

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

Namecheap, Inc. (Namecheap))
)
4600 East Washington Street, Suite 305)
Phoenix, AZ 85034)
)
Claimant)
)
v.)
)
Internet Corporation For)
Assigned Names and Numbers)
(ICANN))
)
12025 Waterfront Drive, Suite 300)
Los Angeles, CA 90094-2536)
)
Respondent)
_____)

ICDR Case No. 01-20-0000-6787

CLAIMANT'S *PRIMA FACIE* SHOWING OF STANDING

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I. INTRODUCTION

1. Pursuant to the IRP Panel’s request, Claimant Namecheap, Inc. (‘Namecheap’ or ‘Claimant’) makes this submission demonstrating that it has standing to bring its claims.

2. Under ICANN’s Bylaws, a ‘Claimant’ includes a legal entity that ‘has been materially affected by a Dispute.’¹ ‘To be materially affected, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.’²

3. As the Emergency Panelist correctly concluded, Namecheap has been ‘materially affected’ because it faces harms that are directly and causally related to the alleged violations.³

As a Registrar of the .org, .biz, and .info gTLDs (‘the Registries’), Namecheap is exposed to the risk of increased pricing for registry services. As the Emergency Panelist correctly observed with respect to.org:

‘This is a harm that is directly and causally related to the alleged violation that ICANN has not followed proper procedures and has improperly consent to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap’s status as a Registrar for the .ORG gTLD . . . Namecheap faces a harm that it was not exposed to with the price controls in place.’ (emphasis added)⁴

4. Similarly, the Emergency Panelist correctly concluded that as a direct and causally related result of ICANN’s alleged violations regarding the change of control process, Namecheap faced potential harm to its financial and other business interests.⁵

5. While the Emergency Relief Decision is not binding on the Panel, its reasoning on Namecheap’s standing is persuasive. Namecheap thus respectfully submits that because, as a

¹ Bylaws, Section 4.3(b)(i).

² *Id.*

³ Decision on Request for Emergency Relief issued 20 March 2020, §§ 90-95.

⁴ *Id.* at § 92 (emphasis added).

⁵ *Id.* at § 93.

Registrar, it faces clear potential harm that is directly and causally related to ICANN's alleged violations, it has been 'materially affected' within the meaning of the Bylaws and has standing to bring its claims.

6. In the alternative, however, if the Panel disagrees with the Emergency Relief Decision and believes that Namecheap must demonstrate evidence of actual harm that has occurred to date (rather than merely potential harm), Namecheap has submitted herewith evidence that is sufficient to meet that higher standard.

7. As demonstrated below, as well as in the expert report of Professor Dr. Frank Verboven and Dr. Gregor Langus and the Affidavits of Namecheap representatives Hillan Klein and Maryna Zhuravlova submitted herewith, Namecheap is presently suffering harm due to the changes to its market environment and uncertainty created by ICANN's violations. Moreover, the future harm that Namecheap faces is not merely theoretical, but inevitable. Thus, Namecheap is a proper 'Claimant' with standing under ICANN's Bylaws.

8. Accordingly, Namecheap respectfully requests that ICANN's challenges to its standing be rejected.

II. BUSINESS CONTEXT

9. Markets change. Change is inherent to all markets. They tend to evolve over time. Businesses adapt to changes in the markets in which they operate. However, the need for adaptation must be considered in the market environment in which a business is run.

10. In the case of .org, .biz, and .info, their respective market environment and their position in the DNS as a whole are very specific: the introduction and renewals of price caps spread over almost twenty years were decided for well-determined reasons. The way the Registry market was established and maintained for nearly twenty years, allowed businesses in the market to organize themselves and operate their activities in an environment that was consistently transparent and predictable.

11. Namecheap has been running its business taking into consideration the transparent and predictable market environment and particularly the price cap framework. Namecheap has become one of the largest ICANN accredited Registrars. It developed a profitable business while serving clients in an ethical way and contributing to the growth of the Registries and their owners.

