

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC,)	
Radix Domain Solutions Pte. Ltd.,)	
and Domain Venture Partners PCC Limited,)	
)	
Claimants,)	ICDR Case No. 01-19-0004-0808
)	
vs.)	
)	
Internet Corporation for Assigned Names)	
and Numbers (ICANN))	
)	
Respondent)	

DECISION ON THE DOCUMENT PRODUCTION

Piotr Nowaczyk, Esq., Chair
Hon. A. Howard Matz (Ret.)
Hon. William J. Cahill (Ret.)

July 11, 2023

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

- (1) This is the Panel’s Decision on the Parties’ requests regarding outstanding discovery issues contained in the Claimants’ Report re Outstanding Discovery Issues dated May 5, 2023 (“**Claimants’ Report**”) and the Respondent’s Report regarding Outstanding Discovery Issues dated May 5, 2023 (“**Respondent’s Report**”) together with the subsequent correspondence.
- (2) By Procedural Order No. 12 the Panel requested that:
 - a) in the week of May 1, 2023, the Parties are to meet and confer with respect to the further document production in this case;
 - b) not later than on May 5, 2023, each Party is to file its report on the results of the meet-and-confer discussions, including the remedies requested from the IRP by each Party concerning the document production (this report shall not exceed 10 pages);
 - c) following the Parties’ reports referred to in point 1(b) above, the IRP will take appropriate measures on the document production in due course.
- (3) In response to Procedural Order No. 12 the Parties filed their respective reports regarding outstanding discovery issues on May 5, 2023.
- (4) Further to Procedural Order No. 12, the Panel now issues the present Decision on the outstanding discovery issues.

II. PROCEDURAL BACKGROUND

- (5) On November 22, 2021, the Panel issued Procedural Order No. 3. In point 2 of this Procedural Order the Panel requested that:
 - a. each Party seeking discovery shall serve the requests for document production not later than on January 14, 2021;
 - b. each Party shall serve the response to the requests for document production of the other Party not later than on February 14, 2021.
- (6) In accordance with Procedural Order No. 3, in January 2022, the Claimants propounded 34 requests for production to the Respondent, providing reasons how each was relevant to the claims in the IRP Request. In February 2022, the Respondent provided responses to these requests¹.
- (7) On March 16, 2022, the Panel issued Procedural Order No. 6. The Panel ordered the Parties, *inter alia*, to:
 - (...) prepare and deliver to the IRP not later than on April 20, 2022, a summary concerning:

¹ Claimants’ Report, p. 2

a) all discovery disputes that remain unresolved as of April 20, 2022, such including the reasons for any delay in completing production of documents and what the parties propose to resolve those issues, including any motions before the IRP.

(8) By the letter dated March 24, 2022, the Claimants informed the Respondent that:

In effort to narrow a "Phase 1" discovery effort by ICANN, we propose that ICANN focus on responses to the following Requests which we believe are more narrowly defined than others ICANN has objected to: 7, 8, 16, 19, 20, 21, 24, 26, 27, 30, 31 and 31 (...)

As discussed, we are not waiving any of the other Requests, but simply trying to start somewhere to get some semblance of document production from ICANN. To date, nothing has been produced in this IRP.

In further reflecting on ICANN's requests to Claimants, I want to be clear that as to almost all of ICANN's requests, Claimants will not have responsive and non-privileged documents other than those responsive documents produced by ICANN or otherwise available at ICANN's website.

(9) In response to Procedural Order No. 6, by the letter of April 20, 2022, the Claimants provided to the Panel their summary of all discovery disputes that remained unresolved. The Claimants proposed that:

as an appropriate next step, the Panel order ICANN to respond fully to Claimants' limited subset of twelve requests, as proposed by undersigned Claimants' counsel on March 24, 2022 -- without any objection other than as to privilege. (...)

(10) By the letter of April 20, 2022, the Respondent replied to Procedural Order No. 6 and explained that:

During the meet-and-confer, the parties discussed the inappropriate volume and breadth of the document requests propounded by Claimants. Claimants ultimately agreed to reduce the number of their document requests, for the time being, to twelve of their original requests for ICANN to consider, but Claimants did not agree to modify the scope of these requests to tailor them to the issues in this IRP.

(11) On April 29, 2022, the Panel issued Procedural Order No. 7. Pursuant to point 2 thereof:

As a result of the CC, the IRP imposes on the Parties the following obligations regarding the document production:

a) not later than on May 5, 2022, the Respondent is to propose in writing to the Claimant precise narrowing of each of the Claimant's 12 requests for document production which the Respondent is willing to produce, if the Claimant further accepts it;

b) not later than on May 12, 2022, the Claimant is to serve on the Respondent the written response to the proposal formulated by the Respondent in accordance with point (2)(a) above, as well its declaration as to any documents that the Claimant is willing to produce in response to the Respondent's requests;

c) not later than on May 17, 2022, the Parties are to meet and confer and discuss the state of the document production after the exchange referred to in points (2)(a) and (b) above;

d) not later than May 19, 2022, the Parties are to file the joint status report (“JSR”) including potential outstanding differences between Parties on the document production. The JSR shall be no longer than 10 pages and shall be sent to Tom Simotas who will further circulate the JSR to the IRP.

(12) On May 5, 2022, the Respondent sent the letter to the Claimants further to the Panel’s Procedural Order No. 7. The letter set forth the Respondent’s position with respect to the Claimants’ specific discovery requests.

