

**COMPLAINANT OPENTLD B.V.'S OPENING BRIEF REQUESTING STAY OF
SUSPENSION OF REGISTRAR ACCREDITATION**

I. INTRODUCTION

Complainant OpenTLD B.V. (“Complainant” or “OpenTLD”), by and through its undersigned counsel, hereby requests an order from the emergency Arbitrator staying Internet Corporation for Assigned Names and Numbers (“Respondent” or “ICANN”) from implementing its suspension of Complainant’s registrar abilities pending a final determination in the arbitration. Because Complainant’s continued operations as a registrar pose no risk of harm to consumers or the public, issuance of stay is mandatory pursuant to §5.8 of the 2013 edition of the Registrar Accreditation Agreement (“RAA”) in effect between the parties. Further, consideration of the significant public interest in ensuring that ICANN administer its own standards in a fair, transparent and consistent manner, and the unwarranted harm that will necessarily befall members of the general public seeking to register domain names in country code registries for West Africa and the South Pacific should the suspension be allowed to take effect, further compels the conclusion that the Arbitrator should exercise its discretion to stay the suspension in any event. Should ICANN ultimately prevail in these proceedings, ICANN will have suffered nothing more than a brief delay in implementing the suspension, with no harm to the public and no prejudice to its rights. Yet absent such a stay, OpenTLD will suffer significant financial and reputational harm without the benefit of fair process, and the public will suffer what may prove to be an entirely unnecessary harm. Wherefore, Complainant respectfully requests that the Arbitrator enter an order staying the suspension pending a final determination in the arbitration.

II. STATEMENT OF FACTS

A. The Parties

1. *Complainant OpenTLD*

OpenTLD is a Netherlands company with its headquarters in Amsterdam, Netherlands. OpenTLD is, among other things, an ICANN accredited Internet domain name registrar. Zuurbier Dec., ¶¶ 1, 3. As an accredited registrar, OpenTLD offers Internet domain name registrations to consumers. *Id.* Joost Zuurbier is the CEO of OpenTLD, and, in the past, has acted as OpenTLD’s contact point with ICANN. *Id.* at ¶¶ 1, 3, 6-11, 14, 18. OpenTLD maintains its status as an ICANN accredited domain name registrar by way of its Registrar Accreditation Agreement (“RAA”) signed and dated 1 June 2014. *Id.* at 4, Exh. A.

OpenTLD also oversees separate *registry* services for five top-level country-code domain names for developing countries in West Africa and the South Pacific, namely Equatorial Guinea (.gq), Tokelau (.tk), Mali (.ml), Gabon (.ga), and the Central African Republic (.cf). Zuurbier Dec., ¶¶ 4, 5. In connection with offering the aforementioned country-code domains, OpenTLD offers the unique economic opportunity for registrants to obtain low cost and free domain registration services through its affiliated <Freenom.com> registration portal to facilitate access to the web in developing countries. *Id.*

2. *Respondent ICANN And Its Publicly Acknowledged Obligation To Administer Its Policies In A Fair, Transparent And Consistent Manner*

Respondent ICANN is a public, non-profit corporation established under the laws of the State of California. Declaration of Jerl B. Leutz (“Leutz Dec.”), ¶ 4, Exh. A. ICANN was

established “for the benefit of the Internet as a whole.” *Id.* at § 4. Under its Articles of Incorporation, ICANN must “carry[] out its activities in conformity with relevant principles of international law and applicable international conventions and local law.” *Id.*

As set forth in its Bylaws, ICANN has a limited, technical mission, “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” Leutz Dec., ¶ 5, Exh. B. ICANN’s “Core Values” also include respect for “creativity, innovation, and the flow of information” as well as “[m]aking decisions by applying documented policies *neutrally and objectively, with integrity and fairness.*” *Id.* at § 2 (emphasis added).

