Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit http://www.icann.org/en/general/bylaws.htm#IV and http://www.icann.org/en/committees/board-governance/.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requesters Information

Requesters are represented by:

Name: Flip Petillion, Crowell & Moring LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number: Contact Information Redacted

Requesters are:

Requester #1

Name: Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #2

Name: Spring McCook, LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #3

Name: Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #4

Name: Famous Four Media Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #5

Name: Radix FZC

Address: Contact Information Redacted

Email: Contact Information Redacted

And its subsidiary applicant:

Name: dot Hotel Inc.

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester #6

Name: Fegistry LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of (check one only):

_x__ Board action/inaction

___ Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Requesters seek reconsideration of both actions and inactions of ICANN's Board of Directors. The specific actions/inactions of the Board are set forth in more detail below, specifically in response to Questions 8 and 10, and relate to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016, published on 11 August 2016 and communicated to Requesters on 15

August 2016 (hereinafter, the 'Decision').

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

4. Date of action/inaction:

On 11 August 2016, the Board published the Decision apparently taken on 9 August 2016.

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

5. On what date did you became aware of the action or that action would not be taken?

Requesters learned of the Decision on 15 August 2016, when ICANN informed Requesters of the Decision.

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

6. Describe how you believe you are materially affected by the action or inaction:

As the ICANN Board did not offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the Decision prevented Requesters – who had applied for the gTLD string .hotel (application IDs 1-927-25198; 1-1249-36568; 1-1500-16803; 1-1181-77853; 1-1059-97519; 1-1913-57874) themselves – from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to

operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for an RfR and ultimately an IRP. Requesters suffered from the same violations of ICANN's Articles of Incorporation (AoI) and Bylaws, as recognized in other cases[1] and as acknowledged by the ICANN Board[2].

However, in contrast with other cases[3], Requesters were materially affected by these violations as, without those violations, Requesters would have prevailed in their actions against HTLD's application for .hotel.

Dot Registry – *i.e.*, the applicant for .inc, .llc and .llp who requested community priority – never had a chance of succeeding in a community priority evaluation (CPE). Although, like any applicant, Dot Registry is entitled to ICANN respecting its AoI and Bylaws – and it may initiate whatever procedure to that purpose – until date it has not been proven that Dot Registry has been materially harmed by ICANN's violation of the AoI and Bylaws. A refusal of Dot Registry's solicited community priority would be in line with the CPE criteria, as the purpose of community-based applications has never been to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry, and because the CPE criteria were specifically developed to prevent "undue priority [being given] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" (Applicant Guidebook, Module 4-9).

In the case of .hotel, ICANN violated its AoI and Bylaws and policy by giving

[1] See *e.g.*, ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*; 38. Board Governance Committee determination on Request for Reconsideration 14-44 of 20 January 2015.
[2] In accepting the Dot Registry IRP Declaration, the Board acknowledged it had violated its AoI and Bylaws in the CPE.
[3] Mentioned in footnotes 1 and 2.

undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.

ICANN's actions required, and still require, Requesters to incur unnecessary costs to guarantee observance of ICANN's AoI, Bylaws and policies. As will be shown below, the ICANN Board agreed to refund these costs to parties who did not show material harm.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, and the Affirmation of Commitments creates inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole. The Decision creates unequal treatment between applicants, and creates uncertainty for both existing and future gTLD applicants. ICANN had clear policies to deny community priority to mere industries, and to disqualify applicants who were not trustworthy. As ICANN fails to abide by these policies, the Decision creates a dangerous precedence that will encourage third parties who seek to game the application process and who vigorously defend positions that are unattainable in an attempt to discourage third parties that play by the book.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

In addition, the Decision goes against the core objectives of the new gTLD

program: a competitive process for opening up the top level of the Internet's namespace to foster diversity and to encourage competition to the benefit of Internet users across the globe. In its consideration of violations of its AoI, Bylaws and policies, ICANN must do more than perform a purely procedural review; it must perform a meaningful review with due respect for an applicant's fundamental rights, and ICANN's core mission.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for

reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

As will be demonstrated in greater detail below, the Board (1) disregarded material information, (2) relied on false and inaccurate material information, (3) failed to take material action, and (4) took action in violation of GNSO-created policy and ICANN's own Articles of Incorporation, Bylaws and Affirmation of Commitments.

