

Exhibit A

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SUPERIOR COURT

IN AND FOR

LOS ANGELES COUNTY, CALIFORNIA

13	FEGISTRY, LLC, RADIX DOMAIN	:	Case No.:	20STCV42881
14	SOLUTIONS PTE. LTD., and DOMAIN	:		
15	VENTURE PARTNERS PCC LIMITED,	:	COMPLAINT	
16		:		
17	Plaintiffs,	:		
18		:	DEMAND FOR JURY TRIAL	
19	vs.	:		
20		:		
21	INTERNET CORPORATION FOR	:		
22	ASSIGNED NAMES AND NUMBERS, a	:		
23	California public benefit corporation,	:		
24		:		
25	Defendants.	:		

For their Complaint against the Internet Corporation for Assigned Names and Numbers ("ICANN"), Plaintiffs allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to force ICANN to implement dispute resolution procedural mechanisms and safeguards specifically required by the Accountability Mechanisms and Ombudsman articles of its bylaws (collectively, ICANN's "Accountability Mechanisms").

BY FAX

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24 (“ICANN”), Plaintiffs allege as follows:

25 **NATURE OF THE ACTION**

26 1. Plaintiffs bring this action to force ICANN to implement dispute resolution
27 procedural mechanisms and safeguards specifically required by the Accountability Mechanisms
28 and Ombudsman articles of its bylaws (collectively, ICANN’s “Accountability Mechanisms”).

1 Plaintiffs has stated substantive claims against ICANN in accord with the substance and
2 procedure set forth in ICANN’s bylaws. If and as those claims are to be resolved through
3 ICANN’s dispute resolution process, they should be heard in accordance with the ICANN
4 bylaws that govern that process -- as incorporated into Plaintiffs’ contracts with ICANN and
5 which are otherwise legally binding on ICANN. Those bylaws specifically require: (1) an
6 independent Ombudsman review of Plaintiffs’ “Requests for Reconsideration” to the ICANN
7 Board; (2) a specially-trained, community-chosen, expert Standing Panel from which panelists
8 will be drawn to hear and decide the merits of Plaintiffs’ disputes with ICANN pursuant to its
9 bylaws’ “Independent Review Process” (“IRP”), and which would *en banc* and *de novo* hear any
10 appeal from any IRP decision; and (3) that ICANN pay all administrative costs of the IRP.

11 2. ICANN has denied Plaintiffs’ repeated requests to provide a process that complies
12 with the clear requirements of ICANN’s bylaws. Indeed, ICANN has ignored three previous IRP
13 panels that have reprimanded ICANN for having failed to adopt the Standing Panel, the last time
14 in 2017. Therefore, Plaintiffs respectfully request this court, *inter alia*, to order ICANN to
15 provide a fair process for resolution of Plaintiffs’ claims against ICANN that complies with
16 ICANNs specific and detailed bylaws describing the Reconsideration and IRP processes.

17 **THE PARTIES**

18 3. Plaintiff Fegistry, LLC is a Washington limited liability company with its principal
19 place of business in Washington.

20 4. Plaintiff Radix Domain Solutions PTE Ltd. is a Singapore limited liability
21 company with its principal place of business in Singapore.

22 5. Plaintiff Domain Venture Partners PCC Ltd. is a Gibraltar limited liability
23 company with its principal place of business in Gibraltar.

24 6. Plaintiffs each effectively own and/or control independent applications to ICANN
25 to own and operate a generic top-level domain (“gTLD”) name registry -- .hotel.

26 7. Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) is a
27 California public benefit corporation with its principal place of business in Los Angeles,
28 California. ICANN is *the* entity responsible for governing the entire global domain name system
 (“DNS”), including domain name and IP address allocation throughout the world. ICANN’s

1 responsibilities include whether and how to add new gTLDs to the root zone of the internet DNS.
2 For example, whether, through whom, and on what terms to allow “.hotel” domain names such
3 as hilton.hotel, westin.hotel, best.hotel, california.hotel, etc., to be registered and used on the
4 internet for commerce, comment or any other legitimate purpose.

5 8. ICANN currently governs more than one thousand gTLD registries that sell
6 domain names for use on the internet, including legacy operations like .com and .org, and new
7 gTLDs like .vacations, .viajes, .Google, .site, .London, .gay, .guitar, .horse, .hotels, and .hoteles.
8 ICANN’s DNS governance covers virtually every web user and every website in the world,
9 including those used personally, in the public sector, and in commerce. ICANN’s governance
10 affects almost all aspects of private and public life, and trillions of dollars in commerce annually.
11 The so-called Accountability Mechanisms in the ICANN bylaws are checks on ICANN’s power
12 and actions, as it is not overseen by any governmental entity.

13 9. Indeed, ICANN promised to implement these Accountability Mechanisms as a
14 condition of the United States government terminating its formal oversight of ICANN in 2016 –
15 yet still has wholly failed to do so.

16 10. Unless this Court forces ICANN to comply with its bylaws in these critical
17 respects, ICANN will continue to force Plaintiffs and any other complaining party into the
18 current, sham “Reconsideration” and “Independent Review” processes that fall far short of the
19 Accountability Mechanisms required in its bylaws.

20 **JURISDICTION AND VENUE**

21 11. This Court has personal jurisdiction over ICANN, and venue is appropriate in this
22 Court. Defendant is a California public benefit corporation with its headquarters and principal
23 place of business in Los Angeles County. In addition, a substantial part of the events giving rise
24 to Plaintiffs’ claims occurred in Los Angeles County.

25 **GENERAL ALLEGATIONS**

26 **Plaintiffs’ Contracts With ICANN,** 27 **ICANN’s Bylaws & “Accountability Mechanisms”**

28 12. Plaintiffs each contracted with ICANN to apply for the rights to exclusively
operate the new gTLD “.hotel.” Each application required each Plaintiff to pay an application

1 fee to ICANN of \$185,000.00 and required each Plaintiff to pay consultant and technical fees of
2 hundreds of thousands of dollars more to prepare each application in accord with ICANN's
3 voluminous Applicant Guidebook.¹ Each such contract² incorporates by reference ICANN's
4 bylaw Accountability Mechanisms which, where applicable, are to be used to resolve issues and
5 disputes that arise in the application review and evaluation process and in the delegation of
6 gTLDs pursuant to ICANN's New gTLD Program. In essence, the Accountability Mechanisms
7 are bylaw-enshrined alternative dispute resolution processes set forth in great detail, based upon
8 thoughtful and comprehensive analysis by experts and the ICANN community, and promised by
9 the ICANN Board and bylaws in critical respects since 2013, and in specific detail since 2016.

10 13. Pursuant to their applications and the application process, Plaintiffs have
11 substantively challenged ICANN's decision-making and review process related to the delegation
12 of the .hotel gTLD. In essence, Plaintiffs claim that ICANN delegated the gTLD improperly to a
13 third-party competitor. In this lawsuit, Plaintiffs are asserting their "procedural" claims that arise
14 from ICANN's failure to implement and adhere to its bylaw-enshrined Accountability
15 Mechanisms.

16 14. ICANN's bylaws³ clearly state its "Mission" in Article 1.1, is "to ensure the stable
17 and secure operation of the Internet's unique identifier systems." ICANN also gives itself the
18 power "to negotiate, enter into and enforce agreements, including public interest commitments,
19 with any party in service of its Mission."

20 15. Article IV of the ICANN bylaws is dedicated to its so-called "Accountability
21 Mechanisms," requiring detailed processes called "Requests for Reconsideration" ("RFR") and
22 the "Independent Review Process" ("IRP"), to be maintained by ICANN to help ensure
23 accountability and transparency in furtherance of fulfilling its Mission. Bylaw Article V is
24 dedicated to a purportedly independent Ombudsman office to be maintained by ICANN, also in
25 furtherance of fulfilling its Mission, requiring a specific and critical role within the
26 Reconsideration process. These processes are set forth at length, and in detail, and were
27 designed through ICANN's multi-stakeholder process, by consensus of the community, retained
28

¹ <https://newgtlds.icann.org/en/applicants/agb>.

² *See, id.*, Module 6.

³ <https://www.icann.org/resources/pages/governance/bylaws-en>.

1 experts and the ICANN Board itself, to help ensure the stable and secure operation of the DNS
2 and of the IP addressing system.

3 **Plaintiffs’ “Requests for Reconsideration”**

4 16. In accordance with ICANN bylaws, Plaintiffs have requested formal
5 Reconsideration⁴ of various substantive decisions made by a subcommittee of the ICANN Board,
6 specially empowered on behalf of the entire Board to make authoritative decisions in the first
7 instance related to the New gTLD Program. That subcommittee is called the “Board
8 Accountability Mechanisms Committee” (“BAMC”) and consists of five members.

9 17. In its bylaws, ICANN specifically represented that it would implement a
10 purportedly independent Ombudsman review process in which an independent Ombudsman
11 retained by ICANN would conduct an independent review of each Request for Reconsideration
12 and provide its advice to the subcommittee of the ICANN Board that is generally empowered on
13 behalf of the entire ICANN Board to hear all Requests for Reconsideration arising from any
14 decision of ICANN Board or Staff on any topic. That subcommittee is *also* the Board
15 Accountability Mechanisms Committee (BAMC) -- making the independent Ombudsman review
16 critical. Without it, the BAMC is simply reconsidering the BAMC’s own underlying decisions
17 without any objective input -- which was clearly not the intent of the express, community-
18 imposed bylaws. BAMC decisions are then passed to the ICANN Board for final, rubber-
19 stamped approval in all instances.

20 18. But, far from implementing a robust and fair Ombudsman review and input
21 process as it represents it will do in its bylaws, ICANN has instead, intentionally and deceitfully:
22 (1) specially empowered the BAMC to make all decisions in the first instance escalating from the
23 new gTLD program; (2) generally empowered the BAMC to make all decisions escalating from
24 formal Requests for Reconsideration, including those escalating from its own underlying
25 decisions; and (3) hired a purportedly independent Ombudsman who, while ostensibly required
26 to review all Requests for Reconsideration, also, inexplicably, apparently is bound to recuse
27 himself from reviewing all such requests. That leaves nobody but the BAMC, five members of
28

⁴ See, <https://www.icann.org/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en>, and, <https://www.icann.org/resources/pages/reconsideration-18-6-trs-et-al-request-2018-04-17-en>.

1 the 20-person ICANN Board, to make and then reconsider each and every one of its very own
2 first-instance decisions relating to the New gTLD Program -- including Plaintiffs' .hotel
3 applications and Plaintiffs' competitors' applications, and the internal reviews and investigations
4 relating to same.

5 19. In fact, the Ombudsman process, as misrepresented by ICANN in its bylaws, is a
6 sham. Not only has the Ombudsman recused himself from Plaintiffs' Requests for
7 Reconsideration, *but in fact he has recused himself from every single Request for*
8 *Reconsideration stemming from the New gTLD Program -- some 14 cases just since 2017.*
9 Neither ICANN nor the Ombudsman has provided any intelligible reason for this gross flouting
10 of ICANN's bylaws and the Ombudsman's dereliction of duty, other than a naked and vague
11 claim of "conflict of interest." The lack of any Ombudsman process not only violates ICANN's
12 bylaws and its contracts with Plaintiffs, but it renders the promise of a fair and independent
13 Reconsideration process null and illusory, and the notion of true accountability a farce.

14 20. Despite Plaintiff's repeated demands, ICANN has refused to provide an alternate
15 Ombudsman to fill this critical role, specifically required by its bylaw-enshrined, so-called
16 "Accountability Mechanisms." ICANN refuses to cure despite repeated requests and ample time
17 to do so.

18 21. Further, on information and belief, the BAMC has *never* granted any Request for
19 Reconsideration of any of its own underlying decisions in the new gTLD program -- not one.
20 Thus, the BAMC has denied each and every analogous case since 2017, including Plaintiffs'
21 requests.

22 22. On information and belief, the ICANN Board has never refused to accept the
23 BAMC subcommittee's recommendation as to any Request for Reconsideration, stemming from
24 the New gTLD Program or otherwise, including in Plaintiffs' cases.

25 23. Plaintiffs' Requests for Reconsideration were denied Ombudsman review, then
26 denied by the BAMC, then denied by the full ICANN Board -- all in quick succession.⁵ On
27 information and belief, every other similar requestor of reconsideration of a BAMC decision has
28

⁵ See <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>, and,
<https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f>.

1 | been denied Ombudsman review, has had reconsideration denied by the BAMC itself, and then
2 | had that decision rubber-stamped by the full ICANN Board.

3 | **The Independent Review Process**

4 | 24. The Independent Review Process (IRP) is an accountability mechanism prescribed
5 | by the ICANN bylaws that allows for independent third-party review of ICANN Board or staff
6 | actions (or inactions).

7 | 25. Pursuant to the bylaws, the IRP is intended to empower claimants in the internet
8 | community to ensure, in certain covered disputes, ICANN’s compliance with its Mission,
9 | Articles and bylaws -- and its accountability and transparency -- specifically by use of
10 | “meaningful, affordable and accessible expert review” and deference to prior IRP precedents.
11 | ICANN thus represents in its bylaws that the purposes of the process are, *inter alia*, to:

12 | (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies
13 | with its Articles of Incorporation and Bylaws.

14 | (ii) Empower the global Internet community and Claimants to enforce compliance with
15 | the Articles of Incorporation and Bylaws through meaningful, affordable and accessible
16 | expert review of Covered Actions

17 | (iii) Ensure that ICANN is accountable to the global Internet community and Claimants . .
18 | ..

19 | (vi) Reduce Disputes by creating precedent to guide and inform [ICANN] and the global
20 | Internet community in connection with policy development and implementation.

21 | (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution
22 | of Disputes.

23 | (viii) Lead to binding, final resolutions consistent with international arbitration norms that
24 | are enforceable in any court with proper jurisdiction.

25 | (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in
26 | the civil courts of the United States or other jurisdictions.

27 | 26. The bylaws regarding the IRP are required to be construed, implemented, and
28 | administered in a manner consistent with the purposes of the IRP.

29 | 27. ICANN also misrepresented in its IRP-related bylaws that there will be a
30 | “Standing Panel” from which three-member panels will be chosen to hear all IRP disputes:

1 There shall be an omnibus standing panel of at least seven members (the
2 "**Standing Panel**") each of whom shall possess significant relevant legal expertise
3 in one or more of the following areas: international law, corporate governance,
4 judicial systems, alternative dispute resolution and/or arbitration. Each member of
5 the Standing Panel shall also have knowledge, developed over time, regarding the
6 DNS and ICANN's Mission, work, policies, practices, and procedures. Members
7 of the Standing Panel shall receive at a minimum, training provided by ICANN on
8 the workings and management of the Internet's unique identifiers and other
9 appropriate training

10 28. The bylaws also require that each IRP Panel chosen from the Standing Panel shall
11 conduct an objective, *de novo* examination of a dispute, based specifically upon any prior
12 applicable IRP precedents.

13 29. The bylaws provide that a claimant may request interim relief, including
14 prospective relief, interlocutory relief, or declaratory or injunctive relief, which specifically may
15 include a stay of the challenged ICANN action or decision until such time as the IRP Panel
16 considers the merits of the IRP complaint.

17 30. The bylaws provide that any decision of a three-person IRP panel may be appealed
18 *de novo* and *en banc* to the entire Standing Panel.

19 31. ICANN also represented in its IRP-related bylaws that it "shall bear all the
20 administrative costs of maintaining the IRP mechanism, including compensation of Standing
21 Panel members." However, on information and belief, due to its failure to appoint the Standing
22 Panel, ICANN has avoided paying some \$2.7 million in Standing Panel fees in thirteen IRP
23 cases arising from the New gTLD Program. Indeed, ICANN has been deemed the losing party,
24 and ordered to reimburse panel fees and costs paid by claimants, *nine times* out of those 13 cases
25 -- totaling \$1.2 million.

26 32. Plaintiffs are claimants⁶ in a pending IRP proceeding filed in December 2019
27 because ICANN gave them a unilateral deadline to do so or else suffer the ultimate consequence
28 -- that ICANN would delegate the .hotel gTLD to Plaintiffs' competitor and Plaintiffs would
29 then lose virtually their entire investment in their applications to ICANN, at least several
30 hundred thousand dollars each. In addition, they might also risk their ability to effectively

⁶ See Request for IRP, <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-request-16dec19-en.pdf>.

1 challenge ICANN’s substantive decision any further, even as specifically and long-promised to
2 Plaintiffs by ICANN in its bylaws, and thus in its contracts not only with Plaintiffs but also with
3 all other parties contracting with ICANN throughout the world. Plaintiffs, however, have
4 continually objected to going forward with the IRP until the bylaw Accountability Mechanisms
5 are put in place, which ICANN has stated would take no longer than 6-12 months from now.
6 There is no urgency whatsoever, from any party or for any purpose, to move any faster. Yet,
7 ICANN obstinately refuses to stay or otherwise suspend those proceedings pending its own
8 compliance with its bylaws, and ominously threatens to delegate away the TLD to a third-party
9 competitor if those IRP proceedings are terminated.

10 **Cooperative Engagement -- Mediation**

11 33. ICANN’s ultimatum to Plaintiffs to file the IRP immediately followed a so-called
12 “Cooperative Engagement Process” (“CEP”) provided for in ICANN’s bylaws. The bylaws
13 provide for a mediation during the CEP, prior to filing of an IRP, with the CEP mediator to be
14 selected from the skilled members of the Standing Panel, and thus also provided at ICANN
15 expense.

16 34. As ICANN has failed to comply with its bylaw representations (discussed in
17 greater detail below), there is no Standing Panel, despite it having been required in ICANN’s
18 bylaws since 2013, and by separate IRP panel decisions in 2015 and 2017 finding ICANN in
19 violation of its bylaws for having failed to implement it. Thus, among other things, Plaintiffs
20 have been denied the opportunity to have their IRP issues submitted to a skilled expert mediator
21 from the Standing Panel, provided at ICANN expense, in addition to being denied the expert
22 Standing Panel in the IRP itself. On information and belief, ICANN also has failed to provide
23 this procedural safeguard and bylaw-mandated ADR process to any other CEP (or IRP)
24 participant despite the clear provisions of its bylaws.

25 35. ICANN’s failure to implement a Standing Panel has led to, among other things,
26 clearly inconsistent opinions among IRP panels which generally have had no previous, relevant
27 experience pertaining to ICANN’s IRP. Plaintiffs’ underlying, substantive claims address such
28 inconsistency as it relates to Plaintiffs’ applications and IRP claims.

36. As alleged, in the pending IRP, each Plaintiff seeks substantive relief related to

1 ICANN’s allegedly improper gTLD delegation decisions and processes.

2 37. While ICANN essentially forced Plaintiffs to file the IRP, else face termination of
3 their applications and related rights to redress, Plaintiffs objected to going forward with that
4 proceeding until ICANN complied with its bylaw representations and obligations to put in place
5 an actual, meaningful Ombudsman review process and the CEP and IRP Standing Panel to hear
6 Plaintiffs’ claims and any appeals arising therefrom, and until ICANN paid the fees it had
7 promised in its bylaws to pay.

8 38. As required by ICANN, Plaintiffs filed their IRP complaint with ICANN’s
9 exclusive, chosen IRP provider (the International Center for Dispute Resolution (“ICDR”).
10 Plaintiffs were forced to pay a \$3,750.00 administrative fee in order for ICDR and ICANN to
11 administer their complaint, even though ICANN’s bylaws specifically require ICANN to bear all
12 administrative costs of the IRP.

13 **ICANN Forced Plaintiffs to Seek Interim Relief, and Plaintiffs Succeeded**

14 39. Almost immediately after Plaintiffs filed their IRP complaint, they were advised
15 by ICANN’s lawyers that ICANN was preparing to immediately delegate the .hotel gTLD to
16 Plaintiffs’ competitor, despite the Plaintiffs’ pending IRP that challenges ICANN’s very
17 decisions and processes related to that TLD delegation. Plaintiffs promptly responded that such
18 action would irreparably harm Plaintiffs, would blatantly subvert ICANN’s bylaws, including the
19 Accountability Mechanisms, and would utterly disregard unanimous prior IRP precedent in
20 which three different IRP panels had held that ICANN must not execute gTLD contracts while
21 an IRP remained pending as to the substantive merits or processes underlying ICANN’s decision
22 to do so.

23 40. Despite Plaintiffs’ repeated protests, ICANN and ICDR required Plaintiffs to pay
24 an additional \$18,000 fee deposit to secure the services of a so-called “Emergency Panelist,” that
25 should have been provided at no cost from the Standing Panel pursuant to specific bylaw
26 provision to that effect. Plaintiffs were also forced to pay counsel to prepare briefing and
27 evidence in support of a stay (aka a “Request for Interim Measures”).⁷ Plaintiffs were thus
28

⁷ <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-claimant-request-30jan20-en.pdf>;
<https://www.icann.org/en/system/files/files/irp-fegistry-et-al-claimant-brief-interim-measures-protection-24apr20-en.pdf>.

1 forced to pay for and to attempt to persuade an ICDR-chosen panelist, with no relevant
2 experience or training, to force ICANN to stop its contracting process until such time as a
3 subsequent IRP Panel considers the merits of the matter.

4 41. The Emergency Panelist ruled in Plaintiffs' favor.⁸ He ruled that: "Claimants'
5 request for interim measures that ICANN be ordered to maintain the *status quo* as to the
6 .HOTEL Contention Set during the pendency of this IRP is granted."

7 42. Thereafter, ICANN's attorneys tried improperly to push the matter along even
8 though ICANN still has not implemented a meaningful and independent Ombudsman review
9 process or the Standing Panel. When Plaintiffs objected to going forward until at least the
10 Standing Panel was implemented and could be utilized in their IRP, ICANN's lawyers threatened
11 to seek dismissal of the IRP altogether, and to thereafter proceed with delegation of the .hotel
12 gTLD to Plaintiffs' competitor. Plaintiffs now pray for this Court's review and order compelling
13 ICANN to provide Accountability Mechanisms to Plaintiffs in accordance with ICANN's
14 bylaws.