ICANN must govern in a fair, reliable, and consistent manner that includes attempts at informal resolution of compliance issues with registrars like OpenTLD that escalate along a predictable course as set forth in ICANN’s published compliance approaches. Leutz Dec. ¶¶ 6, 7, and 8, Exhs. C, D, and E. Published ICANN policy indicates that ICANN will first attempt “informal resolution” by sending (3) three inquiry notices before escalating to suspension, termination or non-renewal of a registrar. *Id.* at ¶ 6, Exh. C. ICANN represents that it will escalate only when there is “no response” or an “insufficient response” from the registrar. *Id.* at p. 2, § 1; also see *Id.* at ¶¶ 7, 9, Exhs. D, and E.

ICANN also represents that its “processes ensure consistency for all parties involved.” Leutz Dec., ¶ 9, Exh. F, § 31. “ICANN attempts to resolve contractual compliance matters informally before pursuing formal remedies available under the agreements.” *Id.* at § 32. If a registrar “must resolve a critical issue immediately, an escalated notice is sent. Failure to adequately respond to an escalated notice may result in a breach notice.” *Id.* ICANN only resorts to the “Formal Resolution” or “Enforcement” processes when the offending registrar fails

to “sufficiently collaborate during the Informal Resolution process” or where it “otherwise continue[s] to be non-compliant after attempts at informal resolution have been unsuccessful.”

Id.

B. OpenTLD Timely Cured Each Of The Unrelated Breach Items Previously Identified By ICANN, And Has Demonstrated A Consistent Willingness To Work With ICANN To Ensure Its Ongoing Compliance

Since becoming an ICANN accredited registrar in June 2014, and prior to its receipt of the Suspension Notice, OpenTLD received a single, unrelated Notice of Breach from ICANN on March 17, 2015 (the “March 17 Notice”). Zuurbier Dec., ¶ 7, Exh. A. The March 17 Notice identified a total of four breach items, which OpenTLD cured to ICANN’s express satisfaction by (1) providing ICANN with a “certificate of compliance,” (2) correcting the display of ICANN’s logo on OpenTLD’s website, (3) depositing gTLD registration data in escrow, and (4) paying past due registrar accreditation fees of \$494.67. *Id.* OpenTLD demonstrated its willingness to cooperate with ICANN by responding to ICANN’s related compliance inquiries and implementing appropriate remedial measures in a mutually agreed upon timeframe. *Id.* at ¶¶ 7-12, Exhs. A-C.

C. ICANN May Have Based Its Findings That OpenTLD Has Engaged In A Pattern And Practice Of Trafficking In Domain Names Based On A Total Of Two Unrelated WIPO Domain Name Disputes

On February 27, 2015, Key-Systems GmbH initiated a domain name dispute against Joost Zuurbier (CEO of OpenTLD) and OpenTLD concerning the domain name registrations <key-systems.cc> and <rrproxy.me>. Zuurbier Dec., ¶ 13. On March 11, 2015 NetEarth

Group, Inc. commenced a second, unrelated domain name dispute against Stichting OpenTLD WHOIS Proxy (an entity affiliated with the WHOIS privacy or “proxy” service offered by complainant) concerning the domain name registration <netearthone.biz>. *Id.*, ¶ 17, Exh. F. WIPO decided both disputes in favor of the respective complainants, and ordered that the subject domain names be transferred to complainants. OpenTLD did not file a response in either dispute. *Id.*, ¶¶ 13-20.

During the course of the domain disputes and thereafter, OpenTLD, the respective complainants, and WIPO exchanged numerous communications. Zuurbier Dec., ¶¶ 14-20, Exhs. D-G. For its own part, ICANN did not communicate with OpenTLD concerning the WIPO disputes during their pendency. *Id.* Indeed, prior to its issuance of the June 23 Suspension Notice, ICANN did not undertake to communicate with OpenTLD in regard to the WIPO disputes, much less issue a Notice of Breach or otherwise indicate any concern that OpenTLD might be engaged in a “pattern and practice” of trafficking domain names, even though ICANN repeatedly communicated with OpenTLD throughout this same period of time concerning its actions to cure the unrelated breaches identified in the March 17 Notice. *Id.*, ¶¶ 7-12, 14, 18, Exhs. A-C.

