

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GCCIX, W.L.L., ) ICDR CASE NO. 01-21-0004-1048  
 )  
Claimant, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S REJOINDER IN OPPOSITION TO GCCIX'S APPLICATION TO  
REVIEW EMERGENCY PANELIST'S ORDER**

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## INTRODUCTION

1. Respondent the Internet Corporation for Assigned Names and Numbers (“ICANN”) submits this rejoinder in opposition to Claimant GCCIX, W.L.L.’s (“Claimant”) Application to Review Emergency Panelist’s Interim Order (“Emergency Panelist’s Order”) submitted on 10 February 2022 (“Review Request”).

2. ICANN respectfully requests that the Panel uphold the Emergency Panelist’s Order and keep the inadmissible Cooperative Engagement Process (“CEP”) confidential discussions excised from the record. In Claimant’s Reply to ICANN’s Opposition (“Reply”), Claimant argues that it is “impossible” for Claimant to prove that ICANN acted in bad faith during the CEP without disclosing the CEP discussions. While ICANN vehemently denies any claims of bad faith, the entire premise of the confidentiality provision in the Bylaws, and analogous state and federal evidentiary provisions, is to bar the use of parties’ confidential communications in an effort to prove a claim or liability. This evidentiary bar is designed to promote candor and openness in settlement discussions by ensuring that what the parties say in such discussions will not later be used against them.

3. Claimant also argues in its Reply that the CEP was not a settlement discussion because ICANN never “offered to settle any issues.” However, the applicable Bylaws and applicable California state and federal law are not so limited. The Bylaws provide that ***“[a]ll matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.”***<sup>1</sup> Similarly, California state and federal law deems any

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<sup>1</sup> Bylaws, Art. IV, § 3.17, R-1 (emphasis added), Annex 3 to Review Request.

conduct or statements made during settlement discussions as confidential, not just actual offers of settlement.

4. Finally, Claimant's argument that it is merely seeking to introduce its own correspondence to ICANN is false and it highlights the prejudice ICANN would suffer if Claimant is permitted to do so. Claimant is not merely seeking to introduce its correspondence, Claimant is seeking to use that correspondence to argue that ICANN somehow conceded the accuracy of Claimant's statements because ICANN allegedly never responded to those letters. In doing so, Claimant ignores the fact that there were CEP conferences where discussions between the parties took place. More importantly, allowing Claimant to introduce its confidential CEP communications would force ICANN to either respond to Claimant's biased allegations by disclosing additional confidential information or allow Claimant's allegations to go unanswered out of deference to CEP confidentiality. This is an untenable decision ICANN should not have to make given the confidentiality of CEP communications.

5. Claimant's Review Request should be denied. The allegations and annexes that were ordered excised by the Emergency Panelist constitute confidential settlement discussions. Thus, affirming the Emergency Panelist's Order not only protects ICANN from unfair prejudice, but also maintains the integrity of the CEP process and the ICANN community's confidence in the confidential nature of CEP discussions.

## **ARGUMENT**

### **I. CLAIMANT'S ALLEGATIONS AND ANNEXES DISCLOSE CONFIDENTIAL CEP DISCUSSIONS THAT ARE INADMISSIBLE.**

#### **A. Inadmissible Settlement Communications Cannot be Relied Upon to Prove any of Claimant's Allegations.**

6. The Panel should uphold the Emergency Panelist's Order because the applicable Bylaws and analogous applicable statutes mandate that confidential settlement discussions, such

as the CEP discussions, are inadmissible.<sup>2</sup> The operative Bylaws are clear that “[a]ll matters *discussed* during the cooperative engagement and conciliation phases *are to remain confidential* and not subject to discovery or *as evidence for any purpose within the IRP*, and are *without prejudice to either party*.”<sup>3</sup> Claimant does not dispute that the allegations and annexes ordered excised from Claimant’s IRP Request are communications made during the CEP. Indeed, the Emergency Panelist’s Order implicitly finds just that.