15 43. Unless ICANN relents, Plaintiffs will be forced to move this Court to continue the
16 stay imposed against ICANN by the Emergency Panelist by preliminarily enjoining ICANN
17 from contracting the .hotel gTLD to Plaintiffs' competitor. Plaintiffs will request such injunction
18 to remain in place so long as this action is pending and/or until the merits of Plaintiffs' IRP
19 complaint are adjudicated in full compliance with the Accountability Mechanisms enshrined in
20 ICANN's bylaws -- which it has egregiously and deceitfully misrepresented to date.

21 **ICANN Has Failed to Implement an IRP Standing Panel Since 2013**

22 44. As quoted above, ICANN represents in its bylaws that the Standing Panel will:

- 23 * be comprised of at least seven members
- 24 * each of whom shall possess significant relevant legal expertise in one or
25 more of the following areas: international law, corporate governance, judicial
26 systems, alternative dispute resolution and/or arbitration;
- 27 * each of whom shall have knowledge, developed over time, regarding the
28 DNS and ICANN's Mission, work, policies, practices, and procedures; and

⁸ <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-emergency-panelist-decision-interim-measures-protection-07aug20-en.pdf>.

1 * each of whom shall receive, at a minimum, training provided by ICANN on
2 the workings and management of the Internet's unique identifiers and other
3 appropriate training.

4 45. Some variation of this bylaw has been in effect since April 2013. At that time, it
5 read:⁹

6 There shall be an omnibus standing panel of between six and nine members with a
7 variety of expertise, including jurisprudence, judicial experience, alternative
8 dispute resolution and knowledge of ICANN's mission and work from which each
9 specific IRP Panel shall be selected. The panelists shall serve for terms that are
10 staggered to allow for continued review of the size of the panel and the range of
11 expertise. A Chair of the standing panel shall be appointed for a term not to
12 exceed three years.

13 46. The history behind the bylaw is poignant -- and proves that ICANN's total refusal
14 to implement the Standing Panel for so many years is a matter of great public concern.

15 47. In 2012, the ICANN Board convened an "Accountability Structures Expert Panel"
16 ("ASEP") to perform a review of ICANN's accountability structures called for in prior,
17 community-driven and consensus Recommendations of an ICANN Board-appointed
18 "Accountability and Transparency Review Team" ("ATRT").¹⁰ Those ATRT Recommendations
19 were developed over several years and through many thousands of hours of community and
20 ICANN staff and Board deliberation. The ASEP produced a report¹¹ in October 2012 that was
21 posted for public comment, along with proposed bylaw revisions, intended to implement the
22 ASEP's and ATRT's recommended changes to ICANN's Reconsideration and IRP processes.

23 48. Notably, one of the ASEP's few, foundational "Guiding Principles" was stated:
24 "Accountability structures should not preclude any party from filing suit against ICANN in court
25 of competent jurisdiction."

26 49. At the ICANN Board's 20 December 2012 meeting, the Board adopted the bylaw
27 revisions as recommended by the ASEP, and directed staff to proceed with implementation
28 work.¹²

⁹ <https://www.icann.org/resources/pages/bylaws-2014-04-04-en>.

¹⁰ <https://www.icann.org/en/system/files/files/final-recommendations-31dec10-en.pdf>.

¹¹ <https://www.icann.org/en/system/files/files/report-26oct12-en.pdf>.

¹² <https://www.icann.org/resources/board-material/resolutions-2012-12-20-en#2.c>.

1 50. ICANN misrepresented to Plaintiffs and the community -- on April 8, 2013¹³ --

2 that:

3 The Board's action in accepting the report of the Accountability Structures Expert
4 Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of
5 the Board's commitment to act on the recommendations of the Accountability and
6 Transparency Review Team (ATRT). The ASEP's work . . . , including a review
7 of the recommendations from the President's Strategy Committee's work on
8 Improving Institutional Confidence, is directly aligned with the ATRT requested
9 review.

10 The adoption of the ASEP's work represents a great stride in ICANN's
11 commitment to accountability to its community The revisions are geared
12 towards instituting more predictability into the processes, and certainty in
13 ICANN's decision making, The Bylaws as further revised also address a
14 potential area of concern raised by the community during the public comments on
15 this issue, regarding the ability for ICANN to maintain a standing panel for the
16 Independent Review proceedings. If a standing panel cannot be comprised, or
17 cannot remain comprised, the Bylaws now allow for Independent Review
18 proceedings to go forward with individually selected panelists.

19 The adoption of these recommendations will have a fiscal impact on ICANN, in
20 that there are anticipated costs associated with maintaining a Chair of the standing
21 panel for the Independent Review process and potential costs to retain other
22 members of the panel. However, the recommendations are expected to result in
23 less costly and time consuming proceedings, which will be positive for ICANN,
24 the community, and those seeking review under these accountability structures.
25 The outcomes of this work are expected to have positive impacts on ICANN and
26 the community in enhanced availability of accountability mechanisms.

27 *****

28 **Immediate Adoption Is Important for Scalability**

Now that initial evaluation results for new gTLD applications are being released, it is of utmost importance that the enhanced Reconsideration and Independent Review processes be put into place. The ASEP recommendations provide more clarity for the community on scope and standing, and will allow for more scalability in proceedings, the ability for summary disposition of claims, the consolidation of proceedings where appropriate, the institution of page limitations, and more predictability on timing. To the extent that decisions arising out of the New gTLD Program result in initiation of Reconsideration or Independent Review proceedings, having the new Bylaws in place will provide consistency to those seeking reconsideration or independent review.

¹³ <https://www.icann.org/en/system/files/bm/briefing-materials-4-11apr13-en.pdf>.

Independent Review Process -- Creation of Standing Panel

ICANN has coordinated with the current IRP Provider, the International Centre for Dispute Resolution (ICDR) to determine how to best create the standing panel. The ICDR is in the process of recommending a fee structure that can help mitigate costs within the proceedings. As the ICDR is working to identify panelists for ICANN consideration, and finalizing fee structure recommendations, we recommend that the Bylaws can now be implemented. Per the 20 December 2012 resolution, additional language relating to the standing panel will provide flexibility to use either the standing panel OR individually selected panelists for any proceeding initiated when a standing panel is not comprised.

51. ICANN obviously and thoroughly understood the serious importance of enacting the standing panel reforms “**immediately**” at least as of early 2013, and promised to itself and its community (including Plaintiffs) that such implementation was imminent as of that time -- as an express condition of implementing the bylaws as of that time.

52. The Standing Panel in fact is supposed to play a role in a whole host of Accountability Measures enhancements, including mediation, interim relief, panel adjudication of all IRP complaints, and the right of *de novo* and *en banc* appeal.

53. Critically, as alleged, the bylaws provide that any IRP Panel decision may be appealed *de novo* to the entire Standing Panel, *en banc*. Because there is no Standing Panel, Plaintiffs have been denied their right to appeal the decision of the Emergency Panelist and/or any full IRP Panel that may be constituted in their pending IRP proceeding, if any.

54. Yet in fact, ICANN did virtually nothing to implement the Standing Panel until after Plaintiffs filed their IRP complaint in November, 2019 -- more than six years later -- yet again raising the issue. And today, the Standing Panel still is not in place to hear Plaintiffs’ IRP complaint, as promised by the bylaws for so long. ICANN now claims yet again that is in process of choosing members of the Standing Panel, and has recently represented to the Emergency Panelist and Plaintiffs that the delay to implementation at this point is only in the range of six more months from now.¹⁴ That is an insignificant amount of time, as there is no demonstrable urgency, and the Plaintiffs’ applications have been pending with ICANN for more than eight years already.

¹⁴ See, <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-icann-opp-claimant-amended-request-12may20-en.pdf>.

1 **ICANN Has Ignored Three Prior IRP Decisions Regarding the Standing Panel**

2 55. Meanwhile, ICANN blatantly ignored the protestations and specific
3 recommendations of three different IRP panels, in 2015 and in 2017, to get the Standing Panel in
4 place as so clearly required by the bylaws.

5 56. In 2015, ICANN lost an IRP case involving the .Africa gTLD application. In the
6 early stages of that case, an emergency IRP panelist issued an order that excoriated ICANN for,
7 among other things -- at that point, not having got the Standing Panel in place. The panelist
8 stated:¹⁵

9 29. First, the Panel is of the view that this IRP could have been heard and finally
10 decided without the need for interim relief, but for ICANN's failure to follow its
11 own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures
12 (Article 1), which require the creation of a standing panel [with] "knowledge of
13 ICANN's mission and work from which each specific IRP Panel shall be selected."

14 30. This requirement in ICANN's Bylaws was established on 11 April 2013.
15 More than a year later, no standing panel has been created. Had ICANN timely
16 constituted the standing panel, the panel could have addressed DCA Trust's request
17 for an IRP as soon as it was filed in January 2014. It is very likely that, by now,
18 that proceeding would have been completed, and there would be no need for any
19 interim relief by DCA Trust.

20 57. Later in the same case, a different and unanimous, three-person panel issued
21 another excoriating declaration,¹⁶ arguing that IRP decisions must be binding on ICANN because
22 it had (even as of then) failed to create the Standing Panel:

23 The need for a compulsory remedy is concretely shown by ICANN's longstanding
24 failure to implement the provision of the Bylaws and Supplementary Procedures
25 requiring the creation of a standing panel. ICANN has offered no explanation for
26 this failure, which evidences that a self-policing regime at ICANN is insufficient.
27 The failure to create a standing panel has consequences, as this case shows,
28 delaying the processing of DCA Trust's claim, and also prejudicing the interest of
a competing .AFRICA applicant.

58. The ICANN Board formally, nominally accepted the final decision of that IRP
panel, but said nothing, and again did nothing, about the Standing Panel. This in turn violated
another ICANN bylaw that requires: "Where feasible, the Board shall consider its response to

¹⁵ <https://www.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf>.

1 IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the
2 decision on the public record based on an expressed rationale.”

3 59. In 2016, ICANN again amended its Accountability Mechanisms bylaws, revising
4 the Standing Panel provision as set forth above.

5 60. In 2017, ICANN lost another IRP case, involving the .Islam and .halal gTLD
6 applications. Those claimants also raised the Standing Panel issue in the IRP, arguing that
7 ICANN should immediately implement the Panel pursuant to its bylaws. The unanimous IRP
8 panel cited to the *DCA Trust* precedent on this issue, and found in claimants’ favor, stating:¹⁷

9 [T]he Articles of Incorporation and Bylaws requires a 'Standing Panel'
10 be established, and this Panel recommends, along with previous IRP
11 panel recommendations that one is created. However, for clarity, this
12 is not to be taken as or in any way inferred as a binding order (as the
13 Panel has no such authority).

14 61. Again, the ICANN Board purportedly accepted the final decision of the IRP panel,
15 but said and did nothing about the Standing Panel -- again in violation of its bylaws.

16 62. ICANN’s refusal to act in the face of these panel decisions obviously illustrates
17 why court intervention is required here: Even if Plaintiffs litigate their procedural bylaw issues
18 in the context of an ICANN-sponsored IRP and prevail, ICANN won’t abide by the decision,
19 rendering Plaintiffs’ efforts futile. ICANN has absolutely proved this by its own conduct in the
20 two prior matters. So again, by insisting that Plaintiffs go forward with the IRP under threat of
21 its dismissal and concomitant loss of their applications altogether, ICANN is trying to herd
22 Plaintiffs into a flawed process, violative of its own bylaws, while at the same time hiding behind
23 a purported covenant not to sue whose enforcement would thus preclude review of ICANN’s
24 related conduct altogether. In the same vein, ICANN’s position, essentially that it can
25 implement the Standing Panel whenever it chooses no matter how many years down the road, if
26 ever, renders its promises hollow and worthless and, legally, false, the bylaw provision itself
27 superfluous, and the obligation illusory.

28 **This Action Is Brought in the Public Interest**

63. Plaintiffs’ action in this Court is in furtherance of and in accordance with the

¹⁷ <https://www.icann.org/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf> (Sec. 146).

1 public interest and with ICANN's Mission. Indeed, ICANN's most recent Board Resolution¹⁸
2 mentioning the Standing Panel (on November 3, 2019) stated that the resolution was:

3 in the public interest as part of implementing and achieving the enhanced outcomes of the
4 IRP in accordance with the recommendations of the community. This action is also within
5 ICANN's Mission and is in the public interest as it is important to ensure that, in carrying
6 out its Mission, ICANN is accountable to the community for operating within the Articles
7 of Incorporation, Bylaws, and other established procedures, by having a process in place
8 by which a person or entity materially affected by an action of the ICANN Board or Staff
9 may request third-party review of that action or inaction by the Board.

10 64. On March 31, 2020, four months *after* Plaintiffs filed their IRP Complaint, ICANN
11 finally made a purported public "Call for Expressions of Interest" from prospective members of a
12 Standing Panel.¹⁹

13 65. On May 12, 2020, ICANN filed a brief²⁰ opposing Plaintiffs' Request for Interim
14 Measures, in which ICANN stated it expected that IRP to last 12-18 months from then, and
15 ICANN also stated that implementation of the Standing Panel would take some two years from
16 then. Thus, ICANN, by its own admission, believes implementation of the Standing Panel --
17 required since 2013 -- would only delay this proceeding an additional 6 to 12 months. The
18 substantive delegation process for the .hotel gTLD has already consumed some 7+ years, but
19 ICANN claims it won't take another 6 or so months to comply with bylaws it should have
20 complied with in 2013 so as to provide a fair adjudicatory process to Plaintiffs to which they
21 (and the public at large) are contractually entitled.

22 66. Plaintiffs have repeatedly requested that ICANN consent to suspend the IRP case
23 until the Standing Panel is in place to hear it. Plaintiffs request that the IRP panel in their case be
24 selected from that trained, expert, community-chosen Standing Panel as required by ICANN's
25 bylaws, and that Plaintiffs also be ensured their right to an *en banc* appeal of any adverse
26 decision to that full Standing Panel. Despite Plaintiffs' several requests for this curative action,
27 and despite affording ICANN ample opportunity to cure, ICANN has denied the requests.

28 67. Plaintiffs have also requested that ICANN meanwhile hire an independent

¹⁸ <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.c>.

¹⁹ <https://www.icann.org/news/announcement-3-2020-03-31-en>.

²⁰ <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-icann-opp-claimant-amended-request-12may20-en.pdf>.

1 Ombudsman to review their Requests for Reconsideration, as also required by ICANN's bylaws.
2 Again, despite Plaintiffs' several requests for this curative action, and despite affording ICANN
3 ample opportunity to cure, ICANN has denied the requests.

4 68. Plaintiffs have also requested that ICANN reimburse them for all ICDR
5 administrative expenses. After a pointed question from the Emergency Panelist, ICANN agreed
6 to repay the \$18,000.00 panelist fee deposit they had forced Plaintiffs to pay, but has still refused
7 to repay the \$3,750.00 administrative fee that Plaintiffs were forced to pay.

8 69. Plaintiffs are harmed far more than anyone from delay in resolution of their .hotel
9 gTLD applications, because, as alleged, each application has cost each Plaintiff a \$185,000.00
10 filing fee paid to ICANN, and at least several hundred thousand dollars more for consulting and
11 carrying costs -- not to mention legal fees incurred in the application, review and IRP processes.
12 ICANN can show no harm whatsoever from any further modest delay in adjudicating Plaintiffs'
13 substantive dispute, as ICANN by its own admission is solely responsible for many years of the
14 prior delay.

15 70. However, the procedural safeguards that ICANN promised over and over, by
16 ICANN's own admissions, are intended to provide real and indeed critical benefits to Plaintiffs
17 and to the internet community at large which must deal with ICANN. Moreover, there is
18 absolutely no harm to ICANN (or anyone else) caused by such a relatively short delay given the
19 long history of the .hotel gTLD applications, and ICANN's own long history of willfully failing
20 to provide Accountability Mechanisms promised by its bylaws since 2013. Since 2016,
21 ICANN's bylaws have been amended on three separate occasions, yet still ICANN has made
22 minimal progress in enacting promises made in previous bylaws.

23 71. These issues are critically important to Plaintiffs, not only with respect to their
24 pending IRP complaint, but also because they each have executed multiple other Registry
25 Agreements with ICANN and operate many other TLDs as their core business activity -- always
26 and forever pursuant to ICANN regulations and fiat. At any time, any Plaintiff -- or any other
27 party contracting with ICANN anywhere in the world -- could have a dispute with ICANN, and
28 then also would be denied all of these critical procedural rights guaranteed to them by its bylaws.
ICANN has done precious little in seven years. While it continues to make related promises, at

1 this point ICANN cannot be trusted to do anything in any time frame.

2 72. For all of those same reasons, this matter is important to the entire internet
3 community -- consisting not only of domain name registries like Plaintiffs, but also all
4 businesses, individuals and organizations that rely upon the global DNS governed by ICANN.
5 Therefore, this matter strongly enhances the public interest and should proceed without negative
6 consequence to Plaintiffs' gTLD applications pending with ICANN.

7 73. ICANN has failed to pursue its general public benefit purpose of providing
8 Accountability Mechanisms as required by its bylaws, designed by the community and ICANN's
9 own retained experts to ensure the integrity and security of the global, critical DNS and IP
10 addressing systems and infrastructure. The importance of ICANN's Mission is difficult to
11 overstate. The Accountability Mechanisms are critical, as they were specifically designed to
12 help ensure that Mission is fulfilled. There is also no legitimate reason why Plaintiffs and the
13 whole internet community should not be afforded the full procedural rights set forth specifically
14 in ICANN's bylaws.

15 **Plaintiffs' Injuries & Damages**

16 74. As a direct and proximate result of ICANN's breaches of contract, its intentional
17 and grossly negligent misrepresentations, its intentional misfeasance and gross negligence in
18 performance of its bylaw obligations, and its other unfair and unlawful acts, Plaintiffs have each
19 been injured and damaged contractually, practically, financially and irreparably.

20 75. First, Plaintiffs have not received the benefit of their contractual bargain.

21 76. Second, Plaintiffs are left to pursue claims against ICANN within its flawed and
22 non-compliant dispute resolution framework, without critical procedural safeguards but at greater
23 expense.

24 77. Third, within that framework Plaintiffs are left without any, much less meaningful
25 and independent, Ombudsman review of their issues made subject to Reconsideration, which
26 causes Plaintiffs irreparable harm by materially compromising the process, its fundamental
27 quality and its substantive outcome, in addition to also causing more protracted proceedings and
28 far greater expense.

78. Fourth, Plaintiffs suffer the absence of specially trained and community-chosen

1 expert Standing Panelists to resolve their issues (which even ICANN admits are critical), and
2 they are denied their right of *de novo* appeal to the *en banc* Standing Panel. Instead, Plaintiffs
3 are left with untrained and partisan panelists and partisan processes. This, again, causes
4 Plaintiffs irreparable harm by materially compromising the process, its fundamental quality and
5 its substantive outcome, in addition to also causing more protracted proceedings and far greater
6 expense.

7 79. A portion of Plaintiffs' related injuries are qualitative and inestimable -- the value
8 of fairness of proceedings and quality of adjudication and outcome is not capable of
9 quantification. And it would not be debatable if ICANN simply followed the rules that it enacted
10 in its own bylaws. And of course, Plaintiffs have had to pay more because ICANN is supposed
11 to pay for the Standing Panel if it existed. Plaintiffs also suffer under the greater expense of
12 potentially unnecessary litigation caused by decisions that a bylaw-compliant Standing Panel
13 might make differently, and without appellate review. The lack of a Standing Panel results in
14 less adherence to panel precedents, and so again, less certainty of outcome and greater expense
15 where none would be incurred at all if an effective Ombudsman process was in place and the
16 Standing Panel was properly constituted. Plaintiffs are left with an inferior and flawed dispute
17 resolution process that ignores many specific and admittedly critical features of ICANN's so-
18 called Accountability Mechanisms, and greater expense. At the same time, Plaintiffs are also left
19 to labor under ICANN's purported, related covenant not to sue and release to the extent these
20 may be applicable to a given issue or dispute. In other words, ICANN wants to keep people out
21 of court and in its dispute resolution process, but it doesn't want to follow its own rules for that
22 process, or to pay for it.

23 80. Finally, the improper delegation of the .hotel gTLD would cause Plaintiffs
24 inestimable and irreparable financial damage and lost commercial opportunities.

25 81. Because at their core Plaintiffs' injuries and damages are chiefly qualitative and
26 irreparable rather than quantitative, and because it may not even be possible to quantify many
27 such injuries and damages, Plaintiffs have no adequate remedy at law. As such, Plaintiffs seek
28 specific performance of the contractual bylaws' provisions regarding ICANN's so-called
Accountability Mechanisms. Moreover, Plaintiffs seek both mandatory and prohibitory public

1 injunctions directing ICANN and its officers to implement the promised dispute resolution
2 procedures and safeguards prior to adjudicating Plaintiffs' substantive claims thereunder.

3 **Plaintiffs' Injury and Their Discovery of the Falsity of ICANN's Representations**

4 82. Plaintiffs were injured by ICANN's breaches and misrepresentations at
5 approximately the same time in 2019 when they were forced into the pending IRP and, as such,
6 were denied the bylaw Accountability Mechanisms. Each Plaintiff discovered ICANN's fraud at
7 about the same time, although each's discovery may have been at different specific times. While
8 Plaintiffs became aware of ICANN's representations at varying times, all Plaintiffs relied on
9 ICANN's repeated and continuing representations and promises of performance and renewed
10 promises of performance, i.e., of implementation and adherence to its Accountability
11 Mechanisms bylaws. ICANN, moreover, continues to make such promises even up until today.
12 Plaintiffs discovered ICANN's true intent as it affected Plaintiffs, when Plaintiffs repeatedly
13 requested and were denied implementation and use of the bylaw Accountability Mechanisms.
14 Prior to that time, Plaintiffs relied on ICANN's plainly stated, supposed intent to implement the
15 Accountability Mechanisms. They relied on its very public statements to that effect. They relied
16 on its enactment of bylaws to that effect. They relied on its successive revision and amendment
17 of those bylaws, each time stating more detailed descriptions of the procedural mechanisms and
18 safeguards, and their fundamental importance to ICANN's Mission, and describing the
19 implementation efforts as ongoing and imminent. Plaintiffs relied on ICANN's *seriatim* public
20 statements, including its experts' and attorneys' pronouncements that the Accountability
21 Mechanisms bylaws should and would be implemented soon after the bylaws were enacted.
22 Plaintiffs did not and could not have discovered that ICANN had no real intention to comply,
23 because ICANN continually misrepresented its intentions, stating repeatedly that compliance was
24 both important to ICANN and its Mission, and imminent. In sum, ICANN concealed its true
25 intentions by continuing to make exactly contrary -- equally misleading -- representations,
26 precluding Plaintiffs' discovery of the true facts. Together with Plaintiffs' participation in
27 ICANN's ultimately flawed dispute resolution process, ICANN's concealment of the related,
28 true facts not only prevented discovery of Plaintiffs' claims, but also requires equitable tolling of
any intervening statute, if any.

