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**

AMENDED REQUEST FOR INDEPENDENT REVIEW PROCESS BY FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS PTE. LTD., AND DOMAIN VENTURE PARTNERS PCC LIMITED

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GLOSSARY

AGB	**gTLD Applicant Guidebook**
BAMC **formerly known as BGC**	**ICANN's Board Accountability Mechanisms Committee** **(fka Board Governance Committee)**
CPE	**Community Priority Evaluation -- via criteria in the AGB**
DNS	**Domain Name System**
EIU	**Economist Intelligence Unit – ICANN's provider of CPE services**
gTLD	**Generic Top-Level Domain**
FTI	**FTI Consultants – ICANN's provider of CPE Process Review services**
HTLD	**HOTEL Top-Level-Domain s.a.r.l. – sole Community applicant, prevailed in CPE**
ICDR Rules	**ICDR International Arbitration Rules**
Interim Rules	**ICANN Interim Supplemental Rules of Procedure for IRP**
RFR	**Request for Reconsideration**

I. IDENTIFICATION OF THE PARTIES

Claimants each effectively own and/or control independent applications to ICANN to own and operate the .HOTEL gTLD.

Respondent is ICANN, a California "public benefit corporation" responsible for governing much of the global domain name system ("DNS"), including whether and how to add new gTLDs to the root zone of the DNS. For example, whether, through whom, and on what terms to allow ".hotel" domain names such as hilton.hotel, best.hotel, austin.hotel, etc., to be registered and used on the internet for commerce, comment or any other legitimate purpose.

II. EXECUTIVE SUMMARY

Preliminarily, ICANN should be forced to produce CPE documents as they produced in the *DotRegistry* IRP, and other documents re the CPE Process Review, and Portal Configuration investigation. Only then can Claimants fairly address the BAMC's arguments by which ICANN denied Claimants' RFRs 16-11 and 18-6. Claimants' Report re Outstanding Discovery Issues is submitted herewith.

In light of all critical evidence, the following issues must be substantively reviewed by the IRP panel: ICANN subversion of the .HOTEL CPE and first IRP (*Despegar*), ICANN subversion of FTI's CPE Process Review, and ICANN subversion of investigation into HTLD theft of trade secrets. The falsely 'independent' CPE processes were in fact subverted by ICANN in violation of Bylaws, and HTLD stole trade secrets from at least one competing applicant. Thus, this Panel is respectfully requested to declare that ICANN has violated its Bylaws, just as the IRP panel declared in the virtually identical *DotRegistry* case, and to recommend that ICANN take consistent remedial measures now.

III. SUMMARY OF BACKGROUND FACTS AND PROCEDURAL HISTORY

From 2006 to 2012, ICANN and hundreds of DNS community volunteers and industry stakeholders created the authoritative Applicant Guidebook containing the exhaustive rules for ICANN's New gTLD Program ("AGB"). It was adopted by the ICANN Board as consensus policy, and was relied upon by all applicants in assessing their investments in new gTLDs. It included thorough rules to address multiple applications for the same TLD string, such as .HOTEL which

had seven applicants in 2012. Whichever satisfied the voluminous and onerous criteria of the AGB, typically would go to an auction to determine the winner of the contract with ICANN.

One way to avoid such a "contention set" and likely a very costly auction, was to file a "Community-based Application" per the terms of the AGB. If the applicant could satisfy ICANN's purportedly rigorous test, scoring at least 14 out of 16 available "points," then that Applicant would get "Community Priority". That means they would win the TLD, and all the others would lose virtually their entire investment -- including $185,000 in application fees that each applicant paid to ICANN, and at least that much more in consulting and service provider fees required to satisfy ICANN's onerous application requirements.

The CPE rules were expressly developed for the purpose to prevent "undue priority [being given] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string."[1] Still, with such strong incentive to do so, at least one applicant gamed the system. A new newly formed LLC, known as HTLD, convinced several hotel chains and associations to support its bid publicly. It is unknown what promises HTLD made in order to secure the support of these commercial entities. None of them explained their support in any detail,[2] and HTLD has never been forced to provide any such information.

Yet, with just that scant and superficial demonstration of so-called "community support," HTLD managed to create the sham facade that there is such a thing as a global "hotel community"; at least, sufficiently to fool ICANN's purportedly "independent evaluators" hired solely to conduct Community Priority Evaluations ("CPE").[3] The "independent evaluators" were meant to substantively review the applications and come to a decision completely independent from ICANN influence. Only that would be consistent with the terms of the AGB, including other AGB resolution methods such as Legal Rights Objections determined by WIPO, and Community Objections determined by ICDR.

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[1] Exhibit A, AGB, Module 4.2.3, p.4-9.

[2] *See* Exhibit B (Letters of Support for HTLD application -- all virtually identical).

