

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 16-11
16 NOVEMBER 2018**

The Requestors, Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (collectively, Requestors) submitted standard applications¹ for the .HOTEL generic top-level domain (gTLD). The Requestors seek reconsideration of ICANN Board Resolutions 2016.08.09.14 and 2016.08.09.15 (collectively, the 2016 Resolutions), which directed ICANN organization to move forward with the processing of the prevailing community application for the .HOTEL gTLD (HTLD’s Application) submitted by Hotel Top-Level Domain S.a.r.l (HTLD).² The Requestors do not challenge the application of the Community Priority Evaluation (CPE) criteria to HTLD’s Application or a particular finding by the CPE Provider on any of the CPE criteria. Instead, the Requestors claim that the 2016 Resolutions are inconsistent with ICANN org’s Articles of Incorporation (Articles) and Bylaws because by accepting the CPE report determining that HTLD’s Application prevailed in CPE, the Board is awarding “undue priority . . . to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string” when “the purpose of community based applications has never been to eliminate competition among applicants for a generic TLD.”³ The Requestors also assert that in deciding

¹ Applicants may apply for a standard or community-based gTLD. A “community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. . . . [A]n application that has not been designated as community-based will be referred to . . . as a standard application.” Applicant Guidebook (Guidebook), Module 1, § 1.2.3. (<https://newgtlds.icann.org/en/applicants/agb/intro-04jun12-en.pdf>).

² As discussed in further detail below, HTLD’s Application prevailed in CPE and thus prevailed over all other applications in the .HOTEL contention set. *See* Applicant Guidebook, Module 4.2, § 4.2.3 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³ Request 16-11 § 6, at Pgs. 5-6.

to proceed with HTLD’s Application, the Board did not consider “the unfair competitive advantage” that HTLD allegedly gained by exploiting a privacy configuration in the New gTLD Applicant portal (Portal Configuration) to obtain confidential information of competing applicants.⁴ The Requestors also allege that the Board discriminated against Requestors by refusing to reconsider the Board’s position regarding the CPE results on HTLD’s Application when the Board did so for other applicants.⁵

I. Brief Summary

The Requestors and HTLD submitted applications for the .HOTEL gTLD and were placed in the same contention set. As a community-based application, HTLD participated and prevailed in CPE.⁶ CPE is a method of string contention resolution.⁷ As a result, HTLD’s Application prevailed over all other applications in the .HOTEL contention set and none of the Requestors’ applications for .HOTEL will proceed.

In 2014, some of the Requestors submitted Reconsideration Requests 14-34 and 14-39, challenging HTLD’s Application CPE results and ICANN org’s response to Requestors’ requests for documents relating to the HTLD CPE, respectively.⁸ Both Requests were denied by the Board Governance Committee (BGC).⁹ Thereafter, some of the Requestors (the IRP Claimants)

⁴ *Id.*, § 8, at Pg. 9-11. On 1 March 2015, ICANN org discovered that, under certain circumstances, an authenticated user of the new gTLD applicant and GDD portals could access the data of, or related to, other users without permission. See <https://www.icann.org/news/announcement-2015-03-01-en>, <https://www.icann.org/news/announcement-2015-04-30-en> and <https://www.icann.org/news/announcement-2015-05-27-en>.

⁵ Request 16-11, § 8, Pg. 18.

⁶ See HTLD CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

⁷ Guidebook, Module 4, § 4.2 (<https://newgtlds.icann.org/en/applicants/agb>).

⁸ See Request 14-34 (<https://www.icann.org/resources/pages/14-34-2014-07-01-en>) and Request 14-39 (<https://www.icann.org/resources/pages/14-39-2014-09-23-en>).

⁹ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Since 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with initial review of reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

filed an independent review process (IRP) challenging the BGC's determinations on Requests 14-34 and 14-39 (Despegar IRP).¹⁰ While the Despegar IRP was pending, the IRP Claimants added a claim in the IRP that HTLD's Application should be rejected because an individual that was at one time associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal to access confidential data of other applications, including data associated with some of the Requestors' .HOTEL applications.¹¹

In 2016, the Despegar IRP Panel declared ICANN to be the prevailing party.¹² The IRP Panel declined to make a finding on the Portal Configuration issue because it was raised after the IRP process had commenced and the issue was still under consideration by the ICANN Board.¹³ The Board accepted the Despegar IRP Panel's findings and directed ICANN org to complete the investigation of the issues alleged by the IRP Claimants regarding the Portal Configuration.¹⁴

Pursuant to the Board's directive, as described in detail below, ICANN org conducted a thorough forensic investigation of the Portal Configuration and related allegations by the IRP Claimants. ICANN org found no evidence that HTLD received any unfair advantage in the CPE process as a result of the Portal Configuration or that any information obtained as a result of the Portal Configuration was used to support HTLD's Application in CPE.

¹⁰ See Despegar IRP Panel Declaration (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>). Travel Reservations SRL (one of the Requestors) was formerly known as Despegar Online SRL. Request 16-11, § 1, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

¹¹ *Id.* at ¶ 49. See also Additional Submission Reply to ICANN's Response by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC, dated 19 Oct. 2015, Pgs. 18-20, (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-additional-submission-19oct15-en.pdf>).

¹² *Id.* ¶ 151.

¹³ *Id.* ¶¶ 134-38.

¹⁴ Resolutions 2016.03.10.10 – 2016.03.10.11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

After taking into consideration all relevant information concerning the forensic investigation into the Portal Configuration, the Board passed the 2016 Resolutions, concluding that the cancellation of HTLD's Application was not warranted, and directed ICANN org to move forward with processing HTLD's Application.¹⁵

Thereafter, the Requestors submitted Request 16-11 seeking reconsideration of the 2016 Resolutions.¹⁶

While Request 16-11 was pending, the ICANN Board and BGC directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). As discussed in further detail in the Facts section below, the CPE Process Review (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.¹⁷ The BGC determined that the pending Reconsideration Requests relating to CPEs, regardless of the basis for those requests, including Request 16-11, would be placed on hold until the CPE Process Review was completed.¹⁸

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).¹⁹

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (2018 Resolutions), which accepted the findings in the CPE Process Review Reports; declared

¹⁵ *Id.*

¹⁶ Request 16-11.

