

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Despegar Online SRL)	
Donuts Inc.)	
Famous Four Media Limited)	
Fegistry LLC)	
Radix FZC)	
)	
Claimants)	
)	
v.)	ICDR Case No. _____
)	
INTERNET CORPORATION FOR)	
ASSIGNED NAMES AND NUMBERS)	
)	
Respondent)	
_____)	

**REQUEST FOR INDEPENDENT REVIEW PROCESS
BY DESPEGAR ONLINE SRL, DONUTS INC., FAMOUS FOUR MEDIA LIMITED,
FEGISTRY LLC, AND RADIX FZC**

Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted

Counsel for Claimants

I. IDENTIFICATION OF THE PARTIES

A. Claimants

1. The Claimants in this dispute are Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC. Full contact details of Claimants are provided as **Annex 1**.

2. Claimants are represented in these proceedings by:

Flip Petillion
Crowell & Moring LLP
Contact Information Redacted

B. Respondent

3. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). The Respondent's contact details are as follows: 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.

II. EXECUTIVE SUMMARY

4. ICANN organized a new gTLD application round in 2012, allowing interested entities to compete for operating new gTLDs or internet extensions of their choice. Where multiple entities applied for the same string, they were asked to come to an amicable agreement under which one or more applicants withdrew their applications. If no amicable solution was found, applicants in contention for the same string were invited to participate in an auction, the proceeds of which would go to ICANN.

5. ICANN wanted to offer some kind of protection to well-established communities that might otherwise lose out if the free-market competition for gTLD strings was allowed to go unchecked. ICANN therefore introduced a mechanism allowing such communities to apply for a so-called community-based gTLD string that would identify the community. If a

community-based gTLD application met the stringent criteria for obtaining “community priority”, the application was allowed to proceed, and non-community-based applications for the same string were set aside.

6. During ICANN’s recent new gTLD application round, Claimants applied to operate the .hotel gTLD (Annexes 2-6). Another applicant, HOTEL Top-Level-Domain s.a.r.l. (HTLD), also applied for the .hotel gTLD (Annex 7). A panel of third-party evaluators, commissioned by ICANN, decided that HTLD’s application for .hotel met the criteria for obtaining “community priority” (Annex 8). ICANN then adopted the panel’s determination, without any review.

7. The determination was, however, opaque, in violation of ICANN’s very policy on “community priority”, based on non-existent facts, made by a faceless panel, and in violation of ICANN’s fundamental obligations. Claimants have never been given an opportunity to comment, let alone contest, the undisclosed materials considered by the panel or the panel’s insufficient reasoning. As a result of the community priority evaluation (CPE), Claimants’ applications have been excluded without justification. Even if ICANN reconsiders the CPE, Claimants’ applications have been needlessly delayed and subjected to additional procedures (Documentary Information Disclosure Policy (DIDP) Request, Request for Reconsideration (RfR)). ICANN’s CPE was an abdication of responsibility and contrary to the evaluation policies ICANN had established for new gTLD applications, especially in view of the fact that community priority was denied for similarly situated applications. The CPE of HTLD’s application for .hotel is not justified by any legitimate security or stability concerns. It is baseless and arbitrary. Moreover, the CPE fails to comply with ICANN’s obligation to promote consumer choice, innovation and competition.

8. Claimants repeatedly asked ICANN – among others in their DIDP Request and two consecutive RfRs – to comply with its own policy and remedy the improper treatment of the

.hotel applications. ICANN has not only declined, but has attempted to evade all responsibility.

9. ICANN's treatment of Claimants' applications is inconsistent with both the new gTLD policies established in the Guidebook and fundamental ICANN policies and obligations requiring fairness, non-discrimination, transparency, accountability, and good faith. By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment. Accordingly, Claimants request that ICANN be required to overturn the CPE in relation to .hotel and allow Claimants' applications to proceed on their own merits.

III. SUMMARY OF RELEVANT FACTS

A. The parties

1. Claimants

10. Despegar Online SRL offers online hotel reservation services. All other Claimants offer services in the Internet's domain name system (DNS).

2. ICANN

11. ICANN is a non-profit public benefit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is responsible for administering technical aspects of the Internet's DNS. Core to its mission is increasing competition and fostering choice in the DNS. ICANN's Articles of Incorporation require ICANN to act "*for the benefit of the Internet community as a whole*" and "*in conformity with the relevant principles of international law and local law*" (**RM¹ 1**, Article 4). ICANN's fundamental principles, which are reiterated numerous times in ICANN's governance documents and other

¹ Reference Material.

policies, require ICANN to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition, as well as to act in good faith.