The June 23 Suspension Notice constituted the first and only indication of ICANN’s concern in regard to the WIPO disputes. Zuurbier Dec., ¶¶ 7-12, 14, 18, Exhs. A-C. The Suspension Notice states that: “[p]ursuant to Section 5.5.2.4 of the RAA, ICANN has found that OpenTLD has engaged in a pattern and practice of trafficking in or use of domain names identical or confusingly similar to a trademark or service mark of a third party in which the Registered Name Holder has no rights or legitimate interest.” *Id.* at Exh. C, p. 1. The Suspension Notice fails to articulate any factual basis for those findings. Again, ICANN

provided no notice of breach or other warning prior to announcing the suspension of OpenTLD's registrar abilities. *Id.*, ¶¶ 12-20, Exh. C. In an addendum to the June 23 Notice, ICANN claims to have sent a single email inquiry to OpenTLD on June 2, 2015. *Id.*, Exh. C, p. 5. Unfortunately, OpenTLD never received this notice, and ICANN apparently made no effort to follow up on its single, earlier email. *Id.*

D. ICANN's Documented Enforcement History Demonstrates That Its Suspension Of OpenTLD's Registrar Abilities Without Prior Notice Of Breach Is Both Unprecedented And Disproportionate To The Severity Of The Alleged Breaches

ICANN maintains a publically accessible archive of the universe of ICANN's past Notices of Breach, Suspension, Termination and Non-Renewal to Registrars dating back to 2008 (the "Enforcement History"). Leutz Dec., ¶ 10, Exh. G. The Enforcement History demonstrates that ICANN has issued a total of just twelve suspension notices since 2008. Consistent with its posted "Overall Compliance Approach," "Informal" and "Formal Resolution Processes, and with its answers to "General Questions," five of those suspensions were implemented only after three noticed breaches by the registrar in a single twelve-month period. *Id.* at Exh. G, *see, e.g., inter alia*, "Pacnames Ltd."; "Cheapies.com"; "Black Ice Domains, Inc.", "BRANDON GRAY INTERNET SERVICES INC. (dba 'NameJuice.com')"; "Visesh Infotecnics Ltd. d/b/a Signdomains.com"; "Homestead Limited dba Namevault.com."

Five of the remaining cases were escalated to suspension only after the registrar's failure to cure in response to at least one prior notice of breach. Leutz Dec., Exh. G., *see, e.g., inter alia*, "Lead Networks Domain Pvt. Ltd.," June 10, 2009; "Alantron Bilisim Ltd. Sti.," February

16, 2012; “Cheapias.com Inc.,” September 13, 2013; “Pacnames Ltd.,” October 8, 2013; “Registration Technologies, Inc.,” September 17, 2014.

Thus, ICANN’s decision to suspend OpenTLD’s registrar activities without granting any prior opportunity to cure the subject breaches represents a dramatic departure from ICANN’s normal practices and, in fact, represents the only case in ICANN’s entire Enforcement History where ICANN has elected to take such action, and is therefore unprecedented.

III. ARGUMENT

OpenTLD is entitled to a mandatory stay of suspension pursuant to Section 5.8 of the RAA because its continued operations as a registrar pose no risk of harm to the public or consumers. Consideration of the significant public interest in ensuring that ICANN administer its own standards in a fair, transparent and consistent manner, and the unwarranted harm that will necessarily befall members of the general public seeking to register domain names in country code registries for West Africa and the South Pacific should the suspension be allowed to take effect, further compels the conclusion that the Arbitrator should exercise its discretion to stay the suspension in any event

A. OpenTLD’s Continued Operations Will Not Harm The Public, And A Mandatory Stay Should Issue Pursuant To Section 5.8

Section 5.8 of the RAA provides for a **mandatory** issuance of stay upon a showing by the registrar that “continued operations would not be harmful to consumers or the public interest.”

