

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GCCIX, W.L.L.,) ICDR CASE NO. 01-21-0004-1048
)
Claimant,)
)
and)
)
THE INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S OPPOSITION TO GCCIX'S APPLICATION TO REVIEW
EMERGENCY PANELIST'S ORDER**

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3 March 2022

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INTRODUCTION

Respondent the Internet Corporation for Assigned Names and Numbers (“ICANN”) responds to Claimant GCCIX, W.L.L.’s (“Claimant”) Application to Review Emergency Panelist’s Interim Order submitted on 10 February 2022 (“Review Request”).

1. ICANN is a California nonprofit public benefit corporation that oversees the technical coordination of the Internet’s domain name system. To remain accountable to the Internet community, ICANN’s Bylaws create several Accountability Mechanisms through which members of the Internet community that claim they have been harmed by ICANN’s conduct can seek review of that conduct. One such Accountability Mechanism is the Independent Review Process (“IRP”), which is similar to an arbitration, presided over by a neutral, three-person panel.

2. Under the applicable ICANN Bylaws,¹ a Claimant – the entity invoking an IRP – is encouraged to participate in a Cooperative Engagement Process (“CEP”) with ICANN prior to initiating an IRP in the hope of resolving or narrowing the issues that may be the subject of an IRP. The CEP is essentially a mediation or settlement discussion. To foster open and candid settlement communications, CEP communications have always been considered confidential, as reflected in the Bylaws in place at the time Claimant initiated its CEP with ICANN, which explicitly state that all matters discussed during the CEP “are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.”² This confidentiality standard mirrors applicable state and federal law, as well as the International Centre for Dispute Resolution’s (“ICDR”) Mediation Procedures, all of which are designed to promote the resolution of disputes by making settlement discussions confidential

¹ All references to ICANN’s Bylaws are to the 7 February 2014 Bylaws (“Bylaws”), which were the operative Bylaws at the time Claimant instituted the Cooperative Engagement Process.

² Bylaws, Art. IV, § 3.17, Annex 3 to Review Request.

and prohibiting the use of confidential settlement discussions as evidence before the ultimate factfinder.

3. The CEP involving Claimant and ICANN lasted several years, but the parties were unable to reach a resolution, and Claimant filed its IRP Request in June 2021. Despite the general understanding, the clear Bylaws requirement, and the applicable law that CEP communications are to remain confidential and cannot be used in an IRP, Claimant's original IRP Request contained numerous allegations and arguments regarding Claimant's version of discussions during the CEP and Claimant even attached written correspondence exchanged during the CEP.

4. ICANN initially requested that Claimant amend its IRP Request to remove references to the CEP discussions, but Claimant refused to do so. As a result, ICANN was left with no option but to request, pursuant to the ICDR Rules, interim relief from an Emergency Panelist. The Emergency Panelist granted ICANN's request and ordered that Claimant file an amended IRP Request that "excised" the allegations and annexes that referenced the parties CEP discussions ("Emergency Panelist's Order").³

5. Claimant's Review Request, seeking to overturn the Emergency Panelist's Order, should be denied. The allegations and annexes that were ordered excised by the Emergency Panelist constitute confidential settlement discussions pursuant to the applicable ICANN Bylaws, meaning those that were in place when Claimant initiated the CEP, and applicable California state and federal law. Affirming the Emergency Panelist's Order is necessary to maintain the integrity of the CEP process and the ICANN community's confidence in the confidential nature of these types of settlement discussions, which is a key public policy that encourages the

³ Emergency Panelist Order ¶ 31.

resolution of disputes. Affirming the Emergency Panelist’s Order will also protect ICANN from having to make the unfair decision between disproving Claimant’s allegations about the CEP, which would require disclosure of more confidential information, or sitting silent in the face of Claimant’s CEP allegations out of deference to CEP confidentiality.

6. ICANN respectfully requests that the Panel uphold the Emergency Panelist’s Order and keep such allegations and annexes excised out of the record.

