

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GCCIX, W.L.L.,)	ICDR CASE NO. 01-21-0004-1048
)	
Claimant,)	
)	
v.)	
)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS,)	
)	
Respondent.)	
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**GCCIX’S REPLY IN SUPPORT OF
APPLICATION TO REVIEW
EMERGENCY PANELIST’S INTERIM ORDER**

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Claimant hereby replies to ICANN's Opposition ("Opp.") to Claimant's Application to Review Emergency Panelist's Order.

I. Claimant Is Entitled to Prove Its Valid Claim of ICANN Bad Faith

ICANN acknowledges that Claimant was "encouraged to participate" in the CEP, "in the hope of resolving or narrowing the issues that may be the subject of an IRP." (Opp., #2). ICANN also acknowledges that a claimant's participation in CEP must be in good faith, else that claimant risks paying all ICANN legal fees in the IRP. (Opp., #21).

However, ICANN fails to acknowledge that ICANN also is bound to participate in CEP in good faith, per the CEP Rules that have been in effect at all relevant times -- "ICANN is expected to participate in the [CEP] in good faith." Indeed, ICANN's counsel has repeatedly admitted that a claimant can state a viable claim against ICANN, alleging that ICANN participated in the CEP in bad faith. ICANN's counsel admitted this during the Emergency Hearing (Tr., 31:14 ("I believe that that is a permissible claim within an IRP...")). Then, ICANN admitted this again in the first Procedural Hearing conducted by this panel, at the 50th minute: "I think that is a colorable claim." ICANN also alleges that "[i]t is entirely possible to prove that a claimant has not participated in a CEP in good faith without disclosing the specifics of the confidential CEP discussions." (Opp., #10). But, ICANN offers no explanation as to how that would be possible, and Claimant maintains that it would be impossible.

There is simply no way for Claimant to prove that ICANN acted in bad faith unless Claimant can provide evidence of its unanswered communications to ICANN. Each of those communications was expressly for the purpose of discussing and narrowing issues. But ICANN never discussed those communications with Claimant, never offered Claimant any concessions,

never attempted to negotiate anything with Claimant, nor did ICANN ever offer Claimant the professional courtesy of a substantive response to any of those attempts. For seven years.¹

II. The CEP Was NOT a Settlement Discussion or Mediation

ICANN uses the words “settlement discussion”, “negotiation” and “mediation” dozens of times in its brief, arguing that public policy and inapplicable law mandate that “settlement communications” remain confidential. But in reality, over that seven-year period, there was none of that. Neither Claimant nor ICANN ever offered to settle any issue. Claimant merely tried to engage ICANN in dialog, to get information about the rationale for ICANN’s actions and inaction, and to suggest that ICANN should consider analogous IRP decisions. These were one-way communications. There were no discussions. There were no negotiations.

Claimant is entitled to prove that ICANN made no substantive effort to participate in good faith. Claimant is entitled to prove its good faith efforts, and ICANN’s bad faith silence in face of those efforts and for so long. All the theories that ICANN relies upon to try to hide Claimant’s communications from the panel and the public are based upon the notion that there were discussions or negotiations, and that confidentiality is required to ensure candor in such matters.² But none of that applies in this case, where there were none. Instead, there have been repeated, demonstrable good faith efforts by Claimant to engage in such discussions, met only by bad faith stonewalling from ICANN.

¹ ICANN further complains that it cannot provide “information about what actually occurred during the CEP.” (Opp., #17). But Claimant encourages ICANN to do so. Because the facts are clear, almost nothing happened except Claimant sending letters. If anything did happen, but ICANN just did not tell Claimant about it, then ICANN should use such evidence to try to rebut Claimant’s allegations, including its allegations of bad faith.

² See, e.g., Opp., #10 (“CEP confidentiality encourages open communications and candor between the parties during the CEP and encourages the parties to attempt to resolve or narrow the issues in order to try to save the parties the time and expense of an IRP.”)

ICANN would have the Panel believe that the CEP “is essentially a mediation or a settlement conference.” (Opp., #10). However, that is far from true. A mediation would involve a neutral mediator or at least a formal discussion of the parties’ principles, and a settlement conference is generally conducted by a judge or other neutral in the context of litigation. There was no neutral involved in Claimant’s CEP – nor in any ICANN CEP to date. There was not any discussion amongst the parties’ principles, despite Claimant’s CEO’s direct efforts in 2013. ICANN only participated in CEP via its lawyers, and never made its executives available or even provided any information or response from its executives (or its lawyers). So, there was never any semblance of mediation in the CEP, and ICANN’s reliance upon that notion is unfounded.