1
2 **COUNT ONE**

3 **(Breach of Contract -- Violation of Bylaws)**

4 83. Plaintiffs incorporate by reference each and every paragraph above as if restated
5 here.

6 84. ICANN's bylaws form part of its contractual terms with each Plaintiff. Those
7 bylaws are expressly incorporated by this reference and require, *inter alia*, that ICANN
8 implement the Standing Panel, that it provide Ombudsman review of Requests for
9 Reconsideration, and that it pay all IRP "administrative" fees -- each requirement as set forth
10 specifically in detail in the bylaws.

11 85. ICANN has materially breached each of the related bylaw provisions and thus
12 breached its contracts with Plaintiffs. ICANN, contrary to the advice of its attorneys and experts,
13 and the pronouncements of at least three separate IRP Panel decisions, has not constituted the
14 Standing Panel nor made significant progress towards doing so. Nor has ICANN provided for
15 any meaningful Ombudsman review or input into Request for Reconsideration decisions, or paid
16 IRP fees -- each as promised by its bylaws.

17 86. Plaintiffs supplied legally sufficient consideration for their contract with ICANN,
18 including gTLD name application fees of \$185,000.00 each, reciprocal promises and related
19 obligations, modified promises and related obligations. Plaintiffs have performed all of the
20 obligations they are required to perform under their contracts with ICANN, save for those that
21 have been excused by ICANN's material breaches. All conditions precedent to ICANN's
22 performance have been satisfied.

23 87. As a direct and proximate result of ICANN's material breaches, Plaintiffs have
24 each been injured and damaged contractually, practically, financially and at least in part
25 irreparably, as alleged above.

26 88. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

27 //

28 //

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1
2 **COUNT TWO**

3 **(Fraud-in-the-Inducement -- Deceit, Civil Code Section 1709, 1710, et seq. -- Specific**
4 **Contractual Provisions)**

5 89. Plaintiffs incorporate by reference each and every paragraph above as if restated
6 here.

7 90. ICANN and its authorized agents made continuing false representations over time
8 to its community, and Plaintiffs, regarding ICANN's Accountability Mechanisms that induced
9 Plaintiffs to accept and/or adhere to several specific terms contained in their contracts with
10 ICANN including the at issue bylaws themselves and ICANN's purported, related covenant not
11 to sue and release terms. Thus, as alleged, ICANN and its agents represented repeatedly in its
12 Board Resolutions, bylaws and other public documents, and continue to represent, that it would
13 implement all of the bylaw provisions covering the Accountability Mechanisms. ICANN and its
14 agents' specific misrepresentations, and the dates and media thereof, are set forth above.

15 91. Each such representation was false when made and ICANN and its agents knew of
16 that falsity, in that, *inter alia*, ICANN never intended to implement an effective Ombudsman
17 procedure, the promised Standing Panel, nor to pay IRP fees. ICANN and its agents made such
18 misrepresentations regarding the dispute resolution process specifically to induce the ICANN
19 community, including Plaintiffs, to contract and to continue to contract with ICANN. Indeed,
20 ICANN promised the Accountability Mechanism enhancements as a specific condition of the
21 community's acceptance of ICANN's proposal to divorce itself from U.S. Government oversight
22 over its core decisions. On specific condition that those enhancements would be timely made,
23 the community approved ICANN's proposal in 2016 -- relinquishing the accountability
24 mechanism of U.S. Government oversight -- and receiving nothing in return as ICANN has still
25 yet to implement the mechanisms designed to take its place.

26 92. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its
27 agents' misrepresentations, to Plaintiffs' detriment. In reliance on the misrepresentations, in
28 example, Plaintiffs contracted with ICANN and accepted the bylaw Accounting Mechanisms and
the purported, related covenant not to sue and release, continued in their contracts with ICANN,
and agreed to bilateral contractual amendments requested by ICANN. Plaintiffs also continued

1 both their financial and work efforts and outlays within the application and delegation process.
2 Plaintiffs also paid fees to ICANN, in part for the guarantee of accountable and fair application
3 review and dispute resolution processes as designed by the community and promised by ICANN
4 in its bylaws. And Plaintiffs have been forced to pay IRP fees that ICANN, pursuant to specific
5 provisions of its bylaws, is responsible to incur.

6 93. As a direct and proximate result of ICANN's material misrepresentations,
7 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
8 in part irreparably, as alleged above.

9 94. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

10 **COUNT THREE**

11 **(Deceit, Civil Code Section 1709, 1710, et seq.)**

12 95. Plaintiffs incorporate by reference each and every paragraph above as if restated
13 here.

14 96. ICANN and its authorized agents made continuing false representations over time
15 to Plaintiffs regarding ICANN's dispute resolution processes that induced Plaintiffs to accept
16 and/or to adhere to their contracts with ICANN. Thus, as set forth above, ICANN and its agents
17 represented repeatedly in its Board Resolutions, bylaws and other public documents that it would
18 implement all of the bylaw-enshrined Accountability Mechanisms. ICANN and its agents'
19 specific misrepresentations, and the dates and media thereof, are set forth above.

20 97. Each such representation was false when made and ICANN and its agents knew of
21 that falsity, in that, *inter alia*, ICANN never intended to implement an effective Ombudsman
22 procedure, the promised Standing Panel, nor to pay IRP fees. ICANN and its agents made such
23 misrepresentations regarding the dispute resolution process specifically to induce Plaintiffs to
24 contract and to continue to contract. For example, ICANN amended its bylaws to include the
25 Accountability Mechanisms, but then intentionally and deceitfully undermined and refused to
26 implement them as designed and specified in the bylaws.

27 98. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its
28 agents' deceit, to Plaintiffs' detriment. In reliance on the misrepresentations, in example,
Plaintiffs contracted with ICANN, continued in their contracts with ICANN, and agreed to

1 contractual amendments requested by ICANN. Plaintiffs also continued both their financial and
2 work efforts and outlays within the application and delegation processes. Plaintiffs also paid
3 fees to ICANN, in part for the guarantee of accountable and fair contract review and dispute
4 resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP fees
5 that ICANN, pursuant to specific provisions of its bylaws, is responsible to incur.

6 99. As a direct and proximate result of ICANN's material misrepresentations,
7 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
8 in part irreparably, as alleged above.

9 100. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

10 **COUNT FOUR**

11 **(Grossly Negligent Misrepresentations)**

12 101. Plaintiffs incorporate by reference each and every paragraph above as if restated
13 here.

14 102. ICANN and its authorized agents made several false representations to Plaintiffs
15 regarding ICANN's Accountability Mechanisms that induced Plaintiffs to accept and/or to
16 continue in their contracts with ICANN. Thus, as set forth above, ICANN and its agents
17 represented repeatedly in its Board Resolutions, bylaws and other public documents that it would
18 implement all of the bylaw provisions' Accountability Mechanisms.

19 103. Each such representation was false when made and ICANN and its agents should
20 have known of that falsity and were grossly negligent and/or willfully blind in making the related
21 representations. ICANN and its agents made such misrepresentations regarding the
22 Accountability Mechanisms specifically to induce Plaintiffs to contract and to continue to
23 contract. ICANN failed then to comply with the most basic of its obligations; it did nothing at
24 all, notwithstanding the facts that its experts and attorneys advised ICANN on several occasions
25 that it should implement the Accountability Mechanisms "immediately," as designed and
26 specified in the bylaws and at least three IRP panels declaring ICANN in violation of its bylaws
27 for failing to have done so.

28 104. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its
agents' grossly negligent misrepresentations, to Plaintiffs' detriment. In reliance on the

1 misrepresentations, in example, Plaintiffs contracted with ICANN, continued in their contracts
2 with ICANN, and agreed to contractual amendments requested or imposed by ICANN. Plaintiffs
3 also paid fees to ICANN, in part for the guarantee of accountable and fair contract review and
4 dispute resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP
5 fees that ICANN, under specific provision of its bylaws, is responsible to incur.

6 105. As a direct and proximate result of ICANN's grossly negligent misrepresentations,
7 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
8 in part irreparably, as alleged above.

9 106. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

10 **COUNT FIVE**

11 **(Gross Negligence)**

12 107. Plaintiffs incorporate by reference each and every paragraph above as if restated
13 here.

14 108. ICANN was grossly negligent in the performance of its promises made to
15 Plaintiffs in their contracts. ICANN failed to comply with the most basic of its obligations; it did
16 nothing at all for at least six years. For example, ICANN amended its bylaws to include the
17 Accountability Mechanisms, but then, with gross negligence, undermined and refused to
18 implement them as designed and specified in the bylaws. Notwithstanding the fact that its
19 experts and attorneys advised ICANN on several occasions that it should implement the Standing
20 Panel immediately, and notwithstanding at least three IRP decisions so prescribing as well,
21 ICANN has yet to do so.

22 109. ICANN has also admitted that at least some of the Accountability Mechanisms it
23 has failed to implement are, essentially, critical ones -- in particular the Standing Panel.
24 Nonetheless, ICANN has done nothing at all to implement them for at least six years, without
25 any excuse or rationale whatsoever. ICANN says it will only take six or so months to provide
26 the Standing Panel for Plaintiffs' IRP, yet ICANN also refuses to stay the IRP proceedings to
27 comply with its own obligations.

28 110. As a direct and proximate result of ICANN's gross negligence, Plaintiffs have each
been injured and damaged contractually, practically, financially and at least in part irreparably,

1 as alleged above.

2 111. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

3 **COUNT SIX**

4 **(Public Benefit Corporation Bylaw Enforcement -- Cal. Corp. Code Section 14623)**

5 112. Plaintiffs incorporate by reference each and every paragraph above as if restated
6 here.

7 113. ICANN is an entity subject to the California Public Benefit Corporation law.
8 Under that law, this Court has the power to require ICANN to comply with its bylaws.

9 114. Cal. Corp. Code section 14623 provides that: “A benefit enforcement proceeding
10 may be commenced or maintained [by] persons as have been specified in the articles or bylaws
11 of the benefit corporation.”

12 115. ICANN’s bylaws also state that “. . . ICANN shall have a separate process for
13 independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant
14 . . .” Bylaws, Section 4.3(a). Such third party review may be brought to “[e]nsure that ICANN
15 does not exceed the scope of its Mission and otherwise complies with its Articles of
16 Incorporation and Bylaws.” Bylaws, Section 4.3(a). A Claimant is defined by ICANN as “any
17 legal or natural person, group, or entity . . . that has been materially affected by a Dispute. To be
18 materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and
19 causally connected to the alleged violation.”

20 116. Plaintiffs in this case have standing as IRP “Claimants” because they have suffered
21 harm directly caused by ICANN’s violations of its own bylaws. Accordingly, ICANN’s own
22 bylaws contemplate and explicitly describe persons and/or parties that are afforded standing to
23 bring such a claim against ICANN, including Plaintiffs. A guiding principle of ICANN’s
24 Accountability Mechanism enhancements was that those Accountability Mechanisms were not
25 intended to be exclusive of other remedies at law or equity, in any court or forum. And indeed,
26 ICANN has not challenged Plaintiffs’ standing as “Claimants” in the IRP.

27 117. Plaintiffs have been injured and damaged by ICANN’s failure to adhere to its
28 bylaws, as alleged, which also form part of ICANN’s contracts with each Plaintiffs.

118. As a direct and proximate result of ICANN’s failure to adhere to its bylaws as

1 alleged, Plaintiffs have each been injured and damaged contractually, practically, financially and
2 at least in part irreparably, as alleged above.

3 119. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

4 **COUNT SEVEN**

5 **(False Advertising Law – Cal. B&P Sections 17500 *et seq.*)**

6 120. Plaintiffs incorporate by reference each and every paragraph above as if restated
7 here.

8 121. As alleged above, ICANN has made many statements in connection with its
9 offering of gTLD registry application services, which it knew or should have known were false
10 at the time they were made, and which would be likely to deceive the public and Plaintiffs.

11 122. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

12 **COUNT EIGHT**

13 **(Unfair Competition -- Cal. B&P Code Sections 17200 *et seq.*)**

14 123. Plaintiffs incorporate by reference each and every paragraph above as if restated
15 here.

16 124. ICANN's conduct and failures to act, as alleged above, and in particular its
17 intentional misrepresentations as alleged, are both unfair and unlawful pursuant to the above-
18 referenced statutes and the common law of contract, fraud and deceit. ICANN's unfair and
19 unlawful acts also affect not only Plaintiffs but the entire, worldwide internet community and the
20 public generally.

21 125. As a direct and proximate result of ICANN's unfair and unlawful acts as alleged,
22 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
23 in part irreparably, as alleged above.

24 126. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

25 **PRAYER FOR RELIEF**

26 Wherefore, Plaintiffs respectfully request that this Court enter judgment in their favor on
27 each and every count set forth above and award them relief including, but not limited to, the
28 following:

1. Specific performance of ICANN's contractual Accountability Mechanisms as set

1 forth in its bylaws, including meaningful, independent Ombudsman review of Plaintiffs'
2 Requests for Reconsideration, constitution of the expert, community-chosen Standing Panel to
3 adjudicate Plaintiffs' IRP complaint and to provide *en banc* appeal of any IRP panel decision,
4 and payment of all IRP administrative fees and costs.

5 2. A mandatory public injunction requiring ICANN to implement the Accountability
6 Mechanisms in its bylaws as aforesaid, and a prohibitory public injunction forbidding ICANN
7 from flouting any such bylaws in the future.

8 3. An award of Plaintiffs' reasonable attorneys' fees pursuant to both, or either, the
9 California Public benefit corporation law and/or the private attorney general statute (Cal. Civ.
10 Proc. Code section 1021.5), as this is an action to enforce important rights affecting the public
11 interest.

12 4. Compensatory, general and/or special damages to be proven at trial, including for
13 attorneys' and consultants' fees otherwise not awarded.

14 5. Punitive damages to be proven at trial.

15 6. All recoverable costs.

16 7. Any other relief as the Court may deem appropriate.

17
18 **JURY DEMAND**

19 Plaintiffs respectfully request trial by jury as to all issues so triable.

20
21 Dated: October 30, 2020

Respectfully submitted,

22
23 By: /s/ *Mike Rodenbaugh*
24 Michael L. Rodenbaugh
25 LOZA & LOZA LLP
26
27
28

Exhibit B



September 3, 2020

Jeff LeVee
Jones Day

Via Email

Re: *Fegistry et al. v. ICANN* – Independent Review Process

Dear Jeff,

As you know, our clients maintain that ICANN and ICDR have refused to comply with ICANN Bylaws and contractual obligations, denying critical procedural rights to our clients that purportedly have been guaranteed by those Bylaws for many years. Specifically, our clients have been denied independent Ombudsman review of their Request for Reconsideration, and subsequently have been denied consideration of their complaint by a trained and community-chosen Standing Panel. Thus, they also have been denied their right to an *en banc* appeal to such a Standing Panel. ICANN has also failed to adopt IRP Rules of Procedure addressing important issues such as discovery and appeal. Moreover, ICANN has forced our clients to pay fees to ICDR despite the Bylaws requiring ICANN to pay all administrative costs and fees of the IRP.

In light of the ICDR panelist's Decision in this matter dated August 7, we hereby write to request that ICANN agree to a suspension of this IRP proceeding, until the IRP Standing Panel is in place. We request that the panel in this case be selected from that Standing Panel, and that our clients ensure their right to an *en banc* appeal of any adverse decision to that full Standing Panel. While it will take some time for ICANN to complete the work of implementing the Standing Panel, ICANN has stated in its briefing that such delay would only be about six months – and that was to be measured from the time of ICANN's briefing earlier this year. In the meanwhile, we again request that ICANN hire an independent Ombudsman to review Request for Reconsideration 18-6 in light of the *DotRegistry* IRP decision and resulting Board action, and make its report to ICANN as required by the Bylaws.

If ICANN agrees to this request, then our clients will agree to proceed under the Interim IRP Rules, rather than continue to insist that final Rules of Procedure be implemented as long promised by the Bylaws. Moreover, once the IRP proceeding resumes, my clients generally would accept your proposal for panel selection from the Standing Panel, as set forth in your email dated August 19. Our clients would be comfortable if a trained, community-chosen Standing Panel assisted in developing those final Rules, by making decisions about discovery (for example) in this case.

If ICANN refuses this request, then my clients will request that all of these procedural requirements be imposed upon ICANN by a judicial authority. We promptly will ask a court to review the matter, and to require ICANN to comply with its Bylaws by implementing those procedures and final Rules for this case, and reimbursing my clients. At minimum, we will argue that ICANN, as a California public benefit corporation, must comply with its own procedural

548 Market Street, Box 55819, San Francisco, CA 94104
Tel/Fax: +1 (415) 738-8087 Email: mike@rodenbaugh.com



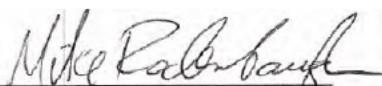
Bylaws when making substantive decisions that affect community rights, including our clients' rights.

We note ICDR International Arbitration Rules 6.7 and 24.3, providing that "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate." Indeed, my clients do not waive their right to arbitrate per the IRP, but do continue to demand that ICANN provide Reconsideration and IRP procedures, and cover all costs and fees, as set forth in the Bylaws. Only then can any IRP be adjudicated fairly and legitimately, consistent with ICANN's own very clear Bylaws.

Our clients certainly would prefer not to be forced to bring this matter before a court, with the additional costs and delay that would surely cause. Therefore, we respectfully request that ICANN agree that the subject IRP process be temporarily suspended, maintaining the *status quo* as ordered by the Emergency Panelist. We continue to maintain that absolutely no harm is caused to ICANN by any delay in this IRP, and six months delay is wholly immaterial to anyone given the very lengthy history of this matter. And in any event, any harm is far outweighed by the ongoing harm to our clients, and to the entire ICANN Community, that continues to flow from ICANN's willful failure for so many years to follow so many of its own very clear Bylaws with respect to the Reconsideration and Independent Review processes.

If ICANN will not agree to provide independent Ombudsman review and implement the Standing Panel in this matter, then please at least confirm that ICANN will agree to suspend this IRP proceeding until such time as a court reviews and rules upon my clients' request for imposition of procedural measures. We then would file a court complaint within a week, and proceed until the court resolves the matter.

Kind regards,

By: 
Mike Rodenaugh
RODENBAUGH LAW

Cc: Tom Simotas, ICDR
Sarah P. McGonigle, Jones Day

Exhibit C

STATEMENT



Date
7/01/2021 through 7/31/2021

Bill To: **Michael Rodenbaugh Esq.**
Loza & Loza LLP
305 N Second Ave #127
Upland CA 91786

Reference #: 1220070468 - Rep# 4
Billing Specialist: **Hart, Lynne**
Email: **Contact Information Redacted**
Telephone:
Employer ID:

RE: **Fegistry, LLC, et al. vs. Internet Corporation for Assigned Names and Numbers**

Neutral(s): **JAMS**

Representing: **Fegistry, LLC ; Radix Domain Solutions Pte. Ltd. ; Domain Venture Partners PCC Limited**

Hearing Type: **MEDIATION**

Date / Time	Description	Hours	Rate/Hr.	Total Billed	Parties Billed	Your Share
				Balance Forward:		\$450.00
Payment Activity:						
7/20/21	Check No. WT Paid By: Domain Venture Partners PCC Limited					(\$8,950.00)
				Total Payments:		(\$8,950.00)
				Credit Balance, Do Not Pay:		(\$8,500.00)

Unused Deposits will not be refunded until the conclusion of the case.

Statement total is based on the fee split agreed upon by all parties. If the case cancels or continues, fees are due per our cancellation and continuance policy. Please make checks payable to JAMS, Inc.

Standard mail:
P.O. Box 845402
Los Angeles, CA 90084

Overnight mail:
18881 Von Karman Ave. Suite 350
Irvine, CA 92612

Exhibit D



Article Talk

Read Edit View history

Search Wikipedia

Oversight Board (Facebook)

From Wikipedia, the free encyclopedia

This article is about the review body established by Facebook. For other uses, see Oversight board.

The **Oversight Board** is a body that makes consequential precedent-setting *content moderation* decisions (see #Table of decisions below) on the social media platforms Facebook and Instagram. Facebook CEO Mark Zuckerberg approved the creation of the board in November 2018, shortly after a meeting with Harvard Law School professor Noah Feldman, who had proposed the creation of a quasi-judiciary on Facebook.^[3] Zuckerberg originally described it as a kind of "Supreme Court", given its role in settlement, negotiation, and mediation, including the power to override the company's decisions.^[4]

Zuckerberg first announced the idea in November 2018, and, after a period of public consultation, the board's 20 founding members were announced in May 2020. The board officially began its work on October 22, 2020,^[5] and issued its first five decisions on January 28, 2021, with four out of the five overturning Facebook's actions with respect to the matters appealed.^[6] It has been subject to substantial media speculation and coverage since its announcement, and has remained so following the referral of Facebook's decision to suspend Donald Trump after the 2021 storming of the U.S. Capitol.^[7]

Oversight Board

Purpose "... promo[ti]ng free expression by making principled, independent decisions ... issuing recommendations on the relevant Facebook company content policy."^[1]

Co-chairs Catalina Botero Marino
Jamal Greene
Michael McConnell
Helle Thorning-Schmidt

Board of directors Kristina Arriaga^[2]
Cherine Chalaby^[2]
Wanda Felton^[2]
Kate O'Regan^[2]
Robert Post^[2]
Paul G. Haaga Jr. (Chair)^[2]

Funding Facebook, Inc.