Here, the June 23 Suspension Notice states that ICANN has made its findings that OpenTLD has engaged in a “pattern and practice” of trafficking in domain names pursuant to Section 5.5.2.4 of the RAA, which suggests that ICANN based its review “on the findings of

arbitral tribunals.” Yet apart from the two unrelated WIPO cases discussed above (one of which did not even directly involve OpenTLD, but merely an affiliated privacy service provider), OpenTLD is unaware of any other WIPO cases that ICANN may have reviewed to make its determination.

Given that OpenTLD manages more than twenty-five million domains worldwide, the fact that OpenTLD happened to have acted as the registrar for a total of three domain names implicated in two unrelated WIPO cases does not fairly evidence a pattern and practice of domain name trafficking, and does not in any way suggest that OpenTLD’s continued operations pose any risk of harm to the public or consumers. This is especially true in light of (i) OpenTLD’s past success in curing the unrelated breach items identified in ICANN’s March 17 Notice of Breach to ICANN’s express satisfaction, (ii) the fact that OpenTLD has already undertaken to cure each of the breach items identified in the June 23 Suspension Notice, and (iii) OpenTLD’s consistent willingness to cooperate with ICANN to fully satisfy its compliance obligations under the RAA. Zuurbier Dec., ¶¶ 7-12, 15, 19, 25-27. Based upon these facts, the Arbitrator should reasonably conclude that OpenTLD has satisfied its burden for a mandatory stay pursuant to Section 5.8 of the RAA, and stay the suspension.

**B. Considerations Of Fundamental Fairness And The Public Interest
Compel The Conclusion That The Arbitrator Should Exercise Its
Discretion To Order A Stay Of Suspension In Any Event**

First, the public has a significant interest in ensuring that ICANN administer and enforce its own standards in a fair, transparent and consistent manner, and adhere to the principles espoused in its Bylaws and Articles of Incorporation, including objectivity, transparency, and accountability. For example, ICANN’s bylaws specifically state that it “shall not apply its

standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment.” Leutz Dec., ¶ 5, Exh. B. ICANN is also obligated to operate “in an open and transparent matter and consistent with procedures designated to ensure fairness.” *Id.* These obligations have been incorporated into many of ICANN’s contracts, including its RAA with OpenTLD. Zuurbier Dec., ¶ 6. Yet ICANN has failed to discharge these obligations in regard to its suspension of OpenTLD’s registrar abilities pursuant to the June 23 Suspension Notice.

Specifically, ICANN failed to provide OpenTLD with any prior notice of breach, or compliance inquiry, concerning the breaches identified in the June 23 Suspension Notice. By proceeding straight to suspension, without any prior notice of breach or opportunity to cure, ICANN failed to comport with its own enforcement guidelines concerning escalation procedures. In fact, ICANN’s decision to suspend Complainant’s registrar abilities by the Suspension Notice, without any prior notice of breach or opportunity to cure, is **unprecedented** in the history of ICANN’s published Enforcement History.

The June 23 Suspension Notice provides no indication that it is an “escalated” or “emergency” notice, fails to identify any particularized basis for ICANN’s findings that OpenTLD engaged in an alleged “pattern and practice,” and otherwise fails to explain why the identified breaches are so egregious that they warrant exemption from the standard enforcement processes as per ICANN’s published guidelines. As a result, the June 23 Suspension Notice fails to comply with ICANN’s own stated processes, and lies beyond the pale of ICANN’s entire Enforcement History.