[3] Exhibit A, AGB, Module 4.2, p.4-7 ("The community priority evaluation is an independent analysis."); *see also* Exhibit C (Community Priority Evaluation website: "The evaluation itself is an independent analysis . . . .").

The CPE Provider hand-picked by ICANN was the Economist Intelligence Unit ("EIU"), despite it having no relevant experience. In June 2014, the EIU found that HTLD passed the CPE and should be awarded Community Priority.[4] Effectively, HTLD would be handed the .HOTEL gTLD despite six other fully paid applications, including Claimants'. There was great public outcry against that decision, and other CPE results as well.[5] The results seemed wildly inconsistent, both to casual observers and to many within the DNS policy community that had developed the AGB and the CPE rules -- including from the former Chair of the BGC and ICANN Board.[6] A number of Requests for Reconsideration ("RFR") were filed to challenge the CPE results, including by Claimants. The denial of their 2014 RFR was subject of an IRP proceeding, styled *Despegar v. ICANN*, with a Final Declaration issued in February 2016.[7]

While that IRP was pending, it was revealed that ICANN had misconfigured access rights to gTLD applicants' (including Claimants') highly sensitive financial and commercial data, supplied by Claimants to ICANN in confidence under a non-disclosure agreement. ICANN ultimately revealed that HTLD's personnel were the only people in the ICANN community identified to have accessed competitors' trade secret data.[8] Claimants brought it to the attention of the IRP Panel, which found "a number of serious allegations arising from a portal configuration issue, which ICANN has admitted occurred."[9]/[10] But ICANN said at that time that it would complete its investigation and then decide on the request to disqualify HTLD's application. The Panel concluded this "should remain open to be considered at a future IRP should one be commenced in respect of this issue."[11]

[4] Exhibit D, EIU CPE Report re .HOTEL.
[5] Exhibit E, examples of experts discussing and/or expressing dismay at CPE results, including comprehensive Navigant Economics report commissioned by dotRegistry.
[6] Exhibit F (letter memorializing webinar in which former ICANN chair Cherine Chalaby admitted "In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE.").
[7] Exhibit G, *Despegar v. ICANN,* Final Declaration.
[8] Exhibit H, ICANN Board Resolutions.
[9] *Despegar* Final Decl., #131.
[10] Exhibit I, ICANN announcements.
[11] *Despegar* Final Decl., #138.

In RFR 16-11,[12] Claimants sought review of ICANN Board Resolutions[13] that ordered ICANN staff to move forward with processing HTLD's application. The circumstances leading to that RFR and to those Resolutions are discussed at length, *infra.* The main rationale for the BAMC denial of that RFR was incredibly flimsy:

> Without evidence that the confidential information was shared, Mr. Krischenowski's corporate holdings alone are not sufficient to demonstrate that HTLD received any of the information that Mr. Krischenowski accessed and/or that HTLD gained some "unfair advantage" from Mr. Krischenowski's access to the information.

And indeed, the unanimous IRP Panel starkly questioned this rationale, bluntly labeling "specious" ICANN's argument that it could not violate its Bylaws by allowing HTLD's application to proceed under the circumstances preliminarily revealed by ICANN as of that time.[14]

Six months after the *Despegar* decision, another IRP Panel issued its Final Declaration upon review of another CPE case, and found ICANN had violated its Bylaws in several critical ways. Much more evidence was provided in that case than in the *Despegar* matter, including a sworn Declaration from the EIU stating at the outset: "We are not a gTLD decision-maker but simply a consultant to ICANN."[15] That was quite a different story than what ICANN had trumpeted all along,[16] and which ICANN had told the *Despegar* panel[17] -- that EIU was an "independent" provider "whose determinations are presumptively final."

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[12] Exhibit J.

[13] Exhibit H.

[14] *Despegar* Final Decl., # 124-138:

> 130. ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws.
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> 131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

[15] Exhibit K, EIU Declaration, para. 3, and ICANN's letter to the IRP Panel re same.

[16] *See, e.g.,* AGB, Module 4.2, p.4-7 - 4-8; Exhibit C ("The evaluation itself is an independent analysis conducted by a panel . . . .").

[17] *Despegar* Final Decl., #59:

> In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows: i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not

Fortunately, ICANN and the EIU's disingenuous arguments fell on deaf ears, and the unanimous *DotRegistry* panel required ICANN to turn over all relevant internal correspondence and correspondence with the EIU,[18] which ICANN had denied to the *Despegar* panel had even existed. ICANN had also refused to provide its contract with EIU to the *Despegar* Claimants, but was forced to turn it over in the *DotRegistry* case, including the provision that "ICANN will be free in its complete discretion to decide whether to follow [EIU's]' determination and to issue a decision on that basis or not."[19] Again, the opposite of what ICANN represented to the *Despegar* panel as to EIU's purportedly "presumptive" decision-making authority.