¹⁷ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>;
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

¹⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

¹⁹ See <https://www.icann.org/news/announcement-2017-12-13-en>.

the CPE Process Review complete; concluded that, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.²⁰

Subsequently, the BAMC invited the Requestors to provide a telephonic presentation to the BAMC in support of Request 16-11, which the Requestors did on 19 July 2018. The BAMC also invited the Requestors to submit additional written materials in response to the CPE Process Review Reports.

The BAMC has reviewed all relevant materials and submissions by the Requestors in support of Request 16-11 to date. The BAMC finds that reconsideration is not warranted because the Board considered all material information, did not disregard any material information, and did not rely on false or inaccurate material information when it adopted the 2016 Resolutions. Moreover, the BAMC finds that there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration. The BAMC also finds that there is no evidence supporting the Requestors' claim that the Board discriminated against the Requestors accepting the CPE results on HTLD's Application. Accordingly, there is no evidence that the Board's adoption of the 2016 Resolutions were based on false information or that the Board failed to consider material information in doing so, and the BAMC recommends that the Board deny Request 16-11.

II. Facts.

As referenced above, in their challenge of the 2016 Resolutions, the Requestors raise

²⁰ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

arguments relating to the CPE result of HTLD's Application, the Portal Configuration, and the overall CPE process. The following are the key facts relevant to the Requestors' claims.

A. The .HOTEL Contention Set

Seven applications were submitted for the .HOTEL gTLD: six standard applications submitted by the Requestors and one community-based application submitted by HTLD.²¹ All seven applications were placed into a contention set.²² As a designated community-based application, HTLD participated and prevailed in CPE.²³ As a result, HTLD's Application prevailed over all other applications in the .HOTEL contention set and none of the Requestors' applications for the .HOTEL will proceed.

B. The Requestors' Challenges to the CPE Result Regarding HTLD's Application.

On 28 June 2014, the Requestors challenged the CPE result of HTLD's Application through Reconsideration Request 14-34.²⁴ The BGC denied Request 14-34 because the Requestors did not identify any misapplication of a policy or procedure by the CPE Provider. Rather, the Requestors simply disagreed with the merits of the CPE Provider's Report, which the BGC determined was not a proper basis for reconsideration.²⁵

On 22 September 2014, the Requestors filed a second Reconsideration Request: Request 14-39. This Request challenged ICANN org's response to the Requestors' request for documentary information relating to the CPE of HTLD's Application pursuant to ICANN's Documentary Information Disclosure Policy (2014 DIDP).²⁶ On 11 October 2014, the BGC

²¹ See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1562>.

²² See Contention Set Diagram, HOTEL (<https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/51>).

²³ See CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

²⁴ Request 14-34 (<https://www.icann.org/en/system/files/files/request-despegar-online-et-al-28jun14-en.pdf>).

²⁵ BGC Determination on Request 14-34 (<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-22aug14-en.pdf>).

²⁶ Request 14-39 (<https://www.icann.org/en/system/files/files/request-despegar-online-et-al-22sep14-en.pdf>).

determined that the Requestors' claims did not support reconsideration and denied Request 14-39.²⁷

On 4 March 2015, some of the Requestors filed the Despegar IRP, challenging, among other things, the BGC's Determinations on Requests 14-34 and 14-39.²⁸ While the Despegar IRP was pending, the IRP Claimants raised new claims concerning the Portal Configuration. The IRP Claimants asserted that "ICANN must reject HTLD's Application for .hotel"²⁹ because the user who purportedly exploited the Portal Configuration issue to access confidential data of other applications, including some of the Requestors' applications for .HOTEL, was associated with HTLD.³⁰ On 11 February 2016, the Despegar IRP Panel declared ICANN the prevailing party.³¹ The Panel specifically declared that

in relation to each of the specific issues raised in the .hotel . . . IRP[] that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles [] and Bylaws, and that the Claimants' complaints have not been made out.³²

The Despegar IRP Panel also noted that the IRP Claimants raised a number of serious concerns with respect to the Portal Configuration. The Panel declined to make a finding on this claim because it was raised well after the IRP process had commenced and the ICANN Board was still considering it.³³ The Board subsequently accepted the findings of the Despegar IRP

²⁷ BGG Determination on Request 14-39, Pg. 4 (<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-11oct14-en.pdf>).

²⁸ Despegar IRP Request, Pgs. 8-10 (<https://www.icann.org/en/system/files/files/irp-request-redacted-10mar15-en.pdf>).

²⁹ *Id.* ¶49.

³⁰ See Additional Submission Reply to ICANN's Response by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC, dated 19 Oct. 2015, at Pgs. 18-20 (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-additional-submission-19oct15-en.pdf>).

³¹ Despegar IRP Panel Declaration (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>).

³² *Id.* ¶151.

³³ *Id.* ¶¶ 134-38.

