

ICANN BOARD PAPER NO. 2022-12-14-1a

TITLE: **Security and Stability Advisory Committee
(SSAC) Member Appointments**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

The Security and Stability Advisory Committee (SSAC) recommends the Board reappoint the SSAC members as identified in the proposed resolution.

COMMITTEE RECOMMENDATION:

The Committee desires the ICANN Board to approve the reappointment of the SSAC members as identified in the proposed resolution.

PROPOSED RESOLUTION:

Whereas, the Board, at Resolution 2010.08.05.07 approved Bylaws revisions that created three-year terms for SSAC members, required staggering of terms, and obligated the SSAC Chair to recommend the reappointment of all current SSAC members to full or partial terms to implement the Bylaws revisions.

Whereas, in January 2022 the SSAC Membership Committee initiated an annual review of eight SSAC members whose terms are ending 31 December 2022 and submitted to the SSAC its recommendations for reappointments on 18 October 2022.

Whereas, on 24 October 2022, the SSAC members approved the reappointments.

Whereas, the SSAC recommends that the Board reappoint the following SSAC members to three-year terms: Joe Abley, Jeff Bedser, Merike Kaeo, Warren Kumari, Jacques Latour, John Levine, Danny McPherson, Tara Whalen.

Resolved (2021.12.14.xx), the Board accepts the recommendation of the SSAC and reappoints the following SSAC members to three-year terms beginning 01 January 2023 and ending 31 December 2025: Joe Abley, Jeff Bedser, Merike Kaeo, Warren Kumari, Jacques Latour, John Levine, Danny McPherson, Tara Whalen.

PROPOSED RATIONALE:

The SSAC is a diverse group of individuals whose expertise in specific subject matters enables the SSAC to fulfill its role and execute its mission. Since its inception, the SSAC has invited to its membership individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC's continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC mission.

This resolution is an organizational administrative function for which no public comment is required. The appointment of SSAC members is in the public interest and in furtherance of ICANN's mission as it contributes to the commitment of the ICANN to strengthen the security, stability, and resiliency of the DNS.

Signature Block:

Submitted by:	James Galvin
Position:	Liaison to the ICANN Board from the Security and Stability Advisory Committee
Date Noted:	xx October 2022
Email:	james.galvin@board.icann.org



nn October 2022

Subject: SSAC2022-12: SSAC Member Appointments

The purpose of this letter is to propose reappointment of members of the Security and Stability Advisory Committee (SSAC) whose terms are ending on 31 December 2022. This proposal is the result of annual member evaluations of those members, conducted by the SSAC Membership Committee and approved by the SSAC.

The SSAC respectfully requests that the Board reappoint the following SSAC members for three-year terms from 1 January 2023 to 31 December 2025:

- Joe Abley, Jeff Bedser, Merike Kaeo, Warren Kumari, Jacques Latour, John Levine, Danny McPherson, Tara Whalen.

Rod Rasmussen
Chair, ICANN Security and Stability Committee

ICANN BOARD SUBMISSION NO. 2022.12.14.1b

TITLE: **Board Accountability Mechanisms Committee's Recommendation on Reconsideration Request 22-5**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Reconsideration Request 22-5 (Request 22-5) submitted by Zydus Lifesciences Ltd. (Requestor) seeks reconsideration of the Board Accountability Mechanism Committee's (BAMC) summary dismissal of Reconsideration Request 22-3, which was also filed by the Requestor. Request 22-3 sought reconsideration of a decision in a Uniform Domain Name Dispute Resolution Policy proceeding to which the Requestor was a party. The BAMC summarily dismissed Request 22-3 after concluding that the challenged action was not taken by the ICANN Board or Staff, but was instead the action of an independent third party, and thus not within the scope of the reconsideration process. In Request 22-5, the Requestor alleges that the BAMC's summary dismissal of Request 22-3, and corresponding inaction in not evaluating Request 22-3 on the merits or providing the relief sought in Request 22-3, violates ICANN's Bylaws and policies regarding reconsideration requests. Specifically, the Requestor alleges that Request 22-3 should not have been summarily dismissed because it satisfied the requirements under Article 4, Section 4.2 of the ICANN Bylaws to maintain a reconsideration request.

Pursuant to the reconsideration process, the Ombudsman has evaluated the merits of Request 22-5, and concluded that the summary dismissal of Request 22-3 was correct and that Request 22-5 lacks merit. (*See Attachment C to the Reference Materials*).

Following the Ombudsman's review, the BAMC evaluated the merits of Request 22-5 and concluded that the summary dismissal of Request 22-3 did not violate the ICANN org Bylaws and policies on which the Requestor relies. The Requestor did not submit a Rebuttal. The BAMC is therefore recommending that Request 22-5 be denied.

BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)

RECOMMENDATION:

The BAMC recommended that Reconsideration Request 22-5 be denied and that no further action be taken in response to the Request because the summary dismissal of Request 22-5 did not contradict ICANN's Commitments, Core Values or established ICANN policy(ies), as set forth in BAMC's Recommendation on Reconsideration Request 22-5, which is attached as Attachment D to the Reference Materials.

PROPOSED RESOLUTION:

Whereas, on 8 August 2022, Zydus Lifesciences Ltd. (Requestor) filed a reconsideration request (Request 22-5) challenging the Board Accountability Mechanisms Committee's (BAMC) summary dismissal of Reconsideration Request 22-3 (Request 22-3), which was also filed by the Requestor.

