

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

**ICANN'S OPPOSITION TO IRP CLAIMANTS' AMENDED REQUEST
FOR INTERIM MEASURES OF PROTECTION**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to and opposes the Amended Request for Interim Measures of Protection (“Amended Emergency Request”) submitted by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited (“Claimants”).

1. The Amended Emergency Request should be summarily denied. Notwithstanding that ICANN provided (on 3 February 2020) a thorough substantive response to Claimants’ Request for IRP, Claimants *do not even attempt* to refute ICANN’s detailed responses on the merits of Claimants’ claims. By failing to address the merits, Claimants ignore the elements for seeking interim relief that ICANN’s Bylaws and Independent Review Process (“IRP”) rules of procedure *require* them to address in order to seek interim relief. Having failed to address these clear requirements in their Emergency Request and Amended Emergency Request, ICANN urges the Emergency Panelist to summarily dismiss the request for interim relief.¹ There literally is no reason to have a hearing.

2. Claimants presumably ignored the requirements for seeking interim relief because Claimants know that they cannot establish any of them: (1) Claimants bring unsupported and objectively weak claims and have not raised serious questions as to (much less shown a likelihood of success on) the merits; (2) Claimants do not have a basis to assert irreparable harm; and (3) the balance of hardships does not tip decidedly toward Claimants.

3. Claimants ask for *six* measures of interim relief in the Amended Emergency Request, but the six really boil down to just two: first, Claimants want to stall this IRP until several community-driven processes are complete, which will likely take more than six months;

¹ Inasmuch as ICANN’s Bylaws and the Interim Supplementary Procedures make clear the elements that any Claimant must address in seeking interim relief, Claimants obviously should not be allowed to address these matters in their reply brief.

second, Claimants want to prevent the delegation of the .HOTEL generic Top Level Domain (“gTLD”) until this IRP concludes, likely another year to eighteen months. This would result in withholding the .HOTEL gTLD from the global hotel community for perhaps two more years – the applications were submitted eight years ago in 2012 – a hardship on those who submitted the application that are representing the relevant community.

4. Claimants’ Request for IRP (“IRP Request”) claims that the ICANN Board did not comply with its Articles of Incorporation (“Articles”), Bylaws, and internal policies and procedures in evaluating Claimants’ challenges through Reconsideration Requests to non-party Hotel Top Level Domain S.a.r.l.’s (“HTLD”) community-based application to operate .HOTEL. Claimants, four of the seven applicants for .HOTEL, want to force an auction for control of .HOTEL, even though HTLD’s application prevailed under the terms of ICANN’s New gTLD Applicant Guidebook (“Guidebook”).

5. ICANN’s interest in this matter is not in picking winners and losers, but in completing the rollout of the .HOTEL gTLD pursuant to the terms of the Guidebook and consistent with ICANN’s Articles, Bylaws, policies and procedures. ICANN seeks to complete that rollout without further delay so that the global hotel community can finally use .HOTEL.

6. In certain prior IRP proceedings, emergency panelists have been reluctant to deny interim relief, instead preserving the status quo while the IRP is pending. But this IRP is quite different from those proceedings. First, as the California Superior Court recently held, proceeding to contracting and delegation with the prevailing applicant cannot cause irreparable harm to another applicant because, in the unlikely event that Claimants succeed in this IRP, Claimants could be made whole by the transfer of the gTLD to the ultimately prevailing applicant. Second, Claimants bring truly weak claims: some are objectively frivolous (seeking Ombudsman review of proceedings that are explicitly *excluded* from his purview), while others

are time-barred (seeking review of 2016 Board Resolutions). These weak claims cannot support further delay in delegating .HOTEL or in resolving this IRP.

SUMMARY OF RELEVANT FACTS

I. ICANN'S ACCOUNTABILITY MECHANISMS AND NEW gTLD PROGRAM.

7. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community. ICANN's core Mission is to ensure the stability, security, and interoperability of the DNS.² ICANN contracts with entities operating gTLDs: the portion of an Internet domain name to the right of the final dot, such as ".ORG" or ".COM."

8. ICANN's Bylaws provide for an Office of the Ombudsman ("Ombudsman")³ "to provide an independent internal evaluation of complaints" that ICANN or an ICANN constituent body has acted unfairly ("Complaints to the Ombudsman").⁴ The Bylaws also provide for a process by which "any person or entity materially affected by an action or inaction" of ICANN may request review or reconsideration of that action or inaction ("Reconsideration Request").⁵ ICANN's Board Accountability Mechanisms Committee ("BAMC") considers and recommends to the Board whether it should accept or deny a Reconsideration Request.⁶

9. Since 1 October 2016, the Ombudsman has been tasked with evaluating Reconsideration Requests unless he recuses himself.⁷ The Ombudsman provides to the BAMC an evaluation of the Reconsideration Request before the BAMC makes a recommendation to the

² ICANN Bylaws (as amended 28 Nov. 2019) ("Bylaws") Art. 1, § 1.1, Ex. R-1 to the IRP Response. Exhibits cited in and attached to ICANN's IRP Response are referenced as "Ex. R-#." New Exhibits are referenced as "Ex. RE-#."

³ *Id.*, Art. 5.

⁴ *Id.*, Art. 5, § 5.2.

⁵ *Id.*, Art. 4, § 4.2.

⁶ *Id.* Previously, the Board Governance Committee ("BGC") held this role.

⁷ *Id.*, Art. 4, § 4.2(l).

Board.⁸ The Ombudsman only reviews Complaints to the Ombudsman “which have not otherwise become the subject of either a Reconsideration Request or an [IRP].”⁹

10. The Bylaws also create the IRP, under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an “independent third-party” for review.¹⁰ IRPs are conducted in accordance with the International Centre for Dispute Resolution’s (“ICDR”) International Arbitration Rules, as modified by ICANN’s Bylaws and IRP Interim Supplementary Procedures (“Interim Procedures”).¹¹ The ICDR “has been designated and approved by ICANN’s Board of Directors as the IRP Provider . . . under Article 4, Section 4.3 of ICANN’s Bylaws.”¹² The IRP Provider is the “well-respected international dispute resolution provider” responsible for administering IRP proceedings.¹³

11. Under ICANN’s New gTLD Program, any interested entity could apply to operate new gTLDs that were not already in use in the DNS. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the applications are placed in a “contention set.”¹⁴ However, if one of the applicants in a contention set applies for “community” status – seeking to represent a defined “community” – and that applicant’s application then prevails in Community Priority Evaluation (“CPE”) (a process set forth in the Guidebook involving evaluation by an independent, third-party provider (“CPE Provider”)), that application would prevail over the remaining applications in the contention set.¹⁵ If none of the applications has prevailed in a CPE, the Guidebook then encourages (but

⁸ *Id.*

⁹ *Id.*, Art. 5, § 5.3(a).