The *DotRegistry* Panel decision is discussed in detail, *infra*, as well as ICANN's responsive actions. So also discussed *infra* are Claimants' RFRs 16-11 and 18-6,[20] the BAMC and ICANN actions in response,[21] and how those actions have differed despite the identical circumstances of the two cases.

In 2016, the ICANN Board put various RFRs "on hold" – including RFR 16-11 -- as it commissioned a purportedly independent review of the CPE administration by ICANN and EIU. ICANN's law firm hand-picked and retained a consulting firm called FTI to do that "CPE Process Review." Their half-hearted, predetermined investigation is discussed at length, *infra*. FTI asked for critical documents, which EIU and ICANN refused to disclose. FTI did not have access to the vast majority of CPE evaluators, as they had already left EIU. Of the interviews that FTI did manage, ICANN has refused to turn over notes or transcripts or even the identity of anyone that was interviewed. ICANN has also refused to disclose either the agreement with FTI, the identity of any of their investigators, or any correspondence with ICANN other than FTI's final reports.

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substantive, but rather is limited to whether the EIU followed established policy or procedure.

[18] Exhibit L, *DotRegistry v. ICANN*, Proc. Order No. 3; *see also*, Exhibit M, *DotRegistry.*, Final Decl., para. 29 -33.

[19] *Exhibit M, DotRegistry*, Final Decl., para. 16.

[20] Exhibit J (RFR 16-11) and Exhibit N (RFR 18-6) .

[21] Exhibit O (BAMC Response 16-11) and Exhibit P (BAMC Response 18-6).

Meanwhile, FTI's willfully hamstrung CPE Process Review "investigation" concluded in December 2017, finding that ICANN had done nothing to influence EIU's CPE decisions. This was directly contrary to the *DotRegistry* IRP findings, yet the ICANN Board did not require anything further, accepted the FTI findings, and resolved for the BAMC to then hear the RFRs it had put on hold, including Claimants'.[22] The BAMC conducted no independent investigation of its own, despite the mandate of the *DotRegistry* decision, and despite the noted failure by FTI to obtain critical evidence from EIU and ICANN staff. Thus, unsurprisingly, the BAMC again rejected Claimant's RFRs with no new rationale or justification, and no new disclosure of any highly relevant information in ICANN's control, as ICANN had been ordered to produce and did produce in the *DotRegistry* case.

Thus, Claimants have been forced to file this IRP Complaint, in order to have real discovery, and real review of ICANN's actions and inactions with respect to the .HOTEL CPE, the CPE Process Review, and the HTLD theft of trade secrets. Claimants argue that ICANN violated its Bylaws as to each of those substantive issues. Claimants also argue that ICANN further violated its Bylaws by misleading Claimants and the ICANN Community when it promised that a Standing Panel of IRP arbitrators would be in place in 2013. That Standing Panel was specifically intended to maintain consistency in IRP decisions arising from the New TLD Program,[23] and to provide *en banc* appellate review of IRP decisions.[24] That Standing Panel still does not exist ten years later, despite two prior IRP orders admonishing ICANN about this. That circumstance already has deprived five losing IRP claimants of any appellate avenue, and would deprive Claimants of same if they do not prevail on all issues in this IRP.

IV. STANDARD OF REVIEW

Section 11 of the Interim Supplemental Rules states (emphasis added):

> Standard of Review. Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

[22] Exhibit Q (Letter from BGC Chair Chris Disspain).
[23] Exhibit Y, ICANN Board Briefing Materials, Apr. 8, 2013, p.4-5.
[24] ICANN Bylaws, Art. 4.3(w).

a. With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated ICANN'S Articles or Bylaws.

b. *All Disputes shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law* ***and prior relevant IRP decisions****.*

V. COVERED ACTIONS OR INACTION TO BE REVIEWED

The stated purposes of the IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).[25] ICANN mouths a boldface "Commitment" in Sec. 1.2(a)(vi) of its Bylaws to "Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness." But it only pays them lip service, having failed to implement key "Accountability Mechanisms" for ten full years.

A. *Claimants Seek Review Whether ICANN Had Undue Influence Over The EIU With Respect To Its CPE Decisions, And Over FTI With Respect To The CPE Process Review.*

ICANN admits to having documented conversations with EIU, purporting not to have influenced or interfered in any way, but only that:

> These types of communications instead demonstrate that ICANN org protected EIU's independence by focusing on ensuring that EIU's conclusions were clear and well-supported, rather than directing EIU to reach a particular conclusion.

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[25] These include:

(i) Ensure that ICANN … complies with its Articles of Incorporation and Bylaws. (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)). (iii) Ensure that ICANN is accountable to the global Internet community and Claimants. ... (vi) Reduce Disputes by creating precedent to guide and inform the Board, … (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes. (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in a court with proper jurisdiction. (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

Yet, ICANN refused to disclose them to Claimants prior to the *Despegar* IRP, arguing that they promised to EIU that they would not, and EIU expressly has threatened to sue ICANN if they do.