Website oversightboard.com^[5]

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- 1 History
 - 1.1 Founding
 - 1.2 Activity
 - 1.3 First decisions
 - 1.3.1 Myanmar Syrian toddler photographs decision
 - 1.3.2 Azerbaijani churches photograph decision
 - 1.3.3 Breast cancer photographs decision
 - 1.3.4 Goebbels misattribution decision
 - 1.3.5 French hydroxychloroquine and azithromycin post decision
 - 1.3.6 Depiction of a Muslim threat to Macron decision
 - 1.3.7 "Zwarte Piet" blackface decision
 - 1.3.8 Ban of Donald Trump
- 2 Governance
 - 2.1 Members
 - 2.2 Former Members
 - 2.3 Oversight Board Trustees
 - 2.4 Table of decisions
- 3 Responses
- 4 References
- 5 External links

History [edit]

Founding [edit]

In November 2018, after meeting with Harvard Law School professor Noah Feldman, who had proposed the creation of a quasi-judiciary on Facebook to oversee *content moderation*, CEO Mark Zuckerberg approved the creation of the board.^{[8][9]} Among the board's goals were to improve the fairness of the appeals process, give oversight and accountability from an outside source, and increase transparency.^[9] The board was modeled after the United States' federal judicial system, as the Oversight Board gives precedential value to previous board decisions.^[10]

Between late 2017 and early 2018, Facebook had hired Brent C. Harris, who had previously worked on the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, and as an advisor to non-profits, to become the company's Director of Global Affairs.^{[11][3][12]} Harris led the effort to create the board, reporting to Nick Clegg, who reported directly to Zuckerberg.^[13] Harris also credited Clegg's involvement, saying that efforts to establish the board "wouldn't have moved absent Nick's sponsorship", and that it was "stalled within the company until Nick really took it on".^[14]

In January 2019, Facebook received a draft charter for the board^[15] and began a period of public consultations and workshops with experts, institutions, and people around the world.^{[16][17]} In June 2019, Facebook released a 250-page report summarizing its findings and announced that they are in the process of looking for people to serve on a 40-person board (the board ended up having 20 members).^[18]

In January 2020, it appointed British human rights expert and former Article 19 Executive Director Thomas Hughes as Director of Oversight Board Administration.^[19] It also said that board members would be named "in the coming months".^[20]

Activity [edit]

On May 6, 2020, Facebook announced the 20 members that would make up the Oversight Board.^[21] Facebook's VP of Global Affairs and Communications Nick Clegg described the group as having a "wide range of views and experiences" and who collectively lived in "over 27 countries", speaking "at least 29 languages,^[22] but a quarter of the group and two of the four co-chairs are from the United States, which some free speech and internet governance experts expressed concerns about.^[21] In July 2020 it was announced that the board would not start work until "later in the year".^[23] It starting accepting cases on October 22, 2020.^[5] Members of the board have noted that it will take several years for the full impact of the board and its decisions to be understood.^{[6][24]}

First decisions [edit]

On January 28, 2021, the board ruled on five moderation decisions made by Facebook, overturning four of them and upholding one.^{[25][6][26]} All but one were unanimous.^[7] Each ruling was decided by a majority vote of a panel of five members of the board, including at least one member from the region where the moderated post originated.^[6]

Myanmar Syrian toddler photographs decision [edit]

In October 2020, a Facebook user in Myanmar posted images of photographs taken by Turkish photojournalist Nilüfer Demir of the corpse of Kurdish Syrian toddler Alan Kurdi, accompanied by text in Burmese to the effect that there was "something wrong" with the psychology or the mindset of Muslims or Muslim men.^[27] The text further contrasted terrorist attacks in France in response to depictions of Muhammad with an asserted relative silence by Muslims in response to the Uyghur genocide in China,^{[6][27]} and asserted that this conduct had led to a loss of sympathy for those like the child in the photograph.^[27]

In reviewing Facebook's decision to remove the post, the board sought a re-translation of the post,^[6] and noted that the post could be read as an insult directed towards Muslims, but could also be read as commentary on a perceived inconsistency of reactions by Muslims to the events in France and China addressed.^{[6][27]}

Azerbaijani churches photograph decision [edit]

A post showing churches in Baku, Azerbaijan was captioned with a statement in Russian that "asserted that Armenians had historical ties with Baku that Azerbaijanis didn't", referring to Azerbaijanis with the ethnic slur *taziks*. The board found that the post was harmful to the safety and dignity of Azerbaijanis, and therefore upheld its removal.^[6]

Breast cancer photographs decision [edit]

In October 2020, a Brazilian woman posted a series of images on Facebook subsidiary Instagram including uncovered breasts with a visible nipple, as part of an international campaign to raise breast cancer awareness.^{[28][29]} The photographs were asserted to show breast cancer symptoms, and indicated this in text in Portuguese, which the website's automated review system failed to understand.^[6]

The images were removed and then later restored.^{[6][27]} Facebook asked that the review be dropped as moot, but the board chose to review the action nonetheless, finding that the importance of the issue made it more beneficial for the board to render a judgment on the underlying question.^[6] The board further held that removal of the post was improper, as it impacted the human rights of women, and recommended improvements to the decision-making process for the removal of such posts.^[6] In particular, the board recommended that users be informed of the use of automated content review mechanisms, that Instagram community standards be revised to expressly permit images with female nipples in breast cancer awareness posts, and that Facebook should clarify that its community standards take precedence over those of Instagram.^[26]

Goebbels misattribution decision [edit]

In October 2020, a Facebook user posted a quote incorrectly attributed to Nazi propagandist **Joseph Goebbels**, stating that appeals to emotion and instinct are more important than appeals to truth.^[6] The post contained no images or symbols. Facebook took down the post under its policy prohibiting the promotion of dangerous individuals and organizations, including Goebbels. The account user appealed, asserting that the post was intended as a commentary on **Donald Trump**. The board found that the evidence supported this assertion and held that post did not indicate support for Goebbels, and ordered that it be restored, with the recommendation that Facebook should indicate to users posting about such persons that "the user must make clear that they are not praising or supporting them".^[6]

French hydroxychloroquine and azithromycin post decision [edit]

In October 2020, a French user posted a **French language**-video in a Facebook group criticizing the **Agence nationale de sécurité du médicament** for its refusal to authorize **hydroxychloroquine** and **azithromycin** to treat **COVID-19**.^[26] Facebook removed the post for spreading **COVID-19 misinformation**, which the board reversed, in part because the drugs mentioned are prescription drugs in France, which would require individuals seeking them to interact with a physician. The board recommended that Facebook correct such misinformation rather than removing it.^[6]

Although Facebook restored the post, it also noted that its approach to **COVID-19 misinformation** reflects the guidance of the U.S. **Centers for Disease Control and Prevention** and the **World Health Organization**, and that it would therefore not change its approach to such matters.^[6]

Depiction of a Muslim threat to Macron decision [edit]

On February 12, 2021, the Board overturned the removal of a Facebook forum post made in October 2020, containing an image of a TV character holding a sheathed sword, with Hindi text translated as stating "if the tongue of the kafir starts against the Prophet, then the sword should be taken out of the sheath", with hashtags equating French President **Emmanuel Macron** to the devil, and calling for a **boycott** of products from France. The board found that the post was not likely to cause harm.^[29]

"Zwarte Piet" blackface decision [edit]

On April 13, 2021, the board upheld the removal of a Facebook post by a Dutch Facebook containing a 17-second video of a child and three adults wearing traditional Dutch "Sinterklaas" costumes, including two white adults dressed as **Zwarte Piet** (Black Pete), with faces painted black and wearing Afro wigs. The board found that although the cultural tradition is not intentionally racist, use of blackface is a common racist trope.^[30]

Ban of Donald Trump [edit]

Facebook's **deplatforming of U.S. President Donald Trump** was not among the initial decisions as it was collecting comments from the public.^{[31][32]}

On January 6, 2021, amid a **riot at the Capitol** while Congress was counting the electoral votes, Trump posted a short video to social media in which he praised the rioters, despite urging them to end the violence, and reiterated his baseless claim that the **2020 presidential election** was fraudulent.^[33] Several platforms, including Facebook, removed it, with Facebook's vice president of integrity, **Guy Rosen**, explaining that the video "contributes to rather than diminishes the risk of ongoing violence".^[34] That day, Facebook also blocked Trump's ability to post new content; the next day, Facebook said the block would remain at least until the **end of Trump's term** on January 20.^[35]

On April 16, 2021, the board announced that it was delaying the decision on whether to overturn Trump's suspensions on Facebook and Instagram to sometime "in the coming weeks" in order to review the more than 9,000 public comments it had received.^[36] Notably, on January 27, 2021, incoming board member **Suzanne Nossel** had published an **op-ed** in the *Los Angeles Times* titled "Banning Trump from Facebook may feel good. Here's why it might be wrong",^[37] but a spokesperson announced that she would not participate in the deliberations over the Trump's case and would be spending the upcoming weeks in training.^[38] On the same day Nossel's appointment was announced, the board also announced a new case.

On May 5, 2021, the board announced its decision to uphold Trump's account suspension, but instructed Facebook to reassess their decision to indefinitely ban Trump within six months.^[39] The board specified that Facebook's standard procedures involve either a timed ban or a complete removal of the offending account, stating that Facebook must follow a "clear, published procedure" in the matter.^[40]

On June 4, 2021, Facebook announced that it had changed the indefinite ban to a two-year suspension, ending on January 7, 2023. After this period ends, the company will "assess whether the risk to public safety has receded" and make a further decision.^[41]

Governance [edit]

In order to ensure the board's independence, Facebook established an **irrevocable trust** with \$130 million in initial funding, expected to cover operational costs for over half a decade.^{[42][43]} The board is able to hear appeals submitted by both Facebook and its users, and Facebook "will be required to respond publicly to any recommendations".^[42] Notably, while the initial remit of the board gave it broad scope to hear anything that can be appealed on Facebook, the company stated that it would take the building of technical infrastructure in order for this to extend beyond the appeal of removals of content.^{[44][45]} The entire Oversight Board is overseen by the Oversight Board Trust, which has the power to confirm or remove new board appointees, as well as ensure that the board is operating in accordance with its stated purpose.^{[42][43]}

Board members indicated that the board would begin its work slowly and deliberately, with a focus on producing meaningful opinions in cases carefully selected to be representative of substantial issues.^[46] Facebook also developed software to enable it to transfer cases to the board without compromising user privacy.^[46] On April 13, 2021, the Oversight Board announced that it would start accepting appeals by users seeking to take down other people's content that had not been removed following an objection.^[47]

Members [edit]

The charter provides for future candidates to be nominated for board membership, through a recommendations portal operated by the U.S. law firm **Baker McKenzie**.^[48]

The 20 members of the Oversight Board were announced on May 6, 2020.^[49] The co-chairs, who selected the other members jointly with Facebook, are former U.S. federal circuit judge and religious freedom expert **Michael McConnell**, constitutional law expert **Jamal Greene**, Colombian attorney **Catalina Botero-Marino** and former Danish Prime Minister **Helle Thorning-Schmidt**.^[49] Among the initial cohort were: former **European Court of Human Rights** judge **András Sajó**, Internet Sans Frontières Executive Director **Julie Owono**, Yemeni activist and Nobel Peace Prize laureate **Tawakkol Karman**, former editor-in-chief of *The Guardian* **Alan Rusbridger**, Pakistani digital rights advocate **Nighat Dad**, and **Ronaldo Lemos**, lawyer that created the **Brazilian Civil Rights Framework for the Internet** law.^[50]

On April 20, 2021, its newest board member, **PEN America** CEO **Suzanne Nossel**, was appointed to replace **Pamela S. Karlan**, who had resigned in February 2021 to join the **Biden administration**.^[38] As of 2021, the United States has the most substantial representation with five members, including two of the four co-chairs of the board. Two board members come from South American countries, six come from countries all across Asia, three come from Africa including one with both African and European ties, who also counts towards three coming from Europe, and one comes from Australia.

Name	Country	Term	Details
Helle Thorning-Schmidt , Co-chair	 Denmark	2020–Present	Former Prime Minister of Denmark
Catalina Botero Marino , Co-chair	 Colombia	2020–Present	Dean of Law Faculty at Universidad de los Andes
Jamal Greene , Co-chair	 United States	2020–Present	Columbia Law School Professor
Michael W. McConnell , Co-chair	 United States	2020–Present	Stanford Law School Professor
Alia Asantewaa Asare-Kyei	 Ghana South Africa	2020–Present	Human rights lawyer
Evelyn Aswad	 United States	2020–Present	University of Oklahoma College of Law Professor
Endy Bayuni	 Indonesia	2020–Present	Journalist
Katherine Chen	 Taiwan	2020–Present	Public relations and statistics professor at National Chengchi University
Nighat Dad	 Pakistan	2020–Present	Lawyer and internet activist
Tawakkol Karman	 Yemen	2020–Present	Journalist and human rights activist
Maina Kiai	 Kenya	2020–Present	Lawyer and human rights activist
Ronaldo Lemos	 Brazil	2020–Present	Member of the National Law School of Brazil

Sudhir Krishnaswamy	India	2020–Present	Vice-Chancellor of the National Law School of India University
Ronaldo Lemos	Brazil	2020–Present	Lawyer and academic
Julia Owono	Cameroon France	2020–Present	Lawyer and executive director of Internet Sans Frontières
Emi Palmor	Israel	2020–Present	Former Director General of Israeli Ministry of Justice
Alan Rusbridger	United Kingdom	2020–Present	Journalist
András Sajó	Hungary	2020–Present	Legal Scholar
John Samples	United States	2020–Present	Vice President of the Cato Institute
Nicolas Suzor	Australia	2020–Present	Queensland University of Technology Law Professor
Suzanne Nossel	United States	2021–Present	CEO of PEN America

Former Members [\[edit \]](#)

Name	Country	Term	Details
Pamela S. Karlan	United States	2020–2021	Stanford Law School Professor

Oversight Board Trustees [\[edit \]](#)

Name	Country	Term	Details
Paul G. Haaga Jr., Chair	United States	2020–Present	Former Chairman of the Capital Group
Robert Post	United States	2020–Present	Professor and former Dean of Yale Law School
Kate O'Regan	South Africa	2020–Present	Former Deputy Chief Justice of South Africa
Kristina Arriaga ^[51]	United States	2020–Present	Former Vice-Chair of the U.S. Commission on International Religious Freedom
Cherine Chalaby ^[52]	United Kingdom	2020–Present	Former Chairman of the Board of the Internet Corporation for Assigned Names & Numbers (ICANN)
Wanda Felton ^[53]	United States	2020–Present	Former Vice-Chair of the Export–Import Bank of the United States

Table of decisions [\[edit \]](#)

Decision date	Platform	Appeal type	Ruling	Countries	Relevant community standard	Link to case
January 28, 2021	Facebook	Removal	n/a	Malaysia	Hate speech	2020-001-FB-UA ↗
January 28, 2021	Facebook	Removal	Overturn	Myanmar, France, China	Hate speech	2020-002-FB-UA ↗
January 28, 2021	Facebook	Removal	Uphold	Armenia, Azerbaijan	Hate speech	2020-003-FB-UA ↗
January 28, 2021	Instagram	Removal	Overturn	Brazil	Adult nudity and sexual activity	2020-004-IG-UA ↗
January 28, 2021	Facebook	Removal	Overturn	United States	Dangerous individuals and organizations	2020-005-FB-UA ↗
January 28, 2021	Facebook	Removal	Overturn	France	Violence and incitement	2020-006-FB-FBR ↗
February 12, 2021	Facebook	Removal	Overturn	France, India	Violence and incitement	2020-007-FB-FBR ↗
April 13, 2021	Facebook	Removal	Uphold	Netherlands	Hate speech	2021-002-FB-UA ↗
April 29, 2021	Facebook	Removal	Overturn	India	Dangerous individuals and organizations	2021-003-FB-UA ↗
May 5, 2021	Facebook	Account suspension	Uphold	United States	Dangerous individuals and organizations	2021-001-FB-FBR ↗
July 10, 2021	Facebook	Removal	Overturn	Russia	Bullying And Harassment	2021-004-FB-UA ↗

Responses [\[edit \]](#)

Facebook's introduction of the Oversight Board elicited a variety of responses, with St. John's University law professor Kate Klonick describing its creation as an historic endeavor,^[54] and technology news website *The Verge* deeming it "a wild new experiment in platform governance".^[46] *Politico* described it as "an unapologetically globalist mix of academic experts, journalists and political figures".^[14]

Even before the board made its first decisions, critics speculated that the board would be too strict, too lenient, or otherwise ineffective. In May 2020, Republican Senator Josh Hawley described the board as a "special censorship committee".^[55] Other critics expressed doubts that it would be effective, leading to the creation of an unrelated and unaffiliated group of "vocal Facebook critics" calling itself the "Real Facebook Oversight Board".^[46] Facebook issued no official comment on the effort, while *Slate* described it as "a citizen campaign against the board".^[6]

Legal affairs blogger Evelyn Douek noted that the board's initial decisions "strike at matters fundamental to the way Facebook designs its content moderation system and clearly signal that the FOB does not intend to play mere occasional pitstop on Facebook's journey to connect the world".^[55]

References [\[edit \]](#)

- ¹ [^] "Oversight Board | Independent Judgment. Transparency, Legitimacy" [↗](#). *oversightboard.com*. Archived [↗](#) from the original on 5 May 2021. Retrieved 5 May 2021.
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- ⁵ [^] ^b Fung, Brian (22 October 2020). "Facebook's Oversight Board is finally hearing cases, two years after it was first announced" [↗](#). *CNN*.
- ⁶ [^] ^a ^b ^c ^d ^e ^f ^g ^h ⁱ ^j ^k ^l ^m ⁿ ^o ^p ^q DeBré, Elena (28 January 2021). "The Independent Facebook Oversight Board Has Made Its First Rulings" [↗](#). *Slate*.
- ⁷ [^] ^a ^b Douek, Evelyn (28 January 2021). "The Facebook Oversight Board's First Decisions: Ambitious, and Perhaps Impractical" [↗](#). *Lawfare*. Retrieved 21 April 2021.
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External links [edit]

- Oversight Board official website[?]
 - Bylaws and Code of Conduct[?]
 - Rulebook for Case Review and Policy Guidance[?], November 2020
 - Overarching Criteria for Case Selection[?]



Categories: Facebook Oversight and watchdog organizations Governance Facebook criticisms and controversies

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Exhibit E

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EIU's purported research , scoring matrices and review of letters of support and opposition; responsive communications from the EIU detailing the purported research, scoring matrices, and thoroughness of review; internal communications within ICANN and within the BGC discussing and considering the thoroughness of the EIU's work on Dot Registry's Community Priority Evaluations ("CPEs"); and deliberative documents for the BGC's meetings , resulting in drafts of the BGC Declaration that denied Dot Registry's Reconsideration Requests ."

See also, e.g., DCA Trust v. ICANN, case no. 50 117 T 1083 13, Procedural Order No. 3 (Sept. 25, 2014) (“ . . . the Panel is of the view that ICANN must respond to RD numbers 3 and 4 by DCA Trust and produce the documents requested . . . as set out in Procedural Order No. 3. In reaching its decision in this regard, the Panel has, among other things, taken into consideration the obligation of ICANN and its constituent bodies to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure CANN Bylaw, Article III, Section 1).”)

Claimants are entitled to a preservation order so that the IRP Panel in this case will have at least the same documents available to it from ICANN, EIU and FTI, as the IRP Panel forced ICANN to disclose in the *Dot Registry* case involving nearly identical facts, parties and documents. Claimants also seek additional documents from HTLD and Afiliis in this matter, that were not relevant in the *Dot Registry* case, and thus seeks a preservation order as to those parties as well.

C. ICANN Has Deprived IRP Claimants of Critical Procedural Rights, For More Than Six Years

The ICANN Board resolved⁷ in December 2012 to amend its Bylaws, in response to recommendations arising from a Bylaws-mandated Accountability and Transparency Review. That Review Team recommended, and the Board agreed, to retain a panel of “three international experts on

⁷ Ex. F: Board Resolution 2012.12.20.17-19.

issues of corporate governance, accountability and international dispute resolution.” That group, called the Accountability Structures Expert Panel (ASEP), produced a lengthy report⁸ that recommended a series of Bylaws changes⁹ that were subject to public comment and adopted by the Board. They became effective in 2013, and remain effective today. Since 2013, ICANN has done virtually nothing to implement the reforms that it enacted into its Bylaws, purported to enhance its accountability and transparency per its own Review Team, Expert Panel, and Board Resolution.

Those reforms provided important new procedural rights that have been denied not only to Claimants in this matter, but also to all IRP claimants since then (including many of these Claimants, in the prior .Hotel IRP). Those rights included, discussed in turn below, 1) the right to independent Ombudsman review of the BAMC’s RFR decisions, before consideration by the ICANN Board; 2) the implementation of a trained Standing Panel to decide IRP complaints and requests for interim relief, and to provide *en banc* appellate review of such decisions; 3) the implementation of Rules of Procedure for the IRP, accounting for the new Bylaws provisions; and 4) providing that ICANN pay the full administrative cost of the IRP, including payment of all Standing Panel fees.

ICANN has no excuse for depriving Claimants of these rights, six years after they were mandated in the Bylaws. ICANN has reaped the rewards of its inaction, by causing claimants to pay ICDR filing and panelist fees that ICANN’s Bylaws require ICANN to pay via implementation of a Standing Panel. These have totalled millions of dollars since 2013, paid by claimants instead of ICANN. ICANN was excoriated by another ICDR Emergency Panelist for failing to adopt the Standing Panel, as of 2014. ICANN still has done precious little since then. They must now be found (again) to have been violating their Bylaws -- very obviously -- all this time, and they must be ordered to implement these

⁸ Ex. G: Report by ASEP, October 2012.

⁹ Ex. H: Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendation of the Accountability Structures Expert Panel.

accountability mechanisms now, so that Claimants are not denied (again) these important procedural rights.

1. ICANN has denied Ombudsman Review of Claimants' RFRs, and indeed all pertinent RFRs, leaving its "Accountability Mechanisms Committee" to sham reconsider that Committee's own decisions re .HOTEL and all other New gTLD applications.