B. ICANN established the new gTLD Program

12. ICANN's responsibilities include establishing a process for introducing new top-level domains (TLDs) in order to promote consumer choice and competition (**RM 4**, Article 9.3). Before the introduction of the new gTLD program, ICANN had, over time, expanded the DNS from the original six generic TLDs (gTLDs) to 22 gTLDs and approximately 250 two-letter country-code TLDs (ccTLDs).

13. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs (**RM 6-7**). The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet (**RM 2**, Article X). In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with allocation criteria and contractual conditions (**RM 8-9**). These allocation criteria were set out in the Applicant Guidebook, which is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs. In June 2011, ICANN's Board approved the Guidebook and authorized the launch of the New gTLD Program (**RM 10**). The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains (**RM 11**).

14. The GNSO decided that there must be a clear and pre-published application process using objective and measurable criteria (**RM 9**, GNSO Recommendation 9). The Applicant Guidebook was for prospective applicants to make sure they understand what was required of them when applying for a new gTLD and what they could expect at each stage of the evaluation process (**RM 11**, p. 12; **RM 12**). The final version of the Applicant Guidebook

was made available on 4 June 2012 (**RM 5**), *i.e.*, after the application window for new gTLD applicants closed on 30 May 2012 (**RM 13**).

C. Claimants applied for .hotel

15. Claimants have individually filed applications to operate the .hotel gTLD (**Annexes 2-6**). Claimants relied on the objective and measurable criteria of the Applicant Guidebook and were confident that the decision as to which applicant ICANN would delegate the .hotel gTLD—referring to the common dictionary word – would ultimately be dependent upon negotiations between applicants or an auction among applicants (assuming all applicants passed evaluation).

D. HTLD applied for .hotel as a “community-based” gTLD

16. HTLD also filed an application to operate the .hotel gTLD (**Annex 7**). In its application, HTLD claimed, first, to be representing a community and, second, that the gTLD was going to be operated for the benefit of this alleged community. The purpose of HTLD’s application for a so-called community-based gTLD was in fact to avoid competition for the gTLD string, a highly sought after generic word.

E. ICANN established a Policy in relation to CPE

17. The GNSO developed a policy of granting priority to so-called “qualified community-based applications”. What the GNSO “*had in mind and what [it] had at heart*” when developing the CPE policy was “*really to protect communities like the Navaho community [2], the communities that really didn’t have any other kind of protection, and they[3] wanted to protect these communities in a certain way*” (**RM 14**, p. 14). “*The community-based application was nothing more but to protect small communities. That was the intent of the*

² The Navaho or Navajo community refers to the largest federally recognized tribe of indigenous people in the United States of America.

³ The GNSO members.

GNSO” (RM 14, p. 15). The purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry. Indeed, any such purpose would be contrary to the fundamental principles that form the basis of ICANN.

18. This purpose was clearly translated in the Applicant Guidebook. As a qualified community application eliminates all directly contending standard applications, ICANN considered it fundamental that “*very stringent requirements for qualification of a community-based application*” were applied (RM 5, Module 4-9). To be qualified, an application need to score at least 14 points in the CPE (RM 5, Module 4-10) and the scoring process was specifically developed to prevent “*undue priority [being given] to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string*” (RM 5, Module 4-9).

19. ICANN initially considered working with a comparative evaluation panel that would advise which applications should be given priority based on a comparative analysis between applications. However, ICANN rejected this idea and opted for a community priority evaluation panel, as there was an absolute consensus within the ICANN community that evaluations should be made on the basis of objective and predictable criteria (RM 9, GNSO Recommendation 9).

F. ICANN selected a CPE Panel, that made an arbitrary determination on the .hotel CPE

20. On the basis of a largely non-transparent selection process the Economist Intelligence Unit was selected to act as the CPE Panel (*infra*, Section VI.A). Having been selected, this CPE Panel arbitrarily determined that HTLD’s application for .hotel be granted community priority (*infra*, Section VI.B).

G. The ICANN Board failed to assure compliance with ICANN’s Policies, as it accepted the CPE Panel’s arbitrary determination on .hotel

21. The CPE Panel was given the task of preparing a recommendation document for ICANN to consider (RM 15, p. 4: final step). On receipt of this recommendation, ICANN published a report stating that the CPE Panel had determined that HTLD’s application met the requirements specified in the Applicant Guidebook. ICANN accepted that the application prevailed in the CPE. ICANN added that the CPE results (i) “do not necessarily determine the final result of the application”, (ii) “might be subject to change”, and (iii) “do not constitute a waiver or amendment of any provision of the Applicant Guidebook” (Annex 8, p. 6).

