

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

Namecheap, Inc.

Claimant,

Case Number: 01-20-0000-6787

- and -

Internet Corporation for Assigned Names
and Numbers (ICANN)

Respondent.

PROCEDURAL ORDER NO. 13

(Other Relief Sought by Namecheap’s Motion to Compel and Motion for Sanctions)

Introduction

1. This Order supplements Procedural Order No. 12 (“PO 12”), which partially ruled on the Motion to Compel and Motion for Sanctions (“Further Motion to Compel”) submitted by Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) on 29 September 2021. As previously explained, PO 12 was limited to the relief that the Panel had already decided at that point to grant, so that it could be issued on an expedited basis. An expedited ruling was important so that Respondent Internet Corporation for Assigned Names and Numbers (“ICANN” or “Respondent”) could produce additional documents promptly and Namecheap could review those documents and submit its Pre-Hearing Brief on the current schedule, without further extensions.

2. The Panel stated in PO 12 that it was not inclined to grant other relief at that time but might do so “in the course of preparing its separate order on the remaining requests or upon further review in the course of this Independent Review Process (‘IRP’).” Having further considered the oral and written arguments and supporting documents submitted by Namecheap and ICANN (collectively, the “Parties”),¹ the Panel issues the following rulings on Namecheap’s requests for relief

¹ As noted in PO 12, the Parties’ submissions include (a) Namecheap’s Further Motion to Compel and Annexes 38-89; (b) ICANN’s 14 October 2021 Response (“ICANN’s Response”) and Exhibits R-19 to R-27; and (c) Affidavit of Russell Weinstein, ICANN’s Vice President of Global Domains Division Accounts and Services, who managed the negotiations with the .ORG, .BIZ, and .INFO registry operators. A hearing was held by videoconference on 19 October 2021, and Namecheap submitted presentation slides, as further described in PO 12.

that were not addressed in PO 12. As explained below, the Panel grants some of Namecheap's other requests for relief and denies Namecheap's remaining requests.

Namecheap's Remaining Requests for Relief

3. Namecheap requests that the Panel "declare that ICANN's production is non-compliant and order that ICANN complete its production by filling the gaps identified by Namecheap in its letters to ICANN and in the present motion" (Further Motion to Compel, ¶ 122) and by taking the following actions:

- a. "reproducing redacted documents in unredacted form at the latest on 6 October 2021;"²
- b. "extending the relevant time period to capture the earliest communications and deliberations about changes to the price control provisions in the registry agreements of legacy gTLD operators;"
- c. "proposing an updated ESI search protocol that guarantees a reasonable search at the latest on 6 October 2021;"
- d. "producing additional documents identified through the updated ESI search protocol at the latest on 30 October 2021;"
- e. "subject to the payment of a penalty of USD10,000 per day of delay".

4. Namecheap also requests that in case of a "persistent failure" by ICANN to complete its production, the Panel "declare that ICANN has acted in bad faith, in violation of its Articles of Incorporation and Bylaws and that the Panel shall draw an adverse inference from the gaps in ICANN's production." (*Id.*, ¶ 123.)

5. In addition, Namecheap requests that the Panel order ICANN to bear all legal costs incurred by Namecheap in these proceedings, and also revisit the procedural schedule to postpone the filing of Namecheap's merits submission until after ICANN completed its production. (*Id.*, ¶¶ 124-25.)

General Principles

6. As explained in Procedural Order 5 ("PO 5") and PO 12, the general principles that govern production of documents in this IRP are set forth in Rule 8 of the ICANN Interim Supplementary Procedures for ICANN Independent Review Process (the "IRP Procedures"), Article 21 of the International Arbitration Rules of the

² The hearing on Namecheap's motion occurred on 19 October. The Parties agreed on a new case schedule on 18 October, so Namecheap's request for production by 6 October has been superseded by events.

International Centre for Dispute Resolution (“ICDR Rules,” 2014 version), and the ICANN Bylaws. (PO 5, ¶¶ 8-13; PO 12, ¶¶ 8-10.)

7. The Panel further explained in PO 5 that:

The Panel is charged with endeavoring to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party’s opportunity to present its claims and defenses fairly. In doing so, the Panel considered the need for proportionality. This involves balancing the disclosure necessary for a fair search for truth – which may fall short of an idealized notion of perfection (for example, complete and full disclosure of each and every conceivably relevant document) – against the burden and cost of disclosure.

(PO 5, ¶ 13.)

8. The Panel incorporates its further explanations of these principles in PO 5 and PO 12 without repeating them here.

Discussion

9. The Panel notes that the structure of Namecheap’s arguments does not strictly correspond with its requests for relief (redacted documents, relevant time period, ESI protocol.) Rather, Namecheap groups its arguments into the following categories: (a) ICANN’s alleged failure to perform a reasonable search and/or to produce communications and documents exchanged with registry operators, and alleged misrepresentations as to the time period for production; (b) ICANN’s alleged failure to perform a reasonable search and/or produce deliberative documents; (c) ICANN’s Board list serve and custodians; (d) ICANN’s stipulation regarding Board meeting agendas and minutes; and (e) sources of ESI.