Whereas, the BAMC summarily dismissed Request 22-3, because the BAMC determined that Request 22-3 did not fall within the scope of the reconsideration process as it did not seek reconsideration of an action taken by the ICANN Board or Staff.

Whereas, in Request 22-5, the Requestor alleges that the BAMC's summary dismissal of Request 22-3 violates ICANN's Bylaws and policies because, the Requestor alleges, Request 22-3 satisfied the requirements under Article 4, Section 4.2 of the ICANN Bylaws to maintain a reconsideration request.

Whereas, on 13 September 2022, the BAMC determined that the request was sufficiently stated and sent Request 22-5 to the Ombudsman for consideration.

Whereas, after evaluation, the Ombudsman concluded that the BAMC's summary dismissal of Request 22-3 was correct, that the BAMC did not violate any Bylaws or established policies in summarily dismissing Request 22-3, and that Request 22-5 lacks merit (Ombudsman Evaluation).

Whereas, the BAMC carefully considered the merits of Request 22-5 and all relevant materials, including the Ombudsman Evaluation, and concluded that the Board did not violate ICANN's Commitments, Core Values or established ICANN policy(ies) by summarily dismissing Request

22-3. Accordingly, the BAMC has recommended that Request 22-5 be denied and that no further action be taken in response to the Request.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 22-5 and all relevant materials related to Request 22-5, and the Board agrees with the BAMC's Recommendation.

Whereas, pursuant to Article 4, Section 4.2(q) of the ICANN Bylaws, the Requestor had 15 days from the receipt of the BAMC's Recommendation on Request 22-5 to submit a rebuttal. No rebuttal was filed by the 6 December 2022 deadline, and none has been received to date.

Resolved (2022.12.14.XX), the Board adopts the [BAMC Recommendation on Reconsideration Request 22-5](#).

PROPOSED RATIONALE:

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. *See* Bylaws, Art. 4, § 4.2(e).

The Board has carefully considered the merits of Request 22-5 and all relevant materials. For the reasons set forth below and more fully in the BAMC Recommendation on Reconsideration Request 22-5, which are incorporated here by reference, the Board finds that BAMC's summary dismissal of Request 22-3 was proper, and there is no basis for reconsidering that decision as requested by Request 22-5. The Board concludes that the BAMC's summary dismissal of Request 22-3 did not contradict ICANN's Commitments, Core Values or established ICANN policy(ies). The Board further concludes that the alleged Board inaction insofar as the BAMC did not consider Request 22-3 on the merits or did not provide the relief sought in the request did not contradict ICANN's Commitments, Core Values or established ICANN policy(ies).

Specifically, the Board agrees with the BAMC's recommendation that the procedural evaluation of Request 22-3 was consistent with the procedural evaluation process for reconsideration requests as set forth under Article 4, Section 4.2(k) of the Bylaws. (*See* Bylaws, Art. 4, § 4.2(k).)

Section 4.2(k) provides that the BAMC shall review each reconsideration request upon its receipt to determine if it is sufficiently stated to meet the criteria for maintaining a reconsideration request. A threshold requirement maintaining a reconsideration request is that the challenged action (or inaction) was taken (or failed to be taken) by the ICANN Board or Staff. The BAMC concluded that Request 22-3 was not sufficiently stated because the request did not seek reconsideration of an action (or inaction) by ICANN Board or Staff. The sole action the Requestor sought to have reconsidered in Request 22-3 was a panel decision in a Uniform Domain Dispute Resolution Policy (UDRP) proceeding (UDRP Decision) to which the Requestor was a party. As discussed in further detail in the BAMC Recommendation on Reconsideration Request 22-5, with which the Board agrees, the BAMC correctly determined that neither the ICANN Board nor ICANN Staff was involved in the UDRP Decision the Requestor sought to challenge in Request 22-3. The Board further agrees with the BAMC's conclusion that, contrary to the Requestor's allegations, UDRP Providers are neither "employees" nor "long-term paid contractors" of ICANN org. ICANN provides no wages to the staff or panelists of UDRP providers, and lacks the right to control the manner or means by which these individuals perform their tasks. They are therefore not ICANN employees. Further, because ICANN does not pay UDRP provider staff or panelists and lacks any contract with them, they cannot be considered "long-term paid contractors." The Board also agrees with the BAMC's findings that the UDRP Provider, which in this case is the World Intellectual Property Organization, and ICANN are separately organized and independent organizations. ICANN does not pay WIPO staff or panelists and lacks any control over how they perform their work. ICANN therefore is not their employer. Accordingly, the Board finds that the UDRP Decision challenged in Request 22-3 was not an action by the ICANN Staff or ICANN Board, that the BAMC correctly concluded Request 22-3 was not a proper reconsideration request, and that the summary dismissal was proper. Accordingly, the Board agrees with the BAMC that there is no basis for reconsidering the BAMC's summary dismissal of Request 22-3 as requested by Request 22-5.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the BAMC's Recommendation of Reconsideration Request 22-5 to submit a rebuttal. No rebuttal was filed by the 6 December 2022 deadline, and none has been received to date.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 8 December 2022
Email: amy.stathos@icann.org

Reconsideration Request Form

1. Requestor Information

Name: Rahul Goel, Representative of Zydus Lifesciences Ltd.