That is an incredibly inappropriate rationale, as ICANN could control whether they agreed to confidentiality with EIU. There is no public interest in such confidentiality. To the contrary, ICANN is bound by its Bylaws to "operate to the maximum extent feasible in an open and transparent manner."[26]

The EIU's CPE processes, as well as the FTI's CPE Process Review, were supposed to be open and independent of ICANN influence. EIU could have no trade secrets in their CPE administration, and nobody has claimed that they did. ICANN has offered no plausible explanation as to how confidentiality of these documents was in the global public interest, or in anyone's interest. Yet, ICANN declined to provide such documents to Claimants prior to the *Despegar* IRP, and since. Some such documents have been disclosed in this case subject to the protective order in place, as was the case in the *DotRegistry* IRP.[27] However, those documents and other sources indicate that ICANN continues to withhold documents that it provided in that case and which are relevant in this case.

1. *ICANN's And EIU's Communications Are Critical, But Remain Secret.*

ICANN admits unequivocally to helping to write the EIU's CPE decisions, purportedly in order to "protect" the EIU's "independence." It is unclear how that serves ICANN's public service mission, or how that could be a true reason. If ICANN had wanted to protect EIU's independence, it would not have interfered in the CPE Evaluation process. That process was supposed to be independent of any ICANN influence. Yet, the communications and edits appear to have been voluminous and at least in some cases, very substantive. ICANN expects the world to accept their word that they didn't actually "direct" the EIU to make any particular decision. That is an incredibly grey line they want to straddle, and only the relevant documents and interviews can elucidate whether they are being truthful.

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[26] ICANN Bylaws, Art. 3.1.
[27] Exhibit L -- *DotRegistry*, Procedural Order No. 3; *see also,* Exhibit R, *id*., Procedural Order No. 2 (ordering ICANN to produce "all non-privileged communications and other documents within its possession, custody or control" concerning the EIUs engagement in the CPE process and the work done by the EIU on complainant's RFR).

But even the ICANN Board has never seen those documents, because ICANN's cherry-picked CPE Review consultant, FTI, was not provided them from EIU or ICANN staff. FTI reported[28] that it requested the EIU to provide 1) "internal emails among relevant [EIU] personnel, including evaluators, relating to the CPE process," and 2) "external emails between relevant [EIU] personnel and relevant ICANN personnel related to the CPE process. Yet, astonishingly, "FTI did not receive documents from [EIU] in response to Items 1 or 2."

FTI says that ICANN provided responsive information as to Item 2, though EIU did not. But any reasonable investigator would get the documents from both sides, in particular to see if either side is trying to hide something. And because each side could have different comments and internal distribution. Indeed, FTI acknowledged that it "compared the information obtained from both [ICANN and EIU]" – at least that very limited information that was provided.

It is inexcusable for FTI's investigation to not have reviewed EIU internal correspondence, which would likely be the best evidence of whether EIU was unduly influenced by ICANN, as it would indicate the evaluators' perceptions in real time. Moreover, FTI conducted interviews of "relevant" ICANN and EIU personnel, but no transcripts, notes or summaries of those interviews have been disclosed. Incredibly, EIU maintained that its definition of "working papers" would not include email.[29] Remarkably, it seems that most evaluators had left EIU before FTI started the CPE Process Review. Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the EIU, to inquire about ICANN's involvement in the CPE process. Surely, FTI could have made a few calls.

Instead, incredibly, ICANN has admitted that EIU threatens to sue ICANN:[30]

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[28] Exhibit S, FTI Report re Communications, p.7.

[29] The contractual argument is dubious, at best. The Board stated in its last Resolution:

> FTI requested additional materials from [EIU] such as the internal correspondence between the CPE Provider's personnel and evaluators, but [EIU] refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN, it was only required to produce CPE working papers, and internal and external emails were not "working papers."

[30] Exhibit T, p.9 (ICANN Response to DIDP Request).

> ICANN organization endeavored to obtain consent from [EIU] to disclose certain information relating to the CPE Process Review, but [EIU] has not agreed to ICANN organization's request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization's contractual commitments must be weighed against its other commitments, including transparency.[31]

The Board, at a minimum, ought to want to know what EIU hid from FTI, which still is being hidden from Claimants, and thus which is shielded from any meaningful consideration by the Board, or any Independent Review as required to be available per the Bylaws. EIU has threatened to sue to keep such documents secret. But there is no public interest in such secrecy, which flies in the face of ICANN's transparency obligations.