III. HARM FROM THE REMOVAL OF PRICE CAPS

12. A change of the price control policy in the Registry Agreements creates an opportunity for the Registries, which possess significant market power, to change their wholesale pricing policy and charge higher prices to Registrars for the registration of domain names. The mere possibility that the Registries may increase prices is sufficient to have an impact on Registrars who now have lower expected future profits and fewer or less attractive investment opportunities. Given Namecheap's position as one of the largest Registrars in the world, Namecheap is directly harmed, while Registries benefit, by ICANN's removal of the price control policy.

IV. HARM TO NAMECHEAP'S POSITION ON THE MARKET

13. The fact that, to date, the Registries have not, or may not have, taken any apparent preparatory action to increase the wholesale prices, is irrelevant.

14. The change of the price control policy of the Registries – as permitted by ICANN since it violated its Articles and Bylaws – has increased the scope for the Registries to exercise market power. At the same time, other players in the Internet domain name markets, including Namecheap who has become a leading player, are weakened.

15. The impact on Namecheap's position in the respective markets dominated by the Registries is a direct harm to Namecheap.

V. HARM FROM THE UNCERTAINTY CREATED BY ICANN'S NON-TRANSPARENT DECISION-MAKING

16. The sudden, unprecedented, unexpected, non-transparent and unannounced⁶ removal of the price caps in the Registry Agreements, disturbs the specific market environment that was consistently transparent and predictable for nearly twenty years.

17. The business environment, and the regulatory framework created by ICANN, have determined how Namecheap had set up and run its domain business and offered value-added services. The registrar activities are run by Namecheap as a commercial entity; it sells these services for profit. This required Namecheap to invest time and money in understanding its business environment and, on the basis of that understanding, setting up strategic management, locating and hiring people, acquiring, hardware and software and other equipment.

18. Namecheap has had to finance the whole enterprise (with equity or loans). In that, Namecheap has had to make expectations about registry prices (a key factor in Namecheap's costs), sales volumes, how to promote the sales, and how to market such promotion to the customers, etc.

19. The removal of the price caps has shocked this business model, of which the fundamentals had been in place for nearly twenty years. This shock requires unexpected and unplanned investments in the preparation for the drastic changes to a previously stable market that the removal of the price caps may, has, and will continue to generate. This generates new costs. That is a harm to Namecheap. It is a harm that would not exist if ICANN had not taken sudden, unprecedented, unexpected, non-transparent and unannounced⁷ decisions. It is a harm

⁶ On 18 March 2019, ICANN invited the public to comment on its plans to renew the .org and .info Registry Agreements without the price control provisions. For .biz, the request for public comments was announced on 3 April 2019. On 30 June 2019, ICANN renewed the .org, .biz and .info Registry Agreements without maintaining the price control provisions, despite universal widespread public comment supporting that price caps be maintained. The fact that ICANN completely ignored the widespread opposition against its plans indicates that ICANN had already decided to remove the price control provisions before it invited the public to comment. The opening of a public comment phase shortly before executing the renewed Registry Agreements for .org, .biz and .info does not qualify as a timely announcement of the removal of the price caps.

⁷ *Supra*.

that could have been mitigated (albeit only in part) if Namecheap had been able to foresee such dramatic change and prepare for it progressively. In forecasting changes, Namecheap cannot be blamed for reasonably assuming that ICANN shall comply with its Articles and Bylaws, which is however sadly not the current state of affairs. As recognized by the Office of the California Attorney General, there is mounting concern that ICANN is no longer responsive to the needs of its stakeholders. If Namecheap can no longer rely on the assumption that ICANN shall comply with its mission and operate transparently and in a manner consistent with its Articles and Bylaws for the benefit of the Internet community as a whole, the environment in which Namecheap operates becomes wholly unpredictable. Namecheap would be subject to the whims of ICANN and would need to factor in ICANN's arbitrariness when making its business projections and investments.