22. Although the CPE Panel’s determination of HTLD’s application is discriminatory and completely at odds with the provisions of the Applicant Guidebook (*infra*, Sections VI.B.1 and VI.B.2), ICANN has repeatedly declined to reject or review the CPE Panel’s determination.

H. The ICANN Board improperly refused to grant Claimants the right to defend themselves

1. Claimants’ first Request for Reconsideration

23. ICANN’s Board ultimately has responsibility to ensure that ICANN policies are dutifully followed. In fact, its Bylaws (and this Independent Review Process) require it. As Claimants were confronted with a surprising and erroneous CPE result, Claimants asked the Board to fulfill its obligation to ensure compliance with ICANN’s policies. On 28 June 2014, Claimants filed a first Request for Reconsideration (RfR) seeking reconsideration of ICANN’s decision to accept the CPE Panel’s recommendation that HTLD’s application for .hotel be granted community priority (Annex 9).

2. Claimants requested information

24. Claimants realized that they had scant information as to the underlying process and

reasoning. They were not given any insight into the documentation relied on by ICANN or the unidentified members of the CPE Panel. As the opaque CPE determination set aside all of Claimants' applications to operate the .hotel gTLD, on 4 August 2014 Claimants asked (in a DIDP request) for information as to how and by whom the decision had been reached (Annex 10). In the DIDP request, Claimants urged ICANN to comply with its transparency obligation surrounding the CPE decision (Annex 10). The purpose of Claimants' DIDP request was to allow them to effectively exercise their right to a defense in the framework of Claimants' first RfR by obtaining equal access to documents and information surrounding the CPE. Without such access, Claimants were severely limited in their ability to defend their own position. They did not have access to the same material as the CPE Panel or ICANN, when challenging ICANN's acceptance of the CPE determination.

3. The ICANN Board denied Claimants' first Request for Reconsideration

25. On 22 August 2014, ICANN's Board Governance Committee (BGC) denied Claimants' first RfR of 28 June 2014 (Annex 11). At that point in time, ICANN had not yet responded to Claimants' DIDP request, the purpose of which was, as stated, to enable them to effectively prepare a defense in the framework of this first RfR. Without access to a properly prepared defense, the BGC was not in a position to appraise the full facts of the case.

4. ICANN denied Claimants' DIDP Request

26. On 3 September 2014, ICANN denied the DIDP Request, refusing access to the information relating to the basis on which the Claimants' applications were rejected in favor of HTLD (Annex 12).

27. ICANN's rejection of the DIDP request made clear that the ICANN Board would not spontaneously review or reverse the BGC's determination of 22 August 2014 in which Claimants' first RfR was denied.

5. Claimants filed a second Request for Reconsideration

28. As Claimants had still not been given an effective opportunity to defend themselves, Claimants filed a second RfR on 22 September 2014, seeking reconsideration of the decision to deny the DIDP request and urging ICANN to perform a fair and transparent CPE (Annex 13). On 11 October 2014, The BGC issued a determination denying the second RfR (Annexes 14-15). In this determination, the BGC stated only that the ICANN staff had adhered to the DIDP process (1) in finding certain requested documents subject to DIDP nondisclosure conditions, and (2) in determining that the potential harm caused by disclosure outweighed the public interest in disclosure. The BGC refused to examine whether the staff's findings and determinations were correct or compliant with ICANN's obligations to remain transparent and accountable, and to ensure due process (*infra*). Compliance with the DIDP process is a necessary, but not sufficient, requirement in ensuring compliance with ICANN's fundamental obligations. By limiting its review to compliance with a given process, the BGC effectively gave complete discretion to its staff. This constitutes an abdication of responsibility in contravention of Article II(1) of the ICANN Bylaws, and a failure by the ICANN Board to conduct due diligence.

I. Claimants had no choice but to initiate a request for an Independent Review Process

29. In an ultimate attempt to convince ICANN to voluntarily remedy the errors made in the CPE, Claimants initiated a Cooperative Engagement Process (CEP) with ICANN. On 10 December 2014, ICANN asked Claimants to evaluate and advise ICANN within a week on the information that the CPE panel failed to consider. Claimants responded on 17 December 2014. ICANN waited until 21 February 2015 to come back and informed Claimants that it decided to terminate the CEP, giving Claimants 15 days to initiate an IRP. Claimants denounced ICANN's unilateral decision and proposed to mutually agree on the termination of the CEP and the deadline to file an IRP, should ICANN no longer wish to engage itself in the

CEP. However, ICANN denied Claimants' proposal to extend the deadline, while it agreed on an extension in other cases.