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

The Requestor seeks reconsideration of the Board Accountability Mechanisms Committee's Summary Dismissal of Reconsideration Request **22 – 3**.

4. Date of action/inaction:

The dismissal of the Reconsideration Request by the Board Accountability Committee was published on 26 July 2022 (and emailed to us on 28 July 2022).

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

The dismissal of the Reconsideration Request by the Board Accountability Committee was conveyed to us and received by us via email dated 28 July 2022.

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

The Board Accountability Mechanism Committee (**'BAMC'**) of the ICANN Forum has not exhibited a clear understanding and interpreting the Reconsideration Request (**'Request'**), dated 11 July 2022 filed by the Requestor against the Respondent, to the extent that they were limited to the preliminary procedural assessment and dismissed the Request upon the same. In doing so, the BAMC lacked the ability to understand and comprehend the facts of the aforementioned Request.

The Request was filed to seek reconsideration of the biased Administrative Panel Decision, *Zydus Lifesciences Ltd. (formerly known as Cadila Healthcare Ltd.) v. Jewlla Privacy LLC/DNS, Domain privacy LTD* **WIPO UDRP Case No. D2022-0880**, granted by the ICANN Staff Panelists **Nick J. Gardner, Pablo A. Palazzi, and Alan L. Limbury.**

The Panelists have erred while deciding on the issue by relying on the misleading arguments made by the Respondents that are devoid of merits and are factually incorrect. The Respondents has attempted to deceive the proceedings by falsifying the facts which the Panelists have based their decision on and have held that the

Respondent has brought the Complaint in bad faith and constitutes an abuse of the administrative proceedings.

The dismissal of the Request by BAMC is based on misunderstanding the Request, resulting in overall failure of ICANN's Policies and Mission, Commitments, and Core Values. The implementation of the Panel's decision along with the dismissed Request, would be a proposed '*inaction*' by the ICANN's Board, which will be covered in '*inaction by a Staff/Board*'.

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

The BAMC's decision has been in violation of the established ICANN Rules, Bylaws, Mechanisms and Policies as the dismissal of the Request was based on the *preliminary procedural assessment* of whether the Requestor has sufficiently stated a Reconsideration Request.¹

Zydus Lifesciences Ltd. ('**Zydus**'), is a leading player in the pharmaceutical sector (globally) and has a strong presence in the regulated markets of the US, Europe and in the high profile markets of Latin America and South Africa. Zydus has been dedicated to the welfare of the people since 1950s, and continues to innovate with an unswerving focus to address the unmet healthcare needs creating healthier, happier communities across the globe.

¹ BAMC Summary Dismissal of Reconsideration Request 22-3 dated 26 July 2022, available at <https://www.icann.org/en/system/files/files/reconsideration-22-3-zydus-lifesciences-board-accountability-request-23jul22-en.pdf>

The implementation of the Panel's decision would have demonstrable harm to the consumers and public at large, specially patients as the disputed domain name <zydus.com> is identical and confusingly similar to the corporate identity of Zydus, from selling spurious, illegal, and unauthorized drugs, which general public may perceived to be manufactured, sourced and supplied by Zydus itself.

As Zydus is a pharmaceutical company, a deceptive domain name, identical to the corporate identity of the Zydus, is most likely to misguide and mislead the patients/consumers. Additionally, Zydus will suffer substantial financial losses in actual costs involved in the business setup and marketing along with intrinsic value of its branding and reliance on international community recognition.

Therefore, this amounts to bad legal practice, which if comes to become a precedent shall amount to grave injustice to the corporations as well as the consumers.

8. Detail of Board or Staff Action/Inaction – Required Information

It is submitted that this Request for Reconsideration is valid and is based upon concrete grounds. It is in accordance with the Section 4.2(c)(i), 4.2(c)(ii) and 4.2(c)(iii) of the ICANN Bylaws, which allows filing of a Reconsideration request for actions and inactions of the Board and Staff of the ICANN.

The WIPO Centre and the WIPO Domain Name Panelists are both ICANN accredited and approved. This information about WIPO's accreditation with ICANN is mentioned in multiple WIPO and ICANN documents that are mentioned herein:

WIPO Website – WIPO Domain Name Panelists – “*some of these panelists also appear on the list of other ICANN-accredited dispute resolution service providers.*”²

ICANN Website – List of Approved Dispute Resolution Service Providers – “*...Complaints under the Uniform Dispute Resolution Policy (UDRP) may be submitted to any approved dispute-resolution service provider listed below – WIPO (World Intellectual Property Organization).*”³

Rules for uniform Domain Name Dispute Resolution Policy – Rule 6(d) – “*... These candidates may be drawn from any ICANN (Internet Corporation for Assigned Names and Numbers) approved Provider’s list of Panelists.*”

WIPO – Frequently Asked Questions: Internet Domain Names – *how did WIPO get involved in the resolution of disputes?* – “*... under the UDRP, WIPO is the leading ICANN – accredited domain dispute resolution service provider.*”⁴

Further, the definition of **Staff** as per Section 4.2(a) of the ICANN Bylaws states that, “*staff included employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors directly.*”

In cases of domain disputes, administrative proceedings are mandatory. Moreover, UDRP proceedings cannot be initiated with ICANN directly. They must be filed with ICANN-approved Dispute Resolution Providers only.⁵ And since

² <https://www.wipo.int/amc/en/domains/panel.html>

³ <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>

⁴ <https://www.wipo.int/amc/en/domains/guide/#:~:text=The%20WIPO%20Center%20was%20the,t he%20UDRP%20Policy%20and%20Rules.>

⁵ <https://icannportal.force.com/compliance/s/udrp>

ICANN Rules, Bylaws and Policies contain no mechanism for employing Panelists and hold Administrative Panel Proceedings, ICANN approves and accredits Panelists and dispute resolution service provider to carry this task.

