IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS PTE. LTD., and DOMAIN VENTURE PARTNERS PCC LIMITED, **Claimants**, vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, **Respondent.**	:	**ICDR Case No. 01-19-0004-0808**

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

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Preliminary Statement

Claimants were forced to file their Request for Interim Measures with ICDR, essentially under protest, pursuant to the explicit written threat from ICANN to materially prejudice Claimants' rights if such a Request were not filed, by an arbitrary and capricious deadline that ICANN unilaterally set. Claimants reserve the right to supplement their Request upon disclosure of requested information relevant to the Request.

ICDR Has a Clear Conflict of Interest and Must Recuse; or At Least, Has an Apparent Conflict of Interest and Must Disclose Information

It is a foundational matter whether ICDR must recuse itself from adjudicating the Request. As stated in Claimants' correspondence to ICDR,[1] it is clearly apparent that ICDR has a financial conflict of interest as to the Request for Interim Measures. Particularly, ICDR has a significant financial interest whether a Standing Panel is implemented per ICANN's Bylaws, enacted more than six years ago. Claimants herein request that ICANN be deemed to have violated those Bylaws by failing to implement that Standing Panel despite such long passage of time; indeed, by failing to even make any substantial progress over that time. Claimants further request that such Standing Panel be implemented to adjudicate this case, and to provide Claimants their critical right to appeal -- per the Bylaws -- that is otherwise deprived of them so long as ICANN refuses to implement the Standing Panel.

At minimum, there is clearly an *apparent* conflict because ICDR is the sole provider of IRP and other arbitration services to ICANN, and if a Standing Panel is created, then ICDR is likely to lose cases and fees it otherwise would maintain. For certain, it will face competition for its role as facilitator of the new Standing Panel, if and when ICANN ever decides or is forced to implement it. Therefore, the

[1] Ex. A, dated January 24, 2020, and February 14, 2020.

ICDR will suffer some detriment if a Standing Pandel is to be implemented; at bare minimum, it would have to respond to an open RFP and then negotiate a contract with ICANN. It could fail to win the contract, and thus lose all of ICANN's business. Therefore, that conflict of interest must be subject of proper and complete disclosure to Claimants and the Emergency Panelist prior to adjudication of this Request.

For reference, Claimants cite to the crystal clear IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by the IBA Council in 2014.[2] Those Guidelines are directly apposite to the situation at hand, and thus are highly persuasive, if not authoritative.[3] To be clear, Claimants do not allege that the appointed Emergency Panelist has any conflict of interest. However, General Standard 5(b) provides that ICDR -- as administrator -- is bound by the same rules as for ICDR arbitrators, and "it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected."

Fundamentally, General Standard 2(a) provides (emphasis added): "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 test to analyze such conflicts, generally. 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 is found at Page 29, and includes #1.3: "The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case."

[2] Ex. B, from the IBA website: ibanet.org.
[3] Ex. C, from Wikipedia: "The International Bar Association (IBA), founded in 1947, is a bar association of international legal practitioners, bar associations and law societies. The IBA currently has a membership of more than 80,000 individual lawyers and 190 bar associations and law societies.

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."

Therefore, Claimants have respectfully requested ICDR and ICANN to fully disclose the terms of their financial relationship, and particularly as it relates or potentially may relate to any ICANN activities (if any) to create the Standing Panel that has been required by ICANN's Bylaws for more than six years. At minimum, Claimants are entitled to see any and 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 are entitled to see any and all correspondence between ICANN and ICDR referring or relating to the mythical Standing Panel that ICANN was to have created so many years ago.

Only once such disclosure has been made can Claimants fairly evaluate the clearly *apparent* conflict of interest. Indeed, only upon reflection of such information could ICDR and/or the Emergency Panelist make any reasoned judgment as to ICDR's conflict of interest as to this Request. Clearly, if ICDR loses ICANN's IRP caseload, then it will suffer financial detriment. ICDR has been the exclusive provider of ICANN IRP arbitration services since 2008, and since 2013 has handled approximately twenty IRP cases arising from ICANN's New gTLD Program.[4] Each case generates at least $3750 in initial filing fees to ICDR, and typically ICDR panelists collectively are paid well in excess of $100,000 per case. That Program is going to expand in the coming years, perhaps exponentially, with at least a proportionate share of additional disputes reasonably expected to arise. That appears to be more than

[4] Ex. D, ICANN IRP cases are listed here: https://www.icann.org/resources/pages/accountability/irp-en.

enough of a "significant financial interest," under the clear IBA Guidelines, to raise justifiable doubts as to ICDR's impartiality and independence as to Claimants' demand for imposition of the Standing Panel now. At least, it must trigger disclosure of complete information as to the apparent conflict. In fact, the ICANN Bylaws, specifically re Conflicts of Interest in the IRP (Art. IV(q)(ii)), unequivocally require as much: "The IRP Provider shall disclose any material relationship with ICANN."