(13) On May 12, 2022, the Claimants sent the letter to the Respondent further to the Panel’s Procedural Order No. 7. According to the Claimants, the Respondent has not proposed to Claimants any “»precise« narrowing of any of these twelve requests. Remarkably, ICANN still has not agreed to provide any documents in response to any of them”. The Claimants further referred the meet-and-confer between the Parties, during which the Respondent, as the Claimants recapitulated, “indicated that you thought some progress was made today, by which you can go back to ICANN and determine what documents can be produced, along with a privilege log as to any purportedly privileged but responsive documents”.

(14) The Claimants also added with respect to its document production that:

Claimants’ conduct is not at issue in the IRP. (...) Unless and until ICANN makes some semblance of an initial document production in response to Claimants’ initial subset of legitimate requests, the Claimants are not in position to declare what further discovery may be necessary either from Claimants or from ICANN. (...)

(15) On May 26, 2022, the Parties filed the Joint Status Report in response to Procedural Order No. 7. The Claimant alleged that:

ICANN had not made any effort to comply with Procedural Order No. 3 by proposing text of narrowed requests to which ICANN is willing to respond. (...) In its May 24 letter, for the first time, ICANN now says it is willing to produce documents, but only in response to five of the first twelve requests, and with caveats. In any event, ICANN still has not produced any documents whatsoever in this case, nor has ICANN committed to any timeline for doing so.

(16) In turn, the Respondent claimed that:

Subsequent to (and pursuant to) Procedural Order No. 7, on 5 May 2022, ICANN sent a letter to Claimants detailing ICANN’s position with respect to narrowing the eleven requests for production at issue (“Requests for Production”) and a second letter setting forth ICANN’s statute of limitations arguments (...) With regard to ICANN’s requests for production, Claimants have still refused to produce any documents in response to ICANN’s requests for production of documents.

(17) On June 2, 2022, the Panel issued Procedural Order No. 8. The Panel set a briefing schedule for the Respondent’s Summary Adjudication Motion. Moreover, in point 2 of Procedural Order No. 8 the Panel stated:

Given that the IRP is intent on proceeding expeditiously, it seeks to have all discovery completed in this round of discovery, so:

a) not later than on June 21, 2022, the Claimant will produce all documents in support of its contentions;

b) not later than on June 21, 2022, the Respondent will produce all documents it has agreed to produce. If the Respondent is unable to produce all document by this date, it will provide the binding last date to do so.

- (18) On April 4, 2023, the Panel issued Statement of Decision on the Respondent's Motion for Summary Adjudication dated June 21, 2022 ("SAM") ("**Decision on SAM**").
- (19) On May 5, 2023, the Claimants' Report was filed. On the same day, the Respondent's Report was filed.
- (20) On May 30, 2023, the Respondent submitted a letter regarding recent developments since the Parties submitted their respective reports. On June 5, 2023, the Claimants submitted their response to this letter of the Respondent.
- (21) On June 6, 2023, the Respondent filed its response to the above correspondence of the Claimants. On June 11, 2023, the Claimants submitted their response to this letter of the Respondent.

III. OVERVIEW OF THE PARTIES' CURRENT POSITIONS

- (22) In the Claimants' Report, the Claimants confirmed that by that date "*ICANN produced some responsive documents and a privilege log (Exhibit G). (...)*"
- (23) However, the Claimants explained that there were two main areas of outstanding disagreement between the parties:

First, ICANN's privilege log is missing critical information as to many of the listed documents, making it impossible to determine whether privilege is properly asserted. From the information provided in the log, it appears that ICANN is again improperly claiming privilege to many documents (as several IRP panels have found ICANN to have done).

Second, ICANN has refused to produce documents responsive to many of Claimants' requests. (...) Claimants have many outstanding requests for which ICANN has simply and improperly refused to produce documents, and Claimants have no assurance that ICANN has comprehensively produced documents as to any request at all.

- (24) In turn, the Respondent confirmed in the Respondent's Report that:

Between June and September 2022, ICANN produced over 8,000 pages of documents responsive to Claimants' Requests (as narrowed in March 2022 and that were not subject to ICANN's Motion). Specifically, ICANN produced (or provided publicly available

links for): (i) non-privileged, substantive documents FTI considered in preparing its CPE Process Review Reports; (ii) all public announcements that ICANN made concerning its investigation into the Portal Configuration issue; (iii) Board resolutions and related materials regarding the Portal Configuration Issue; and (iv) communications with HTLD and the other .HOTEL applicants regarding the Portal Configuration issue.

- (25) According to the Respondent the main area of outstanding disagreement between the parties is the following:

Now that the Panel has ruled on ICANN's Motion for Summary Adjudication ("Motion"), the only Requests for Production ("Requests") that should be at issue following the Panel's ruling are the Requests to which ICANN objected on the ground that they were barred by the statute of limitations (Request Nos. 8, 16, 19, 21, 30, and 31). Those Requests have mostly been resolved, as set forth below. Claimants, however, are using the Panel's ruling on ICANN's Motion to reopen nearly all discovery in this IRP and pursue Requests that they have not raised in over a year. (...)

Claimants' last-minute maneuver to reopen all discovery at this late juncture stands in stark contrast to their own lack of discovery efforts: Claimants have not produced a single document from their own files.

- (26) Next, on May 30, 2023, the Respondent informed that following receipt of the Claimants' Report, it agreed to:

(i) supplement its privilege log for entries that allegedly were "missing" information, and (ii) provide Claimants with the custodians and search terms used to collect documents in response to Request Nos. 7, 8, 16, 17, 24, and 26 (...) ICANN provided its custodians and search terms and served its supplemental privilege log on 26 May, meaning that Claimants' requested relief in this respect should be resolved.