The Board, at a minimum, should have forced EIU and ICANN's lawyers to disclose those documents, and at least for the FTI and the Board itself to consider them, before accepting FTI's report and declaring that nothing bad ever happened. The Board could not have made an informed decision about the CPE Process Review unless that information was disclosed and considered. At minimum now, for there to be any truly independent review of that Board inaction and action, the Claimants and the Panel must be able to see EIU internal correspondence relating to the .HOTEL application, referring or relating to ICANN's comments or questions as to EIU's drafts, ICANN staff's work on the CPE and CPE Process Review, as well as all relevant excerpts from the interviews that FTI conducted. FTI's agreement with ICANN also has never been revealed, despite having been repeatedly requested. Only once these documents are disclosed can there be any meaningful review.

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[31] *But see, e.g.,* Exhibit M, *DotRegistry*, Final Decl., #89:

> [T]he contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations.

b. DotRegistry IRP And FTI's Report Reveals A Lack Of Independence Of EIU

The *DotRegistry* IRP Panel reviewed correspondence between EIU and ICANN which was denied to the *Despegar* Claimants, and held:[32]

> EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, ….

The *DotRegistry* Panel then further held:[33]

> Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

The Panel then explained how ICANN violated its Bylaws duties of transparency, and due diligence upon reasonable investigation -- by failing to review precisely the information the *Despegar* Claimants had requested and were denied, but which the *DotRegistry* Panel forced ICANN to disclose.[34] The Panel then explained how ICANN violated its Bylaws duty of independent judgment, again by failing to disclose documents which could have shown such judgment.[35] Instead:

> The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.[36]

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[32] Exhibit M, *DotRegistry*, Final Decl., #93; *see also,* #94-99, discussing one egregious example.
[33] *Id.*, *DotRegistry*, Final Decl. #111-113 ("An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry RFRs….").
[34] *Id.,* #114-125 (concluding: "It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.").
[35] *Id.,* # 126-150 (concluding: "And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC ..., the BGC has put itself in contravention of Bylaws ... requiring that ICANN staff work on which it relies be made public.")
[36] *Id.*, #128.

The Panel concluded its analysis by declaring "that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws."[37]

Claimants in this IRP have made exactly the same claims to ICANN, and have repeatedly cited this precedential decision. Yet, ICANN continually has refused to provide responsive information to Claimants, and to review its RFR decisions in light of the evidentiary requirements of the *DotRegistry* rulings. That ruling is binding and precedential per the Bylaws.[38] Yet ICANN ignores the obvious relevance to Claimant's similarly situated RFRs subject to review in this IRP. This Panel must consider that precedent per the Bylaws' "Standard of Review" quoted *supra* in Section IV.

Furthermore, FTI's report reveals that abundant phone calls were made between EIU and ICANN to discuss "various issues".[39] It also reveals that ICANN advised at times that EIU's conclusions were not supported by sufficient reasoning.[40] FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by EIU, (ii) that those drafts were discussed at length between EIU and ICANN, and (iii) that the working of EIU and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus EIU".[41] It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or EIU.

The abundant phone calls between ICANN and EIU, and ICANN's influence on EIU's drafting and rationale demonstrate that EIU was not free from external influence from ICANN. One can only conclude from these findings that EIU was not independent from ICANN. Any influence by ICANN in the CPE was contrary to settled ICANN policy and to ICANN's public statements, and therefore undue. FTI's report confirms ICANN's intimate involvement in the

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[37] *Id.*, #151.
[38] Bylaws, Art. IV, Sec. 4.3(a)(vi) and (viii) (purposes of the IRP: "Reduce Disputes by creating precedent to guide and inform the Board" and "Lead to binding, final resolutions").
[39] The report makes mention of weekly conference calls between ICANN and EIU. Exhibit S, FTI Scope 1 Report, p. 12-14.
[40] *Id.*, p. 12.
[41] *Id.*, pp. 15-16.

CPE, as found by the *DotRegistry* Panel. It also confirms the fact that the *Despegar* IRP Panel was given incomplete and false information by ICANN which was material to its decision.

c. ICANN Materially Misled Claimants And The Despegar IRP Panel.

The *Despegar* IRP Panel's conclusion that the inconsistencies of the CPE process did not amount to a violation of ICANN's Bylaws and core values was based upon the false premise that the EIU was not mandated to apply ICANN's core values, and upon the false premise that the EIU's determinations are presumptively final and are made independently by the EIU, without ICANN's active involvement.

In this respect, ICANN “informed” Claimants and the IRP Panel that "[b]ecause of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE"-- and the Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist".[42] The IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result],” and that “ICANN staff supplied continuing and important input on the CPE reports.”[43] As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs. That is also clear from the examples of such communications referenced in the *DotRegistry* Final Declaration. So, ICANN lied in writing to the Panel.