Panel and directed ICANN org to complete the investigation of the issues alleged by the IRP Claimants regarding the Portal Configuration.³⁴

Pursuant to the Board's directive, ICANN org completed an investigation of the issues regarding the Portal Configuration and provided the Board with its findings. The details of the forensic investigation are discussed in detail in the following section. After consideration of all relevant information concerning the forensic investigation into the Portal Configuration and the Requestors' claims relating to the Portal Configuration, the Board passed the 2016 Resolutions.³⁵ The 2016 Resolutions concluded that the cancellation of HTLD's Application was not warranted, and directed ICANN org to move forward with processing HTLD's Application.³⁶

C. The Portal Configuration.

In late February 2015, ICANN org discovered that the privacy settings for the new gTLD applicant and GDD portals had been misconfigured, which resulted in authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) being able to see information belonging to other authorized users without the permission.³⁷

Upon becoming aware of the Portal Configuration issue, ICANN org took the portals offline to re-configure the privacy settings and to prevent any further unauthorized access. ICANN org also began a forensic investigation to identify instances of unauthorized access to information on the portals.³⁸ ICANN org retained two independent firms to review and analyze

³⁴ Resolutions 2016.03.10.10 – 2016.03.10.11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Portal Configuration Notice (<https://www.icann.org/news/announcement-2015-03-01-en>); New gTLD Applicant and GDD Portals Q&A (<https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf>).

³⁸ *See* New gTLD Applicant and GDD Portal Update (<https://www.icann.org/news/announcement-2015-03-01-en>); Update: New gTLD Applicant and GDD Portal Back Online (<https://www.icann.org/news/announcement-3-2015-03-02-en>); Update: New gTLD Applicant and GDD Portal Q&A Published

the full set of log files detailing activity on the portals going back to when the portals first launched. The firms confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted from March through October 2014 using a limited set of user credentials issued to Mr. Dirk Krischenowski and his associates, Mr. Oliver Süme and Ms. Katrin Ohlmer.³⁹

ICANN org informed the parties whose data was viewed and provided them with information regarding: (1) the name(s) of the user(s) whose credentials were used to view their information without their authorization or by individuals that were not officially designated by their org to access certain data; (2) any explanation(s) and/or certification(s) that the user(s) provided to ICANN regarding the unauthorized access; (3) the date(s) and time(s) of access; and (4) what portion(s) of their data was seen.⁴⁰ Some of the Requestors were among the affected parties whose data relating to their .HOTEL applications were viewed by Mr. Krischenowski.⁴¹

ICANN org also contacted the users, including Messrs. Krischenowski and Süme and Ms. Ohlmer, who appeared to have viewed information that was not their own, and required that they provide an explanation of their activity. ICANN org also asked them to certify that they will delete or destroy all information obtained and to certify that they have not and will not use the data or convey it to any third party.⁴²

(<https://www.icann.org/news/announcement-4-2015-03-02-en>); New gTLD Applicant and GDD Portal Update (<https://www.icann.org/news/announcement-2015-04-30-en>).

³⁹ See Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>); ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁰ Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>).

⁴¹ See 23 February 2016 Letter from ICANN org to Despegar (Guillermo Luis Perrone), (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf> at Pgs. 95-96).

⁴² Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>).

Mr. Krischenowski acknowledged that he accessed confidential information of other users, but denied that he acted improperly or unlawfully. Among other things, Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN that they would delete or destroy all information obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party.⁴³

ICANN's investigation revealed that at the time that Mr. Krischenowski accessed confidential information, he was not directly linked to HTLD's Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD. Mr. Philipp Grabensee, the sole Managing Director of HTLD, informed ICANN org that Mr. Krischenowski was "not an employee" of HTLD, but that Mr. Krischenowski acted as a consultant for HTLD's Application at the time it was submitted in 2012. Mr. Grabensee further verified that HTLD "only learned about [Mr. Krischenowski's access to the data] on 30 April 2015 in the context of ICANN's investigation." Mr. Grabensee stated that the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015.⁴⁴

⁴³ Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁴ Letter from Mr. Philipp Grabensee to ICANN (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>). The Requestors assert that Ms. Ohlmer has also been associated with HTLD. *See* Request 16-11 § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>). The BAMC concludes that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 § 8, at Pg. 15) does not support reconsideration because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE.

In its investigation, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski's first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL applicants did not occur until 27 March, 29 March and 11 April 2014.⁴⁵

On 29 July 2015 and 8 March 2016, Despegar requested that ICANN cancel HTLD's Application.⁴⁶

On 9 August 2016, after the conclusion of ICANN org's Portal Configuration investigation, the Board considered the Requestors' request for cancellation of HTLD's Application.⁴⁷ The Board concluded that, even assuming that Mr. Krischenowski did obtain confidential information belonging to the .HOTEL applicants, this would not have had any impact on the CPE process for HTLD's Application. Specifically, whether HTLD's Application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013⁴⁸ – all of which occurred before Mr. Krischenowski or his associates accessed any confidential

⁴⁵ Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁶ See Letter from Requestors to ICANN org (<https://www.icann.org/en/system/files/correspondence/petillion-to-atallah-08mar16-en.pdf>). See also Briefing Materials (2) for Special Meeting of the ICANN Board (Minutes), 9 August 2016 at Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

⁴⁷ Resolutions 2016.08.09.14 – 2016.08.09.15, dated 8 August 2016 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁴⁸ *Id.*

information, which occurred from March 2014 through October 2014. HTLD did not submit a change request during CPE to amend its application, nor did it submit any documentation that could have been considered by the CPE panel.⁴⁹ In fact, the last documents amending HTLD's Application were uploaded on 16 August and 30 August 2013 (change of address and additional endorsements), well before the unauthorized access.⁵⁰ The Board also concluded that there was no evidence or claim by the Requestors that the CPE Panel had any interaction at all with Mr. Krischenowski or HTLD during the CPE process, which began on 19 February 2014.⁵¹ The Board declined to cancel HTLD's Application⁵² and directed ICANN org to move forward with processing HTLD's Application.⁵³

D. Request 16-11.

The Requestors submitted Request 16-11⁵⁴ asserting that the 2016 Resolutions are inconsistent with ICANN org's Articles and Bylaws because by accepting the CPE results of HTLD's Application, the Board is awarding "undue priority [] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" when "the purpose of community based applications has never been to eliminate competition among applicants for a generic TLD."⁵⁵ The Requestors also asserted that in deciding to proceed with HTLD's Application, the Board did not consider "the unfair competitive advantage" that HTLD allegedly gained by exploiting the Portal Configuration to obtain trade secrets of competing

⁴⁹ Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

⁵⁰ *See id.* at Pgs. 156-158.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Request 16-11 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

⁵⁵ *Id.*, § 6, at Pgs. 5-6.

applicants.⁵⁶ The Requestors also alleged that the Board discriminated against the Requestors by refusing to reconsider its position on HTLD’s CPE determination when it did so for other applicants and asked the Board to conduct a meaningful review of the .HOTEL CPE to ensure consistency of approach in the application of the CPE criteria by the CPE Provider.⁵⁷ The Requestors did not challenge the application of particular CPE criteria to HTLD’s Application or a particular finding by the CPE Provider on any of the CPE criteria.

On 16 December 2016, at the BGC’s invitation, the Requestors made a telephonic presentation to the BGC regarding Request 16-11.⁵⁸ Pursuant to the BGC’s request during the presentation, the Requestors provided the Board with a written statement of their position concerning Request 16-11.⁵⁹ The Requestors argued that even though Krischenowski’s unauthorized access to confidential information did not occur until after HTLD submitted its application and elected to participate in CPE, the information HTLD obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD,” and Krischenowski’s behavior was “unacceptable to the Internet behavior and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.”⁶⁰

E. The CPE Process Review.

On 17 September 2016, the Board directed ICANN org to undertake a review of the “process by which ICANN [org] interacted with the CPE Provider, both generally and

⁵⁶ *Id.*, § 8, at Pg. 9-11.

⁵⁷ Request 16-11, §§ 8-9, at Pgs. 18, 20.

⁵⁸ Minutes, Board Governance Committee Meeting, 16 December 2016 (<https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en>).

⁵⁹ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

⁶⁰ *Id.* at Pg. 2.

specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1).⁶¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC.

The BGC later determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).⁶² Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to the CPE process, including Request 16-11, would be on hold until the CPE Process Review was completed.⁶³

FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI’s reports issued in connection with the CPE Process Review (the CPE Process Review Reports).

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.⁶⁴

⁶¹ ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

⁶² <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁶³ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁶⁴ Scope 1 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

FTI also concluded that “ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”⁶⁵

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”⁶⁶

For Scope 3, FTI compiled the research relied upon by the CPE Provider for the evaluations which are the subject of the pending Reconsideration Requests relating to CPE.⁶⁷ The results of Scope 3 of the CPE Process Review are set forth in the CPE Process Review Reports, and are not relevant to the issues raised in Request 16-11.⁶⁸

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.⁶⁹ As part of the process, the BAMC invited the Request 16-11 Requestors to “submit additional information relating to Request 16-11, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the

⁶⁵ *Id.*, at Pg. 9, 15.

⁶⁶ Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

⁶⁷ Scope 3 Report, at Pg. 3-4 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

⁶⁸ *See id.*

⁶⁹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

Request 16-11 Requestors to “make a telephonic oral presentation to the BAMC in support of” Request 16-11. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials.”⁷⁰

F. The Requestors’ Response to the CPE Process Review.

The Requestors challenged the Board’s acceptance of the CPE Process Review Reports in a series of letters in January and February 2018.⁷¹

Subsequently, the Requestors accepted the BAMC’s invitation to submit additional materials and to provide a telephonic presentation to the BAMC, and on 9 April 2018, the Requestors submitted a letter to the Board concerning the 2018 Resolutions. The Requestors asserted that the Board passed the resolutions “without considering Request[o]rs’ arguments against accepting the findings set forth in the CPE Process Review Reports,” and “[i]nstead . . . considered that Request[o]rs will have the opportunity to address their arguments in support of . . . Request 16-11.”⁷² The Requestors asserted that the 2018 Resolutions “make[] a meaningful review of [the] main arguments expressed by Request[o]rs impossible.”⁷³ The Requestors believed that “upholding [the 2018 Resolutions] would preclude the ICANN Board from

⁷⁰ 19 March 2018 email from ICANN org to Flip Petillion, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-attachment-1-14jun18-en.pdf>.

⁷¹ See 16 January 2018 letter from Petillion to BAMC (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>); 1 February 2018 letter from Petillion to BAMC, (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>); and 22 February 2018 letter from Petillion to BAMC (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf>). Although the subject lines of these letters reference Request 16-11, the letters challenged the Board action concerning the CPE Process Review, which is the subject of Request 18-6, filed by a subset of the Requestors. Accordingly, the Board has considered and addressed the claims raised in these letters in its consideration of Request 18-6.

⁷² 9 April 2018 letter from Petillion to Board at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-09apr18-en.pdf>).

⁷³ *Id.*

granting the remedies requested by Request[ors] in the framework of . . . Request 16-11.”⁷⁴ The Requestors concluded that the 2018 Resolutions were “either careless and incompetent or prejudiced.”⁷⁵

On 14 April 2018, a subset of the Requestors⁷⁶ submitted Request 18-6, challenging the 2018 Resolutions.⁷⁷ The Requestors claimed that the 2018 Resolutions are contrary to ICANN org’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.⁷⁸ The Board denied Request 18-6 on 18 July 2018.⁷⁹

G. Relief Requested

The Requestors ask the BAMC to:

1. “[R]everse the [2016 Resolutions] . . . and declare that HTLD’s application for .hotel is cancelled, and . . . take whatever steps towards HTLD it deems necessary”;
2. “[T]ake all necessary steps to ensure that Requestors’ applications for .hotel remain in contention until Requestors have self-resolved the contention set, or until Requestors have resolved the contention set in an auction, organized by ICANN”;
3. “[E]ngage in conversations with Requestors,” organize a hearing, and “refrain from executing the registry agreement with HTLD, and . . . provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the [CPE Provider] and third parties . . . regarding HTLD’s application for .hotel”; and

⁷⁴ *Id.* at Pg. 1-2.

⁷⁵ *Id.* at Pg. 2.

⁷⁶ Spring McCook, LLC, Famous Four Media Limited, and dot Hotel Limited, all parties to Request 16-11, were *not* parties to Request 18-6. Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., and Fegistry LLC are parties to Request 16-11 and 28-6. *Compare* Request 18-6 § 1, at Pg. 2-3 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf> with [Request 16-11, § 1, at Pg. 1-3](#)).

⁷⁷ Request 18-6, § 2, at Pg. 3.

⁷⁸ *Id.* § 7, at Pg. 6-7.

⁷⁹ Board action on Request 18-6 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>).

4. If the Board decides to not cancel HTLD’s Application, then it should “take[] the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration].”⁸⁰

III. Issues Presented.

The issue is as follows:

1. Whether the Board’s adoption of the 2016 Resolutions occurred without consideration of material information or were taken as a result of its reliance on false or inaccurate material information.

IV. The Relevant Standards for Reconsideration Requests.

Article IV, Section 2.1 and 2.2 of ICANN’s Bylaws⁸¹ provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) One or more Staff actions or inactions that contradict established ICANN policy(ies);
- (b) One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.⁸²

⁸⁰ Request 16-11, § 9, Pg. 20.

⁸¹ The BAMC has considered Request 16-11 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestors submitted Request 16-11).

⁸² ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

Where, as here, the reconsideration request seeks reconsideration of Board action, the operative version of the Bylaws direct the BAMC⁸³ to review the request and provide a recommendation to the Board.⁸⁴ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁸⁵

Reconsideration requests from different parties may be considered in the same proceeding if: (1) the requests involve the same general action or inaction; and (ii) the parties submitting the requests are similarly affected by such action or inaction.⁸⁶

On 26 April 2017, the BGC placed Request 16-11 on hold, and it remained on hold until 15 March 2018 when the Board directed the BAMC to proceed with its evaluation of Request 16-11. Accordingly, the BAMC has reviewed Request 16-11 and all relevant materials, and issues this Recommendation.

V. Analysis and Rationale.

A. The Board Adopted The 2016 Resolutions After Considering All Material Information And Without Reliance On False Or Inaccurate Material Information.

The Requestors appear to be dissatisfied with ICANN org’s investigation of the Portal Configuration and the Board’s decision to allow HTLD’s Application to proceed, asserting that ICANN org “failed to properly investigate and address illegal actions.”⁸⁷ However, under the relevant Bylaws, reconsideration is permitted only to challenge Board actions taken either: (a)

⁸³ As noted above, *supra* n.2, the BAMC is currently tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁸⁴ See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

⁸⁵ *Id.*

⁸⁶ *Id.* § 2.8.

⁸⁷ Request 16-11, § 8, Pg. 14.

without consideration of material information, or (b) in reliance on false or inaccurate material information.⁸⁸ The Requestors fail to identify any material information that the Board allegedly failed to consider or any Board action taken in reliance on false or inaccurate material information. As such, the Requestors fail to identify a proper basis for reconsideration.

1. The Requestors Have Not Identified False or Misleading Information that the Board Relied Upon, or Material Information that the Board Did Not Consider, In Investigating The Portal Configuration.

The Requestors assert that reconsideration is warranted because ICANN org “failed to properly investigate and address illegal actions,” insofar as ICANN org did not verify Mr. Krischenowski’s affirmation that he did not and would not provide the information he accessed to HTLD or its personnel.⁸⁹ However, contrary to the Requestors’ claim, ICANN org *did* verify that statement when it obtained HTLD’s confirmation that none of its personnel received that information.⁹⁰ ICANN org concluded that Mr. Krischenowski’s affirmation that he and his associates did not and would not share the confidential information with HTLD, coupled with HTLD’s confirmation that it did not receive the confidential information, was sufficient verification under ICANN org’s policies and procedures, and the Requestors have not identified a policy or procedure that required ICANN org to undertake different or additional verification processes.

Even if Mr. Krischenowski (or his associates) had obtained sensitive business documents belonging to the Requestors, it would not have had any impact on the CPE process for HTLD’s Application, for a number of reasons. First, CPE is performed by the CPE Provider, and entails

⁸⁸ Bylaws, Article IV, § 2.2.

⁸⁹ Request 16-11, § 8, Pg. 14.

⁹⁰ See Letter from Mr. Philipp Grabensee to ICANN organization (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

scoring each application according to four specified criteria: (i) community establishment; (ii) nexus between the proposed string and community; (iii) registration policies; and (iv) community endorsement.⁹¹ The Requestors have not explained how confidential documents belonging to the other applicants for .HOTEL could impact these criteria, which do not consider other entities' confidential information.

Second, even if the information obtained by Mr. Krischenowski could have had an impact in some way on the CPE process (there is no evidence that it did, as discussed below), that information was not obtained by Mr. Krischenowski until late in March 2014, when the CPE process for HTLD's Application was already underway. While Mr. Krischenowski's access occurred prior to the issuance of the CPE Report in June 2014, HTLD did not submit a change request during CPE to amend its application, nor did it submit any documentation that could have been considered by the CPE panel.⁹² In fact, the last documents amending HTLD's Application were uploaded on 16 August and 30 August 2013 (the change of address and additional endorsements), well before the unauthorized access.⁹³ There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.⁹⁴

Nor does the BAMC agree with the Requestors' assertion that ICANN org "failed to properly investigate" the Portal Configuration. As detailed above, ICANN org undertook a careful and thorough analysis of the Portal Configuration. Pursuant to the Board's directive on

⁹¹ See Guidebook, § 4.2.