Moreover, if the suspension is not stayed, ICANN will have effectively suspended the operations of an accredited registrar arbitrarily and without any means of predictability. The June 23 Suspension Notice provides no explanation as to which RAA provision or other governance

principle led ICANN to depart from its well-documented enforcement processes, both formal and informal, when suspending OpenTLD without notice. Failure to stay the suspension will further destabilize the consistency of ICANN's enforcement procedures, and subject accredited domain registrars to an unpredictable regulatory structure where their operations can be suspended on little to no notice. Effectively, ICANN's singular treatment of OpenTLD tends to show that it has singled out OpenTLD among all other registrars for disparate treatment and is applying its enforcement scheme subjectively in violation of its own bylaws and standards.

Accordingly, interests of fundamental fairness, along with the public's significant interest in ensuring that ICANN discharges its promise to the public and contractual obligations to registrars to administer its own standards in a fair, transparent, and consistent manner, all militate in favor of the Arbitrator exercising his discretion in favor of staying the suspension of OpenTLD's registrar abilities pending a final determination on the merits herein.

C. **The Arbitrator Should Also Exercise His Discretion To Stay The Suspension To Prevent Unwarranted Harm To Users Of The Country Code Registries For West Africa And The South Pacific Managed By OpenTLD**

As stated, in addition to its registrar functions, OpenTLD also oversees separate *registry* services for five top-level country-code domain names for developing countries in West Africa and the South Pacific, namely Equatorial Guinea (.gq), Tokelau (.tk), Mali (.ml), Gabon (.ga), and the Central African Republic (.cf). Zuurbier Dec., ¶¶ 3-5, 28. OpenTLD also offers the unique economic opportunity for registrants to obtain low cost and free domain registration services for domains within those latter registries through its affiliated "Freenom" registration portal at <Freenom.com> to facilitate access to the web in developing countries. *Id.* Should the

arbitrator fail to exercise his discretion in favor of stay and allow the suspension of OpenTLD's registrar abilities to take effect, the Internet community will be deprived and directly harmed by the loss of the low-cost and free domain name registrations offered by OpenTLD. Users from emerging economies where the cost of domain name registrations can be beyond the reach of many individuals will be particularly hard hit by the loss of the opportunity to obtain domain registrations for low or no cost. *Id.*

D. Staying The Suspension Will Not Prejudice ICANN's Ability To Implement The Suspension In The Event It Prevails

Significantly, granting the stay poses no risk of prejudice to ICANN. Should ICANN ultimately prevail in these proceedings, ICANN will have suffered nothing more than a brief delay in implementing the suspension, with no harm to the public and no prejudice to its rights. Should the Arbitrator fail to order such a stay, however, the immediate implementation of ICANN's unprecedented and disproportionately punitive suspension of OpenTLD's registrar abilities without a prior opportunity to cure will cause tangible and unwarranted harm to members of the public seeking to register domain names in registries managed by OpenTLD for country codes in West Africa and the South Pacific, and will also harm the public interests for all the other reasons previously discussed.

As mentioned before, OpenTLD has already undertaken steps to comply with the nine (9) compliance demonstrations demanded by ICANN in the June 23 Suspension Notice. Zuurbier Dec., ¶¶ 25-28. The domains subject to the domain disputes identified in the June 23 Suspension Notice have already been taken over by the complaining rights-holders, and OpenTLD has already prepared its lists of domain registrations and network of resellers. *Id.* at ¶¶ 15, 19, 25-28. The deficiencies identified by ICANN in its June 23 Suspension Notice have already been cured

and its requested demonstrations of compliance are already underway at OpenTLD. By these circumstances, the lack of potential harm weighs in favor of the issuance of a stay on the suspension.

IV. CONCLUSION

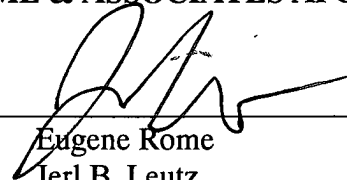
For all the foregoing reasons, OpenTLD requests an order staying the suspension of OpenTLD's registrar abilities pending a final determination on the merits herein.

Dated: July 23, 2015

Respectfully submitted,

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