Moreover, ICDR has demonstrated material bias in favor of ICANN, specifically with respect to Requests for Interim Measures, in this case and presumably all others in which such a Request has been made. Typically in IRP proceedings, ICDR requires the parties make equal monetary deposits to secure the IRP Panelists' time. However, with respect to so-called Emergency Requests, ICDR requires Claimants to pay 100% of the deposit, and ICANN to pay nothing. Claimants challenged ICDR about this purported "rule".[5] ICDR repeatedly dodged the question before ultimately replying that rule is unwritten, and not specific to IRP matters. Which begs the question, why is there not a specific, equitable rule in IRP cases, compliant with ICANN's Bylaws?

To be sure, that "rule" has a chilling effect on the making of such requests. ICDR forced Claimants to pay an $18,000 deposit for the Emergency Panelist, else their Request would be deemed withdrawn. And yet, as discussed further below, ICANN's own Bylaws have required ICANN -- for more than six years now -- to have in place a Standing Panel to hear such requests, and for ICANN to pay all costs of that Standing Panel including panelists' fees. ICDR's purported, yet unwritten "rule" is contrary to ICANN's own Bylaws, and prejudicial to all claimants for interim measures of relief. It indicates ICDR has instituted bias toward ICANN, precisely with respect to all requests such as Claimants' instant Request.

[5] Ex. E: email from Rodenbaugh to Simotas.

Lack of funding for IRP panelist fees has been cited as the cause for the only IRP case to ever be terminated without a Final Declaration.[6] If ICANN had been compliant with its Bylaws at that time, that case would have been heard by the Standing Panel at ICANN's expense. Instead, the claimant prepared an IRP Complaint and a Request for Interim Measures, but could not afford the panelist fees to adjudicate them. ICANN won only by willfully flouting its own Bylaws, by that point for more than four years.

ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request. At minimum, ICDR must fully disclose information so the issue can be properly considered and resolved.

Request for Interim Measures of Protection

Claimants respectfully seek Interim Measures of Protection pursuant to Section 10 of the Interim Rules, specifically requiring ICANN to: A) not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP; B) preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this matter; and, C) provide to Claimants the procedural rights required by ICANN's Bylaws for more than six years; namely, 1) appoint an independent ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6; 2) appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Rules, from which any IRP Panel shall be selected per Section 3 of the Interim Rules, and to which Claimants might appeal, *en banc,* any IRP Panel Decisions per Section 14 of the Interim Rules; 3) adopt final Rules of Procedure as required by ICANN Bylaws; and, 4) pay all costs of the Emergency Panel and of the IRP Panelists.

[6] *Commercial Connect v. ICANN*, ICDR No. 01-16-0000-2245 (Order Terminating Case, Apr. 11, 2017).

A. ICANN Must Maintain Status Quo as to .HOTEL Contention Set During Pendency of This IRP

ICANN shows no respect for unanimous 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 specifically state that prior IRP decisions must be respected by ICANN as binding precedent, discussed below.

Here, as in all of the prior cases, Claimants' challenge underlying decisions of the ICANN Board that, if they are reconsidered by the Board as requested by Claimants, should lead to a different result than the one ICANN threatens to impose now. Specifically in this case, ICANN proposes to award the .HOTEL gTLD Registry Agreement to Claimants' competitor, thereby eliminating Claimants' applications from contention for award of that contract. In other words, 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 already will have awarded the contract, and indeed the gTLD could even be operational before this IRP concludes. That would leave Claimants with no possible redress for their Complaint.

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. *See 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) (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."); *DCA Trust v. ICANN*, case no. 50 117 T 1083 13, Decision on Interim Measures of

Protection (May 7, 2014) (ordering "!CANN [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.").

In *Dot Registry,* the Emergency Panelist stated:

> 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. !CANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.

GCC v. ICANN, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (Feb. 12, 2015) (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).