¹⁰ Bylaws Art. 4, § 4.3, Ex. R-1.

¹¹ Interim Procedures (25 Oct. 2018), Ex. R-4.

¹² *Id.*, Definitions.

¹³ Ex. R-1 Art. 4, § 4.3(m)(i).

¹⁴ Guidebook, § 4.1.1, Ex. R-6.

¹⁵ *Id.*, § 4.3. The proceeds of a public auction are provided to ICANN but are earmarked for purposes consistent with ICANN’s Mission, Core Values and non-profit status. *Id.*, § 4.3, n.1.

does not require) the applicants to agree among themselves on a private resolution of the contention set.¹⁶ If the applicants are unable to agree to a private resolution, the contention set may be resolved through an ICANN auction.

II. THE IRP REQUEST.

12. ICANN received seven applications for .HOTEL — six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD (“HTLD’s Application”).¹⁷ The seven applications for .HOTEL were placed in a contention set pursuant to the procedures set forth in the Guidebook.¹⁸ On 11 June 2014, HTLD’s Application prevailed in CPE¹⁹ and therefore automatically prevailed over the six other applications for .HOTEL, pursuant to the terms of the Guidebook.²⁰

13. Over the ensuing five years, Claimants and other unsuccessful applicants for .HOTEL lodged a series of challenges to HTLD’s Application. Those challenges are described in ICANN’s Response to the IRP Request (“IRP Response”),²¹ and they culminated in Claimants’ submission of Reconsideration Request 16-11 (“Request 16-11”) on 25 August 2016 and Reconsideration Request 18-6 (“Request 18-6”) on 14 April 2018. Request 16-11 asked the Board to reconsider two 2016 Board Resolutions not to cancel HTLD’s community-based application to operate .HOTEL.²² Request 18-6 challenged the Board’s 2018 acceptance of a report conducted by FTI Consulting, Inc. (“FTI”) concerning how ICANN interacted with the

¹⁶ *Id.*, § 4.1.3.

¹⁷ *See* HTLD application details, Ex. R-11.

¹⁸ *See* Contention Set Diagram, HOTEL, Ex. R-12.

¹⁹ *See* HTLD CPE Report, Claimants’ IRP Request Ex. D. Exhibits submitted in support of Claimants’ IRP Request are referenced herein as “Ex. C-#.”

²⁰ *See* Board Action on Reconsideration Request 16-11, Ex. R-29.

²¹ IRP Response, at Pgs. 6-11. ICANN fully incorporates herein its Response to Claimants’ IRP and, for the Emergency Panelist’s convenience, has appended a copy of the Response as Ex. RE-1.

²² *See Id.* at Pgs. 6-7, 9-10.

CPE Provider.²³ Consistent with ICANN’s standard practice, ICANN placed the .HOTEL contention set on hold while those challenges were pending.²⁴

14. Claimants’ IRP Request, filed on 16 December 2020, purports to challenge the Board’s actions on Requests 16-11 and 18-6,²⁵ although one would never know that from reading Claimants’ Amended Emergency Request. ICANN filed its IRP Response on 3 February 2020, explaining that, although IRPs are designed to challenge conduct of ICANN’s Board and Staff, Claimants do not actually challenge the Board’s reasoning in Requests 16-11 and 18-6. Instead, Claimants rely on baseless, hyperbolic accusations and attempt to challenge—again—events from between 2013 and 2015, even though such challenges were time-barred months or years before Claimants initiated this IRP. And even if those issues were not time-barred, Claimants never address the Board’s thorough, reasoned decisions on Requests 16-11 and 18-6, and thus literally have given the Emergency Panelist no basis to find that Claimants have a basis to succeed on the merits of their claims.

III. THE AMENDED EMERGENCY REQUEST.

15. On 30 December 2019, ICANN notified the ICDR Administrator that, consistent with ICANN’s standard practice and “as Claimants are aware, without emergency measures of protection, ICANN will proceed with the contracting phase for the prevailing .HOTEL application, after which the gTLD will move to the delegation phase.”²⁶

16. On 30 January 2020, Claimants served a request for interim relief²⁷ and, on that basis, ICANN kept the .HOTEL contention set on hold. Consistent with the ICDR’s standard

²³ *Id.* at Pgs. 8-11.

²⁴ 30 December 2019 letter from J. LeVee to T. Simotas, Ex. RE-2. The BGC placed Request 16-11 and several other pending Reconsideration Requests on hold from April 2017 through March 2018. *See* Ex. R-29 at Pg. 30.

²⁵ *See generally* Ex. RE-1.

²⁶ Ex. RE-2.

²⁷ Claimants’ Request for Interim Measures, 30 January 2020, <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-claimant-request-30jan20-en.pdf>.

practice, the ICDR appointed an Emergency Panelist and required Claimants—the party seeking interim relief—to pay the Emergency Panelist’s initial deposit.²⁸ Claimants refused to pay the deposit until April 2020, claiming that: (1) Claimants should not be required to pay the full deposit; and (2) neither the ICDR nor a panelist selected by the ICDR should have any role in the request for interim relief because Claimants believed that the ICDR had a conflict of interest.²⁹

17. Once the Claimants finally paid the deposit, the Emergency Panelist met by telephone with the parties on 7 April 2020. Only then did Claimants assert that they needed *more* time to amend their request for interim relief, despite having served their initial request over three months earlier.³⁰ The Emergency Panelist permitted the amendment, and Claimants served the Amended Emergency Request on 24 April 2020, seeking six measures of interim relief requiring ICANN to:

- (i) keep the .HOTEL contention set on hold until this IRP concludes, preventing ICANN from Contracting with the prevailing applicant for the gTLD;
- (ii) “appoint an[other] independent ombudsman to review the BAMC’s decisions in [Requests] 16-11 and 18-6”;
- (iii) “appoint and train a Standing Panel”;
- (iv) “adopt final Rules of Procedure”;
- (v) “pay all costs of the Emergency Panel and of the IRP Panelists”; and
- (vi) “preserve, and direct HTLD, [the CPE Provider], FTI and Afilias to preserve, all potentially relevant information for review in this matter.”³¹

²⁸ 12 Feb 2020 email from T. Simotas to Parties, Ex. RE-3.

²⁹ See 1 April 2020 email chain between T. Simotas and parties, Claimants’ Amended Emergency Request Ex. E, at Pg. 5-6. Exhibits to Claimants’ Amended Emergency Request are referenced herein as “Ex. CE-#.”