10. The Panel first addresses Namecheap’s arguments as set forth in the categories above, and then addresses Namecheap’s requests for relief as set forth in paragraphs 122-24 of its Further Motion to Compel.

A. Renewal Negotiations with the Registry Operators - Alleged Gaps in Production

11. Namecheap complains that ICANN produced only a handful of documents regarding its negotiations (the “Renewal Negotiations”) in 2018 and 2019 with the registry operators of .ORG, .INFO, and .BIZ (the “Three Registry Operators”) regarding renewal of the applicable registry agreement (the “Registry Agreement”; collectively, “Registry Agreements”). The new Registry Agreements lacked the price controls that were present in prior registry agreements. Namecheap states that ICANN produced only (a) four email chains with PIR, the operator of .ORG: (b) two email

chains with Afiliias, the operator of .INFO; and (c) six email chains with Neustar, the operator of .BIZ. Namecheap asserts that additional documents must exist, such as agendas and minutes of meetings, draft Registry Agreements, and other emails.

12. PO 12 granted Namecheap's request that ICANN be ordered to produce attachments to emails exchanged with the Three Registry Operators, as well as a letter cited in an email. PO 12 also ordered ICANN to check whether the ICANN personnel who participated in the phone calls with the Three Registry Operators had handwritten notes of those calls. However, PO 12 did not address the other relief requested by Namecheap in connection with the Renewal Negotiations, including Namecheap's requests that the Panel: find that ICANN did not conduct a reasonable search as to the Renewal Negotiations, order ICANN to conduct additional searches, and produce additional documents resulting from that search.

13. Except as otherwise set forth in this Order, the Panel denies Namecheap's other requests. ICANN has provided a plausible explanation for why so few responsive documents exist. ICANN was required to produce only documents that relate to modification or removal of price controls. For example, as to Namecheap's Document Request No. 1, the Panel ordered ICANN to produce non-public, non-privileged documents and communications for the time period from 1 January 2018 through 18 November 2019 that "relate or refer to the modification and/or removal of price control provisions in the registry agreements (regardless of whether such documents and communications specifically reference the .ORG, .INFO, and .BIZ Registry Agreements)." (PO 5, Appendix B at 3-4, Panel Ruling on Namecheap's Document Request No. 1.) Thus, ICANN was not required to produce communications with the Three Registry Operators that that did not refer or relate to price controls and instead discussed other provisions of the Registry Agreement.

14. ICANN explained that:

- price controls were not a major topic of discussion in the Renewal Negotiations because they began with the Base gTLD Registry Agreement as the template;
- the Base gTLD Registry Agreement does not include price controls; thus, none of the drafts referred to a price control clause that did not exist, and there were no redlines or discussions concerning a non-existent clause;
- the Three Registry Operators had no reason to object to the absence of price controls and thus made few comments on that subject;
- many of the negotiations took place by phone, as Mr. Weinstein confirmed in his affidavit.

15. Namecheap has not rebutted ICANN's explanations. In addition, ICANN did produce some emails with the Three Registry Operators that refer to price controls. While the number is small, ICANN's production of those emails is consistent with its statement that it searched for responsive documents that refer to price controls and produced the documents it found.

B. The Start of the Renewal Negotiations and Relevant Time Period for Production

16. Namecheap argues that ICANN "misrepresented" that the Renewal Negotiations with the Three Registry Operators began in May 2018 because ICANN produced no documents showing that negotiations began at that time. Namecheap also notes that ICANN's privilege log refers to a 12 January 2018 document providing legal advice about renewal of registry agreements. Namecheap argues that this shows that the negotiations began before May 2018.

17. ICANN replies that the Renewal Negotiations did in fact begin in May 2018, but reiterates that they did not focus on price controls, so many of the documents relating to the negotiations are not responsive. As to the 12 January 2018 document, ICANN states that the privileged advice concerned a top-level domain name not at issue in this IRP.

18. The Panel is not persuaded that ICANN misrepresented the starting date of the Renewal Negotiations. Moreover, even if the Renewal Negotiations began in January rather than May 2018, the Panel ordered production of documents related to modification or removal of price controls starting from January (not May) 2018. Thus, ICANN's search should have extended back to January. Indeed, ICANN identified a privileged document from January 2018, which confirms that its search did extend back to January.

19. Separate from the issue of the beginning date of the Renewal Negotiations, Namecheap requests more generally that the time period for document searches be extended to include the earliest communications and deliberations about changes in the price control provisions in the registry agreement of legacy gTLD operators. There is some merit to this request. As previously noted, ICANN states that price controls were not a major topic of discussion in the Renewal Negotiations because they began with the Base gTLD Registry Agreement as the template. Thus, the decision to remove price controls may have occurred prior to the commencement of the Renewal Negotiations in 2018. If so, documents relating to that decision would also predate 2018.