The same day, however, Claimants conceded that they have not even searched for documents from their internal files in response to ICANN's Requests, which were served in January 2022, and refuse to do so. (...)

- (27) In its response to the Respondent's correspondence, on June 5, 2023, the Claimants alleged that:

That letter makes clear that ICANN did not conduct any searches of its internal systems for documents in response to Claimants' requests for production. (...)

Therefore, Claimants reiterate their request for the Panel to order ICANN to provide all documents relating to the FTI reports, and ICANN's review and acceptance of those reports.

- (28) With respect to the Respondent's arguments on the refusal to produce any documents by the Claimants, the latter stated that:

In fact, Claimants have repeatedly expressed their willingness to search for any potentially responsive documents, if ICANN could describe with any specificity what they are looking for, and why. (...) Rather than communicating any such requests to Claimants, Mr. LeVee instead complains to the Panel that two Requests supposedly seek relevant information not already in ICANN's possession. But neither of them do so. (...)

- (29) On June 6, 2023, the Respondent replied to the Claimants' contentions:

ICANN wishes to be extremely clear: it has produced all responsive, non-privileged documents relating to the CPE Process Review, which includes all of ICANN's correspondence with the EIU, FTI and/or Jones Day. As to the correspondence between ICANN and the EIU regarding CPEs, ICANN turned all of those materials over to FTI when it was doing the CPE Process Review. Accordingly, when Claimants served their discovery requests on ICANN for these same materials, there was no reason for ICANN to search a second time for those materials because all of those materials had already been turned over to FTI and would have been included in the documents FTI retained from the CPE Process Review. Therefore, ICANN thoroughly reviewed the relevant materials retained by FTI and produced the responsive, non-privileged materials to Claimants. The simple fact is that there were extremely few documents related to .HOTEL, despite Claimants' demand that there must be more.

As for Claimants' complete lack of response to ICANN's document requests, as explained in my letter of 30 May 2023, two of those requests (among many others) seek extremely responsive materials and Claimants' "spin" on why those requests are not responsive is unpersuasive. Moreover, how could Claimants know if there are or are not any responsive documents when they never searched for or reviewed any documents from Claimants' files? (...)

- (30) In the Claimants' response dated June 11, 2023, the Claimants reiterated that the Respondent has not produced documents consisting of draft reports or related correspondence between EIU, FTI and/or Jones Day related to the CPE Process Review and resulting FTI reports. The Respondent has only produced the final CPE Process Review reports by FTI and some correspondence between EIU and ICANN (and/or Jones Day) seeking documents from EIU for use by FTI. The Claimants added:

But, in order to evaluate Claimants' allegations that ICANN (and/or Jones Day) had undue influence over the drafting of the FTI reports in effort to whitewash the review to fit ICANN's preferred narrative, Claimants and the Panel must be given access to all documents bearing upon the hiring of an investigation by FTI, and the drafting of the FTI reports. ICANN continues to refuse to produce such documents.

- (31) Moreover, the Claimants stated that the Respondent has refused to produce the documents that it was forced to produce in the *DotRegistry* IRP case (after they had denied the very existence of such documents), which documents were heavily relied upon by the tribunal in that case to find that the Respondent had violated its Bylaws with respect to the community priority applications in that case.

- (32) As for the Respondent's claims regarding the lack of document production by the Claimants, the latter stated:

Mr. LeVee also continues to complain that Claimants have not searched their systems for documents responsive to ICANN's myriad overbroad requests. Mr. LeVee specifies a new type of document that ICANN seeks: "a document from Claimants' files that expresses concern that HTLD's application would appropriately be given community priority would be extremely relevant." However, Mr. LeVee makes no effort to explain how such a unicorn would be relevant at all to ICANN's decision-making process at that time, and thus could have any potential relevance to this case now.

IV. REMEDIES REQUESTED BY THE PARTIES

- (33) By Procedural Order No. 12 dated April 27, 2023, the Panel requested that each Party files its report on the results of the meet-and-confer discussions regarding the document production, including the remedies requested from the Panel by each Party concerning the document production.
- (34) In the Claimants' Report and the Respondent's Report, the Parties requested the following remedies from the Panel.

A. *The Claimants*

- (35) First, the Claimants submit that the Respondent's privilege log is missing key information and request the Panel to "*order ICANN to complete its review and to provide all missing information, and further »identification« information (employer and role) as to all non-lawyers -- no later than May 26*"².
- (36) Second, the Claimants request the Panel to:

order ICANN to review all of its privilege designations, and to explain in detail how each assertion of privilege is purported to be validly asserted. Specifically, ICANN must explain in detail when and how it concluded that it "anticipated litigation" relating to the CPE Process Review, even long before the FTI Reports were published³.
- (37) Third, the Claimants request Panel to confirm that the sixteen Claimants' requests (nos. 3, 5, 6, 9, 12–15, 17–18, 22–23, 25, and 27–29) "*remain valid and pending*"⁴.
- (38) Fourth, as for requests nos. 14, 15, 18, 19 and 20, the Claimants request Panel to "*order ICANN to produce all internal correspondence, drafts, etc. which are responsive to (...) in particular these five critical Requests*"⁵.
- (39) Fifth, as for requests nos. 7, 8, 16, 19 and 30, the Claimants request Panel to "*order ICANN to produce all non-privileged responsive documents for these five requests no later than May 26*"⁶.
- (40) Sixth, as for the requests nos. 21 and 31, the Claimants request Panel to "*order ICANN to produce all responsive non-privileged documents as to these two Requests by May 26*"⁷.