SUMMARY OF RELEVANT FACTS

7. A complete summary of the facts underlying this IRP is set forth in ICANN’s 27 December 2021 Response to IRP Request and is not repeated in full here for the sake of brevity and efficiency.

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

8. To help ensure that ICANN is serving and remains accountable to the global Internet community, the ICANN community established several Accountability Mechanisms that were included in ICANN’s Bylaws that allow certain interested parties to challenge or seek review of ICANN actions or inactions.

9. In particular, the IRP allows a party that was allegedly materially and adversely affected by an ICANN Board action or inaction to submit its claims to an “independent third-party” for review.⁴ IRP requests are administered by the ICDR, and are governed by ICANN’s Bylaws, the Interim Supplementary Procedures as well as the ICDR arbitration rules. In that ICANN is a California corporation, and California is its principal place of business, California state and federal law is also applicable to IRPs on certain topics, such as privilege and confidentiality.

⁴ Bylaws, Art. IV, § 3.1, Annex 3 to Review Request.

10. The Bylaws in place when the parties entered their CEP encourage a claimant to participate in a CEP prior to initiating an IRP, which is a “period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP.”⁵ The CEP is essentially a mediation or settlement conference and, therefore, the Bylaws provide that “[a]ll matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.”⁶ CEP confidentiality encourages open communications and candor between the parties during the CEP and encourages the parties to attempt to resolve or narrow the issues in order to try to save the parties the time and expense of an IRP.

II. THE PARTIES’ CEP, CLAIMANT’S IRP REQUEST, AND THE EMERGENCY PANELIST’S ORDER.

11. As set forth in ICANN’s Response to IRP Request, Claimant’s application for a .GCC gTLD faced a number of fierce objections and challenges because “GCC” is the acronym of a well-known Intergovernmental Organization (“IGO”) that was in no way connected to, or involved in, Claimant’s application.⁷ In February 2014, Claimant initiated a CEP with ICANN regarding the Board’s action on the Claimants’ .GCC application.⁸ Claimant and ICANN continued to discuss the issues for several years, but failed to come to a resolution.⁹ Claimant therefore initiated this IRP in June 2021.¹⁰

⁵ *Id.*, Art. IV, § 3.14, Annex 3 to Review Request.

⁶ *Id.*, Art. IV, § 3.17, Annex 3 to Review Request.

⁷ ICANN’s Response to IRP Request, ¶¶ 22-37.

⁸ Cooperative Engagement and Independent Review Processes Status Update (18 May 2021), Ex. R-22.

⁹ The Claimant always had the option of unilaterally terminating the CEP and ending settlement discussions with ICANN, but chose not to do so.

¹⁰ Ex. R-22.

12. Contrary to the Bylaws provisions regarding CEP confidentiality and applicable law, Claimant failed to maintain the confidentiality of the CEP discussions when it included in its original IRP Request several, adversarial allegations regarding the confidential settlement discussions between the parties. Although ICANN is constrained in how it can describe these allegations, as a general matter, these allegations set forth Claimant’s view of the content and tone of the CEP discussions. In addition, Claimant’s original IRP Request attached letters sent by Claimant’s counsel to ICANN during the CEP regarding the parties’ CEP discussions, which Claimant attempted to incorporate into its original IRP Request as evidence. For example, Claimant even goes so far as to argue in its original IRP Request that by failing to provide a written response and objection to an alleged timeline of events contained in Claimant’s correspondence, ICANN somehow “stipulated” to that timeline for purposes of this IRP, a baseless claim in all respects. Finally, Claimant attempts to use various communications during the CEP as evidence that ICANN allegedly engaged in the CEP in bad faith.