25. While the Panel limited e-discovery to the period of 1 January 2018 through 18 November 2019, PO 5 required ICANN to conduct a reasonable search for certain documents outside of that period through other means, including interviews with relevant ICANN personnel:

For certain requests to ICANN (*e.g.*, Nos. 1.r., 2.1. and 2.t.), the Panel has limited ICANN's obligation to conduct an ESI search to the period of January 1, 2018 through November 18, 2019, but nonetheless requires that ICANN conduct a reasonable inquiry to identify responsive documents and ESI outside that period. Such inquiry shall, at a minimum, include interviews with relevant ICANN staff. If ICANN prefers to supplement such inquiry through e-searches, it may of course do so.

(PO 5, ¶ 17.) ICANN's counsel confirmed in a 2 August 2021 letter to Namecheap's counsel that it had conducted interviews and identified the interviewees. (Annex 50.)

26. PO 5 also provided that to the extent that ICANN relies on pre-2018 documents or communications "to affirmatively demonstrate in this IRP that removal of the price control provisions complied with the Articles of Incorporation and Bylaws, Namecheap may seek leave from the Panel to obtain the disclosure of such other documents and communications that are reasonably related to the documents or communications relied upon by ICANN." (PO 5, Appendix B, Panel Ruling on Namecheap's Request No. 1.j.)

27. PO 5 provided further that: "The parties shall be precluded from relying on documents in the merits phase of this proceeding that were responsive to disclosure requests, but that they did not produce, except upon a compelling showing of good cause." (PO 5, ¶ 23.)

28. Reading the foregoing provisions from PO 5 together (*i.e.*, paragraphs 13 and 17 of the Order and the ruling on Namecheap's Request No. 1.j. in Appendix B), it is conceivable that there would be documents that are not "responsive" to Namecheap's requests as narrowed by the Panel in PO 5 (for example, they pre-date 2018, while not being responsive to Namecheap requests 1.r., 2.1. and 2.t.), but that ICANN seeks to rely upon to support its decision to remove price controls from the Base gTLD Registry Agreements (which subsequently became the template for the Registry Agreements).

29. As noted, the Panel sought to address this situation in PO 5 by providing that to the extent ICANN relies upon pre-2018 documents to show that it complied with the ICANN Articles of Incorporation and Bylaws in removing price controls for .ORG, .INFO, and .BIZ (including documents supporting the decision to utilize the Base gTLD Registry Agreement for those domains), Namecheap may seek leave to obtain disclosure of other documents and communications that are reasonably related to those relied upon by ICANN. (PO 5, Appendix B, Panel Ruling on Namecheap's Request No. 1.j.) The difficulty is that this could result in another round of discovery that occurs only after ICANN submits its exhibits, which are due on 14 January 2022. This would not be ideal for either party.

30. ICANN may have already produced all pre-2018 documents on which it intends to rely. However, if there are pre-2018 documents that are not responsive to the discovery requests allowed by the Panel in PO 5 that ICANN intends to rely upon to support its decision and that it has not yet produced, the Panel strongly encourages ICANN to produce such documents to Namecheap forthwith, notwithstanding its 14 January 2022 deadline for submitting exhibits.

C. Specific Requests for Documents in Connection with the Renewal Negotiations

31. Namecheap makes several requests for specific relief regarding the Renewal Negotiations that were not addressed in PO 12. The Panel denies these requests for the following reasons:

- Annex 65: Namecheap asserts that ICANN did not produce the reply to the most recent email in this chain. ICANN responds that it did produce the reply, which it submitted as Exhibit R-25.
- Annex 63: Namecheap notes that this 18 September 2018 email from ICANN to Neustar refers to a proposal regarding the Base gTLD Registry Agreement that will be provided “in the coming weeks.” Namecheap argues that no such proposal was produced. ICANN replies that (a) the email does not suggest that any proposal would include price controls; (b) ICANN did not find any further emails in this chain; and (c) Neustar complained in a 11 February 2019 email (Annex 70) about ICANN’s lack of update since September 2018, which seems to corroborate ICANN’s statement that no proposal was provided in that five-month period.
- Annex 70: Namecheap notes that this February 2019 email refers to a meeting between Neustar and ICANN on 19 September 2018 and complains that ICANN did not produce any document regarding that meeting. ICANN replies that the “19 September” meeting almost certainly refers to the “quick but productive call” that ICANN mentioned in its 18 September 2018 email (Annex 63), which ICANN did produce. ICANN’s point is well taken. Neustar is based in Australia, as Annex 70 indicates, while ICANN is based in California. Thus, a phone call on 18 September in ICANN’s time zone corresponds to 19 September in Neustar’s location.

D. ICANN’s Internal Communications and Deliberative Documents

32. Namecheap maintains that ICANN produced virtually no “deliberative documents” regarding the removal of price controls from the Registry Agreements for .ORG, .BIZ, and .INFO, such as internal communications between ICANN staff or Board Members, meeting minutes, agendas, and briefing memos. Namecheap contends that some of the documents produced by ICANN refer to meetings on this subject, yet

ICANN failed to produce documents associated with those meetings. Namecheap complains that ICANN redacted large parts of the documents it did produce, either as non-responsive or privileged. Namecheap also complains that ICANN used the “Highly Confidential – Outside Attorneys’ Eyes Only” designation with respect to documents that do not warrant that classification. Namecheap requests that ICANN be ordered to produce unredacted versions, conduct additional searches, and produce additional documents.