VI. HARM RESULTING FROM PRICE INCREASES IS INEVITABLE

20. The Registries may decide to increase the wholesale prices in the immediate future or at a later date and even at different moments in time. That mere possibility creates uncertainty for Registrars and Namecheap. Namecheap must take measures to anticipate the impact of a change of the wholesale pricing policy on its costs and its own retail pricing policy. Namecheap must decide to either absorb the increase as a cost, absorb part and pass on the balance to its customers via an increase of the retail price, or absorb none and pass through the entire increase to its customers. Needless to add that the latter is pure theory and unthinkable; it would not be consistent with the economic theory and the reality of Namecheap's business environment, as well as the ethical standards that Namecheap stands for.

21. Moreover, even if Namecheap was able to pass through the increase entirely to its customers, Namecheap's profits would still decrease because many customers would not renew or purchase new domains at higher retail prices, facing Namecheap with a loss of customers. Also, Namecheap would fail to attract new customers because of the higher retail prices, even

if all other factors would remain unchanged.

22. In addition, Namecheap will lose some customers and fail to attract new ones whatever happens further, as in the current situation the pricing for domain names in the Registries has also become more uncertain for the customers.

VII. HARM RESULTING FROM SPILLOVER EFFECTS

23. We remind the Panel that price caps are still in place for the .com TLD (with oversight by the U.S. Department of Commerce ('DoC')) and the .net TLD (without DoC oversight). The .net Registry Agreement was renewed on 1 July 2017 and has been amended as recently as 27 April 2020. ICANN has maintained price caps for .com and .net.

24. With regard to the .org, .biz and .info Registries, ICANN pretends that it has put these Registries in line with the new gTLDs delegated since 2012, which are all managed under the Base Registry Agreement. However, ICANN remains silent as to the question, clearly put to it in our submissions and brought up again at our hearings, why the community should not fear that ICANN will introduce the same change for the .com and .net Registries, and why the removal of price caps on .org, .biz and .info would not create a precedent making such change more likely for .com and .net. When new gTLDs were introduced without price caps, Carlton saw no basis for the concern that this would lead to the repeal of existing price caps in .com, .net, .org, .info or .biz ((**RM 24**), para. 22). The challenged decisions show that this reasonable assumption proved to be incorrect, at least with respect to .org, .biz and .info. So far, ICANN has not given any assurance about maintaining the price caps for .com and .net.

25. Allowing the change of the price control policy for the .org, .biz and .info Registry Agreements to proceed creates unsanctioned risks and may establish precedent for price increases in the .com and .net registries. The .com and .net registries, both operated by Verisign, would indeed be the only registries that operate with price caps. As ICANN's reasons for removing the price caps in .org, .biz and .info are unclear, it is equally unclear how ICANN

would continue to justify that .com and .net are treated differently. For .com and .net, the DoC maintains some regulatory control over Verisign via the Cooperative Agreement that is currently in place until 30 November 2024 and which requires the DoC's approval for a removal of the price caps with respect to .com.⁸ However, no such approval is required for .net. If not for a strong precedent set by this Panel, it is unclear what would prevent ICANN from advocating for a removal of price caps in .com and allowing Verisign to operate .net without price caps.

VIII. HARM RESULTING FROM ICANN'S NON-TRANSPARENT HANDLING OF (PROPOSED) CHANGES OF CONTROL

26. After ICANN had removed the price caps, ICANN was asked to rule on a proposed change of control of Public Interest Registry (PIR), the registry operator of .org. ICANN ultimately rejected this change of control, as a result of pressure from a group of U.S. Senators and a firm letter from the California Attorney General demanding that ICANN take steps to prevent the change of control.

27. Pending the IRP, GoDaddy Inc. announced its acquisition of the registry business of Neustar, the registry operator of .biz⁹ and several other TLDs.¹⁰ ICANN accepted a change of control of the registry operator of .biz (the 8th largest gTLD).

28. On 19 November 2020, Donuts Inc., a registry operator holding company managing the largest portfolio of new gTLDs, announced its acquisition of Afilias Inc., the registry of .INFO, who also acts as the back-end registry operator of .org.¹¹ With this acquisition, Donuts Inc.

