

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-4
26 JUNE 2016**

The Requester, Roman Belichenko, seeks reconsideration of the ICANN Contractual Compliance department's response to the Requester's complaint regarding a dispute between the Requester and the domain name registrar GoDaddy.

I. Brief Summary.

For approximately seven months, the Requester was the registrant of a domain name, magic-pills.com, which was used to sell and distribute various pharmaceuticals (Domain Name). GoDaddy is the registrar for the Domain Name. On 23 December 2015, GoDaddy notified the Requester that it was suspending the Domain Name because the Requester had violated GoDaddy's Universal Terms of Service. Specifically, GoDaddy indicated that the Domain Name was associated with the sale or distribution of prescription medications and/or controlled substances without requiring a valid prescription, or linking to sites that did so, which contravenes GoDaddy's Universal Terms of Service. After receiving GoDaddy's suspension notice, the Requester asked that GoDaddy permit it to transfer the Domain Name to a different registrar, but GoDaddy denied that request.

The Requester then filed a complaint with ICANN's Contractual Compliance department regarding GoDaddy's denial of its transfer request (Complaint). Upon review of the Complaint pursuant to the Contractual Compliance approach,¹ ICANN determined that GoDaddy had not violated any contractual obligation, and informed the Requester that it would therefore not take any further action regarding the Requester's dispute with GoDaddy. The Requester claims that

¹ See ICANN Contractual Compliance Overall Approach, available at <https://www.icann.org/en/system/files/files/overall-03oct14-en.pdf>.

ICANN's handling of its Complaint warrants reconsideration. In particular, the Requester asserts that the "complaint was not considered properly" and that the "Contractual Compliance team has taken the registrar's side without thorough investigation of our explanations and comments."²

The Requester, however, does not present any evidence to show a misapplication of any policy or procedure by ICANN staff when it considered and evaluated the Requester's Complaint, because there was no such misapplication. Rather, the Requester simply disagrees with GoDaddy's determination that the Requester violated GoDaddy's Universal Terms of Service and its resulting decision to suspend the Domain Name. ICANN adhered to all applicable policies and procedures in responding to the Requester's Complaint, and the Requester presented no evidence to the contrary. Because the Requester has failed to show that ICANN staff acted in contravention of any established policy or procedure, the BGC concludes that Reconsideration Request 16-4 be denied.

II. Facts.

A. Background Facts.

Starting in 2015, for approximately seven months, the Requester was the registrant of the Domain Name, magic-pills.com. The Requester used the Domain Name to sell and distribute "medicines" and "[d]ietary supplements."³

GoDaddy is the registrar for the Domain Name. On 23 December 2015, GoDaddy notified the Requester by email that it was suspending the Domain Name "for violation of the GoDaddy Universal Terms of Service."⁴

On 24 December 2015, the Requester responded to GoDaddy, contending that the

² Request, § 9, Pg. 14.

³ *Id.*, § 3, Pgs. 2-3.

⁴ *Id.*, § 3, Pg. 2.

activities conducted on its website were legal according to Russian law, and requesting that GoDaddy “open [the Domain Name] for a transfer to another registrar[.]”⁵

On 28 December 2015, GoDaddy denied this request, noting that the Domain Name “will remain suspended until its expiration date.”⁶ In the same email, GoDaddy stated that the Domain Name violated “Section 5 of the GoDaddy Universal Terms of Service . . . because our investigation found it [to] be associated with the sale or distribution of prescription medication and/or controlled substances without requiring a valid prescription or it was linking to a site taking part in the same activities.”⁷ GoDaddy noted that Section 5 of its Universal Terms of Service expressly prohibits its registrants from “promot[ing], encourage[ing], or engage[ing] in the sale or distribution of prescription medication without a valid prescription.”⁸ Further, GoDaddy noted that the same section of its Universal Terms of Service requires GoDaddy’s registrants to comply with the “Ryan Haight Online Pharmacy Act” (Online Pharmacy Act), which is a United States federal statute that prohibits online prescription sales “without a valid prescription.”⁹

On 29 December 2015, the Requester responded to GoDaddy that “[the Requester’s] company has the status of [a] legal entity (limited liability company)” and that its actions are lawful under “legislation of the Russian Federation.”¹⁰ In that same email, the Requester noted that “in the territory of the USA our preparations would be generics and would be forbidden to sale, because of [the Online Pharmacy Act].”¹¹

That same day, GoDaddy confirmed that the Requester “was not requiring a prescription

⁵ *Id.*, § 3, Pg. 3.