² The Claimants' Report, p. 6.

³ The Claimants' Report, p. 7.

⁴ The Claimants' Report, p. 7.

⁵ The Claimants' Report, p. 9.

⁶ The Claimants' Report, p. 10.

⁷ The Claimants' Report, p. 11.

(41) Seventh, as for the requests nos. 3, 5, 6, 7, 8, 9, 13, 16, 17, 24, 25, 26, 27, 28 and 34, the Claimants request Panel to” order *ICANN to provide such information*”, namely the custodians and search terms used to collect documents, “*no later than May 26*”⁸.

B. *The Respondent*

(42) The Respondent submits that „*the only Requests that should be at issue are Request Nos. 7, 8, 16, 19, 21, 30, and 31. These Requests, however, should require no further document production either because ICANN already produced responsive documents, or the Requests are irrelevant to any remaining issues in this IRP and are significantly overbroad*”⁹.

(43) Thus, the Respondent requests “*that the Panel deny Claimants’ Requests either because: (1) ICANN already produced responsive documents; (2) Claimants waived any right to pursue additional Requests; or (3) the Requests are irrelevant and/or overbroad*”¹⁰.

V. THE PANELS’ DECISION ON THE DOCUMENT PRODUCTION

A. *The Panel’s decision on the remedies requested by the Claimants.*

1. The first and second remedy requested by the Claimants.

(44) First, the Claimants request the Panel to “*order ICANN to complete its review and to provide all missing information, and further »identification« information (employer and role) as to all non-lawyers*” in the Respondent’s privilege log¹¹. Second, the Claimants request that the Panel orders the Respondent “*to review all of its privilege designations, and to explain in detail how each assertion of privilege is purported to be validly asserted*”¹².

(45) After the Claimants’ Report was submitted, on May 30, 2023, the Respondent informed that it agreed to supplement its privilege log for entries that were missing information.

(46) The Panel reviewed the Respondent’s privilege log attached to the Claimants’ Report, as well as the Respondent’s correspondence regarding the supplementing this privilege log dated May 30, 2023. The Panel finds that the Respondent sufficiently substantiated its privilege claims and proved that these claims have merit. Thus, the Panel believes that the Respondent’s correspondence of May 30, 2023, resolves the outstanding issues with respect to the Respondent’s privilege log.

⁸ The Claimants’ Report, p. 11.

⁹ The Respondent’s Report, para. (9).

¹⁰ The Respondent’s Report, para. (10).

¹¹ The Claimants’ Report, p. 6.

¹² The Claimants’ Report, p. 7.

(47) Given the above, the Panel concludes that the Claimants' first and second requests for remedies are DENIED.

2. The third remedy requested by the Claimants.

(48) Third, the Claimants request Panel to confirm that the sixteen Claimants' requests (nos. 3, 5, 6, 9, 12–15, 17–18, 22–23, 25, and 27–29) “*remain valid and pending*”¹³.

(49) The dispute between the Parties in this regard results from the Respondent's allegation that the Claimants elected not to pursue request nos. 3, 5, 6, 9, 12–15, 17–18, 22–23, 25, and 28–29 in March 2022; the Claimants have not pursued Request No. 27 since the Respondent's May 2022 letter; and the Claimants have not pursued requests Nos. 20, 24, and 26 after the Respondent produced responsive documents in June, July, and September 2022. The Respondent submit that these requests should be denied on that basis alone¹⁴.

(50) According to the Claimants, there was no reason to pursue further discovery during pendency of the SAM, which could have eviscerated most of the Claimants' case. The Respondent has suffered no prejudice whatsoever in the interim¹⁵.

(51) The Panel does not find in the case file a specific basis sufficient to support the Respondent's allegation that the Claimants explicitly agreed to limit the number of their document requests. However, the absence of such specific evidence does not mean that the Respondent has no basis to contend that the document production should be currently narrowed.

(52) First, the Panel has the responsibility and the right to define or limit the scope of discovery, consistent with and pursuant to the applicable rules.

(53) In accordance with Article 20(2) of the ICDR Rules “[*t*]he tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute”. Moreover, Article 20(7) of the ICDR Rules establishes that “[*t*]he parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration”.

(54) Next, Article 21 provides for the following rules on the exchange of information:

1. The arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding

¹³ The Claimants' Report, p. 7.

¹⁴ The Respondent's Report, para. (10).

¹⁵ The Claimants' Report, p. 5.

surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

2. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority. To the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.

3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.

4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case. (...)

8. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

(55) As results from the above, this Panel shall manage the exchange of information between the Parties with a view to maintaining efficiency and economy. The Panel and the Parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each Party's opportunity to present its claims and defenses fairly.

(56) Given that the ICDR Rules establish that the Parties exchange information that is reasonably likely to be relevant and material to the resolution of the claims or defenses in the IRP, the fact that the Claimants have not pursued the document production requests in question till now suggests to the Panel that the documents covered by these requests are not that relevant and material to the resolution of the Claimants' claims or defenses in the IRP.

(57) Second, as indicated in the Section "*Procedural Background*" above, there have been numerous developments and Panel's orders since at least March 24, 2022, that were intended to place borders on the document production dispute between the Parties in consistency with what is genuinely at issue and within the scope of this IRP. The Panel intended to narrow some aspects

of the incessant back and forth maneuvering. The Panel also issued the Decision on SAM which substantially limited the claims for relief in this IRP. The Panel reached a point where one could reasonably hope that the unprecedented delays would be further reduced.