⁹² Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

⁹³ See *id.* at Pgs. 156-158.

⁹⁴ *Id.* at Pg. 95-96.

10 March 2016, ICANN org completed its investigation of the issues raised by the Requestors regarding the Portal Configuration. The Requestors have not identified any false or inaccurate material information they allege the Board relied on, and for the reasons discussed in section V.A.2 below, the Board *did* consider the evidence that the Requestors claim it ignored. Indeed, as noted above, ICANN org did not uncover—and the Requestors have not identified—any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD’s Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE.⁹⁵

Moreover, the Requestors have not offered any evidence that Mr. Krischenowski shared the Requestors’ confidential information with HTLD.⁹⁶ In the course of ICANN org’s investigation, Mr. Krischenowski affirmed that he and his associates had not used and would not use the information obtained, or convey it to any third party,⁹⁷ and HTLD confirmed that Mr. Krischenowski did not inform HTLD’s personnel about “his action” and “did not provide any of the accessed information” to HTLD or its personnel.⁹⁸ The Board’s conclusion that Mr. Krischenowski did not provide confidential information to HTLD is not changed simply because Mr. Krischenowski was a 50% shareholder and managing director of a minority (48.8%) shareholder of HTLD.⁹⁹ Without evidence that the confidential information was shared, Mr. Krischenowski’s corporate holdings alone are not sufficient to demonstrate that HTLD received

⁹⁵ Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁹⁶ See Request 16-11.

⁹⁷ ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

⁹⁸ Letter from Mr. Philipp Grabensee to ICANN organization (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

⁹⁹ *Id.*

any of the information that Mr. Krischenowski accessed and/or that HTLD gained some “unfair advantage” from Mr. Krischenowski’s access to the information.

This evidence also undermines the Requestors’ argument that information Mr. Krischenowski obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD.”¹⁰⁰ Because ICANN org’s investigation determined that there was no evidence that HTLD received the Requestors’ confidential information, the Requestors’ assertion that the information will create an unfair advantage for HTLD if it is allowed to operate the .HOTEL gTLD does not support reconsideration.

2. The Requestors Have Not Identified False or Misleading Information that the Board Relied Upon, or Material Information that the Board Did Not Consider, In Deciding to Allow HTLD’s Application To Proceed.

The Requestors claim that the Board “failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of prospective registry operators.”¹⁰¹ The Requestors state that “allowing HTLD’s Application to proceed ... amounts to an acquiescence in criminal acts.”¹⁰² The BAMC considers these claims very seriously, but must conclude that they do not support reconsideration, insofar as the Requestors do not identify any action taken by the Board without material information or in reliance on false or inaccurate information. Rather, the Requestors appear to simply disagree with the Board’s actions in adopting the 2016 Resolutions; however, the Requestor’s disagreement with the merits of the Board’s decision, alone, without evidentiary support that it was taken without material

¹⁰⁰ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹⁰¹ Request 16-11, § 8, Pg. 9.

¹⁰² *Id.* at Pg. 16.

information or in reliance on false or inaccurate information, is not a proper basis for reconsideration.¹⁰³

As discussed in more detail above, the Requestors have not identified any material information that the Board failed to consider (nor any false material information that the Board relied on) when it accepted ICANN org's conclusion that Mr. Krischenowski's and his associates' access to confidential information had no effect on the CPE outcome of HTLD's Application and that HTLD did not receive any unfair benefit from Mr. Krischenowski's access to the information.

The Board's decision to allow HTLD's Application to proceed was made following a comprehensive investigation, and was well reasoned and consistent with ICANN org's Articles and Bylaws. In particular, in reaching its decision that HTLD's Application should not be excluded, the Board carefully considered the results of ICANN org's forensic review and investigation of the Portal Configuration and the Requestors' claims relating the alleged impact of Portal Configuration on the CPE of HTLD's Application. The details of ICANN org's investigation into these matters are described above.

Further, the Board did consider the actions of Mr. Krischenowski and his associates. The Board evaluated the timeline of events, Mr. Krischenowski's affirmations that he did not and would not share the confidential information with any third party, and HTLD's confirmation that it did not receive the confirmation. Based on all of this evidence, the Board determined that the Requestors were not harmed as a result of the information Mr. Krischenowski and his associates obtained through the portal misconfiguration. As discussed above, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a

¹⁰³ *Id.* at Pg. 9.

result of the Portal Configuration was used to support HTLD’s Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE. The Requestors provide no evidence otherwise nor do the Requestors cite to any evidence demonstrating the alleged unfair competitive advantage gained by HTLD as a result of the Portal Configuration that the Board failed to consider. Accordingly, the Requestors’ claims do not support reconsideration.

The Requestors also ignore the evidence uncovered by ICANN org during its investigation of the Portal Configuration. In particular, as evidenced in the letters exchanged with HTLD, at the time of his apparent access to materials belonging to the Requestors, Mr. Krischenowski was not an employee of HTLD, did not use HTLD’s login ID to access the portal, and was merely a 50% shareholder in an entity that was a minority shareholder in HTLD.¹⁰⁴ Moreover, the Requestors fail to identify the specific harm they will have suffered as a result of Mr. Krischenowski’s actions, and even concede that the information obtained by Mr. Krischenowski and his associates “may not have directly impacted HTLD’s position as an applicant.”¹⁰⁵ As such, contrary to Requestors’ assertions, the Board fully considered whether the Portal Configuration conferred an unfair competitive advantage to HTLD, and concluded that the misconfiguration had no bearing on the CPE process for .HOTEL or the Requestors’ applications for .HOTEL.