13. On 24 June 2021, ICANN requested that Claimant amend its original IRP Request to exclude all references to the CEP,¹¹ given the explicit provisions in the Bylaws that the discussions are to remain confidential and cannot be used “as evidence for any purpose within the IRP.”¹² Claimant refused.¹³ Therefore, ICANN was forced to file an application to strike the confidential CEP discussions with the Emergency Panelist. On 8 December 2021, the Emergency Panelist granted ICANN’s application and ordered Claimant to file a new IRP Request that “excised” all allegations and annexes that referenced, or were made during, the

¹¹ Email Correspondence between E. Enson and M. Rodenbaugh (June 2021), Ex. R-42.

¹² Bylaws, Art. IV, § 3.17, Annex 3 to Review Request.

¹³ Ex. R-42.

parties' CEP discussions.¹⁴ The Emergency Panelist further ordered that only the amended IRP Request and the Emergency Order “be placed on the arbitration ‘file’ to be passed to the tribunal when formed.”¹⁵

ARGUMENT

I. AFFIRMING THE EMERGENCY PANELIST’S ORDER WILL UPHOLD CEP CONFIDENTIALITY AND AVOID UNFAIR PREJUDICE.

14. Affirming the Emergency Panelist’s Order is necessary to maintain the integrity of the CEP process and the ICANN community’s confidence in the confidential nature of these types of settlement discussions. The key public policy behind the confidentiality of the CEP is to promote candor and openness in settlement discussions by ensuring that the ultimate factfinder in the dispute will not be exposed to parties’ confidential communications. This policy of promoting open and frank discussions during a CEP by keeping them confidential is express in the applicable Bylaws’ direction that all discussions during a CEP are “without prejudice to either party,” and that they cannot be used “as evidence for any purpose within the IRP.”¹⁶

15. When analyzing evidentiary codes making settlement negotiations inadmissible, California state and federal courts have found repeatedly that “[b]y preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering the policy toward settlement.” *United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982), RLA-4; *C&K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 13 (1978) (“The strong public policy favoring settlement negotiations and the necessity of candor in conducting them combine to require exclusion of” statements made during

¹⁴ Emergency Panelist Order, ¶ 31. Notably, rather than complying with the Emergency Panelist’s Order and excising the offending allegations and annexes, Claimant simply filed a redacted version of its IRP Request with the ICDR.

¹⁵ Emergency Panelist Order, ¶ 32.

¹⁶ Bylaws, Art. IV, § 3.17, Annex 3 to Review Request.

compromise negotiations), RLA-1; *Caira v. Offner*, 126 Cal. App. 4th 12, 32-33 (2005) (“[C]ourts have recognized that the purpose of section 1152 [is] to promote candor in settlement negotiation.”) (internal quotation marks and citation omitted), RLA-2.) Courts have also found it appropriate to strike from pleadings allegations disclosing confidential settlement negotiations. *McCrary v. Elations Co., LLC*, No. EDCV 13-0242 JGB (OPx), 2013 WL 6403073, at *6-7 (C.D. Cal. July 12, 2013) (striking confidential settlement negotiations from the complaint), RLA-3.) Even the ICDR’s own Mediation Procedures prohibit parties from using confidential mediation discussions “as evidence in any arbitral, judicial, or other proceeding” in order to encourage candor in settlement discussions.¹⁷

16. ICANN is therefore respectfully requesting that the Panel uphold the Emergency Panelist’s Order because this key and well-established public policy will be severely undermined if the allegations that describe and even quote the parties’ confidential CEP discussions are not kept out of the record.

17. Affirmance of the Emergency Panelist’s Order is also necessary to avoid unfair prejudice to ICANN. If the Emergency Panelist’s Order is overturned, the confidential status of the CEP discussions described in the original IRP Request will be irretrievably lost. Once that happens, ICANN will be unfairly forced to make an untenable decision. On the one hand, ICANN could respond to, and debunk, Claimant’s biased allegations about the CEP by providing information about what actually occurred during the CEP, which will only further undermine CEP confidentiality. On the other hand, ICANN could sit silent out of deference to CEP confidentiality, which would allow Claimant to assert any number of fabricated claims. ICANN should not be forced into such a decision.