I. The ICANN Board disregarded material information

A. The ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case

On 29 July 2016, the IRP Panel in the matter between Dot Registry, LLC and ICANN issued its final IRP Declaration (the "*Dot Registry* IRP Declaration"). On 9 August 2016, the ICANN Board accepted the *Dot Registry* IRP Declaration, naming Dot Registry the prevailing party because the ICANN Board "failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations" in ICANN's handling of the CPE process.

The ICANN Board's acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board's acceptance of the IRP Declaration regarding the .hotel gTLD (the "*Despegar et al.* IRP Declaration"). Both IRPs criticized the insufficiencies of ICANN's handling of the CPE process. But the *Dot Registry* IRP Panel considered that these insufficiencies amounted to a violation of ICANN's AoI and Bylaws, whereas the *Despegar et al.* IRP Panel came to the

opposite conclusion. The ICANN Board cannot accept both conclusions, as they are incompatible. The close relationship between these two IRP Declarations makes them an indivisible whole, which requires the ICANN Board to consider them together to avoid the risk of irreconcilable decisions.

The Board could only have accepted both IRP Declarations if it had addressed the insufficiencies of the CPE process, as recommended in the *Despegar et al.* IRP Declaration, that is 1) to put "*a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators*"[4], 2) "*to ensure consistency, both of approach and marking*"[5], and 3) to affirm that "*transparency and administrative due process*" are applicable[6]. "Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address." Para. 158.

The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information. (see below under II.)

B. The ICANN Board failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of competing prospective registry operators

In the Decision, the ICANN Board decided not to cancel HTLD's application,

[4] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.
[5] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.
[6] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 145.

based on the fact that ICANN had not "uncovered 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 for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE." The rationale also states that the ICANN Board had "the opportunity to consider all of the materials submitted relating to the .HOTEL Claimants' request for cancellation of HTLD's .HOTEL application. Following consideration of all relevant information provided and for the reasons set forth in the Resolution and Rationale, the Board has determined that cancellation of HTLD's .HOTEL application is not warranted, and the .HOTEL Claimants' request is therefore denied."

The mere statement that the Board had "the opportunity to consider" all of the materials submitted by Requesters and that it did consider "all relevant information" does not show that all relevant information – submitted by Requesters or third parties – was actually considered. As a matter of fact, the Decision is based on findings which Requesters showed to be irrelevant. The arguments brought forward by Requesters have not been addressed in the Decision. More specifically, the ICANN Board did not address the unfair competitive advantage HTLD obtained via the illegal access of sensitive business information of its direct competitors. The ICANN Board also failed to address the argument that it is inappropriate – and contrary to ICANN's AoI, Bylaws and GNSO policy – to allocate a critical Internet resource to a party that has been cheating (or acquiesced in fraudulent actions). Finally, the ICANN Board did not

address the fact that the CPE result on HTLD's application was seriously criticized for being inconsistent with other CPE results and unreasonable, and that it would be discriminatory not to address these inconsistencies, whereas the Board has addressed inconsistency issues in similar situations. In its consideration of the *Dot Registry* IRP Declaration, the ICANN Board increased the disparate treatment towards Requesters.

Requesters explained to the ICANN Board – but the Board failed to consider – that it is of no relevance whether or not HTLD has used this information in the framework of ICANN's evaluation of .hotel. What matters is that the information was accessed with the obvious intent to obtain an unfair advantage over direct competitors. The future registry operator of the .hotel gTLD will compete with other registry operators. In the unlikely event that HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of its access to sensitive business information of Requesters. HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information of its direct competitors.