- (58) In sum, with a view to maintaining efficiency and economy of this proceedings, the Panel decides that the Claimants' request to confirm that the sixteen Claimants' requests (nos. 3, 5, 6, 9, 12–15, 17–18, 22–23, 25, and 27–29) “*remain valid and pending*” is DENIED.

3. The fourth remedy requested by the Claimants.

- (59) Fourth, the Claimants request Panel to “*order ICANN to produce all internal correspondence, drafts, etc. which are responsive to (...) in particular these five critical Requests*”, namely requests nos. 14, 15, 18, 19 and 20 (“*[a]ll documents and things which concern reflect or relate to Claimants' Requests for Reconsideration Nos. 16-11 and 18-6*”) ¹⁶. According to the Claimants, “[*t*]hese are critical as the request information relating to ICANN’s consideration of Claimants DIDP Request, RFRs, resulting Board resolutions, and the portal configuration issue” ¹⁷.

- (60) As to the requests nos. 14, 15 and 18, as outlined in para. (58) above, in order to maintain efficiency and economy of this proceedings, these Claimants' requests are denied.

- (61) However, the requests nos. 14, 15, 18, as well as the requests nos. 19 and 20 should be also denied on their merits.

- (62) With respect to the request no. 14 (“*all documents and things which concern reflect or relate to Claimants' Requests for Reconsideration Nos. 16-11 and 18-6*”) ¹⁸, the Panel finds that the request formulated in such a way is overly broad and unduly burdensome.

- (63) With respect to the request no. 15 (“*all documents and things which concern, reflect or relate to analyses, discussions, reports, resolutions, communiques or other documents had or taken by the Respondent or any of its Constituent Bodies, contractors or agents related to any issue raised in Claimants' Requests for Reconsideration 16-11 and 18-6*”) ¹⁹, the Panel similarly finds that this request is overly broad and unduly burdensome. The Panel also agrees that it relates to the documents outside of the Respondent’s possession, custody, or control to the extent it seeks documents from the Respondent’s contractors, or agents.

¹⁶ The Claimants' Report, p. 9.

¹⁷ The Claimants' Report, p. 9.

¹⁸ The Respondent's Report, para (10).

¹⁹ The Respondent's Report, para (10).

- (64) With respect to the request no. 18 (“*all documents and things which concern, reflect or relate to Respondent’s Board Resolutions referenced in Exhibit H to the IRP Complaint*”)²⁰, the Panel finds this request unclear. The Panel notes the Respondent’s explanation that “*Claimants clarified during the meet-and-confer that they are seeking documents relating to the Board Resolutions regarding the request for cancellation of HTLD’s .HOTEL application*”²¹. However, the Panel accepts the Respondent’s position that “[t]he non-privileged documents responsive to these Requests are publicly available”²².
- (65) With respect to the request no. 19 (“*all documents and things which concern, reflect or relate to discovery sought by any party prior to or during the Despegar IRP, including without limitation the DIDP requests referenced in paragraphs 36, 39, 91-111, and/or 124-128 of the Final Declaration issued in that case*”)²³, the Panel acknowledges that – as pointed out by the Respondent – there was no discovery sought by the *Despegar* Claimants in that IRP. Additionally, the Panel accepts the Respondent’s clarification that “*the DIDP Request and ICANN’s Response to the DIDP Request that Claimants submitted to ICANN prior to the IRP (and which comprises a process that is separate and distinct from IRP discovery) are publicly available online*”²⁴. The Panel believes that the Claimants have not identified any additional documents in response to these requests that are relevant and material to the outcome of this case.
- (66) With respect to the request no. 20 (“*all documents and things which concern, reflect or relate to discovery sought by any party prior to or during the DotRegistry IRP, including without limitation the discovery requests, privilege assertions and/or produced documents that are referenced in Procedural Orders 2, 3, 4, 6 and/or 8, and/or referenced in paragraphs 14-16, 30-33, 96-99, and/or 127-149 of the Final Declaration issued in that case, and/or referenced in Exhibit K to the IRP in this case*”)²⁵, the Panel finds that the Claimants have not demonstrated in what way this request would lead to the discovery of evidence which is admissible, relevant and material to this IRP.
- (67) In sum, the Claimants’ request to “*order ICANN to produce all internal correspondence, drafts, etc. which are responsive to (...) in particular these five critical Requests*”, namely requests nos. 14, 15, 18, 19 and 20²⁶, is DENIED.

²⁰ The Respondent’s Report, para (10).

²¹ The Respondent’s Report, para (10).

²² The Respondent’s Report, para (10).

²³ The Respondent’s Report, para (9).

²⁴ The Respondent’s Report, para (9).

²⁵ The Respondent’s Report, para (9).

²⁶ The Claimants’ Report, p. 9.