ICANN Bylaws specifically state that prior IRP decisions must be respected by ICANN as binding precedent. For example, per Art. 4.3(a)(vi), one of the explicitly stated "Purposes of the IRP" is to "Reduce Disputes by creating precedent to guide and inform the Board, Officers ..., Staff members."

And that clearly includes ICANN's legal department, and ICANN's outside counsel that is purportedly managed by ICANN Staff members. In addition, Art. 4.3(i)(ii) states (emphasis added): "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, Art. 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."

ICANN has no justification for ignoring these prior, binding precedents, forcing Claimants to pay $18,000 to ICDR, to pay counsel for further briefing as to the exact same issue in this case. The Bylaws do not materially differ from those in the prior cases. Indeed the facts and Bylaws in particular as to the *Dot Registry* case are relevantly virtually identical. Therefore, the Emergency Panelist must order ICANN to stay all action as to the .Hotel Contention Set, until such time as the IRP is resolved via a Final Declaration or a settlement. Furthermore, the Emergency Panelist should require ICANN to pay all costs related to Claimants' Request, including all of the Emergency Panelists' fees, because of ICANN's frivolous and vexatious conduct in forcing relitigation of this issue despite the clear requirement of its Bylaws -- to respect prior IRP precedents.

B. ICANN Must Preserve, and Direct HTLD, EIU, FTI and Afilias to Preserve, All Potentially Relevant Information for Review in this Matter.

Claimants respectfully 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 matter. Claimants would propose a list of specific categories of documents that must be preserved in order for any IRP panel to fairly adjudicate this matter.

Many of those categories of documents were required to be disclosed by ICANN to the *Dot Registry* IRP panel, even after ICANN's repeated stonewalling as to the existence of some of them. *See Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Amended Procedural Order No. 2 (requiring ICANN to produce "all non-privileged communications and other documents within its possession , custody or control referring to or describing (a) the engagement by !CANN of the Economist Intelligence Unit ("EIU") to perform Community Priority Evaluations , including without limitation any Board and staff records , contracts and agreements between !CANN and EIU evidencing that engagement and/or describing the scope of EIU's responsibilities thereunder , and (b) the work done and to be done by the EIU with respect to the Determination of the !CANN Board of Governance Committee on Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014 , including work done by the EIU at the request, directly or indirectly, of the Board Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry 's applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board Governance Committee."); *Id.*, Procedural Order No. 6 (Jun. 12, 2015) (ordering ICANN to produce documents requested by the panel, stating ("A party may not decline to produce a document that falls within the Panel's request on the basis that the party regards that document not to be "relevant.""). The panel further stated:

> To be clear, the Panel regards the Board of Governance Committee (the BGC") to be within the Panel's document production order, whether or not it is the full Board. The Panel did not limit our directive to the Board. Rather, the Panel requested all responsive ICANN documents , not solely Board documents . Among other matters , our requests covered , to the extent that they are not covered by a privilege recognized by the applicable laws, the following : "communications between members of the Board of Governance Committee , ICANN Staff, and The Economist Intelligence Unit ("EIU") asking questions pertinent to Dot Registry's complaints, including inquiring into the

> EIU's purported research , scoring matrices and review of letters of support and opposition; responsive communications from the EIU detailing the purported research, scoring matrices, and thoroughness of review; internal communications within ICANN and within the BGC discussing and considering the thoroughness of the EIU's work on Dot Registry's Community Priority Evaluations ("CPEs"); and deliberative documents for the BGC's meetings , resulting in drafts of the BGC Declaration that denied Dot Registry's Reconsideration Requests ."

See also, e.g., DCA Trust v. ICANN, case no. 50 117 T 1083 13, Procedural Order No. 3 (Sept. 25, 2014) (". . . the Panel is of the view that ICANN must respond to RD numbers 3 and 4 by DCA Trust and produce the documents requested . . . as set out in Procedural Order No. 3. In reaching its decision in this regard, the Panel has, among other things, taken into consideration the obligation of ICANN and its constituent bodies to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure CANN Bylaw, Article III, Section 1).")

Claimants are entitled to a preservation order so that the IRP Panel in this case will have at least the same documents available to it from ICANN, EIU and FTI, as the IRP Panel forced ICANN to disclose in the *Dot Registry* 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* case, and thus seeks a preservation order as to those parties as well.