ICANN relies on the notion that the ICANN community must have “confidence in the confidential nature of these types of settlement discussions.” (Opp., #14.). But there were none in this case. And there is no rule or policy providing for any semblance of confidentiality since the Bylaws were amended in 2016, to repeal the precise and only language that ICANN so heavily relies upon now. The Bylaws were not repealed by accident. On this point they were inconsistent with other Bylaws and the CEP Rules, which each separately require a party to participate in CEP in good faith. ICANN relies on a lone work group slide from 2016 to suggest the repeal was unintentional and/or will be fixed, but that is nothing more than wishful thinking. ICANN is required by its Bylaws to act with “maximum transparency”, it cannot make secret back room deals under the guise of CEP or otherwise. That is likely why that Bylaw was repealed, it was not an accident.

III. Evidence Is Crucial to Oppose a Stay, and to Prove Many of the IRP Claims

Claimant’s excised evidence is critical for Claimant to use to oppose ICANN’s request for a stay. The evidence proves that

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Redacted - Confidential Information -- yet only now ICANN wants to stay this ongoing IRP, and only for that purpose. Claimant must be allowed to show that ICANN has no justification for staying this case now, because Redacted - Confidential Information

Moreover, Claimant's excised communications set forth many other issues beyond the GAC, all of which also are at issue in this IRP, and have never been addressed by ICANN. Indeed, that correspondence is also relevant to show that ICANN Board violated its Bylaws by failing to provide rationale for terminating the fully briefed WIPO Legal Rights Objection proceeding. (IRP Complaint, p.18, Claim #5). It is also relevant to show that ICANN violated its Bylaws by refusing to provide rationale and/or to even consider the conflict between GNSO Supermajority consensus advice which is generally binding on the Board, and unsupported GAC advice which is not. (*Id.*, #6-10). It is also relevant to show that ICANN refused and/or failed to consider two prior IRP decisions and was notified of that. (*Id.*, #11, 12, 14.) And of course, it is relevant to show that ICANN Redacted - Confidential Information . (*Id.*, #13.)

The excised evidence is thus highly relevant as to nearly all of Claimant's IRP claims. Evidence that Claimant Redacted - Confidential Information , is relevant at least to show that ICANN: 1) decided at various points to act or not to act in various ways, despite prior written notice that such conduct would violate its Bylaws; 2) never engaged with Claimant in any discussion over seven years; and, thus, 3) has acted willfully in bad faith with respect to Claimant. Pursuant to its Bylaws and precedential IRP decisions, ICANN's bad faith conduct can and should lead to additional

penalties that Claimant intends to seek in this matter, including its reasonable attorneys' fees.³ This evidence is highly relevant to Claimant's case, and ought not be excluded based on a non-existent confidentiality provision.

IV. Claimant Only Seeks to Introduce Its Own Unanswered Letters

Claimant is not seeking to introduce any semblance of settlement communications, nor any evidence of any negotiation by ICANN. Indeed, that would be impossible as there was none. Claimant does not seek to introduce evidence of anything ICANN's lawyers said to Claimant during the CEP, as there was hardly anything ever said by them anyway. Claimant only seeks to introduce its own correspondence to ICANN, in order state and prove its claims that ICANN participated in CEP in bad faith and made many other decisions in bad faith despite Claimant's prior written notice and requests. ICANN refused to either respond or consider Claimant's allegations for seven years, and now Claimant is entitled to use that to prove ICANN's bad faith so that ICANN is held accountable per its Bylaws and CEP Rules.

ICANN further states, falsely, that Claimant's excised Annex 12 included a "request for documents under ICANN's [DIDP]." However, Claimant's document request was expressly preceded by the following language at p.7: Redacted - Confidential Information

. So, ICANN clearly did publish a significant part of that CEP communication, unilaterally. It has no basis to claim confidentiality as to any other portion of that document now, nor any of the other of Claimant's own letters.

³ ICANN states that the *Afilias* decision "only related to claimant's request for interim relief" (Opp., #25), as if that request had nothing to do with ICANN's conduct in CEP. But that is patently false. ICANN was held to have acted in bad faith by forcing that claimant to seek interim relief, merely to maintain the *status quo* in a contention set, as previously had been ordered by at least three different IRP panels under the same circumstances. Obviously, during the CEP that claimant asked ICANN to maintain the *status quo*, based on those precedents, and ICANN refused. That required the claimant to request that interim relief, and that is what the IRP panel found was in bad faith. ICANN's disingenuous characterization notwithstanding, had it acted in good faith during the CEP on that critical point, then it would not have been held to have acted in bad faith for requiring claimant to win that interim relief.

Respectfully Submitted,

By: 

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