⁶ *Id.*, § 3, Pg. 4.

⁷ *Id.*

⁸ *Id.*

⁹ 21 U.S.C. § 829(e)(1).

¹⁰ Request, § 3, Pg. 5.

¹¹ *Id.*

for known prescription medications or linking to site doing the same.”¹² It reiterated that “[t]here are no reactivation options available to you at this time.”¹³

On 4 January 2016, the Requester responded to GoDaddy’s email, again stating that it complies with Russian law in all respects and asserting that the Online Pharmacy Act “should not be undertaken by the whole world.”¹⁴

On 8 January 2016, GoDaddy responded that the Requester’s use of the Domain Name “was found to be in violation of our terms of service and quite possibly illegal.”¹⁵ It reaffirmed that the Domain Name “will not be reinstated to allow you to transfer elsewhere.”¹⁶

On 9 January 2016, the Requester replied, asserting that GoDaddy had launched “insubstantial accusations without evidence” against it, and stating its intent to file a Transfer Complaint Form with ICANN.¹⁷

The Requester then filed a Transfer Complaint Form (Complaint) with ICANN,¹⁸ in which it did not assert that its use of the Domain Name complied with the Online Pharmacy Act, but instead that it complied with “Russian laws and regulations.”¹⁹ The Complaint requested that ICANN “consider our dispute with the Registrar company GoDaddy about our legality and possibility to transfer our domain name.”²⁰ It stated that the Requester “disagree[d]” with GoDaddy’s decision not to permit it to transfer the Domain Name and asked for ICANN’s “support” and for ICANN to conduct a “competent and impartial investigation.”²¹

¹² *Id.*, § 3, Pg. 6.

¹³ *Id.*

¹⁴ *Id.*, § 3, Pg. 7.

¹⁵ *Id.*, § 3, Pg. 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Where there is no date indicated with respect to a given piece of correspondence, the Requester does not include that information.

¹⁹ *Id.*, § 8, Pg. 11.

²⁰ *Id.*

²¹ *Id.*

ICANN responded, asking the Requester to send additional information by 26 January 2016, and noted that once it was received, ICANN would commence its “standard Contractual Compliance process regarding domain name transfers.”²²

The Requester sent the requested information to ICANN, which included the fact that the Requester had asked GoDaddy for its AuthInfo code, and GoDaddy denied that request.²³ An AuthInfo code is created by the registrar and is necessary to transfer a domain name from one registrar to another.²⁴

ICANN responded, noting that pursuant to the Contractual Compliance Approach on complaints, a “1st Notice will be sent to the registrar, and the registrar will have 5 business days to respond.”²⁵

On 28 January 2016, ICANN sent the Requester the results of its investigation, stating in pertinent part:

ICANN addressed your complaint below and found that the registrar has not breached its obligations under the Registrar Accreditation Agreement (RAA) or ICANN’s Consensus Policies.

The registrar of record advised ICANN that the Registered Name Holder’s account was suspended following the registrar’s own domain use policy. Please note that ICANN-accredited registrars may set their own domain use (or anti-abuse) policy, provided that it is consistent with their obligations under the RAA and any applicable laws or regulations. If you believe that the registrar might have breached its registration agreement with you or any applicable laws or regulations, you may consider seeking legal advice as to what options you may have.

ICANN considers this matter now closed.²⁶

On 9 February 2016, the Requester filed Reconsideration Request 16-4 (Request 16-4)

²² *Id.*, § 8, Pg. 12.

²³ *Id.*

²⁴ See About Auth-Code, <https://www.icann.org/resources/pages/auth-2013-05-03-en>.

²⁵ Request, § 8, Pg. 13.