C. ICANN Has Deprived IRP Claimants of Critical Procedural Rights, For More Than Six Years

The ICANN Board resolved[7] in December 2012 to amend its Bylaws, in response to recommendations arising from a Bylaws-mandated Accountability and Transparency Review. That Review Team recommended, and the Board agreed, to retain a panel of "three international experts on

[7] Ex. F: Board Resolution 2012.12.20.17-19.

issues of corporate governance, accountability and international dispute resolution." That group, called the Accountability Structures Expert Panel (ASEP), produced a lengthy report[8] that recommended a series of Bylaws changes[9] that were subject to public comment and adopted by the Board. They became effective in 2013, and remain effective today. Since 2013, ICANN has done virtually nothing to implement the reforms that it enacted into its Bylaws, purported to enhance its accountability and transparency per its own Review Team, Expert Panel, and Board Resolution.

Those reforms provided important new procedural rights that have been denied not only to Claimants in this matter, but also to all IRP claimants since then (including many of these Claimants, in the prior .Hotel IRP). Those rights included, discussed in turn below, 1) the right to independent Ombudsman review of the BAMC's RFR decisions, before consideration by the ICANN Board; 2) the implementation of a trained Standing Panel to decide IRP complaints and requests for interim relief, and to provide *en banc* appellate review of such decisions; 3) the implementation of Rules of Procedure for the IRP, accounting for the new Bylaws provisions; and 4) providing that ICANN pay the full administrative cost of the IRP, including payment of all Standing Panel fees.

ICANN has no excuse for depriving Claimants of these rights, six years after they were mandated in the Bylaws. ICANN has reaped the rewards of its inaction, by causing claimants to pay ICDR filing and panelist fees that ICANN's Bylaws require ICANN to pay via implementation of a Standing Panel. These have totalled millions of dollars since 2013, paid by claimants instead of ICANN. ICANN was excoriated by another ICDR Emergency Panelist for failing to adopt the Standing Panel, as of 2014. ICANN still has done precious little since then. They must now be found (again) to have been violating their Bylaws -- very obviously -- all this time, and they must be ordered to implement these

[8] Ex. G: Report by ASEP, October 2012.
[9] Ex. H: Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendation of the Accountability Structures Expert Panel.

accountability mechanisms now, so that Claimants are not denied (again) these important procedural rights.

1. ICANN has denied Ombudsman Review of Claimants' RFRs, and indeed <u>all</u> pertinent RFRs, leaving its "Accountability Mechanisms Committee" to sham reconsider that Committee's <u>own</u> decisions re .HOTEL and all other New gTLD applications.

ICANN stated, in it's curt denial of RFR 18-6:

> Whereas, the BAMC previously determined that Request 18-6 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.
>
> Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

There was no explanation given for the recusal. And 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. Indeed, despite ICANN's latest Bylaws (Section 4.2(l)(iii)) that require a purportedly independent Ombudsman (though hired and paid by ICANN...) to review each and every RFR, as the <u>only</u> purportedly independent check on ICANN's decisions, short of filing an IRP Complaint. An IRP Complaint has required a minimum $3750 filing fee to ICDR, the appointment of and payment for three distinguished arbitrators (typically costing in excess of $100,000); and, IRP cases typically take well over a year to get to a Final Declaration.

This new Ombudsman Review provision was added at ICANN's own appointed experts' behest, approved through community comment and Board Resolution, to improve ICANN's accountability and transparency. It was designed to provide a much-needed, purportedly "independent" check on ICANN decisions, short of full-blown IRP proceedings. ICANN makes a mockery of that "accountability mechanism" by employing an Ombudsman who has stated, without explanation, that he is conflicted out of every single RFR relating to the New gTLD Program -- more than 90% of RFRs historically.

The RFR Bylaws are very clear (emphasis added):

> (l) For **all** Reconsideration Requests ..., the Reconsideration Request shall be sent to the Ombudsman, who **shall** promptly proceed to review and consider the Reconsideration Request.
>
> > (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
> >
> > (ii) The Ombudsman **shall** submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

Likewise, the Bylaws re the Ombudsman are clear and unequivocal, twice. In Art. 4, Sec. 5.2, the Charter: "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 ." Again in Sec. 5.3, Operations, "The Office of the Ombudsman shall: ... (b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests."