Pursuant to Section 4.2(a) of ICANN Bylaws, these ICANN accredited and approved dispute resolution service providers and Panelists must fall under the purview of 'Staff' as they function as per the guidelines of ICANN which does not have a mechanism to employ such personnel directly.

The Reconsideration request 22-3, which was dismissed on the ground '*UDPR proceeding are administered by independent administrative dispute resolution providers, in this case WIPO. ICANN approved UDRP providers in accordance with the approval process for dispute resolution service providers*', in other words, WIPO is not '*Staff*' and ICANN merely accredits it.

This argument, according to our knowledge, falls short because 'accreditation', as defined by 2013 Registrar Accreditation Agreement means the following:

'1.2 "Accredited" or "Accreditation" means to identify and set minimum standards for the performance of registration functions, to recognize persons or entities meeting those standards, and to enter into an accreditation agreement that sets forth the rules and procedures applicable to the provision of Registrar Services.

Even in general terms and as defined by Black's law dictionary, 'accreditation' means

'To give official authorization or status. To recognize as having sufficient

*academic standards to qualify graduates for higher education or for professional practice. In international law: (1) To acknowledge; to receive as an envoy in his public character, and give him credit and rank accordingly. (2) To send with credentials as an envoy. This latter use is now the accepted one.*⁶

Hence, it is understood that when a dispute resolution service provider is accredited by ICANN to conduct mandatory administrative policy, as prescribed by the UDRP adopted by ICANN, such service providers are extension of ICANN itself.

Therefore, if the Panel is in violation of core values of ICANN provided under Article 3, Section 4.3 (a) and (b) must allow parties for reconsideration requests to be filed based upon the grounds that the core values of ICANN have been violated and there has been no just, fair and transparent resolution of the dispute to the ICANN BAMC.

Further, considering that the eventual implementation of the Administration Panel's Decision is to be done by the Registrar ('Sea Wasps'), and since the said Registrar is also accredited by ICANN⁷, the implementation of a biased Administration Panel's Decision by the Registrar, as accredited by ICANN, would by a proposed '*inaction*' by the Board and Staff of ICANN.

This signifies that the present reconsideration request has standing not merely

⁶ Black's Law Dictionary, p20, 6th ed.

⁷<https://www.icann.org/en/accredited-registrars?filter-letter=s&page=4&sort-param=name&sort-direction=asc>

because of the Non-Discriminatory principle of ICANN Bylaws, but also because the core values of ICANN have been contradicted amounting to an unfair resolution of dispute.

9. What are you asking ICANN to do now?

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;
- ii. The BAMC's Summary Dismissal of Reconsideration Request **22-3** dated **26 July 2022** be reversed;
- iii. The Administrative Panel's decision be reversed and Panelists be forever barred.

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

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.

The Panelists have stated that the Complaint was brought in bad faith and

constitutes an abuse of the administrative proceedings without considering material facts and relying on the false and inaccurate information submitted by the Respondents.

There have been number of discussions⁸ regarding bias in case allocation for UDRP along with choosing the Panelists but ICANN has not taken any step in correcting the wrongs.⁹

It must be noted that it is mandatory for the ICANN and its constituent bodies to operate to the maximum extent in an open and transparent manner. ICANN and its constituent bodies must operate consistent with the procedures designed to ensure fairness. As per Section 4.3(a)(vii), the ICANN must secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

In the present case, the Complainant has gravely suffered pursuant to the violation of ICANN's core values pertaining to transparency, consistency and fairness. The decision of the Administrative Panel is in grave violations of these core values of ICANN and ICANN has turned a blind eye to it.

⁸ Jay P. Kesan & Andres A. Gallo, The Market for Private Dispute Resolution Services—An Empirical Re-assessment of ICANN-UDRP Performance, 11 Mich. Telecomm. Tech. L. Rev. 285, 295–96 (2005); John Selby, Competitive Provider Selection Under the ICANN UDRP: Are ICANN's Goals Being Achieved?, AusWeb (2004), <http://ausweb.scu.edu.au/aw04/papers/refereed/selby/paper.html>; 3 Michael Geist, Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP, 27 Brook. J. Int'l L. 903, 922 (2002); The UDRP: Fundamentally Fair, But Far from Perfect, 6 Electronic Com. & L. Rep. (BNA) No. 34, at 937 (Aug. 29, 2001).

⁹ David A. Simon, An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute Resolution Policy, 53 B.C. L. Rev. 65 (2012).

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

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?

Yes

No

12a. If yes, please explain why matter is urgent for reconsideration.

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

The Requestor understands that ICANN has complete access to all pertinent documents in **BAMC's Summary Dismissal of Reconsideration Request 22-3** and **WIPO UDRP Case No. D2022-0880**, the Requestor is further enclosing other necessary documents in the form of **Exhibits** for the reference of the Board.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).