³⁰ ICANN understands the Amended Emergency Request to supersede and replace Claimants’ 30 January 2020 request for interim measures. To the extent Claimants raised arguments in their 30 January 2020 request for interim measures that they did not raise in the Amended Emergency Request, those arguments should be deemed waived.

³¹ Amended Emergency Request, at Pg. 7.

STANDARD OF REVIEW

18. ICANN’s Bylaws and Interim Procedures allow for interim relief in the form of a stay to *maintain* the status quo.³² The rules expressly provide that interim relief is warranted only if *all* of the following factors are met:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³³

19. Requests for interim relief that would *change* the status quo—*i.e.*, a mandatory injunction—are “subject to a higher degree of scrutiny and [are] disfavored by law.”³⁴ Claimants here seek several mandatory injunctions, yet they literally do not address *any* of the three elements for obtaining interim relief.

ARGUMENT

IV. CLAIMANTS IGNORE THE REQUIREMENTS FOR OBTAINING INTERIM RELIEF.

20. Counsel for Claimants is a member of the IRP Implementation Oversight Team (“IRP-IOT”), which is composed of members of the global Internet community and tasked to “develop clear published rules for the IRP” that will take effect upon approval by the ICANN Board. As such, Claimants’ counsel is well aware of the requirements for obtaining interim relief in an IRP, which are set forth in the Bylaws and in the Interim Procedures. Thus, he cannot possibly claim ignorance that Claimants are required to establish each of these requirements in order to obtain interim relief. Yet, Claimants chose not to address *any* of these

³² Ex. R-1 Art. 4, § 4.3(p).

³³ *Id.*; Ex. R-4, Rule 10.

³⁴ Emergency Panelist’s Decision on Claimant’s Request for Interim Measures of Protection, ¶ 97, *Namecheap, Inc. v. ICANN*, ICDR Case No. 01-20-0000-6787 (20 Mar. 2020), Ex. RELA-1.

requirements. And despite the fact that Claimants had the benefit of reviewing ICANN’s IRP Response, filed more than two months before Claimants filed the Amended Emergency Request, they did not respond to *any* of ICANN’s arguments and have failed to establish either a likelihood of success on the merits or at least sufficiently serious questions about the merits.

21. Given that Claimants have experienced counsel who is part of the team charged with creating IRP Updated Supplementary Procedures (“Updated Procedures”), and that Claimants had *two* opportunities to meet the requirements for obtaining interim relief,³⁵ Claimants should not be allowed to sandbag ICANN by addressing the requirements in their reply brief for the very first time. Rather, ICANN urges the Emergency Panelist to determine that Claimants have failed to meet their burden (or even try to meet it), and to summarily deny the Amended Emergency Request.

A. Claimants’ IRP Request Does Not Raise “Sufficiently Serious Questions” That Justify Interim Relief.

22. Claimants must show either a likelihood of success on the merits or that they have raised “sufficiently serious questions related to the merits” of this IRP.³⁶ Claimants have not identified which of these showings they are basing their request on, and (more importantly) they do not even try to show sufficiently serious questions, nor a likelihood of success on the merits.³⁷

23. As discussed in detail in ICANN’s IRP Response, dated 3 February 2020, Claimants literally ignore the key question in this IRP: were any of the Board’s actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? As set forth in the IRP Response, the answer is a categorical “no.” Claimants barely *reference* the Board’s

³⁵ First in Claimants’ 30 January 2020 request for interim measures, then in their 24 April 2020 Amended Emergency Request.

³⁶ Ex. R-4, Rule 10.

³⁷ See Amended Emergency Request. This is particularly striking because several of Claimants’ requests amount to mandatory injunctions, where the standard is more stringent. Ex. RELA-1 ¶ 97.

actions on Requests 16-11 and 18-6 in their IRP Request, instead attempting to re-litigate the underlying claims, which are long since time-barred.³⁸ And, as explained in the IRP Response, the Board’s actions on these Reconsideration Requests were well-reasoned and consistent with ICANN’s Articles, Bylaws, policies, and procedures.³⁹

24. Likewise, Claimants’ request for Ombudsman review of any component of Requests 16-11 and 18-6 are time-barred and meritless for the reasons set forth in the IRP Response.⁴⁰ Claimants pile on to their request for Ombudsman review in the Amended Emergency Request, but they omit a critical Bylaws provision in their discussion:

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman *shall recuse himself or herself* and the [BAMC] shall review the Reconsideration Request without involvement by the Ombudsman.⁴¹

25. This reveals the frivolousness of Claimants’ argument: it is entirely proper – indeed, required – for the Ombudsman to recuse himself in *any* Reconsideration Request involving matters for which the Ombudsman took a position before the Reconsideration Request was filed. Moreover, this provision provides the “specific reasons” Claimants seek as to the Ombudsman’s recusal from Request 18-6: he recused himself “[p]ursuant to Article 4, Section 4.2(l)(iii)” of the Bylaws, meaning the ICANN Ombudsman took a position concerning the subject of Request 18-6, before Request 18-6 was filed.⁴² Accordingly, Claimants *already have*

³⁸ See Ex. RE-1 at Pg. 2.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Ex. R-1 (Bylaws, Art. 4, § 4.2(l)(iii)) (emphasis added).

⁴² Ex. R-37 (Ombudsman Action on Request 18-6). As explained in the IRP Response, the Ombudsman had no role in Reconsideration Requests when Request 16-11 was submitted. Ex. RE- at Pgs. 11-12.

the reason they seek.

26. Claimants raise a new argument in the Amended Emergency Request that, without Ombudsman review, the Board (or a subcommittee of it) is left to reconsider its own actions or inactions.⁴³ Claimants are describing the Reconsideration Request process as set forth in the Bylaws: whether or not the Ombudsman evaluates a Reconsideration Request, the BAMC is *always* responsible for making a recommendation to the Board, and the Board is *always* responsible for making a decision on the Reconsideration Request. This is the process set forth in the Bylaws for Reconsideration Requests challenging ICANN Staff and Board actions and inactions. The Reconsideration Request process has been in place since at least 2002, and every iteration of the Bylaws has permitted the Board to reconsider its own decisions.⁴⁴

27. For these reasons and for the other reasons set forth in the IRP Response, Claimants have not raised “serious questions” about the merits of their IRP Request, much less a likelihood of success on the merits. The Amended Emergency Request should be denied.

B. Claimants Will Not Suffer A Harm For Which There will be No Adequate Remedy In The Absence Of Interim Relief.

28. It is critical that an applicant for any interim relief in an IRP demonstrate that the claimant will suffer irreparable harm absent a stay.⁴⁵ Claimants have not done so.

