

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION**

NAMECHEAP, INC.,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-20-0000-6787

WITNESS STATEMENT OF MAARTEN BOTTERMAN

14 January 2022

I, Maarten Botterman, declare as follows:

1. I am the Chair of the Board of Directors for the Internet Corporation for Assigned Names and Numbers (“ICANN”) and have been since October 2019. Before becoming the Chair, I was appointed by the ICANN Nominating Committee to serve as a Board member in November 2016. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Pre-Hearing Brief on the Merits.
2. Throughout my career, I have had extensive experience in Internet governance, and have advised a number of governmental and other institutions regarding the economic, business, and societal impacts of current and future Internet innovations and technologies. I was the Head of the Information Management Unit and then Senior Telework Consultant and Policy Advisory to the Dutch Government from 1987 to 1995. Then, I became a Scientific Officer to the Communications Technology Research program run by the European Commission from 1995 to 1999.
3. From 1999 to 2006, I was a Director of Information Society at the RAND Corporation’s European office, setting up and running an Information Society policy practice in Europe. From 2003 to 2006, I also was the Chief Executive Officer of the Information Assurance Advisory Council, which is a multistakeholder platform that aims to advance information assurance in the United Kingdom.
4. From 2008 to 2016, I was the Chairman of the Board of Public Interest Registry, the registry operator for .ORG. From 2013 through 2019, I was also the Chairman of the Supervisory Board of NLNet foundation, which stimulates network research and development in the domain of Internet technology. I became the Co-Founder and a member of the Board for i4ada, the institute for accountability in the digital age, from 2017 through 2019.
5. Since 2006, I have worked at Global Networked Knowledge Society (“GNKS”) Consult BV as an independent strategic advisor to governments and businesses in close

cooperation with leading independent research institutions in Europe, including RAND Europe, TNO Netherlands, DTI Denmark, and Inno France.

6. In addition to being the current Chair of the ICANN Board, I am also the Chair of ICANN’s Compensation Committee and Executive Committee.

ICANN’s Role With Regard To Promoting Competition And Regulating Prices

7. ICANN is a California non-profit public benefit corporation formed in 1998. Under the Bylaws, ICANN is obligated to act “through open and transparent processes that enable competition and open entry in Internet-related markets.”¹ One of ICANN’s Core Values, as set forth in ICANN’s Bylaws, requires ICANN to promote competition in the registration of domain names “where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”² The Bylaws further require ICANN, “[w]here feasible and appropriate,” to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.”³
8. ICANN, however, is not a regulator of either competition or pricing in the domain name system (“DNS”). Rather, ICANN is responsible for overseeing, at the global level, the secure and stable operation of the Internet’s DNS, which ICANN and the Internet community have developed together over time. The market and the appropriate competition authorities—including, in the United States, the Department of Justice (“DOJ”) and the Department of Commerce (“DOC”) and, in Europe, the European Commission Directorate-General for Competition (“DG Comp”)—are responsible for ensuring that competition remains robust and prices remain lawful, as they do for all other industries. ICANN does not possess the institutional capacity, resources, expertise, or authority to act as a pricing regulator or to monitor (much less set) prices in the DNS. Indeed, there are certain registries within the DNS, such as country code TLDs (“ccTLDs”), with which ICANN has no contractual relationship and would have no

¹ Bylaws, Art. 1, § 1.2(a).

² *Id.*, § 1.2(b)(iv).

³ *Id.* 1.2(b)(iii).

ability to address pricing within those registries.

9. ICANN’s Bylaws clearly establish that ICANN “shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide. . . . For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”⁴
10. ICANN complies with its Core Values regarding competition in a variety of ways. A good example is ICANN’s implementation of the New generic Top-Level Domain (“gTLD”) Program. The New gTLD Program (often referred to as the “Program”) resulted from a community driven policy development process to increase competition and consumer choice in the DNS, and ICANN’s role was to implement that policy. Through that Program, ICANN has introduced over 1,200 new gTLDs into the DNS, and thus introduced significant consumer choice and competition. In addition, ICANN refers any competition concerns to the appropriate competition authorities, including DOJ, DOC and DG Comp. Those competition authorities, and not ICANN, possess the skill and expertise to address competition and pricing concerns within the DNS.