06 August 2022

Signature

Date

Rahul Goel

Representative of Zydus Lifesciences Ltd.

Print Name

Subject: Re: [Reconsideration Request] Reconsideration Request 22-5
Date: Monday, October 3, 2022 at 2:45:29 PM Pacific Daylight Time
From: reconsider on behalf of Herb Waye via reconsider <reconsider@icann.org>
To: Confidential Employment Matter >, ombudsman <ombudsman@icann.org>
CC: reconsideration@icann.org <reconsideration@icann.org>
Attachments: ATT00001.txt

Greetings,

Pursuant to Article 4, Section 4.2(l), I am accepting consideration of Request 22-5.

Regards Herb

Herb Waye
ICANN Ombudsman

Herb Waye
ICANN Ombudsman

<https://www.icann.org/ombudsman>
<https://www.facebook.com/ICANNOmbudsman> [facebook.com]
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf>

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en>

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

From: Confidential Employment Matter

Date: Friday, September 30, 2022 at 2:16 PM

To: ombudsman <ombudsman@icann.org>, Herb Waye <herb.waye@icann.org>

Cc: "reconsideration@icann.org" <reconsideration@icann.org>

Subject: Reconsideration Request 22-5

Dear Herb,

ICANN org recently received the attached reconsideration request ([Request 22-5](#)), submitted by ZyduS Lifesciences Ltd. (Requestor), challenging the Board Accountability Mechanisms Committee's (BAMC) [summary dismissal of a prior reconsideration request \(Request 22-3\)](#)

filed by the same requestor. The prior Request 22-3 sought reconsideration of a UDRP panel decision and the BAMC [summarily dismissed the request](#) because the challenged action was not an action taken by the ICANN Board or Staff, but rather by a third party UDPR provider and panel.

The BAMC has determined that Request 22-5 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Section 4.2(l) of the Bylaws specify that reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2\(l\)](#) states:

- (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.
 - (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 22-5 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 22-5 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of the Request.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

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 6th, 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)).¹ 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.

¹ 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 10th, 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”).²

As allowed by UDRP policy,³ 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.⁴ 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

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

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

⁴ 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 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 26th, 2022 the BAMC summarily dismissed Reconsideration Request 22-3.⁵

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.⁶ The BAMC concluded, “the challenged action is that of an independent third party”; as such the BAMC summarily dismissed Request 22-3.⁷

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*

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

⁶ 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.

⁷ 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.*⁸ Or, in this instance, to *re-litigate* the dispute over the domain name 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.⁹

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.³⁶ Such mechanisms do not involve ICANN."¹⁰

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;

⁸ 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.

⁹ 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>

¹⁰ <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.²² 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.²³

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, 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.

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECOMMENDATION ON RECONSIDERATION REQUEST 22-5
21 NOVEMBER 2022**

I. Introduction and Summary

The Requestor, Zydus Lifesciences Ltd., seeks reconsideration of the BAMC’s [summary dismissal of Reconsideration Request 22-3](#), which was also filed by the same Requestor. That prior request sought reconsideration of a decision in a Uniform Domain Name Dispute Resolution Policy (UDRP) proceeding to which the Requestor was a party (UDRP Decision).¹ The BAMC summarily dismissed Request 22-3 after concluding that the request did not satisfy the Bylaws-mandated requirements to maintain a reconsideration request. Specifically, the BAMC concluded that the challenged action was not taken by the ICANN Board or Staff but was instead the action of an independent third party, and thus not within the scope of the reconsideration process.² In Request 22-5, the Requestor alleges that the BAMC’s summary dismissal of Request 22-3, and corresponding inaction in not evaluating Request 22-3 on the merits or providing the relief sought in Request 22-3, violates ICANN’s Bylaws and policies regarding reconsideration requests. Specifically, the Requestor alleges that Request 22-3 should not have been summarily dismissed because it satisfied the requirements under Article 4, Section 4.2 of the ICANN Bylaws to maintain a reconsideration request.³ The Requestor asks that the

¹ Request for Reconsideration 22-3, 10 July 2022, <https://www.icann.org/resources/pages/reconsideration-22-3-zydus-lifesciences-request-2022-07-15-en>, Exhibit A, Administrative Panel Decision, Case No. D2022-0880, § 4 at Pg. 2, <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>.

² BAMC Summary Dismissal of Request 22-3, 26 July 2022, <https://www.icann.org/en/system/files/files/reconsideration-22-3-zydus-lifesciences-board-accountability-request-23jul22-en.pdf>.

³ See, e.g., Request for Reconsideration 22-5, 6 August 2022, § 6 at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-22-5-zydus-lifesciences-request-redacted-08aug22-en.pdf>.

Board: (i) reverse the summary dismissal, (ii) consider of the merits of Request 22-3, (iii) reverse the decision of the UDRP Panel, and (iv) “forever bar[]” the UDRP Panelists.

