

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

NAMECHEAP, INC.,) ICDR CASE NO. 01-20-0000-6787
)
 Claimant,)
)
 and)
)
 INTERNET CORPORATION FOR ASSIGNED)
 NAMES AND NUMBERS,)
)
 Respondent.)
 _____)

ICANN'S PRE-HEARING BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
SUMMARY OF RELEVANT FACTS	6
I. ICANN AND ITS UNIQUE BOTTOM-UP, MULTISTAKEHOLDER MODEL	6
II. THE EARLY YEARS OF THE DOMAIN NAME SYSTEM	10
III. ICANN’S NEW GTLD PROGRAM.....	13
IV. THE DEVELOPMENT OF THE BASE REGISTRY AGREEMENT.....	14
V. THE ICANN BOARD’S DELEGATION OF AUTHORITY TO ICANN STAFF REGARDING REGISTRY AGREEMENTS	18
VI. ICANN HAS TRANSITIONED MANY OF THE LEGACY GTLDS TO THE BASE REGISTRY AGREEMENT	20
VII. TRANSITION OF THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS TO THE BASE REGISTRY AGREEMENT.....	21
VIII. NAMECHEAP’S RECONSIDERATION REQUEST AND IRP REQUEST	29
STANDARD OF REVIEW	30
ARGUMENT.....	33
I. NAMECHEAP’S FAILURE TO PRODUCE ANY EVIDENCE OF HARM ALLEGEDLY CAUSED BY ICANN ACTIONS CONFIRMS THAT NAMECHEAP DOES NOT QUALIFY AS A “CLAIMANT” WITH STANDING TO PURSUE THIS IRP	33
A. This Panel’s Procedural Order Is Not Dispositive Of Whether Namecheap Qualifies As A Claimant.....	34
B. Namecheap Has Not Produced Any Evidence Demonstrating Harm	35
C. Namecheap’s Experts’ Theory Of Future Harm Is Unsupported And Unsupportable.....	38
1. Economic theory [REDACTED] establish that Namecheap can and does pass through wholesale registry price increases to its customers	38
2. Namecheap is unlikely to lose any customers as a result of potential price increases.....	40
II. THE ICANN BOARD FULLY COMPLIED WITH ICANN’S ARTICLES AND BYLAWS IN CONNECTION WITH THE 2019 REGISTRY AGREEMENTS.....	41
A. The ICANN Board Appropriately Delegated Negotiations Of Registry Agreements To ICANN Staff, A Decision That Is Protected By The Business Judgment Rule	42

TABLE OF CONTENTS

(continued)

	Page
B. The ICANN Board Was Kept Apprised Of The Status Of The 2019 Registry Agreements, And Did Not Need To Convene An ICANN Board Meeting Under The Bylaws To Consider The Agreements	45
III. ICANN FULLY COMPLIED WITH THE ARTICLES AND BYLAWS IN TRANSITIONING THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS TO THE BASE REGISTRY AGREEMENT	49
A. ICANN Staff Considered Numerous Factors Before Proposing To Transition The .BIZ, .INFO, and .ORG Registry Agreements To The Base Registry Agreement	50
B. ICANN Staff Sought Input From The Internet Community And Kept The Community Apprised Of Its Decision-Making Process And Rationale	52
C. ICANN Staff Briefed The Board On Two Separate Occasions	56
IV. ICANN COMPLIED WITH ITS CORE VALUES REGARDING COMPETITION	56
V. NAMECHEAP’S CLAIM THAT THE PUBLIC INTEREST REQUIRES ICANN TO MAINTAIN THE PRICE CONTROL PROVISIONS IN .BIZ, .INFO, AND .ORG IS BASELESS	59
A. The “Studies” And Correspondence That Namecheap Relies Upon Pre-Date The New gTLD Program And Relate To A Very Different DNS	59
B. Price Controls In The .BIZ, .INFO, And .ORG Registry Agreements Are Not Justified Given The Competitive Landscape	60
VI. ICANN APPLIED ITS POLICIES FAIRLY AND EQUITABLY WHEN THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS WERE TRANSITIONED TO THE BASE REGISTRY AGREEMENT	63
VII. ICANN DID NOT APPLY ITS POLICIES UNFAIRLY WITH RESPECT TO .ORG	65
VIII. NAMECHEAP’S REMAINING ARGUMENTS FAIL TO DEMONSTRATE THAT ICANN VIOLATED ITS ARTICLES OR BYLAWS	67
A. Namecheap’s Newly-Raised Claims Should Not Be Considered	67
B. ICANN Did Not “Hide” Information Or Mislead The Board In Any Way	68
C. ICANN Was Open And Transparent In Its Consideration Of Namecheap’s Reconsideration Request	71
IX. NAMECHEAP’S CLAIMS REGARDING THE .BIZ GTLD ARE UNTIMELY	73
X. NAMECHEAP SEEKS RELIEF THAT EXCEEDS THE PANEL’S AUTHORITY	75
CONCLUSION	76

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) submits this Pre-Hearing Brief on the Merits in response to Namecheap’s Pre-Hearing Brief on the Merits submitted on 30 November 2021 (“Pre-Hearing Brief”).

1. A unique, and foundational, issue in this Independent Review Process (“IRP”) proceeding is whether Namecheap has demonstrated that it actually qualifies as a proper “Claimant” with standing to pursue its claims. Namecheap’s Pre-Hearing Brief, as well as this submission and the underlying expert analysis of Dr. Dennis Carlton, confirms that Namecheap lacks standing because it has not been harmed, and is not likely to be materially harmed in the future, by the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement (collectively, the “2019 Registry Agreements”), which contain no price control provisions.¹ The Panel has given Namecheap ample opportunities at numerous different phases of this IRP to produce evidence that it has been, or is even likely to be, harmed by ICANN’s actions. But Namecheap has not come forward with a single document, dataset or piece of evidence establishing that it has been, or will be, harmed by ICANN’s decision.

2. Tellingly, Namecheap failed to identify even a single witness who could come forward and testify as to the alleged harm Namecheap has suffered or likely will suffer. Rather, Namecheap, which is the only registrar to formally challenge the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, rests its claims of harm entirely on the unsupported, speculative, and easily refuted theories offered by its retained economists that wholesale domain name prices may rise at some point in the future. These speculative

¹ In this brief, ICANN uses the terms “price control provisions” and “price controls,” but notes that the terms “price cap provisions” and “price caps” also have been used to describe the price control provisions in the former .BIZ, .INFO, and .ORG Registry Agreements.

theories may have been sufficient to make a *prima facie* showing of harm on ICANN’s motion to dismiss, but they are insufficient at the merits phase to establish that Namecheap has standing.

3. Indeed, Namecheap’s experts’ theories of harm have now been proven to be just that, theories. ICANN’s expert economist, Dr. Carlton, did what Namecheap’s experts did not do. He reviewed Namecheap’s available costs and sales data, going back to 2018, to determine how Namecheap has responded to previous price changes in these three generic top-level domains (“gTLDs”) and others. [Redacted - Confidential Information]

Thus, Dr. Carlton concludes that Namecheap has not been harmed, and is not likely to be materially harmed in the future, by the removal of price control provisions in .BIZ, .INFO and .ORG. Dr. Carlton’s findings, as well as Namecheap’s utter failure to come forward with evidence of harm, requires dismissal of this IRP for a lack of standing.

4. Should the Panel decide to proceed to the merits of Namecheap’s claims, the evidence establishes that ICANN fully complied with its Articles of Incorporation (“Articles”) and Bylaws when the .BIZ, .INFO, and .ORG Registry Agreements were transitioned to the Base Registry Agreement, which is utilized by nearly every other gTLD in the Domain Name System (“DNS”). Each of Namecheap’s arguments to the contrary suffer from serious flaws that are fatal to its claims.

5. The ICANN Board did not need to convene a Board meeting regarding the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, in part, because it appropriately had delegated to ICANN staff the authority to negotiate and execute contracts (including registry agreements), a decision that was absolutely within the

Board's reasonable business judgment and thus entitled to deference by this Panel. This decision was also fully consistent with the fact that the ICANN Board is an oversight board, which provides direction and advice to ICANN on major policy issues and initiatives, as opposed to a managing or executive board that directly handles an organization's day-to-day operations, as explained by ICANN Board members Maarten Botterman and J. Beckwith Burr in their witness statements.

6. Pursuant to the Board's delegation of authority, ICANN staff negotiated the 2019 Registry Agreements in a manner that complied with ICANN's Articles and Bylaws. Each of the respective registry operators requested to transition, or were interested in transitioning, to the Base Registry Agreement. Simultaneously, ICANN staff engaged in significant deliberations and considered a variety of factors before transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, including the maturation of the DNS from just a handful of gTLDs to over 1,200; ICANN's goal of ensuring consistency across registry operators; the fact that ICANN is not a price regulator; and the significant protections afforded by the Base Registry Agreement, which was developed in conjunction with the Internet community through ICANN's multistakeholder model. Importantly, the Board was fully informed about ICANN staff's decision to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, and the Board was supportive of that decision, as confirmed by Mr. Botterman.

7. ICANN staff was also open and transparent, to the maximum extent feasible, in its negotiations of the 2019 Registry Agreements and its rationale for transitioning the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement. ICANN staff opened a public comment period through which anyone, including members of the Internet community, could provide comments on the proposed renewals; analyzed those comments

internally, then published its analysis; and explained to the Internet community the next steps in the process. ICANN's public analysis even addressed specifically the absence of the price control provisions and why they would not be included in the .BIZ, .INFO and .ORG Registry Agreements. It is difficult to conceive of a more transparent process than the one ICANN engaged in here. That Namecheap disagrees with ICANN staff's ultimate decision, for whatever reason, does not mean that ICANN staff violated the Articles or Bylaws.

8. Namecheap continues to argue that ICANN must apply its documented policies consistently and fairly without singling out any particular party for discriminatory treatment. Then, Namecheap makes the perplexing argument that, in order to meet those requirements, ICANN should re-impose price control provisions on each of the .BIZ, .INFO and .ORG registries, even though almost none of the more than 1,200 other registry agreements in place contain price control provisions. In making such an argument, Namecheap effectively is asking ICANN to *discriminate* against .BIZ, .INFO, and .ORG without any justifiable basis. Namecheap's positions are irreconcilable. It is the *absence* of price control provisions, not the imposition of them, that ensures consistency (and equal treatment) across nearly all registry agreements between ICANN and gTLD registry operators.

9. Finally, Namecheap claims that ICANN must regulate both competition and pricing in the DNS. Namecheap even goes so far as to argue that ICANN's regulatory mandate is more robust than the mandate given to the United States Department of Justice ("DOJ") or Department of Commerce ("DOC"). As ICANN's Bylaws demonstrate, however, and ICANN Board members Ms. Burr and Mr. Botterman confirm, ICANN is *not* a regulator of either price or competition in the DNS. Indeed, an IRP Panel recently rejected this exact argument in a precedential opinion.

10. Moreover, Dr. Carlton has evaluated the .BIZ, .INFO, and .ORG registries, the previous price control provisions and the current state of competition within the DNS and has concluded that there is no justification for price control provisions on .BIZ, .INFO or .ORG. Namecheap's experts do not adequately consider the costs of price regulation in these gTLDs, including the difficulty of setting an optimal price that is typically left to market forces. Set against these costs, any benefits of price controls are quite small. Dr. Carlton concludes that the evidence indicates that .BIZ, .INFO, and .ORG are not likely to raise registry prices above the levels allowed by the prior price controls in the immediate future or even further in the future. .BIZ, .INFO and .ORG are subject to competition from hundreds of other TLDs, including .COM, which is highly popular (accounting for 74% of registered domains and 67% of new registrations) and will continue to have a low, regulated price for the foreseeable future. The mere presence of .COM curbs all TLDs' ability to successfully increase prices to supracompetitive levels. .BIZ, .INFO and .ORG's collective share of registrations is small—just 4.5% of all registered domain names in the DNS—and has declined in recent years, indicating that their competitive importance is waning in the face of competition from other TLDs, including the hundreds of new gTLDs introduced by ICANN into the DNS, and the rise of “open” country code top-level domains (“ccTLDs”). Finally, under the terms of the Base Registry Agreement, registrars (and therefore registrants) of .BIZ, .INFO and .ORG can protect themselves against price increases by locking in current prices for up to ten years. Thus, even if ICANN had some regulatory authority over competition in the DNS, which it does not, transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement was a sound economic decision and one that serves the public interest.

11. In short, Namecheap does not have standing to pursue this IRP but, even if it did, Namecheap has failed to establish that ICANN violated its Articles or Bylaws in taking the actions that it took.

SUMMARY OF RELEVANT FACTS²

I. ICANN AND ITS UNIQUE BOTTOM-UP, MULTISTAKEHOLDER MODEL.

12. ICANN is a complex organization with the critical Mission of ensuring “the stable and secure operation of the Internet’s unique identifier systems.”³ More specifically, ICANN is responsible for overseeing the technical coordination of the Internet’s DNS on behalf of the Internet community.⁴

13. ICANN contracts with registry operators to operate gTLDs. Registry operators separately contract with registrars—entities through which individuals and entities, known as “registrants,” can register domain names—and that contract is known as a “Registry-Registrar Agreement.” Registrars, such as Namecheap, are the intermediary between registrants and the registry operators. There are nearly 2,500 ICANN-accredited registrars around the world.⁵

14. ICANN’s Bylaws contain a number of “Core Values” that ICANN strives to achieve in carrying out its Mission on behalf of the Internet community. Among other things, the Core Values state that ICANN should: (i) “[w]here feasible and appropriate, depending on market mechanisms [] promote and sustain a competitive environment in the DNS market”; and

² Namecheap’s Pre-Hearing Brief contains an extensive factual background section, often citing to its own counsel’s work product, that is largely irrelevant to the issues before the Panel. The factual background section in ICANN’s brief is limited to facts actually relevant to this IRP, and therefore does not address many of the statements made by Namecheap. But to be clear, ICANN’s decision not to address the extraneous historical account provided by Namecheap does not suggest that ICANN agrees in any way with Namecheap’s assertions in that account.