33. ICANN responds that it collected documents from numerous custodians and produced responsive, non-privileged documents that it located after conducting an extensive search and review of documents. Indeed, ICANN states that it “has produced approximately 6,900 documents in this IRP, which ... is far more documents than ICANN has ever produced in any IRP.”

34. Regarding the alleged gaps in ICANN’s production – namely documents being absent where Namecheap would expect them to exist – ICANN replies that it cannot produce what it does not have; that it is being asked to prove a negative, which it has attempted to do as best it can; and that many of the documents that Namecheap might have expected to find either do not exist or are protected by attorney-client privilege.

35. ICANN maintains that its redaction of non-responsive confidential material is proper but offers to allow the Panel to conduct *in camera* review of its redactions. ICANN also states that “most of the memoranda prepared for ICANN Board meetings regarding the contract negotiations were prepared at the request of and by ICANN’s legal department and reflect legal advice by ICANN’s counsel,” and are thus protected by the attorney-client privilege and are listed on ICANN’s privilege log. ICANN notes that *in camera* review would not be proper as to redacted privileged material.

36. Except as otherwise forth in this Order, the Panel denies Namecheap’s request for an order requiring ICANN to conduct additional searches and produce additional internal communications and deliberative documents. The Panel has no reason to question the integrity of counsel for either side, including the representations of ICANN’s counsel that ICANN has conducted an extensive search and has not intentionally withheld responsive documents. Namecheap has not demonstrated that additional searches would likely be fruitful.

37. As to privilege, the Panel finds that ICANN has made a prima facie showing that the documents it has declined to produce (either in whole or in part) are

shielded from disclosure by the attorney-client privilege. Namecheap has not overcome that prima facie showing.³

38. Nevertheless, the Panel finds that some of Namecheap's specific requests warrant relief. Namecheap notes that the Annex 62 ICANN email chain adds the following agenda items to an upcoming call on 7 September 2018: "Potential Press Qs: Removal of Price Caps for Legacy TLDs during Registry Agreement Renewal." Namecheap complains that ICANN has not produced any briefing documents, agenda, working document, presentations, meeting notes, meeting minutes, or recordings for that call. ICANN has argued generally that it produced responsive non-privileged documents, but it has not specifically replied about the call mentioned in Annex 62. Accordingly, ICANN is ordered to either certify that no responsive documents for that call exist (specifically including handwritten notes) or produce all responsive non-privileged documents and to identify any privileged documents on its privilege log.

39. Namecheap notes that Annexes 64, 66, and 67 refer to price controls, but portions of those documents have been redacted. ICANN has offered to produce unredacted versions of those documents so that the Panel can confirm that the redacted portions are non-responsive. The Panel accepts that offer and directs ICANN to produce unredacted versions of Annexes 64, 66, and 67 to the Panel for *in camera* review.

40. Namecheap complains that ICANN designated the Annex 66, 67, and 68 email chains as "Highly Confidential - Outside Attorneys' Eyes Only," even though they do not contain "Highly Confidential" material.

41. ICANN responds that it already redesignated Annex 67 as "Confidential" (not "Highly Confidential"). Thus, this particular request is moot.

42. As to Annex 66, ICANN states that it limited the "Highly Confidential" designation to the portions of the email chain that refer to contract negotiations with Verisign. However, the non-redacted portions of that email chain are limited to high-

³ ICANN's comments at the 19 October hearing indicate that it understands that cloaking documents in privilege, as it is entitled to do, potentially narrows the scope of the evidence for ICANN to rebut claims that it violated its Articles of Incorporation and Bylaws. The possible implications of using the privilege to shield information considered by the ICANN Board Governance Committee were discussed in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel, ¶¶ 149-50 (July 29, 2016). ICANN expressed confidence during the 19 October hearing that the non-privileged evidence of ICANN's deliberations will be sufficient to show that ICANN did not violate its Articles of Incorporation or Bylaws, and the Panel expresses no view on whether the concerns noted in the *Dot Registry* Declaration apply here. The Panel simply highlights the issue so that both Parties may address it in their submissions.

level references only and do not refer to the details of the contract negotiations with Verisign. Thus, they do not appear to meet the definition of “Highly Confidential” in the Stipulated Protective Order, which is limited to “highly sensitive business or personal information, the disclosure of which would result in a serious competitive disadvantage to the producing Party or third parties, or otherwise seriously harm the producing Party or third parties.” Accordingly, ICANN is directed to produce the Annex 67 email chain to Namecheap without the “Highly Confidential” designation.⁴

43. As to Annex 68, ICANN contends that the “Highly Confidential” designation is appropriate because parts of the most recent email refer to negotiations regarding the “Asia” and “Aero” domain names. In contrast to Annex 67, the references in Annex 68 do include some specifics as to the negotiations. It is not clear whether those references are sufficiently detailed to justify “Highly Confidential” treatment, but the Panel will not alter that designation because the “Asia” and “Aero” domain names do not appear to be relevant to this IRP. However, the immediately preceding paragraph in that document about .BIZ/.INFO/.ORG is potentially relevant to this IRP and does not appear to qualify for “Highly Confidential” treatment. Accordingly, ICANN is ordered to produce the Annex 68 email with the “Highly Confidential” designation removed from all portions of the document except for the discussion of “Asia” and “Aero.”