The ICANN Board’s Delegation of Authority to ICANN Staff

11. The ICANN Board is an oversight board that provides direction and advice to ICANN on major policy issues and initiatives, but it is not a managing or executive board directly handling day-to-day operational decisions. Rather, the ICANN Board has delegated to the ICANN organization (meaning ICANN staff) the authority to manage the day-to-day operations of ICANN, with the Board’s oversight. For instance, the ICANN Board has delegated to ICANN staff the authority to enter into contract negotiations with registry operators and other third parties. This includes the authority to enter into negotiations with registry operators for both legacy gTLDs (including .COM, .BIZ, .INFO, and .ORG) as well as with registry operators for new gTLDs delegated pursuant to the Program.
12. The Board’s delegation of authority was most recently memorialized in November 2016 when the ICANN Board adopted ICANN’s Delegation of Authority Guidelines

⁴ Bylaws Art. § 1.1(c).

(“Guidelines”). I understand that, pursuant to this general practice and the subsequent written Guidelines, ICANN staff has entered into thousands of agreements, renewals, amendments, and addendums with third parties, including registry operators.

13. ICANN staff can and does consult with the ICANN Board regarding registry agreement renewals when deemed necessary, depending on the circumstances of the contract negotiations. Occasionally, the ICANN Board will issue a formal Board resolution regarding registry agreement renewals, but it does not engage in this practice as a matter of course.
14. Delegating contract renewals and negotiations to ICANN staff significantly improves the ICANN Board’s efficiencies and allows it to better fulfill its mandate to ICANN. For example, the Board is better able to focus on high-level strategic and policy initiatives, and engagement with ICANN’s Supporting Organizations and Advisory Committees, among other things. It would simply be unworkable for the Board if it was required to negotiate with registry operators or issue resolutions each time any of the over 1,200 registry agreements were up for renewal (or any other third-party agreement needed to be executed). Nevertheless, the Board certainly is available as a resource for ICANN staff whenever staff seeks Board consultation.

ICANN Board Workshops – Discussion Regarding The 2019 .BIZ, .INFO, and .ORG Registry Agreements

15. The ICANN Board conducts three types of Board meetings under the Bylaws, annual, regular, and special meetings. When convening an annual, regular, or special Board meeting, the Bylaws obligate the Board to meet certain requirements, such as providing notice and an agenda for the meeting, establishing a quorum, posting minutes, and the like.
16. Outside of these Board meetings, the Board also convenes Board workshops and Board informational calls. Board workshops generally are working sessions for the ICANN Board where the Board is briefed on relevant topics going on in the Internet community as well as certain ICANN operational topics or issues. Prior to Board workshops or informational calls, the Board often receives briefing materials prepared by ICANN staff

(and often by ICANN’s in-house legal department) setting forth the relevant issues and/or topics for discussion, and then during the sessions briefed by ICANN staff (and often ICANN’s in-house legal department). The Board engages with ICANN staff, asking questions whenever the Board members deem appropriate. But the Board does not make formal decisions or issue formal resolutions at Board workshops or informational calls. Formal decisions and resolutions are reserved for annual, regular, and special Board meetings.

17. Board workshops and Board informational calls are necessary in order for the ICANN Board to complete its work and better fulfill its mandate to ICANN. It would be extremely difficult—if not impossible—for the Board to inform itself and accomplish all of its duties if it could only have discussions and briefings at annual, regular, or special ICANN Board meetings, or if it had to meet all of the Board meeting requirements set out in the Bylaws every time the Board needed to discuss a topic.
18. With regard to the 2019 Registry Agreement renewals for .BIZ, .INFO, and .ORG (“2019 Registry Agreements”), the topic was discussed at two of the Board’s workshop sessions (not Board meetings), the first in January 2019 and the second in June 2019. I attended both of these workshop sessions.
19. In January 2019, the Board received privileged briefing material regarding the 2019 Registry Agreements before the workshop, and then ICANN staff briefed the ICANN Board regarding those renewals. Certain communications during that workshop session, in which ICANN’s in-house legal department were integrally involved, are privileged and, thus, I will not disclose the details of any legal advice sought or provided so as to avoid waiving the attorney-client privilege. I will only disclose non-privileged information regarding the workshop session.
20. ICANN staff’s briefing focused on the upcoming expiration of the .BIZ, .INFO, and .ORG registry agreements in June 2019 and ICANN staff’s proposal to transition the .BIZ, .INFO, and .ORG registry agreements to the Base Registry Agreement following its negotiations with the respective registry operators. One of the topics, but not the only topic, discussed was the price control provisions present in the former .BIZ, .INFO, and

.ORG registry agreements that were not included in the Base Registry Agreement.

21. ICANN staff presented the history of price control provisions in various gTLD registry agreements, how the concepts of price control and price protection were considered by the Internet community during the development of the Base Registry Agreement for the New gTLD Program, and the rationale for why ICANN staff recommended transitioning to the Base Registry Agreement for the 2019 Registry Agreements. This was provided for the Board's information; ICANN staff did not request formal approval, a formal decision, or a formal resolution from the Board, nor did the Board feel the need to provide such.
22. ICANN staff demonstrated that it had exercised due diligence and considered a number of factors in reaching the decision to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. I recall ICANN staff referencing the additional safeguards for registrars and registrants afforded by the Base Registry Agreement; that the Base Registry Agreement creates efficiencies for ICANN staff and the registry operators; the maturation of the DNS following the New gTLD Program; ICANN's goal of treating registry operators equitably; and the fact that ICANN is not a price regulator, among others.
23. The ICANN Board could have intervened if it had concerns with the work of ICANN staff on these issues. The Board discussed this option, but did not do so since the Board was supportive of ICANN staff making the decision, the Board appropriately had delegated this authority to ICANN staff, and ICANN staff had engaged in significant deliberations before proposing the transition to the Base Registry Agreement. Thus, there was no reason for the Board to make an exception to the authority it had already delegated to ICANN staff.
24. ICANN staff opened a public comment proceeding for each of the .BIZ, .INFO, and .ORG gTLDs with regard to the 2019 Registry Agreements, received a number of comments in response, summarized and analyzed those comments, and prepared and published a Report of Public Comments for each gTLD.

25. The next Board workshop was in June 2019, which was before the .BIZ, .INFO, and .ORG registry agreements were due to expire. In advance of that workshop, the ICANN Board received additional privileged briefing materials, and was directed to the Report of Public Comments for each gTLD prepared and published by ICANN staff. As with the January 2019 workshop, certain communications during the June 2019 workshop session, in which ICANN's in-house legal department were integrally involved, are privileged. Thus, I will not disclose the details of any legal advice sought or provided so as to avoid waiving the attorney-client privilege. I will only disclose non-privileged information regarding the workshop.
26. ICANN staff briefed the Board regarding the status of the renewal negotiations and the results of the public comment process. ICANN staff proposed proceeding with the 2019 Registry Agreements utilizing the Base Registry Agreement and explained its rationale to the Board. ICANN staff also shared its analysis of the results of the public comments, identified and addressed the concerns raised by the public comments, and explained the reasons why the public comments regarding the price control provisions did not dissuade ICANN staff from recommending the transition to the Base Registry Agreement, specifically that each of the factors staff considered prior to the public comment process still suggested that the best course of action was to transition to the Base Registry Agreement.
27. Again, the Board saw no reason to intervene in light of the diligence ICANN staff demonstrated. Rather, the Board was supportive of ICANN staff's proposed recommendation. Of particular importance to me was the notion that ICANN is not a regulator of wholesale registry pricing (or any pricing in the DNS), and that ICANN lacks the expertise, resources, and skill to set such prices. Additionally, I found probative the fact that ICANN and the Internet community have worked extremely hard over the past decade to introduce additional consumer choice into the DNS and, as a result, the DNS has matured from just a handful of gTLDs to over 1,200 new gTLDs, in addition to the scores of ccTLDs that are open to all domain name registrants.
28. I understand that Namecheap is claiming that the Board acted in secret when deciding to

go forward with the 2019 Registry Agreements. Nothing about the Board’s conduct occurred in secret. The Board did not convene a “secret” annual, regular, or special Board meeting and did not make any “secret” formal decisions or “secret” resolutions. Instead, the Board was briefed by ICANN staff regarding contract renewals that were well within their delegated authority to negotiate and execute.

29. The Bylaws are clear that ICANN must “operate to the maximum extent feasible in an open and transparent manner.” But I have never understood this Bylaws provision to require that every time the Board needs to get work done, or every time the Board receives a briefing from ICANN staff on a specific topic, it must do so in public or at a annual, regular or special Board meeting. Nor would such a requirement be feasible.
30. The Board was kept fully apprised of ICANN staff’s proposed course of action and rationale for doing so throughout the renewal process and was supportive of ICANN staff’s approach. ICANN staff’s diligence in the negotiations and its consideration of numerous relevant factors demonstrated that the Board did not need to re-assert authority it had already delegated.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 14th day of January 2022 at Rotterdam (NL).

By: 
Maarten Botterman