³ Bylaws, Art. 1, § 1.1(a), RM 2.

⁴ *Id.*

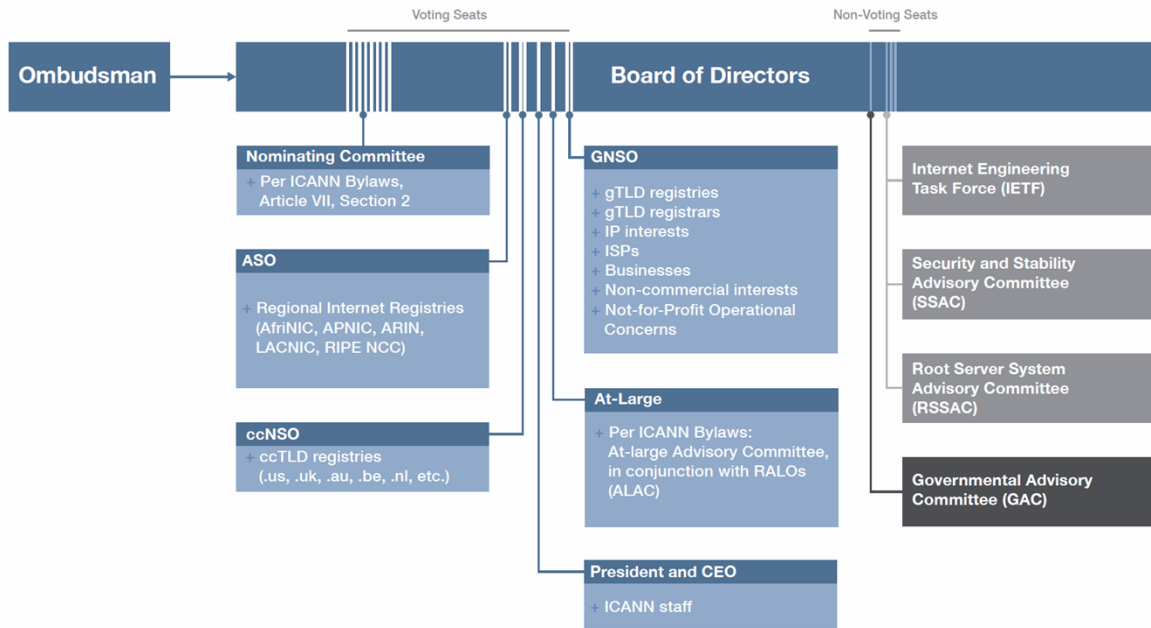
⁵ List of ICANN-Accredited Registrars, *available at* <https://www.icann.org/registrar-reports/accreditation-qualified-list.html>.

(ii) “[i]ntroduc[e] and promot[e] 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.”⁶ ICANN’s Bylaws, however, make clear that ICANN is *not* a regulator of competition or registry pricing. The Bylaws state 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.***”⁷

15. ICANN accomplishes its Mission through its unique multistakeholder model in which individuals, non-commercial stakeholder groups, industry participants, and governments play important roles in its community-based, consensus-driven, policy-making approach. In fact, ICANN in many ways operates more as a community of participants than a traditional corporation, as shown by the following organization chart:

⁶ Bylaws, Art. 1, § 1.2(b)(iii) and (iv).

⁷ See *id.*, Art. 1, § 1.1(c) (emphasis added); see also ICANN Decides on .COM Amendment and Proposed Binding Letter of Intent between ICANN and Verisign, Ex. R-1 (“I also want to take this opportunity to clarify ICANN’s role with respect to wholesale pricing of top-level domains. Let me be clear, ICANN org is not a competition authority or price regulator.”).



16. In addition to its international Board of Directors and approximately 400 staff members, the ICANN community includes three Supporting Organizations that develop and recommend policies, within their distinct areas of expertise, concerning the Internet’s technical management. They are the Address Supporting Organization,⁸ the Country Code Names Supporting Organization⁹ and the Generic Names Supporting Organization (“GNSO”).¹⁰

17. The ICANN community also includes four Advisory Committees that serve as formal advisory bodies to the ICANN Board. They are made up of representatives from the Internet community to advise on particular issues or policy areas and include the Governmental Advisory Committee,¹¹ the Security and Stability Advisory Committee,¹² the Root Server System Advisory Committee¹³ and the At-Large Advisory Committee.¹⁴

⁸ Bylaws, Art. 9.

⁹ *Id.*, Art. 10.

¹⁰ *Id.*, Art. 11.

¹¹ *Id.*, Art. 12, § 12.2(a).

¹² *Id.*, Art. 12, § 12.2(b).

¹³ *Id.*, Art. 12, § 12.2(c).

¹⁴ *Id.*, Art. 12, § 12.2(d).

18. In addition, there is an ICANN Nominating Committee (“NomCom”). The NomCom is made up of ICANN community members tasked with selecting, among other positions, some of ICANN’s Board members, as well as leaders of certain Supporting Organizations and Advisory Committees.¹⁵

19. The Ombudsman is another important part of the ICANN community.¹⁶ “The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”¹⁷

20. The final component of the ICANN community is the large, globally diverse group of Internet stakeholders, including, among others, national governments, international organizations, the business sector, civil society, the technical community, and individual Internet users. Such entities and individuals participate in ICANN processes by, among other things, attending ICANN’s public meetings, responding to calls for public comment, and initiating ICANN’s Accountability Mechanisms.

21. ICANN defines its unique model as follows:

- ***Bottom-up.*** Members of sub-groups in ICANN can raise issues at the grassroots level. If the issue is worth addressing and falls within ICANN’s remit, it rises through various Advisory Committees and Supporting Organizations until eventually policy recommendations are passed to the Board for adoption.¹⁸
- ***Consensus-driven.*** Through its Bylaws, processes, and international meetings, ICANN provides the arena where advocates and interested parties can discuss Internet

¹⁵ *Id.*, Art. 8.

¹⁶ *Id.*, Art. 5, § 5.1.

¹⁷ *Id.*, Art. 5, § 5.2.

¹⁸ Welcome to ICANN!, RM 78.

policy issues. Almost anyone can join most of ICANN’s volunteer working groups, assuring broad representation with a diverse array of perspectives. Hearing all points of view, searching for mutual interests, and working toward consensus takes time, but the process resists capture by any single interest – an important consideration when administering a resource vital to the global Internet.¹⁹

- ***Multistakeholder model.*** ICANN’s inclusive approach treats the public sector, the private sector, and technical experts as peers.²⁰ The ICANN community includes registry operators, registrars, Internet service providers, intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from almost 180 governments,²¹ and individual Internet users from around the world. All points of view receive consideration on their own merits. ICANN’s fundamental philosophy is that all users of the Internet deserve a say in how the DNS operates.²²

22. To ensure that ICANN remains accountable to the Internet community, ICANN’s Bylaws establish accountability mechanisms for review of ICANN actions. One such mechanism is the IRP, through which aggrieved parties can seek review of ICANN actions or inactions to determine if those actions/inactions are consistent with ICANN’s Articles and/or Bylaws. Only a “Claimant” can institute an IRP. The Bylaws define a Claimant as an entity “that has been materially affected by a Dispute. To be materially affected by a Dispute, the

¹⁹ *Id.*

²⁰ *Id.*

²¹ Governmental Advisory Committee, Ex. R-28.

²² RM 78.

Claimant must suffer an injury or harm that is *directly and causally* connected to the alleged violation.”²³

II. THE EARLY YEARS OF THE DOMAIN NAME SYSTEM.

23. Before ICANN was created in 1998, there were only eight TLDs in the DNS: .COM, .EDU, .GOV, .INT, .MIL, .NET, .ORG, and .ARPA.²⁴ Registrants could register domain names freely in .COM, .NET, and .ORG, but the other five TLDs had limited purposes and limited access to registrations.²⁵ Pursuant to a Cooperative Agreement between the DOC’s National Telecommunications and Information Administration (“NTIA”) and Verisign, Inc. (“Verisign), the then registry operator of .COM, .NET, and .ORG, there were limitations on the prices that Verisign could charge registrars for domain name registrations in these gTLDs; thus, the registry agreements between ICANN and Verisign for operation of the gTLDs each contained a provision limiting the wholesale registration prices that Verisign could charge.²⁶ These pricing limitations were put into place at NTIA’s insistence based on its view of the DNS at that early time.²⁷

24. To determine if the DNS could handle a limited number of additional gTLDs, and in order to introduce additional consumer choice into the DNS, ICANN opened an application round for new gTLDs in 2000. Through that application round, ICANN approved seven additional gTLDs, including .BIZ, .INFO, .NAME, and .PRO.²⁸ Each of these gTLDs constitutes an “unsponsored” gTLD, meaning that the gTLD operates under policies established

²³ *Id.*, Art. 4, § 4.3(b)(i) (emphasis added).

²⁴ RE-2. “RE” refers to exhibits submitted in conjunction with ICANN’s Opposition to Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection.

²⁵ ICANN | Archives, Top-Level Domains, Ex. R-29.

²⁶ Witness Statement of J. Beckwith Burr (“Burr Witness Stmt.”), ¶ 14.

²⁷ *Id.*

²⁸ RE-2.

by the global Internet community directly through ICANN’s processes.²⁹ As had been the customary practice at that time, the registry agreements for these gTLDs contained provisions limiting the wholesale registry prices that the respective registry operators could charge registrars per year.³⁰ The remaining three gTLDs that were introduced in the 2000 round, .AERO, .COOP, and .MUSEUM, were “sponsored” gTLDs.³¹ Sponsored gTLDs are specialized gTLDs that have a sponsor representing the narrower community that is most affected by the gTLD. The sponsor plays a unique role in the management of the TLD:

A Sponsor is an organization to which is delegated some defined ongoing policy formation authority regarding the manner in which a particular sponsored TLD is operated. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operators and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.³²

Given the sponsor’s role and that narrower focus, these gTLDs did not contain any price control provisions.³³

²⁹ICANN: Progress in Process for Introducing New Sponsored Top-Level Domains (19 March 2004), Ex. R-30.

³⁰ .PRO Registry Agreement (2002), § 3.4.3, *available at* <https://www.icann.org/en/registry-agreements/pro/pro-registry-agreement-signed-3-may-2002-3-5-2002-en>; .NAME Registry Agreement (2001), § 3.4.3, *available at* <https://www.icann.org/en/registry-agreements/name/name-registry-agreement-1-8-2001-en>; .INFO Registry Agreement (2001), § 3.4.3, *available at* <https://www.icann.org/en/registry-agreements/info/info-registry-agreement-11-5-2001-en>; .BIZ Registry Agreement (2003), § 3.4.3, *available at* <https://www.icann.org/en/registry-agreements/biz/biz-registry-agreement---signed-11-may-2001-amended-18-june-2003-18-6-2003-en>.

³¹ Ex. R-30.

³² Ex. R-29.

³³ *See generally*, .MUSEUM Registry Agreement (2001), *available at* <https://www.icann.org/en/registry-agreements/museum/museum-tld-sponsorship-agreement-17-10-2001-en>; .COOP Registry Agreement (2001), *available at* <https://www.icann.org/en/registry-agreements/coop/coop-tld-sponsorship-agreement-21-11-2001-en>; .AERO Registry Agreement (2001), *available at* <https://www.icann.org/en/registry-agreements/aero/aero-tld->

25. In 2003, ICANN opened another application round during which seven more gTLDs were introduced into the DNS: .ASIA, .CAT, .JOBS, .POST, .MOBI, .TEL, and .TRAVEL.³⁴ Each of these gTLDs also constituted sponsored gTLDs and their registry agreements therefore did not contain any price control provisions.³⁵ In sum, price control provisions were not a common occurrence in what have come to be known as the legacy gTLDs;³⁶ indeed, .AERO, .COOP, .MUSEUM, .ASIA, .CAT, .JOBS, .POST, .MOBI, .TEL, and .TRAVEL never had any price control provisions.

III. ICANN'S NEW GTLD PROGRAM.

26. As part of its Mission “to promote and sustain a competitive environment in the DNS market,”³⁷ ICANN’s GNSO sought to introduce even more competition and consumer choice into the DNS through the introduction of additional gTLDs.³⁸ In 2005, the GNSO began a policy development process to consider the introduction of new gTLDs. The GNSO’s two-year long policy development process included detailed and lengthy consultations with the many

(continued...)

sponsorship-agreement---effective-date-17-december-2001---amended-and-posted-5-november-2004-17-12-2001-en.

³⁴ Ex. R-30; RE-2.

³⁵ See generally .MOBI Registry Agreement (2005), available at <https://www.icann.org/en/registry-agreements/mobi/mobi-registry-agreement-10-7-2005-en>; .TEL Registry Agreement (2006), available at <https://www.icann.org/en/registry-agreements/tel/tel-registry-agreement-30-5-2006-en>; .TRAVEL Registry Agreement (2005), available at <https://www.icann.org/en/registry-agreements/travel/sponsored-tld-registry-agreement-travel-5-5-2005-en>; .ASIA Registry Agreement (2006), available at <https://www.icann.org/en/registry-agreements/asia/asia-registry-agreement---6-december-2006-amended-22-june-2010-6-12-2006-en>; .CAT Registry Agreement (2005), available at <https://www.icann.org/en/registry-agreements/cat/cat-registry-agreement---23-september-2005-amended-24-june-2010-23-9-2005-en>; .JOBS Registry Agreements (2005), available at <https://www.icann.org/en/registry-agreements/jobs/jobs-registry-agreement-5-5-2005-en>; .POST Registry Agreement (2009), available at <https://www.icann.org/en/registry-agreements/post/post-registry-agreement-11-12-2009-en>.

