

6 February 2023

Internet Corporation for Assigned Names and Numbers (ICANN)

Attn: Ms. Sally Costerton (Interim CEO) Mr. León Sánchez (Chair of the BAMC) and the Members of the BAMC

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

Via email through counsel

Dear Mr. Sánchez and Members of the BAMC,

Re: Namecheap v. ICANN – ICDR Case No. 01-20-0000-6787

We write on behalf of Namecheap Inc. regarding the recent final declaration in the independent review proceedings between Namecheap and ICANN. We refer to our letter of 18 January 2023 to the ICANN Board, transmitted through counsel with a request to publish it on the ICANN's website correspondence and IRP pages.

Despite confirmation from counsel on 20 January 2023 that the letter and our request were transmitted to the ICANN Board, our letter is still to be published. In addition, there is no sign that the ICANN Board has considered the contents of our letter.

On 21 January 2023, the ICANN Board adopted resolutions 2023.01.21.06 – 2023.01.21.09. In these resolutions, the Board acknowledged that the IRP Panel declared the following: (i) Namecheap prevailed on certain of its claims in the Namecheap, Inc. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Namecheap the sum of US\$58,750. The Board directed the Interim President and CEO, or her designee(s), to take

all steps necessary to reimburse Namecheap in the amount of US\$58,750. Finally, the Board resolved that further consideration is needed on the recommendations¹ in the IRP Panel's Final Declaration and asked the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider.

Namecheap has taken note of these findings. Unless mistaken, and unless payment was made today, Namecheap has not yet received reimbursement of the sum of US\$58,750. Payment information has already been transmitted through counsel and we look forward to your confirmation as to when Namecheap may expect payment.

With respect to the Board meeting in which the resolutions were taken, Namecheap makes the following initial observations:

- The rationale for the resolutions appears to be prepared by ICANN's staff and adopted by the Board without sufficient diligence. In the first paragraph of the rationale, reference is made to ICANN's staff conducting "its due diligence." It looks as if ICANN is repeating the same mantra as it has done during the IRP proceedings, namely claiming that it exercised proper due diligence. However, the Panel determined that "ICANN's invocation of privilege leaves the Panel 'highly uncertain' whether the decisionmakers at ICANN had 'exercised due diligence and care in having a reasonable amount of facts in front of them' in making the decision at issue." Please explain how the Board came to the determination in its rationale that ICANN conducted due diligence.
- Under the same paragraph, reference is made to ICANN's preference to transition the 2013 Registry Agreements to the "Base Registry Agreement". However, this "preference" seems based on the erroneous assumption that the Base Registry Agreement offers new safeguards and is essentially different from the 2013 Registry Agreements for .ORG, .INFO and .BIZ. As was made clear during (unrebutted) expert testimony during the IRP proceedings, the only safeguards that were not included in the 2013 Registry Agreements were those that had not yet been finalized at the time of execution, *i.e.*, the uniform rapid suspension and the public interest commitments. The other safeguards of the Base Registry Agreement (*i.e.*, the new audit rights,

¹ The ICANN Board described these recommendations as non-binding. For the reasons outlined in our 18 January 2023 letter, this description must be nuanced as the recommendations are not permissive.

technical requirements, data escrow requirements, emergency thresholds) were already put into the 2013 Registry Agreements. Thus, the registry agreements for .ORG, .INFO and .BIZ had already transitioned to the Base Registry Agreement in 2013, while maintaining the price caps. Consequently, ICANN's "preference" to transition to the Base Registry Agreement cannot serve as a rationale for removing the price caps.

- The preliminary report of the 21 January 2023 Board Meeting shows that one Board Director "recused herself from consideration of the matter out of an abundance of caution to avoid any potential conflicts of interest or the appearance of a conflict of interest." However, no detail is provided as to the identity of the Board Director recusing herself and the nature of the potential conflict of interest or appearance thereof.

During the consideration of Namecheap's reconsideration request I9-2, which has preceded the IRP and which dealt with issues addressed in the IRP, two ICANN Board Directors who are presently members of the BAMC, Ms. Becky Burr and Ms. Sarah Deutsch, had recused themselves, noting potential conflicts of interest. They offered the following explanations:

- Ms. Burr declared: *"Because this addresses issues that were arised (sic) in connection with the extension of the BIZ contract and I was at Neustar and advised Neustar, I'm going to recuse myself from I9-2";*
- Ms. Deutsch declared: *"Yes, because of I serve on the Board of the EFF and they've been involved in this issue, I am going to be recusing myself from this request."*

Ms. Burr was thus advising the .BIZ registry operator, a for-profit company with a clear commercial interest in the price cap removal. For the reasons set out in our letter of 18 January 2023, the BAMC and the Board should consider .BIZ.

Ms. Deutsch's motives for recusing herself appear to be non-commercial. The Electronic Frontier Foundation (or EFF) had submitted reconsideration request I9-3, in which it stated not to address the issue of price cap removal, but urging the ICANN Board to "carefully consider Namecheap's pending Reconsideration Request, which comprehensively addresses this important issue." The EFF's Reconsideration Request and its support of Namecheap's Reconsideration Request were clearly motivated by a concern to protect the public interest and to ensure open entry in Internet-related markets for the noncommercial domain name registrants of .ORG. These goals are completely aligned with ICANN's mission and fundamental obligations. Yet, Namecheap understands that Ms. Deutsch chose to recuse

herself while Reconsideration Request 19-3 was pending. Now that Reconsideration Request 19-3 is no longer pending, it no longer appears necessary that Ms. Deutsch's voice be silenced for the consideration of the Final IRP Declaration. While Ms. Deutsch may elect to recuse herself from voting, Namecheap believes that the BAMC and the ICANN Board might benefit from having Ms. Deutsch participate fully in the present consideration and, having omitted to do so before, give serious consideration to the EFF's (and potentially her) motives for urging ICANN to carefully consider the price cap issue.

Namecheap also remains at the BAMC's and the Board's disposal to more fully delineate for the ICANN Directors its position regarding the consequences of the IRP Declaration. And, to avoid misunderstandings and differences that we hope everyone wish to avoid, we believe that it would indeed be judicious for the Board and the BAMC to hear Namecheap's position in addition to the opinions given by ICANN's internal and external advisors. This approach may well avoid future litigation involving the matter.

Finally, we respectfully reiterate that the IRP ruling sets forth the appropriate methodology of compliance with its Bylaws and procedures by ICANN. Omitting to do so would not only run contrary to the IRP decision but could constitute a violation of ICANN's Bylaws and imperil its active status as a tax-exempt non-profit entity. Consequently, ICANN's very existence is dependent upon a faithful compliance with its Bylaws, as delineated by IRP decision.

The present letter is sent without prejudice. Namecheap further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America in regards to this matter.

Yours sincerely,


Flip Petillion


Jan Janssen