⁸ Verisign Cooperative Agreement, Amendment 35, 26 October 2018, https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf.

⁹ Neustar is the parent company of Registry Services, LLC. Since 2017, Neustar assigned the .BIZ registry agreement to its wholly owned subsidiary Registry Services, LLC (See Assignment and Assumption Agreement of 8 August 2017, <https://www.icann.org/sites/default/files/tlds/biz/biz-assign-pdf-08aug17-en.pdf>). For ease of reference, we refer to Neustar as the registry operator of .biz.

¹⁰ PR Newswire. (6 April 2020). *GoDaddy Acquires Neustar's Registry Business*. Retrieved from <https://www.prnewswire.com/news-releases/godaddy-acquires-neustars-registry-business-301036134.html>.

¹¹ Donuts Inc. (19 November 2020). *Donuts Inc. to Acquire Afilias Inc.* Retrieved from <https://donuts.news/donuts-inc-to-acquire-afilias-inc>.

would become a registry with approximately 450 gTLDs under management. Donuts Inc.'s current CEO is ICANN's former President of the Global Domains Division (ICANN's division responsible for negotiating and overseeing the registry agreements) and ICANN's former interim CEO, Mr. Akram Atallah. In his former role, Mr. Akram Atallah negotiated and executed a number of registry agreements on ICANN's behalf, including registry agreements between ICANN and Donuts Inc.'s subsidiaries. Donuts Inc. announced that the transaction is expected to close in Q4 2020, following successful completion of regulatory requirements.¹² On 27 November 2020, ICANN ascertained that Donuts Inc.'s proposed acquisition of Afilias Inc.'s registry operations had not yet been consummated. ICANN provided no further clarity as to this statement.

29. Shortly before submitting this evidentiary submission, Namecheap discovered that Afilias' Change of Control Approval Request was on the agenda of a special Board Meeting on 17 December 2020.¹³ Namecheap is unaware of the request that was made by Afilias, or of any deliberations that have taken place, the criteria that ICANN will use in evaluating the change of control approval request, Mr. Atallah's role in developing change of control approval criteria while being at ICANN, etc.

30. It is unclear whether other changes of control have been presented to ICANN, when these changes of control were first proposed to ICANN, and whether any such proposals influenced ICANN's deliberative process regarding the decision to remove price caps. However, it is clear that these changes of control affect Namecheap's business environment dramatically and may harm its ability to compete effectively.

31. The fact that ICANN is not transparent about its deliberations regarding changes of

¹² Donuts Inc. (2020, 19 November). *Donuts Inc. to Acquire Afilias, Inc.* Retrieved from <https://donuts.news/donuts-inc-to-acquire-afilias-inc>.

¹³ ICANN, Agenda – Special Meeting of the ICANN Board, 17 December 2020, <https://www.icann.org/resources/board-material/agenda-2020-12-17-en>.

control indeed harms Namecheap. The lack of openness and transparency about *inter alia* the timing and the criteria that ICANN uses to evaluate changes of control makes it impossible to make reliable business projections and to stay abreast of important market developments. This affects Namecheap's ability to compete effectively, compared to a situation where ICANN's decision-making process is transparent.


32. The uncertainty created by ICANN's lack of transparency increases Namecheap's cost of business, particularly in view of the magnitude of the changes of control that are currently under review behind closed doors.

IX. CONCLUSION

33. In conclusion, Namecheap has hereby demonstrated evidence, supported by an independent expert report, specifically identifying the harm that Namecheap is suffering, and may suffer in the future, directly and causally connected to ICANN's violations that resulted in the change of the price control policy of the Registries. Namecheap has thus demonstrated *prima facie* standing.

Respectfully submitted,
21 November 2020


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List of Affidavits

- CL-Aff. 1. Affidavit of Mr. Hillan Klein of 21 December 2020
- CL-Aff. 2. Affidavit of Ms. Maryna Zhuravlova

Expert Report and Appendices

- Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus with appendices
- Namecheap data files (**HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY**) sent in attachment as a secured zipped file together with the Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus