

## Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 22-5

This substantive evaluation of Request for Reconsideration 22-5 (filed by Zydus Lifesciences Ltd. (“Zydus”) on August 6<sup>th</sup>, 2022) by me, the ICANN Ombudsman, is required to be timely submitted to the ICANN Board Accountability Mechanisms Committee (“BAMC”) under Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws” (as amended July 22, 2017)).<sup>1</sup> There is, it turns out, quite a bit to evaluate.

Under Bylaws Section 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction by the ICANN Board or Staff as follows:

### **Section 4.2. RECONSIDERATION...**

- (c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the Requestor has been adversely affected by:
- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
  - (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
  - (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.

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<sup>1</sup> ICANN Bylaws 4.2(l): “For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

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

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

This Request for Reconsideration (RfR) 22-5 made by Zydus relates directly to the Summary Dismissal by the BAMC of RfR 22-3, also brought by Zydus (on July 10<sup>th</sup>, 2022). Before delving into the requisite substantive analysis of RfR 22-5, I will provide some relevant context concerning RfR 22-3.

### Reconsideration Request 22-3

In Request 22-3, Zydus requested Reconsideration of ICANN actions and inactions relating to a dispute resolution made by a World Intellectual Property Organization (“WIPO”) Panel: WIPO is one of six Approved Dispute Resolution Service Providers under the current Uniform Domain Name Dispute Resolution Policy (“UDRP”).<sup>2</sup>

As allowed by UDRP policy,<sup>3</sup> Zydus brought its domain name dispute concerning the domain name “www.zydus.com” to WIPO for resolution: Zydus was denied relief by the WIPO Panel.<sup>4</sup> Beyond denying relief to Zydus, the WIPO Panel in its Decision instead found that Zydus had brought the Complaint in bad faith (which it deemed “an abuse” of the system and the administrative proceedings themselves):

The Complainant [Zydus] is professionally represented in this matter and, in the opinion of the Panel, knew or ought to have known that it had no reasonable chance of prevailing in this proceeding for the reasons set out above. In particular the Complainant has in large measure ignored the key issue – the fact that the Respondent acquired the Disputed Domain Name in 2004. The Complaint has instead simply produced voluminous evidence directed at events after that date. Further the Complaint contains statements which are, at least on the evidence as filed, inaccurate – specifically that the Complainant’s predecessor had in some way adopted the term Zydus from 1952 and that the Complainant owned a US trademark registration for the term ZYDUS prior to the date the Disputed Domain Name was registered. The Panel also accept the Respondent’s case that it is more likely than not that the numerous unsolicited offers to buy the Disputed Domain Name received by the Respondent in early 2022

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<sup>2</sup> <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>

<sup>3</sup> <https://www.icann.org/resources/pages/dndr-2012-02-25-en>

<sup>4</sup> Administrative Panel Decision - *Zydus Lifesciences Ltd. (formerly known as Cadila Healthcare Ltd.) v. Jewella Privacy LLC / DNS, Domain Privacy LTD* WIPO UDRP Case No. D2022-0880

The Panel’s Decision can be found here:

<https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>

were made on behalf of the Complainant. These offers were undisclosed by the Complainant in the Complaint and would appear to indicate the Complainant knew it did not have prior rights that would allow it to recover the Disputed Domain Name. At the very least the Complainant should have disclosed it had made these offers and explained why it had done so given the nature of the case it advanced in the Complaint.

The Panel is also of the view that the sheer volume of material produced by the Complainant, without a proper referencing to indicate the key parts of this material, tended to obfuscate matters in a manner the Panel found unhelpful.

Taking all of the above into account the Panel considers it appropriate to find that the Complainant (sic) was brought in bad faith and constitutes an abuse of the administrative proceeding.

Zydus, unhappy with this result in its UDRP dispute brought before the WIPO Panel, then sought relief from that Decision from ICANN via a Request for Reconsideration. In 22-3, Zydus, asked ICANN for the following relief (in response to Question 9 of the Reconsideration Request Form):

The Panel perpetrated extreme bias on the Complainant in this decision. Complainant respectfully requests that this Panel decision be reversed and the Panelists be forever barred. Additionally, Respondent's Response which was presented with unclean hands solely to fraud this Complainant and Panel shall also amount to this Panel Decision being reversed.

Zydus's contention is that since WIPO was chosen to resolve domain name disputes by ICANN, it was both approved and "accredited" by ICANN, and moreover, since ICANN does not handle domain name disputes directly, the WIPO Panel should, all things considered, be treated as though it were ICANN Staff for the purposes of Requests for Reconsideration (as presumably should all the approved domain name dispute resolution providers, though that lies beyond scope).