Moreover, Bylaws generally require ICANN to solicit and accept independent expert advice, which the Ombudsman is intended to seek out with respect to all RFRs, and produce an independent report for the BAMC. Otherwise, as under the old Bylaws in dozens of RFR cases re the New gTLD Program, the same committee of the Board that made the decision, also considered the RFR. Those five people on the BAMC routinely 'reconsider' their own decisions. Unsurprisingly, RFRs are always denied by the BAMC. Of the fourteen[10] RFRs concerning the new gTLD program filed since 2017, the BAMC has recommended that all fourteen be denied. The Board has adopted the BAMC's recommendation in all of the 14 cases.

[10] This number only includes administratively compliant requests reviewed by the BAMC.

The "new" 2013 Bylaws were supposed to make the RFR process more meaningful, to provide a purportedly neutral[11] check before BAMC decisions. That is particularly important where it is the BAMC decision that is under review. It is a sham that they are constantly, solely reviewing their own decisions. It is longstanding legal doctrine that a reviewing body should not take part in the investigation of its own underlying decision. *E.g., Willapoint Oysters v. Ewing*, 174 F.2d 676, 692 (9th Cir. 1949) ("No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review.") (*quoting* section 5(c) of the Administrative Procedure Act).

But 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 19[12] cases, including 14 of 14[13] cases involving New gTLD applicants. One might reasonably believe that ICANN chose this Ombudsman because he is conflicted so often, or at least they do not mind that so much. As it has left very few cases where he has engaged -- and none re new gTLDs.

It 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. This is especially important in this case, because it was the BAMC that made the underlying decisions which claimants sought ICANN to reconsider -- and the Board delegated that reconsideration, indeed all RFRs, right back to the BAMC. That Committee contains just five members of the Board,

[11] Note the Ombudsman is still hired, paid and fired at the pleasure of the ICANN Board, which also sets the budget for the Office of the Ombudsman. Bylaws Art. 5, Sec. 5.1.
[12] This number includes only administratively compliant requests.
[13] *Id.*

who have unfettered power to "reconsider" their own critical decisions with respect to the New gTLD Program. The Ombudsman is supposed to provide a check on that.

At bare minimum, ICANN must disclose the specific reasons the Ombudsman recused, and explain why a substitute ombudsman could not have been appointed to fulfill this critical role. Otherwise, there appears to be no legitimate reason why Claimants have been denied that crucial right in this case. That review could have helped avoid this IRP proceeding entirely, or at least substantially narrow the issues for decision. Indeed, it still can, via appointment of a substitute ombudsman to review this RFR as required by the Bylaws. The BAMC then should consider that input as required by the Bylaws. Perhaps then this IRP can be withdrawn, or at least substantially narrowed.

2. ICANN has continued to violate its Bylaws by failing to make any real progress to adopt a "Standing Panel" of specially trained IRP panelists, chosen with broad community input -- for some nine years -- despite several iterations of Bylaws <u>and</u> a prior IRP Declaration clearly requiring it.

3. ICANN also has failed to adopt IRP Rules of Procedure -- for some six years -- despite the Bylaws that have clearly required ICANN to do so; instead, 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.

The Bylaws expressly have required creation of an IRP Standing Panel, since 2013.[14]/[15]

> 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....

[14] Bylaws, Sec. 4.3(j) and (k); s*ee also, DCA Trust v. ICANN*, Decision on Interim Measures of Protection, ¶¶ 29-30 (May 12, 2014) (discussed *infra*).

[15] The former ICDR Supplemental Procedures for ICANN IRP, dated 2011, repeatedly referred to a standing panel that is yet to exist.

ICANN's own Interim Rules, Section 3 (since at least 2016) begins "The IRP Panel will comprise three panelists selected from the Standing Panel." Section 10 provides that the Emergency Panel shall be selected from the Standing Panel, which obviously will not be possible in this case. And, Section 14 follows on Bylaws, Art. 4.3(w), and provides for the right of appeal of IRP panel decisions to the illusory Standing Panel, *en banc*.[16] Claimants are deprived of these important procedural rights, and others,[17]/[18] solely because of ICANN's willful inaction, refusing to create a Standing Panel for some nine years now.

This is particularly outrageous because ICANN was admonished by a previous IRP Panel for exactly this same reason, exactly six years ago:[19]

> 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."
>
> 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.

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[16] An IRP Panel Decision may be appealed to the full Standing Panel sitting en banc .... 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.

[17] Claimants also have been forced to pay a $3750 filing fee to ICDR, despite Bylaws Sec. 4.3(r) ("ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members."). Claimants have requested ICANN to repay that filing fee to Claimants, and have been denied. Ex. XX ("ICANN does not pay for the ICDR fees when there is no standing panel.")