Moreover, ICANN's description in the *Despegar* IRP of the EIU as the independent evaluator, making "presumptively final" determinations was false. The EIU contract, finally divulged in the *DotRegistry* IRP after ICANN refused to divulge it to Claimants prior to the *Despegar* IRP, proved otherwise as discussed *supra.* The findings of the *Dot Registry* IRP Panel reveal that the EIU -- by its own measure -- was "simply a consultant to ICANN", and that ICANN had agreed with the EIU that the EIU ''would operate largely in the background, and that

[42] *Despegar, #*95.
[43] *DotRegistry, #*93, 101.

ICANN would be solely responsible of all legal matters pertaining to the application process."[44] ICANN was "solely responsible to applicants ... for the decisions it decide[d] to issue", and "each decision [had to] be issued by ICANN in its own name only."[45]

Moreover, the fact that material information was hidden from Claimants and the *Despegar* Panel is a violation of ICANN's obligations to conduct its operations in a transparent manner. Claimants specifically and repeatedly asked for all communications, agreements between ICANN and the CPE Panel and the CPE Review Panel. Claimants and the *Despegar* Panel were told by !CANN staff and the ICANN Board that this information was non-existent and/or could not be disclosed. That was wrong.

The *DotRegistry* IRP Panel forced ICANN to reveal that it did possess all of that information, and to turn it over to the Panel and to DotRegistry. Claimants had explicitly asked for and been denied this information, and the *Despegar* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Claimants and the Panel at that time that it had disclosed such material information to DotRegistry and to that IRP Panel.

Instead, Claimants and the *Despegar* IRP Panel were denied access to essential documents kept by ICANN, such as for example, communications between ICANN and HTLD with respect to the Community Application, between ICANN and EIU with respect to the CPE Evaluation, and between ICANN and FTI with respect to the CPE Process Review. Claimants have not been given anywhere near a fair opportunity to contest the arguments and evidence adduced by the BAMC, because Claimants have been denied the underlying documents core to most of the BAMC's factual arguments.

Claimants and this Panel have every reason to be suspicious, as ICANN has materially and plainly lied about the existence of these documents, directly to the *Despegar* Panel. Indeed, ICANN made a clear and comprehensive statement that it did not have any communications with the evaluators that identify the scoring of any individual CPE.[46] However,

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[44] *Id.,* #91.
[45] *Id.,* #92.
[46] *Despegar* Final Decl., #95.

both the *DotRegistry* IRP and the FTI report revealed that ICANN had frequently been commenting on and questioning the reasoning behind assigning one score or another and provided feedback to EIU's draft reports.[47] ICANN could not have made such comments without access to communications that identify the scoring of individual CPEs.

Certainly, a principal even "questioning" a contractor's reasoning about a score can be seen at least as implicit "direction" to change that score, or at least to consider changing it. Such direction could even be quite explicit from the context and/or content of the "questioning." Without full transparency about the CPE and CPE Review, as ordered by the *DotRegistry* panel and desired by ICANN's own FTI consultants, we cannot know. The ICANN Board also does not know, because it failed to meet its Bylaws obligations of transparency, due diligence upon reasonable investigation, and independent judgment by not requiring disclosure by EIU and ICANN Staff, to Claimants and the *Despegar* Panel. Now, such disclosure is required to provide opportunity for any meaningful review by this Panel and Claimants herein.

B. *Claimants Seek Review Whether They Were Discriminated Against, As ICANN Reviewed Other CPE Results But Not .HOTEL, Even Per RFRs After* ***<u>DotRegistry</u>***

Bylaws, Sec. 1.2(a)(v) require ICANN to:

> Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).

A previous IRP Panel has explained:[48]

> The requirement for discrimination is not that it was malicious or even intentional, ... Rather, the requirement for discrimination is that a party was treated differently from others in its situation without "substantial and reasonable" justification. The IRP Panel does find that this standard was met.

Claimants were discriminated against in the CPE, as argued in its first RFR which was subject to the *Despegar* IRP. That was proved by the *DotRegistry* IRP after appropriate discovery, as argued in both of Claimants' RFRs since. ICANN provides almost no rationale in support of its position that they were not. The Bylaws clearly prohibit discrimination among

[47] Exhibit S, FTI Report, Scope 1.
[48] Exhibit U, *Corn Lake LLC v. ICANN,* Final Decl. #8.65.

similarly situated parties. ICANN's weak effort to explain this part of their decision must be reviewed by the IRP Panel.

In the CPE Guidelines, the EIU states that "the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance ."[49] Yet as it turned out, EIU did not employ any comparative process as to their decisions, and had no relevant experience making any such decisions. And ICANN was constantly interfering with comments and "questions" about EIU draft decisions, which its "contractor" EIU had no power to ignore. So, there was significant inconsistency in the CPE decisions, as shown by many commentators and an expert economist hired by DotRegistry.[50]

ICANN has not disputed this; instead, they say they did not make the decisions. But in fact, they had ultimate control such that their contractor could not be independent, they heavily influenced at least some of those "presumptive" decisions, and have hidden information that would be relevant to explain why. The *DotRegistry* IRP proved that, because the CPE results in fact were unduly influenced by ICANN staff, the BGC could and should have investigated that conduct before rubber-stamping its own prior decision to approve the CPE results, and before approving the FTI Reports. But they did not, which leads to an inference that they exercised undue influence in the .HOTEL CPE -- discriminating against Claimants.