30. As a result, Claimants had no choice but to initiate this request for an Independent Review Process. The challenged decisions and actions are attributable to the ICANN Board and materially affect Claimants. If the CPE determination is maintained, Claimants will be unable to compete for the .hotel gTLD, in which all applicants have an equally legitimate interest. It follows that Claimants have standing to file this request.

IV. APPLICABLE LAW

31. In accordance with Article IV(3) of ICANN's Bylaws, an IRP Panel must determine whether the contested actions of the ICANN Board are consistent with applicable rules. The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with *inter alia* International law⁴ and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.

32. The IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with these principles. The most recent versions of

⁴ In particular, Article IV charges ICANN “with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law” (**RM 27**, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

ICANN's Bylaws⁵ – which had not been introduced at the time of Claimants' submissions of its applications⁶ – also require the IRP Panel to focus on whether the ICANN Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.

V. SUMMARY OF ICANN'S OBLIGATIONS

A. Apply policies neutrally, fairly and without discrimination

33. ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general principles of international law, it is also laid down repeatedly in ICANN's governing documents. Article 2(3) of ICANN's Bylaws provides that:

“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause . . . ”

34. The above obligation is further elaborated upon in ICANN's Core Values, which require ICANN to make *“decisions by applying documented policies neutrally and objectively, with integrity and fairness.”*(RM 2, Art. I, §2)⁷

B. Remain transparent

35. Article 4 of ICANN's Articles of Incorporation provides that ICANN:

“shall operate for the benefit of the Internet community as a whole, carrying out its activities ... to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

36. Similarly, Article III of ICANN's Bylaws states that:

⁵ Adopted on 11 April 2013 and subsequently amended on 7 February 2014. Also see ICANN's Bylaws as amended on 16 March 2012, Article IV(3).

⁶ In 2012.

⁷ This requirement is also found in applicable California law, which requires that decisions be made according to procedures that are 'fair and applied uniformly', and not in an 'arbitrary and capricious manner.'

*“ICANN and its constituent bodies shall operate to the maximum extent feasible in an **open and transparent** manner and consistent with procedures designed to **ensure fairness**.”*

37. These provisions are supplemented by the ‘Core Values’ set out in ICANN’s Bylaws. The purpose of the Core Values is to “*guide the decisions and actions of ICANN*” in the performance of its mission (**RM 2**, Art. I, §2). The Core Values include:

*“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.”*(**RM 2**, Art. I, §2(7))

38. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting space that ICANN occupies. The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. The coupling of the terms ‘*open*’ and ‘*transparent*’, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision-making.

C. Remain accountable

39. As already noted, ICANN is required to ensure that it is accountable. Again, one of ICANN’s Core Values is that it must “[*r*]emain[*] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”* (**RM 2**, Art. I, §2(10) This is reiterated in Art. IV, § 1 of ICANN’s Bylaws, which requires ICANN to “*be accountable to the community for operating in a manner that is consistent with the [...] Bylaws, and with due regard for the core values set forth in Article 1 of the [...] Bylaws.*”

D. Promote competition and innovation

40. In performing its mission, ICANN must depend to the largest possible extent on market mechanisms to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. This follows clearly from ICANN's Core Values, which include:

“2. *Respecting the creativity, innovation, and flow of information made possible by the Internet by **limiting ICANN's activities** to those matters within ICANN's mission requiring or significantly benefiting from global coordination. [...]*

5. *Where feasible and appropriate, **depending on market mechanisms to promote and sustain a competitive environment.***

6. *Introducing and **promoting competition** in the registration of domain names where practicable and beneficial in the public interest.”(RM 2, Art. I, §2)*

E. Act in good faith

41. Many of the guiding substantive and procedural rules in ICANN's Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”⁸

42. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and

⁸ Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits) (RM 28); see also Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”) (RM 29).

recognizing legitimate expectations.⁹ ICANN’s core values require ICANN to obtain informed input from those entities most affected by ICANN’s decisions (**RM 2**, Art. I, §2(9)).

VI. SUMMARY OF ICANN’S BREACHES

A. **The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel**

43. Rather than itself performing the CPE, the ICANN Board decided to rely on the recommendation of third party contractors. As a result, the ICANN Board sought third party providers for “Applicant Evaluation Teams (Technical and Financial Evaluation)”, “Geographic Name Evaluation”, “String Similarity Examiners” and a “Comparative Evaluation Panel” (which later became a “Community Priority Evaluation Panel”) (**RM 16**). The ICANN Board made a number of significant errors in the resulting CPE.