¹⁷ ICDR Mediation Rules, M-12(3), Ex. R-40.

II. CLAIMANT’S ALLEGATIONS AND ANNEXES DISCLOSING CONFIDENTIAL CEP DISCUSSIONS SHOULD REMAIN EXCLUDED UNDER THE APPLICABLE BYLAWS AND APPLICABLE LAW.

18. The Panel should uphold the Emergency Panelist’s Order because the Bylaws applicable to the CEP and analogous applicable statutes mandate that confidential settlement discussions, such as the CEP discussions, are inadmissible. The applicable Bylaws are clear that “[a]ll matters discussed during the cooperative engagement and conciliation phases are to remain *confidential* and not subject to discovery or *as evidence for any purpose within the IRP*, and are *without prejudice to either party*.”¹⁸ Claimant does not dispute that the allegations and annexes ordered to be excised from Claimant’s original IRP Request are communications between the parties made during the CEP. Indeed, the Emergency Panelist’s Order implicitly finds that the excised allegations and annexes are communications between the parties made during the CEP. Claimant’s arguments against the confidentiality of these communications are unmeritorious and do not support Claimant’s position.

A. ICANN has not Disclosed any Confidential CEP Discussions.

19. Claimant argues that ICANN purportedly has already published significant portions of content from the parties’ CEP. This is demonstrably false. Claimant attached as Annex 12 to its IRP Request an eight-page letter from Claimant’s counsel to ICANN on 4 May 2016 (during the CEP) setting forth the alleged factual background and procedural history on pages one through six, and then a request for documents under ICANN’s Documentary Information Disclosure Policy (“DIDP”),¹⁹ on pages six through eight. Annex 12 is one of the

¹⁸ Bylaws, Art. IV, § 3.17 (emphasis added), Annex 3 to Review Request.

¹⁹ ICANN’s DIDP process allows members of the public to request documents or information from ICANN. It is intended to “ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.” ICANN Documentary Information Disclosure, Ex. R-37.

annexes ordered excised by the Emergency Panelist. While CEP discussions are kept confidential, requests and responses under ICANN’s DIDP are not. ICANN responded to Claimant’s DIDP request (“DIDP Response”), and published that response on its website in accordance with its normal practice.²⁰ Notably, ICANN specifically did not post Claimant’s 4 May 2016 letter nor did it publish any information related to the claims and allegations in Annex 12. Rather, ICANN’s DIDP Response merely summarized the documents Claimant requested and responded thereto. Accordingly, ICANN is not seeking to strike the DIDP Response; ICANN is seeking to shield the remaining information in Annex 12, which contains confidential CEP discussions.

B. The Bylaws in Effect at the Time Claimant Initiated the CEP Govern the CEP, but any Version of the Bylaws Support That the CEP Discussions are to Remain Confidential, in any Event.

20. Claimant argues that the November 2019 Bylaws (the “Current Bylaws”) are applicable to this IRP, and that they do not require that CEP discussions remain confidential. Claimant’s argument is incorrect. The parties’ CEP, the precursor to this IRP, was initiated in February 2014 under the Bylaws and rules in place at that time. Claimant acknowledges that the applicable CEP rules are the 2013 CEP rules that were in place at the time the CEP was initiated,²¹ yet Claimant inexplicably takes a different position with respect to the Bylaws. The 2013 CEP rules apply to the CEP in the same way that the 2014 Bylaws—the Bylaws in place at the time the CEP was initiated—apply to the CEP. Those Bylaws are explicit that CEP discussions are to remain confidential.²²

²⁰ Annex 6 to Review Request.

²¹ Review Request, 6.

²² Bylaws, Art. IV, § 3.17, Annex 3 to Review Request.