Despite all of this, the Requestors maintain that the information Mr. Krischenowski obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD,” and Mr. Krischenowski’s behavior

¹⁰⁴ Letter from Mr. Philipp Grabensee to ICANN (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

¹⁰⁵ Request 16-11, § 8, Pg. 15.

was “unacceptable to the Internet behavior and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.”¹⁰⁶ But the Requestors do not identify any false or inaccurate information or any information that the Board did not consider, to support this argument. Accordingly, this argument does not support reconsideration.

In conclusion, far from relying upon incomplete or false information, the Board carefully considered all of the materials and issues presented and came to a well-reasoned decision based on these considerations in adopting the 2016 Resolutions.

B. The Board Did Not Rely Upon False Or Misleading Information In Accepting The Despegar IRP Panel’s Declaration.

Although Request 16-11 challenges the Board’s conduct as it “relate[s] to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016,”¹⁰⁷ which concern the Board’s consideration of the request for cancellation of HTLD’s Application, the Requestors also appear to challenge the Board’s acceptance of the Despegar IRP Panel’s Declaration. In particular, the Requestors assert that “the Despegar et al. IRP Panel relied on false and inaccurate material information,” such that “[w]hen the ICANN Board accepted the Despegar et al. IRP Declaration, it relied on the same false and inaccurate material information.”¹⁰⁸

As an initial matter, the Requestors’ claim is time-barred. The Board’s resolution accepting the findings of the Despegar IRP Panel’s Declaration was published on 10 March 2016.¹⁰⁹ Request 16-11 was submitted on 25 August 2016, over five months after the Board’s

¹⁰⁶ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹⁰⁷ Request 16-11, § 3, Pg. 3.

¹⁰⁸ *Id.*, § 8, Pg. 9.

¹⁰⁹ 2016 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

acceptance of the Despegar IRP Panel's Declaration, and well past the 15-day time limit to seek reconsideration of a Board action.¹¹⁰

1. The Requestors' Claims Regarding the Dot Registry and Corn Lake IRP Panel Declarations Do Not Support their Claims of Discrimination.

Even had the Requestors timely challenged the Board's acceptance of the Despegar IRP Panel's Declaration, their claims do not support reconsideration. The Requestors cite to the IRP Panel Declaration issued in *Dot Registry, LLC v. ICANN* (Dot Registry IRP Panel Declaration) to support their claim that the Despegar IRP Panel Declaration was based "upon the false premise that the [CPE Provider's] determinations are presumptively final and are made independently by the [CPE Provider], without ICANN's active involvement."¹¹¹ In particular, the Requestors claim that the Dot Registry IRP Panel Declaration demonstrates that "ICANN did have communications with the evaluators that identify the scoring of individual CPEs,"¹¹² such that the Despegar IRP Panel relied upon false information (namely ICANN org's representation in its Response to the 2014 DIDP Request that ICANN org does not engage in communications with individual evaluators, which was the subject of Request 14-39), when it found ICANN org to be the prevailing party. As a result, the argument goes, the ICANN Board also relied upon false information when it accepted the Despegar IRP Panel Declaration. The Requestors also argue that they are "situated similarly" to the Dot Registry claimants, and therefore if the Board refuses to grant the Requestors relief when the Board granted the Dot Registry claimants relief, then the Board is discriminating against the Requestors in contradiction to ICANN's Articles and Bylaws. The Dot Registry IRP Declaration and the Board's response to it, however, do not support the Requestors' request for reconsideration.

¹¹⁰ ICANN Bylaws, 11 February 2016, Art. IV, § 2.5.

¹¹¹ Request 16-11, § 8, Pg. 12.

¹¹² *Id.* (emphasis in original).

As an initial matter, the findings of one IRP Panel cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP. The Dot Registry IRP concerned the .LLC, .INC, and .LLP gTLD strings. The Despegar IRP, by contrast, concerned .HOTEL. During the CPE process, .LLC, .INC, and .LLP were each awarded 5 out of 16 points, and therefore did not prevail in CPE; the .HOTEL string was awarded 15 out of 16 points, and therefore did prevail in CPE.¹¹³ Different issues were considered in each IRP, based on different arguments presented by different parties concerning different applications and unrelated factual situations. As such, there is no support for the Requestors' attempt to apply the findings of the Dot Registry IRP Declaration to the Despegar IRP.

The Requestors similarly cite the Board's acceptance of the final declaration in *Corn Lake, LLC v. ICANN*, (Corn Lake IRP Declaration) and decision "to extend its final review procedure to include review of Corn Lake's charity expert determination."¹¹⁴ The Requestors argue that a refusal to implement some form of review mechanism here would amount to inconsistent and discriminatory treatment, in violation of the Bylaws.¹¹⁵ The argument does not support reconsideration. The Corn Lake IRP Declaration explains that ICANN org has "discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interest of the Internet community as a whole."¹¹⁶ As was the case with the Dot Registry IRP, the circumstances in the Corn Lake IRP and the Board's subsequent decision concerning

¹¹³ See .LLC, .INC, .LLP, and .HOTEL CPE Reports (<https://newgtlds.icann.org/en/applicants/cpe>).

¹¹⁴ Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 4-5 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹¹⁵ *Id.*

¹¹⁶ Corn Lake IRP Declaration, ¶ 8.98 (<https://www.icann.org/resources/pages/corn-lake-v-icann-2015-04-07-en>).

.CHARITY involved different facts and distinct considerations specific to the circumstances in Corn Lake’s application. As such, the Board’s action there does not amount to inconsistent or discriminatory treatment; it is instead an example of the way that the Board must “draw nuanced distinctions between different [gTLD] applications,”¹¹⁷ and is consistent with ICANN org’s Articles and Bylaws.

2. The CPE Process Review Confirms that ICANN Org did not have any Undue Influence on the CPE Provider with respect to the CPEs Conducted.