(1) Claimants Will Not Suffer Irreparable Harm When .HOTEL is Delegated.

29. Claimants assert that they will suffer irreparable harm because proceeding to

⁴³ Amended Emergency Request at Pgs. 15-16.

⁴⁴ Indeed, in 2012, the Accountability Structures Expert Panel (“ASEP”) Report reaffirmed the propriety and normalcy of the practice of a Board reconsidering its own decisions. *See* Ex. CE-G at Pgs. 11- 28. This structure was not changed in 2016, when the Cross Community Working Group on Enhancing ICANN Accountability (“CCWG-ACCT”) developed recommendations for Bylaws revisions. Counsel for Claimants is well aware of this, as he was a participant in the CCWG-ACCT’s work leading up to the 2016 Bylaws recommendations. *See* CCWG-ACCT Workstream 1 Members & Participants, Ex. RE-4.

⁴⁵ Ex. R-1, Art. 4, § 4.3(p)(i); Ex. R-4, Rule 10.

contracting and delegation of .HOTEL with HTLD “would make this IRP meaningless, and a complete waste of time and money—because Claimants would have no recourse even if they prevail.”⁴⁶ This argument incorrectly assumes that once a gTLD is contracted for and delegated, the registry agreement (and operation of the gTLD) can never be assigned to another registry operator. There is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a registry agreement is in place or even after a gTLD has been delegated. Rather, ICANN’s registry agreements specifically contemplate transition of control of gTLDs;⁴⁷ in fact, ICANN has a process for transitioning to a prospective successor.⁴⁸

30. Moreover, ICANN will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP. Accordingly, even if the IRP Panel determines that ICANN violated its Articles or Bylaws, and the ICANN Board then determines (based upon the Board’s review of the IRP Panel’s conclusions and recommendations) that .HOTEL should be subject to auction that results in another applicant being awarded the right to operate .HOTEL, ICANN would have the right to enter into a registry agreement with a new prevailing party. Emergency relief is therefore unnecessary because any harm to Claimants can be adequately remedied.⁴⁹

31. Claimants do not submit any actual evidence supporting their claim that they will suffer irreparable harm if .HOTEL proceeds to contracting and delegation. Instead, Claimants rely on decisions on requests for interim relief in other IRP proceedings. In addition to those other proceedings being distinguishable, the California Superior Court subsequently found that

⁴⁶ Amended Emergency Request, at Pg. 8.

⁴⁷ Base gTLD Registry Agreement Art. 7, Ex. R-42.

⁴⁸ Registry Transition Processes Ex. RE-5.

⁴⁹ See Order Denying Plaintiff’s Motion for Preliminary Injunction, at Pg. 4, *DotConnectAfrica Trust v. ICANN*, Case No. BC607494 (Super. Ct. Cal. 3 Feb. 2017), Ex. RELA-2.

any harm caused by delegation of a gTLD is not irreparable and therefore cannot support a request for interim relief.

32. Where, as here, ICANN is able to transfer the registry agreement to the ultimately prevailing party – which may or may not be one of these Claimants because some of the applicants for .HOTEL are not Claimants here – the type of harm Claimants allege is *not* irreparable and does not warrant interim relief. In 2017, in *DotConnectAfrica Trust v. ICANN*, an applicant for .AFRICA (“DCA”) moved for a preliminary injunction to prevent ICANN from entering into a registry agreement for .AFRICA with a competing applicant.⁵⁰ The California Superior Court denied the motion, finding “no potential for irreparable harm” to DCA.⁵¹ The court explained that the “gTLD can be re-[assigned] to DCA in the event DCA prevails.”⁵² The court further noted that re-assigning gTLDs “is not uncommon and has occurred numerous times,” acknowledging ICANN’s established procedure for assigning registry agreements.⁵³

33. The same is true here. ICANN will contractually preserve the option of effecting an assignment of .HOTEL to another registry operator pending the outcome following the IRP. Then, if the IRP Panel agrees with Claimants, and the ICANN Board determines (based on its review of the IRP Panel’s declaration) that HTLD should not operate .HOTEL, ICANN can effect an assignment of .HOTEL to another registry operator. Claimants’ IRP will not be “worthless” merely because .HOTEL proceeds to delegation prior to the conclusion of the IRP.

34. Claimants cite decisions on interim relief in *Dot Registry, LLC v. ICANN*, ICDR

⁵⁰ *Id.*

⁵¹ *Id.* at Pg. 4.

⁵² *Id.*

⁵³ *Id.* Similarly, in 2016, the District Court for the Central District of California denied an application to prevent the .WEB contention set from proceeding to “auction [to] award the rights to operate the registry to the winning bidder.” Order Denying Plaintiff’s Ex Parte Application for Temporary Restraining Order, at Pg. 1, *Ruby Glen, LLC v. ICANN*, Case No. CV 16-5505 PA (C.D. Cal. 26 July 2016), Ex. RELA-3. “[B]ecause the results of the auction could be unwound, Plaintiff ha[d] not met its burden to establish that it will suffer irreparable harm” if the auction proceeded. *Id.* at Pg. 4.

Case No. 01-14-0001-5004, a December 2014 Emergency Panelist decision (“Dot Registry Interim Decision”) and *DCA Trust v. ICANN*, Case No. 50 117 T 1083 13, a May 2014 Emergency Panelist decision (“DCA Interim Decision”).⁵⁴ But neither of these Interim Decisions considered the fact that the registry agreements for the gTLDs at issue could be assigned to another registry operator.⁵⁵

35. Claimants also cite the decision on Interim Relief in *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065 (“GCC IRP”). The dispute in that case is different in a critical respect from the dispute here: in the GCC IRP, the claimants opposed the existence of the .PERSIANGULF gTLD because “the GCC and its members are extremely sensitive to use of the term ‘Persian Gulf’ in virtually any context, including its use as a top level domain.”⁵⁶ Thus, the delegation (and “operation” by any entity) of .PERSIANGULF was the harm—not the operation of the gTLD by one applicant rather than another. Here, the delegation of .HOTEL *in itself* is not the harm. Claimants allege harm related to the *identity* of the registry operator, but as explained above, this harm *can* be adequately remedied through the registry transfer process.

36. The older IRP decisions did not consider whether the harm identified here can be remedied by transferring the registry agreement after delegation. The more recent California Superior Court decision addressed *exactly* this issue and concluded that there was no irreparable harm under these circumstances. The Emergency Panelist should do the same here because the same remedy will be available when this IRP concludes: ICANN would be able to terminate the registry agreement with HTLD and enter into a registry agreement with another party, if the

⁵⁴ Amended Emergency Request at Pgs. 8-9. Claimants also cite *Donuts v. ICANN*, ICDR Case No. 01-14-0000-1579 (Nov. 21, 2014). That proceeding is completely inapposite; as Claimants note, “ICANN voluntarily agreed to a stay.” Amended Emergency Request at Pg. 9. There was no IRP decision, and no precedent was created.