ICANN stated, in its curt denial of RFR 18-6:

Whereas, the BAMC previously determined that Request 18-6 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

There was no explanation given for the recusal. And as to RFR-16-11, even though the BAMC decided to consider that RFR in 2018, it failed to refer it to the Ombudsman as required by the Bylaws then in effect. Indeed, despite ICANN's latest Bylaws (Section 4.2(l)(iii)) that require a purportedly independent Ombudsman (though hired and paid by ICANN...) to review each and every RFR, as the only purportedly independent check on ICANN's decisions, short of filing an IRP Complaint. An IRP Complaint has required a minimum \$3750 filing fee to ICDR, the appointment of and payment for three distinguished arbitrators (typically costing in excess of \$100,000); and, IRP cases typically take well over a year to get to a Final Declaration.

This new Ombudsman Review provision was added at ICANN's own appointed experts' behest, approved through community comment and Board Resolution, to improve ICANN's accountability and transparency. It was designed to provide a much-needed, purportedly "independent" check on ICANN decisions, short of full-blown IRP proceedings. ICANN makes a mockery of that "accountability mechanism" by employing an Ombudsman who has stated, without explanation, that he is conflicted out of every single RFR relating to the New gTLD Program -- more than 90% of RFRs historically.

The RFR Bylaws are very clear (emphasis added):

(l) For **all** Reconsideration Requests ..., the Reconsideration Request shall be sent to the Ombudsman, who **shall** promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman **shall** submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

Likewise, the Bylaws re the Ombudsman are clear and unequivocal, twice. In Art. 4, Sec. 5.2, the Charter: "With respect to the Reconsideration Request Process set forth in Section 4.2 , the Ombudsman shall serve the function expressly provided for in Section 4.2 ." Again in Sec. 5.3, Operations, "The Office of the Ombudsman shall: ... (b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests."

Moreover, Bylaws generally require ICANN to solicit and accept independent expert advice, which the Ombudsman is intended to seek out with respect to all RFRs, and produce an independent report for the BAMC. Otherwise, as under the old Bylaws in dozens of RFR cases re the New gTLD Program, the same committee of the Board that made the decision, also considered the RFR. Those five people on the BAMC routinely 'reconsider' their own decisions. Unsurprisingly, RFRs are always denied by the BAMC. Of the fourteen¹⁰ RFRs concerning the new gTLD program filed since 2017, the BAMC has recommended that all fourteen be denied. The Board has adopted the BAMC's recommendation in all of the 14 cases.

¹⁰ This number only includes administratively compliant requests reviewed by the BAMC.

The “new” 2013 Bylaws were supposed to make the RFR process more meaningful, to provide a purportedly neutral¹¹ check before BAMC decisions. That is particularly important where it is the BAMC decision that is under review. It is a sham that they are constantly, solely reviewing their own decisions. It is longstanding legal doctrine that a reviewing body should not take part in the investigation of its own underlying decision. *E.g., Willapoint Oysters v. Ewing*, 174 F.2d 676, 692 (9th Cir. 1949) (“No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review.”) (*quoting* section 5(c) of the Administrative Procedure Act).

But ICANN has subverted this check on its decisions by failing to provide a non-conflicted Ombudsman, not just in this case but in every single case concerning the New gTLD program at least since 2017. Indeed, it appears the Ombudsman has recused itself in 15 out of 19¹² cases, including 14 of 14¹³ cases involving New gTLD applicants. One might reasonably believe that ICANN chose this Ombudsman because he is conflicted so often, or at least they do not mind that so much. As it has left very few cases where he has engaged -- and none re new gTLDs.

It clearly violates ICANN’s Bylaws to systematically refuse to provide this important, purportedly neutral and independent check prior to consideration and adoption by the BAMC or Board. This is especially important in this case, because it was the BAMC that made the underlying decisions which claimants sought ICANN to reconsider -- and the Board delegated that reconsideration, indeed all RFRs, right back to the BAMC. That Committee contains just five members of the Board,

¹¹ Note the Ombudsman is still hired, paid and fired at the pleasure of the ICANN Board, which also sets the budget for the Office of the Ombudsman. Bylaws Art. 5, Sec. 5.1.

¹² This number includes only administratively compliant requests.

¹³ *Id.*

who have unfettered power to “reconsider” their own critical decisions with respect to the New gTLD Program. The Ombudsman is supposed to provide a check on that.

At bare minimum, ICANN must disclose the specific reasons the Ombudsman recused, and explain why a substitute ombudsman could not have been appointed to fulfill this critical role. Otherwise, there appears to be no legitimate reason why Claimants have been denied that crucial right in this case. That review could have helped avoid this IRP proceeding entirely, or at least substantially narrow the issues for decision. Indeed, it still can, via appointment of a substitute ombudsman to review this RFR as required by the Bylaws. The BAMC then should consider that input as required by the Bylaws. Perhaps then this IRP can be withdrawn, or at least substantially narrowed.

2. ICANN has continued to violate its Bylaws by failing to make any real progress to adopt a “Standing Panel” of specially trained IRP panelists, chosen with broad community input -- for some nine years -- despite several iterations of Bylaws and a prior IRP Declaration clearly requiring it.

3. ICANN also has failed to adopt IRP Rules of Procedure -- for some six years -- despite the Bylaws that have clearly required ICANN to do so; instead, we have incomplete, improper ‘Interim’ rules in place for more than three years now, with no apparent timeline or plan to complete the actual Rules.

The Bylaws expressly have required creation of an IRP Standing Panel, since 2013.^{14/15}

There shall be an omnibus standing panel of at least seven members (the "Standing Panel") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training....

¹⁴ Bylaws, Sec. 4.3(j) and (k); see also, *DCA Trust v. ICANN*, Decision on Interim Measures of Protection, ¶¶ 29-30 (May 12, 2014) (discussed *infra*).

¹⁵ The former ICDR Supplemental Procedures for ICANN IRP, dated 2011, repeatedly referred to a standing panel that is yet to exist.

ICANN's own Interim Rules, Section 3 (since at least 2016) begins "The IRP Panel will comprise three panelists selected from the Standing Panel." Section 10 provides that the Emergency Panel shall be selected from the Standing Panel, which obviously will not be possible in this case. And, Section 14 follows on Bylaws, Art. 4.3(w), and provides for the right of appeal of IRP panel decisions to the illusory Standing Panel, *en banc*.¹⁶ Claimants are deprived of these important procedural rights, and others,^{17/}¹⁸ solely because of ICANN's willful inaction, refusing to create a Standing Panel for some nine years now.

This is particularly outrageous because ICANN was admonished by a previous IRP Panel for exactly this same reason, exactly six years ago:¹⁹

29. First, the Panel is of the view that this IRP could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel [with] "knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an IRP as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.

¹⁶ An IRP Panel Decision may be appealed to the full Standing Panel sitting *en banc* The *en banc* Standing Panel will review such appealed IRP Panel Decision based on a clear error of judgment or the application of an incorrect legal standard.

¹⁷ Claimants also have been forced to pay a \$3750 filing fee to ICDR, despite Bylaws Sec. 4.3(r) ("ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members."). Claimants have requested ICANN to repay that filing fee to Claimants, and have been denied. Ex. XX ("ICANN does not pay for the ICDR fees when there is no standing panel.")

¹⁸ The Bylaws Sec. 4.3(e)(iv) also state that a mediator should be provided from the Standing Panel, during the precursor Cooperative Engagement Process ("CEP") phase of the IRP. Claimants were denied that opportunity during CEP.

¹⁹ *DCA Trust v. ICANN*, Decision on Interim Measures of Protection, ¶¶ 29-30 (May 12, 2014).

Now, it's almost seven years later, not just one. ICANN has not even made any real progress towards implementing a Standing Panel, or finalizing the Interim Rules. Obviously, by its willful inaction for so long, ICANN has decided the implementation of its so-called "Accountability Mechanisms" is an extremely low priority. ICANN has thumbed its nose at the *DCA Trust* IRP Panel Decision, for six years, despite all the very purposes of the IRP to provide binding decisions and to guide ICANN actions to remedy Bylaws violations. ICANN has failed to come close to finalizing the Interim Rules imposed more than three years ago, promised by the Bylaws six years ago. That failure likely will cause much to be argued by the parties and decided by the Panel -- which should have been the focus of ICANN-driven community consensus, and set in the Rules by now.²⁰ But it hasn't been even a remote priority for ICANN.

Indeed, this has directly benefited ICANN's finances, saving perhaps more than \$1 million per year on fees paid by IRP Claimants to the ICDR, which ICANN should have been paying to maintain a Standing Panel as clearly required by its Bylaws since 2013. ICANN has no incentive to create the Standing Panel that it must pay for, when it has willfully shirked that Bylaws obligation for more than six years already, with impunity -- forcing dozens of Claimants to pay ICDR fees for administration of the IRP, that should have been ICANN's sole fiscal responsibility, per its own Bylaws.

Besides the obvious financial harm from being forced to pay ICDR fees, it harms Claimants to not have benefit of appointments from a Standing Panel with the specialized training, resultant expertise, and community backing that the Bylaws required ICANN to provide to all IRP claimants so

²⁰ Bylaws, 4.3(n)(i) and (iv) "The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements: [for example]... (C) Rules governing written submissions.... (D) Availability and limitations on discovery methods; (E) Whether hearings shall be permitted ..."

long ago. And then, in the end, these Claimants entirely would be denied the basic *en banc* appeal mechanism provided by ICANN's own Bylaws more than six years ago, and its own Interim Rules purportedly implemented more than three years ago -- except for that part about the Standing Panel. Still illusory, after all these years. ICANN has violated its Bylaws by taking so long to implement both the Standing Panel and the Rules of Procedure, causing direct harm to Claimants and to all parties who would seek Independent Review of ICANN conduct.

4. ICANN must pay all administrative costs of this IRP, including all Panelists' fees.

Claimants respectfully demand that ICANN pay all costs of the Emergency Panelist in this matter, and of all IRP panelists appointed in this matter, because that is clearly required by the ICANN Bylaws. Article 4.3(r) states that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members." Obviously, ICANN has intentionally refused to implement the Standing Panel, as it then would be required to pay millions of dollars in fees annually to the Standing Panel members, much of which is paid by Claimants to the ICDR now -- and for the past six-plus years since the Standing Panel was to be implemented. ICANN cannot be allowed to blatantly ignore its crystal clear Bylaws commitments, and concomitant financial obligations, for so long and at such great cost to the broader community and to Claimants in this case.

Certainly, there is no basis for ICDR to require Claimants to pay 100% of the Emergency Panel fees, as ICDR has required thus far in accord with its "unwritten rule". ICDR offers no explanation as to why it has ordered that, rather than an equal pre-split of emergency panel fees, as with IRP panelist fees in all previous cases. Its purported "rule" to this effect is an indicator of institutional bias towards ICANN, and certainly has a chilling effect on such Requests. ICANN's position is frivolous; it cannot reasonably argue that it has not violated its Bylaws by failing to provide an Ombudsman review of

RFRs, and by failing to implement the Standing Panel and Rules of Procedure after all this time.

Therefore, ICANN must be required to pay all IRP costs, as required by the very Bylaws that ICANN continues to violate.

CONCLUSION

For all of the foregoing reasons, Claimants respectfully request an order pursuant to Section 10 of the Interim Rules, specifically requiring ICANN to: A) not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP; B) preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this matter; and, C) provide to Claimants the procedural rights required by ICANN's Bylaws for more than six years; namely, 1) appoint an independent ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6; 2) appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Rules, from which any IRP Panel shall be selected per Section 3 of the Interim Rules, and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the Interim Rules; 3) adopt final Rules of Procedure as required by ICANN Bylaws; and, 4) pay all costs of the Emergency Panel and of the IRP Panelists.

RESPECTFULLY SUBMITTED,

By: 

Mike Rodenbaugh
RODENBAUGH LAW

Attorneys for Claimants

DATED: April 24, 2020

Exhibit F

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
A Division of the American Arbitration Association (AAA)
CASE # 50 117 T 1083 13**

In the matter of an Independent Review Process pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

**Between: DotConnectAfrica (DCA) Trust;
("Claimant")**

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

**Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")**

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

DECISION ON INTERIM MEASURES OF PROTECTION

**Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)**

12 May 2014

BACKGROUND

1. DotConnectAfrica (“DCA”) Trust (“Claimant”), is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
2. In March 2012, DCA Trust applied to the Internet Corporation for Assigned Names and Numbers (“ICANN”) for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
3. ICANN (“Respondent”) is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
4. On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA’s application.
5. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
6. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, however, no resolution was reached.
7. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

INDEPENDENT REVIEW PROCESS

8. According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process invoked by DCA Trust in October 2013 and

described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”¹

9. According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’S application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”² DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”³
10. In its Response to Claimant’s Amended Notice submitted to DCA Trust on 10 February 2014⁴, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”⁵
11. ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”⁶
12. Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African

¹ Claimant’s Amended Notice of Independent Review Process, *para.* 2.

² *Ibid.*

³ *Ibid.*

⁴ ICANN’s Response to Claimant’s Amended Notice contains a typographical error, it is dated “February 10, 2013” rather than 2014.

⁵ ICANN’s Response to Claimant’s Amended Notice, *para.* 4

⁶ *Ibid.* *para.* 5

countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the Guidebook; [and] ICANN properly denied DCA’s Request for Reconsideration.”⁷

13. In short, ICANN argued that in these proceedings, “the evidence establishes that the process worked exactly as it was supposed to work.”⁸

REQUEST FOR INTERIM MEASURES OF PROTECTION

14. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules. In addition, DCA Trust indicated that it believed it had the right to seek such relief because there is no standing panel (as anticipated in the Supplementary Procedures for ICANN Independent Review Process), which would otherwise hear requests for emergency relief.

15. In response, in an email dated 5 February 2014, ICANN wrote:

“Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA’s IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.”⁹

16. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted to ICANN on 28 March 2014, DCA Trust argued, *inter alia*, that, “in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.”¹⁰

⁷ *Ibid.*

⁸ *Ibid. para. 6*

⁹ ICANN counsel’s email to DCA Trust counsel dated 5 February 2014.

¹⁰ Request for Emergency Arbitrator and Interim Measures of Protection, *para. 3*

17. DCA Trust also argued that “on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*”¹¹
18. According to DCA Trust, that same day, “ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith.”¹² DCA Trust also argued that on 25 March 2014, as per ICANN’s email to the ICDR, “ICANN for the first time informed DCA that it would accept the application of Article 37 [of the ICDR International Dispute Resolution Procedures, amended and effective June 1, 2009 (“ICDR Rules”)] to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process.”¹³
19. In its Request, DCA Trust argued that it “is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA’s only competitor – which took actions that were instrumental in the process leading to ICANN’s decision to reject DCA’s application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN’s own constitutive instruments and international law.”¹⁴
20. Finally, DCA Trust requested, among other things, the following interim relief:
- a. An order compelling ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...]¹⁵

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 4.

¹⁴ *Ibid.*, para. 5.

¹⁵ *Ibid.*, para. 6.

21. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection submitted on 4 April 2014, ICANN urged that DCA's request for a stay be denied. ICANN also reproached DCA for having waited five months before initiating its Request for Interim Measures of Protection pursuant to Article 37 of the ICDR Rules.
22. ICANN further argued that Claimant's Request for Interim Relief ought to be denied because "DCA has not demonstrated a reasonable possibility that it will succeed on the merits of this IRP, which the law requires DCA to demonstrate."¹⁶
23. According to ICANN, "DCA's decision to wait five months before seeking a stay reflects the weakness of DCA's claims and the lack of any corresponding irreparable harm to DCA. This is compounded by the fact that DCA has done nothing to try to expedite these proceedings. To the contrary, DCA has failed to file its fees timely, it sought multiple extensions of time to file its papers, and it requested a very leisurely amount of time for the parties to select the IRP Panel. ICANN, and not the DCA, has been the party trying to expedite these proceedings, and DCA has resisted at every turn."¹⁷
24. DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, initially scheduled for a hearing on 14 April 2014 before an emergency arbitrator pursuant to ICDR Rules 21 and 37, was instead referred to this Panel on 13 April 2014 for review and consideration pursuant to Article 37.6 of the ICDR Rules.
25. On 22 April 2014, this Panel held an organizational telephone conference call with the Parties. During that call, it was agreed, among other things, that the telephone hearing for DCA's Request for Interim Measures of Protection will be heard on 5 May 2014, and that ICANN would not take any further steps that would in any way prevent this Panel from granting the full relief requested by DCA Trust in its Request. These and a number of directions given by the Panel to the Parties were reflected in a Procedural Order No. 1 issued on 24 April 2014.
26. On 5 May 2014 this Panel heard the Parties' submissions on their respective written submissions and the Panel's questions sent to them in advance on 2 May 2014.

¹⁶ ICANN's Response to Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 3.

¹⁷ *Ibid.*, *para.* 30.

DECISION AND REASONS OF THE IRP PANEL

27. After having carefully read DCA Trust's written submissions and the responses filed by ICANN, and after listening to the Parties' respective oral presentations made by telephone on 5 May 2014, for reasons set forth below, the Panel is unanimously of the view that a stay ruling in the form described below is in order in this proceeding and that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its final decision regarding the same.
28. The Panel finds that interim relief in this proceeding is warranted based on two independent and equally sufficient grounds.
29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:
- "There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."
30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.
31. In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review. This is the same opportunity DCA would have enjoyed without a stay, but for ICANN's failure to create the standing panel.
32. Whether the Panel's decision is advisory only, as ICANN contends, or binding, as DCA Trust argues, the Panel is strongly of the view that ICANN's unique, international and important public functions require it to scrupulously honor the procedural protections its Bylaws, rules and regulations purport to offer the internet community. ICANN has been entrusted with the important

responsibility of bringing order to the global internet system. As set out in Article I, Sections 1 and 2 of ICANN's Bylaws:

"[t]he mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. [...] In performing its mission, the following core values should guide the decisions and actions of ICANN:

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial to public interest.

[...]

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

33. In the Panel's unanimous view, it would be unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief by DCA Trust arises out of ICANN's failure to follow its own Bylaws and procedures.
34. Second, interim relief in this case is independently warranted for reasons unrelated to ICANN's role in creating the need for such relief as explained above.
35. DCA Trust argues that four criteria must be satisfied before interim relief is granted under international law and in international proceedings: urgency, necessity, protection of an existing right, and existence of a *prima facie* case on the merits, without the necessity of prejudging the matter.
36. ICANN agrees with the first three criteria identified by DCA Trust, but disagrees with the fourth. For ICANN, the Panel needs to find more than a *prima facie* case on the merits before ordering interim relief in this proceeding. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, ICANN submits that the standard must be the one set out in article 17(A)(1)(b) of the UNCITRAL *Model Law on International Commercial Arbitration*. ICANN explains:

"In fact, it is generally accepted under both international and U.S. law that, in order to demonstrate entitlement to interim relief, the party seeking relief must also demonstrate a reasonable possibility of success on the merits. For example, Article 27 [*sic.*] (A)(1)(b) of the United Nations Commission on International Trade Law's ("UNCITRAL's") Model Law on International Commercial Arbitration states that a party requesting an interim measure must demonstrate

that “there is a reasonable possibility that the requesting party will succeed on the merits of the claim.” [...] Likewise, under U.S. law, a party seeking a preliminary injunction must at least demonstrate that “the likelihood of success is such that serious questions going to the merits were raised.”¹⁸

37. The Panel agrees with the Parties that the four criteria listed above in paragraph 35 form a part of the criteria most commonly used by international and national courts and arbitral tribunals¹⁹ to evaluate a party’s request for interim relief. The Panel, however, does not see a distinction between the demonstration of “a prima facie case” or “a reasonable possibility that the requesting party will succeed on the merits of the claim”. Like the International Law Association (“ILA”), the Panel is of the view that the demonstration of “a prima facie case” and “a reasonable possibility that the requesting party will succeed on the merits of the claim” are in reality one and the same standard.
38. Indeed, as the ILA recommended in its resolution of 1996²⁰, the granting of an interim relief should be available “on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law”.

Urgency

39. Both DCA Trust and ICANN agree that urgency is one of the criteria that this Panel must consider before it decides to grant interim relief. DCA Trust in particular argues that the orders it requests are needed urgently, because:

“[w]ithout the order compelling ICANN to stay processing of ZACR’s application, DCA will suffer irreparable harm before the IRP process can be concluded... A request for interim measures of protection is considered urgent, if absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before such final decision is given. This standard is sometimes termed “imminent harm”. In light of ICANN’s response to DCA’S request that it refrain from signing a Registry Agreement with ZACR – namely, signing the agreement 48 hours ahead of time in order to prevent any effective intervention by DCA – the additional harm DCA seeks to prevent clearly is imminent. Moreover, ZACR claims that it will have received

¹⁸ *Ibid.*, para. 21.

¹⁹ By “most commonly used”, the Panel means that this standard is used by international or regional courts and tribunals, but also by many domestic courts under their own laws.

²⁰ ILA Report of the Sixty-Seventh Conference, Helsinki, 1996, p. 202.

all rights to .AFRICA by April 2014, and will begin operating .AFRICA by May 2014.”²¹

40. The Panel is satisfied that the urgency test is met in the present case. Indeed, DCA Trust argues, without being contradicted by ICANN, that in March 2014 the latter officially signed the registry agreement for the .Africa gTLD with ZACR, DCA Trust’s competitor.
41. The urgency test is met as well when the Panel takes into consideration, ICANN’s noncommittal email to it and DCA Trust of 23 April 2014, in which ICANN writes:

“I am writing to follow up...with respect to the timing of the ultimate delegation by ICANN to ZA Central Registry of .AFRICA into the root zone...ICANN will not, as a practical matter, be able to conclude the delegation process prior to 15 May 2014. As a result, the schedule adopted by the Panel...would give ICANN the opportunity to consider the Panel’s recommendation in the event the Panel recommends a stay.” [Emphasis added]

42. The registry agreement being signed, the countdown for the launch of the .Africa gTLD could commence. ZACR announces on its website (<https://www.registry.net.za/launch.php>) that the launch should take place in June 2014. This Panel, even if it works very rapidly, will not be in a position to decide on the merits of DCA’s Request for an Independent Review before June 2014. Therefore, there is absolutely no doubt in the Panel’s mind that DCA Trust’s need for interim relief in this matter is urgent.