4. The fifth remedy requested by the Claimants.

- (68) As for requests nos. 7, 8, 16, 19 and 30, the Claimants request Panel to “*order ICANN to produce all non-privileged responsive documents for these five requests no later than May 26*”²⁷.
- (69) In support of these 5 discovery requests, the Claimants underline that they argue in this IRP that the Respondent had undue influence over EIU regarding its CPE decisions, and over FTI regarding the CPE Process Review. Specifically, the Claimants argue that the Respondent has kept secret key information regarding the CPE, and misled Claimants and the *Despegar* panel by withholding such critical information then, and still now. That violates ICANN Bylaws. Such information, as revealed in the *DotRegistry* decision and FTI Reports, existed and was material, but was not considered by ICANN in adjudicating Claimants’ RFRs. That also violates Bylaws²⁸.
- (70) In turn, the Respondent submits that the only discovery requests that should be at issue are request Nos. 7, 8, 16, 19, 21, 30, and 31. These Requests, however, should require no further document production either because the Respondent already produced responsive documents, or the requests are irrelevant to any remaining issues in this IRP and are significantly overbroad²⁹.
- (71) The request no. 7 relates to “*all documents and things which concern, reflect or relate to the Letters of Support submitted on behalf of HTLD’s .HOTEL gTLD application, set forth in Exhibit B to the IRP Complaint*”³⁰. The Panel acknowledges that the Respondent has already produced some documents responsive to this request. The Claimants have not demonstrated that the scope of documents produced does not satisfy this request. In particular, the Claimants have not specified what additional documents they are seeking beyond the documents already produced by the Respondent, as well as the documents which are already in possession of the Claimants (and were used as the basis for the IRP Request).
- (72) Next, request no. 8 concern “*all documents and things which concern, reflect or relate to analyses, discussions, reports, resolutions, communiques or other documents had or taken by the Respondent or any of its Constituent Bodies, contractors or agents related to the EIU’s CPE Report related to the .HOTEL gTLD, set forth as Exhibit D to the IRP Complaint*”³¹. Here again, it is the Panel’s understanding that the Respondent has already produced some documents responsive to this request. The Claimants have not demonstrated that the scope of documents

²⁷ The Claimants’ Report, p. 10.

²⁸ The Claimants’ Report, p. 10.

²⁹ The Respondent’s Report, para (9).

³⁰ The Respondent’s Report, para (9).

³¹ The Respondent’s Report, para (9).

produced does not satisfy this request. Moreover, the Panel finds that this request relates to the documents outside of the Respondent’s possession, custody, or control to the extent it seeks documents from the Respondent’s contractors, or agents.

- (73) Next, request no. 16 encompasses “*all documents and things which concern, reflect or relate to allegations that CPE scoring criteria were applied inconsistently, including without limitation the webinar referenced in Exh. F to the IRP Complaint*”³². Similarly, as above, it is the Panel’s understanding that the Respondent has already produced some documents responsive to this request. The Claimants have not demonstrated that the scope of documents produced does not satisfy this request. Moreover, the Panel finds this request to be unclear and overly broad.
- (74) Next, as for the request no. 19, please see para. (65) above.
- (75) Finally, request no. 30 covers “*all documents and things which concern, reflect or relate to the DotRegistry IRP, including without limitation all correspondence between the parties and between either party and the ICDR and/or IRP panel, and including without limitation the unredacted Final Hearing transcript, unredacted Emergency Panelist hearing transcript, and unredacted transcripts of all other hearings, BAMC recommendations, Board resolutions and all documents related thereto*”³³. The Panel acknowledges that many of the documents relating to the *Dot Registry* IRP are publicly available online, including the IRP hearing transcript, the parties’ substantive briefs, the IRP Panel’s Final Declaration, and the ICANN Board resolutions following the *Dot Registry* IRP. In the Panel’s view, the Claimants have not specified what additional documents they are seeking beyond these publicly available documents, as well as the documents already produced by the Respondent. Moreover, the Panel finds that the Claimants have not demonstrated in what way this request would lead to the discovery of evidence relevant and material to this IRP.
- (76) In sum, the Claimant’s requests to “*order ICANN to produce all non-privileged responsive documents for these five requests no later than May 26*”, namely the requests nos. 7, 8, 16, 19 and 30³⁴, is DENIED.

5. The sixth remedy requested by the Claimants.

- (77) Sixth, as for the requests nos. 21 and 31, the Claimants request Panel to “*order ICANN to produce all responsive non-privileged documents as to these two Requests by May 26*”³⁵.

³² The Respondent’s Report, para (9).

³³ The Respondent’s Report, para (9).

³⁴ The Claimants’ Report, p. 10.

³⁵ The Claimants’ Report, p. 11.

(78) The Claimants explain that these requests relate to the following:

(...) the DotRegistry IRP, including “ICANN staff documents relating to ICANN’s discovery responses”. ICANN says that IRP is unrelated and so Claimants are not entitled to documents produced therein. However, it is obvious that IRP is highly related to this one. They involve highly similar allegations that ICANN has withheld vital information from IRP claimants and panels. The information revealed in that case, which was denied to Claimants in response to their DIDP request and which was denied to exist before the Despegar panel, is highly relevant to prove that ICANN has willfully violated its Bylaws in refusing to provide that information since³⁶.

(79) The request no. 21 relates to “*all documents and things which concern, reflect or relate to discovery sought by any party prior to or during the DotRegistry IRP, including without limitation the discovery requests, privilege assertions and/or produced documents that are referenced in Procedural Orders 2, 3, 4, 6 and/or 8, and/or referenced in paragraphs 14-16, 30-33, 96-99, and/or 127-149 of the Final Declaration issued in that case, and/or referenced in Exhibit K to the IRP in this case*”³⁷. In the Panel’s view, even though the Claimants allege that they “*made a very specific Request No. 21, and ICANN only asserts that it is irrelevant – which it clearly is not (...)*”³⁸, the Claimant have not in fact specifically demonstrated in what way this request would lead to the discovery of evidence relevant and material to this IRP.