⁵⁵ See DCA Interim Decision, ¶¶ 39-50, Ex. RELA-4; Dot Registry Interim Decision ¶¶ 50-52, Ex. RELA-5.

⁵⁶ Interim Declaration on Emergency Request ¶ 10, GCC IRP (12 Feb. 2015), Ex. RELA-6.

circumstances require it.⁵⁷

(2) Claimants Will Not Suffer Irreparable Harm Without Ombudsman Review of Requests 16-11 and 18-6.

37. Claimants ask the Emergency Panelist to “appoint an independent ombudsman to review the BAMC’s decisions in [Requests] 16-11 and 18-6”⁵⁸ or to require ICANN to “disclose the specific reasons the Ombudsman recused [himself from reviewing Request 18-6], and explain why a substitute ombudsman could not have been appointed to fulfill this critical rule.”⁵⁹

38. The purpose of interim relief is to “maintain the *status quo*.”⁶⁰ The status quo is that the Ombudsman did not evaluate Requests 18-6 and 16-11. Claimants want to force ICANN (via interim relief) to circumvent the Bylaws by *affirmatively* appointing a *different* Ombudsman or directing the current Ombudsman to review these Requests. This is tantamount to a mandatory injunction “subject to a higher degree of scrutiny[,] and is disfavored by law.”⁶¹

39. Claimants have not met that higher degree of scrutiny (or any degree of scrutiny). They do not argue that the lack of Ombudsman review creates *any* possibility of irreparable harm to Claimants. They simply reiterate their IRP Request arguments (summarized above). And the sole harm identified there is that Claimants paid a fee to file this IRP (hardly irreparable), which they assert they might have avoided, had the Ombudsman reviewed Requests 16-11 and 18-6.⁶²

(3) Claimants Will Not Suffer Irreparable Harm If the IRP Proceeds Under the Interim Procedures and Pursuant to the Bylaws Provisions

⁵⁷ Ex. RELA-2.

⁵⁸ Amended Emergency Request, at Pg. 7.

⁵⁹ *Id.* at Pg. 17.

⁶⁰ *Id.*

⁶¹ Ex. RELA-1 ¶ 97.

⁶² Amended Emergency Request, at Pg. 17. Claimants assert that the Ombudsman’s review of Reconsideration Requests “was added at ICANN’s own appointed experts’ behest,” referencing the 2012 ASEP Report. Amended Emergency Request, at Pgs. 13-14. They are wrong. The ASEP Report recommended “[n]o change” be made to the Ombudsman’s role. Ex. CE-G, at Pg. 8. Rather, the changes to the Ombudsman’s role were recommended not by ICANN but by the community as part of the recommendations of the CCWG-ACCT in February 2016. The Ombudsman role was then incorporated into the Bylaws effective 1 October 2016 as part of the implementation of the CCWG-ACCT’s recommendations attendant to ICANN’s IANA Stewardship Transition Process. CCWG-ACCT Recommendations, Feb. 2016, Annex 08, Ex. RE-6; *see also* Ex. RE-4.

for Selecting Panelists.

40. Claimants make three requests that, in effect, seek mandatory relief and would require the Emergency Panelist to halt this IRP proceeding until community-driven processes that ICANN does not control conclude.

41. Claimants ask the Emergency Panelist to “requir[e] ICANN to”:

- (i) “[A]ppoint and train a Standing Panel”;
- (ii) “[A]dopt final Rules of Procedure” for IRP proceedings; and
- (iii) “[P]ay all costs of the Emergency Panel and of the IRP Panelists.”⁶³

42. The establishment of the Standing Panel and development of Updated Procedures are processes that are driven, in the first instance, by ICANN’s “community”; ICANN does not control their progress.⁶⁴ And the Bylaws specifically contemplate that, while these community-driven processes move forward, there are operative rules that will govern this proceeding – the ICDR’s International Arbitration Rules (which will continue to control once Updated Procedures are implemented), the Interim Procedures (about which the Claimants make *no* complaints), and the Bylaws provisions for selecting panelists in the absence of a Standing Panel. Claimants have not even argued (much less demonstrated) that they will suffer irreparable harm if the Interim Procedures are used (as they are being used in other IRPs that are currently pending).

43. Claimants instead argue, without support, that “[i]t harms [them] to not have [the] benefit of appointments from a Standing Panel with the specialized training, resultant expertise, and community backing” for Standing Panel members.⁶⁵ This argument is speculative and premature: the Panelists for this IRP have not been selected; and, pursuant to the Bylaws

⁶³ Amended Emergency Request, at Pg. 7.

⁶⁴ See Section V.A, *infra*.

⁶⁵ Amended Emergency Request, at Pg. 19.

process, Claimants may nominate one of the Panelists, and that Panelist will be involved in selecting (along with the Panelist that ICANN chooses) the chair.⁶⁶ Claimants may select a Panelist with as much specialized experience and expertise as they wish.⁶⁷ This process is set forth in the Bylaws, which were subject to public comment.⁶⁸

44. As to the Claimants’ purported “right” to an appeal mechanism,⁶⁹ the concern again is premature and not appropriate for “emergency” relief. Claimants can only possibly be harmed if: this IRP concludes; the IRP Panel (which has not even been selected yet) makes a final determination against Claimants; Claimants decide to appeal the decision; *and, at that point*, the Standing Panel has not been established. Until then, there is no risk of harm—much less irreparable harm—associated with this argument.

45. Finally, and relatedly, the request that ICANN pay the Claimants’ portion of IRP and Panelist fees now, rather than allow the Panel to apportion fees at the conclusion of the IRP is by definition not irreparable—it will be redressed by the Panel in conjunction with its final award, whereby the Panel may allocate the ICDR’s fees based on the outcome of the IRP.⁷⁰

(4) Claimants Will Not Suffer Irreparable Harm If ICANN Does Not “Direct” the CPE Provider and FTI to Preserve “Potentially Relevant Information.”

46. Claimants ask the Emergency Panelist to order ICANN to preserve “all potentially relevant information,” and to order ICANN to “direct HTLD, [the CPE Provider], FTI

⁶⁶ Ex. R-1 Art. 4, § 4.3(k)(ii).

⁶⁷ Were this IRP to be the first IRP with a Standing Panel, the members of the Standing Panel might well be adjudicating their first IRP.