Pursuant to the reconsideration process, the Ombudsman has evaluated these claims, and concluded that the summary dismissal of Request 22-3 was correct and that Request 22-5 lacks merit. Specifically, the Ombudsman concluded that the Requestor has presented no evidence demonstrating that the BAMC’s action in dismissing Request 22-3 or its inaction in not providing the relief requested in Request 22-3 contradicted the Bylaws or established policies or that BAMC’s action or inaction were taken without consideration of material information or based on inaccurate information. The Ombudsman further concluded that the Requestor is “dissatisfied with the BAMC’s Summary Dismissal of Request 22-3 and seeks a second bite the apple by now challenging the summary dismissal”⁴ and that the Requestor’s action is a “misuse of the accountability mechanism.”⁵

Based on its review of all relevant materials, the BAMC concludes that the summary dismissal of Request 22-3 did not violate the ICANN org Bylaws and policies on which the Requestor relies. As explained in the summary dismissal of Request 22-3, and as the Ombudsman found, Article 4, Section 4.2 of ICANN’s Bylaws permit reconsideration only of actions or inactions of the ICANN Board or Staff. Because UDRP providers and UDRP panels are not ICANN Board or Staff, the Bylaws do not permit use of the reconsideration mechanism to challenge the results of a UDRP proceeding. Summary dismissal of Request 22-3 was thus fully consistent with the ICANN Bylaws. Accordingly, the BAMC recommends that the Board deny Request 22-5.

⁴ Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 22-5, at Pg. 5, <https://www.icann.org/en/system/files/files/reconsideration-22-5-substantive-evaluation-ombudsman-redacted-15oct22-en.pdf>.

⁵ *Id.* at Pgs. 4–5.

II. Factual Background

The Requestor owns numerous trademarks which comprise or include the word “zydus.”⁶

On 14 March 2022, the Requestor filed a Complaint under the UDRP.⁷ Trademark owners who allege that a domain name was abusively registered can file a complaint with an ICANN-approved dispute-resolution service provider. The Requestor filed its complaint with WIPO,⁸ one of six providers currently approved for handling UDRP disputes.⁹ The UDRP Rules do not provide any role for ICANN in disputes subject to the UDRP.¹⁰ Accordingly, neither the ICANN Board nor Staff was a party to the Zydus UDRP proceeding, nor was ICANN in any way involved in that proceeding.

In a 24 June 2022 decision, the UDRP Panel denied the Requestor’s Complaint.¹¹ The UDRP Panel further determined that the Complaint was filed in bad faith and constituted an abuse of the administrative proceeding.¹²

On 10 July 2022, the Requestor submitted to ICANN a request for reconsideration of the UDRP Decision (Request 22-3), asserting that it contradicted ICANN’s Bylaws concerning non-discriminatory treatment and openness and transparency, and that the Requestor was harmed because the decision allowed the registrant to maintain its registration of <zydus.com>.¹³ The BAMC summarily dismissed Request 22-3 on 23 July 2022. As the summary dismissal explained, Article 4, Section 4.2(c) of the ICANN Bylaws permits reconsideration requests based

⁶ Request 22-3, Exhibit A, Administrative Panel Decision, Case No. D2022-0880, § 4 at Pg. 2, <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>;

⁷ *Id.* § 3 at Pg. 1.

⁸ *Id.*

⁹ <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>.

¹⁰ *See* Rules for Uniform Domain Name Dispute Resolution, <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

¹¹ Request 22-3, Exhibit A, Administrative Panel Decision, Case No. D2022-0880, § 8 at Pg. 7, <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>.

¹² *Id.*

¹³ Request 22-3, § 6 at Pg. 3–4.

only on ICANN Board or Staff action or inaction. Because neither WIPO nor the UDRP Panel are members of the ICANN Board or ICANN Staff, the UDRP Panel’s decision is the action of a third party, not ICANN Board or Staff action, and cannot be challenged through the reconsideration process.

On 8 August 2022, the Requestor submitted a second request (Request 22-5), seeking reconsideration of the BAMC’s action in summarily dismissing Request 22-3 and the BAMC’s corresponding inaction insofar as it did not address Request 22-3 on the merits or provide the relief requested. The Requestor asserts that the “WIPO panel is part and parcel of ICANN as it is accredited by ICANN,” and therefore the BAMC erred by summarily dismissing the Requestor’s request for reconsideration of the UDRP panel’s decision.¹⁴ On 13 September 2022, the BAMC determined that Request 22-5 is sufficiently stated and therefore satisfies the procedural evaluation required by Article 4, Section 4.2(k) of the Bylaws.¹⁵

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 22-5 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the request.¹⁶ The Ombudsman concluded that (1) “the WIPO Panel is not ICANN Staff (or Board),” (2) “reconsideration of WIPO Panel Decisions are not within [BAMC’s] ‘jurisdiction,’” and (3) “BAMC wasn’t wrong in summarily dismissing [Request] 22-3 as insufficiently stated.”¹⁷ The Ombudsman further found that Request 22-5 to be “[a] clear attempt by the requestor to appeal the decision in 22-3,” which “amounts to misuse of this accountability

¹⁴ Request 22-5, § 10 at Pg. 8.

¹⁵ <https://www.icann.org/en/system/files/files/reconsideration-requests-status-2022-15nov22-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/files/reconsideration-22-5-zydus-lifesciences-ombudsman-action-request-redacted-03oct22-en.pdf>.