(80) The request no. 31 concerns “*all documents and things which concern, reflect or relate to the DotRegistry IRP, including without limitation all correspondence between the parties and between either party and the ICDR and/or IRP panel, and including without limitation the unredacted Final Hearing transcript, unredacted Emergency Panelist hearing transcript, and unredacted transcripts of all other hearings, BAMC recommendations, Board resolutions and all documents related thereto*”³⁹. Here again, the Panel finds the Claimant have not specifically demonstrated in what way this request would lead to the discovery of evidence admissible, relevant, and material to this IRP. In any case, the Panel once again notes that many of the documents relating to the *Dot Registry* IRP are publicly available online, including the IRP hearing transcript, the parties’ substantive briefs, the IRP Panel’s Final Declaration, and the ICANN Board resolutions following the *Dot Registry* IRP.

(81) In sum, as for the requests nos. 21 and 31, the Claimants’ request to “*order ICANN to produce all responsive non-privileged documents as to these two Requests by May 26*” is DENIED.

³⁶ The Claimants’ Report, p. 10.

³⁷ The Respondent’s Report, para (9).

³⁸ The Claimants’ Report, p. 10.

³⁹ The Respondent’s Report, para (9).

6. The seventh remedy requested by the Claimants.

- (82) Seventh, as for the requests nos. 3, 5, 6, 7, 8, 9, 13, 16, 17, 24, 25, 26, 27, 28 and 34, the Claimants request Panel to “*order ICANN to provide such information*”, namely the custodians and search terms used to collect documents, “*no later than May 26*”⁴⁰.
- (83) With respect to the requests nos. 3, 5, 6, 7, 8, 9, 13, 16, 17, 25, 27, 28, the Panel has already denied them, as elaborated in paras. (48) – (58) and (68) – (76) above.
- (84) The request no. 24 relates to “*all documents and things which concern, reflect or relate to the FTI investigation and/or CPE Process Review referenced in the IRP Complaint, pages 12-16, including without limitation all documents reviewed by FTI during the CPE Process Review, all interview transcripts, all document requests and responses, all drafts of FTI’s reports and all comments made by Respondent in response to any FTI report including without limitation the report referenced in Exhibit S to the IRP Complaint*”⁴¹.
- (85) Next, the request no. 26 relates to “*all documents and things which concern, reflect or relate to any and all discussions, deliberations, decisions, actions and statements of EIU in relation to the .HOTEL gTLD, the aforementioned FTI investigation and/or the CPE Process Review, including without limitation EIU’s contract with ICANN, communications with ICANN and/or FTI, and its threat to sue ICANN as referenced in Exhibit T to the IRP Complaint*”⁴².
- (86) As for the request No. 34, the Panel notes that it was inadvertently omitted from the Claimants’ email to the Respondent dated May 3, 2023, which constituted a current list of outstanding discovery issues in the IRP⁴³.
- (87) In the letter to the Panel dated May 30, 2023, the Respondent informed that following receipt of the Claimants’ Report, it agreed to provide Claimants with the custodians and search terms used to collect documents in response to Request Nos. 7, 8, 16, 17, 24, and 26. The Respondent served its custodians and search terms on the Claimants on May 26, 2023, which was attached to the Respondent’s letter to the Panel dated May 30, 2023⁴⁴.
- (88) The Claimants were not satisfied with the Respondent’s letter. The Claimants alleged:

ICANN apparently continues to hide all of its internal correspondence relating to the CPE Process Review itself, and all of its correspondence with EIU, FTI and/or Jones Day as to the CPE Process Review. Instead, ICANN only has provided some filtered

⁴⁰ The Claimants’ Report, p. 11.

⁴¹ The Respondent’s Report, para (10).

⁴² The Respondent’s Report, para (10).

⁴³ The Claimants’ Report, p. 4.

⁴⁴ The Respondent’s letter to the Panel dated May 30, 2023.

communications that its counsel had provided to FTI many years ago in order for FTI to conduct that review. Claimants are entitled to ICANN’s communications relating to the CPE Process Review outputs, including drafts of the FTI reports, ICANN comments as to those drafts, and all communications between EIU, FTI and/or ICANN (or ICANN counsel) relating to the CPE Process Review and/or reports. Without such documents, it is impossible to evaluate whether ICANN acted transparently and otherwise in accord with its Articles and Bylaws when it accepted the findings of the CPE Process Review. Therefore, Claimants reiterate their request for the Panel to order ICANN to provide all documents relating to the FTI reports, and ICANN’s review and acceptance of those reports.

- (89) Irrespective of the dispute between the Parties as to the custodians and search terms served by the Respondent on the Claimants on May 26, 2023, the Panel finds that the Claimants have not demonstrated what additional documents they are seeking beyond those produced in result of using the custodians and search terms. While the Panel acknowledges that the nature of the Claimants’ claim underlying the discovery requests in question might make it difficult to formulate a class of documents with great precision, the Panel still finds these requests not specific enough and overly broad.
- (90) Given the above, as for the requests nos. 3, 5, 6, 7, 8, 9, 13, 16, 17, 24, 25, 26, 27, 28 and 34, the Claimants’ request to “*order ICANN to provide such information*”, namely the custodians and search terms used to collect documents, “*no later than May 26*”⁴⁵, is DENIED.

B. The Panel’s decision on the remedies requested by the Respondent.

- (91) First, the Respondent requests that the Panel deny the Claimants’ discovery requests either because the Respondent already produced responsive documents; the Claimants waived any right to pursue additional discovery requests; or the discovery requests are irrelevant and/or overbroad⁴⁶.
- (92) In this respect, the Panel decided to deny the Claimants’ outstanding discovery requests.
- (93) Second, the Respondent points out to the lack of discovery efforts by the Claimants. The Respondent notes that the Claimants have not produced a single document from their own files in response to the Respondent’s discovery requests⁴⁷.
- (94) In this regard the Claimants allege that:

Claimants’ conduct is not at issue in this IRP in any way. We have repeatedly asked ICANN to describe any documents that it believes Claimants may have, which bear materially on any issue in this case and which were not created by ICANN or its

⁴⁵ The Claimants’ Report, p. 11.