21. Even so, the Current Bylaws do not state that CEP discussions are *not* confidential. In a non sequitur attempt to argue that CEP discussions are no longer confidential, Claimant points to the provision in the Current Bylaws that “[i]f the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.”²³ First, it should be noted that this provision is only applicable to a claim that a *claimant* acted in bad faith. Second, this provision has nothing to do with the confidentiality of the discussions within the CEP. It is entirely possible to prove that a claimant has not participated in a CEP in good faith without disclosing the specifics of the confidential CEP discussions. More importantly, this provision does not provide that CEP discussions are somehow automatically not confidential.

22. Indeed, the operative Bylaws²⁴, the Current Bylaws, and the CEP rules applicable throughout all describe the CEP as a process “for the purpose of attempting to resolve and/or narrow the Dispute”²⁵ and that a “complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP”²⁶ – which clearly set out the expectation that these are confidential settlement discussions in the CEP.

23. Moreover, the intent since revising the Bylaws in 2016 has always been to maintain the confidentiality of the CEP discussions. The Current Bylaws provide that “CEPs

²³ Review Request, 11-12 (citing Current Bylaws, Art. 4, § 4.3(e)(2)).

²⁴ Bylaws, Art. IV, § 3.14, Annex 3 to Review Request .

²⁵ Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 28 Nov. 2019), Art. 4, § 4.3(e)(i), Ex. R-27.

²⁶ CEP Rules, 1, Annex 1 to Review Request.

shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.”²⁷ An ICANN community-lead working group has been tasked by the ICANN community with evaluating new rules for the CEP, which include memorializing in those rules that the CEP discussions are to remain confidential.²⁸ That those rules are not yet finalized does not mean that, by amending the Bylaws, ICANN somehow explicitly (or even implicitly) intended for CEP communications to be non-confidential in the interim. This is especially true in light of analogous California state and federal law upholding the confidentiality of these kinds of settlement discussions, as set forth more fully below.

24. Claimant next argues that in the *Afilias v. ICANN* IRP, substantial CEP discussion emails were admitted to prove ICANN’s bad faith in the process.²⁹ That is simply not true. In *Afilias*, the claimant submitted as an exhibit an email string with ICANN that contained mostly administrative discussions regarding the CEP, and only referenced the top email, which was written by ICANN on 14 November 2018, a day after that CEP was closed, meaning the email was sent outside the CEP.³⁰

²⁷ Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 28 Nov. 2019), Art. 4, § 4.3(e)(i), Ex. R-27.

²⁸ Reviewing the CEP, WS2 Subgroup, Meeting 1 (26 October 2016), at slide 19, Ex. R-43.

²⁹ Review Request, 12.

³⁰ *Afilias’ Sur-Reply to Verisign, Inc.’s and Nu Dotco LLC’s Request to Participate as Amicus Curiae in Independent Review Process, Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702 ¶ 39, Annex 8 to Review Request. It appears that within this email chain there was an inadvertent disclosure – one of the emails in the long email string captured in this exhibit, which was contained in an even longer 174-page set of exhibits, contains a substantive communication during the CEP (which was not referenced or used as evidence in that IRP). An inadvertent disclosure of CEP discussions in the *Afilias* IRP, however, is irrelevant to and has no impact on whether the parties’ confidential CEP discussions can be used in this IRP.

25. Even more erroneous is Claimant’s argument that Afiliás’ attorneys’ fee award in that IRP related to ICANN’s “bad faith litigation tactics” during the CEP.³¹ To be clear, that award related only to the claimant’s request for emergency interim relief *in the IRP* (notably, *after* closure of the CEP), *not* the CEP.³² Claimant’s argument that this award somehow relates to the CEP is, at best, a gross misreading of the cited order, and does not even apply much less support its position here.