²⁶ *Id.*, § 8, Pg. 12.

seeking reconsideration of ICANN’s response to its Complaint.

B. Relief Requested.

The Requester asks that ICANN:

1. “resolve the dispute between us and the registrar GoDaddy concerning the domain transfer matter”; and
2. “unlock our domain name and provide us with Autoinfo [*sic*] code in order to transfer to [an]other registrar.”²⁷

III. The Relevant Standards For Reconsideration Requests and Contractual Compliance Review.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.²⁸ The Requester challenges staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

B. ICANN’s Contractual Compliance Review Process Relating To Transfers Of Domain Names.

The mission of ICANN’s Contractual Compliance department is to “preserve the security,

²⁷ *Id.*, § 9, Pg. 14.

²⁸ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states 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); or
- (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.

stability and resiliency of the Domain Name System and to promote consumer trust.”²⁹ The scope of the review conducted by the Contractual Compliance department is limited to “ensur[ing] that ICANN’s contracted parties fulfill the requirements set forth in their agreements with ICANN.”³⁰ In this instance, those requirements are found in the Registrar Accreditation Agreement (RAA) and the consensus policies (Consensus Policies).³¹

ICANN’s Contractual Compliance department investigates complaints regarding a number of different topics, including “a complaint on the transfer of a domain name.”³² To transfer a domain name means that a registrant transfers its registration to a different registrar.³³ Once a contractual compliance complaint is submitted, ICANN adheres to an “Informal Resolution Process” that details the procedures that the Contractual Compliance department follows in responding to a complaint.³⁴ This process consists of: (1) a review of the complaint; (2) sending a “notice/inquiry” to the contracted party; (3) ensuring through those communications that any issue that might exist is cured; and (4) informing the complainant of the results of the process.³⁵

IV. Analysis and Rationale.

The Requester does not present any evidence to show a misapplication of any policy or procedure by ICANN staff when it considered and evaluated the Requester’s Complaint, namely because ICANN adhered to all applicable policies and procedures in doing so. The Requester disagrees with GoDaddy’s determination that the Requester violated GoDaddy’s Universal

²⁹ Contractual Compliance – About, <https://www.icann.org/resources/pages/about-2014-10-10-en>.

³⁰ Contractual Compliance, <https://www.icann.org/resources/pages/compliance-2012-02-25-en>

³¹ See Consensus Policies, <https://www.icann.org/resources/pages/registrars/consensus-policies-en>; 2013 RAA, <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

³² Transfer Complaint Form, <http://forms.icann.org/en/resources/compliance/complaints/transfer/form>; What Is A Contractual Compliance Complaint?, <https://www.icann.org/en/system/files/files/contractual-compliance-complaint-03sep15-en.pdf>.

³³ See FAQ for Domain-Name Holders, <https://www.icann.org/resources/pages/name-holder-faqs-2012-02-25-en>.

³⁴ Informal Resolution Process, <https://www.icann.org/en/system/files/files/informal-resolution-03oct14-en.pdf>.

³⁵ *Id.*

Terms of Service, and with GoDaddy's subsequent suspension of the Domain Name without permitting the Requester to transfer it. Substantive disagreement with a registrar's determination, or with ICANN's decision to close a contractual compliance complaint after following proper procedure in evaluating the complaint, is not a proper basis for reconsideration.

A. No Reconsideration Is Warranted With Respect To ICANN's Response To The Requester's Complaint.

The Requester seeks reconsideration of ICANN's handling of its Complaint. However, ICANN adhered to all applicable policies and procedures in responding to the Complaint. Accordingly, no reconsideration is warranted.

1. ICANN Adhered To The Informal Resolution Process.

Once a complaint is submitted, the Informal Resolution Process calls for the Contractual Compliance department to: (1) review [] the complaint; (2) send a "notice/inquiry" to the contracted party; (3) ensure through those communications that any issue that might exist is cured; and (4) inform the complainant of the results of the process.³⁶ ICANN followed each step here, and the Requester does not properly assert otherwise.