³⁶ The term “legacy gTLDs” refers to gTLDs that were introduced into the DNS before the New gTLD Program launched.

³⁷ Bylaws, Art. 1, § 1.2(b)(iii).

³⁸ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 August 2007), RE-4; ICANN Adopted Board Resolutions (26 June 2008), RE-5.

constituencies of ICANN’s global Internet community, including but not limited to governments, civil society, business and intellectual property holders, and resulted in 19 specific policy recommendations for the New gTLD Program (often referred to as the “Program”).³⁹ In June 2008, the ICANN Board adopted the GNSO’s policy recommendations for introducing more gTLDs and directed ICANN staff to develop an implementation plan for the New gTLD Program, in conjunction with the ICANN community, to be provided to the Board for evaluation and approval.⁴⁰ Accordingly, ICANN undertook an open, inclusive, and transparent implementation process to address a variety of stakeholder issues, including things such as the protection of intellectual property and community interests, consumer protection, and DNS stability.

27. The New gTLD Program was designed to enhance diversity, creativity, and consumer choice in gTLDs, and to provide the benefits of innovation to consumers, among other things.⁴¹ Through the Program, any interested entity could apply for the opportunity to operate one or more new gTLDs. The application window for the New gTLD Program officially launched in 2012.⁴² ICANN received 1,930 applications for new gTLDs, the majority of which proceeded through the evaluation process set forth in ICANN’s New gTLD Applicant Guidebook (“Guidebook”).⁴³ Applications that successfully passed the evaluation process and contention set resolution (if applicable) proceeded to contracting with ICANN, during which the

³⁹ RE-4.

⁴⁰ RE-5.

⁴¹ Applicant Guidebook, Preamble, RE-6.

⁴² ICANN New gTLD Program Timeline(14 October 2016), RE-9.

⁴³ ICANN New gTLD Program Statistics (31 December 2021), R-54.

parties executed a form registry agreement applicable to all new gTLDs, the Base Registry Agreement.⁴⁴ After contracting, ICANN took the steps to delegate the gTLDs into the DNS.

28. ICANN delegated its first new gTLD into the DNS in October 2013 and, since then, has introduced approximately 1,240 new gTLDs.⁴⁵

IV. THE DEVELOPMENT OF THE BASE REGISTRY AGREEMENT.

29. Simultaneous with the development of the New gTLD Program, ICANN engaged the Internet community in the development of the Guidebook and the Base Registry Agreement that would apply to all registry operators that secured the right to operate a new gTLD. ICANN and the Internet community embarked on this process to ensure consistency across registry operators and avoid the inefficiencies associated with negotiating over a thousand different agreements.⁴⁶

30. The Guidebook establishes the process for evaluating new gTLD applications and includes a draft of the Base Registry Agreement.⁴⁷ The Guidebook and the Base Registry Agreement were developed based on ICANN community input over several years and several iterations.⁴⁸ In 2008, ICANN published the first version of the Guidebook calling for public comment. ICANN made revisions in response to the public comments received and published revised versions of the Guidebook for additional public comments, repeating this process numerous times.⁴⁹ Ultimately, ICANN went forward with the New gTLD Program based on the

⁴⁴ Base Registry Agreement (31 July 2017), RE-7. There were some registry operators that requested and received minor modifications to the Base Registry Agreement, but the majority of operators executed the Base Registry Agreement in its original form.

⁴⁵ RE-9; Ex. R-54.

⁴⁶ Witness Statement of Russell Weinstein (“Weinstein Witness Stmt.”), ¶ 4.

⁴⁷ *Id.* ¶ 3.

⁴⁸ Letter from Cryus Namazi to Zak Muscovitch (26 July 2019), RE-8, p. 1.

⁴⁹ ICANN | Archive | Applicant Guidebook, Ex. R-31.

4 June 2012 version of the Guidebook, but continued revising the Base Registry Agreement based on community input.

31. In February 2013, ICANN opened another public comment period regarding proposed revisions to the Base Registry Agreement.⁵⁰ ICANN made revisions to the Base Registry Agreement in response to the comments received and published the proposed final version of the Base Registry Agreement for additional public comment in April 2013.⁵¹ In doing so, ICANN explained the “updates and changes to the New gTLD Registry Agreement in response to community feedback on the version of the New gTLD Registry Agreement posted for public comment on 5 February 2013 and discussions of the New gTLD Registry Agreement at the ICANN 46 meeting in Beijing, China 7-11 April 2013.”⁵² ICANN considered the additional public comments received and published the final version of the Base Registry Agreement on 2 July 2013.⁵³

32. ICANN also retained Dr. Dennis Carlton, a renowned economist, to evaluate aspects of the New gTLD Program, including whether price cap or price control provisions were necessary to ensure that consumers (i.e., registrants) benefit from the introduction of new gTLDs.⁵⁴ In his final report, Dr. Carlton concluded that price controls were unlikely to generate significant consumer benefits, in part because “competition among a variety of TLDs reduces concerns about opportunistic behavior by new gTLD registries that may result from switching

⁵⁰ ICANN Public Comment – Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification (5 February 2013), Ex. R-32.

⁵¹ ICANN Public Comment – Proposed Final New gTLD Registry Agreement (29 April 2013), Ex. R-33.

⁵² *Id.*

⁵³ Since that time, ICANN and the Internet community have made several revisions to the Base Registry Agreement, although the pricing provision has remained unchanged since the first version.

⁵⁴ Report of Dennis Carlton Regarding ICANN’s Proposed Mechanism For Introducing New gTLDs, ¶ 10 (5 June 2009), RM 23.

costs faced by registrants of new domain names.”⁵⁵ He further noted that “the continuing growth of Internet services further reduces concerns about opportunistic behavior by operators of new gTLD registries” because “incentives for opportunistic behavior are lower in rapidly growing industries.”⁵⁶

33. Finally, Dr. Carlton confirmed that the sponsored TLDs, such as .MUSEUM and .TRAVEL, were not subject to any price control provisions and that he was “unaware of any complaints from registrars or end-users that obtain services from these new sponsored TLDs that their registries have acted opportunistically by raising prices significantly to existing customers.”⁵⁷ He thus opined that this “provides further evidence that price caps are not necessary to protect registrants from opportunistic behavior by new gTLD registries.”⁵⁸

34. Accordingly, and following the extensive public comment periods and negotiations, no price cap or price control provisions were included in the Base Registry Agreement.⁵⁹ The Base Registry Agreement does, however, contain various protections relating to price increases. Section 2.10 requires registry operators to provide registrars with thirty days’ advance notice of any price increase for initial registrations, and six months’ advance notice of price increases for “renewals of domain name registrations.”⁶⁰ Registry operators are also required to allow registrars to lock in the current price (i.e., the price in place prior to the notice of the increase) for up to ten years on behalf of their customers.⁶¹ Finally, registry operators

⁵⁵ *Id.*, ¶ 71.

⁵⁶ *Id.*, ¶ 75.

⁵⁷ *Id.*, ¶ 74.

⁵⁸ *Id.*, ¶ 74. While Dr. Carlton stated that the price control provisions for other gTLDs constrain the ability of new gTLD registry operators from charging supracompetitive prices, he was not asked to consider the appropriateness of those price control provisions and even acknowledged that “the appropriateness of these price caps may be debatable.” *Id.*, ¶ 73.

⁵⁹ *See, e.g.*, RE-7, § 2.10.

⁶⁰ RE-8, p. 1; RE-7, § 2.10(c).

⁶¹ RE-7, § 2.10(a), (b).

must provide “uniform pricing for renewals of domain name registrations,” meaning they must charge all registrars the same price for domain name registration renewals.⁶² As such, even though price controls or price caps were not included in the Base Registry Agreement, the Base Registry Agreement included important provisions that protect registrars (and ultimately registrants) from price increases.

35. Moreover, the Base Registry Agreement contains a number of additional non-price-related safeguards for registrants and registrars. For example: the Base Registry Agreement requires registry operators to contract only with registrars accredited under the 2013 Registrar Accreditation Agreement, which provides certain safeguards and enhancements for registrars and registrants that were not included in prior versions of the Registrar Accreditation Agreement; the Base Registry Agreement includes additional public interest commitments, which are subject to enforcement by the Public Interest Commitment Dispute Resolution Procedure; and additional protections of third parties’ legal rights and certain rights protection mechanisms, such as the Uniform Rapid Suspension system, the Trademark Post-Delegation Dispute Resolution Procedure and the Registration Restrictions Dispute Resolution Procedure, are included in the Base Registry Agreement.⁶³

36. Every single new gTLD operates pursuant to the Base Registry Agreement, and most without any modification.⁶⁴ Therefore, the Base Registry Agreement is applicable to over 1,200 gTLDs in the DNS.

⁶² *Id.*, § 2.10(c).

⁶³ Weinstein Witness Stmt., ¶ 7.

⁶⁴ Weinstein Witness Stmt., ¶ 9.

V. THE ICANN BOARD'S DELEGATION OF AUTHORITY TO ICANN STAFF REGARDING REGISTRY AGREEMENTS.

37. The ICANN Board is an oversight board that provides direction and advice on major policy issues and initiatives, but it is not a managing or executive board that directly handles day-to-day operational decisions.⁶⁵ Accordingly, the ICANN Board has delegated to the ICANN organization (“ICANN staff”) the authority to manage the day-to-day operations of ICANN, with the Board’s oversight. Relevant here, the ICANN Board has delegated to ICANN staff the authority to enter into contract negotiations with registry operators and other third parties.⁶⁶ This includes negotiations regarding legacy registry agreements (such as .BIZ, .INFO, and .ORG) as well as negotiations with the new gTLD registry operators.⁶⁷ The ICANN Board has even delegated this authority with respect to the .COM registry agreement, which is the largest registry by far and is still subject to an agreement between Verisign (the .COM registry operator) and NTIA.⁶⁸

38. This delegation of authority to ICANN staff increases efficiencies and allows the Board to focus on more high-level strategic initiatives, policy recommendations, and outreach with the Supporting Organizations and Advisory Committees, among other oversight responsibilities.⁶⁹ Indeed, there are over 1,200 gTLDs in the DNS that are subject to a registry agreement with ICANN that must be negotiated and renewed at periodic intervals. There are also thousands of other agreements that ICANN has entered into with various other third parties

⁶⁵ Burr Witness Stmt., ¶ 26, Witness Statement of Maarten Botterman (“Botterman Witness Stmt.”), ¶ 11.

⁶⁶ Burr Witness Stmt., ¶ 26; Botterman Witness Stmt., ¶ 11.

⁶⁷ Botterman Witness Stmt., ¶ 11, Burr Witness Stmt., ¶ 26, Weinstein Witness Stmt., ¶ 10.

⁶⁸ ICANN Decision Paper re Amendment 3 to .COM Registry Agreement, and Binding Letter of Intent between ICANN and Verisign, Ex. R-34 (“The Board agreed that ICANN’s President and CEO will make a final decision on the proposed Amendment 3 and binding LOI as decision-making duties regarding contracts fall within the President and CEO’s authority as set forth in the Delegation of Authority Guidelines.”).

⁶⁹ Botterman Witness Stmt., ¶ 14, Burr Witness Stmt., ¶¶ 29–30; ICANN-NC-008499, Ex. R-35.

in the Internet community, such as the thousands of Registrar Accreditation Agreements that ICANN staff has executed over the years, including the nearly 2,500 in place today. ICANN staff (with approximately 400 staff members across the world) compared to the ICANN Board (with sixteen voting Directors and four non-voting Liaisons)⁷⁰ is best equipped to manage such contracts.⁷¹

39. The Board’s delegation of authority was memorialized in November 2016 when the ICANN Board adopted ICANN’s Delegation of Authority Guidelines (“Guidelines”).⁷² The purpose of these Guidelines was to “identify the respective key roles of the Board and the Chief Executive Officer (CEO) and the delegation of authority from the Board to the CEO and key staff.”⁷³ The Board explained that its “approval of the Guidelines will have positive impact on the community as it provides additional transparency and clarity about the roles and responsibilities of key members in the ICANN organization.”⁷⁴ By way of example only, the ICANN Board delegated to the President and CEO the following responsibilities: (i) “Interact[] with the broader Internet community and other interested parties within the scope of ICANN’s Mission and Board’s directives”; and (ii) “Lead[] and oversee[] ICANN’s day-to-day operations.”⁷⁵

40. Pursuant to its delegated authority, both before and since it was memorialized in the Guidelines, ICANN staff has negotiated and entered into thousands of agreements, renewals,

⁷⁰ Bylaws, Art. 7, § 7.1.

⁷¹ Burr Witness Stmt., ¶ 29.

⁷² Adopted Board Resolutions | Regular Meeting of the ICANN Board (8 November 2016), Ex. R-36; ICANN’s Delegation of Authority Guidelines (8 November 2016), Ex. R-37.

⁷³ Ex. R-37.

⁷⁴ Ex. R-36.

⁷⁵ Ex. R-37.

amendments, and addendums with third parties.⁷⁶ Occasionally, after ICANN staff has negotiated the terms of the registry agreements with the respective registry operators, the ICANN Board has discussed and considered the proposed renewals and approved renewal of the registry agreements. But the ICANN Board has done so for very few of the over 1,200 gTLDs and does not engage in this practice as a matter of course.⁷⁷

VI. ICANN HAS TRANSITIONED MANY OF THE LEGACY GTLDS TO THE BASE REGISTRY AGREEMENT.

41. Consistent with its authority, and after finalizing the Base Registry Agreement, ICANN staff began working with legacy gTLD registry operators to transition them to the Base Registry Agreement when their agreements came up for renewal.⁷⁸ The preference was to transition the legacy gTLDs to the Base Registry Agreement to promote consistency across all registry operators so that the legacy gTLDs would have the same agreement as all of the new gTLDs, to the extent possible, including the new protections contained in the Base Registry Agreement.⁷⁹ Pursuant to those negotiations, in addition to .BIZ, .INFO, and .ORG, many legacy gTLDs, including but not limited to .PRO, .TEL, .TRAVEL, and .JOBS, have adopted the Base Registry Agreement.⁸⁰ While it is true that the Base Registry Agreement does not have price control provisions, neither did most of the legacy gTLD agreements (so, for instance, .TEL, .TRAVEL, and .JOBS did not have price control provisions either before or after transitioning to the Base Registry Agreement).