⁴⁶ The Respondent’s Report, para (11).

⁴⁷ The Respondent’s Report, para (3).

contractors, or otherwise published on ICANN's website. You have not provided even one example of any such document.

Therefore, there are not, and could not be, any documents in Claimants' possession which are both 1) not already in ICANN's possession and 2) potentially relevant and material to the outcome of the case. To require Claimants to search for responsive documents would be inefficient and incoherent, because no such documents could possibly be relevant and material to the outcome of the case, and not already in ICANN's possession⁴⁸.

- (95) The Panel cannot agree with the Claimants' standpoint.
- (96) The rules governing this case, in particular Article 21(4) of the ICDR Rules, impose the equal duty on both Parties to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case, when so decided by the Tribunal. There is no provision in the applicable rules which would limit the discovery obligations only to the party whose conduct is "*at issue in this IRP*".
- (97) The Panel notes that in the Respondent's correspondence to the Panel dated May 30, 2023 and June 6, 2023, the Respondent indicates 2 of the Respondent's discovery requests, namely requests nos. 1 and 3, which "*seek extremely responsive materials*"⁴⁹.
- (98) The Respondent's request No. 1 seeks documents "*relating to the .HOTEL gTLD and the CPE of the .HOTEL application, which is relevant to Claimants' arguments regarding the underlying CPE of .HOTEL, including whether Claimants themselves considered applying as a community, and whether Claimants have studied whether .HOTEL should qualify for community priority, which is a claim that Claimants have continued to pursue in this IRP (even though ICANN believes it was barred by the Panel's ruling on ICANN's Motion for Summary Adjudication)*"⁵⁰.
- (99) Next, the Respondent's request no. 3 seeks documents "*relating to the portal configuration issue, including any alleged harm that Claimants have suffered or will suffer as a result of the portal configuration issue. This Request relates to ICANN's defense that Claimants' .HOTEL applications could not have been adversely affected by any unauthorized access of Claimants' materials by a competing applicant when that access occurred after all applicants already had submitted their .HOTEL applications*"⁵¹.

⁴⁸ The Claimant's email to the Respondent dated May 26, 2023, Exhibit B to the Respondent's email to the Panel dated May 30, 2023.

⁴⁹ The Respondent's letter to the Panel dated June 6, 2023.

⁵⁰ The Respondent's letter to the Panel dated May 30, 2023.

⁵¹ The Respondent's letter to the Panel dated May 30, 2023.

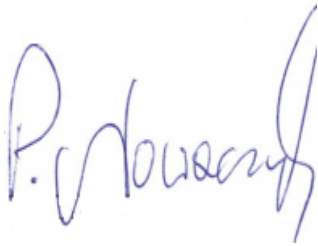
- (100) The Panel finds the Respondent's requests nos. 1 and 3 to be reasonably calculated to lead to the discovery of the documents which are relevant and material to the outcome of this case. Moreover, the Panel considers that the Claimants have not stated the valid, sufficient and specific objections against these requests.
- (101) Thus, in sum, in the view of avoiding further unnecessary delay and expense while at the same time assuring equality of treatment and safeguarding each party's opportunity to present its claims and defenses fairly, the Panel decides that the Respondent's discovery requests nos. 1 and 3 are GRANTED. The Claimants are directed to produce responsive documents no later than on September 1, 2023.
- (102) Finally, any outstanding Respondent's discovery requests are DENIED.

C. Operative Part

- (103) Based on the foregoing, the Panel hereby decides that:
1. the Claimants' request to "*order ICANN to complete its review and to provide all missing information, and further »identification« information (employer and role) as to all non-lawyers*" in the Respondent's privilege log is DENIED;
 2. the Claimants' request that the Panel orders the Respondent "*to review all of its privilege designations, and to explain in detail how each assertion of privilege is purported to be validly asserted*" is DENIED;
 3. the Claimants' request to confirm that the sixteen Claimants' requests (nos. 3, 5, 6, 9, 12–15, 17–18, 22–23, 25, and 27–29) "*remain valid and pending*" is DENIED;
 4. the Claimants' request regarding the requests nos. 14, 15, 18, 19 and 20, to "*order ICANN to produce all internal correspondence, drafts, etc. which are responsive to (...) in particular these five critical Requests*" is DENIED;
 5. the Claimants' request regarding the requests nos. 7, 8, 16, 19 and 30, to "*order ICANN to produce all non-privileged responsive documents for these five requests no later than May 26*" is DENIED;
 6. the Claimants' request regarding the requests nos. 21 and 31, to "*order ICANN to produce all responsive non-privileged documents as to these two Requests by May 26*" is DENIED;
 7. the Claimants' request regarding the requests nos. 3, 5, 6, 7, 8, 9, 13, 16, 17, 24, 25, 26, 27, 28 and 34, to "*order ICANN to provide such information*", namely the custodians and search terms used to collect documents, is DENIED;

8. the Respondent's discovery requests nos. 1 and 3 are GRANTED. The Claimants are directed to produce responsive documents no later than on September 1, 2023;
9. any other outstanding Respondent's discovery requests are DENIED.

Date: July 11, 2023

A handwritten signature in blue ink, appearing to read "P. Nowaczyk". The signature is stylized and cursive.

Piotr Nowaczyk

Presiding Panelist for the full Panel