44. Finally, Namecheap makes several arguments regarding the Excel spreadsheets that it has submitted as Annexes 82 and 83, which are ICANN documents summarizing public comments regarding .ORG and .INFO. PO 12 resolved one of Namecheap’s arguments regarding metadata by ordering ICANN to produce native versions of these spreadsheets that contain the correct metadata.

45. Namecheap also argues that the Annex 82 and 83 spreadsheets are incomplete “work in progress” and that other iterations must exist. Namecheap insists that ICANN should produce a similar spreadsheet for .BIZ, which “must exist.” Namecheap further contends that the spreadsheets refer to various materials for Board meetings that ICANN did not produce.

46. ICANN responds that it ceased work on the Annex 82 and 83 spreadsheets after concluding they were impractical due to the large number of public comments. ICANN also represents that no similar spreadsheet was created for .BIZ, and that the memoranda presented to the Board regarding the 2019 Registry Agreements are privileged. The Panel declines to order further production in view of these representations by ICANN.

⁴ The Panel has ordered ICANN to produce the Annex 66 email chain for *in camera* review. The Panel expresses no view at this time whether the redacted portions are “Highly Confidential.”

E. ICANN Board List Serve and Custodians

47. Procedural Order No. 5 required ICANN to “conduct a reasonable search and produce non-public, non-privileged communications between ICANN Board members regarding the modification and/or removal of the price control provisions in the 2019 .ORG, .INFO, and .BIZ Registry Agreements,” for the period of 1 January 2018 through 18 November 2019. (PO 5, Appendix B at 43-44, Panel Ruling on Namecheap’s Document Request No. 1.o.) It further stated that “ICANN will not be required to search the Board members’ personal (non-ICANN) email accounts,” and otherwise denied the request on the ground that “the requested documents are only marginally relevant and material relative to the burden of production.” (*Id.*)

48. Namecheap argues that Procedural Order No. 5 required ICANN “to search for all communications between Board Members, using their email accounts,” but that ICANN has failed to do so. Namecheap asserts that ICANN did not include the ICANN Board list serve as a custodian when it performed its search.⁵ Namecheap states further that ICANN did not disclose that its Board list serve includes some persons who are not members of the Board. Namecheap argues that if ICANN had disclosed this fact, Namecheap would not have agreed to limit the ESI search to the protocol proposed by ICANN.

49. ICANN replies that contrary to Namecheap’s assertion, the Panel did not order ICANN to search for “all communications between Board Members, using their email accounts.” ICANN states that to the extent that Namecheap is arguing that ICANN’s ESI protocol should have included all individual ICANN Board members, that argument is untimely because Namecheap did not challenge the list of custodians that ICANN proposed in January 2021. ICANN’s list of custodians included 16 individuals, plus the “ICANN Board list serve,” “Board Operations list serve/drive,” and “Global Support list serve.” (Annex 33, submitted by Namecheap with its 29 January 2021 Objection to ICANN’s ESI Protocol.) ICANN states that the custodians included its General Counsel, John Jeffrey, and Deputy General Counsel, Amy Stathos, “who are members of the ICANN Board listserv, meaning that all documents circulated to the ICANN’s Board listserv, which was one of the Board’s identified custodians,

⁵ Namecheap also asserts that ICANN did not include the Global Support list serve as a custodian, but does not appear to request specific relief related to that omission. ICANN states that it included the Global Support list serve to collect any inquiries related to price control provisions during the public comment process, but “thereafter determined that any such documents, to the extent they related to price control provisions, would have been sent via email to either Russell Weinstein or Danielle Gordon (or both), and therefore encompassed by the collection of their emails. (ICANN’s Response n.4.) Namecheap has not disputed that point or sought relief related to public comments, except as to Annexes 82 and 83, which are discussed above.

would have been included by ICANN's collection of Mr. Jeffrey's and/or Ms. Stathos' files." (ICANN's Response at 2 n.3.)

50. ICANN is correct that PO 5 did not require production of "all communications between Board Members, using their email accounts." Rather, PO 5 limited production of communications between Board Members to (a) communications "regarding the modification and/or removal of the price control provisions in the 2019 .ORG, .INFO, and .BIZ Registry Agreements"; and (b) communications between 1 January 2018 to 18 November 2019).

51. ICANN is also correct that the time for Namecheap to object to ICANN's proposed list of custodians has passed. Procedural Order No. 5 ordered the Parties to exchange proposed ESI Protocols by 8 January 2021, with any objection to be filed by 22 January 2021. (PO 5, ¶ 15.) On 15 January 2021, the Panel extended the deadline for objections to 29 January 2021. Namecheap submitted timely objections on 29 January to some aspects of ICANN's proposed ESI protocol, but did not object to ICANN's list of custodians.

52. Namecheap argues that it would have objected to ICANN's list of custodians had ICANN disclosed that the ICANN Board list serve includes persons who are not Board members. Namecheap fails to explain, however, why their inclusion would have been objectionable. The inclusion of certain non-Board members on the ICANN Board list serve *in addition to* Board members would not seem to alter the fact that the list serve would capture messages to and from Board members.