⁷⁶ Weinstein Witness Stmt., ¶ 10.

⁷⁷ Botterman Witness Stmt., ¶ 13; Burr Witness Stmt., ¶ 28. Namecheap suggests that the ICANN Board has issued a resolution every time a legacy registry agreement has been renewed, but that argument belies the facts. While the ICANN Board has issued resolutions for some legacy registry agreement renewals, it by no means has done so for each renewal or amendment.

⁷⁸ RE-8, p. 1; Weinstein Witness Stmt., ¶ 11.

⁷⁹ RE-8, p. 1; Weinstein Witness Stmt., ¶ 11.

⁸⁰ RE-8, p. 1; Weinstein Witness Stmt., ¶ 11; Annex 5, p. 8.

42. Renewal of registry agreements, however, are subject to bilateral negotiations with the registry operators. Pursuant to those negotiations, certain legacy registry operators have chosen not to transition to or adopt the Base Registry Agreement for various business reasons. As a result, there is a small handful of legacy gTLDs that have not adopted the Base Registry Agreement.⁸¹ For instance, Namecheap questions why .NET and .NAME have not transitioned to the Base Registry Agreement. The answer is simple: Verisign, the registry operator for .NET, .NAME and .COM, chose not to transition to the Base Registry Agreement during the recent negotiations of its .NET and .NAME registry agreements.⁸²

VII. TRANSITION OF THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS TO THE BASE REGISTRY AGREEMENT.

43. The 2013 .BIZ, .INFO, and .ORG Registry Agreements (“2013 Registry Agreements”) were all due to expire in June 2019. In anticipation of the expiration of these agreements (and consistent with the authority delegated by the ICANN Board), ICANN staff entered into separate negotiations with the respective registry operators to renew the agreements.⁸³

44. As with all legacy registry agreements, ICANN’s preference was to transition the 2013 Registry Agreements to the Base Registry Agreement, given its additional protections for registrars and registrants and increased operational efficiencies for ICANN, registry operators, registrars, and registrants. The .BIZ, .INFO, and .ORG registry operators agreed with this approach and each requested to transition or were interested in transitioning to the Base Registry Agreement.⁸⁴ Thus, the negotiations between ICANN staff and the respective registry operators,

⁸¹ Weinstein Witness Stmt., ¶ 12.

⁸² *Id.*

⁸³ *Id.*, ¶ 13.

⁸⁴ *Id.*, ¶¶ 13, 17.

which occurred occasionally via email or in person but primarily via telephone, focused on transitioning the then-current registry agreements to the Base Registry Agreement.⁸⁵ The negotiations, however, did not focus on removal of the price control provisions because ICANN and the registry operators were all of the view that .BIZ, .INFO, and .ORG should transition to the Base Registry Agreement, which does not have any price control provisions. Thus, there was little (if anything) to negotiate on this topic.⁸⁶ Rather, the starting point for the negotiations was the Base Registry Agreement, not the 2013 Registry Agreements; so the negotiations focused on any modifications to the Base Registry Agreement that the registry operators and ICANN believed appropriate.⁸⁷

45. ICANN staff also performed its own due diligence and deliberations when considering the best course of action for the upcoming renewals. ICANN staff discussed the .BIZ, .INFO, and .ORG Registry Agreements at several ICANN staff meetings (some of which

⁸⁵ *Id.*, ¶ 17.

⁸⁶ Weinstein Witness Stmt., ¶ 17. Namecheap attempts to suggest that ICANN did not engage in sufficient negotiations regarding the 2019 Registry Agreements because there are not scores of documents reflecting ICANN staff's negotiations with the registry operators regarding the price control provisions. But Mr. Weinstein clearly explains the absence of the documents Namecheap wishes existed. While this may have been a "drastic" change for Namecheap (which ICANN doubts), this was not a "drastic" change for ICANN or the registry operators, and therefore, the absence of this provision did not require extensive negotiation. Even so, many of the negotiations occurred via phone and not via email. *Id.*

⁸⁷ *Id.* Namecheap suggests that Ms. Burr was a primary negotiator for Neustar regarding the .BIZ registry agreement while she was an ICANN Board member. Namecheap's Pre-Hearing Brief, ¶ 138. Namecheap is wrong. Ms. Burr explains in her accompanying Witness Stmt. that she was not a primary negotiator on behalf of Neustar. Burr Witness Stmt., ¶ 31. Moreover, there is nothing nefarious about Ms. Burr's role at Neustar or as an ICANN Board member. She also abstained from voting on Namecheap's Request 19-2 regarding .ORG and .INFO in an abundance of caution—even though it did not relate to .BIZ—because she takes potential conflicts of interest extremely seriously and did not want to jeopardize the work of the ICANN Board in evaluating Namecheap's Reconsideration Request. *Id.*, ¶ 32. The other Reconsideration Requests Namecheap references (Request 19-3 and Request 20-1) did not ask ICANN to reconsider the absence of price control provisions in the .BIZ, .INFO, or .ORG Registry Agreements, or did not otherwise involve a substantive evaluation of those claims, and therefore there was no need for Ms. Burr to abstain. *Id.*, ¶ 33. To be clear, Request 20-1 originally included a claim regarding the price control provisions, but that claim was summarily dismissed as untimely, and therefore there was no substantive consideration of that issue. In any event, in an abundance of caution, Ms. Burr recused herself from the discussion and vote whereby these claims were summarily dismissed. *Id.*; Minutes | Board Accountability Mechanisms Committee Meeting (18 March 2020), Ex. R-38.

included ICANN’s in-house counsel), and considered a variety of factors before proposing a way forward.⁸⁸ By way of example only, ICANN considered:

- ICANN’s goal of treating the .BIZ, .INFO, and .ORG registry operators equally with the operators of new gTLDs and other legacy gTLDs;
- That transitioning to the Base Registry Agreement would ensure consistency for registries, registrars, and registrants, and provide increased operational efficiencies;
- That the Base Registry Agreement, which was drafted with the Internet community, contained a number of safeguards and security and stability requirements that were more robust than the 2013 Registry Agreements;
- The additional protections afforded to registrars (and therefore hopefully passed on to registrants) by the Base Registry Agreement from a pricing perspective;
- The maturation of the domain name market since ICANN’s inception and the introduction of significant consumer choice and competition through the New gTLD Program;
- The extremely low number of registrations in these three gTLDs relative to the number of registrations in all TLDs;
- The fact that ICANN is not a price or competition regulator and therefore should not be required to monitor the prices registry operators charge registrars for registrations in these gTLDs; and
- The absence of any government mandate requiring price control provisions, as compared to .COM.⁸⁹

46. ICANN staff also consulted with the ICANN Board concerning these agreements during an ICANN Board workshop in January 2019.⁹⁰ Board workshops are essentially working sessions for the Board where they receive briefings on topics relevant to the Internet community,

⁸⁸ Weinstein Witness Stmt., ¶¶ 14–15; *see also* Annex 67*bis* (listing the .BIZ, .INFO, and .ORG contract renewals as agenda items or action items on 5 September and 12 September). Namecheap complains that there are few “deliberative documents” regarding the renewal negotiations. Many of the “deliberations,” however, occurred in telephonic or in-person staff meetings and not via email, or involved ICANN’s internal and external legal counsel and thus are privileged. Weinstein Witness Stmt., ¶ 14; *see also* Annex 67*bis* (listing the .BIZ, .INFO, and .ORG contract renewals as agenda items or action items on 5 September and 12 September). Additionally, the basis for the decision is reflected in the publicly available Staff Report of Public Comment Proceedings that ICANN published for the respective gTLDs at the conclusion of the public comment period (as discussed more fully below), and in public correspondence. *See, e.g.*, RE-8, Annexes 5–7.

⁸⁹ Weinstein Witness Stmt., ¶ 15; ICANN-NC-008499, Ex. R-35; Annex 105.

⁹⁰ Botterman Witness Stmt., ¶ 18–22. The Board did not convene a Board meeting on this topic as it did not need to pass any resolution, given that it had delegated the authority to renew the agreements to ICANN staff. *Id.*, ¶¶ 18, 23, 28.

and accomplish housekeeping tasks, among other things.⁹¹ They are not Board meetings under the Bylaws, and no formal decisions or resolutions are taken at Board workshops.⁹²

47. Prior to the workshop, the ICANN Board received a privileged Board briefing setting forth the relevant background and the intended course of action.⁹³ At the workshop, ICANN legal counsel was present and provided legal advice to the Board. In order to avoid a waiver of the privilege, ICANN will not disclose the substance of that advice, but ICANN can disclose that ICANN staff presented the history of price control provisions in various gTLD contracts, how the concept of price controls was considered by the community during the development of the Base Registry Agreement for the New gTLD Program, and the rationale for transitioning to the Base Registry Agreement.⁹⁴

48. The Board had every opportunity to intervene with the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement if the Board disagreed with the approach.⁹⁵ Or the Board could have decided to take up the issue at an ICANN Board meeting. But the Board did not intervene and did not issue any formal decision or resolution on this issue, as the Board was supportive of ICANN staff's proposed transition.⁹⁶ Therefore, following the briefing, ICANN staff proceeded with the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, following the trend of other legacy gTLDs and new gTLDs, and consistent with the negotiations between ICANN staff and the respective registry operators.⁹⁷

⁹¹ Botterman Witness Stmt., ¶ 16–17, Burr Witness Stmt., ¶¶ 21–24.

⁹² Botterman Witness Stmt., ¶ 16–17, Burr Witness Stmt., ¶¶ 21–24.

⁹³ Botterman Witness Stmt., ¶ 19; RE-8; Annex 105.

⁹⁴ Botterman Witness Stmt., ¶ 19–22; RE-8; Annex 105.

⁹⁵ Botterman Witness Stmt., ¶ 23.

⁹⁶ *Id.*

⁹⁷ RE-8; Weinstein Witness Stmt., ¶ 18.

49. Before executing the 2019 Registry Agreements, ICANN staff opened a public comment period seeking input from the Internet community on the proposed 2019 Registry Agreements.⁹⁸ On the public comment page, ICANN staff published the proposed registry agreement and addendum separately for each gTLD (.BIZ, .INFO, and .ORG), along with a redline of the proposed registry agreement compared to the Base Registry Agreement.⁹⁹ ICANN staff specifically identified for the Internet community the provisions in the proposed 2019 Registry Agreements that were materially different from the 2013 Registry Agreements, including provisions regarding: (i) approved services; (ii) protection of the legal rights of third parties and minimum requirements for rights protection mechanisms; (iii) public interest commitments; (iv) pricing for domain name registrations and registry services; and (v) fees to be paid to ICANN.¹⁰⁰ As to the pricing for domain name registrations, ICANN staff further explained:

Pricing for Domain Name Registrations and Registry Services (Section 2.10 of the .biz[, .info, and .org] renewal agreement[s]): In alignment with the base registry agreement, the price cap provisions in the current .biz[, .info, and .org] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .biz[, .info, and .org] renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .biz[, .info, and .org] renewal agreement[s] to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.¹⁰¹

⁹⁸ Weinstein Witness Stmt., ¶ 19; Botterman Witness Stmt., ¶ 24; Annex 105.

⁹⁹ Proposed Renewal of .ORG Registry Agreement (18 March 2019), Annex 2; Proposed Renewal of .INFO Registry Agreement (18 March 2019), Annex 3; Proposed Renewal of .BIZ Registry Agreement (3 April 2019), Annex 4.

¹⁰⁰ Annexes 2–4.

¹⁰¹ Annexes 2–4.

50. ICANN also disclosed to the Internet community the next steps in the process: “Following review of the public comments received, ICANN will prepare and publish a summary and analysis of the comments received.”¹⁰²

51. ICANN staff received a number of public comments and fully considered the substance of those comments; it also internally summarized the comments received, including the areas of concern expressed through the public comments.¹⁰³ Many comments advocated for including price control provisions in the .BIZ, .INFO, and .ORG renewed registry agreements, while others favored the transition to the Base Registry Agreement without such price control provisions.¹⁰⁴ Many of the comments disfavoring removal of the price control provisions, however, appeared to be form or template comments.¹⁰⁵ Indeed, the Internet Commerce Association (“ICA”) established a template on its website that registrants could use to submit public comments to ICANN. Registrants could click a few buttons and a public comment would be generated and sent to ICANN:¹⁰⁶

¹⁰² Annexes 2–4.

¹⁰³ See generally ICANN-NC-016431, Ex. R-39; ICANN-NC-016436, Ex. R-40; ICANN-NC-016357, Ex. R-41; Annex 82; Annexes 5–7; Weinstein Witness Stmt., ¶ 20.

¹⁰⁴ Annex 5, p. 6 (moving to “market-based pricing makes sense with today’s healthy TLD market, which is populated with many choices for consumers to choose from”); Weinstein Witness Stmt., ¶ 21.

¹⁰⁵ Weinstein Witness Stmt., ¶ 21.

¹⁰⁶ Internet Commerce Association, Comment Submission for .ORG Registry Renewal Agreement, Ex. R-42.

TIME IS RUNNING OUT! COMMENT BY APRIL 29TH...

ICANN is currently accepting comments on the proposed renewal of the .ORG Registry Agreement with Public Interest Registry (PIR).

This form will create an email in your default mail program. If you do not have one set up, you can simply copy and paste the below into a new email sent using this form will NOT be or appear to be from or by the ICA – it will be an email sent by you from your usual mail application.

You can edit your comment as you wish before you send it in.