First, ICANN reviewed the Complaint.³⁷ Second, ICANN notified the registrar, GoDaddy, of the Complaint.³⁸ Third, through its communications with GoDaddy, ICANN determined that no issue existed, insofar as GoDaddy had complied with all of its contractual obligations related to the Domain Name, as discussed below.³⁹ Fourth, ICANN notified the Requester of the results of its investigation.⁴⁰ Accordingly, ICANN adhered to all aspects of the Informal Resolution Process in evaluating and responding to the Complaint.

³⁶ Informal Resolution Process, <https://www.icann.org/en/system/files/files/informal-resolution-03oct14-en.pdf>.

³⁷ Request, § 8, Pg. 13.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

2. ICANN Correctly Determined That GoDaddy Was Not In Violation Of The RAA Or Any Consensus Policy.

The only step of the Informal Resolution Process that the Requester could even possibly claim ICANN might not have followed would be ICANN's determination that GoDaddy was in contractual compliance. If this determination is the Requester's claim, it is not supported by the facts.

The scope of the Contractual Compliance department's review is to "ensure that ICANN's contracted parties fulfill the requirements set forth in their agreements with ICANN."⁴¹ Those requirements for registrars are found in the RAA and Consensus Policies. ICANN followed its process for evaluation, and determined that GoDaddy did not violate the RAA or any Consensus Policy in taking the actions it did with respect to the Domain Name. Accordingly, ICANN's refusal to take action against GoDaddy, and refusal to force the transfer of the Domain Name (which ICANN does not have the authority to do in any case), was fully compliant with applicable established policies and procedures. Therefore, reconsideration is not warranted.

a. GoDaddy Did Not Violate The RAA.

ICANN correctly determined that GoDaddy had not breached the RAA. As ICANN informed the Requester, registrars "may set their own domain use (or anti-abuse) policy, provided that it is consistent with their obligations under the RAA and any applicable laws or regulations."⁴² Here, GoDaddy suspended the Domain Name according to GoDaddy's "own domain use policy."⁴³ In particular, GoDaddy's Universal Terms of Service expressly prohibit registrants from using a domain name to sell prescription medicine without a valid prescription.⁴⁴ GoDaddy found that the Requester here was violating this aspect of GoDaddy's Universal Terms

⁴¹ Contractual Compliance, <https://www.icann.org/resources/pages/compliance-2012-02-25-en>.

⁴² *Id.*

⁴³ Request, § 8, Pg. 13.

⁴⁴ *Id.*, § 3, Pg. 4.

of Service and, for that reason, suspended the Domain Name, which GoDaddy's policies expressly allow it to do. Further, the Requester has not presented any evidence to even suggest that GoDaddy's Universal Terms of Service are inconsistent with the RAA or any applicable laws or regulations, and ICANN has not found otherwise. Accordingly, there is no evidence to show that GoDaddy violated the RAA by enforcing its Universal Terms of Service and suspending the Domain Name. As ICANN properly followed the established Informal Resolution Process in determining that GoDaddy did not violate the RAA, reconsideration is not warranted on this basis.⁴⁵

b. GoDaddy Did Not Violate Any Consensus Policy.

ICANN also properly determined that GoDaddy did not violate any applicable Consensus Policies in refusing to provide the AuthInfo code sought by the Requester or otherwise facilitate the transfer of the Requester's Domain Name. The only possible Consensus Policy applicable here is the Policy on Transfer of Registrations between Registrars (Inter-Registrar Transfer Policy, or IRTP), which (among other things) governs a registrar's response to a registrant's request to transfer a domain name to another registrar.⁴⁶ GoDaddy's refusal to provide the Requester with the AuthInfo code or otherwise facilitate a transfer of the Domain Name is supported by two provisions of the IRTP.

First, the IRTP requires a registrar to provide the registrant with its "unique 'AuthInfo' code" upon request;⁴⁷ but this requirement is "[s]ubject to ICANN specifications or policies and

⁴⁵ Moreover, the RAA provides that registrars may not "with actual knowledge (or through gross negligence) permit[] Illegal Activity in the registration or use of domain names[.]" RAA, § 5.5.2.1.3, <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#raa>. The RAA defines "Illegal Activity" as that "prohibited by applicable law[.]" *Id.*, § 1.13. GoDaddy determined that the activities taking place via the Domain Name were "possibly illegal" (Request, § 3, Pg. 9), comprising an additional reason why suspending the Domain Name did not contravene GoDaddy's obligations under the RAA.

