay combined with the filing of the State Court Lawsuit are examples of Claimants’
21 persistent efforts to delay this IRP, which already has been pending for almost two years.

22 18. Respondent’s next major contention is that the State Court Action is
23 unlikely to succeed, because (among other reasons) Claimants waived all rights to sue the
24 Respondent in any court. Respondent’s demurrer emphasizes that point. (See *infra*.)

25 19. Next, Respondent states that the Claimants’ procedural rights
26 regarding a Standing Panel and Ombudsman review have either already been denied by the
27 Emergency Panelist or are entirely meritless. Respondent has been working with various
28 community groups to convene a Standing Panel, both before and after the Emergency

1 Panelist’s decision was issued. Also, Claimants’ Request 16-11 was not wrongfully denied
2 Ombudsman review because there was no process in the Bylaws allowing for such review
3 of Reconsideration Requests at the time that Request 16-11 was made.

4 20. In any event, argues Respondent, this IRP is available and qualified to
5 evaluate Claimants’ contentions and provide appropriate relief if Claimants succeed in
6 proving them. That is precisely what the Emergency Panelist concluded, as Claimants
7 acknowledge at page 6 of their brief.

8 **D. PANEL’S FINDINGS AND REASONS FOR DENYING A STAY**

9 21. Having considered the foregoing contentions, read the parties’ briefs
10 and supporting materials, and taking into account Articles 19(1) (“Arbitral Jurisdiction”) and
11 20 (“Conduct of Proceedings) of the ICDR’s International Dispute Resolution Rules,
12 the Panel finds that Claimants have failed to establish any basis for either form of relief
13 that their stay application seeks. The Panel will now address those forms of relief
14 separately.

15 22. Stay Pending Implementation of Standing Panel And Ombudsman
16 Review of Claimants’ RFRs.

17 (a) Respondent is correct that neither the State Court Action nor
18 the halt of this IRP is likely to hasten the final implementation of a Standing Panel. While
19 the *DCA Trust* panel strongly rebuked ICANN for not having formed such a panel as of
20 2014, no IRP has actually ruled that its failure to do so violated the ICANN Articles or
21 Bylaws. Thus, Claimants’ contention that a stay is necessary because ICANN ignored two
22 prior IRP rulings is unfounded. Moreover, efforts are now and for a long time have been
23 underway to create the Standing Panel. As the Eisner Affidavit demonstrates, the
24 community-driven process is exceedingly complicated, but it has reached progress as
25 recently as March 11, 2021.

26 (b) Respondent has not even attempted to demonstrate why this
27 Panel cannot fairly conduct this IRP to assure the rights of both sides and all parties. The
28 Emergency Panelist specifically noted that Claimants could raise these issues before this

1 IRP during the merits phase.

2 (c) There is a concern that Claimants are forum-shopping. As
3 noted above, Claimants previously made the gist of their arguments to the Emergency
4 Panelist.

5 (d) Claimants have cited no legal authority or precedent for the
6 issuance of a stay.

7 23. Stay Pending Final Resolution of the State Court Case or Until That
8 Court Directs That This IRP Proceed Before This Panel.

9 (a) As Respondent's Demurrer demonstrates, and as Claimants
10 neither dispute nor challenge, Claimants executed a Covenant Not To Sue ICANN in any
11 court. It reads as follows:

12
13 APPLICANT AGREES NOT TO CHALLENGE
14 IN COURT OR IN ANY OTHER JUDICIAL
15 FORA ANY FINAL DECISION MADE BY
16 ICANN WITH RESPECT TO THE
17 APPLICATION [for the gTLD] AND
18 IRREVOCABLY WAIVES ANY RIGHT TO
19 SUE OR PROCEED IN COURT OR ANY
20 OTHER JUDICIAL FORA ON THE BASIS OF
21 ANY OTHER LEGAL CLAIM AGAINST
22 ICANN ...WITH RESPECT TO THE
23 APPLICATION...

24 Respondent's Ex. R-51, p.9.

25 (b) In California courts, a demurrer is a pleading where the
26 defendant challenges the legal sufficiency of a cause of action in a complaint. The
27 demurrer does not dispute the facts but argues that even if the facts are proven there is no
28 justiciable claim that has been stated. In other words, the court lacks the power to grant

1 the relief the plaintiff seeks. Thus, given Claimant’s written waiver of any right to sue
2 ICANN in Superior Court, it is possible that a California Superior Court would sustain the
3 demurrer without leave to amend and not allow the State Court Case to be prosecuted.

4 (c) On the other hand, if the Superior Court finds a basis to allow
5 Claimants to pursue the State Court Case, the case will probably take years for the trial
6 court to issue a decision wherein the “Final Resolution” of that case would be reached.
7 There is a huge backload of civil cases in Los Angeles Superior Court. Here, for example,
8 the demurrer was filed last January, yet the in-court hearing will not take place until
9 December 2021, a ten month delay before the court even hears the motion, much less
10 issues a ruling. (Such motions are often taken under consideration.) And that hearing
11 could be delayed further, given the crushing impact on state court administration caused by
12 Covid 19. Moreover, the court could sustain (*i.e.*, uphold) the demurrer with leave to
13 amend (usually 30 days is given for plaintiff to file an amended pleading) and then
14 defendant could file a demurrer to that pleading.

15 (d) In addition, even if the court sustains the demurrer without
16 leave to amend, it could take even more years before Claimants obtain a ruling on whether
17 they may pursue the State case, because either side could appeal the demurrer ruling.

18 24. Conclusion

19 This panel believes that this IRP will be completed well before the state court action
20 reaches a final decision. If there are any developments concerning the status of the
21 Standing Panel or Ombudsman before this Panel’s decision, this Panel can address those
22 developments when and if they occur.

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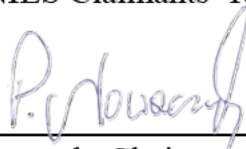
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For the foregoing reasons, the Panel DENIES Claimants' Request for a Stay.

DATED: November 1, 2021



Piotr Nowaczyk, Chair



A. Howard Matz



William Cahill