

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Registry, LLC, Minds + Machines Group, Ltd.,) ICDR CASE NO. 01-19-0004-0808
Radix Domain Solutions Pte. Ltd., and Domain)
Ventures Partners PCC Limited)
)
Claimants,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S RESPONSE TO CLAIMANTS' REQUEST FOR STAY OF PROCEEDINGS

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INTRODUCTION

Respondent ICANN opposes the Request for Stay of Proceedings (“Request for Stay”) submitted by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited (“Claimants”).

1. Claimants have not demonstrated that there is any basis for a stay of this Independent Review Process (“IRP”). Rather, Claimants appear to be using this as another delay tactic in this IRP, which they initiated *over 20 months ago*. First, Claimants have not established, and barely even argued, that they will suffer any harm if this IRP proceeds simultaneously with the lawsuit initiated in California state court by certain of the Claimants (“State Court Action”). Second, Claimants’ State Court Action is highly unlikely to succeed: Claimants waived all rights to sue ICANN in court in any way related to their .HOTEL applications.

2. Third, Claimants’ contentions that their “procedural rights” regarding a Standing Panel and Ombudsman review have been denied are equally unsupported and were already rejected by the Emergency Panelist in this matter. At most, these contentions should be addressed in conjunction with the merits of the IRP and are not a basis for a stay.

3. Fourth, Claimants’ attempt to forum shop should not delay this IRP any longer. The Emergency Panelist specifically advised Claimants that they could raise the issues substantively with the full IRP Panel during the merits phase of the IRP. Instead, Claimants proceeded to California state court, thereby trying to circumvent the jurisdiction of this IRP Panel and in direct contravention of the Claimants’ express agreements not to sue ICANN in court. The prevailing applicant for .HOTEL has been waiting for more than seven years to move forward with the .HOTEL generic top-level domain (“gTLD”), waiting for Claimants’ countless challenges to conclude. Further delay of this IRP is not warranted.

SUMMARY OF RELEVANT FACTS

I. ICANN, THE NEW GTLD PROGRAM, AND THE COVENANT NOT TO SUE.

4. ICANN is a California non-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, which converts easily-remembered Internet domain names, such as ICANN.ORG, into numeric IP addresses recognized by computers. ICANN’s core Mission is to ensure the stability, security, and interoperability of the DNS.¹ ICANN contracts with entities operating gTLDs: the portion of an Internet domain name to the right of the final dot, such as “.ORG” or “.COM.”

5. In 2012, ICANN launched the New gTLD Program, through which interested entities could apply to operate new gTLDs not yet in the DNS. The Applicant Guidebook (“Guidebook”) sets forth the Terms and Conditions to which each applicant agreed when it submitted a new gTLD application. A key provision of the Guidebook’s Terms and Conditions, the Covenant Not to Sue (“Covenant”), expressly forbids lawsuits against ICANN related to ICANN’s evaluation of applications:

APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION . . . ; PROVIDED THAT, APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.²

¹ ICANN Bylaws (as amended 28 Nov. 2019) (“Bylaws”) Art. 1, § 1.1, Ex. R-1.

² Guidebook, Module 6, § 6.6 (capitalization in original), Ex. R-45.

II. ICANN’S ACCOUNTABILITY MECHANISMS.

6. In lieu of suing ICANN in court, ICANN’s Bylaws provide for several Accountability Mechanisms by which aggrieved new gTLD applicants can hold ICANN accountable, including Reconsideration Requests, the IRP, and the Ombudsman.³ A Reconsideration Request allows an aggrieved party to request reconsideration of an action or inaction by the ICANN Board or staff, and is reviewed by a subset of the ICANN Board, the Board Accountability Mechanisms Committee (“BAMC”), which makes recommendations to the ICANN Board on the merits of the Reconsideration Request.⁴ In October 2016, ICANN’s Bylaws were amended to require that Reconsideration Requests be sent first to ICANN’s Office of the Ombudsman for review, but noted that the Ombudsman must recuse itself from matters “for which the Ombudsman has, in advance of filing the Reconsideration Request, taken a position while performing his or her role as the Ombudsman . . . or involving the Ombudsman’s conduct in some way.”⁵ In the case of such a recusal, the Bylaws indicate that the BAMC must “review the Reconsideration Request without involvement by the Ombudsman.”⁶