Necessity

43. Both DCA Trust and ICANN agree that a test of necessity must be met before granting the requested interim relief. Indeed, in its Response to Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, ICANN writes:

“As DCA acknowledges in its Request, in order to show necessity under international law, it must demonstrate proportionality, *i.e.* that the harm it would occur in the absence of interim relief measures would “exceed [] greatly the damage caused to the party affected” by these measures. DCA contends that it would suffer serious harm in the absence of interim relief because the “operation of .AFRICA is a unique right” and “DCA was created expressly for the purpose of campaigning for, competing for and ultimately operating .AFRICA.” But DCA fails to acknowledge that, whatever its unilateral plans might have been, its

²¹ Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 30.

actual probability of harm is greatly diminished by its scant probability of success on the merits. DCA also fails to note the substantial potential harm that ZACR could suffer if the processing of its application for, and the ultimate delegation of, .AFRICA is delayed.”

“ICANN’S decision to proceed with the processing of ZACR’s application for .AFRICA despite DCA’s pending IRP is a reflection of ICANN’s belief that: (i) DCA’s IRP is frivolous and unlikely to succeed on the merits; and (ii) ZACR potentially could suffer substantial harm if the delegation of .AFRICA to it is further delayed.”²²

44. The Panel is of the opinion that the necessity test requires the Panel to consider the proportionality of the relief requested. The Panel thus must balance the harm caused to DCA Trust if a stay is not granted and the harm that would be caused to ICANN if interim relief were to be ordered. As explained by DCA Trust:

“If [DCA Trust] is deprived of the opportunity even to compete to operate .AFRICA, DCA will be unable to accomplish its charitable aims and will be unable to perform its mandate [...] By contrast, ICANN will suffer no similar harm...Regardless of the outcome of the IRP, ICANN will be able to delegate .AFRICA. [Similarly, ZACR may receive the rights to “AFRICA even if DCA is permitted to compete with it pursuant to ICANN’s rules and procedures for the new gTLD program.] The IRP is meant to be an expedited dispute resolution process. A slight delay in delegation is hardly an undue burden compared to the issues at stake.”²³

45. It is abundantly clear to the Panel from the facts as explained by both Parties in this case that if a stay is not granted and the registry agreement between ICANN and ZACR is implemented further, the chances of DCA Trust having its Request for an independent review heard and properly considered will be jeopardized.
46. The Panel considers that a stay in the implementation of the registry agreement between ICANN and ZACR is therefore proportionate and adequate to the particular circumstances of this case. Indeed, neither ICANN, nor ZACR will suffer from a few more months of delay if a stay of processing of ZACR’s .AFRICA application is ordered. Indeed, neither ICANN nor ZACR has pointed to any specific prejudice or harm that it will suffer if DCA Trust’s request for interim relief is granted. The same cannot be said about the

²² ICANN’s Response to Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 25 and 26.

²³ Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 27 and 29.

absence of such a relief for DCA Trust, which clearly would suffer irreparable harm if interim relief is not granted.

Protection of an existing right

47. DCA Trust has demonstrated, to the satisfaction of this Panel that, beyond the procedural rights it must enjoy to have its case heard, DCA Trust also enjoys, according to ICANN's own Bylaws, the right to have ICANN's Board decision reviewed by an independent panel, a right which will be lost if interim relief is not granted in this case. Indeed, Article IV, Section 3, paragraph 1 of ICANN's Bylaws unequivocally indicates that:

"In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." [Emphasis added]

Consequently, the Panel has determined that this criterion for the granting of interim relief in this case has also been met.

A reasonable possibility that the requesting party will succeed on the merits

48. This criterion was most heavily debated between the Parties. ICANN argues that DCA Trust does not have a case on the merits. In fact, ICANN goes as far as saying that Claimant's Request for an Independent Review Process is frivolous. Therefore, ICANN argues that DCA Trust has not demonstrated that there is a reasonable possibility it would succeed on the merits. In the Panel's view, by doing so, ICANN is asking for more than is required of DCA Trust at this stage of the independent review process.
49. Contrary to ICANN'S submissions, the Panel is of the view that it need not, at this stage, make a full appraisal of the merits of DCA Trust's case, given that the standard of proof for interim relief is lower than the standard of proof required for the evaluation of the merits of the case²⁴.
50. Having carefully examined the written submissions of the Parties, heard their oral submissions by telephone and deliberated on the various issues raised by them to date, the Panel is of the view that DCA Trust's case must proceed to the next stage.

²⁴ See the report accompanying the ILA resolution of 1996 mentioned in footnote 2. On page 195, the report says that the "standard of proof propounded (...) was one which found wide acceptance" among all the countries studied, except one.

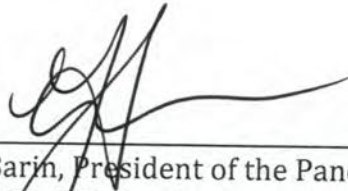
DECISION OF THE IRP PANEL

51. The Panel therefore concludes that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same.
52. The Panel reserves its views with respect to the other requests for relief made by DCA Trust in its Request for Emergency Arbitrator and Interim Measures of Protection. The Panel will consider the Parties' respective arguments in that regard if and when required by the Parties and if appropriate.
53. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Decision on Interim Measures of Protection has thirteen (13) pages. The members of the Panel have all reviewed this decision and agreed that the Chair may sign it alone on their behalf.

Signed in Montreal, Quebec for delivery to the Parties in Los Angeles, California.

Dated 12 May 2014.



Babak Barin, President of the Panel, on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.) as consented to by the Parties in their respective emails to the Panel of 7 May 2014

Exhibit G

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
A Division of the American Arbitration Association (AAA)
CASE # 50 117 T 1083 13**

In the matter of an Independent Review Process pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

Between: **DotConnectAfrica (DCA) Trust;**
("Claimant")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

DECISION ON ICANN'S REQUEST FOR PARTIAL RECONSIDERATION

Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

4 June 2014

BACKGROUND & PARTIES' POSITIONS

1. On 20 May 2014, following receipt of the Panel's Decision on Interim Measures of Protection dated 12 May 2014 ("Decision"), ICANN applied to the Panel with a Request for Partial Reconsideration ("Request") of paragraphs 29 to 33 of the Decision, which read as follows:

29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:

"There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.

31. In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review. This is the same opportunity DCA would have enjoyed without a stay, but for ICANN's failure to create the standing panel.

32. Whether the Panel's decision is advisory only, as ICANN contends, or binding, as DCA Trust argues, the Panel is strongly of the view that ICANN's unique, international and important public functions require it to scrupulously honor the procedural protections its Bylaws, rules and regulations purport to offer the internet community. ICANN has been entrusted with the important responsibility of bringing order to the global internet system. As set out in Article I, Sections 1 and 2 of ICANN's Bylaws:

"[t]he mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. [...] In performing its mission, the following core values should guide the decisions and actions of ICANN:

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial to public interest.

[...]

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

33. In the Panel's unanimous view, it would be unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief by DCA Trust arises out of ICANN's failure to follow its own Bylaws and procedures.
2. In its Request, ICANN submitted that it did not fail to follow its Bylaws and that the Panel's statement that it has failed to "follow its own Bylaws and procedures is not accurate". ICANN remarked, however, that the "Panel's statement was in the context of addressing which of the parties should be viewed as responsible for the delays associated with DCA's request for interim relief" and it indicated that ICANN was not asking the "Panel to re-evaluate its position on interim relief at this time."
 3. In its Request, while ICANN acknowledged that "a standing panel is not yet in place to hear the Independent Review proceedings", ICANN argued that the last sentence of Article IV, Section 3, paragraph 6 of ICANN's Bylaws – and in particular the passages that are in italics below – specifically provide that "in the circumstances in which a standing panel is not in place when a particular proceeding is initiated, the proceeding will be considered by a one – or three – member panel comprised in accordance with the ICDR's rules."

In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one – or three – member panel comprised in accordance with the rules of the IRP Provider [...].
 4. Hence, ICANN concluded, "since the Bylaws specifically address the possibility that a standing panel might not exist, and those same Bylaws set forth how an Independent Review proceeding would be presided over in the absence of a standing panel, it is not appropriate to state that, because no standing panel is in place, ICANN has failed to follow its Bylaws".
 5. Having been given the opportunity to respond to ICANN's Request in the Panel's 27 May 2014 Procedural Order No. 2, DCA Trust submitted that there "is no basis for modifying the Panel's Decision...for the simple reason that ICANN was under an obligation to create a standing panel and failed to do so."
 6. According to DCA Trust, ICANN "adopted the standing panel requirement in April 2013 at the recommendation of a panel of three experts chosen to evaluate ICANN's accountability structures and suggest improvements. Notably, the experts recommended that ICANN institute a standing panel, but did not recommend that there be any alternatives for forming an IRP Panel in the event that ICANN neglected to create such a panel. It is not clear how the additional language relating to the constitution of an IRP Panel in the absence of a standing panel came to be added to the Bylaws...The ICANN Board Resolution approving the amended language stated only that 'if a standing panel cannot be comprised or cannot remain comprised, the Bylaws now

allow for Independent Review proceedings to go forward with individually selected panelists’.”

7. According to DCA Trust, ICANN “added the language on the constitution of an IRP Panel in the absence of a standing panel solely in order to avoid delaying any potential IRP proceedings commenced after the effective date of the revised Bylaws but before ICANN had the opportunity to form an omnibus panel...Although there is no deadline in the Bylaws for forming the standing panel, given the mandatory nature of the provision, ICANN certainly should have acted by now – more than one year later – to establish it.”
8. Based on the above submissions, DCA Trust requested that the Panel deny ICANN’s Request.

THE PANEL’S REASONS & CONCLUSIONS

9. After careful consideration of the Parties’ respective submissions, the Panel is of the unanimous view that ICANN’s Request must be denied for two reasons.
10. First, there is nothing in ICANN’s Bylaws, the International Dispute Resolution Procedures of the ICDR effective as at 1 June 2009 or the Supplementary Procedures for ICANN Independent Review Process that in any way address the Panel’s ability to address ICANN’s Request. The Panel has not been able to find any relevant guidance in this regard in any of the above instruments and ICANN has not pointed to any relevant provision or rule that would support its argument that the Panel has the authority to reconsider its Decision of 12 May 2014.
11. Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel’s Decision and it has not requested an interpretation of the Panel’s Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN’s view, inaccurate.
12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust’s Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is

not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a standing panel. Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

THE PANEL'S DECISION


13. The Panel therefore concludes that ICANN's Request must be denied.

14. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the decision on the merits.

This Decision on ICANN's Request for Partial Reconsideration has five (5) pages. The members of the Panel have all reviewed this decision and agreed that the Chair may sign it alone on their behalf.

Signed in Montreal, Quebec for delivery to the Parties in Los Angeles, California.

Dated 4 June 2014.



Babak Barin, President of the Panel, on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.)

Exhibit H

1.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PROCESS
ICDR CASE NO. 01-15-0005-9838

In the Matter of an Independent Review Process

Between:

ASIA GREEN IT SYSTEM
BILGISAYAR SAN. VE TIC. LTD. STI., ("AGIT")
Claimant

Vs.

INTERNET CORPORATION for ASSIGNED
NAMES AND NUMBERS ("ICANN")
Respondent

FINAL DECLARATION

Independent Review Process Panel:

Calvin Hamilton, FCI Arb (Chair)

Honourable William Cahill (Ret.)

Klaus Reichert SC

PROCEDURAL HISTORY

2. The relevant procedural history of this Independent Review Process ("IRP") is set out in the following paragraphs. The Panel has only recorded those matters which it considers, in its appreciation of the file of this IRP, necessary for this Final Declaration.
3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: Mike Robenbaugh
Robenbaugh Law
548 Market Street (Box No 55819)
San Francisco, CA 94104

Respondent: Eric Enson, Jeffrey A. LeVee, Kelly Ozurovich
Jones Day
555 South Flower Street 50th Floor
Los Angeles, CA 90071

4. The authority for the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with “declaring whether the Board has acted consistently with the Provision of ICANN’s Articles of Incorporation and Bylaws.”
5. The applicable procedural rules are the International Centre for Dispute Resolution’s (ICDR) International Dispute Resolution Procedures, as amended and in effect as of 1st June 2014, as augmented by ICANN’s Supplementary Procedures, as amended and in effect as of 2011.
6. On 7th February 2014, ICANN’s chairman informed AGIT that, following the New gTLD (“gTLD”) Programme Committee (“NGPC”) decision and subsequent Resolution made on 5th February 2014, “the NGPC will not address the applications further until such time as the noted conflicts have been resolved”.¹ AGIT submit that from this point, their applications were “On Hold”.²
7. On 26th February 2014, AGIT filed a Request for Reconsideration with ICANN’s Board Governance Committee (“BGC”). AGIT’s request was summarily dismissed by the BGC on 13th March 2014, and this decision was accepted by the NGPC.³
8. On 21st February 2014, AGIT requested that ICANN engage in a “Cooperative Engagement Process” in accordance with the Bylaws of ICANN.⁴ The Cooperative Engagement Process was terminated on 13th November 2015 and no resolution was reached.
9. AGIT submitted a Request for Independent Review Process (“IRP Request”) on 16th December 2015, which ICANN responded to on 1st February 2016. AGIT submitted a supplemental brief on 6th January 2017, which ICANN responded to on 3rd February 2017.

¹ See Annex 12 I

² This status was confirmed by Mr Enson in paras 13 – 25, pg 95 – Telephonic Hearing

³ See Annex 14

⁴ S3, Article IV, ICANN Bylaws

10. A preparatory conference call was held on 19th April 2016 during which a procedural calendar was agreed upon (Procedural Order No.1).
11. Pursuant to Procedural Order No. 1, AGIT submitted their ‘Observations on the Scope of Panel Authority’ on 3rd May 2016, which ICANN responded to on 13th May 2016.
12. With respect to document requests, pursuant to Procedural Order No. 1, AGIT were required to submit their request for document production on 3rd May 2016. ICANN were to answer by 13th May and, if appropriate, were to both request documents and object to AGIT’s request. On 23rd May 2016, AGIT were to both reply to ICANN’s objection, and file their own objection against ICANN’s request if appropriate. ICANN were to answer AGIT’s objection by 2nd June 2016. The 2nd June 2016 was set for ICANN’s document production, and 13th June 2016 for AGIT. The issue of document disclosure was eventually resolved by the parties themselves with little involvement by the Panel.
12. A telephonic hearing took place on 4th May 2017. Present for the hearing were the IRP Panel (Calvin Hamilton (Chair), Honourable William Cahill, Klaus Reichert SC), Mike Rodenbaugh for AGIT (“the Claimant”), Eric Enson for ICANN (“the Respondent”). Amy Stathos and Casandra Fure were also present on behalf of the Respondent. The hearing was reported by Jana J. Bommarito.

PANEL AUTHORITY

13. The authority of this Panel is set out in the following paragraphs.
14. Article IV, Section 3.4 ICANN Articles of Incorporation and Bylaws:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a) Did the Board act without conflict of interest in taking its decision?;

- b) Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c) Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

15. As articulated by the IRP Panel in *Merck KGaA v ICANN*⁵ and as stipulated by the parties in this IRP:

“The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for comparison requires careful assessment of the action itself rather than its characterisation by either the complainant or ICANN. The Panel, of course, does take careful note of the characterisations that are advanced by the Claimant and ICANN.

As regards the substantive object of the comparison exercise, namely, was there consistency as between the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit in focusing on three specific elements. The phrase “defined standard of review” undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word “consistent” as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.⁶”

FACTS OF THE CASE

16. The salient facts are set out in the following paragraphs.

17. ICANN is a non-profit, multi-stakeholder organisation incorporated in California, United States of America. It was established in 1998, and is charged with registering and administering both top and second level domain names. ICANN operates pursuant to its Articles of Incorporation and Bylaws.

⁵ International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604

⁶ *Merck KGaA v ICANN* International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604IRP Final Declaration Paras 16-18

18. From 2004-2011, the Generic Names Supporting Organisation (“GNSO”) of ICANN developed a programme to introduce new top-level domain names into the domain name system (gTLD). An applicant guidebook (“Guidebook”) was developed by ICANN in consultation with stakeholders, detailing a “transparent and predictable criteria” for applications.⁷
19. The Guidebook includes detailed procedures for applying for and objecting to the issuance of top level domain names. ICANN aimed to create “an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁸ Applicants must provide detailed responses to 50 questions, which seek to establish the competency of applicant. The objection process includes an Independent Objector (“IO”) and the prospect of an objection by one or more of the Governments that make up ICANN’s Government Advisory Committee (“GAC”). The IO can lodge an objection, which ordinarily results in the appointment of one or more independent experts to consider and determine the merits of the objection.⁹
20. In addition to the IO and GAC formal objections, GAC members are permitted to file an “Early Warning Notice”, detailing concerns about applications.¹⁰ Early Warning Notices simply act to place an applicant on notice. It is not a formal objection, however it “raises the likelihood that the application could be the subject of GAC Advice on New gTLDs or of a formal objection at a later stage in the process.”¹¹ Concerning GAC Advice, in situations where members of the GAC provide “consensus” advice against an application, a strong presumption is created against that application. Should the Board of ICANN decide to act contrary to this advice, they must provide a rationale for doing so.¹² Concerning formal objections, the objection must fall within one of four specified grounds - String Confusion, Legal Rights, Limited Public Interest or Community Objection.¹³ In determining whether an objector has standing to object, they must satisfy one of these four identified Objection Grounds which are dependent of the ground being

⁷ Recommendation One, S.1.1.5, ICANN, gTLD Final Applicant Guidebook.

⁸ Preamble, ‘New gTLD Program Background’ gTLD Applicant Guidebook Version 2012-06-04

⁹ S3.2.5 Applicant Guidebook

¹⁰ S1.1.2.4 Applicant Guidebook

¹¹ Ibid (1.1.2.4)

¹² S1.1.2.7 Applicant Guidebook

¹³ S3.2.1 Grounds for Objection

used.¹⁴ In addition, a Limited Public Interest Objection comment process¹⁵ is available, which allows for the “participation of many stakeholder groups in a public discussion.”¹⁶

21. In early 2012, Asia Green IT System (“AGIT”), a Turkish cooperation, submitted two applications to ICANN under the new gTLD programme to operate the .ISLAM and .HALAL top-level domains. Following their applications, Early Warning Notices were submitted by the United Arab Emirates (UAE) and India¹⁷ in November 2012, to which AGIT filed formal responses.¹⁸ Within their responses, AGIT included a proposed Governance Model and Public Interest Commitments (“PICs”), which it hoped would alleviate the concerns raised in the Early Warning Notices.¹⁹

22. In addition, the IO, Dr Pellet, was instructed to evaluate the applications. The UAE then filed two formal objections under the grounds of a Community Objection against each of the applications. The Applicant Guidebook details those with standing to submit a Community Objections as “(e)stablished institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.”²⁰ Following this, Mr Cremades, a Panellist from the International Chamber of Commerce, was instructed to consider the objections.

23. On 11th April 2013, the GAC, in accordance with the Applicant Guidebook,²¹ published a Communique to the ICANN Board following a meeting in Beijing to consider the two applications. The Communique noted:

“The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.”²²

¹⁴ See 3.2.2 Applicant Guidebook,

¹⁵ See telephonic pg 69 lines 20-25

¹⁶ See Guidebook I.1.2.3

¹⁷ India did not post formal objections following their Early Warning Notices.

¹⁸ See Annex 6

¹⁹ Ibid - 6

²⁰ See 3.2.2.4

²¹ S3.1 Applicant Guidebook

²² See full text of Communique at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

24. Following this, a scorecard system was produced to assist in the evaluation of the applications, and a subsequent meeting took place in Durban in July 2013.
25. On 25th July 2013, both Kuwait and the Gulf Cooperation Council (“GCC”) expressed objections to the applications by AGIT and support of the Community Objection by the UAE.²³
26. On 30th August 2013, AGIT were informed that both the .ISLAM and the .HALAL applications were accepted by ICANN’s expert evaluation Panels,²⁴ and that their applications had passed Initial Evaluation²⁵.
27. On 4th September 2013, Lebanon expressed objections to the applications by AGIT and support of the Community Objection by the UAE.
28. On 24th October 2013, Mr Cremades published a report evaluating the Community Objection filed by the UAE against both applications. In his decision, Mr Cremades found there was neither substantial opposition to the applications, nor would the applications create a “likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community.”²⁶
29. On 4th November 2013, a letter was received by the ICANN Board, and subsequently sent to the GAC, from the Organisation of Islamic Council (“OIC”). The letter contained a formal objection to the use of top-level domain names by “any entity not representing the collective voice of the Muslim people.”²⁷ Following receipt of this letter, dialogue was recommended and a meeting held in Buenos Aires. It is submitted by ICANN that the letter of objection by the OIC was received as part of their “public comment” process,²⁸ which allows for the “participation of many stakeholder groups in a public discussion”²⁹ thereby giving a platform to interested parties outside of the formal objection process. Time constraints are provided for the consideration of comments during the Initial

²³ See telephonic pg 67 Lines 6-1

²⁴ See Annex 2

²⁵ Ibid

²⁶ See Annex 8

²⁷ See pg10 AGIT’s request for an IRP wherein they note: “in November 2013, the Chair of the ICANN Board forwarded to the GAC Chair a letter from the OIC which requested the GAC to “kindly consider this letter as an official opposition of the Member States of the OIC ... [to] use of these [TLDs] by any entity not representing the collective voice of the Muslim people.”

²⁸ See telephonic pg 69 lines 20-25

²⁹ See Guidebook 1.1.2.3 and telephonic g 61 lines 10 - 16

Evaluation review (the formal objection period runs for seven months following the posting of applications³⁰), however the Guidebook allows for comments received after this period to be “stored and available (along with comments received during the period) for other considerations, such as the dispute resolution process, as described below.”³¹

30. On 19 December 2013, the OIC informed ICANN that a unanimous resolution had been adopted by the 57 Member States of the OIC objecting to the operation of .ISLAM and .HALAL by “any entity not reflecting the collective voice of Muslim people”.³² The Panel notes that this resolution is not amongst the materials placed before it.