The Requestors argue that ICANN org exerted undue influence over the CPE Provider’s execution of CPE.¹¹⁸ The ICANN Board considered and addressed this assertion in the 2018 Resolutions, and the BAMC incorporates that reasoning here by reference.¹¹⁹

The standards governing CPE are set forth in Module 4.2 of the Guidebook. CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.¹²⁰ CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.¹²¹ A CPE panel’s role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook. The four criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

¹¹⁷ *Id.*

¹¹⁸ Request 16-11, § 8, at Pg. 12-13.

¹¹⁹ 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>).

¹²⁰ Guidebook, Module 4.2.

¹²¹ *Id.* Module 4.2.2.

The CPE Process Review’s Scope 1 Report confirms that “there is no evidence that ICANN org had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process,” including with respect to HTLD’s Application.¹²² The Requestors believe that the Scope 1 Report demonstrates that “the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue.”¹²³ The Requestors do not identify what “policy” they are referring to, but regardless, their disagreement with the conclusions of the Scope 1 Report do not support reconsideration. This is because the Requestors do not dispute that, when ICANN org provided input to the CPE Provider, that input did *not* involve challenging the CPE Provider’s conclusions, but rather was to ensure that the CPE Reports were clear and “that the *CPE Provider’s* conclusions”—not ICANN org’s conclusions—were “supported by sufficient reasoning.”¹²⁴ The Requestors also cite “phone calls between ICANN and the CPE Provider to discuss ‘various issues,’” claiming that those calls “demonstrate that the CPE Provider was not free from external influence from ICANN” org and was therefore not independent.¹²⁵

Neither of these facts demonstrates that the CPE Provider was “not independent” or that ICANN org exerted undue influence over the CPE Provider. These types of communications instead demonstrate that ICANN org protected the CPE Provider’s independence by focusing on ensuring that the CPE Provider’s conclusions were clear and well-supported, rather than

¹²² FTI Scope 1 Report at Pg. 3 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

¹²³ 1 February 2018 letter from Petillion to BAMC, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>).

¹²⁴ 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing FTI Scope 1 Report, at Pg. 12 (emphasis added).

¹²⁵ *Id.*

directing the CPE Provider to reach a particular conclusion. This argument therefore does not support reconsideration.

Because the Scope 1 Report demonstrates that ICANN org did not exert undue influence on the CPE Provider and CPE process, it disproves the Requestors' claim that "the *Despegar et al.* IRP Panel was given incomplete and misleading information" which is based solely on the premise of ICANN org's undue influence in the CPE process.¹²⁶

3. The Requestors Have Not Demonstrated that ICANN Org was Obligated to Produce Communications Between ICANN Org and the CPE Panel.

The Requestors suggest that there is unfairness by virtue of the fact that certain communications between ICANN org and the applicable CPE panel were produced in the Dot Registry IRP, but not in the Despegar IRP.¹²⁷ There is no support for the Requestors' assertions in this regard and reconsideration is not warranted on this basis.

Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter.¹²⁸ In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce all documents reflecting "[c]onsideration by ICANN of the work performed by the [CPE Provider] in connection with Dot Registry's application" and "[a]cts done and decisions taken by ICANN with respect to the work performed by the [CPE Provider] in connection with Dot

¹²⁶ *Id.*, at Pg. 3.

¹²⁷ See Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

¹²⁸ Nothing in ICANN's Bylaws, the DIDP, or other policy or procedure requires ICANN to voluntarily produce in the course of an IRP documents that were properly withheld in response to a DIDP request.

Registry’s applications.”¹²⁹ ICANN org’s communications with the CPE panels for .INC, .LLC, and .LLP fell within the scope of such requests, and thus were produced. Ultimately, ICANN org acted in accordance with applicable policies and procedures, including ICANN’s Bylaws, in both instances.¹³⁰

4. The Requestors Have Not Demonstrated that a New CPE Review of HTLD’s Application is Appropriate.

Finally, without identifying particular CPE criteria, the Requestors ask the Board to “ensure meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration].”¹³¹ To the extent the Requestors are asserting that the outcome of the CPE analysis of HTLD’s Application is inconsistent with other CPE applications, this argument was addressed in Scope 2 of the CPE Process Review. There, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”¹³² Additionally, for the reasons discussed in above, neither the .HOTEL CPE nor the 2016 Resolutions evidence inconsistent or discriminatory treatment toward the Requestors. For these reasons, this argument does not support reconsideration.

C. The 2018 Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).

¹²⁹ Procedural Order No. 3, *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>).

¹³⁰ The Requestors were fully aware that communications occurred between ICANN staff and the CPE panel, since such communications are expressly contemplated in the CPE Panel Process Document and ICANN disclosed the existence of these communications in the 2014 DIDP Response. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe>) (“The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.”).

¹³¹ Request 16-11, § 9, Pg. 20.

¹³² Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

The Requestors' criticisms of the 2018 Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC notes that it addressed the Requestors' concerns regarding the 2018 Resolutions in its Recommendation on Request 18-6,¹³³ which the Board adopted on 18 July 2018.¹³⁴ The rationales set forth by the BAMC, and the Board in its determination of Request 18-6, are incorporated herein by reference.

VI. Recommendation

The BAMC has considered the merits of Request 16-11 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN's Mission, Commitments and Core Values when it passed the 2016 Resolutions. Accordingly, the BAMC recommends that the Board deny Request 16-11.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws applicable to Request 16-11 provides that the BAMC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BAMC would have to have acted by 24 September 2016. However, Request 16-11 was placed on hold pending completion of the CPE Process Review. The Requestors were then provided an opportunity to supplement their arguments in light of the CPE Process Review results, and to make a second presentation to the BAMC. The Requestors submitted additional written materials in January, February, and April 2018. Accordingly, the first opportunity that the BAMC had to fully consider Request 16-11 was 16 November 2018.

¹³³ BAMC Recommendation on Request 18-6 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf>).

¹³⁴ Resolution 2918.07.18.09 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>).