44. In establishing the selection criteria for evaluation panels, and in making selections, the ICANN Board had a duty to ensure compliance with ICANN’s fundamental obligations. As expressly stated in ICANN’s Call for Expressions of Interest (CfEoI) for CPE Panel, the process for selecting the CPE had *inter alia* to “*respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination*” (**RM 17-18**, p. 5).

45. However, ICANN did not provide transparency in relation to the CPE selection process. ICANN failed to make clear how it would evaluate candidate responses or how it ultimately did so. The only action taken by ICANN in this regard was to state, in the CfEoI, that responses would be evaluated on the basis of criteria defined in the CfEoI and the Applicant Guidebook (**RM 18**, p. 6). At that time, the Applicant Guidebook was still in an early draft form, and neither the Applicant Guidebook nor the CfEoI in fact contained any

⁹ U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.

information as to how responses would be evaluated. In addition, the identities of the unsuccessful candidates (if any) for the CPE panel's role remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ICANN has revealed only that, overall, there were 12 candidates for all the different evaluation panel roles, and that EIU was selected to perform the String Similarity Review (**RM 19**, p. 1). There is no indication that any other candidate expressed an interest in performing the CPE. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the CPE? How did this impact on the discussions with the CPE Panel? What are the terms of ICANN's contract with the CPE Panel?

46. It also remains unclear whether the minimum selection criteria were met. ICANN has never demonstrated that any of the following required information was provided by the CPE Panel selected by the ICANN Board:

- a “*plan for ensuring fairness, nondiscrimination and transparency*” (**RM 18**, p. 6);
- a “*plan for ensuring that evaluation teams[...] consist of qualified individuals and that the candidate will make every effort to ensure a consistently diverse and international panel*” (**RM 18**, p. 6);
- a “*Statement of Suitability that includes a detailed description of the candidate's ability to perform the work [...] which demonstrates knowledge, experience and expertise, including but not limited to projects, consulting work, research, publications and other relevant information*” (**RM 18**, p. 6);
- a “*curriculum vitae for each person proposed by the candidate to manage or lead work on th[e] project, the candidate's selection process for persons being proposed to ICANN, and explanation of the role that each named person would play*” (**RM 18**, p. 6);
- an indication of “*the experience and availability of proposed evaluators*” (**RM 18**, p. 6).

47. Furthermore, the many failures in the CPE Panel's performance of the CPE, described below¹⁰, create a strong presumption that appropriate selection criteria were not met.

B. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in allowing the appointed CPE Panel to develop and perform an unfair and arbitrary review process

48. The international law standard of good faith encompasses an obligation to ensure procedural fairness and due process. General principles of 'international due process' include equal and fair treatment of the parties, fair notice, and a fair opportunity to present one's case. These requirements are basic principles that inform transnational procedural public policy. They are more than just formalistic procedural requirements. Compliance must be meaningful: parties must be given adequate notice of the relevant rules and a full and fair opportunity to present their case. The mechanisms for redress must be both timely and effective. In view of ICANN's general obligations and the selection criteria for the CPE Panel established by ICANN, new gTLD applicants could reasonably expect that the CPE would, at a minimum, (i) act in accordance with a plan for "*ensuring fairness, nondiscrimination and transparency*", (ii) reach conclusions that were "*compelling and defensible*" and (iii) "*document the way in which [the CPE performed evaluations] in each case*" (**RM 18**, pp. 5 and 6). Instead, the ICANN Board allowed the CPE Panel to perform the CPE (i) arbitrarily and discriminatory (Section VI.B.1), (ii) without (fairly) applying ICANN's policy (Section VI.B.2), (iii) without providing meaningful reasoning (Section VI.B.3), and (iv) without providing any transparency regarding the evaluators (Section II.B.4).

1. The ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting community priority of

¹⁰ *Infra*, Section VI.B.