31. On 24th December 2013, the Government of Indonesia filed its objection with ICANN to both of the applications.

32. On 5th February 2014, the NGPC applied the objections raised to the scorecard, and on 7th February 2014, AGIT were informed “the NGPC will not address the applications further until such time as the noted conflicts have been resolved.”³³ The letter informed AGIT that two IGOs and two Government representatives (the GCC, the OIC, Lebanon and Indonesia) had indicated conflicts with AGIT’s Governance model and the PIC.

33. The task of this Panel is to determine whether ICANN have acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Guidebook.

PROVISIONS OF ICANN’S ARTICLES OF INCORPORATION, BYLAWS AND THE APPLICANT GUIDEBOOK

34. The salient provisions of these governance documents are listed below:

35. Article 4, Articles of Incorporation

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

³⁰ Guidebook 1.1.2.6

³¹ Ibid

³² See telephonic pg 70 lines 8-13

³³ See Annex 12

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

36. S3 (4) Article IV Bylaws and Rule 8 of ICANN Supplementary (Independent Review of Board Actions)

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *Did the Board act without conflict of interest in taking its decision?*
- b. *Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

37. S2 Article I Bylaws (Core Values)

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- a. *Core Value 3*
- b. *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- c. *Core Value 7*
- d. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- e. *Core Value 8*
- f. *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- g. *Core Value 9*
- h. *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*

38. Article II, Section 2 (3) Bylaws (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

39. Article II, Section 2 (1) Bylaws (General Powers)

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors.

40. Article III, Section 3 (6) Bylaws (Notice and Comment on Policy Actions)

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

- i. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;*
- ii. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board; and*
- iii. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.*

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) *After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.*

41. Article VI, S 4 (6) Bylaws and Article I Supplemental Procedures

There shall be an omnibus standing Panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The Panelists shall serve for terms that are staggered to allow for continued review of the size of the Panel and the range of expertise. A Chair of the standing Panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing Panel. In the event that an omnibus standing Panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member Panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more Panelists, as required, from outside the omnibus standing Panel to augment the Panel members for that proceeding.

42. §1.1.5 Applicant Guidebook

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process (...)

a. *Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider Panel that finds in favor of*

the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD

43. §3.1 Applicant Guidebook

The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.³⁴

44. §3.1 (II) Applicant Guidebook

GAC Advice may take one of the following forms:

(...)

II. The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

45. §3.2 Applicant Guidebook

As described in section 3.1 above, ICANN’s Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

46. §5.1 Applicant Guidebook

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

³⁴ “May” no requirement to adhere to advice of experts, or indeed to appoint in the first place. Cf pg 21 AGIT Request for IRP

47. GNSO Recommendations:

ICANN GNSO, Final Report — Introduction of New Generic Top-Level Domains:³⁵

Recommendation No. 1: The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

Recommendation No. 9: There must be a clear and pre-published application process using objective and measurable criteria.

Recommendation No. 12: Dispute resolution and challenge processes must be established prior to the start of the process.

Principle G:

The String Process must not infringe on the applicant's freedom of expression rights that are protected under internationally recognised principles of law.

PARTIES' POSITIONS

48. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties.

POSITION OF THE CLAIMANT

49. AGIT seeks a declaration that the Board of ICANN acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its granting of an "On Hold" status to AGIT applications for .HALAL and .ISLAM. AGIT makes the following contentions, set out below.

50. ICANN consulted in secret with the GAC and Objectors regarding the delay or denial of AGIT's application, in violation of Core Values 7 and 9. Core Value 7 mandates open and transparent policy development that promote well informed decisions based on expert advice. Core Value 9 mandates ICANN to act promptly while, as part of the decision-making process, obtaining informed input from those entities most affected.

³⁵ See AGIT Request for IRP – pg 18

51. In particular, through meetings in Beijing and Durban, and via correspondence with the OIC:

Beijing meeting:

Only ICANN staff, executives and Board members were allowed in the room – Restricted to “Members Only”³⁶ (although this policy changed shortly afterwards) No minutes, transcripts or rationales from the meeting were released;

Durban meeting:

Closed meeting held with “some GAC representatives”. No transcript has ever been produced outside of the 32 minute recording.³⁷

52. No effort was made to reach out to AGIT to participate in the discussion or provide input. The meeting was only attended by a “few GAC members” without inviting or informing the entire GAC what took place, or informing AGIT, the public or the GNSO of what occurred at the meeting.

53. Despite requests, no Board member met with AGIT CEO/MD while in Durban.

54. ICANN held a number of meetings with the OIC, despite the untimely and undocumented procedure for further objections. AGIT were unable to obtain further information on these meetings.

55. ICANN failed to obtain informed input from either AGIT or the Objectors prior to reaching its 5th February 2014 resolution, in violation of Core Value 9.

56. ICANN violated Core Value 8 by failing to inform AGIT of the conflicts which it must resolve in order to progress from “On Hold” status.

57. ICANN have violated Core Values 3, 7 and 8, along with §3.1 of the Guidebook by deciding in a manner inconsistent with expert advice, and this action is discriminatory.

³⁶ Annex 20

³⁷ See telephonic pg 22 lines 22 – 25

58. ICANN have acted in a discriminatory manner, contrary to Article II, §2 (3) Bylaws (Non-Discriminatory Treatment) by differentiating between the treatment of .KOSHER/.SHIA with .HALAL/.ISLAM.
59. Under Module 3³⁸, the GAC were responsible for rejecting any applications which violated public interest. By the GAC failing to recommend rejection of AGIT's applications to the Board as per the Guidebook §3.1, they provided implicit consent to both applications. This should have been taken into account by the Board.
60. ICANN have violated §1.1.5 of the Guidebook by acting in a manner inconsistent with the scenarios laid down.
61. The non-disclosure by ICANN of requested documents under the Document Disclosure Policy ("DIDP") violates Core Values 7 and 8.
62. ICANN have violated Article 4, §3 (6) by failing to create a Standing Panel as required by their Bylaws.

POSITION OF THE RESPONDENT

63. ICANN disputes each of AGIT's contentions, and asserts that the Board did not violate the Articles of Incorporation, the Bylaws or the Guidebook.
64. ICANN refutes the accusation that secret consultations took place with GAC Objectors, specifically as regards the *Beijing Meeting*: the ICANN Board examined, discussed, evaluated and responded to the GAC's advice from the Beijing meeting. Meetings prior to mid-2013 were held with GAC members only, making the decision to hold the Beijing meeting with members-only routine.
65. Specifically as regards the *Durban Meeting*, neither the Articles of Incorporation, Bylaws nor the Guidebook mandate a full complement of GAC members or Board members to be present during such a meeting.
66. Neither the Articles of Incorporation, Bylaws nor the Guidebook mandate that members of the Board meet with an applicant on the applicant's request.

³⁸ See pg7 AGIT - Supplementary Brief

67. Specifically as regards *OIC correspondence* ICANN staff members' responsibilities include outreach and dialogue with stakeholders in the Middle East, which includes the OIC.
68. There is no evidence that any communications with the OIC influenced the Board's decision to place the applications on hold.
69. The Board not only fulfilled but exceeded its requirements under §3.1 (2) by:
- a. Entering into dialogue with concerned GAC members at the Durban meeting;
 - b. Reviewing correspondence from various Objectors;
 - c. Its use of the 5th February Scorecard; and
 - d. Communicating the rationale behind its decision in a letter to the Claimant, dated 7th February 2014, by informing the Claimant of the conflicts arising, the identities of the objectors, the nature of their objections and what the Claimant must do before the Board would resume consideration of the applications.
70. The Board will resume consideration of the .ISLAM and .HALAL applications once the conflicts noted have been resolved, however ICANN is not required to act as liaison between the Claimant and those who objected to its application.
71. New policy has not been created, rather the Board have followed §5.1 of the Guidebook in exercising their discretion to consider individual applications and whether they are in the best interests of the Internet community.
72. The Board is not mandated under either the Articles of Incorporation, Bylaws or Guidebook to follow expert opinion.
73. No discrimination has occurred with the granting of .KOSHER/.SHIA and .HALAL/.ISLAM. Any difference in treatment of the referenced applications was a result of different circumstances.
74. Scenario 4 contained in §1.1.5 Guidebook is not "any sort of promise by ICANN"³⁹, and instead provides scenarios by which an application may proceed. This provision does not mandate that an application must proceed.⁴⁰

³⁹ Supplementary Response by ICANN pg 22 para 50

75. ICANN staff are tasked with responding to document requests, not the ICANN Board. Board involvement takes place when a reconsideration request, seeking the Board's review of staff action regarding document disclosure, is requested by a Claimant. As a reconsideration request was not filed, no Board action was taken. An IRP is concerned only with Board actions. However, should ICANN's response to the DIDP request be subject to review by the IRP, ICANN submits that staff complied with "standards applicable to DIDP requests."⁴¹
76. The decision not to produce certain documents under the DIDP request but to do so under the IRP conforms to standards and processes in place.

STATEMENT OF REASONS

77. The Panel is of the view that in order to address the party's positions as posed in this IRP, the analysis utilised in the *Merck* declaration is instructive. Applying Article IV, §3.4 Articles of Incorporation and Bylaws, with, where relevant, consideration to the following questions:
- a. Did the Board act without conflict of interest when taking its decision?
 - b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?
 - c. Did the Board members exercise independent judgement in taking the decision, believed to be in the best interests of the company?

BEIJING MEETING:

ACTION: RELIANCE ON LIMITED OUTPUT FROM THE BEIJING MEETING

78. In order for the GAC to properly evaluate gTLD applications, geographic meetings are held in accordance with §3.1 Guidebook.
79. The GAC was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly in matters where there may be an

2.

⁴⁰⁴⁰ See telephonic pg. 97 lines 2-10 "These are simply 2 examples of ways in which applications may proceed. This is not intended it be an exhaustive list of possibilities."

⁴¹¹ Ibid pg 23 para 54

interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

80. The framework and structure for how these meetings are convened, minuted and disseminated are a matter of convention, outside of structured rules. Guidance can be taken from convention, noting from an interview held on 10th May 2014 between Heather Dryden, Head of the GAC with Brad White, ICANN Communications, that, although policy has now changed, previous GAC meetings were held through a 'closed format.'⁴² It is instructive that in May 2013, Heather Dryden confirmed that going forward, GAC meetings would be more open.⁴³

81. The sole output from the Beijing meeting was a Communique of 6 pages.⁴⁴ The only wording relating to the Claimants application consisted of 58 words, detailing concerns on 'religious sensitivity' of the gTLDs.⁴⁵ In addition, the Communique stated that the GAC members concerned were of the view that the applications should not proceed.⁴⁶ No more is said. Core Value 7 calls upon ICANN to employ "open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process". It is the opinion of the Panel that a 58 word output in this manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7. Anyone not physically present at that meeting would have little idea, if any, beyond the general contours contained the Communique, as to what actually happened during the meeting nor what was said by any of the participants.

Did the Board act without a conflict of interest?

82. This is not applicable. There is no evidence of a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

⁴² See Annex 21 – Claimant's Supplemental Brief

⁴³ Ibid

⁴⁴ Excluding Annexes.

Full Communique available here: <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

⁴⁵ As quoted in para 23 above

⁴⁶ The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .ISLAM and .HALAL. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

83. The closed nature and limited record of the regarding the Beijing meeting provides little in the way of ‘facts’ to the Board. Of the 6 page document produced by the GAC to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilising vague and non-descript terms. For the reasons set out in paragraph 81 above, any reliance on the Beijing Communique by the Board in making their decision would necessarily be to do so without a reasonable amount of facts.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

84. This is not applicable. There is no evidence of a lack of independence with regards the Beijing Communique and the manner in which the Board considered this document.

DURBAN MEETING:

ACTIONS: LIMITED OUTPUT FROM THE MEETING; INSUFFICIENT INVOLVEMENT BY GAC MEMBERS; INSUFFICIENT INVOLVEMENT BY ICANN BOARD; INSUFFICIENT INVOLVEMENT BY CLAIMANT

85. The meetings in Durban were held in July 2013, post the noted policy change⁴⁷ of employing a more open structure to GAC meetings. The Claimant has received a 32-minute audio recording of this meeting, however no Communique was issued.

86. The Guidebook, under §3.1, references the process of the GAC providing advice to the ICANN Board where objections exist to the gTLD application. It would appear eight Board members and ten GAC members were present.

87. The Claimant claims the limited number of GAC attendees at the Durban meeting to discuss the objections renders the advice insufficient to constitute “GAC Advice”. §3.1 does not specifically state what constitutes GAC Advice insofar as whether a full complement, majority, minority or affected parties need be present.

88. The Claimant claims that §3.1 should be interpreted using an *Expressio Unius* model in such that as other sections of the Guidebook and Bylaws use a restricted composition of the GAC, then any other reference automatically applies to the full GAC. For example:

⁴⁷ Para 71

§2.2.1.4 of the Guidebook states, with regard early warnings: “... *GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities.*” and

“... *GAC consensus is not required for a GAC Early Warning to be issued.*”

89. The argument that a full complement of GAC members need to be present in order to constitute GAC advice is flawed. There is no reference to quorum requirements in §3.1 and it is practical that only relevant and concerned members be in attendance.
90. Contrastingly, the Claimant did not reference the statement in Guidebook §3.1 which states the “... *GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors...*” This gives rise to an implication that more than the mere objectors should be present at a GAC advisory meeting.
91. The Claimant uses a number of emails in order to demonstrate disagreement with the manner in which the meeting was carried out. The emails range in date from 1st July 2013 – 12th July 2013, and the Claimant relies specifically on emails sent by Ray Plzak, member of the ICANN Board, between the 1st July 2013 and 10th July 2013, questioning the form in which the meeting was to take place.⁴⁸ These emails indicate that Mr Plzak had a number of questions and queries regarding the format of the meeting. Heather Dryden stated that this was to be “*a meeting available to the subset of Members in the GAC that has a direct interest in these strings.*”⁴⁹ Mr Plzak acknowledges in his 2nd July email “*The fact is that not all GAC members are either interested in all matters or participate in all discussions, or even attend discussions on all matters.*”⁵⁰
92. The Claimant claims that the full Board membership should have been present for the Durban meeting. However, it is the view of this Panel that neither the Bylaws nor the Guidebook mandate full Board attendance.
93. The Claimant claims that a breach of Core Values 7 and 9 occurred through the lack of involvement by the CEO/MD⁵¹ of Claimant during the meeting in Durban. The CEO/MD

⁴⁸ See Annex 22, Claimants Supplementary Annexes

⁴⁹ Annex 22 - Email dated 2nd July 2013

⁵⁰ Ibid

⁵¹ Please note that both titles are present in the 11th July email from Mehdi Abbasnia, and as such, both are used here.

of the Claimant company attempted to meet with ICANN Board members during the Durban meeting (annex 25). The CEO/MD emailed all ICANN Board members on 11th July but was unsuccessful in meeting with any Board members.

Did the Board act without a conflict of interest

94. Claimants claim that the reason for the reduced complement of Board members at the Durban and Beijing meetings was, in the end, to ensure the gTLD string was made available to a 3rd party during the next round of applications.
95. Furthermore, the meetings were deemed to have been organised and structured in a way that was outside of usual GAC and Board meetings. It was accepted that this was not a meeting of the GAC but rather a discussion for the board to understand the concerns of the GAC. The Panel finds on this record the Board did not have a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it

96. The Board is mandated under the Guidebook §3.1 to review advice from the GAC at such meetings in collaboration with additional advice it deems necessary. The Respondent claims that it was unnecessary to include members over and above those with an interest in the gTLD which may have provided more rounded advice.
97. It is the opinion of this Panel that, whilst a meeting with the CEO/MD of the Claimant company may have increased the volume of facts which the Board had in front of it, the lack of available Board members to meet with the Claimant's CEO/MD is not inconsistent with Core Values 7 or 9. The meeting requests were private matters, and therefore at the discretion of each party.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

98. Judgement involving the make-up of the meetings being only those who have an interest is based on the Guidebook, which states:

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to

understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

99. The ICANN Board met with the GAC members who had an interest in .HALAL and .ISLAM in order to greater understand the concerns. There is no evidence that the reduced number of GAC members in attendance was not following the exercise of independent judgment.

ACTION: CONTINUED CONSULTATIONS WITH THE ORGANISATION OF ISLAMIC STATES (“OIC”)

100. There would appear to be a lack of openness and transparency with regards discussions with the OIC, in particular with regards alleged meetings which occurred via telephone on or around 29th October 2013⁵² and in November 2013 in Buenos Aires.⁵³ ICANN acknowledged through their Supplementary Response that that they are both unclear as to whether the meeting took place and unclear as to what was discussed beyond membership or failed community objections.⁵⁴ Whilst it is acknowledged that the OIC had lodged objections to the Claimant’s applications through the public comment process, it is the opinion of this Panel that such meetings, held with ICANN staff and not ICANN Board members, are not in breach of Core Value 7. ICANN staff do not hold decision making authority, and it is evidenced through Annex 28 that the OIC were advised of their obligations to follow ICANN procedure.⁵⁵ It is further noted that the members of staff which communicated with the OIC at this time were specifically tasked with outreach to the Middle East,⁵⁶ making such communications and meetings an expected element of such outreach.

Did the Board act without a conflict of interest

101. ICANN, in its Response to the Claimant’s request for an IRP, acknowledge that an outreach programme is operating with the Middle East, and with the OIC representing 57

⁵² See Claimant Supplementary Brief pg 5

⁵³ Ibid

⁵⁴ See para 21 ICANN’s Response to Claimant’s Supplementary Brief: “*Likewise, it is not clear that the meeting discussed in Annex 26 ever took place and, if it did, what was discussed beyond the OIC’s GAC membership or the OIC’s failed community objection against the Applications*”

⁵⁵ No. 129, Email from ICANN Senior Advisor – OIC Rep “asked the funny question whether the two strings could be delegated to the OIC. We told him never outside the process”.

⁵⁶ See ICANN Response to AGIT Request for IRP – pg 4.

Muslim states, consultations with the body throughout Claimant's application process were inevitable. ICANN have informed the Panel through their Supplementary Response that ICANN staff do not have decision making authority with respect to applications, and it is ICANN staff who were conducting the outreach. It is therefore the opinion of this Panel that the Board acted without a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

102. The content of the meetings between ICANN staff and the OIC is unclear. However, it is the remit of this IRP to consider Board actions, and it is the opinion of this Panel that the Board have exercised due diligence and care in light of a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

103. This Panel has no evidence of staff members passing on any information from the undocumented meetings discussed above to Board members. In light of the lack of evidence to the contrary, it is the view of this Panel that on this record, independent judgement was made.

ACTION: EXTENT OF INPUT OBTAINED FROM ENTITIES MOST AFFECTED

104. It is the opinion of the Panel that the numerous meetings and subsequent Communiqués demonstrate involvement by entities most affected in the context of the objectors, and therefore ICANN did not breach its obligation under Core Value 9. Core Value 9 mandates "acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected". Input was received by ICANN from objectors on numerous occasions, including and notably during the Durban meeting. Numerous communications have taken place between the GAC and the objectors, through both the Community Objection, subsequent support of the Objection and the public comment process. ICANN stated the following in their 7th February letter to the Claimant:

"... a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM. The Gulf Cooperation Council (25 July 2013: applications not supported by the community, applicants did not

consult the community; believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC); the Republic of Lebanon (4 September 2013: management and operation of these TLDs must be conducted by a neutral, nongovernmental multistakeholder group); the Organisation of Islamic Cooperation (19 December 2013: foreign ministers of 57 Muslim Member States supported a resolution opposing the strings; resolution was unanimously adopted); and the government of Indonesia (24 December 2013: strongly opposes approval of .islam) all voiced opposition to the AGIT applications... ”⁵⁷

Did the Board act without a conflict of interest?

105. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

106. Based on the lack of information provided by the Board of the ‘religious sensitivities’ or information on how the Governance model offered by the Claimant could be improved, amended or adapted, it is the view of this Panel that, based on this record, the Board did not exercise the appropriate due diligence and care, due to not having a reasonable amount of facts in front of it. Had the Board been in a position to elaborate on the religious sensitivities and subsequent amendments which could be made to ensure the Governance model of the Claimant would be sufficient, the Claimant would have been in an improved position with regards removing itself from the current “On Hold” position in which it finds itself.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

107. The lack of detailed content obtained from the meetings held with concerned GAC members, along with insufficient information on the revisions needed by the Claimant for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board did not exercise independent judgement with regards the objectors. Independent judgement requires a reasonable

⁵⁷ See Para 37, Pg 16 ICANN’s response to AGIT’s Supplemental Brief

amount of facts to be placed before the decision maker. Without such a reasonable amount of facts, independent judgement cannot be achieved.

ACTION: PLACING THE CLAIMANT'S APPLICATIONS "ON HOLD" WITHOUT DOCUMENTED PROCEDURE FOR SUCH AN OCCURRENCE

108. The Claimants maintain that they were not informed as to which conflicts they were to resolve with the objectors, why they must do so, how they might do so, who will judge whether it has done so, by what criteria or following which schedule.⁵⁸ ICANN maintains that their behaviour and information provision went over and above that necessary when informing the Claimant.
109. It is the opinion of this Panel that the Claimant was expressly informed as to what conflicts they were to resolve through the letter dated 7th February 2014. Through this letter, the Claimant was informed which countries had raised objections through documented, dated letters, detailed over 2 paragraphs.⁵⁹ Although somewhat brief, the conflicts were identified. However, the manner in which the Claimants and objectors were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, the Claimant was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved.
110. The Panel accepts the contention made by ICANN that it is not ICANN's responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an "On Hold" applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work.
111. During the telephonic hearing, ICANN submitted that by placing the .HALAL and .ISLAM applications in an "On Hold" category, the Claimants were given an opportunity to work with the community and group which they sought to represent.⁶⁰ However, ICANN went on to acknowledge that there is no obligation on the Objectors to speak with

⁵⁸ See, for example, pg 10 AGIT Supplementary Response

⁵⁹ See Ibid

⁶⁰ Telephonic - pg 72 – 73 lines 13-25 and 1 - 7

the Claimant, and ICANN does not have the jurisdiction to require such communication takes place.⁶¹ ICANN stated that should this be the case, and the Claimant is unable to make progress with the Objectors, they should inform ICANN in “some official manner” and inform the Board. This statement, made by Mr Enson on behalf of ICANN, is unacceptably vague, and even at this late stage, fails to provide the Claimant with a structured means of addressing a potential lack of cooperation in resolving in the conflicts noted. It is this absence of procedure and documented policy which concerns this Panel with regards the “On Hold” status. In addition, the Claimant has noted that “*there’s been no other applicant put on hold*”⁶² and this statement was not refuted by ICANN.

