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Re: ICDR Case 50 2013 00 1083; Response to DCA's Letter of 29 May 2014

Dear Mr. President and Members of the Panel:

As authorized by the President's email of 30 May 2014, I am responding to DCA's letter of 29 May 2014.

ICANN reiterates that it is not within the scope of this Panel's authority to declare whether IRP Panel declarations are binding on ICANN's Board. Further, the Panel does not have the authority to re-write ICANN's Bylaws or the rules applicable to this proceeding. The Panel's mandate is strictly limited to "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[1]

In its 29 May letter, DCA concedes that the prior version of ICANN's Bylaws made clear that IRP declarations were *not* binding. Although the Bylaws were updated in 2013, there is *nothing* within the plain language of the Bylaws that now raises a question as to the non-binding nature of Panel declarations. Not only is there no language in the Bylaws stating that IRP Panel

[1] Bylaws, Art. IV, § 3.4.

declarations are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding. Further, words such as "arbitration" and "arbitrator" were *removed* from the Bylaws, making DCA's argument that this IRP Panel's declaration should have the force of normal commercial arbitration even more specious.

In short, DCA fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one. Instead, DCA argues that the addition of the sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value" distinguishes this version of the Bylaws from the version that was under review during the *ICM* IRP proceeding. But as ICANN already has explained to this Panel, that language was added to address the recommendation of ICANN's Accountability Structures Expert Panel ("ASEP") that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. It was not intended to, and did not, convert IRP Panel declarations into binding decisions.[2] Further, as ICANN has noted, declarations undoubtedly can be non-binding and have precedential—i.e., persuasive—value.[3]

DCA's 29 May letter devotes considerable attention to the question of whether, under the 2004 sTLD application process in which ICM participated, ICM could have filed suit against ICANN in court. DCA argues that the sTLD application "did not deprive ICM of access to local courts," suggesting that this somehow gave comfort to that IRP Panel in determining that its declaration was not binding. But DCA's interpretation of the sTLD application is absolutely false: as demonstrated by the very portion of the sTLD application waiver quoted by DCA, that waiver provided that "the applicant . . . ***hereby waives liability on the part of ICANN*** . . . for its [] actions or inaction in verifying the information provided in this application or ***in conducting any other aspect of its [] evaluation***."[4]

In short, the *ICM* IRP Panel recognized the non-binding nature of its declaration even though, as here, a broad waiver was in place.[5] In all events, this Independent Review proceeding is ***not*** about – nor can it properly be about – the "fairness" of the terms and conditions that DCA

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[2] ICANN's Further Memorandum Regarding Procedural Issues ¶¶ 7-8.

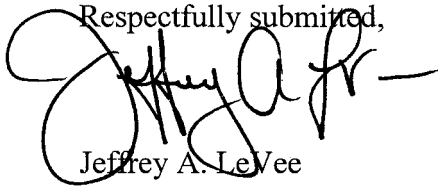
[3] *Id.* ¶ 10.

[4] *Id.* at 2 n.6; *see also* http://archive.icann.org/en/tlds/new-stld-rfp/new-stld-application-partb-15dec03.htm.

[5] And while the 2012 gTLD application (like the 2004 sTLD application) required DCA to waive its right to sue ICANN in court, it did not deprive DCA of remedies with respect to its application for .AFRICA. As ICANN has repeatedly emphasized, while this Panel's declaration is not "binding" on ICANN's Board, the Board takes all IRP declarations very seriously (and, in fact, followed the declaration of the ICM IRP Panel).

agreed to when applying for a new gTLD.[6] This proceeding is about whether ICANN's Board acted within its Bylaws and Articles of Incorporation when it accepted the GAC advice relating to DCA's application and determined that the application would not proceed. DCA's continued arguments on procedural diversions do nothing more than mask the fact that DCA has not presented a single persuasive merits-based argument demonstrating why it should prevail in this proceeding. It is time for the posturing to end so that the parties and the Panel can proceed to the merits.

Respectfully submitted,



Jeffrey A. LeVee

cc: Ms. Carolina Cardenos-Soto
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[6] As ICANN has noted, even if IRPs were arbitrations, which they are not, under the Federal Arbitration Act and the California Arbitration Act, "enforceability of an arbitration agreement is ordinarily to be determined by the court" unless it is established "by clear and unmistakable evidence that the parties intended to delegate the issue to the arbitrator." ICANN's Further Memorandum Regarding Procedural Issues ¶ 11 n.18 (quoting *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 781-82 (2012). The authorities that DCA cites for the proposition that the *Panel* may find the terms of the waiver unconscionable actually speak only of the right of *courts* to do so. DCA's Response on Procedural Issues ¶ 15 n.47.