In essence, Zydus sought to relitigate its domain name dispute over [www.zydus.com](http://www.zydus.com) by requesting ICANN's Reconsideration of the WIPO Panel Decision, asserting in its Request that the WIPO Panel is ICANN Staff (or the *equivalent* of ICANN Staff for the purposes of a Reconsideration Request). That argument seems like rather a stretch; unsurprisingly, the BAMC concluded that the WIPO Panel is *not* ICANN Staff.

On that basis, on July 26<sup>th</sup>, 2022 the BAMC summarily dismissed Reconsideration Request 22-3.<sup>5</sup>

The BAMC summarily dismissed 22-3 because it determined that the WIPO Panel that resolved the domain name dispute was neither ICANN Staff (nor Board), nor were ICANN Staff or Board involved in the Decision or with the Panel in any way. Therefore *any* action by the WIPO Panel (or inaction, for that matter) cannot form the basis of an ICANN RfR, even if WIPO have been “approved” (and even perhaps “accredited”) by ICANN.<sup>6</sup> The BAMC concluded, “the challenged action is that of an independent third party”; as such the BAMC summarily dismissed Request 22-3.<sup>7</sup>

One would think that this summary dismissal by the BAMC of its prior Request 22-3 would be the ultimate end of Zydus’s quest for relief via ICANN relating to the adverse WIPO Panel Decision—that it was *not* the end of Zydus’s quest now obliges me to weigh in substantively with my evaluation of Zydus’s Request 22-5. And long story short—I think Zydus has *now* reached “the end” of its search for relief from the WIPO Panel’s adverse decision, as least insofar as ICANN is concerned.

### Reconsideration Request 22-5

I will begin this portion of the evaluation with my conclusion, and then set forth how I reached it.

This Request by Zydus, 22-5, to me, pertains to the RfR process and while ICANN (here the BAMC) clearly has jurisdiction in both RfR 22-3 and 22-5, RfR 22-5 is in essence an appeal of the Summary Dismissal of Zydus’s Request 22-3. As discussed in further detail below, the Requestor has not demonstrated that the BAMC contradicted the Bylaws or the Articles of Incorporation, or that its decision was taken without consideration of material information or taken in reliance of false information. While I will not go so far as to conclude that this Request is an *actual abuse* of process by Zydus, Requests for Reconsideration filed as an appeal of a previous Request for Reconsideration seems to be a misuse of the accountability mechanism. Furthermore, I believe the ICANN Bylaws should allow for summary dismissal by the BAMC of Requests that seek to relitigate Requests that have *already*

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<sup>5</sup> <https://www.icann.org/en/system/files/files/reconsideration-22-3-zydus-lifesciences-board-accountability-request-23jul22-en.pdf>

<sup>6</sup> These arguments about the WIPO Panel being “Staff” because they are approved and accredited by ICANN are now made by Zydus in RfR 22-5.

<sup>7</sup> Per the Bylaws, requests that are “not sufficiently stated cannot withstand reconsideration and will be summarily dismissed.” (BAMC Summary Dismissal of Reconsideration Request 22-3, p. 1)

*been denied.*<sup>8</sup> Or, in this instance, to *re-litigate* the dispute over the domain name [www.zydus.com](http://www.zydus.com).

Now, before I explain how I reached this conclusion, I do not find that any further investigation by me is warranted as far as this Request is concerned, based on the facts presented by both RfR 22-3 and 22-5, the BAMC's summary dismissal, and the WIPO Panel Decision.<sup>9</sup>

What seems clear to me here is that the WIPO Panel Decision at issue is not an action (or inaction) by the ICANN Staff or Board, as the BAMC concluded in dismissing RfR 22-3: the BAMC's summary dismissal decision looks correct to me.

The BAMC's summary dismissal on Request 22-3 was consistent with Article 4, Section 4.2 of the ICANN Bylaws. The BAMC properly concluded that Request 22-3 was not sufficiently stated and did not pass the procedural evaluation because it did not qualify as a proper reconsideration request under Article 4, Section 4.2(c) of the Bylaws. The actions of the UDRP panel did not constitute ICANN Board or Staff action or inaction to maintain a reconsideration request. As the BAMC noted in dismissing Request 22-3: "If the Requestor is dissatisfied with the UDRP Decision, the UDRP provides mechanisms for parties to resolve disputes after an administrative proceeding has concluded.<sup>36</sup> Such mechanisms do not involve ICANN."<sup>10</sup>

Requestor Zydus in Request 22-5 is now dissatisfied with the BAMC's Summary Dismissal of Request 22-3 and seeks a second bite at the apple by now challenging the summary dismissal.

Tellingly, the relief Zydus seeks in 22-5 is almost exactly the same as it sought in 22-3:

The BAMC perpetrated extreme bias on the Requestor while considering the Request, therefore, we seek that:

- i. ICANN consider this Reconsideration Request on the basis of its merits and does not limit it to the preliminary procedural assessment;

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<sup>8</sup> Again, this is absent there coming to light new material information or evidence of fraud or inaccurate relevant information that might then make summary dismissal inappropriate.