112. Core Value 8 mandates “making decisions by applying documented policies neutrally and objectively, with integrity and fairness”. There is a distinct lack of documented policy with regards the next steps required by the Claimant, and in particular how and when these steps will be assessed. Rather, it is unclear as to which or how many objectors have authority to even negotiate a resolution to the objections. Even if that were known, the Claimant is left entirely at the mercy of the Objectors, who may not agree to cooperate, may insist that unreasonable conditions be imposed on the Claimant or indeed any number of other potential unknown outcomes. The Guidebook provides for a detailed, clear, comprehensive and structured approach to applications, documenting policies and providing assistance with the application process. This does not mean that every application has an expectation of success, but rather that applicants know the “rules of the game” and exactly what the requirements for success are. However, the situation in which the Claimant finds itself does not feature in the Guidebook. It is the opinion of this Panel that this is a glaring omission, and should be rectified promptly. Without such a documented procedure, it is the view of this Panel that ICANN is acting in a manner which is inconsistent with Core Value 8.
113. The Claimant claims that by placing its application “On Hold”, ICANN has created a new policy, and by doing so without following documented procedure, inconsistency has occurred. The Panel agrees.
114. As discussed above, the Claimant argues that it was not informed as to what conflicts it must resolve with the Objectors, why it must do so, how it might do so, who will judge whether it has done so, and by what criteria or schedule.⁶³

⁶¹ Telephonic – pg 77 lines 16 - 25

⁶² Telephonic – pg 36 lines 19-25

⁶³ See, for example, pg 10 AGIT Supplementary Response

115. There are, therefore, two possible paths to consider with regards the “On Hold” status.
116. First, this is a new concept. A new norm has been created, which ICANN will have the discretion to apply to future applications, which in turn will have new policy creation implications as per the Bylaws.
117. Secondly, this is a one-off. Relevant only to the circumstances surrounding these two applications, in which case, the question of non-discrimination arises.
118. Based on the lack of previous use, and the positive light in which ICANN presented this “On Hold” status during the telephonic hearing (*“Judge Cahill, it’s a good question and I think it demonstrates what ICANN is doing here. And ICANN, rather than just denying the applications based on every Muslim country saying they don’t want this, the ICANN Board gave the Claimant the opportunity to work with the very community (...)”*)⁶⁴, this Panel are minded to consider this a new policy.
119. Placing the applicant on hold is markedly distinct from a ‘yes’ or ‘no’. Where a ‘yes’ is given, the Guidebook offers detailed procedure and policy to follow. When a ‘no’ is given, an application is refused. Both of these options follow clear and concise paths, which are prescribed and available. In contrast, the “On Hold” status is neither clear nor prescribed. One cannot easily predict the way in which such a status will be applied in the same way as they can a ‘yes’ or ‘no’. This is a very specific status, and one which requires greater clarification and explanation. It is for these reasons that the designation of these applications as “On Hold” is considered a new policy, created, without notice or authority, by ICANN.
120. Following the Bylaws, where a new policy is created, a structured procedure must be followed, and ICANN has failed to adhere to this obligation. In addition, with respect to Core Value 7, which calls for the employment of open and transparent policy development mechanisms, it is the opinion of this Panel that such openness and transparency with regards this policy development has not been forthcoming. The first opportunity which the Claimant had to learn of the new policy was when it was imposed upon them through the 7th February letter.

⁶⁴ Telephonic – Pg 72 lines 18 – 24

Did the Board act without a conflict of interest?

121. The Claimant contends that the decision to place the applications “On Hold”, without method or procedure which the Claimant could utilise to move its application forward, was done in order to allow a third party to submit a applications for these two TLDs. However ICANN staff have rebutted this contention, and no applications for .HALAL or .ISLAM have been accepted, some three or more years after the applications were placed on hold. Whilst questions surround the manner in which this policy has been implemented, it is the opinion of this Panel, on this record, that no conflict of interest has occurred.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

122. The decision to place the applications on hold, without foreseeing the need for a formalised mechanism to be in place under which applications placed in this category are to proceed, would indicate that the Board has not acted with sufficient facts in front of it. The Board could not have had a reasonable amount of facts in front of them pertaining to the operation of the on hold status, as such facts do not exist as yet. Had ICANN created a policy under which decisions such as this would operate and formulated a suitable framework, then the Panel could appreciate how the Board may have been acting with a reasonable amount of facts in order to make the decision to place the applications on hold. However, without such a procedure or mechanism in place to accompany the new policy, it is the view of this Panel that the Board has not exercised due diligence with regards this decision as the Board did not have a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

123. By the Respondent failing to foresee the need for or advance a formalised mechanism under which an “On Hold” applications are to proceed, the parties find themselves in front of this IRP in order to resolve the questions which have arisen following the “On Hold” decision. It is the opinion of this Panel that, although independent judgement was exercised by the Board, the decision to place the applications “On Hold” without foreseeing the difficulties that could arise from such a decision was not in the best interests of the internet. Clear, efficient and effective mechanisms are essential in ensuring that the best interests of the internet are suitably considered and served by ICANN.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH EXPERT ADVICE

124. Core Value 7 calls for “well-informed decisions based on expert advice”, but does not mandate that once advice is provided, it must be followed.
125. The Guidebook permits the Board to consult with independent experts under §3.1 *The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.*
126. The Guidebook therefore does not mandate consulting with independent experts, rather the discretion is left to the Board. This is clear through the inclusion of the term “may”. It would therefore be counter-logical if this Panel were to interpret the Guidebook as to allowing the Board discretion to determine *whether* to obtain an expert opinion, but should they decide to, *bind them* to the contents of the opinion.
127. In light of the provisions of both the Guidebook and the Bylaws, it is the opinion of this Panel that the Board is entitled to decide in a manner inconsistent with expert advice.

Did the Board act without a conflict of interest?

128. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

129. Although ultimately deciding to follow a course contrary to expert opinion, ICANN was privy to the opinions of experts when making their decision, including that of the Independent Objector, Dr. Pellet and of Mr. Cremades, the Community Objection Expert. There is no evidence of a lack of due diligence and care in having a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

130. Although deciding contrary to expert opinion, ICANN submitted that it did so in light of all of the facts in front of them. Expert opinion was sought and considered, and those experts were considered to be independent. This fact has not been contested. It is therefore the view of this Panel that the Board did exercise independent judgement in reaching its decision with regards expert opinions.

ACTION: DISTINGUISHING BETWEEN THE GRANTING OF .KOSHER/.SHIA AND “ON HOLD” STATUS OF .HALAL/.ISLAM

131. ICANN informed the Panel through their Response to the Supplemental Brief of the following:

“The applications for .KOSHER and .SHIA were not the subject of any GAC advice or successful Community Objections, and thus were properly delegated pursuant to the procedures set forth in the Guidebook”⁶⁵

132. In reaching its decision, the Panel have considered the .AMAZON case, whereby an allegation arose of disparate treatment by the NGPC against the Claimant.⁶⁶

Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

(...) As pointed out by ICANN’s counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws’ proscription against disparate treatment applies to Board action, and this threshold requirement is missing.

⁶⁵ See ICANN’s response to the Supplemental Brief Pg 21, Para 48

⁶⁶ G : Para 120 – 121 AMAZON EU S.A.R.L

Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

133. It is the opinion of this Panel that, as with .AMAZON, no Board action took place with regards the .KOSHER application, and therefore the threshold for this requirement is missing. No action inconsistent with Article II, S3 of the Bylaws has occurred.

Did the Board act without a conflict of interest?

134. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

135. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

136. This is not applicable as the Board decision is not being considered due to the distinction made above.

ACTION: IMPACT OF THE GAC FAILING TO REJECT AN APPLICATION

137. This is outside of the remit of this Panel, which is tasked with ascertaining whether or not there have been actions by the Board which are inconsistent with the Bylaws, Articles of Incorporation or the Guidebook. However, as an observation, following the Guidebook, the GAC are not mandated to expressly accept or reject an application, and therefore their decision not to reject is in accordance with the Guidebook.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH GUIDEBOOK SCENARIO

138. Following the overarching aim of the Guidebook, one must assume that the scenarios referenced were included in order to assist candidates with their applications, but with no intention of binding the Board. The following, found under §1.1.5, is deemed instructive of this: *“The following scenarios briefly show a variety of ways in which an application*

may proceed through the evaluation process.” The express inclusion of the term “may” is further indication that §1.1.5 was not intended to be binding on the Board, nor provide applications with a guaranteed route of success.

139. It is the opinion of this Panel that such scenarios act merely to provide examples of how an application may proceed, but do not purport to provide a roadmap to follow to ensure success. Although it is understandable that a certain level of reliance may be placed on such scenarios by applicants, one would expect in the majority of cases for there to be distinguishing factors. As such, the scenarios cannot be considered binding on the Respondent, and no inconsistent act occurs should ICANN deviate from the scenarios.

Did the Board act without a conflict of interest?

140. The Board were not mandated to follow the scenarios laid down in the Guidebook, as it is found by this Panel that the scenarios were merely instructive. There is no evidence that the Board were conflicted in making this decision, rather they were exercising their judgement in order to distinguish the Claimant’s application from the scenario listed.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

141. The decision to act in a manner contrary to the Guidebook scenario was made following an assessment of the objections, independent expert opinions and the applications, whereupon ICANN made the decision to distinguish the scenario from the applications. The status of the scenarios being advisory rather than mandatory confirms the notion that the Board acted with due diligence in choosing to distinguish the applications and act in a manner contrary to the scenario listed.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

142. Independent judgement is evidenced by the Board choosing to distinguish the applications from the scenarios. It is submitted that it is in the best interests of the internet for consideration to be given to each case in turn, rather than mandate through prescribed scenarios the way in which a case must proceed. The Board have utilised their right of independent judgement in taking the decision, and it is submitted that this path is in the best interests of the internet.

ACTION: CLASSIFICATION OF A NUMBER OF DOCUMENTS AS CONFIDENTIAL

143. ICANN has a published Documentary Information Disclosure Policy (DIDP) which states:

“ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”

144. The Claimant claims a request was made under this policy for documents related to the parties' dispute, which was subsequently declined by ICANN, thereby acting in breach of Recommendation No. 1, Core Value 7 and Core Value 8. ICANN claims that the Claimant did not file a reconsideration request seeking the Board's review of ICANN staff's DIDP response. As no reconsideration request was filed, the DIDP response involved no Board action.⁶⁷
145. The remit of this Panel is restricted to the analysis of Board actions or inactions. The Claimant has not produced any evidence to indicate that a reconsideration request was filed, and it is therefore outside the purview of this IRP to consider the actions of ICANN staff members.

ACTION: FAILING TO ESTABLISH A STANDING PANEL

146. §4 (6) of the Articles of Incorporation and Bylaws requires a 'Standing Panel' be established, and this Panel recommends, along with previous IRP panel recommendations⁶⁸, that one is created. However, for clarity, this is not to be taken as or in any way inferred as a binding order (as the Panel has no such authority). Also, whether or not there is a standing panel seems to have no direct relationship with the facts of this IRP.

CONCLUSION

147. For the reasons stated above, the Panel concludes that ICANN has acted in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. Specifically:

⁶⁷ See ICANN's Supplementary Response para 4 and <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-cn.pdf>

⁶⁸ See *.AFRICA (DotConnectAfrica Trust v ICANN – Case #50 2013 001083)*

148. Core Value 7 – Articles of Incorporation and Bylaws

It is the opinion of the Panel that the volume and quality of information disseminated following the meeting of the GAC in Beijing constituted an act which was inconsistent with Core Value 7; to be consistent with Core Value 7 requires ICANN to act in an open and transparent manner.

149. Core Value 8 - Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent acted inconsistently with Core Value 8; to be consistent with Core Value 8 requires the Respondent to make, rather than defer (for practical purposes, indefinitely), a decision ("making decisions by applying documented policies neutrally and objectively, with integrity and fairness") as to the outcome of the Claimant's applications. The Respondent, in order to act in a manner consistent with its Articles of Incorporation and Bylaws, needs to promptly make a decision on the application (one way or the other) with integrity and fairness. However, nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for the Respondent.

150. Article III (S3 (b)) Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent created a new policy. In light of this, the Respondent failed to follow the procedure detailed in Article III (S3 (b)), which is required when new policy is developed.

151. We further conclude that Claimant is the prevailing party in this IRP. We hold this view consistent with the finding that the designation of "On Hold" is a new policy. ICANN failed to implement procedures pursuant to which applications placed in an "On Hold" status are to proceed. As a result, the Board has not acted with due diligence in this regard.

152. The failure to determine how Claimant should proceed under the new "On Hold" policy has largely resulted in the Claimant's costs in this IRP. Accordingly, pursuant to Article IV, Section 4.3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 34 of the ICDR Rules, ICANN shall bear the costs of this IRP, the cost of the Reporter, as well as the cost of the IRP provider.

153. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totalling US \$6,279.84 shall be borne by ICANN.

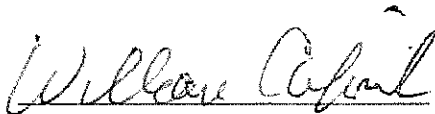
154. The compensation and expenses of the Panelists totalling US \$175,807.82 shall be borne by ICANN.
155. The fees and expenses of the Reporter, Ms. Bommarito, shall be borne by ICANN. ICANN has already settled Ms. Bommarito's invoices.
156. Therefore, ICANN shall reimburse AGIT the sum of US \$93,918.83, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Respondent.
157. Each party shall bear its own expenses and attorneys' fees.
158. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

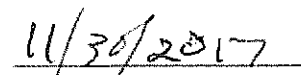
The Panel would like to take this opportunity to congratulate the Parties' legal representatives for their hard work, civility and responsiveness during the proceedings. The Panel was pleased with the quality of the written submissions, in addition to the oral advocacy skills displayed throughout the proceedings.

Respectfully submitted:

Calvin A. Hamilton FCI Arb., Chair

Date


Honourable William Cahill (Ret.)


Date

Klaus Reichert SC

Date

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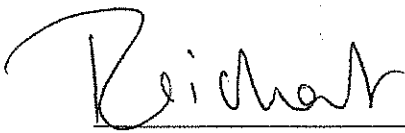
Respectfully submitted:

Calvin A. Hamilton FCI Arb., Chair

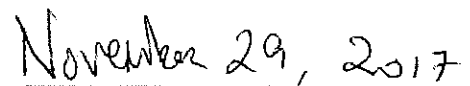
Date

Honourable William Cahill (Ret.)

Date



Klaus Reichert SC



Date

Exhibit I



WIKIPEDIA The Free Encyclopedia

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Donuts (company)

From Wikipedia, the free encyclopedia

\$ This article **may have been created or edited in return for undisclosed payments**, a violation of Wikipedia's terms of use. It may require cleanup to comply with Wikipedia's content policies, particularly neutral point of view. (July 2021)

Donuts Inc. is a domain name registry with a portfolio of 270 new *generic top-level domains* (gTLDs), as made possible by ICANN's gTLD expansion program. Donuts, through its subsidiaries, is also a Registry Service Provider for 173 other TLDs including .au and .org among others.^[1]

It was co-founded in 2010 by Paul Stahura, Jonathon Nevett, Richard Tindal, and Daniel Schindler.^[1] The company's headquarters are located in Bellevue, Washington with other offices throughout the globe.^[2]

In September 2012, Donuts was ranked #14 in *The Wall Street Journal's* Top 50 Start-Ups for 2012.^[3] In 2017, founding CEO Paul Stahura became Executive Chair of the board of directors, and board member Bruce Jaffe became CEO.^{[4][5]} In July 2017, Donuts acquired Rightside, along with domain registrar Name.com, and was ranked #1 on the *Deloitte Fast 500 North America* list.^{[6][7][8][9][5]}

On August 11, 2018, Donuts entered into an agreement to be acquired by private equity firm Abry Partners.^{[10][8][11][12]}

In November 2018, Donuts appointed Akram Atallah as CEO.^{[13][10][14]} In March 2020, Donuts named Mina Neuberger as its new Chief Marketing Officer.^{[15][12]}

In 2020, Donuts Inc launched TrueName™, a portfolio of 245+ descriptive domains. TrueName™ descriptive domains block the registration of malicious homographic variations of all domain labels paired with their TLDs to protect registrants from malicious phishing attacks.^{[16][17][18]}

In December 2020, Donuts acquired Afiliias, Inc.,^{[19][20]} a registry operator and registry service provider headquartered outside of Philadelphia, Pennsylvania. Afiliias operated the authoritative directories and DNS for over 200 top-level domains and included top-level domains such as .info, .global, and .mobi, as well as country codes, dotBrands and other gTLDs.^[21]

In January 2021, Donuts announced that Ethos Capital would be acquiring a controlling interest in the company.^{[22][23]}

Donuts Inc.

Type of site	Private
Founded	2010; 11 years ago
Headquarters	Bellevue, Washington, U.S.
Key people	Akram Atallah, President and CEO
Industry	Internet
URL	https://donuts.domains

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External links [edit]

- Official website

Authority control VIAF (1) · WorldCat

Categories: Internet technology companies of the United States American companies established in 2010 Domain name registrars Privately held companies based in Washington (state)

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Exhibit J

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Delegation Record for .HOTELES

(Generic top-level domain)

Sponsoring Organisation

Travel Reservations SRL

Ruta 8 km 17,500, Edificio Synergia, Oficina 101, Zonamerica, Montevideo, UY 1600 Uruguay

Administrative Contact

New Business Team Leader

Travel Reservations SRL

Ruta 8 km 17,500, Edificio Synergia, Oficina 101, Zonamerica, Montevideo 91600 Uruguay

Email: gtldscontact@despegar.com**Voice:** +54.1148943500 ext: 2129**Fax:** +541148943500

Technical Contact

Director

Neustar, Inc.

21575 Ridgetop Circle

Sterling, VA 20166

United States

Email: technical1@registry.neustar**Voice:** +1 844-677-2878**Fax:** +1 571-434-5401

Name Servers

HOST NAME	IP ADDRESS(ES)
ns5.dns.nic.hoteles	156.154.173.2 2610:a1:1075:0:0:0:1:2
ns2.dns.nic.hoteles	156.154.170.2 2610:a1:1072:0:0:0:1:2
ns6.dns.nic.hoteles	156.154.174.2 2610:a1:1076:0:0:0:1:2
ns1.dns.nic.hoteles	156.154.169.2 2610:a1:1071:0:0:0:1:2
ns4.dns.nic.hoteles	156.154.172.2 2610:a1:1074:0:0:0:1:2
ns3.dns.nic.hoteles	156.154.171.2 2610:a1:1073:0:0:0:1:2

Registry Information

URL for registration services: <http://www.despegar.com>

IANA Reports

- [Delegation of the .hoteles domain to Travel Reservations SRL \(2015-06-23\)](#)

Record last updated 2020-05-01. Registration date 2015-05-14.[Domain Names](#) [Root Zone Registry](#) [.INT Registry](#) [.ARPA Registry](#) [IDN Repository](#)[Number Resources](#) [Abuse Information](#)[Protocols](#) [Protocol Registries](#) [Time Zone Database](#)[About Us](#) [Presentations](#) [Reports](#) [Performance](#) [Reviews](#) [Excellence](#) [Contact Us](#)The IANA functions coordinate the Internet's globally unique identifiers, and are provided by **Public Technical Identifiers**, an affiliate of ICANN.[Privacy Policy](#) [Terms of Service](#)

Coming Soon

Abuse Contact:

Reach out to us at gtldscontact@despegar.com

Rerservalia Trademark Counsel - Av Corrientes 746 CABA, 1043
Argentina

Domain Names

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Delegation Record for .HOTELS

(Generic top-level domain)

Sponsoring Organisation

Booking.com B.V.Herengracht 597, Amsterdam, Noord-Holland, 1017 CE NL
Netherlands

Administrative Contact

Christopher NiemiMarkMonitor Inc.
3540 East Longwing Lane, Suite 300, Meridian, Idaho 83646
United States**Email:** dothotels@markmonitor.com**Voice:** +1 208-389-5740**Fax:** +1 208-389-5771

Technical Contact

DirectorNeustar, Inc.
21575 Ridgetop Circle
Sterling, VA 20166
United States**Email:** technical1@registry.neustar**Voice:** +1 844-677-2878**Fax:** +1 571-434-5401

Name Servers

HOST NAME	IP ADDRESS(ES)
ns6.dns.nic.hotels	156.154.174.3 2610:a1:1076:0:0:0:1:3
ns3.dns.nic.hotels	156.154.171.3 2610:a1:1073:0:0:0:1:3
ns4.dns.nic.hotels	156.154.172.3 2610:a1:1074:0:0:0:1:3
ns2.dns.nic.hotels	156.154.170.3 2610:a1:1072:0:0:0:1:3
ns5.dns.nic.hotels	156.154.173.3 2610:a1:1075:0:0:0:1:3
ns1.dns.nic.hotels	156.154.169.3 2610:a1:1071:0:0:0:1:3

Registry Information

URL for registration services: <http://www.booking.com>

IANA Reports

- [Delegation of the .hotels domain to Booking.com B.V. \(2017-04-03\)](#)

Record last updated 2020-05-01. Registration date 2016-09-16.[Domain Names](#) [Root Zone Registry](#) [.INT Registry](#) [.ARPA Registry](#) [IDN Repository](#)[Number Resources](#) [Abuse Information](#)[Protocols](#) [Protocol Registries](#) [Time Zone Database](#)[About Us](#) [Presentations](#) [Reports](#) [Performance](#) [Reviews](#) [Excellence](#) [Contact Us](#)The IANA functions coordinate the Internet's globally unique identifiers, and are provided by **Public Technical Identifiers**, an affiliate of ICANN.[Privacy Policy](#) [Terms of Service](#)



Abuse Contact

Booking.com B.V.
c/o MarkMonitor Inc.
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Policies

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[Hotels WHOIS](#)
Registration policy (coming soon)
[DNS Policy](#)