HTLD’s application, while other applications with identical characteristics were denied community priority

49. HTLD is not the only applicant that sought to game the application process by invoking an alleged community with a view to obtaining community priority for a highly sought-after generic word. Other applicants used the same strategy:

- Starting Dot applied for the .immo gTLD, destined to serve “*a community restricted to businesses, organizations, associations and governmental and non-governmental organisations operating in the real estate industry*” (**RM 20**);
- dotgay llc attempted to invoke community priority for the .gay gTLD aimed at “*individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society*” (**RM 21**);
- Dadotart Inc attempted to invoke community priority for the .art gTLD aimed at the Art community, “*comprised of individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities*” (**RM 22**);
- EFLUX.ART, LLC attempted to invoke community priority for the .art gTLD aimed at “*individuals, organizations and companies who are actively involved on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics*” (**RM 23**).
- Taxi Pay GmbH attempted to invoke community priority for the .taxi gTLD aimed at “*[t]he global taxi community, including its four main community groups*” consisting of taxi drivers, offices and entrepreneurs, members of the immediate surrounding industry, superordinate organizations and affiliated businesses (**RM 24**).
- .MUSIC LLC attempted to invoke community priority for the .music gTLD aimed at the Global Music Community, “*comprised of an international range of associations and organizations and the millions of individuals these organizations represent, all of whom are involved in the creation, development, publishing, recording, advocacy, promotion, distribution, education, preservation and or nurturing of the art of music*” (**RM 25**);
- Tennis Australia Ltd attempted to invoke community priority for the .tennis gTLD, which was to “*serve the Australian tennis community, which is comprised of the eight Australian state-and territory-based Member Associations*” related to tennis (**RM 26**).

50. None of these applications was granted community priority. No applicant affiliated with an industry sector besides HTLD was granted community priority over other applicants for a string related to that industry sector. The extraordinary outcome for HTLD’s application was only possible due to a completely different and erroneous application of the evaluation criteria in the .hotel CPE. There is no legitimate reason to differentiate between the .hotel

CPE, on the one hand, and the CPEs for .immo, .gay, .art, .taxi, .music and .tennis, on the other.

51. By way of example, in relation to .art, the CPE panels considered that there is a need for a community “*that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes” this entire community (**RM 22 and 23**). This requirement is not taken up in the CPE evaluation of .hotel. And, by HTLD’s own admission, there is no single entity that encompasses the ‘community’ defined by HTLD. The members of IH&RA – the association to which the CPE panel and HTLD refer – only represent part of the hotels worldwide (**Annexes 7 and 8**). HTLD also recognizes that IH&RA is not mainly dedicated to the hotel industry, but is equally dedicated to the restaurant sector (**Annex 7**). Hence, HTLD has not therefore established that there is at least one entity that is mainly dedicated to, encompasses and/or organizes the ‘community’ defined by HTLD.*

52. Another example of discrimination without legitimate reason is the disparate treatment in assessing the nexus between the proposed string and the community. In cases where the string did not match or identify the peripheral industries and entities that are included in the definition of the community, the CPE Panel considered that there was a misalignment between the proposed string and the community as defined by the applicant (**RM 20, RM 24**; see also **RM 22**). In such cases, the CPE granted no points for the nexus requirement. In the .hotel CPE, the Panel recognized that HTLD’s defined ‘community’ also includes entities, such as hotel marketing associations, that may not be automatically associated with the gTLD. However, it considered these entities to comprise only a small part of the community. Such reasoning was not applied in the other CPEs. *E.g.*, in the .gay CPE, the inclusion of individuals who are supportive of the gay community, but who are not gay themselves, was a reason to deny the existence of a nexus between the proposed string and

the community (RM 21). Moreover, the CPE Panel in the .hotel evaluation did not take into account that associations representing hotels (1) are not usually referred to using the term ‘hotel’, and (2) often represent other sectors as well. If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met.

2. **The CPE process was unfair and non-transparent because of the evaluators’ disregard of ICANN’s policy**

53. The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy. As outlined in RfR 14-34, the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a community that meets the definition of “community” under the rules of the Applicant Guidebook, requiring an analysis of the awareness and recognition of the community among the members. The CPE panel did not verify whether such awareness and recognition was present, but simply considered that there is awareness and recognition among the members of the community, “*because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services*” (Annex 8, p. 2). However, the mere definition of a ‘community’ in a particular way can never demonstrate awareness and recognition by community members. Indeed, it is very unlikely that e.g., a tourism association, which is representative of travel services, tour guides, restaurants, lodging facilities, car rental services, etc., but which also happens to represent hoteliers, is aware of the fact that it is a member of the ‘hotel community’ as defined by HTLD. In this regard, the CPE Panel in the .taxi CPE found that there was no awareness or recognition among community members, because “*many affiliated businesses and sectors would have only a tangential relationship with the core taxi community, and therefore would not associate themselves with being part of the community as defined by the applicant*” (RM 24, p. 2).