7. Instead, Claimant argues that admitting the confidential communications is the only way Claimant can prove that ICANN acted in bad faith during the CEP.<sup>4</sup> While ICANN denies that it acted in bad faith during the CEP, the entire point behind the confidentiality provision in the Bylaws, and analogous state and federal provisions, is to promote candor and openness by barring the use of parties’ confidential communications against them in an effort to prove a claim or liability. *United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982) (“By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering the policy toward settlement.”) RLA-4\_ ; *C&K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 13 (1978) (“The strong public policy favoring settlement negotiations and the necessity of candor in conducting them combine to require exclusion of” statements made during compromise negotiations) RLA-1. Claimant cannot use the parties’ confidential communications to attempt to establish a claim of bad faith.

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<sup>2</sup> Claimant argues that the operative Bylaws are inconsistent with other Bylaws and CEP Rules that require the parties to participate in the CEP in good faith; however, those two ideas are not mutually exclusive. The Bylaws and CEP Rules can require both confidentiality of the settlement discussions as well as participation in good faith because the content of the confidential communications cannot be used to prove bad faith.

<sup>3</sup> Bylaws, Art. IV, § 3.17, R-1 (emphasis added), Annex 3 to Review Request.

<sup>4</sup> Reply, 4-6.

**B. CEP Communications are Settlement Discussions and Therefore are Confidential.**

8. Claimant next argues that CEP communications are not settlement discussions because neither Claimant nor ICANN “ever offered to settle any issues.” First, a CEP is clearly a settlement discussion. Parties engage in a CEP in hopes of resolving or narrowing the issues that may be the subject of an IRP, like all other settlement discussions.<sup>5</sup>

9. Second, neither the Bylaws nor the applicable California state and federal law limit confidentiality to discussions that contain an actual offer to settle. The applicable Bylaws make clear that “[all] matters discussed” during the CEP are to remain confidential. The excised allegations and annexes certainly qualify as “matters discussed” during the CEP.

10. Further, California state and federal law also broadly define what qualifies as a confidential settlement communication. California Evidence Code Section 1152, for example, applies not only to the specific offer or compromise, but also to “any conduct or statements made in negotiation thereof.”<sup>6</sup> Similarly, the Federal Rule of Evidence 408 states that “*conduct or a statement made during* compromise negotiations about the claim” is not admissible “either to prove or disprove the validity or amount of a disputed claim.”<sup>7</sup>

**II. ALLOWING CLAIMANT TO USE CONFIDENTIAL CEP COMMUNICATIONS WILL UNFAIRLY PREJUDICE ICANN AND UNDERMINE THE CEP.**

11. Claimant argues that the Emergency Panelist’s Order should be reversed because Claimant only attempts to “introduce its own correspondence to ICANN.” But that is not true.

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<sup>5</sup> Claimant also argues that this is not the case because of technicalities, such as the lack of a neutral mediator or judge. However, the intention behind a CEP and the clear language in the operative Bylaws confirm that CEPs are to be treated as settlement communications.

<sup>6</sup> Cal. Evid. Code §1152, RLA-5.

<sup>7</sup> Fed. R. Evid. 408, RLA-6; *Caira v. Offner*, 126 Cal. App. 4th 12, 32 (2005) (“Evidence Code section 1152 broadly precludes the introduction of statements made in the context of settlement negotiations.”), RLA-2; *Contra Costa*, 678 F.2d at 92, RLA-4.

In actuality, Claimant is using its CEP correspondence to argue that ICANN somehow tacitly conceded the accuracy of the statements in that correspondence, which also is not true.

Moreover, this demonstrates the prejudice ICANN would suffer if the Emergency Panelist's Order is overturned. Claimant's one-sided presentation of evidence regarding what was allegedly discussed during the CEP would force ICANN into the unfair position of either refuting Claimant's CEP allegations by disclosing additional confidential information or allowing Claimant's allegations to go unanswered out of deference to CEP confidentiality. Neither is a decision ICANN should be forced to make.

12. Moreover, affirming the Emergency Panelist's Order is necessary to maintain the integrity of the CEP process and the ICANN community's confidence in the confidential nature of these types of settlement discussions. If Claimant is allowed to use confidential CEP communications against ICANN in this IRP, the next claimant and possibly ICANN may not be forthcoming in the next CEP.

### **CONCLUSION**

13. ICANN respectfully requests that the Panel uphold the Emergency Panelist's Order.

Dated: 17 March 2022

Respectfully submitted,

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