The Board has not looked at the issue because it did not require EIU to provide it, nor ICANN staff to publicize its work. That violated ICANN's Bylaws as to the *DotRegistry* claimants and equally as to these Claimants. Same as re the sham RFR process, whereby the BAMC thoughtlessly "reconsidered" its own prior decisions to accept purportedly independent CPE results in both cases, without doing any reasonable investigation of the claims of inconsistency and undue influence.[51] Those failures also violated ICANN's Bylaws as to the *DotRegistry* claimants and equally as to these Claimants.

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[49] Exhibit V, CPE Guidelines, at 22.
[50] Exhibit E, s*ee supra*, note 5.
[51] *See* Exhibit W ("Specifically, the BGC is only authorized to determine if any policies or processes were violated during CPE. The BGC has no authority to evaluate whether the CPE results are correct.").

Yet, the ICANN Board has fully addressed the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants.[52] The ICANN Board agreed to refund Dot Registry's IRP costs of more than $200,000 -- as the IRP Panel had ordered. The ICANN Board also ordered the BGC to reconsider the DotRegistry RFRs in light of the IRP Final Declaration. Yet, the BGC refused to provide any additional information to Claimants or do any further due diligence or reasonable investigation, by which it could make any independent judgment. Instead, they summarily denied the RFRs, and forced Claimants to file this IRP in order to get any real review.

Claimants suffered from the same violations as the *DotRegistry* claimants, and the *DotRegistry* IRP decision is a binding precedent. However, ICANN refuses to produce responsive documents to these Claimants, and refuses any other remedy to Claimants. It must be forced to produce now, so that there can be a meaningful review in this case as there was in that case. ICANN has not and cannot provide any justification why it treats Claimants differently, although they are and always have been situated identically to the *DotRegistry* claimants. Claimants request that the IRP Panel recommend ICANN take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, and of these Claimants' RFRs -- at least to ensure consistency of approach with its handling of the *DotRegistry* case.

ICANN also provided a completely new CPE for an applicant for the .GAY gTLD, merely because of a "procedural error" whereby some of its letters of support were not 'verified' by EIU, even though they were still considered in the EIU scoring. The BAMC Recommendation re RFR 14-44 concluded for that flimsy reason that "the CPE Panel Report shall be set aside, and EIU shall identify two different evaluators to perform a new CPE".[53] Again, ICANN has discriminated against Claimants because Claimants have raised much more substantial issues, and have been rebuffed.

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[52] Exhibit H (ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12).
[53] Exhibit X, p. 2.

C. *Claimants Seek Review Of ICANN's "Portal Configuration" Investigation And Refusal To Penalize HTLD's Willful Accessing Of Claimant's Trade Secret Info*

Clearly, the *Despegar* IRP Panel left this issue open for future scrutiny, and found ICANN's early defensive argument "specious".[54] As explained in Claimant's later RFRs and letters to ICANN, HTLD's theft of competitor Claimants' private and highly confidential trade secret data was unique and stunning. And deserving not only of thorough investigation as ICANN promised, but also of some consequence to HTLD once the scope, frequency and significance of its abuse was revealed. ICANN refused to produce key information underlying its bare conclusions, couching each with equivocal language such as "at a minimum," etc.

This purported "rationale" for BAMC denial of RFR 16-11 is facially flimsy, particularly in light of the *Despegar* Panel's statements on this issue[55] which question it:

> Without evidence that the confidential information was shared, Mr. Krischenowski's corporate holdings alone are not sufficient to demonstrate that HTLD received any of the information that Mr. Krischenowski accessed and/or that HTLD gained some "unfair advantage" from Mr. Krischenowski's access to the information.

There is little doubt under US law that such misdeeds of any major shareholder or other decision maker would be imputed to their closely held corporation that benefitted therefrom.[56] Katrin Otrin (at least) was also a shareholder in Krischenowski's shareholding company, and she also had access to the confidential competitive data, so their collective holdings were closer to 50% and controlling interest – further supporting the argument to impute their actions to HTLD.[57] Therefore, the Board action to ignore such facts and law violates its Bylaws.