7. The IRP is a dispute resolution process through which an aggrieved party can ask independent panelists to evaluate whether an ICANN action or inaction was inconsistent with ICANN’s Articles of Incorporation (“Articles”) and Bylaws.⁷ In 2013, the Bylaws were amended to provide for a Standing Panel of independent panelists to hear and resolve IRPs and IRP appeals and, in 2016, the Bylaws were amended further to establish the process for convening a Standing Panel: ICANN, “in consultation with the Supporting Organizations and

³ Bylaws, Art. 4, §§ 4.2, 4.3.

⁴ *Id.*, Art. 4, § 4.2(e).

⁵ *Id.*, Art. 4, § 4.2(l)(iii).

⁶ *Id.*

⁷ *Id.*, Art. 4, § 4.3(a).

Advisory Committees,” must “initiate a four-step process to establish the Standing Panel.”⁸ The Bylaws, however, do not set a deadline by which this extensive community-driven process must be complete. ICANN has been working diligently with the Supporting Organizations (“SOs”) and Advisory Committees (“ACs”) to convene a Standing Panel, but much of this process is outside of ICANN’s direct control.⁹

8. Until a Standing Panel is convened, the Bylaws explicitly provide a method by which IRP claimants and ICANN are able to appoint an IRP Panel: “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.”¹⁰ ICANN and IRP claimants have used this procedure both before and after the 2016 Bylaws, including in two currently-pending IRPs.

III. THE .HOTEL GTLD AND CLAIMANTS’ SUBSEQUENT CHALLENGES.

9. ICANN received seven applications for the .HOTEL gTLD through the New gTLD Program, including applications from Claimants and an application from Hotel Top Level Domain S.a.r.l. (“HTLD”). Under the Guidebook, however, only one applicant can secure the right to operate an applied-for gTLD.¹¹ In June 2014, the application submitted by HTLD was declared the prevailing application in accordance with Guidebook procedures.¹²

10. Thereafter, certain of the Claimants initiated two Reconsideration Requests, one in 2016 (“Request 16-11”) before the October 2016 Bylaws took effect, and one in 2018 (“Request 18-6”), challenging ICANN’s decision to award .HOTEL to HTLD.¹³ There was no

⁸ *Id.*, Art. 4, § 4.3(j)(ii).

⁹ ICANN’s efforts to implement the Standing Panel are set forth in the Affidavit of Samantha Eisner.

¹⁰ Bylaws, Art. 4, § 4.3(k)(ii).

¹¹ Guidebook, Module 4, § 4.1, R-6.

¹² HTLD Community Priority Evaluation Report (11 June 2014), Ex. R-46.

¹³ Certain of the Claimants also initiated an IRP in 2015 seeking to prevent delegation of .HOTEL to HTLD, which was denied. Final Declaration, *Despegar v. ICANN*, ICDR Case No. 01-15-0002-8061 (11 Feb. 2016), R-47.

process for Ombudsman review in ICANN’s Bylaws (or elsewhere) when Request 16-11 was initiated,¹⁴ and the Ombudsman recused himself from considering Request 18-6 in accordance with the Bylaws.¹⁵ Thereafter, both Reconsideration Requests were denied by the ICANN Board.¹⁶ Claimants then initiated this IRP in December 2019, challenging ICANN’s denial of the Reconsideration Requests.¹⁷ ICANN responded to Claimant’s IRP Request in February 2020.¹⁸

11. In January 2020, Claimants moved for emergency relief seeking, among other things, to “appoint an independent ombudsman” to review Claimants’ Reconsideration Requests, and to “appoint and train a Standing Panel” to hear Claimants’ IRP.¹⁹ Following extensive briefing and argument, the Emergency Panelist denied Claimants’ request for appointment of an Ombudsman and denied Claimants’ request for appointment of a Standing Panel.²⁰

12. Claimants then filed the State Court Action—notwithstanding their agreement not to file such a lawsuit—seeking the same relief the Emergency Panelist already rejected.²¹ ICANN moved to dismiss the Complaint in the State Court Action in January 2021, but the first available hearing date was not until December 2021.²²

13. Claimants then submitted this Request for Stay pending the outcome of the State Court Action, seeking yet another delay of this IRP.