¹⁷ Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 22-5, at Pg. 7, <https://www.icann.org/en/system/files/files/reconsideration-22-5-substantive-evaluation-ombudsman-redacted-15oct22-en.pdf>.

mechanism,” particularly “because the conclusion is a foregone one—no relief can or should be given to the Requestor here.”¹⁸ Thus, the Ombudsman recommended that “BAMC and the Board should not grant relief and should dismiss Zydus’s latest request.”¹⁹

III. Standard of Review.

Article 4, Sections 4.2(a) and (c) of ICANN’s Bylaws provide, in relevant part, that “any 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.”²⁰

Request 22-5 seeks reconsideration of ICANN Board action or inaction insofar as it summarily dismissed Request 22-3 and did not evaluate Request 22-3 on the merits or provide the requested relief. The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.²¹ Because the BAMC determined that Request 22-5 is sufficiently stated, the BAMC now reviews this request on the merits and provides a recommendation to the Board.²² Denial of a reconsideration request is appropriate if the BAMC recommends and the Board determines that the requestor has not satisfied the reconsideration

¹⁸ *Id.* at Pgs. 7–8.

¹⁹ *Id.* at Pg. 8.

²⁰ ICANN Bylaws, 2 June 2022, Art. 4, §§ 4.2(a) and (c).

²¹ *Id.* § 4.2(k).

²² *See id.* § 4.2(e).

criteria set forth in the Bylaws.²³ Here, Request 22-5 should be denied if the Requestor has not established that the summary dismissal of Request 22-3 was either improper under established ICANN policies or was based on incomplete or inaccurate information.

IV. Analysis and Rationale.

Request 22-3 was summarily dismissed based on the BAMC's conclusion that it was not sufficiently stated under Article 4, Section 4.2(a) and (c) of ICANN's Bylaws. In evaluating whether a reconsideration request is sufficiently stated, the BAMC considers whether the reconsideration request is timely and whether the requestor meets the requirements for bringing a reconsideration request. The BAMC correctly concluded that Request 22-3 did not satisfy the criteria for maintaining a reconsideration request. Although it would have been timely filed if it had been a proper request, Request 22-3 did not identify any ICANN Staff or Board action or inaction that allegedly violated a Bylaws provision or established ICANN policy, which is a threshold requirement for a reconsideration request.²⁴ The sole action the Requestor sought to have reconsidered in Request 22-3 was the "Administrative Panel Decision" in WIPO UDRP Case No. D2022-0880.²⁵ As the BAMC noted in its summary dismissal of Request 22-3, neither the ICANN Board nor the ICANN Staff was involved in the UDRP Decision the Requestor sought in Request 22-3 to challenge. Because the UDRP Decision was not an action by the ICANN Staff or ICANN Board, the BAMC correctly concluded that it cannot serve as a basis for a reconsideration request.

²³ *Id.*

²⁴ *Id.* § 4.2(a), (c).

²⁵ Request 22-3, § 3 at Pg. 1.

In Request 22-5, the Requestor argues that this conclusion was wrong, and that Request 22-3 sought reconsideration of ICANN Staff action, on two primary grounds. Neither justifies reconsideration.

A. UDRP providers and panelists are not ICANN Staff.

The Requestor asserts that the “WIPO Centre and the WIPO Domain Name Panelists are both ICANN accredited and approved.”²⁶ The Requestor thus contends that “ICANN accredited and approved dispute resolution service providers and Panelists must fall under the purview of ‘Staff.’”²⁷ This argument is unpersuasive, as it relies on an incorrect reading of the ICANN Bylaws and a misunderstanding of the relationship between ICANN and the UDRP dispute resolution providers.

ICANN Staff is defined in the Bylaws as “employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors directly.”²⁸ UDRP providers are neither “employees” nor “long-term paid contractors” of ICANN. “Employment” generally involves “service performed for wages or under a contract of hire.” *Tieberg v. Unemployment Ins. App. Bd.*, 471 P.2d 975, 977 (Cal. 1970). “The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” *Id.* ICANN provides no wages to the staff or panelists of UDRP providers, and lacks the right to control the manner or means by which these individuals perform their tasks. They are therefore not ICANN employees. Further, because ICANN does not pay UDRP provider staff or panelists and lacks any contract with them, they cannot be considered “long-term paid contractors.”

²⁶ Request 22-5, § 8 at Pg. 4–5 (citing WIPO sources referencing “accredited dispute resolution service providers” and ICANN sources referencing “approved” providers).

²⁷ *Id.* at Pg. 6.

²⁸ ICANN Bylaws, 2 June 2022, Art. 4, § 4.2(a).

The Requestor also suggests that UDRP panelists must qualify as ICANN Staff because “WIPO panel is part and parcel of ICANN.”²⁹ ICANN and WIPO are separately organized, independent organizations: ICANN is a nonprofit public benefit corporation organized under the laws of the State of California.³⁰ WIPO is an intergovernmental organization created by treaty as an agency of the United Nations.³¹ Each organization has its own governing documents, and neither organization’s governing documents reference the other.³² Under California law, the employees of one organization may also be considered the employees of another organization in certain limited circumstances, but those circumstances are not presented here: There is no basis for considering either ICANN or WIPO alter egos of each other. *See, e.g., Toho-Towa Co. v. Morgan Creek Prods., Inc.*, 217 Cal. App. 4th 1096, 1107, 159 Cal. Rptr. 3d 469, 479 (2013) (explaining that courts may “disregard the corporate form” only in narrow circumstances where one corporation “is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation”). Nor is there any basis for treating WIPO and ICANN as “co-employers,” which occurs where more than one organization “employs or exercises control over the wages, hours, or working conditions of any person,” such as “when one entity . . . hires and pays a worker, and another entity supervises the work.” *Martinez v. Combs*, 49 Cal. 4th 35, 76, 231 P.3d 259, 286 (2010), *as modified* (June 9, 2010). As noted above, ICANN does not pay WIPO staff or panelists and lacks any control over how they perform their work. ICANN therefore is not their employer.