⁶⁸ Revised ICANN Bylaws and Restated Articles of Incorporation, Ex. RE-7.

⁶⁹ Amended Emergency Request, at Pg. 18.

⁷⁰ Ex. R-4, Rule 15. Claimants assert that the ASEP Report recommended that ICANN should bear all IRP costs. *See* Amended Emergency Request, at Pg. 20-21. Not so; ASEP made no recommendations concerning IRP panelist fees, and recommended preserving a Bylaws provision that “[t]he party not prevailing” is responsible for the IRP Provider’s costs. Ex. CE-H at Pg. 4.

and Afiliás” to do the same.⁷¹ Claimants offer to “propose a list of specific categories of documents” that they would like preserved, but (despite having raised this issue in the IRP Request more than five months ago) have not identified those categories.⁷²

47. ICANN will, of course, comply with its obligations to preserve documents in its possession, custody, or control. But Claimants’ requests are more properly raised as discovery requests during the course of the IRP, not as a request for interim relief.⁷³ The Interim Procedures specifically provide for certain types of document discovery, and Claimants will have a full opportunity to request documents during the course of the IRP; they do not need interim relief for this purpose.⁷⁴

48. In any event, before the hearing, ICANN will ask FTI and the CPE Provider to preserve any documents they have relating to the HTLD CPE Evaluation and any gTLD applications for .HOTEL. But ICANN’s contractual relationship with the CPE Provider does not give ICANN control over documents in the CPE Provider’s possession, and the CPE Provider was only required to retain documents for five years.⁷⁵ The CPE Provider completed the HTLD CPE Evaluation more than five years before Claimants initiated this IRP.⁷⁶ Ordering ICANN to “direct” the CPE Provider to preserve documents is inappropriate, as ICANN cannot force the CPE Provider to preserve documents for longer than the five-year period stated in the contract.

49. Claimants cite procedural orders from prior IRPs in support of this request for

⁷¹ Amended Emergency Request, at Pg. 10.

⁷² *Id.* at Pgs. 11-12. In the IRP Request, Claimants suggested that they would seek excerpts from FTI’s investigative interviews. The interview notes themselves are not “relevant,” but even if they were, ICANN “does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to” FTI’s interviews. Ex. C-T.

⁷³ Claimants’ citations to *procedural orders* (not decisions on Requests for Emergency Relief) underscores this fact. *See* Amended Emergency Request at Pgs. 11-12.

⁷⁴ Ex. R-4, Rule 8.

⁷⁵ CPE Provider Consulting Agreement Statement of Work #2, at Art. 9(B), 12 March 2012, Ex. R-32.

⁷⁶ CPE Report, HTLD Community Application for .HOTEL, Ex. C-D.

emergency measures.⁷⁷ Those orders concerned ICANN’s production of documents—they were not preservation orders, did not grant interim relief, and did not extend to third parties.⁷⁸

50. More importantly, Claimants have never challenged any particular aspect of the CPE Provider’s evaluation of HTLD’s Application. Claimants do not assert that the CPE Provider mis-applied the CPE criteria or make any other specific allegation about the CPE Provider’s evaluation.⁷⁹ FTI’s and the CPE Provider’s documents are therefore not relevant.

C. The Balance Of Hardships Does Not Tip In Claimants’ Favor.

51. Claimants do not even *attempt to argue* that the balance of hardships tips decidedly in their favor. Again, Claimants *must* establish this element to obtain interim relief, and they have not even tried to do so. On this ground alone, the Amended Emergency Request should be denied.

V. CLAIMANTS SEEK MEASURES OF RELIEF THAT ARE BEYOND ICANN’S CONTROL.

52. Several of the measures of interim relief that Claimants seek involve processes that are not in ICANN’s exclusive control or relate to parties over which ICANN does not have any control, rendering these requests misguided. Further, granting these requests would mean that this IRP would not even get *started* for six months or more, until those processes conclude.

A. ICANN’s Community-Driven Processes.

53. Claimants ask the Emergency Panelist to order ICANN to establish a Standing Panel from which IRP panelists will be selected, and to finalize the Updated Procedures. Essentially, Claimants are trying to avoid paying their share of the fees for the Panelists in this

⁷⁷ Amended Emergency Request at Pgs. 11-12.

⁷⁸ See *Dot Registry, LLC v. ICANN*, ICDR Case No 01-14-0001-5004: Amended Procedural Order No. 2, ¶ 2, (26 Mar. 2015) (ordering ICANN to produce non-privileged documents “within its possession, custody or control”), Procedural Order No. 3 (4 May 2015) (same), Procedural Order No. 4 (12 June 2015) (same); *DCA Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13: Procedural Order No. 4 (25 Sept. 2014).

⁷⁹ See Board Action on Request 16-11, Ex. R-29, Board Action on Request 18-6, Ex. R-30.

IRP, even though numerous IRPs have proceeded since the concept of a Standing Panel was proposed and, in all those IRPs, the parties have equally paid for the IRP panelists unless and until the final Panel determination awarded cost-shifting.⁸⁰

54. Even if it were appropriate to order ICANN to implement the Standing Panel (and it is not, for the reasons discussed in Section IV.B.3, above), ICANN cannot snap its proverbial fingers and do this. The establishment of the Standing Panel and finalization of Updated Procedures depend on contributions and work from across ICANN’s community, including the IRP-IOT, representatives of ICANN’s Supporting Organizations (“SOs”) and Advisory Committees (“ACs”), and others. ICANN cannot unilaterally complete these processes. An order that ICANN do so before this IRP may proceed could halt the IRP for six months or more, while the community, ICANN, and the Board work to complete the processes.

55. The process for establishing a Standing Panel is set forth in the Bylaws. The Bylaws require ICANN to work with SOs, ACs, and the Board to identify, solicit, and vet applications for Standing Panel membership.⁸¹ This process has begun: on 31 March 2020, ICANN opened a call for expressions of interest for panelists to serve on the Standing Panel and published a “Summary of Comments Received from Supporting Organizations and Advisory Committees on qualifications for Standing Panelists, and Next Steps.”⁸² Expressions of Interest are due in July 2020.⁸³ Once they are received, SOs and ACs—not ICANN’s Staff or Board—are responsible for nominating a slate of Standing Panel members, which the ICANN Board will then consider. ICANN cannot mandate the speed at which the community process will occur.⁸⁴

⁸⁰ For example, each party paid its share of the panelists’ initial deposit, in *Amazon EU S.a.r.l. v. ICANN*, ICDR Case No. 01-16-0000-7056 and *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938.

⁸¹ Ex. R-1 Art. 4, § 4.3(j)(ii)(B).