[18] The Bylaws Sec. 4.3(e)(iv) also state that a mediator should be provided from the Standing Panel, during the precursor Cooperative Engagement Process ("CEP") phase of the IRP. Claimants were denied that opportunity during CEP.

[19] *DCA Trust v. ICANN*, Decision on Interim Measures of Protection, ¶¶ 29-30 (May 12, 2014).

Now, it's almost seven years later, not just one. ICANN has not even made any real progress towards implementing a Standing Panel, or finalizing the Interim Rules. Obviously, by its willful inaction for so long, ICANN has decided the implementation of its so-called "Accountability Mechanisms" is an extremely low priority. ICANN has thumbed its nose at the *DCA Trust* IRP Panel Decision, for six years, despite all the very purposes of the IRP to provide binding decisions and to guide ICANN actions to remedy Bylaws violations. ICANN has failed to come close to finalizing the Interim Rules imposed more than three years ago, promised by the Bylaws six years ago. That failure 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.[20] But it hasn't been even a remote priority for ICANN.

Indeed, this has directly benefited ICANN's finances, saving perhaps more than $1 million per year on fees paid by IRP Claimants to the ICDR, which ICANN should have been paying to maintain a Standing Panel as clearly required by its Bylaws since 2013. ICANN has no incentive to create the Standing Panel that it must pay for, when it has willfully shirked that Bylaws obligation for more than six years already, with impunity -- forcing dozens of Claimants to pay ICDR fees for administration of the IRP, that should have been ICANN's sole fiscal responsibility, per its own Bylaws.

Besides the obvious financial harm from being forced to pay ICDR fees, it harms Claimants to not have 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 so

[20] Bylaws, 4.3(n)(i) and (iv) "The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements: [for example]… (C) Rules governing written submissions…. (D) Availability and limitations on discovery methods; (E) Whether hearings shall be permitted ..."

long ago. And then, in the end, these Claimants entirely would be denied the basic *en banc* appeal mechanism provided by ICANN's own Bylaws more than six years ago, and its own Interim Rules purportedly implemented more than three years ago -- except for that part about the Standing Panel. Still illusory, after all these years. ICANN has violated its Bylaws by taking so long to implement both the Standing Panel and the Rules of Procedure, causing direct harm to Claimants and to all parties who would seek Independent Review of ICANN conduct.

4. ICANN must pay all administrative costs of this IRP, including all Panelists' fees.

Claimants respectfully demand that ICANN pay all costs of the Emergency Panelist in this matter, and of all IRP panelists appointed in this matter, because that is clearly required by the ICANN Bylaws. Article 4.3(r) states that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members." Obviously, 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. ICANN cannot be allowed to blatantly ignore its crystal clear Bylaws commitments, and concomitant financial obligations, for so long and at such great cost to the broader community and to Claimants in this case.

Certainly, there is no basis for ICDR to require Claimants to pay 100% of the Emergency Panel fees, as ICDR has required thus far in accord with its "unwritten rule". ICDR offers no explanation as to why it has ordered that, rather than an equal pre-split of emergency panel fees, as with IRP panelist fees in all previous cases. Its purported "rule" to this effect is an indicator of institutional bias towards ICANN, and certainly has a chilling effect on such Requests. ICANN's position is frivolous; it cannot reasonably argue that it has not violated its Bylaws by failing to provide an Ombudsman review of

RFRs, and by failing to implement the Standing Panel and Rules of Procedure after all this time. Therefore, ICANN must be required to pay all IRP costs, as required by the very Bylaws that ICANN continues to violate.

CONCLUSION

For all of the foregoing reasons, Claimants respectfully request an order pursuant to Section 10 of the Interim Rules, specifically requiring ICANN to: A) not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP; B) preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this matter; and, C) provide to Claimants the procedural rights required by ICANN's Bylaws for more than six years; namely, 1) appoint an independent ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6; 2) appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Rules, from which any IRP Panel shall be selected per Section 3 of the Interim Rules, and to which Claimants might appeal, *en banc,* any IRP Panel Decisions per Section 14 of the Interim Rules; 3) adopt final Rules of Procedure as required by ICANN Bylaws; and, 4) pay all costs of the Emergency Panel and of the IRP Panelists.

RESPECTFULLY SUBMITTED,

DATED: April 24, 2020

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