II. The ICANN Board relied on false and inaccurate material information

The *Despegar et al.* IRP Panel's conclusion that the insufficiencies of the CPE process did not amount to a violation of ICANN's AoI, Bylaws and core values was based upon the premise that the EIU was not mandated to apply ICANN's

core values[7], and upon the false premise that the EIU's determinations are presumptively final[8] and are made independently by the EIU, without ICANN's active involvement. In this respect, ICANN 'informed' Requesters and the IRP Panel that "[b]ecause of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE".[9] The IRP Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist"[10], and the IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result]"[11] "The ICANN staff supplied continuing and important input on the CPE reports."[12] As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs.

Moreover, ICANN's description in the *Despegar et al.* IRP of the EIU as the "panel firm" or independent evaluator, making "presumptively final" determinations was misleading. Because of ICANN's staff intimate involvement in the process, the EIU cannot be qualified as a "panel firm" or independent evaluator. The findings of the *Dot Registry* IRP Panel also reveal that the EIU was "simply a consultant to ICANN", and that ICANN had agreed with the EIU

[7] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.
[8] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.
[9] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.
[10] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.
[11] ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 93, 101.
[12] ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 93.

that the EIU "would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process".[13] ICANN was "solely responsible to applicants ... for the decisions it decide[d] to issue", and "each decision [had to] be issued by ICANN in its own name only."[14] The intimate involvement of ICANN staff, and the fact that ICANN had to issue decisions in its own name is material to the IRP Determinations in the *Despegar et al.* and *Dot Registry* cases. Both IRP Panels agreed[15], and ICANN acknowledged[16], that ICANN staff is bound to conduct itself in accordance with ICANN's AoI and Bylaws. The *Despegar et al.* IRP Panel considered:

> "The Panel is, of course, charged with reviewing the action of ICANN's Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN's staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself."[17]

The *Despegar et al.* Panel's reliance on false information that the EIU served as an independent panel (*i.e.*, without intimate involvement of ICANN staff) was material to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.

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[13] ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 91.
[14] ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 92.
[15] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104; ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 88, 100
[16] ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 100.
[17] ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104.

Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information.

III. The ICANN Board failed to take material action

A. The ICANN Board failed to properly investigate and address illegal actions that are attributable to HTLD

The Decision's rationale shows that the ICANN Board relied on unverified and implausible statements that Mr. Krischenowski "did not inform HTLD's personnel about 'his action,' 'did not provide any of the accessed information' to HTLD or its personnel, and HTLD 'personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it.'"[18]. ICANN does

[18] See rationale to the Decision.

not show it has done anything to check the veracity of these statements.

Moreover, for the very first time in this matter, Requesters learnt from the Decision that Mr. Krischenowski was not the only individual affiliated to HTLD, who violated Requesters' trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer (identified in the Decision as Mr. Krischenowski's associates) were also "responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information, which occurred from March through October 2014"[19]. Again, this is new information for Requesters and Requesters have not been able so far to perform a thorough check on Mr. Süme and Ms. Ohlmer's background. But summary research shows that ICANN and its Board have not done any check at all. Ms. Ohlmer was the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information. She was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Decision is based on Mr. Krischenowski's actions and affiliation to HTLD only. While Mr. Krischenowski's actions, combined with HTLD's inaction towards him, are a sufficient reason to disqualify HTLD as an applicant, the fact that HTLD's CEO committed the same violations is an even stronger reason for disqualification. As HTLD's CEO, Ms. Ohlmer would have been able to use the illegally obtained information to HTLD's benefit. While the information may not have directly impacted HTLD's position as an applicant, it is clear that the information could have been used to improve its position towards

[19] See rationale to the Decision.

competing registry operators, both existing ones and prospective ones. It would be completely incredible if a CEO were to obtain unauthorized access to confidential information on numerous occasions without the intention to use this information to its advantage. Moreover, the competitive advantage obtained via this information allowed HTLD to improve its market value. HTLD's shareholders must have benefited from it, when selling their shares.