⁴⁶ Policy on Transfer of Registrations between Registrars (IRTP), <https://www.icann.org/resources/pages/policy-transfers-2014-07-02-en>.

⁴⁷ *Id.*, § A.5.

any applicable laws or regulations[.]”⁴⁸ GoDaddy determined that there could be a potential violation of “applicable laws” due to the Requester’s use of a domain name to sell prescription medicine without a valid prescription. In addition, not only was the Requester possibly violating the law, GoDaddy determined that applicable laws might be interpreted in a way that could potentially increase GoDaddy’s legal liability if it facilitated the transfer of the Domain Name. Since GoDaddy had determined that providing the AuthInfo code could be contrary to “applicable laws or regulations,” under the IRTP GoDaddy was relieved of its obligation to provide the Requester with the AuthInfo code. Accordingly, declining to provide the AuthInfo code to the Requester was not a violation of the IRTP.

Second, the IRTP permits a registrar to “deny a transfer request” where there is “[e]vidence of fraud.”⁴⁹ Here, GoDaddy determined that there was evidence of fraud taking place in connection with the Domain Name, insofar as GoDaddy determined that the Requester had used a domain name to sell prescription medicine without a valid prescription. As such, pursuant to the IRTP, GoDaddy was not obligated to permit the Requester to transfer the Domain Name. Accordingly, GoDaddy did not violate the IRTP (which is the only relevant Consensus Policy) in refusing to provide the AuthInfo code or otherwise facilitate the transfer of the Domain Name.

In sum, ICANN properly followed the established Informal Resolution Process in determining that GoDaddy’s conduct did not violate the RAA or the IRTP. As no established policy or procedure required ICANN to do anything further than what ICANN did to handle the Requester’s Complaint, no reconsideration is warranted.

B. The Requester Seeks Relief That Exceeds The Scope Of The Reconsideration

⁴⁸ IRTP, § A.5, <https://www.icann.org/resources/pages/policy-transfers-2014-07-02-en>.

⁴⁹ *Id.*, § A.3.1.

Request Process and Exceeds ICANN's Authority.

The Requester asks that ICANN “resolve” its dispute with GoDaddy and “unlock our domain name and provide us with [AuthInfo] code in order to transfer to other registrar.”⁵⁰ Indeed, the Requester asserts that its “complaint was not considered properly” and that the “Contractual Compliance team has taken the registrar’s side without thorough investigation of our explanations and comments.”⁵¹ No ICANN policy or procedure, however, authorizes ICANN to undertake this sort of action on behalf of a registrant in response to a domain transfer complaint. To the contrary, as discussed above, the scope of ICANN’s compliance review is limited to a review of whether the registrar complied with the RAA and the Consensus Policies, which ICANN did in determining that GoDaddy had “not breached its obligations”⁵² under either. At bottom, the Requester’s dispute is with GoDaddy, and no reconsideration is warranted with respect to ICANN’s response to the Requester’s Complaint relating to that dispute. Moreover, ICANN does not have the authority to unlock a domain name or force a registrar to do so. If ICANN had determined that GoDaddy was in violation of the RAA or any Consensus Policy, and that violation was not cured, ICANN’s authority is limited to sending a breach notice and potentially terminating the registrar.

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 16-4. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board

⁵⁰ Request, § 9, Pg. 14.

⁵¹ *Id.*

⁵² *Id.*, § 8, Pg. 13.

consideration is required. As discussed above, Request 16-4 seeks reconsideration of a staff action or inaction. As such, after consideration of Request 16-4, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC 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 BGC would have to have acted by 10 March 2016. However, when the BGC initially considered Request 16-4, it determined that additional information from the relevant registrar was required in order to resolve the issues raised therein. After gathering that information, the BGC considered Request 16-4 at the first practical opportunity, namely 26 June 2016.