STEP 1: IDENTIFY YOURSELF

- I am a .org registrant.
- I am a .org registrant (not-for-profit).
- I am a .org registrant (non-profit).
- I am a domain name registrant.

STEP 2: SELECT YOUR OPINIONS

- I oppose the incorporation of the URS into the .org renewal agreement.
- Legacy domain name extensions should not be treated the same as new gTLDs.
- Removing price caps on .org is a bad idea.
- ICANN should be looking out for the .org registrants, in particular the non-profits.

STEP 3: SUBMIT YOUR COMMENT

Version: A B C D

To

comments-org-renewal-18mar19@icann.org

Subject

Proposed Renewal of .org Registry Agreement

Body

ICANN does not seem to recognize the difference between a legacy extension created with the support of the US government, that predates the existence of ICANN and that has millions of e users and the brand new extensions that started off with a new set of rules, in particular no price controls, and no existing registrants. They have completely different characteristics, history, a ownership structure. It is not acceptable for ICANN to ignore these differences and to propose that they be treated the same.

Removing price caps is not fair to .org domain owners. Many of them have websites that they have used for years. If price caps are removed, the cost to renew their domain names may beco expensive, and they could be forced to give up websites that are important to them.

The Uniform Rapid Suspension policy is too new and untested to apply on domain names that may be 20 years old or more. With the URS, the domain names could be taken down in a matte with little notice.

This explains why hundreds (if not thousands) of the public comments were nearly identical.

Even ICANN’s Ombudsman recognized that many of the public comments “seem clearly to be computer generated,” and equated them to “spam.”¹⁰⁷

52. ICANN considered the public comments, and then drafted and published a Staff Report of Public Comment Proceeding for each gTLD (collectively, the “Reports”). The Reports set forth an analysis of the public comments, the next steps to be followed, and the basis for

¹⁰⁷ RE-13, p. 3.

transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.¹⁰⁸ As to the price control provisions, ICANN staff explained:

There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price cap provisions in the .biz[, .info, and .org] Registry Agreement[s] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.

Aligning with the Base gTLD Registry Agreement would also afford protections to existing registrants. The registry operator must provide six months' notice to registrars for price changes and enable registrants to renew for up to 10 years prior to the change taking effect, thus enabling a registrant to lock in current prices for up to 10 years in advance of a pricing change. Enacting this change will not only allow the .biz[, .info, and .org] renewal agreement[s] to conform to the Base gTLD Registry Agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base gTLD Registry Agreement.¹⁰⁹

53. As always, ICANN staff committed to “consider the feedback from the community on this issue” and, “in consultation with the ICANN Board of Directors, [to] make a decision regarding the proposed registry agreement,” which it did.¹¹⁰

54. In June 2019, the ICANN Board had another Board workshop during which ICANN staff briefed the Board again regarding the status of the negotiations and the results of the public comment process.¹¹¹ As it did with the January 2019 Board workshop, prior to the

¹⁰⁸ See generally, Annexes 5–7.

¹⁰⁹ Annex 5, p. 8; Annex 7, pp. 6-7; Annex 6, p. 7.

¹¹⁰ Annex 5, pp. 1, 8; Annex 7, pp. 1, 7; Annex 6, pp. 1, 7.

¹¹¹ Botterman Witness Stmt., ¶ 25–26, Weinstein Witness Stmt., ¶¶ 23–24; RE-8; Annex 105. This workshop likewise comprises a privileged session, so ICANN is limited in what information it can disclose, and will not disclose any information protected by the attorney-client privilege.

June 2019 workshop, ICANN staff prepared privileged briefings setting forth staff’s proposed plan and underlying analysis.¹¹² The Board was kept fully apprised of the status of the negotiations and the rationale for transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement and was supportive of the transition after each Board workshop. The Board did not, and did not have to, issue any formal approval, decision, or resolution on this topic because ICANN staff had the authority to conclude the process.¹¹³ And there is no reason to believe that a Board resolution would have been any different; the Board discussed the issue with staff, had every opportunity to intervene, saw no need to intervene or suggest a different approach and, in fact, agreed with the approach.

55. Following that June 2019 briefing, ICANN staff proceeded with the 2019 Registry Agreements as proposed.¹¹⁴ Executed on 30 June 2019, the 2019 Registry Agreements mirror substantially the Base Registry Agreement, and include the same price and non-price related protections afforded by that agreement.

VIII. NAMECHEAP’S RECONSIDERATION REQUEST AND IRP REQUEST.

56. On 12 July 2019, Namecheap submitted a Reconsideration Request seeking review of ICANN’s decision not to include price control provisions in the 2019 .ORG and .INFO Registry Agreements (“Reconsideration Request 19-2”).¹¹⁵ Namecheap was explicit that Reconsideration Request 19-2 sought reconsideration of ICANN’s decision as to the .INFO and .ORG registry agreements only. In the section titled “Description of specific action you are seeking to have reconsidered,” Namecheap stated, “On 30 June 2019, ICANN org renewed the

¹¹² Botterman Witness Stmt., ¶ 25.

¹¹³ Botterman Witness Stmt., ¶¶ 26–27, Weinstein Witness Stmt., ¶¶ 24–25; RE-8; Annex 105.

¹¹⁴ Weinstein Witness Stmt., ¶ 25; Annex 105.

¹¹⁵ A Reconsideration Request is an accountability mechanism established by ICANN’s Bylaws by which “any person or entity materially affected by an action or inaction” of the ICANN Board or ICANN staff may request reconsideration of that action or inaction. Bylaws, Art. 4, § 4.2(a).

registry agreement *for the .org and .info TLD* without the historic price caps”¹¹⁶

Namecheap then cited to the public links for the .INFO and .ORG registry agreements only.¹¹⁷

57. On 21 November 2019, the ICANN Board denied Reconsideration Request 19-2 because Namecheap failed to establish that ICANN violated its Articles or Bylaws when it decided not to include price controls in the 2019 .INFO and .ORG Registry Agreements.¹¹⁸ Namecheap initiated this IRP on 25 February 2020 challenging ICANN’s decision to transition not only the .INFO and .ORG Registry Agreements, but also the .BIZ Registry Agreement, to the Base Registry Agreement, which did not contain any price control provisions.

STANDARD OF REVIEW

58. The scope of this Panel’s jurisdiction, and the standard of review governing this IRP, should not be controversial. They are set forth expressly in Article 4, section 4.3 of ICANN’s Bylaws and Rule 11 of the Interim Supplementary Procedures (which are substantially identical). As to the scope of the IRP, an IRP Panel is asked only to evaluate whether an ICANN action or inaction was consistent with ICANN’s Articles and Bylaws.¹¹⁹

59. The standard of review is equally explicit. Section 4.3(i) states:

¹¹⁶ Annex 8, p. 2 (emphasis added). Namecheap also confirmed that it submitted Reconsideration Request 19-2, not on its own behalf, but “to protect the rights and interests of Namecheap’s customers and the entire internet community.” Annex 8, p. 3.

¹¹⁷ Annex 8, p. 2.

¹¹⁸ Final Determination of the ICANN Board of Directors Reconsideration Request 19-2 (21 November 2019), Annex 11.

¹¹⁹ Bylaws, Art. 4, § 4.3(b)(ii) (defining Covered Actions as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”); *id.* at Art. 4, § 4.3(b)(iii) (defining a Dispute as “[c]laims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws”). Namecheap recycles its claim that violation of ICANN’s “secondary rules created by ICANN, such as the DNSO and GNSO policies and commitments ICANN made to the benefit of the Internet community as a whole” can form the basis of an IRP. Namecheap’s Pre-Hearing Brief, ¶ 205. Namecheap is wrong. The GNSO’s (and its precursor, the DNSO) recommendations are not ICANN “policies and procedures” within the scope of an IRP. Instead, the scope of an IRP is limited to determining whether ICANN has complied with its Articles and Bylaws, not whether ICANN has complied with recommendations from its supporting organizations.

Each IRP PANEL shall conduct an objective, de novo examination of the Dispute.

- (i) With respect to Covered Actions the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.
- (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- (iii) For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment. . . .¹²⁰

60. Article 4, section 4.3(i) and Rule 11 establish a general *de novo* standard of review and require the Panel to make findings of fact to determine whether any Covered Action violated the Articles or Bylaws. Article 4, section 4.3(i)(iii) also creates a carve-out from that general standard for claims arising from the Board’s exercise of its fiduciary duties. In that case, the IRP Panel reviews the Board’s conduct only to determine whether it was “within the realm of reasonable business judgment.”¹²¹ Thus, the Panel applies a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual Directors, Officers or Staff members, but the Panel reviews actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment.

61. Namecheap discounts the deference to the Board’s business judgment mandated by Article 4, section 4.3(i)(iii). Specifically, Namecheap asserts that prior IRP decisions have rejected any such deference, relying in part on the IRP Panel’s decision in the *ICM Registry, LLC*

¹²⁰ Subsections (iv) and (v) of Section 4.3(i) concern IRPs involving claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, and therefore are not relevant here.

¹²¹ Bylaws, Art. 4, § 4.3(i)(iii).

v. ICANN IRP, dated 19 February 2010.¹²² The Panel in that IRP declined to apply the business judgment rule after finding that the “Articles and Bylaws . . . do not specify or imply that the International Review Process [*sic*] provided for shall (or shall not) accord deference to the decisions of the ICANN Board.”¹²³ But that finding has no relevance here because it was made under a previous version of ICANN’s Bylaws, which have been amended more than a dozen times in the interim. The version of ICANN’s Bylaws that was operative at the time of the *ICM* decision did not have any provision analogous to the current Article 4.3(i)(iii), which expressly mandates that the Panel defer to the Board’s reasonable business judgment.

62. Similarly, each of the prior IRP Panel decisions on which Namecheap relies were decided under an earlier version of the Bylaws with a different standard of review.¹²⁴ The Bylaws were amended in October 2016 and now memorialize a specific standard of review, which is the same as the current standard set forth above. The first IRP Panel to consider Board conduct under this standard of review acknowledged the applicability of the business judgment rule as follows: “the Parties agree that, to the extent the Panel finds that the business judgment rule as it may have been incorporated in Section 4.3(i)(iii) of the Bylaws has any application in the present case, it refers to a ‘judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.’”¹²⁵

63. Although the Bylaws and Interim Supplementary Procedures do not define “reasonable business judgment,” that term has a well-established legal meaning. Every United States jurisdiction, including California, recognizes the “business judgment rule,” which

¹²² Namecheap’s Pre-Hearing Brief, ¶ 256.

¹²³ *ICM Registry, LLC v. ICANN*, Final Declaration ¶ 136 (19 February 2010), RM 3.

¹²⁴ See RM 176, ¶ 92; RM 170, ¶ 111; RM 165, ¶ 68; RM 171, ¶ 122; see also *id.*, ¶ 124 (“The Panel agrees with ICANN’s statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”); RM 172, ¶ 16; RM 173, ¶ 64; RM 174, ¶ 126; RM 175, ¶ 104.

¹²⁵ *Afilias v. ICANN* IRP, Corrected Final Decision ¶ 288 (15 July 2021), Ex. R-43.

provides a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”¹²⁶ Article 4.3(i)(iii) is expressed in terms strikingly similar to those used by the California Supreme Court to describe the business judgment rule.¹²⁷

64. In sum, the Panel must apply the standard of review set out in Article 4, section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures. Under those provisions, the Panel applies a *de novo* standard in making findings of fact and determining whether actions or inactions by ICANN’s officers or staff violated the Bylaws or Articles. The Panel must, however, apply a more limited review to actions or inactions of ICANN’s Board, which can be disturbed only if they are outside the realm of reasonable business judgment.

ARGUMENT

I. NAMECHEAP’S FAILURE TO PRODUCE ANY EVIDENCE OF HARM ALLEGEDLY CAUSED BY ICANN ACTIONS CONFIRMS THAT NAMECHEAP DOES NOT QUALIFY AS A “CLAIMANT” WITH STANDING TO PURSUE THIS IRP.

65. Under the Bylaws, which were developed with the Internet community, only a “Claimant” may institute an IRP.¹²⁸ The Bylaws define “Claimant” as a person or entity “that has been materially affected by a Dispute,” meaning that it “must suffer an injury or harm that is

¹²⁶ *Lee v. Interinsurance Exch., of the Auto. Club of S. Cal.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)), RLA-5. The California Supreme Court has noted “that rule of judicial deference to corporate decision making ‘exists in one form or another in every American jurisdiction.’” *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass’n*, 42 Cal. 3d 490, 507 n.14 (1986)), RLA-4.

¹²⁷ Compare Bylaws, Art. 4, § 4.3(i)(iii) (stating that the Panel “shall not replace the Board’s reasonable judgment with its own”) with, e.g., *Lamden*, 21 Cal. 4th at 257 (“a court will not substitute its judgment for that of the corporation’s board of directors.”), RLA-4.

¹²⁸ *Id.*, Art. 4, § 4.3(b).

directly and causally connected to the alleged violation.”¹²⁹ The IRP Panel is authorized to “[s]ummarily dismiss Disputes that are brought without standing[.]”¹³⁰

66. In the almost two years since this IRP has been pending, and in the over two and a half years since the execution of the 2019 Registry Agreements, Namecheap has failed to produce a single piece of evidence of past harm, current harm, or “likely” future harm. Instead, Namecheap relies on expert reports that do not consider any Namecheap purchase or sales data and clings to this Panel’s ruling on ICANN’s motion to dismiss, which was decided pursuant to a much lower standard than is required now at the merits phase. Namecheap’s failure to come forward with evidence of harm – through internal documents or data or reliable expert analysis or anything concrete – compels the conclusion that Namecheap has not been, and is unlikely to be, harmed by ICANN’s conduct and does not qualify as a proper Claimant.¹³¹

A. This Panel’s Procedural Order Is Not Dispositive Of Whether Namecheap Qualifies As A Claimant.

67. Namecheap relies on this Panel’s Procedural Order on ICANN’s motion to dismiss this IRP. But the Procedural Order was issued at a much earlier phase in the IRP and considered only whether Namecheap had made out a *prima facie* case for standing. Importantly, the Panel did *not* consider whether Namecheap had actually provided credible evidence that it has standing to pursue this IRP:

ICANN’s critiques go to the weight of Namecheap’s evidence, but the Panel need not (and is not in a position to) make findings at this stage of the proceeding whether Namecheap’s factual allegations are well-founded or true. The Panel simply finds that they are

¹²⁹ *Id.*, Art. 4, § 4.3(b)(i).