¹⁴ See, e.g., ICANN Bylaws (11 Feb. 2016) Art. IV, § 2, Ex. R-2.

¹⁵ Email from Ombudsman to Reconsideration (23 May 2018), Ex. R-48.

¹⁶ Approved Board Resolutions | Regular Meeting of the ICANN Board (27 Jan. 2019), Ex. R-49; Approved Board Resolutions | Special Meeting of the ICANN Board (18 July 2018), Ex. R-50.

¹⁷ See generally, IRP Request.

¹⁸ See generally, ICANN’s Response to IRP Request.

¹⁹ Claimant’s Brief in Support of Request for Interim Measures, p. 7.

²⁰ Emergency Panelist Decision, ¶¶ 226(F), (G), (I).

²¹ See Request for Stay, Ex. A, ¶¶ 83–126.

²² ICANN’s Demurrer is attached for the Panel’s reference as Ex. R-51.

ARGUMENT

I. APPLICABLE LAW.

14. The law applicable to this IRP, including the Request for Stay, is California law, supplemented by U.S. federal law, because ICANN is a California non-profit public benefit corporation organized under the laws of California.²³ Claimants acknowledge as much in their Request for Stay by citing to both California state law and Ninth Circuit federal law.²⁴

Claimants do not argue that any other law is applicable to this IRP or to the Request for Stay.

II. CLAIMANTS' REQUEST FOR STAY SHOULD BE DENIED BECAUSE CLAIMANTS ARE UNLIKELY TO SUCCEED IN THE STATE COURT ACTION.

15. Claimants' Request for Stay is predicated on the State Court Action, which is highly unlikely to succeed. ICANN demurred to Claimants' Complaint for numerous reasons, including that the entire action is barred by the Covenant, which prohibits applicants such as Claimants from suing ICANN in court for any claims that "arise out of, are based upon, or are in any way related to" ICANN's review of the new gTLD application.²⁵ Federal and state California courts have upheld the enforceability of the Covenant,²⁶ and ICANN expects the same result on its pending Demurrer. Given that Claimants' State Court Action is likely to be dismissed, there is no basis to stay this IRP pending the outcome of that case.

16. This is especially true given what ICANN understands to be a significant backlog on the State Court's docket. ICANN filed its Demurrer in January 2021 and was unable to

²³ Procedural Order No. 4, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702 (12 June 2020) ¶ 33, Ex. R-52.

²⁴ Request for Stay, p. 5 n.6.

²⁵ Guidebook, Module 6, § 6.6, Ex. R-45.

²⁶ See *Ruby Glen, LLC v. Internet Corp. for Assigned Names and Numbers*, 740 F. App'x 118 (C.D. Cal. Oct. 15, 2018) ("The district court properly dismissed the FAC on the grounds that Ruby Glen's claims are barred by the covenant not to sue contained in the Applicant Guidebook."), Ex. RLA-6; *Commercial Connect, LLC v. Internet Corp. for Assigned Names and Numbers*, No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at *9–10 (W.D. Ky. Jan. 26, 2016) (holding that the Covenant is enforceable, "clear and comprehensive."), Ex. RLA-3; *DotConnect Africa Trust v. Internet Corp. for Assigned Names and Numbers*, 2017 WL 5956975, at *3 (Cal. Super. Ct. Aug. 9, 2017) (finding that the Covenant barred Plaintiff's non-fraud claims), Ex. RLA-4.

reserve a hearing date until 11 months later. Of course, there is no guarantee that the Court will even issue a decision at the hearing. And even if the State Court Action proceeds, the likelihood that Claimants ultimately will prevail is low, which reconfirms that a stay is inappropriate.²⁷

III. ICANN HAS NOT DENIED CLAIMANTS ANY PROCEDURAL RIGHTS, AND IN ALL EVENTS, THOSE ISSUES SHOULD BE RESOLVED IN THIS IRP AND ARE NOT GROUNDS FOR A STAY.