53. Nevertheless, Namecheap was entitled to expect that ICANN would perform searches in accordance with the agreed protocol, unless otherwise agreed by the Parties or ordered by the Panel. The record is not clear on this point, but ICANN's arguments suggest that after proposing the "ICANN Board list serve" as a custodian in January 2021, ICANN decided not to conduct a search for documents on the Board list serve because any such documents would also be in the custody of John Jeffrey and Amy Stathos and thus encompassed by a search for responsive documents of those two individual custodians.

54. ICANN's decision would seem to be reasonable, assuming that (a) Mr. Jeffrey and Ms. Stathos were members of the Board list serve during the entire relevant period (1 January 2018 to 18 November 2019); and (b) any email sent through the Board list serve would have been captured in the emails of Mr. Jeffrey and Ms. Stathos. ICANN has not stated that explicitly, however. To clarify the record, ICANN is directed to confirm whether it conducted a search for documents in the custody of the "ICANN Board list serve." If ICANN did not conduct such a search, ICANN shall provide a sworn declaration from a competent ICANN employee with sufficient detail to demonstrate that any responsive documents on the ICANN Board list serve are

necessarily encompassed by its search for responsive documents in the custody of John Jeffrey and Amy Stathos.

F. ICANN's Stipulation Regarding Board Meeting Minutes

55. Procedural Order No. 5 ordered ICANN to provide "a written stipulation that the complete agendas and minutes for all Board meetings addressing the modification and/or removal of the price control provisions in the 2019 .ORG, .INFO, and .BIZ Registry Agreements are posted on the ICANN website (www.icann.org)." (PO 5, Appendix B at 57, Panel Ruling on Namecheap Document Request No. 1.s.) It further stated that ICANN shall produce any missing agendas or minutes that are not posted on its website, and that Namecheap's request is otherwise denied "absent any particularized showing of need with respect to the deliberations at any particular Board meetings."

56. ICANN's counsel stated in its letter to Namecheap of 2 August 2021 (Annex 50): "In response to the Panel's Procedural Order No. 5 related to Request No. 1(s), ICANN can confirm that, to the best of its knowledge, all non-privileged agendas and minutes for all annual, regular, and special Board meetings (as those terms are defined in ICANN's Bylaws) are published on ICANN's website."

57. Namecheap contends that ICANN's statement does not comply with PO 5 because (a) it is qualified by "best of [ICANN's] knowledge"; (b) it does not refer to "complete" agendas and minutes and is instead limited to "non-privileged" agendas and minutes; (c) it does not refer to "all" Board meetings addressing modification and/or removal of the price control provisions in the 2019 .ORG, .INFO, and .BIZ Registry Agreements, and is instead limited to "annual, regular, and special" Board meetings, as defined in ICANN's Bylaws.

58. ICANN responds that the "best of knowledge" qualification is reasonable. The Panel agrees.

59. ICANN asserts that it is entitled to redact privileged material from its Board agenda and minutes, and that it did not refer to "complete" agenda and minutes because such material is redacted from the Board agenda and minutes on its publicly available website. The Panel agrees that ICANN is entitled to redact privileged material.

60. ICANN argues that its reference to "annual, regular, and special" Board meetings is not a significant limitation because those are the only types of "Board meetings" that ICANN conducts. ICANN further notes that informal Board workshops and calls are not "Board meetings" under its Bylaws, so agendas and minutes are not regularly created or posted on ICANN's website. ICANN adds that agendas and other documents related to Board workshops or calls that pertain to price controls would

likely have been encompassed by ICANN's ESI protocol and hence produced if responsive and non-privileged.

61. The Panel agrees with ICANN that the stipulation required by PO 5 was limited to official ICANN "Board meetings," whether annual, regular, or special. At the same time, while no stipulation was required as to informal Board workshops or calls, documents for such workshops or calls that relate to removal or modification of price controls in the .ORG, .BIZ, and .INFO Registry Agreement in the relevant time period are responsive and should be produced, if non-privileged. The Panel agrees that ICANN's ESI Protocol appears to be broad enough to encompass such documents and thus does not order ICANN to conduct further searches or to produce additional documents at this time.

G. Slack and Other Sources of ESI

62. Namecheap argues that ICANN "misrepresented" that emails and attachments are the only ESI to be searched, even though it was later revealed that some ESI is stored on an internal system called "WeCANN," as well as on Google Drive.

63. Namecheap seems to acknowledge that ICANN has now conducted searches on WeCANN and Google Drive and does not request additional searches of those sources. However, Namecheap complains that ICANN has refused to search for information on Slack, which it describes as a "a business communication platform, offering persistent chat rooms (channels) organized by topic, private groups, and direct messaging." Namecheap also complains that ICANN has declined to certify that "there are no other systems and/or custodians on which responsive ESI is stored."