¹³⁰ *Id.*, Art. 4, § 4.3(o)(i); Interim Supplementary Procedures, Rule 9, RE-1.

¹³¹ In fact, in its Reconsideration Request 19-2, Namecheap conceded that it “is submitting this reconsideration request to protect the rights and interests of *Namecheap’s customers* and the entire internet community,” not on its own behalf. Annex 8, p. 3 (emphasis added).

sufficient to make out a *prima facie* case for standing such that the case may proceed.¹³²

68. The Procedural Order thus evaluated Namecheap's claims under a lower threshold of whether Namecheap stated a claim of harm, and not the higher standard at the merits phase of whether Namecheap actually has been, or is likely to be, harmed. In the ten months since the Panel issued its Procedural Order, however, Namecheap has not produced a single piece of evidence demonstrating that it has been or is likely to be harmed, as discussed below.

B. Namecheap Has Not Produced Any Evidence Demonstrating Harm.

69. Namecheap has had multiple opportunities throughout this IRP to produce actual evidence that it has been, or is likely to be, harmed. Namecheap's inability (and in some cases refusal) to prove its harm means that Namecheap's theory of harm is just that – an unsupported and speculative theory.

70. Over a year ago, in December 2020, Namecheap made an evidentiary submission setting forth how it purportedly had been harmed by ICANN's conduct, as requested by the Panel. Namecheap submitted an affidavit from Maryna Zhuravlova, Namecheap's Head of Marketing, and an affidavit from Hillan Klein, Namecheap's Chief Operating Officer.¹³³ Notably, the affidavits did not provide evidence of harm to Namecheap, which is likely why neither Ms. Zhuralova nor Mr. Klein submitted a witness statement in support of Namecheap's Pre-Hearing Brief.¹³⁴

71. Ms. Zhuralova's affidavit merely offers the opinion that "moving a website from one TLD to another is a complicated and 'painful' procedure for Search Engine Optimization

¹³² Procedural Order No. 8, ¶ 48.

¹³³ See generally, Klein Affidavit; Zhuravlova Affidavit.

¹³⁴ In fact, Namecheap did not submit a single witness statement with its Pre-Hearing Brief.

(SEO).”¹³⁵ This opinion, however, is irrelevant to the issue of harm to Namecheap because any such “pain” would be felt by domain name registrants, not registrars like Namecheap.

72. In his affidavit, Mr. Klein claimed that Namecheap’s business intelligence team performed an analysis projecting “a decline in domain name registration, renewal and other revenue for Namecheap as a result of the removal of the price control provisions.”¹³⁶ Mr. Klein also claimed that he instructed his team to provide that analysis to Namecheap’s economists for use in this IRP.¹³⁷ Yet, Mr. Klein did not disclose the details of this analysis, Namecheap did not annex that analysis to its evidentiary submission, and Namecheap’s economists do not claim to have reviewed or relied upon any such analysis.

73. Moreover, Namecheap refused to produce this purported analysis in discovery, even though it is clearly relevant to this IRP to the extent it exists and is reliable. The Panel required Namecheap to produce “[a]ll documents or communications referring to or reflecting the alleged harm Namecheap has suffered or will suffer as a result of removal of the price control provisions in the [.BIZ, .INFO, and .ORG] Registry Agreements.”¹³⁸ Namecheap refused, claiming that any responsive documents were protected by the attorney-client privilege or work product doctrine.¹³⁹ The analysis referenced in the Klein Affidavit, however, almost certainly would be responsive to ICANN’s request. Yet, Namecheap has never produced the analysis or included it on its privilege log. Thus, either Namecheap’s privilege log is incomplete, or the analysis referred to in Mr. Klein’s affidavit, to the extent it exists, does not actually show that

¹³⁵ Zhuravlova Affidavit, ¶ 4.

¹³⁶ Klein Affidavit, ¶ 5.

¹³⁷ *Id.*

¹³⁸ Procedural Order No. 5, at Appendix A, ICANN’s Request No. 1.

¹³⁹ 18 August 2021 Letter from F. Petillion to J. LeVee, Ex. R-23. Namecheap also claimed that its production “contains documents showing Namecheap’s efforts in responding to customer anxiety because of ICANN’s decision to remove the price control provisions,” but it is unclear how any such documents equate to harm to Namecheap.

Namecheap has been, or is likely to be, harmed. Either way, without the purported analysis being in evidence, it cannot be considered.

74. Namecheap also did not produce—and apparently did not provide its experts with—any sort of financial projection, profit and loss statement, strategy plan for addressing the absence of the price control provisions, or any other ordinary course document that would identify Namecheap’s supposed harm. This dearth of evidence should be outcome-determinative: Numerous gTLDs have, over the past several years, increased their prices; if Namecheap had suffered a material harm as a result, Namecheap should have been able to demonstrate that harm, which might suggest that price increases in .BIZ, .INFO, and .ORG would yield similar harm. In fact, renewal prices in .BIZ and .INFO have increased since the filing of this IRP,¹⁴⁰ but Namecheap has not produced any evidence of harm to its business due to these price increases. Given the absence of any documents or data establishing that Namecheap has been, or will be, harmed from the removal of price controls applicable to .BIZ, .INFO, and .ORG, the Panel should find that no such harm exists and that Namecheap is not a proper Claimant in this IRP.

75. Finally, the purported expert analysis in the second expert report by Drs. Verboven and Langus (“Expert Report II”) does not bridge the evidentiary gap on the issue of harm to Namecheap. Namecheap and its experts confirm that the only new evidence the experts considered in Expert Report II is “the characteristics of demand for registrations in .ORG, .INFO, .BIZ and in other TLDs, and indicators of market power.”¹⁴¹ Of critical importance, however, is the fact that Namecheap’s experts did not analyze Namecheap’s cost

¹⁴⁰ Expert Report of Dennis W. Carlton, Ph.D. (“Carlton Expert Report”), ¶¶ 24.

¹⁴¹ Namecheap’s Pre-Hearing Brief, ¶ 272; Expert Report II, ¶ 273.

data or financial projections or conduct any new quantitative analysis. For example, Namecheap's experts did not analyze Namecheap's historical cost data to determine whether Namecheap has been unable to pass through previous price increases without losing customers. This omission is telling. [REDACTED - Confidential Information]

[REDACTED]

[REDACTED]

[REDACTED].¹⁴²

76. Namecheap claims that Expert Report II also establishes an additional harm to Namecheap, namely harm to “the profits that registrars make by providing value-added services.”¹⁴³ Again, however, neither Namecheap nor its experts actually explain how or if the purported harm is likely, or how it results directly and causally from ICANN's conduct, as required by the Bylaws. They also do not provide any actual evidence of this supposed harm, meaning that this argument is yet another unsupported speculative theory.

77. In short, Namecheap has not met its burden of providing actual evidence that it has been, or is likely to be, harmed by ICANN's conduct, despite ample opportunity at multiple different procedural phases of this IRP over the past two and a half years. And, as discussed more fully below, the fabricated theory of some “supposed future harm” presented by Namecheap's experts is easily refuted, which Dr. Carlton has done convincingly.

C. Namecheap's Experts' Theory Of Future Harm Is Unsupported And Unsupportable.

¹⁴² Carlton Expert Report, ¶¶ 22–27.

¹⁴³ Namecheap's Pre-Hearing Brief, ¶ 273 (citing to Expert Report II, ¶ 226).

78. The Expert Report of Dr. Dennis Carlton (“Carlton Expert Report”) and Namecheap’s own data demonstrate that Namecheap’s experts’ theory of supposed future harm is unfounded and unlikely.

1. **Economic theory** [Redacted - Confidential Information] **establish that Namecheap can and does pass through wholesale registry price increases to its customers.**

79. Even if the potential for future harm can constitute harm sufficient to confer standing, which ICANN still disputes, robust economic theory [Redacted - Confidential Information] refute that any such future harm is likely.

80. As Dr. Carlton explains, rational economic theory predicts that if wholesale registry prices increased, Namecheap would pass on any price increases to its customers. Namecheap is one of nearly 2,500 ICANN-accredited registrars that offer domain names to registrants, and one of hundreds of ICANN-accredited registrars that offer domain names specifically in .BIZ, .INFO, and .ORG.¹⁴⁴ Namecheap thus competes against many other registrars that have exactly the same access to same registries, such as .BIZ, .INFO, and .ORG, as does Namecheap, which all pay the same wholesale price for these registry inputs. [Redacted]

[Redacted - Confidential Information]

[Redacted].¹⁴⁵ Given the hundreds of registrar competitors (each facing the same registry prices from the .BIZ, .INFO, and .ORG registry operators), economic theory predicts that Namecheap and other such registrars do not have significant market power.¹⁴⁶ Without market power, registrars like

¹⁴⁴ Carlton Expert Report, ¶ 18.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, ¶ 19.

Namecheap do not earn supra-competitive margins and cannot absorb higher input costs.¹⁴⁷ As a result, economic theory, as well as common sense, predicts that Namecheap and other competing registrars must pass on higher registry wholesale prices by raising prices to registrants, with little or no resulting harm to Namecheap.¹⁴⁸

81. Unlike Namecheap’s experts, Dr. Carlton then examined Namecheap’s historical pricing data produced in this IRP to determine whether his predictions based on economic theory in competitive markets were correct. Redacted - Confidential Information

[REDACTED]

[REDACTED]¹⁴⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵⁰

82. Namecheap’s own statements to its customers confirm Dr. Carlton’s findings:

Redacted - Confidential Information

151

83. Critically, Namecheap’s experts do not even mention—let alone analyze—Namecheap’s historical cost data. Yet, they still opine, without explanation or support, that Namecheap cannot pass through price increases without losing customers.¹⁵² Frankly, it is

¹⁴⁷ *Id.*, ¶ 17.

¹⁴⁸ *Id.*, ¶¶ 17–21.

¹⁴⁹ *Id.*, ¶¶ 22–27.

¹⁵⁰ *Id.*, ¶ 27.

¹⁵¹ Namecheap000165, Ex. R-44; *see also* “Introducing .COM, .ORG, .NET, .BIZ, & .CO Domains” (“If they choose to increase their prices, then registrars will need to do so as well.”), Ex. R-45.

¹⁵² Expert Report II, ¶ 221.

irresponsible of Namecheap's experts to proffer such an opinion without analyzing Namecheap's historical cost data. [Redacted - Confidential Information]

2. **Namecheap is unlikely to lose any customers as a result of potential price increases.**

84. Namecheap's experts conclude that if Namecheap passes on registry price increases to customers, it *may* lose customers as a result. Importantly, they do not perform any quantitative analysis in support of this conclusion, and Dr. Carlton, who did perform a quantitative analysis, opines otherwise.

85. As Dr. Carlton explains, even if Namecheap passes through price increases to its customers for .BIZ, .INFO, or .ORG registrations, the impact on overall registrant demand is likely to be minimal (if at all).¹⁵³ Namecheap concedes as much based on its public advisement to registrants that it may be worth paying a premium to register a domain name in a given TLD:

Let's say the domain name you really want costs \$50 per year, but you could settle for a second choice that's only \$10. You'd be wise to think twice before passing on the more expensive one just to save a few bucks. Your domain name is your brand. It's your identity on the web, your calling card, the web address you'll give to your customers and friends. Something this crucial to your online presence is not something to skimp on. So even though your first choice is more expensive, it may be worth the price.¹⁵⁴

86. Moreover, Dr. Carlton explains that, even if some registrants decided to no longer register their domain names in either the .BIZ, .INFO, or .ORG gTLDs as a result of higher prices from Namecheap, that does not mean that Namecheap will lose the business of these registrants, as Drs. Verboven and Langus seem to suggest. Rather, many of these registrants, if

¹⁵³ Carlton Expert Report ¶¶ 28–39.

¹⁵⁴ "Why Do Some Domain Extensions Cost More?", Ex. R-46.

faced with higher pricing from .BIZ, .INFO, or .ORG, could choose to switch to other registries that Namecheap offers, meaning that Namecheap would still serve these registrants. [REDACTED]

[REDACTED] Redacted - Confidential Information [REDACTED]

[REDACTED] As. Dr. Carlton opines, [REDACTED]

[REDACTED] 155

87. Therefore, even if “theoretical” future harm or the possibility of future harm were sufficient to qualify as a Claimant, which ICANN disputes, Namecheap has not even been able to meet that low threshold. Now that Namecheap has had *more than two full years* to attempt to qualify as a “Claimant,” ICANN urges the Panel to dismiss this IRP now as no additional evidence could be presented at the hearing that would salvage Namecheap’s lack of standing.

II. THE ICANN BOARD FULLY COMPLIED WITH ICANN’S ARTICLES AND BYLAWS IN CONNECTION WITH THE 2019 REGISTRY AGREEMENTS.

88. Namecheap claims that ICANN violated its Articles and Bylaws by organizing “secret Board meetings” regarding the Board’s so-called “decision” to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.¹⁵⁶ Namecheap’s argument, however, is uninformed and baseless. The Board did not, and could not have, violated any Articles or Bylaws provision regarding the 2019 Registry Agreements because the Board did not make the renewal decision. Instead, the Board appropriately delegated that authority to ICANN staff, which ultimately made the decision. Nonetheless, the Board was fully informed of ICANN staff’s decision and rationale for doing so, and was supportive of staff’s proposed course of action.