54. Other examples of policy violations are taken up in Claimants' first RfR (Annex 9).

3. **The CPE process was unfair, non-transparent and arbitrary, because of the lack of meaningful reasoning**

55. The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts. When evaluating HTLD's registration policies as indicated in the application, the CPE Panel must assess whether these policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms. HTLD's application does not contain a policy with specific enforcement measures and is silent on any appeal mechanism (Annex 7). Nevertheless, the CPE Panel considered: "*The applicant outlined policies that include specific enforcement measures constituting a coherent set. [...] There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name. (Comprehensive details are provided in Section 20e of the applicant documentation)*" (Annex 8, p. 5). HTLD did not outline any policy that includes specific enforcement measures. It merely stated that it "*will set-up a process for any questions and challenges that may arise from registrations*" (Annex 7). This intention to set-up a process – whatever that might be – in no way qualifies as "*outlined policies that include specific enforcement measures constituting a coherent set*". The affirmation by the CPE Panel that there is an appeals mechanism is even more bizarre. The word 'appeal' does not appear anywhere in HTLD's application (Annex 7). In other CPEs, the CPE Panel sanctioned the applicant for not having an appeal mechanism (RM 24, p. 5). Even if an appeals process had been mentioned, it would have to have been clearly described or it would score zero on the enforcement requirement (RM 25, p. 7).

56. Additionally, the reasoning the CPE Panel has provided is meaningless, because it is contradictory. In evaluating the community endorsement criterion, the CPE Panel considers that the supporting groups "*constitute the recognized institutions to represent the community*" and that they "*represent a majority of the overall community as defined by the applicant*"

(**Annex 8**, p. 6, emphasis added). The CPE Panel makes a distinction between “the community” and the larger “overall community as defined by the applicant”. It is not clear how the former ‘community’ should be defined. However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE panel’s findings on organization and nexus between the proposed string and the ‘community’.

4. **The CPE process was unfair, non-transparent and discriminatory due to the use of anonymous evaluators**

57. ICANN’s obligation to safeguard due process rights covers the right to be heard by an independent and impartial adjudicator.¹¹ That right is violated if the adjudicator remains anonymous.¹² The right to know the identity of the adjudicator – with a view to knowing whether there might be grounds for challenging or removing them – is a fundamental requirement.¹³

58. In this case, Claimants had no notice, and absolutely no opportunity to present their case. Claimants were deprived of procedural fairness and the opportunity to be heard through ICANN’s failure to provide advance notice of the applicable standards, failure to allow any opportunity to contest those standards, and failure to provide any means of remedy or redress. Put simply, Claimants were not offered any opportunity to be heard on their own case.

59. Further, Claimants were not given any opportunity for remedy or redress once the decision had been made. Although Claimants challenged the decision through ICANN’s

¹¹ *E.g.*, Article 14 ICCPR (**RM 30**).

¹² IACoMHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 115-118 (**RM 31**).

¹³ *See* IACoMHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 116 (**RM 31**).

Reconsideration process, ICANN's Board explicitly refused to reconsider the substance of the challenged decision, instead relying on a cursory analysis of procedural requirements.

60. Claimants were never given any meaningful opportunity to be heard on the substance of the CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), nor any opportunity to seek redress for the erroneous decision. Accordingly, the CPE determination was made without due process, and ICANN's acceptance of the determination, and repeated failure to remedy the wrongful determination through the Reconsideration process or otherwise, is a failure to act with due diligence and independent judgment, and a failure to act in good faith as required by ICANN's Bylaws and Articles of Incorporation.

C. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process by blindly accepting the advice of the CPE, without providing effective quality control

61. The CPE Panel's description of the CPE process shows that the Panel's final step in that process is the preparation of a "final recommendation document" (**RM 15**). In other words, the CPE Panel does not take a decision, instead it is supposed to give a recommendation to ICANN.

62. There is no indication that any quality review process – other than the CPE Panel's internal quality review process – has been put in place or followed by ICANN. ICANN simply accepted the recommendation and posted it on its website without review.

D. ICANN failed to promote competition and innovation by accepting the CPE

63. ICANN's core mission requires ICANN to be as non-interventionist as possible, and the purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD or pick winners and losers within a diverse commercial industry. Despite this, the ICANN Board's decision to accept the CPE Panel's determination

does exactly that. It picks a winner, HTLD, on the basis of a purely arbitrary decision, and eliminates all possible competition for obtaining the .hotel gTLD.

E. The ICANN Board failed to correct the mistakes in the CPE process and denied Claimants their right to be heard

64. The ICANN Board should have corrected the mistakes in the CPE process on its own motion. Since ICANN's Board has ultimate responsibility for the New gTLD Program, it is required to supervise and assure the compliance of that program (and its implementation) with ICANN's fundamental obligations under its Articles of Incorporation and Bylaws. The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism (**RM 5**, Module 5-4), such as a Request for Reconsideration (**RM 2 and RM 3**, Article IV(2)).