17. Claimants' main argument for a stay is that ICANN allegedly has "denied critical" and "guaranteed" procedural rights,²⁸ which does not support its Request for Stay.

18. First, ICANN has not denied Claimants any "guaranteed" procedural rights as Claimants argue. The Bylaws provide a mechanism by which Claimants and ICANN are to appoint an IRP Panel in the absence of the Standing Panel, which the parties used to appoint the Panelists in this matter.²⁹ Moreover, Claimants could not have been denied any right to appeal to an *en banc* Standing Panel because this IRP has not yet concluded. As the Emergency Panelist recognized, the risk of harm to Claimants "is dependent upon . . . 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."³⁰

19. Claimants argue "that ICANN appears no closer to implementing the Standing Panel" and that "[w]hatever momentum they pretended to have last year, appears to be lost."³¹ This is demonstrably false. As set forth in Ms. Eisner's affidavit, ICANN diligently has been working with the SOs and ACs (community groups) to convene a Standing Panel (both before and after the Emergency Panelist's decision).

²⁷ As set forth in ICANN's Demurrer, there are a number of other reasons why Claimant's Complaint is unlikely to succeed, and ICANN directs the Panel to those arguments. *See* Ex. R-51.

²⁸ Request for Stay, p. 6.

²⁹ Bylaws, Art. 4, § 4.3(k)(ii).

³⁰ Emergency Panelist Decision, ¶ 210 (emphasis in original).

³¹ Request for Stay, p. 6.

20. Claimants then cite a 2014 order in the *DCA Trust v. ICANN* IRP on an unrelated issue, which stated in dicta that “ICANN has offered no explanation why a standing panel has not been formed. . . .”³² This was not a determination that ICANN violated its Articles, Bylaws, policies, or procedures,³³ and it does not apply to the current circumstances because the process for selecting a Standing Panel changed when ICANN enacted new Bylaws (drafted in large part by the Internet community) in October 2016.³⁴ To be clear, no IRP Panel has *ever* ruled that ICANN violated its Articles or Bylaws by not implementing a Standing Panel quickly enough, so there is no way that ICANN could have “ignor[ed] two prior IRP rulings on the issue,” as Claimants contend.³⁵

21. As to Claimants’ argument with respect to Ombudsman review of their Reconsideration Requests, Claimants have not been denied any “guaranteed” procedural rights. When Claimants submitted Request 16-11, there was no process in the Bylaws or otherwise for Ombudsman review of Reconsideration Requests. By the time Claimants submitted Request 18-6, the Bylaws provided that the Ombudsman must recuse himself from Reconsideration Requests under certain circumstances.³⁶ That the Ombudsman did so in accordance with this provision can hardly be considered a “denial” of a “guaranteed” procedural right.

22. Claimants mainly just recycle arguments made to the Emergency Panelist, but the Emergency Panelist already rejected these arguments as a basis for a stay, explaining that

³² Request for Stay, p. 7 & Ex. G. Claimants also argue that they were denied discovery and a Standing Panel in prior IRPs, but those claims are not properly before this IRP (and are time barred in any event).

³³ Moreover, the parties in the *DCA Trust* IRP did not even brief this issue. Instead, their discussion of the Standing Panel concerned whether claimant could seek emergency relief under the then-governing ICDR Supplementary Procedures before the Standing Panel was established. *See* DCA Request for Interim Relief, p. 2 n.1, Ex. RE-13.

³⁴ The Bylaws in effect in 2014, when DCA Trust filed its IRP and when the DCA Trust IRP Panel issued the quoted statement, did not describe the process for establishing the Standing Panel. ICANN Bylaws (11 Apr. 2013), Art. IV, §§ 3.6-3.7, Ex. RE-12. Under those Bylaws, a third party was responsible for assembling the Standing Panel; ICANN’s only role was to approve the Standing Panel once compiled.

³⁵ Request for Stay, p. 8.

³⁶ Bylaws, Art. 4, § 4.2(l)(iii).

Claimants could raise the substantive issues before the full IRP Panel. Thus, these issues should be adjudicated in the merits phase of the IRP; they are not grounds for a stay.