¹⁵⁵ Carlton Expert Report, ¶¶ 29–33.

¹⁵⁶ Namecheap’s Pre-Hearing Brief, pp. 90–99.

A. The ICANN Board Appropriately Delegated Negotiations Of Registry Agreements To ICANN Staff, A Decision That Is Protected By The Business Judgment Rule.

89. The ICANN Board did not, and was not required to, make any “decision” or issue any formal resolution regarding the 2019 Registry Agreements because the Board had appropriately delegated that responsibility to ICANN’s CEO and ICANN staff. While the Board maintains ultimate oversight over ICANN’s operations, the ICANN Board has delegated the authority to the ICANN organization to enter into contract negotiations, not just with registry operators but with registrars and numerous other third parties.¹⁵⁷ Indeed, ICANN staff has entered into thousands of agreements, renewals, amendments, and addendums with third parties.¹⁵⁸ That delegated authority was memorialized in November 2016 when the ICANN Board adopted ICANN’s Delegation of Authority Guidelines (“Guidelines”).¹⁵⁹

90. As the ICANN Board and staff have stated, these Guidelines encompass “decision-making duties regarding contracts,” which includes renewal of registry agreements.¹⁶⁰ As one ICANN staff member explained in response to a question as to why the ICANN Board did not adopt a resolution to approve the 2019 Registry Agreements, “The Org continues to review and refine its practices for effectiveness, and in consultation with the Board it was agreed that renewal of TLDs is within the Org’s delegation of authority.”¹⁶¹

91. Occasionally, after ICANN staff negotiates with registry operators regarding renewal of the registry agreements, the ICANN Board considers the proposed renewal at an

¹⁵⁷ Botterman Witness Stmt., ¶ 11; Burr Witness Stmt., ¶¶ 26, 30.

¹⁵⁸ Weinstein Witness Stmt., ¶ 10.

¹⁵⁹ Ex. R-36; Ex. R-37.

¹⁶⁰ Ex. R-34 (“The Board agreed that ICANN’s President and CEO will make a final decision on the proposed Amendment 3 and binding LOI *as decision-making duties regarding contracts fall within the President and CEO’s authority as set forth in the Delegation of Authority Guidelines.*”) (emphasis added); *see also* ICANN-NC-008499, Ex. R-35.

¹⁶¹ Ex. R-35.

ICANN Board meeting and issues a subsequent resolution. But the ICANN Board has done so for very few of the over 1,200 gTLDs in the DNS and does not engage in this practice as a matter of course for registry agreement renewals, amendments, or addendums.¹⁶²

92. ICANN staff made it known to the Internet community that it was responsible for the negotiations of the registry agreements in its Reports: “The proposed [.BIZ, .INFO, and .ORG] Registry Agreement[s] [are] the result of discussion, negotiations and agreement between ICANN org and Public Interest Registry,” Afilias Limited, and Registry Services, LLC, respectively.¹⁶³ Nonetheless, as discussed more fully below, the ICANN Board was kept fully informed about ICANN staff’s proposed course of action and underlying rationale.¹⁶⁴

93. It is entirely reasonable that the Board delegated contract negotiations to ICANN staff, for several reasons. One, as Mr. Botterman and Ms. Burr explain in their witness statements, the ICANN Board is an oversight board that provides direction and advice to ICANN on major policy issues and initiatives, as opposed to a managing or executive board, which makes decisions on an organization’s day-to-day operations.¹⁶⁵

94. Two, there are over 1,200 gTLDs in the DNS, nearly all of which are subject to a registry agreement with ICANN that must be negotiated and renewed at periodic intervals. There are also hundreds, if not thousands, of other agreements that ICANN has entered into with various other third parties in the Internet community. It would be nearly impossible for the Board to complete its other tasks if it were required to negotiate, consider, or issue formal resolutions each time an agreement was negotiated, renewed, or entered into.¹⁶⁶ Moreover,

¹⁶² Botterman Witness Stmt., ¶ 13; Burr Witness Stmt., ¶ 28.

¹⁶³ Annex 5, p. 1; Annex 6, p. 1; Annex 7, p. 1.

¹⁶⁴ Botterman Witness Stmt., ¶¶ 19–30.

¹⁶⁵ *Id.*, ¶ 11; Burr Witness Stmt., ¶¶ 26, 30.

¹⁶⁶ Botterman Witness Stmt., ¶ 14, Burr Witness Stmt., ¶ 29.

delegating to the President and CEO (and other ICANN staff) the responsibility for negotiating and renewing various and multiple agreements 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).¹⁶⁷ Nevertheless, the Board is available as a resource for ICANN staff whenever staff seeks Board consultation.¹⁶⁸

95. Three, this delegation is entirely consistent with the Board's responsibilities under the Bylaws because not a single Bylaws provision requires or even provides for the ICANN Board to enter into contract negotiations or otherwise execute contracts with registry operators. Nor do the Bylaws require the Board to issue formal resolutions regarding registry agreement renewals.

96. Importantly, the Board's long-ago delegation of this authority to ICANN staff clearly arises "out of the Board's exercise of its fiduciary duties," and is "within the realm of reasonable business judgment." Thus, under the Bylaws, the Panel must defer to the Board's reasonable business judgment and cannot replace it with the Panel's own judgment.¹⁶⁹

¹⁶⁷ Botterman Witness Stmt., ¶ 14; Burr Witness Stmt., ¶ 29–30.

¹⁶⁸ Botterman Witness Stmt., ¶ 14; Burr Witness Stmt., ¶ 28. Namecheap's argument that the business judgment rule is inapplicable to the Board's conduct is misplaced. Namecheap claims the Panel cannot apply the rule to the Board's "decision" at its "secret meeting" because there is not enough information about the alleged meeting to demonstrate that the Board's conduct was reasonable. Namecheap's Pre-Hearing Brief, ¶¶ 313–314. As explained above, however, the ICANN Board did not make any such decision regarding the 2019 Registry Agreements and, therefore, ICANN is not arguing that the Panel should defer to such "decision."

¹⁶⁹ Bylaws, Art. 4, § 4.3(i)(iii). To be clear, even if a *de novo* standard of review applied (which it does not), the Board's delegation of authority still complied with the Articles and Bylaws for each of the reasons set forth above.

B. The ICANN Board Was Kept Apprised Of The Status Of The 2019 Registry Agreements, And Did Not Need To Convene An ICANN Board Meeting Under The Bylaws To Consider The Agreements.

97. Namecheap argues that the ICANN Board conducted “secret meetings” regarding the 2019 Registry Agreements in violation of its Articles and Bylaws. Specifically, Namecheap claims that the ICANN Board was required to provide notice and an agenda, take and post minutes, publish a resolution and preliminary report, issue a rationale, and keep a voting record regarding the alleged secret Board meetings where the Board “decided” to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.¹⁷⁰ This is demonstrably false because the ICANN Board did not make any “decision,” as set forth above, the ICANN Board did not convene an ICANN Board meeting on this topic, and the Board was not required to do so.

98. Under ICANN’s Bylaws, the Board conducts three types of Board meetings: annual, regular, and special.¹⁷¹ Annual, regular, and special Board meetings must meet certain requirements set forth in the Bylaws regarding notice of the meeting, agendas, quorums, voting records, the publishing of resolutions reached at the meetings, and issuance of preliminary reports, among others.¹⁷² These requirements apply only to annual, regular, and special Board meetings.

99. The Board also conducts business outside of Board meetings through Board workshops and Board informational calls. These Board workshops and informational calls are not Board meetings under the Bylaws, and therefore are not subject to the same Bylaws requirements. Board workshops and informational calls essentially are working sessions for the

¹⁷⁰ Namecheap’s Pre-Hearing Brief, pp. 90–97.

¹⁷¹ Bylaws, Art. 7, § 7.13, 7.14, and 7.15.

¹⁷² See generally, Bylaws, Art. 7.

ICANN Board, where the Board exchanges information, is briefed on certain topics relevant to ICANN and the Internet community (often by ICANN’s legal counsel), addresses various housekeeping matters, and the like.¹⁷³ These sessions are necessary for the ICANN Board so that it can conduct its work and fulfill its mandate to ICANN. Indeed, if the Board were allowed to have discussions and briefings only at the annual, regular, and special ICANN Board meetings, or if it were required to meet all of the requirements in the Bylaws any time it needed to discuss a topic, it would be extremely difficult for the Board to complete its work.¹⁷⁴

100. Relevant here, the 2019 Registry Agreements were not an agenda item at any annual, regular, or special Board meeting, nor did the Board make any decisions on this topic, because it appropriately had delegated that authority to the ICANN CEO and his staff.¹⁷⁵ As such, ICANN did not violate, and could not have violated, a single Bylaws provision applicable to annual, regular, or special Board meetings.¹⁷⁶

101. Nonetheless, and given its oversight role, the Board was kept informed by ICANN staff regarding the renewals through Board workshops.¹⁷⁷ The Board conducted a Board

¹⁷³ Burr Witness Stmt., ¶¶ 21–24, Botterman Witness Stmt., ¶¶ 16–17.

¹⁷⁴ Burr Witness Stmt., ¶ 23, Botterman Witness Stmt., ¶¶ 16–17.

¹⁷⁵ For this reason, Namecheap’s claims that ICANN may also have violated Article 7, sections 7.6 (prohibiting Board members from voting on the topics for which they have a conflict of interest) and 7.17 (quorum requirements) of its Bylaws are completely baseless. Namecheap’s Pre-Hearing Brief, ¶ 318. There was no vote from which any interested Board member could have abstained and there likewise was no quorum requirement. Equally unsupported (and quite frankly absurd) is Namecheap’s request that the Panel draw an “adverse inference from the fact that ICANN has failed to provide any information that would disprove its violation of” these Bylaws provisions. Namecheap’s Pre-Hearing Brief, ¶ 317. There simply is no such information to provide and absolutely no basis from which to draw an “adverse inference.”

¹⁷⁶ Similarly, even if the California Corporations Code sections Namecheap cites are applicable here (which they are not), ICANN could not have violated them in any event.

¹⁷⁷ Namecheap claims that “Renewal of Legacy contracts gTLDs BIZ ORG and INFO” was put on a Board agenda, yet the record contains no similar agenda for the Board meeting. Namecheap’s Pre-Hearing Brief, ¶ 285. This topic was discussed at a Board workshop, not a Board meeting, meaning no formal agenda would have been posted on ICANN’s website. And any such session description for the Board workshop would not have been produced in this IRP because the description does not relate to modification and/or removal of price control provisions. In any event, other documents in ICANN’s production (as well as publicly available correspondence) identify the specific workshops where these registry agreements were discussed, so Namecheap surely has been aware of these workshops for many months, if not years. *See, e.g.,* RE-8, p. 2 (“During the course of renewal negotiations with the

workshop in January 2019, during which ICANN staff briefed the Board regarding its intention to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, among numerous other topics. The Board received privileged briefings setting forth the relevant background and proposed course of action prior to the workshop. At the workshop, ICANN staff presented the history of price control provisions in various gTLD contracts, 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 transitioning to the Base Registry Agreement was the right approach.¹⁷⁸

102. To be clear, ICANN staff did *not* request formal approval, a resolution, or a decision from the Board regarding the renewals. But the Board did discuss the issue with staff and saw no need to intervene or suggest a different approach.¹⁷⁹ Rather, the Board was supportive of ICANN staff’s plans for a number of reasons, including but not limited to the fact that ICANN had introduced significant competition into the DNS through the New gTLD Program and that ICANN is not a price regulator.¹⁸⁰

103. After the public comment period, the ICANN Board had another scheduled Board workshop in June 2019, in which the Board discussed an array of matters, including the 2019 Registry Agreements. Again, the Board received privileged briefings in advance of the

(continued...)

respective registry operators for .biz, .info and .org, the ICANN org provided a briefing and held a discussion with the ICANN Board at the Board’s workshop in Los Angeles (25-28 January 2019).”; *id.* (“In addition, briefing papers were provided to the Board in advance of its workshop in June 2019 in Marrakech.”).

¹⁷⁸ Botterman Witness Stmt., ¶¶ 18–23; RE-8. ICANN’s in-house legal counsel was present at and provided legal advice to the Board at the Board workshop. ICANN will not disclose the substance of that advice or waive the attorney-client privilege.

¹⁷⁹ Botterman Witness Stmt., ¶ 23; Annex 64 (item for Board workshop states that “Price Caps in legacy gTLD renewals” was an item “for discussion,” not “for resolution”).

¹⁸⁰ Botterman Witness Stmt., ¶¶ 22–23; RE-8.

workshop, and was briefed by ICANN staff regarding the status of the negotiations and the results of the public comment process.¹⁸¹ ICANN staff shared its analysis regarding the public comments and discussed staff’s plan to continue with the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.¹⁸² The Board was supportive of ICANN staff’s plans, but did not issue any formal approval, decision, or resolution on this topic.¹⁸³ Nor did it see any basis to alter ICANN staff’s planned course of action or otherwise usurp its authority, given the diligence staff demonstrated and the sound rationale it presented.¹⁸⁴

104. To the extent Namecheap intends to argue that the Board should have considered the matter at a Board meeting and should have issued a Board resolution (notwithstanding that the delegation of authority to negotiate contracts was well within the Board’s reasonable business judgment), Namecheap’s argument suffers from a critical flaw. The ICANN Board was kept fully informed of ICANN staff’s work regarding the renewals, including its analysis of the public comments and its rationale for transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Based on those briefings in January and June 2019, the ICANN Board supported ICANN staff’s decision.¹⁸⁵ Thus, there is no reason to believe that a Board resolution would have yielded a different result.