64. ICANN responds that it "does not regularly maintain an archive of communications made via Slack in its ordinary course of business." ICANN also notes that the email cited by Namecheap that refers to Slack (Annex 78) does so in a context that suggests that the Slack message does not contain significant other information.⁶ ICANN maintains that it complied with its obligation to conduct a "reasonable" search and that it should not be required to certify that no other potentially responsive documents exist across the ICANN organization, which has almost 400 staff members across the world.

65. The limited information before the Panel at this time does not give a clear picture of how ICANN personnel used Slack messages during the relevant period or whether such messages are likely to contain meaningfully relevant ESI beyond what ICANN has already produced. The Panel also notes that ICANN's representation that it

⁶ Namecheap also argues that it is unclear why ICANN redacted portions of the Annex 78 email (including an attachment) as privileged. The Panel agrees that this is not clear and notes that ICANN has not directly responded to Namecheap's argument. Accordingly, ICANN is directed to explain why it contends that the redacted text and attachments are privileged.

“does not regularly maintain an archive of communications made via Slack in its ordinary course of business” leaves open a number of questions.

66. It is the Panel’s understanding that Slack is a cloud-based team collaboration and messaging platform allowing public channels for discussions among larger groups, private channels to communicate with smaller groups, and direct messaging for individual exchanges. The Panel also understands that Slack offers users the following account options:

- Free and Standard accounts
- Plus accounts
- Enterprise Grid accounts

Slack permits only certain individuals to export data from a Slack account, and the authorized individuals vary depending on the foregoing account types.

67. ICANN is directed to provide information that is sufficient for the Panel to determine whether searches of Slack data should be ordered, including (but not necessarily limited to) the following:

- a. The nature of the Slack accounts used by the custodians identified in ICANN’s ESI Protocol (i.e., Free, Standard, Plus or Enterprise Grid account) during the relevant time period (1 January 2018 to 19 November 2019).
- b. If feasible, a listing of any Slack “channels” that may have been used by such custodians in discussing the Renewal Negotiations or the removal or modification of price controls for the .ORG, .BIZ or .INFO domains.
- c. Whether these custodians utilized Slack for direct messaging in connection with the Renewal Negotiations or the decision to remove or modify price controls for the .ORG, .BIZ or .INFO domains?
- d. Any issues associated with exporting content from Slack for production.

The foregoing list is non-exhaustive. The Panel invites ICANN to provide any information that would assist in assessing the likelihood that Slack data would include non-duplicative responsive information that is likely to be material to the outcome of this IRP proceeding, relative to the cost and burden of production.

68. Following receipt of this information from ICANN and Namecheap’s response, if any, the Panel will consider whether any further searches of Slack data

would be appropriate. In deciding this issue, the Panel will be guided in part by the balancing factors set forth in paragraph 13 of PO 5.

H. Namecheap's Incorporation of Other Requests in Letters

69. Namecheap requests an order that "ICANN complete its production by filling the gaps identified by Namecheap *in its letters to ICANN* and in the present motion." (Further Motion to Compel, ¶ 122 (emphasis added).) Namecheap also generally requests that ICANN be ordered to produce redacted documents in unredacted form. (Further Motion to Compel, ¶ 122.) It is not entirely clear whether this request extends beyond specific documents that Namecheap has requested be unredacted to cover all redacted documents.⁷

70. To the extent Namecheap is asking the Panel to order relief that Namecheap included in its letters to ICANN only, and not in its motion, the requests are denied. Namecheap has provided no basis to provide such relief for documents that Namecheap has not identified or discussed.⁸

I. Updated ESI Protocol

71. Namecheap requests that ICANN be ordered to propose "an updated ESI search protocol that guarantees a reasonable search" and then produce additional documents identified through that search. Namecheap does not specify, however, the content of that updated protocol. Namecheap's only specific arguments related to the ESI protocol are (a) the time period should be extended; (b) custodians should be expanded to include the Board list serve and individual Board members; and (c) other ESI sources such as Slack should be included. Those specific arguments are addressed elsewhere in this Order.

72. To the extent that Namecheap is requesting that ICANN make other unidentified changes to the ESI protocol, that request is denied as both vague and

⁷ As discussed above and in PO 12, Namecheap has made arguments about specific redacted documents, and the Panel has ordered production of certain unredacted documents for in camera review. Namecheap's general request, however, suggests that it may be seeking an order that ICANN produce all redacted documents in unredacted form.

⁸ Namecheap maintained that it could not identify all of the documents from which ICANN redacted non-responsive confidential information. ICANN replied that the redactions are clear from the metadata and the face of the documents and from the metadata. Namecheap did not dispute that point at the 19 October hearing or request that ICANN be ordered to identify all redacted documents. Thus, Namecheap has not shown that its alleged inability to identify redacted documents provides a basis for further relief.

untimely. The Panel cannot evaluate whether unidentified changes to the protocol are warranted. Further, the time for Namecheap to object to ESI's protocol has passed.

73. In addition, with the exception of the specific relief that the Panel has granted, Namecheap has not provided persuasive support for its allegation that other responsive, non-privileged documents "must exist."