⁸² Summary of Community Feedback on Establishing a Standing Panel, and Next Steps, at Pg. 7, 31 March 2020, Ex. RE-11.

⁸³ Call for Expressions of Interest, 31 Mar. 2020, Ex. RE-10.

⁸⁴ Ex. R-1 Art. 4, § 4.3(j)(ii)(C); Ex. RE-11.

56. To establish the Standing Panel, interested persons must first submit expressions of interest. As those are received, ICANN org will work with the SOs and ACs to form a group of Community Representatives and coordinate “SO/AC involvement in the selection of an expert to assist the ICANN community in finalizing a desired skills matrix, interview preparation, and recommendations for potential Standing Panel members.”⁸⁵ That group of Community Representatives must then, using the process developed, identify a proposed slate for the Standing Panel from amongst the applicants, and then the Board will need to consider the recommended slate. If the Board has questions on that proposal, there will need to be time for the Board to seek clarification.⁸⁶ The selected Standing Panel members will also need training.⁸⁷

57. Claimants cite a 2014 order granting interim relief in the *DCA Trust* IRP, which stated that “[h]ad ICANN timely constituted the standing panel, the panel could have addressed DCA Trust’s request for an IRP as soon as it was filed in January 2014.”⁸⁸ This was not a determination that ICANN violated its Articles, Bylaws, policies, or procedures,⁸⁹ and it does not apply to the current circumstances in all events because the process for selecting a Standing Panel changed when ICANN enacted its new Bylaws in October 2016.⁹⁰ Accordingly, the *DCA Trust* order should not provide guidance—and is not binding precedent—here.

⁸⁵ Ex. RE-11 at Pg. 31.

⁸⁶ *See id.*

⁸⁷ *See id.*; *see also* Ex. R-1 Art. 4 § 4.3(j)(i) (describing Standing Panel training requirements).

⁸⁸ Amended Emergency Request, at Pg. 18 (quoting Decision on Interim Measures of Protection, *DCA Trust v. ICANN*, Case # 50 117 T 1083 13).

⁸⁹ Moreover, the parties in the *DCA Trust* IRP did not even brief this issue. Instead, their discussion of the Standing Panel concerned whether claimant could seek emergency relief under the then-governing ICDR Supplementary Procedures before the Standing Panel was established. *See* DCA Request for Interim Relief at Pg. 2 n.1, Ex. RE-13.

⁹⁰ The Bylaws in effect in 2014, when DCA Trust filed its IRP and when the DCA Trust IRP Panel issued the quoted statement, did not describe the process for establishing the Standing Panel. The Bylaws in effect in 2014 provided only that “[t]here shall be an omnibus standing panel,” and that the IRP Provider was responsible for “coordinat[ing]” membership, “subject to approval by ICANN.” ICANN Bylaws, 11 Apr. 2013, Art. IV, §§ 3.6-3.7, Ex. RE-12. Under those Bylaws, a third party was responsible for assembling the Standing Panel; ICANN’s only role was to approve the Standing Panel once compiled.

58. Under the current Bylaws,⁹¹ ICANN does not even have the *power* to complete the Standing Panel process on its own because of the important roles of the SOs and ACs. Since the Bylaws were amended to provide for a process for establishing the Standing Panel, ICANN (with the SOs and ACs) has worked toward establishing a Standing Panel, including most recently by opening a call for expressions of interest for Standing Panel Membership.⁹²

59. Claimants' request that the IRP be delayed until ICANN has finalized the Updated Procedures is likewise senseless. ICANN has already adopted Interim Procedures that govern this proceeding, and Claimants have used those procedures (as have claimants in two other IRPs that are proceeding at this moment).⁹³ Further, Claimants do not even make an interim relief argument regarding "final" Updated Procedures—the entire argument section under this header in Claimants' brief concerns the request for a Standing Panel. And there is no argument to make. The Bylaws delegate responsibility for developing Updated Procedures to the IRP-IOT "comprised of members of the global Internet community."⁹⁴ As Claimants know well (because Claimants' Counsel is on the IRP-IOT⁹⁵), the IRP-IOT is actively working to finalize Updated Procedures, but was stalled because the membership was unable to commit the necessary time. The ICANN Board then, when it was clear that the IRP-IOT was stalled, coordinated with the ICANN community and re-comprised the IRP-IOT so that Updated Procedures can be finalized. The re-comprised IRP-IOT is active and meeting regularly at this time.⁹⁶ Additionally, consistent with the Bylaws' commitment to seeking broad, informed

⁹¹ See Ex. RE-4 Art. 4, § 4.3(j).

⁹² Ex. RE-10.

⁹³ See Amended Emergency Request at Pg. 18.

⁹⁴ Ex. R-1 Art. 4, § 4.3(n)(i).

⁹⁵ IRP Implementation Oversight Team Home Page, Ex. RE-14.

⁹⁶ See Update and Information on IRP-IOT Re-Composition, 26 June 2019, Ex. RE-15.

participation from the public,⁹⁷ the IRP-IOT has invited multiple rounds of public comment in the course of developing Updated Procedures,⁹⁸ and further public comment will be needed prior to Board consideration of a finalized set of Updated Supplementary Procedures. In short, Claimants' suggestion that ICANN has somehow delayed finalization of the Updated Procedures⁹⁹ cannot be earnest.

60. Ordering ICANN to “complete” these processes before the IRP proceeds will pause the IRP for an extended time. Combine that with Claimants' request to freeze the .HOTEL delegation process until this IRP concludes, and the total delay could be two years. Delay should never be the purpose of an IRP, yet delay appears to be Claimants' primary objective.

B. Discovery Requests

61. Claimants ask the Emergency Panelist to order ICANN to “direct” HTLD and Afilias to preserve “potentially relevant information.”¹⁰⁰ Afilias and HTLD are third parties with no duty to ICANN to preserve or provide documents. ICANN lacks the “right, authority, or practical ability to obtain . . . documents”¹⁰¹ from them or force them to preserve material.

VI. THE ICDR DOES NOT HAVE A CONFLICT OF INTEREST.

62. Claimants object to the ICDR's administrative role¹⁰² in this proceeding, asking the Emergency Panelist to order the ICDR to recuse itself from “adjudicating the [Emergency] Request,” or alternatively to force “ICDR and ICANN to fully disclose the terms of their

⁹⁷ Ex. R-1 Art. 4. § 4.3(n)(ii); *id.* Art. 1, § 1.1(a)(i) (bottom-up consensus-based multistakeholder process); *id.* Art. 1, § 1.2(a)(iv) (“Employ open, transparent and bottom-up, multistakeholder policy development processes . . . [which] shall . . . seek input from the public.”).