C. California State and Federal Law Support the Confidentiality of CEP Discussions.

26. Well-settled California state and federal law deem settlement discussions, like those had during a CEP, as confidential. Specifically, California Evidence Code Section 1152 and Federal Rule of Evidence 408 both provide that conduct or statements made during settlement negotiations are not admissible to prove liability.³³ For example, Section 1152 of California’s Evidence Code makes clear “that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation.” *Caira*, 126 Cal. App. 4th at 32, RLA-2. Likewise, Rule 408 of the Federal Rules of Evidence expressly states that settlement negotiations are “not admissible to prove liability.” *Contra Costa County Water District*, 678 F.2d at 92, RLA-4.

27. Claimant contends that ICANN has not argued that the allegations or annexes were made “in compromise” or constitute an “offer or a promise,” in accordance with Section

³¹ Review Request, 12.

³² See Annex 8 to Review Request ¶ 410, (“The Panel reduces the Claimant’s claim on account of the Request for Emergency Interim Relief. . .”).

³³ Cal. Evid. Code § 1152(a) (“Evidence that a person has, in compromise or from humanitarian motives, furnished or offered . . ., as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”), RLA-5; Fed. R. Evid. 408(a), (a)(2) (“conduct or a statement made during compromise negotiations about the claim” is not admissible “either to prove or disprove the validity or amount of a disputed claim. . .”), RLA-6.

1152. But Section 1152 is not so limited: it applies not only to the specific offer or compromise, but also to “any conduct or statements made in negotiation thereof.”³⁴ This broad interpretation has been widely upheld by courts³⁵ and Federal Rule of Evidence 408 has been interpreted the same way.³⁶

28. Claimant next argues that California and federal law are inapplicable to this IRP, which directly contradicts analogous precedent and is nonsensical in all events. According to Claimant, only the Bylaws, the ICDR Rules, and the Interim Supplementary Procedures govern this IRP and apply to this dispute. Some law, however, must apply to ICANN and to disputes involving ICANN. Given that ICANN is a California non-profit public benefit corporation organized under the law of the state of California, California law, supplemented by U.S. federal law, governs its conduct.³⁷ Claimant does not offer any alternative.

29. The IRP Panel in the *Afilias* IRP explicitly held as much:

The Respondent is an organization incorporated under the laws of California and the communications and documents at issue in the Application were created by or concern legal advice from California attorneys. In such circumstances, the Panel is of the opinion that the law of California, as supplemented by U.S. federal law, applies to the issues arising from the Application, and it is on the basis of that law that it has determined these issues.³⁸

30. To be clear, nowhere in Claimant’s Review Request does Claimant argue, or even suggest, that the communications ICANN is seeking to keep out of the record were not made within ICANN’s CEP. That these communications occurred as part of the parties’ CEP is

³⁴ RLA-5.

³⁵ See, e.g., *Caira*, 126 Cal. App. 4th at 32 (“Evidence Code section 1152 broadly precludes the introduction of statements made in the context of settlement negotiations.”), RLA-2.

³⁶ *United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982), RLA-4.

³⁷ Claimant’s counsel also recently filed a lawsuit against ICANN in a different matter in California state court seeking to apply California state law to ICANN’s conduct.

³⁸ Procedural Order No. 4, *Afilias v. ICANN*, ¶ 33, Ex. R-44.

undisputed and implicit in the Emergency Panelist's Order. Thus, under ICANN's Bylaws and applicable California state and federal law, Claimant's allegations and annexes disclosing confidential CEP discussions comprise confidential settlement communications and should remain out of the IRP record.

CONCLUSION

31. The allegations and annexes that were ordered excised by the Emergency Panelist constitute settlement discussions within the CEP that are deemed confidential by provisions in the applicable ICANN Bylaws and applicable state and federal law. Allowing confidential CEP communications to be used in an IRP in the manner proposed by Claimant would completely undermine the integrity and purpose of the CEP, for this CEP and for future CEPs. For all the reasons stated herein, ICANN respectfully requests that the Panel uphold the Emergency Panelist's Order and keep the confidential information out of the IRP record.

Respectfully submitted,

JONES DAY

Dated: 3 March 2022

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