J. Sanctions

74. Namecheap has requested that the Panel impose prospective sanctions against ICANN in the form of a penalty of USD 10,000 for each day of delay in meeting the 6 and 30 October 2021 deadlines requested by Namecheap. Namecheap further requests that the Panel apply "adverse inferences" in the event of a "persistent failure" by ICANN to produce documents. The Panel finds that such prospective sanctions are not warranted, and also that the proposed deadlines have been superseded by the passage of time and the Parties' revised schedule.

K. Legal Costs

75. Namecheap requests that the Panel order ICANN to bear all legal costs incurred by Namecheap in these proceedings.

76. Rule 15 of the IRP Procedures provides that:

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts. Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

77. Applying the foregoing Rule, Namecheap's request for costs is premature, as costs are fixed in the final IRP decision. In addition, the Panel does not find ICANN's positions to be frivolous or abusive.

L. The Procedural Schedule

78. Namecheap's 29 September request to revisit the schedule has been overtaken by subsequent events. On 18 October 2021, Namecheap notified the Panel that the Parties had agreed to a revised schedule that postponed all pending dates by about 6 to 8 weeks. For example, the 20 October 2021 deadline for Namecheap's Pre-Hearing Brief was extended to 30 November 2021.

79. Namecheap stated that it agreed to the revised schedule on the premise that the pending issues with ICANN's production would be "resolved" by 30 October 2021. It is not clear whether "resolved" meant the Panel would decide all pending issues by 30 October or that ICANN would produce all further documents by that date. However, even if Namecheap was proceeding on the latter assumption, the Panel finds that Namecheap has not demonstrated good cause for a further extension. The Panel has ordered ICANN to produce a limited number of documents and information before the 30 November 2021 deadline for Namecheap's Pre-Hearing Brief. Even if it were assumed that some documents may be produced after that date, those documents are not likely to be so significant as to warrant another extension, especially since Namecheap may seek leave to address any such documents in the rebuttal submission due on 8 February 2022.

Decision

80. For the reasons set forth above, ICANN is hereby ordered to take the following actions on or before 9 November 2021:

- A. ICANN shall either certify that no responsive documents for the call referred to in Annex 62 exist (specifically including handwritten notes) or produce all responsive non-privileged documents and identify any privileged documents on its privilege log.
- B. ICANN shall produce unredacted versions of Annexes 64, 66, and 67 to the Panel for *in camera* review;
- C. ICANN shall provide Namecheap with a new version of the Annex 66 email chain that removes the "Highly Confidential" designation;
- D. ICANN shall provide Namecheap with a new version of the Annex 67 email chain that removes the "Highly Confidential" designation from all portions other than the paragraphs that refer to the "Asia" and "Aero" domain names;
- E. ICANN shall clarify whether it conducted a search for documents in the custody of "ICANN Board list serve." If ICANN did not conduct such a search, ICANN shall provide an affidavit from a competent ICANN employee that contains sufficient detail to demonstrate that any responsive documents on the ICANN Board list serve are necessarily encompassed by its search for responsive documents in the custody of John Jeffrey and Amy Stathos.
- F. ICANN shall explain why it contends that the text and attachments redacted from the Annex 78 emails are privileged.

81. For the reasons set forth above, ICANN is hereby directed to provide information on or before 12 November 2021 that is sufficient for the Panel to determine whether searches of Slack data should be ordered. Such information shall include (but is not necessarily limited to) the following:

1. The nature of the Slack accounts used by the custodians identified in ICANN's ESI Protocol (i.e., Free, Standard, Plus or Enterprise Grid account) during the relevant time period (1 January 2018 to 19 November 2019).
2. If feasible, a listing of any Slack "channels" that may have been used by such custodians in discussing the Renewal Negotiations or the removal or modification of price controls for the .ORG, .BIZ or .INFO domains.
3. Whether these custodians utilized Slack for direct messaging in connection with the Renewal Negotiations or the decision to remove or modify price controls for the .ORG, .BIZ or .INFO domains?
4. Any issues associated with exporting content from Slack for production.

The foregoing list is non-exhaustive. The Panel invites ICANN to provide any information that would assist in assessing the likelihood that Slack data would include non-duplicative responsive information that is likely to be material to the outcome of this IRP proceeding, relative to the cost and burden of production.

Namecheap is invited to respond to ICANN's submission on or before 22 November 2021.

82. The Panel declines to draw any adverse inferences at this stage of the proceedings and also declines to impose sanctions against ICANN.

83. Namecheap's request for an award of legal fees and costs is denied (without prejudice to either or both Parties seeking an award of legal fees and costs at the end of this case).

84. Namecheap's request to revisit the schedule is denied. Both Parties shall make submissions in accordance with the revised schedule that the Parties jointly submitted on 18 October 2021, which was previously approved by the Panel and is memorialized in Procedural Order No. 14.

85. The Panel will issue a further order after reviewing the additional documents and information that ICANN has been ordered to provide. The Panel retains the discretion to order further discovery as the case develops.

86. All other relief in Namecheap's Further Motion to Compel that is not expressly granted herein is denied.

**As at Los Angeles, California, USA
November 2, 2021**

FOR THE PANEL:

A handwritten signature in black ink, appearing to read "Glenn P. Hendrix". The signature is written in a cursive, flowing style.

**Glenn P. Hendrix
Chair**