²⁹ Request 22-5, § 10 at Pg. 8.

³⁰ *See* Article of Incorporation of Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/articles-2012-02-25-en>.

³¹ *See* What is WIPO?, <https://www.wipo.int/about-wipo/en/>.

³² *See* Convention Establishing the World Intellectual Property Organization, <https://wipolex.wipo.int/en/text/283854>; Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/articles-2012-02-25-en>; Bylaws for Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/governance/bylaws-en>.

The Requestor finally suggests that, regardless of the actual relationship between ICANN and UDRP providers, UDRP panelists must be ICANN Staff because “they function as per the guidelines of ICANN which does not have a mechanism to employ such personnel directly.”³³ While the ICANN Bylaws do acknowledge that ICANN Staff might “serv[e] in locations where ICANN does not have the mechanisms to employ such contractors directly,” such Staff still must be “long-term paid contractors.” As explained above, UDRP panelists are not paid by ICANN and have no contract with ICANN. They therefore are not ICANN Staff, and their actions cannot be the subject of a proper reconsideration request. The BAMC’s summary dismissal of Request 22-3 was therefore proper, and there is no basis for reconsidering that decision as requested by Request 22-5.

B. Registrars are not ICANN Staff.

The Requestor also alleges that “the eventual implementation of the Administrati[ve] Panel’s Decision is to be done by the Registrar,” that “the said Registrar is also accredited by ICANN,” and therefore that “implementation of a biased Administration Panel’s Decision by the Registrar . . . would b[e] a proposed ‘inaction’ by the Board and Staff of ICANN.”³⁴ To begin, the Requestor did not challenge any action or inaction of the registrar in Request 22-3,³⁵ and complaints about the registrar therefore could not justify reconsidering the summary dismissal of Request 22-3. In any event, although ICANN does accredit registrars, registrars still do not qualify as ICANN Staff. Indeed, the Bylaws expressly prohibit ICANN from acting as a registrar, ensuring that all registrars are independent of ICANN, and foreclosing the possibility

³³ Request 22-5, § 8 at Pg. 6.

³⁴ *Id.* at Pg. 7.

³⁵ See Request 22-3, § 3 at Pg. 1 (identifying the specific action subject to the reconsideration request as the UDRP Decision).

that ICANN Staff could run a registrar.³⁶ Moreover, per the ICANN Bylaws, as explained above, the ICANN Staff consists of ICANN’s “*employees* and individual long-term *paid contractors*.”³⁷ ICANN lacks the authority to control the day-to-day operators of registrars or their employees, so ICANN does not have an employment relationship with these organizations. And ICANN does not pay registrars or their employees, so they cannot be classified as paid contractors. Registrars thus cannot qualify as ICANN Staff under the Bylaws.

Even if registrars could qualify as ICANN Staff, though, the Requestor has asserted no basis for challenging any action by the registrar aside from its underlying complaints about the UDRP Decision. The Requestor has not asserted, and could not plausibly allege, that the registrar would violate any Bylaws provision or established ICANN policy by implementing a duly issued UDRP Decision. For this reason, too, the registrar’s implementation of the UDRP Decision would not be a proper basis for a reconsideration request. The BAMC’s summary dismissal of Request 22-3 was therefore proper, and there is no basis for reconsidering that decision as requested by Request 22-5.

V. Recommendation.

The BAMC has considered the merits of Request 22-5 as well as all relevant information provided and the Ombudsman’s Evaluation, and, based on the foregoing, concludes that ICANN did not violate ICANN’s Commitments, Core Values, or established ICANN policy(ies) through its action of summarily dismissing Request 22-3 or through its corresponding inaction insofar as the BAMC did not consider Request 22-3 on the merits or provide the relief sought in the request. Accordingly, the BAMC recommends that the Board deny Request 22-5.

³⁶ ICANN Bylaws, 2 June 2022, Art. 2, § 2.2 (“ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN.”).

³⁷ *Id.*, Art. 4, § 4.2(a) (emphasis added).

ICANN BOARD SUBMISSION NO. 2022.12.14.1b

TITLE: **Consideration of the Board Accountability Mechanisms Committee's Recommendation on Reconsideration Request 22-5**

Documents

The following attachments are relevant to the Board's consideration of Reconsideration Request 22-5.

Attachment A is Reconsideration Request 22-5, submitted on 8 August 2022.

Attachment B is the Ombudsman Action Regarding Reconsideration Request 22-5, issued on 3 October 2022.

Attachment C is the Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 22-5, issued on 15 October 2022.

Attachment D is the Board Accountability Mechanism Committee's Recommendation on Reconsideration Request 22-5, issued 21 November 2022.

Background Links

The following links are relevant to the Board's consideration of Reconsideration Request 22-5.

- [Reconsideration Request 22-3](#), submitted on 11 July 2022.
- [Exhibits A to L1](#) in support of Reconsideration Request 22-3, submitted on 11 July 2022.
- [Board Accountability Mechanisms Committee's Summary Dismissal of Reconsideration Request 22-3](#).

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Date Noted: 7 December 2022

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