23. Claimants’ primary objective (now and throughout this IRP) appears to be delay, but delay should never be the purpose of a stay. As one California court reasoned:

Convenience of the courts is best served when motions to stay proceedings are discouraged. Indeed, California courts are guided by the strong principle that any elapsed time other than that reasonably required for pleadings and discovery is unacceptable and should be eliminated. To that end, courts must control the pace of litigation, reduce delay and maintain a current docket so as to enable the just, expeditious, and efficient resolution of cases.³⁷

IV. CLAIMANTS WILL NOT SUFFER ANY HARM IN THE ABSENCE OF A STAY.

24. Claimants must demonstrate either hardship or inequity in requesting a stay if the stay will cause damage to someone else (which is the case here, as set forth below).³⁸ Claimants raise just two brief arguments regarding the purported harm they will suffer if a stay is not granted, neither of which is sufficient. First, they argue that their “respective investment[s] . . . sit idly worthless as this matter continues.” This argument is nonsensical. Any alleged “idleness”—if that can even qualify as a hardship—is solely a result of Claimants’ persistent efforts to delay this IRP. Claimants next argue that “each Claimant operates many other TLDs under contract from ICANN, and thus has a vested interest in ICANN complying with its Bylaws Accountability Mechanisms.”³⁹ This IRP, however, relates only to Claimants’ applications for .HOTEL, not any “other TLDs under contract from ICANN.”

³⁷ *In re Alpha Media Resort Investment Cases*, 39 Cal. App. 5th 1121, 1132 (2019) (internal quotation marks and citations omitted), Ex. RLA-2.

³⁸ *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (“[I]f there is even a fair possibility that the stay . . . will work damage to someone else, the party seeking the stay must make out a clear case of hardship or inequity.”) (internal quotation marks and citation omitted), Ex. RLA-5.

³⁹ Request for Stay, pp. 8–9.

25. Claimants also attempt to shift to ICANN the burden of demonstrating harm to ICANN or third parties in the absence of a stay.⁴⁰ As the moving party, however, the burden is on Claimants to demonstrate the purported harm to Claimants.⁴¹ In any event, there is harm to ICANN, HTLD, and the Internet community if a stay were ordered.⁴²

26. First, ICANN cannot snap its proverbial fingers to convene a Standing Panel; it is a community-driven process. Second, Claimants have not even argued (much less demonstrated) that they will suffer irreparable harm if this IRP is adjudicated by the three esteemed Panelists as opposed to Panelists selected from a Standing Panel. Third, there is harm to HTLD, the prevailing .HOTEL applicant, given that the Emergency Panelist ruled that ICANN cannot delegate the .HOTEL gTLD during the pendency of this IRP.⁴³ HTLD applied for .HOTEL in 2012, yet almost ten years later, the gTLD remains on hold.⁴⁴ Finally, there is harm to ICANN, which is trying to complete the resolution of all the gTLD applications that it received nearly ten years ago, and to the Internet community, which has not been able to register domain names in the .HOTEL gTLD.

CONCLUSION

27. ICANN respectfully requests that Claimants' Request for Stay be denied.

⁴⁰ Request for Stay, p. 8.

⁴¹ *See, e.g., Lockyer*, 398 F.3d at 1112, RLA-5.

⁴² Similarly, Claimants have not demonstrated any harm in the absence of Ombudsman review of Claimants' Reconsideration Requests.

⁴³ Emergency Panelist Decision, ¶ 226.D.

⁴⁴ Claimants claim that because ICANN argued that the .HOTEL gTLD could later be re-delegated from HTLD to Claimants, "ICANN understands there is no harm to any third party if this action is stayed, even indefinitely." Request for Stay, p. 9. Claimants miss a critical point. The .HOTEL gTLD can only be re-delegated if it is delegated in the first place. The Request for Stay seeks to delay delegation of the .HOTEL gTLD even further, resulting in harm to HTLD and the Internet community that would like to purchase domain names in the .HOTEL gTLD. Claimants also point to the fact that other similar TLDs have not yet been launched but, again, that has nothing to do with the fact that delaying this IRP even more than Claimants already have inevitably deprives HTLD of the right to operate its awarded gTLD.

Respectfully submitted,

JONES DAY

Dated: August 31, 2021

By: /s/ Jeffrey A. LeVee
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