⁹⁸ See IRP-IOT Draft Recommendations Public Comment, 22 June 2018, Ex. RE-16; Updated Supplementary Procedures for IRP Public Comment, 28 Nov. 2016, Ex. RE-8.

⁹⁹ Amended Emergency Request, at Pg. 17.

¹⁰⁰ *Id.*, at Pg. 10.

¹⁰¹ *M Seven Sys. Ltd. v. Leap Wireless Int'l Inc.*, No. 12cv1424-CAB (BLM), 2014 WL 12026064 at *4 (S.D. Cal. Mar. 17, 2014), Ex. REL-7 (“[T]he question is whether the party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” (internal quotation marks and citations omitted)).

¹⁰² Claimants “do not allege that the appointed Emergency Panelist has any conflict of interest.” Amended Emergency Request at Pg. 4.

financial relationship.”¹⁰³

63. Claimants assert that the ICDR is conflicted “because ICDR is the sole provider of IRP and other arbitration services to ICANN, and . . . if a Standing Panel is created then ICDR is likely to lose cases and fees it otherwise would maintain.”¹⁰⁴ Thus, Claimants believe that the “ICDR has a significant financial interest in whether a Standing Panel is implemented.”¹⁰⁵

64. Claimants misunderstand the ICDR’s role in this proceeding and its relation to the Standing Panel. First, the ICDR obviously is not “adjudicating” this Amended Emergency Request: the Emergency Panelist is “adjudicating” it; the ICDR has an administrative function.

65. Second, the ICDR will *not* automatically cease to be the IRP Provider the moment the Standing Panel is established. “The existence of the [S]tanding [P]anel will not change the fact that all of the parties to an arbitration need an administrative force behind it.”¹⁰⁶ The IRP-IOT discussed this issue with ICANN after the Board approved the October 2016 Bylaws revisions, but it was not necessary at the time “to change service providers.”¹⁰⁷ The mere fact that a Standing Panel is established will not revoke the ICDR’s position as the IRP Provider.

66. Third, the ICDR has *no* financial interest in selecting panelists. It receives no portion of the panelist fees and its only “revenue” are administrative fees,¹⁰⁸ and any other dispute resolution provider would charge administrative fees as well.

¹⁰³ Amended Emergency Request at Pg. 5.

¹⁰⁴ *Id.* at Pg. 3.

¹⁰⁵ *Id.* Claimants rely on the International Bar Association Guidelines on Conflicts of Interest (2014) (“IBA Guidelines”). Neither the Bylaws, Interim Procedures, nor ICDR International Arbitration Rules incorporate the IBA Guidelines. Moreover, the IBA Guidelines are intentionally flexible, using general terms that should be “interpreted reasonably in light of the facts and circumstances in each case.” *See* Ex. CE-B at Pgs. 19-20. Here, the facts and circumstances include the fact that the ICDR’s sole role is as administrator (not as adjudicator), and the fees it receives from IRP administration are not “significant.” And IRPs are just one category of the ICDR’s cases. It has other income.

¹⁰⁶ Transcript, IRP-IOT meeting, 28 Jan. 2020, at Pg. 14, Ex. RE-9.

¹⁰⁷ *Id.*

¹⁰⁸ Ex. CE-E at Pg. 7. For this reason, Claimants’ references to fees paid to IRP panelists (*see* Amended Emergency Request at Pg. 5) are completely irrelevant.

67. Fourth, the Bylaws direct the IRP Provider to “function independently from ICANN.”¹⁰⁹ And nothing in the ICDR’s actions as the IRP Provider in this proceeding demonstrates a violation of the ICANN Bylaws or a conflict of interest. Claimants’ challenge to the ICDR ignores explicit provisions in the Bylaws *directing* the administration of the IRP in this manner until the Standing Panel is established (and thereafter, under certain circumstances).¹¹⁰

68. Pursuant to the ICDR’s longstanding policy (which applies to *all* cases administered by the ICDR and is not particular to IRPs), the ICDR Administrator required the party requesting emergency relief—Claimants—to pay the initial deposit for the emergency arbitrator.¹¹¹ This does not demonstrate any bias toward ICANN; the Bylaws do not require any different process;¹¹² and no Claimant has ever previously accused the ICDR of bias when required to pay the full initial deposit for an emergency panelist.

69. Fifth, the ICDR has already disclosed the “terms of [its] financial relationship” with ICANN: the ICDR’s “only revenue[s]” from IRP proceedings are the standard fees for non-monetary claims.¹¹³ Claimants have the relief they seek; they are entitled to no more.

CONCLUSION

70. Claimants have not even attempted to carry their burden for seeking interim relief: they have not attempted to argue that there are questions, much less serious questions, as to the merits of their claims; they have provided no evidence that they will suffer irreparable harm; and they have not established that the balance of hardships tips decidedly in their favor. ICANN respectfully requests that Claimants’ Amended Emergency Request be denied.

¹⁰⁹ Ex. R-1 Art. 4, § 4.3(m).

¹¹⁰ *Id.* Art. 4, § 4.3(k)(ii) (IRP Panel); *id.* § 4.3(p) (Emergency Panelist)).

¹¹¹ Ex. CE-E (describing the ICDR’s “procedure to bill the entire deposit for emergency compensation to the party filing an emergent relief application” as “an internal, universal policy of the ICDR” that is “not specific in any way to IRP cases but applies to all commercial disputes”).

¹¹² *See* Ex. R-1 Art. 4, § 4.3(p).

¹¹³ *See* Ex. CE-E at Pg. 7; *see also* ICDR Standard Fee Schedule, Ex. RE-17.

Respectfully submitted,

JONES DAY

Dated: May 12, 2020

By:



Jeffrey A. LeVee

ISP

Counsel for Respondent ICANN

PROOF OF SERVICE BY E-MAIL

I am a citizen of the United States and employed in Suffolk County, Massachusetts. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 100 High Street, 21st Floor, Boston, Massachusetts, 02110-1781. On 12 May 2020, I served a copy of the following document:

**ICANN'S RESPONSE TO AMENDED REQUEST FOR
EMERGENCY MEASURES AND SUPPORTING EXHIBITS**

by e-mailing a copy thereof to the following individuals at the following e-mail addresses:

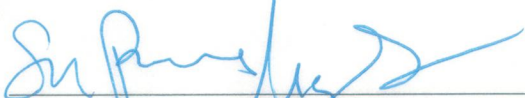
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I declare under penalty of perjury under the laws of the Commonwealth of Massachusetts that the above is true and correct.

Executed on 12 May 2020, at Winchester, Massachusetts.



Sarah Podmaniczky McGonigle