65. Claimants' RfRs and DIDP request (**Annexes 9, 10 and 13**), and the fact that ICANN discovered affected applicants had no sufficient information regarding the process, should have alerted the ICANN Board to the need to investigate and correct the errors in that process. Instead, the ICANN Board chose, in its own self-interest, to invoke the excuse of confidentiality (**Annexes 12 and 14**) and to refuse to offer any transparency in relation to the CPE process.

66. When Claimants filed their RfRs with the ICANN Board, they informed the Board of the many errors in the CPE process, giving the Board ample opportunity to correct those errors. However, the Board chose, through the BGC, to take no action, not even to investigate the conformity of the CPE process with its fundamental obligations. The BGC contented itself with issuing a statement that the CPE "*Panel's adherence to the Guidebook [that] violates the broadly-phrased fairness principles in ICANN's foundational documents [are not] a proper ground for reconsideration [...]*" (**Annex 11**, p. 10). Otherwise, "*every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request*" (**Annex 11**, p. 10). When dismissing Claimants' second RfR, the BGC contented

itself with issuing a statement that Claimants identified “*no policy or procedure that ICANN staff violated in making its determination*”. In both RfRs, the BGC refused to review compliance of ICANN’s actions with ICANN’s fundamental obligations. The BGC’s blanket refusal to verify this issue was based on the misunderstanding that Claimants wished to rewrite the Applicant Guidebook. Claimants were not, however, seeking to rewrite ICANN’s policy or the Applicant Guidebook. Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process, and to implement the Applicant Guidebook in compliance with these fundamental obligations. Moreover, even if a published policy or process were to explicitly derogate from fundamental due process rights (which is not the case here), ICANN could not implement that policy or process without violating its Articles of Incorporation and Bylaws, regardless of the contents of the Applicant Guidebook. Instead of investigating compliance with those policies and principles (*i.e.*, its governing rules), the ICANN Board – through the BGC – chose to misinterpret and ignore Claimants’ RfRs. As a result, the ICANN Board denied Claimants their right to be heard.

VII. PROCEDURAL MATTERS

67. Pursuant to Article IV, Section 3(9) of the Bylaws, Claimants hereby request that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

68. It does not appear that ICANN has established the omnibus standing panel described in Art. IV, Section (6) of the Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, Claimants suggest that the parties agree to the following method for appointing the IRP Panel: each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

69. Claimants propose that both Claimants and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

VIII. RELIEF REQUESTED

70. Based on the foregoing, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel :

- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook;
- Declare that ICANN must reject the determination that HTLD's application for .hotel be granted community priority;
- Award Claimants their costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,



Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted



Counsel for Claimant

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List of annexes

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- Annex 2 - Despegar Online SRL's application to operate the .hotel gTLD (Application ID 1-1249-1940)
- Annex 3 - Spring McCook, LLC (subsidiary of Donuts Inc.)'s application to operate the .hotel gTLD (Application ID 1-1500-16803)
- Annex 4 - dot Hotel Limited / Famous Four Media Limited's application to operate the .hotel gTLD (Application ID 1-1181-77853)
- Annex 5 - Fegistry LLC's application to operate the .hotel gTLD (Application ID 1-1913-57874)
- Annex 6 - DotHotel Inc. / Radix FZC's application to operate the .hotel gTLD (Application ID 1-1059-97519)
- Annex 7 - HOTEL Top-Level-Domain s.a.r.l.'s application to operate the .hotel gTLD (Application ID 1-1032-95136)
- Annex 8 - Community priority evaluation report of HOTEL Top-Level-Domain s.a.r.l.'s application to operate the .hotel gTLD, dated 11 June 2014
- Annex 9 - Claimants' Request for Reconsideration 14-34 of 28 June 2014
- Annex 10 - Claimants' DIDP Request of 4 August 2014
- Annex 11 - Board Governance Committee determination on Request for Reconsideration 14-34 of 22 August 2014
- Annex 12 - ICANN's Response to DIDP Request of 3 September 2014
- Annex 13 - Claimants' Request for Reconsideration 14-39 of 22 September 2014
- Annex 14 - Board Governance Committee determination on Request for Reconsideration 14-39 of 11 October 2014
- Annex 15 - Minutes of the Meeting of the Board Governance Committee on 11 October 2014, published on 23 October 2014

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