B. The ICANN Board failed to remedy the violations of its AoI and Bylaws in the CPE process for Requesters, while the ICANN Board is addressing these issues for other applicants

The ICANN Board is addressing the violations of its AoI and Bylaws in the CPE for Dot Registry (cfr. ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12). The ICANN Board even agreed to refund Dot Registry's legal costs.

Requesters suffered from the same violations. However, the ICANN Board did not remedy these violations for Requesters.

IV. The ICANN Board took action in violation of GNSO-created policy and ICANN's AoI, Bylaws and Affirmation of Commitments

A. The ICANN Board's refusal to cancel HTLD's application for .hotel is unjustified and a violation of ICANN's core obligations

Allowing HTLD's application to proceed goes against everything that ICANN stands for. It amounts to an acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence is contrary to ICANN's obligations under its Articles of Incorporation and Bylaws and to ICANN's mandate to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with

relevant principles of international law and applicable international conventions and local law and through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN's duty "to protect the public interest in the allocation of critical Internet resources" (gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24). In this respect, ICANN made clear that "applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or the Internet to facilitate the commission of crimes" were going to be "automatically disqualified from the program" (gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22).

In the case at hand, ICANN caught not one, but multiple representatives of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information of a competing applicant. It is clearly not in the public interest, and the public interest will not be protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accord with any of the core values that should guide the decisions and actions of ICANN. It goes against ICANN's mandate to act in conformity with, inter alia, open and transparent processes that enable competition and open entry in Internet-related markets.

B. The ICANN Board discriminated against Requesters by accepting Dot Registry IRP Determination and refusing to reconsider its position on the CPE determination re .hotel

As already explained under section III.B above, the ICANN Board is addressing the violations of its AoI and Bylaws in the CPE for Dot Registry, and has provided a remedy to Dot Registry. ICANN also provided remedies for the applicant for .gay. Moreover, ICANN disclosed information to Dot Registry, but not to Requesters, although Requesters had asked for the same or similar information. ICANN did not provide a justification why it treats Requesters differently, although Requesters are situated similarly.

C. The ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application

HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afilias.

After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.

One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and

fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).

The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. The sale to Afilias of shares (or Afilias' promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds. The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed.

Moreover, the ICANN Board cannot ignore the fact that HTLD made these changes only after it was informed that ICANN was taking the matter seriously, and more than two years after it had obtained illegal access to trade secrets of competitors. HTLD claims that it only learned about Mr. Krischenowski's illegal actions on 30 April 2015. This claim – however doubtful it may be – cannot be made for the illegal actions of HTLD's CEO, Ms. Ohlmer. Moreover, HTLD kept Mr. Krischenowski on as a consultant until 31 December 2015. He also remained the managing director of a HTLD-related company and a major shareholder. Ms. Ohlmer remained CEO until long after her misdeeds, and she even acquired shares in HTLD after ICANN had informed HTLD it was taking the situation seriously. The ICANN Board now turning a blind eye to HTLD's misdeeds contradicts that ICANN is taking the situation seriously.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Requesters ask ICANN to reverse the Decision. The ICANN Board is requested to declare that HTLD's application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary. The ICANN Board is also requested to take all necessary steps to ensure that Requesters' applications for .hotel remain in contention until Requesters have self-resolved the contention set, or until Requesters have resolved the contention set in an auction, organized by ICANN.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organized. In such event, ICANN is requested to refrain from executing the registry agreement with HTLD, and to provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the EIU and third parties (including but not limited to individuals and entities supporting HTLD's application) regarding HTLD's application for .hotel.

In the unlikely event that the ICANN Board does not decide to cancel HTLD's application immediately, Requesters request that the ICANN Board takes the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* case.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

The Decision directly harms the Requesters, as it blocks the Requesters from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's AoI and Bylaws. As a result of ICANN's acceptance of this advice, the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses most of the harm in that the relief would allow Requesters to proceed with fairly competing for the .hotel gTLD.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

__x__ Yes

_____ No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Requesters' harm is identical, as explained in section 6 above.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm.

At this stage, all relevant documents are believed to be in ICANN's possession.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Filip Petillion

Signature

25 August 2016

Date