<sup>9</sup> Administrative Panel Decision - Zydus Lifesciences Ltd. (formerly known as Cadila Healthcare Ltd.) v. Jewella Privacy LLC / DNS, Domain Privacy LTD WIPO UDRP Case No. D2022-0880 <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>

<sup>10</sup> <https://www.icann.org/en/system/files/files/reconsideration-22-3-zydus-lifesciences-board-accountability-request-23jul22-en.pdf>

- ii. The BAMC's Summary Dismissal of Reconsideration Request 22-3 dated 26 July 2022 be reversed;

The Administrative Panel's decision be reversed and Panelists be forever barred.

The Bylaws Section 4.2 (c) provides in relevant part that:

[A]ny person or entity materially affected by an action or inaction of the ICANN Board or Staff . . . may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

Nothing seems to indicate that the BAMC's summary dismissal of an insufficiently stated Request somehow contradicts "ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies)." Now, it *is* conceivable that the BAMC failed to take into consideration material information, or relied on false or inaccurate relevant information. But as noted above, I just don't see that here. If the BAMC did so fail, or relied on false or inaccurate relevant information, that may change my evaluation. But assuming no new evidence or information (relevant or not)— I conclude that the BAMC properly dismissed Request 22-3 and that the Requestor has not demonstrated that it's challenge of the BAMC's summary dismissal warrants reconsideration.

In its Summary Dismissal of RfR 22-3, the BAMC stated:

The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.<sup>22</sup> The BAMC may summarily dismiss a reconsideration request if the BAMC determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.<sup>23</sup>

With regard to RfR 22-5, this means that Zydus sufficiently stated a Request (in this case, an action by the BAMC, which is obviously a Board “action”), and also that Zydus’s current Request is not “frivolous.”

Zydus posits its desired conclusion (in the face of BAMC’s Dismissal of 22-3 stating the contrary):

While it is established that WIPO panel is part and parcel of ICANN as it is accredited by ICANN, it must also be stated that the Panel has committed a gross violation of Article 2.3 and 3.1 of ICANN Bylaws by relying on factually incorrect, misleading and inaccurate information put forth by the Respondents.

I am of the opinion that the BAMC wasn’t wrong in summarily dismissing RfR 22-3 as insufficiently stated, and that the WIPO Panel is not ICANN Staff (or Board), and that the BAMC in its decision did *not* rely on factually incorrect, or false or misleading or inaccurate relevant information. My substantive evaluation of RfR 22-5 leads me to an evaluation of the BAMC’s summary dismissal of RfR22-3, and whether this action was contrary to “ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).”

Request 22-5 asserts that the BAMC has jurisdiction, both over the WIPO Panel in UDRP Case No. D2022-0880, and over itself, and its earlier Summary Dismissal of RfR 22-3. I agree with the BAMC in that reconsideration of WIPO Panel Decisions are not within its “jurisdiction”. Decisions by the WIPO Panel in a domain name dispute are not sufficient basis for an RfR (hence the BAMC had no ‘jurisdiction’ other than the jurisdiction necessary to dismiss the Request).

The BAMC properly asserts its jurisdiction over Request 22-5—but did not see fit to dismiss *this* Request summarily. I feel that RfR 22-5 has placed the BAMC in the awkward position of policing itself; hence perhaps, its hesitancy to summarily dismiss a Request concerning its own actions. A clear attempt by the requestor to appeal the decision in 22-3. An unfortunate situation that, to me, amounts to misuse of this accountability mechanism.

I state again, I am of the opinion ICANN does not have the “jurisdiction” to review decisions made by Panels in UDRP Cases (such as the WIPO Panel Decision at issue here). The BAMC made that patently clear in its summary dismissal of RfR 22-3. Whether Zydus can get relief from WIPO (or *anywhere else...*) is not at issue in this substantive evaluation.

My substantive evaluation is that this Request 22-5 is *tantamount* to a misuse of the process, because the conclusion is a foregone one—no relief can or should be given to the Requestor here. It will likely wind up being a waste of resources (RfR’s require time, effort, and hours to resolve). Were it clear, either in the Bylaws or by precedence set by the Board or BAMC, that Requestors cannot sufficiently state a claim for relief when the action in question is the (summary) dismissal of the same Requestor’s earlier Request it would be far less likely that Zydus, or anyone, would make such Requests.

Zydus, in seeking to, once again, relitigate its UDRP domain name dispute concerning [www.zydus.com](http://www.zydus.com), has, in my opinion, misused the Reconsideration process in making its Request 22-5 seeking Reconsideration of the BAMC Summary Dismissal of its (remarkably) similar Request 22-3. The BAMC and the Board should not grant relief and should dismiss Zydus’s latest Request.