It is also self-evident that ICANN and HTLD, in conducting their investigation, were each embarrassed parties with strong incentive to find nothing wrong with HTLD's conduct. In other words, it can be inferred that either of them would have said anything -- or hid anything -- to save themselves from further embarrassment. At minimum, that circumstance should require further discovery in the IRP, of all documents concerning ICANN's investigation of HTLD's

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[54] *See supra, n.14.*
[55] *Id.; Despegar* Final Decl., #124-138.
[56] *See* Exhibit AA, Restatement (Second) of Agency § 219 (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").
[57] Exhibit H (ICANN Board Resolutions).

breach. ICANN has no privilege or other valid reason for withholding those documents to date, and ought not be allowed to stymie Independent Review of its decision by withholding any such documents now. It violates the duty of transparency to withhold them. To the extent the BAMC and/or Board failed to have such information before deciding to ignore HTLD's breach, that violated their duty of due diligence upon reasonable investigation, and their duty of independent judgment.

Claimants in RFR 16-11 argued that ICANN gave "undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant." ICANN did not recognize HTLD as an "unreliable applicant", even though they were the only one of many hundreds of applicants who cheated the ICANN system and stole its competitors' trade secret information.

That was clearly embarrassing for ICANN to have allowed anyone, let alone each and every one of the hundreds of applicants' representatives, to access private trade secret data for weeks on end -- which it had explicitly promised to keep strictly confidential. Yet, just one company took advantage of that ill-begotten access, causing a lot of further embarrassment and expense to ICANN.[58] HTLD took the extraordinary step of writing to ICANN to admit to Krischenowski's misconduct, while purporting to distance itself from it.[59] While ICANN may have been happy to be rid of Mr. Krischenowski from HTLD, ICANN has never considered the injury that its failure to satisfy its contractual commit to safeguard data caused to the six other applicants for the .HOTEL gTLD, including Claimants.

Claimants aver that HTLD's application should be denied, or at least its purported Community Priority relinquished, as a consequence of HTLD's stealing its competitors' trade secret information. HTLD and ought not benefit from Community Priority over the six other fully qualified, fully paid applicants -- *e.g.*, Claimants.

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[58] *See, e.g.,* Exhibit Z (articles discussing data breach and HTLD misconduct).
[59] Exhibit Z1 (Afilias letter to ICANN re Krischenowski).

D. *Claimants Seek Review Of ICANN's Failure To Provide An IRP Standing Panel*

The ICANN Bylaws expressly have required creation of an IRP Standing Panel, since 2013:[60]/[61]

> 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….

Bylaws, Art. 4.3(w) provides for the right of appeal of IRP panel decisions to the illusory Standing Panel, *en banc*. Because of ICANN's willful and ongoing refusal to create a Standing Panel for ten years, Claimants have been deprived of these important procedural rights granted under the Bylaws.[62]

This continuing breach of the Bylaws is particularly outrageous because ICANN was admonished by a previous IRP Panel for exactly this same reason more than nine years ago:[63]

> 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."
>
> 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

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

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

[62] *E.g.*, Bylaws Sec. 4.3(e)(iv) 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.

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

> 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.

Now, it is ten years later, not just one. Again in 2017, another IRP panel also recommended that ICANN get the Standing Panel in place.[64] Yet ICANN completely ignored that recommendation in its resolution of that decision,[65] despite Bylaws requiring ICANN to expressly address recommendations of IRP panels.[66] Only after this IRP Request was filed in late 2019 did ICANN even begin to progress towards implementing a Standing Panel. Obviously, by its willful inaction for so long, ICANN has decided that 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 nine years, despite the very purposes of the IRP to provide binding decisions and to remedy Bylaws violations. It harms Claimants not to have the benefit of appointments from a Standing Panel with the specialized training, resultant expertise, and community backing that the Bylaws have required ICANN to provide to all IRP claimants for so long. And then, in the end if they fail to prevail on any issue, Claimants will be denied the *en banc* appeal mechanism provided by ICANN's own Bylaws more than ten years ago. ICANN has violated its Bylaws by taking so long to implement the Standing Panel, willfully insulating itself from any appellate review, and thereby causing direct harm to Claimants and to all parties who seek Independent Review of ICANN conduct.

VII. CONCLUSION

For all of the foregoing reasons, this honorable IRP Panel should 1) order appropriate discovery from ICANN; 2) independently review ICANN's actions and inactions as aforesaid; 3) render a Final Declaration that ICANN has violated its Bylaws, and 4) recommend that ICANN provide appropriate remedial relief.

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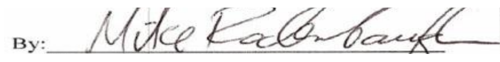
64 See Exhibit Z2, *Asia Green IT Sys. v. ICANN*, Final Declaration, #146 (Nov. 28, 2017).
65 ICANN Board Resolution, at https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-special-meeting-of-the-icann-board-03-10-2018-en#1.b
66 Bylaws, Art. 4.3(x)(iii)(A) ("the Board shall … shall affirm or reject compliance with the decision on the public record based on an expressed rationale").

RESPECTFULLY SUBMITTED,

DATED: May 5, 2023



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