105. In sum, because the ICANN Board has appropriately delegated the authority to negotiate and execute contracts (including the 2019 Registry Agreements) to ICANN staff—a decision within the Board’s reasonable business judgment—and because the Board did not

¹⁸¹ Botterman Witness Stmt., ¶¶ 24–25; Weinstein Witness Stmt., ¶¶ 23–24; RE-8. This workshop likewise comprises a privileged session, and ICANN’s limited description of what was discussed does not reveal the legal advice sought from or provided by ICANN counsel and in no way amounts to a waiver of the attorney-client privilege.

¹⁸² Botterman Witness Stmt., ¶ 26; Weinstein Witness Stmt., ¶ 24; RE-8.

¹⁸³ Botterman Witness Stmt., ¶¶ 27–28; Weinstein Witness Stmt., ¶ 24; RE-8.

¹⁸⁴ Botterman Witness Stmt., ¶¶ 27–28; RE-8.

¹⁸⁵ See Botterman Witness Stmt., ¶¶ 18–30; Weinstein Witness Stmt., ¶¶ 23–24; RE-8.

convene an annual, regular, or special meeting or pass any formal resolution regarding the 2019 Registry Agreements, it could not have violated the Bylaws requirements applicable to Board meetings.

III. ICANN FULLY COMPLIED WITH THE ARTICLES AND BYLAWS IN TRANSITIONING THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS TO THE BASE REGISTRY AGREEMENT.

106. ICANN’s Bylaws require ICANN to “operate to the maximum extent feasible in an open and transparent manner” and to “make decisions by applying documented policies consistently, neutrally, objectively, and fairly.”¹⁸⁶ Namecheap has not demonstrated (because it cannot) that ICANN staff did anything other than comply fully with these Bylaws provisions when the .BIZ, .INFO, and .ORG Registry Agreements were transitioned to the Base Registry Agreement. Indeed, the evidence demonstrates that, in accordance with the authority delegated by the Board, ICANN staff conducted a thorough analysis before transitioning these agreements to the Base Registry Agreement, interacted with the Internet community and the ICANN Board about this decision (keeping both fully apprised), and made a reasoned decision that is consistent with the public interest. That Namecheap disagrees with the decision is not a basis to find that ICANN violated its Articles or Bylaws.

A. ICANN Staff Considered Numerous Factors Before Proposing To Transition The .BIZ, .INFO, and .ORG Registry Agreements To The Base Registry Agreement.

107. ICANN considered a variety of factors before transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, each of which demonstrates that doing so furthered the public interest. For instance, as Mr. Weinstein explains, ICANN considered the fact that, unlike the 2013 Registry Agreements, the Base Registry Agreement was

¹⁸⁶ Bylaws, Art. 1, § 1.2(a)(v) and Art. 3, § 3.1.

drafted with the Internet community through ICANN’s bottom-up, multistakeholder process.¹⁸⁷ Importantly, the Base Registry Agreement contains a number of additional safeguards and security and stability requirements that are more robust than the 2013 Registry Agreements.¹⁸⁸ And the 2019 Registry Agreements still offer protection to registrars (and therefore registrants) regarding pricing for initial and renewal domain name registrations, including the ability to lock in prices for up to ten years.¹⁸⁹

108. ICANN staff also considered the maturation of the domain name market since ICANN’s inception, as well as the extremely low estimated combined market share for .BIZ, .INFO, and .ORG. The domain name market has matured from just a handful of gTLDs in the early 2000s—only a few of which were unsponsored and thus fully open for domain name registrations—to over 1,200 gTLDs today, not to mention the hundreds of country code top-level domains (“ccTLDs”). And the .BIZ, .INFO, and .ORG registries collectively account for approximately 5% of the total domains under management in the DNS.¹⁹⁰ The introduction of significant competition into the DNS thus has created a materially different competitive landscape where the number of TLDs, as opposed to price control provisions, are more than likely to constrain registry pricing.

109. Mr. Weinstein also explains that ICANN considered its goal of treating the .BIZ, .INFO, and .ORG registry operators equitably with the operators of new gTLDs and other legacy gTLDs, as well as the fact that ICANN is not a price regulator. Furthermore, transitioning to the Base Registry Agreement would ensure consistency for registries, registrars,

¹⁸⁷ Weinstein Witness Stmt., ¶ 15.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*; RE-7, § 2.10.

¹⁹⁰ Weinstein Witness Stmt., ¶ 15; Annex 105.

and registrants, and provide additional operational efficiencies. ICANN also considered how the concepts of price control and price protection were considered by the community during the development of the Base gTLD Registry Agreement for the New gTLD Program.¹⁹¹

110. Mr. Weinstein explains that ICANN additionally considered that, unlike .COM, there was no mandate from any governmental or regulatory authority regarding pricing for .BIZ, .INFO, and .ORG.¹⁹² And, as discussed more fully below, ICANN staff likewise considered the public comments ICANN received regarding the proposed renewals.

111. All of these factors, as well as the bilateral negotiations with the individual registry operators, led to the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement that was applicable to nearly every other new gTLD and many of the legacy gTLDs in the DNS.¹⁹³

B. ICANN Staff Sought Input From The Internet Community And Kept The Community Apprised Of Its Decision-Making Process And Rationale.

112. ICANN staff also interacted with the Internet community prior to finalizing the 2019 Registry Agreements and kept the community apprised of its process throughout.

Specifically, ICANN staff opened a public comment period for each of the .BIZ, .INFO, and

¹⁹¹ Weinstein Witness Stmt., ¶ 15.

¹⁹² *Id.*

¹⁹³ *Id.*, ¶ 16. Namecheap seems to suggest that because ICANN did not review any “expert advice” in making this decision, it violated its Bylaws. The provision to which Namecheap cites, however, relates to a specific process led by the private sector, referred to as a policy development process or PDP. Bylaws, Art. 1, § 1.2(a)(iv). It does not apply to all decisions ICANN makes on any topic. Namecheap also claims that because certain Board members inquired about whether an economic study as to how the market has changed since the New gTLD Program launched before deciding on Namecheap’s Reconsideration Request 19-2 (i.e., well after ICANN staff executed the 2019 Registry Agreements) is indicative that such an expert analysis was “the right approach to address the way forward.” Namecheap’s Pre-Hearing Brief, ¶ 329. This is a non-sequitur. Regardless of whether the ICANN Board considered (or did not consider) any such report or expert advice in deciding Namecheap’s Reconsideration Request 19-2 in November 2019 does not amount to a violation of the Articles or Bylaws when, in June 2019, ICANN staff and the respective registry operators agreed to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Nor does it detract from the plethora of information that ICANN staff did consider.

.ORG gTLDs whereby anyone, including interested members of the Internet community, could provide comments to ICANN regarding the renewal of each registry agreement.

113. In connection with that process, ICANN staff specifically identified the provisions in the proposed 2019 Registry Agreements that were materially different from the 2013 Registry Agreements, including the price control provisions (among several others).¹⁹⁴ ICANN staff also publicly disclosed the next steps in the process: “Following review of the public comments received, ICANN will prepare and publish a summary and analysis of the comments received. The report will be available for the ICANN Board in its consideration of the proposed .biz[, .info, and .org] renewal agreement[s].”¹⁹⁵

114. ICANN staff received a number of public comments in response, and fully considered the substance of those comments, notwithstanding Namecheap’s arguments to the contrary. ICANN internally summarized the public comments and used that summary to draft the respective Reports that were published on ICANN’s website and made available to the ICANN Board.¹⁹⁶ Although many comments disfavored removing the price control provisions, some of the comments favored the transition to the Base Registry Agreement without price control provisions.¹⁹⁷

115. Namecheap seems to argue that the volume of comments disfavoring the absence of the price control provisions alone required ICANN to maintain these provisions.¹⁹⁸ That argument, however, is meritless for several reasons. First, in taking public comments, ICANN’s

¹⁹⁴ Annexes 2–4.

¹⁹⁵ Annexes 2–4.

¹⁹⁶ Weinstein Witness Stmt., ¶¶ 20–24. *See, e.g.*, Ex. R-39; Ex. R-40; Ex. R-41; Annex 82; Annexes 5–7.

¹⁹⁷ Annex 5, p. 6 (moving to “market-based pricing makes sense with today’s healthy TLD market, which is populated with many choices for consumers to choose from”); Weinstein Witness Stmt., ¶ 21.

¹⁹⁸ Namecheap’s Pre-Hearing Brief, ¶ 376.

purpose is not to conduct a survey and then implement the results of that survey, which seems to be Namecheap’s primary basis for this IRP. ICANN is tasked with considering the public comments, and then making an independent, informed decision, based on its expertise and in the best interests of the Internet community. ICANN is not under a duty to yield to all public comments (which would be nearly impossible) or to side with any one position (whether or not that position might appear to be the “majority” position of the ICANN community). Instead, the Articles and Bylaws require ICANN to make “decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”¹⁹⁹ That is *exactly* what ICANN did here by considering the public comments and coming to a well-reasoned decision.

116. Second, the volume of comments without context is misleading. Many of the public comments ICANN received appeared to be form or template comments. This is likely because Namecheap, along with the ICA, rallied registrants (i.e., Namecheap’s customers) into submitting form public comments to ICANN. Namecheap warned its customers that if registry operators increase prices to Namecheap, Namecheap would in turn raise prices to registrants:

Redacted - Confidential Information

200

117. Namecheap published similar admonitions on its website:

¹⁹⁹ Bylaws Art. 1, §§ 1.1, 1.2(v).

²⁰⁰ Ex. R-44 (italics added); *see also* Namecheap 0001671 (explaining that Namecheap is Redacted - Confidential Information), Ex. R-47; “Standing Up to ICANN to Keep Domain Prices in Check” (“Namecheap immediately encouraged Internet users to submit comments to ICANN in support of keeping the price caps for .org and other legacy TLDs.”), Ex. R-48.

This means that the price for the domain name you've been using for over a decade could shoot up. The registry has to tell the registrar six months in advance, but then they are free to charge whatever they want. Switching domains is hard, *so you will have little option but to pay the higher prices.*²⁰¹

Notably, Namecheap does not advise its customers that Namecheap has the ability to lock in the current price before any potential increase for up to ten years. Thus, Namecheap solicited many comments that were almost certainly ill-informed.

118. In the same article, Namecheap directs its customers to the ICA's website, where the ICA had established a template registrants could use to submit public comments to ICANN. Registrants could click a few buttons and a public comment would be generated and sent to ICANN.²⁰² Thus, hundreds (if not thousands) of the public comments are nearly identical form comments. Indeed, the ICANN Ombudsman recognized that many of the public comments "seem clearly to be computer generated" and equated them to "spam."²⁰³

119. Third, the vast majority of comments were submitted by registrants, not by registrars like Namecheap. Therefore, they do not relate whatsoever to any alleged harm to Namecheap and further support that Namecheap has not been, and will not be, harmed by this decision at all.

120. After ICANN considered the public comments, it drafted and published the Reports for each TLD. The Reports set forth ICANN staff's analysis of the public comments, the next steps it intended to follow, and the basis for transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. ICANN staff explained that transitioning to the Base Registry Agreement furthered its core value of "promot[ing] competition in the

²⁰¹ "Help Keep Domain Prices in Check," Ex. R-49 (emphasis added).

²⁰² Ex. R-42.

²⁰³ See RE-13, p. 3.

registration of domain names[.]”²⁰⁴ ICANN also explained that the Base Registry Agreement “lays the framework for consistency for registries, registrars, and registrants,” and “afford[s] protections to existing registrants” that are not present in the 2013 Registry Agreements.²⁰⁵ In the Reports, ICANN committed to consider “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement[s],” which it did.²⁰⁶

121. Therefore, Namecheap’s claim that “there is no record of any analysis that was made”²⁰⁷ simply is not credible. ICANN staff clearly complied with the Bylaws provisions requiring ICANN to “operate to the maximum extent feasible in an open and transparent manner” and to “make decisions by applying documented policies consistently, neutrally, objectively, and fairly.”²⁰⁸

C. ICANN Staff Briefed The Board On Two Separate Occasions.

122. Finally, as set forth above, ICANN staff briefed the ICANN Board both before and after the public comment process. After each briefing, the ICANN Board was supportive of staff’s decision and did not suggest an alternative course of action.²⁰⁹

123. In sum, each of these factors and outreach efforts led to ICANN staff’s reasoned decision to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, an agreement that was developed with significant community input and contains additional protections for the Internet community.²¹⁰

²⁰⁴ Annex 5, p. 8; Annex 6, p. 7; Annex 7, p. 7.

²⁰⁵ Annex 5, p. 8; Annex 6, p. 7; Annex 7, pp. 6, 7.

²⁰⁶ Annex 5, pp. 1, 9; Annex 6, at 1, 8; Annex 7, pp. 1, 8; Weinstein Witness Stmt., ¶¶ 20–24.

²⁰⁷ Namecheap’s Pre-Hearing Brief, ¶ 328.

²⁰⁸ Bylaws, Art. 1, §1.2(a)(v) and Art. 3 § 3.1.

²⁰⁹ Botterman Witness Stmt., ¶¶ 18–30.

²¹⁰ Weinstein Witness Stmt., ¶¶ 15–16.

IV. ICANN COMPLIED WITH ITS CORE VALUES REGARDING COMPETITION.

124. Throughout its brief, Namecheap argues, without any underlying support, that ICANN is a regulator of both competition and registry pricing in the DNS, and that the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement does not comply with ICANN’s Core Values regarding competition. Namecheap even goes so far as to claim that ICANN’s purported regulatory role is *more* robust than the powers vested with the U.S. DOJ and DOC.²¹¹ And Namecheap makes the further unsupported and incredulous claim that ICANN “was created” to “prevent providers of registry services from charging prices above competitive levels.”²¹² Namecheap is wrong on every count.

125. One of ICANN’s Core Values, as set forth in ICANN’s Bylaws, is 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.”²¹³ The Bylaws also encourage ICANN, “[w]here feasible and appropriate,” to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.”²¹⁴ But, as Ms. Burr (who worked for DOC when ICANN was created) explains, ICANN’s Bylaws-mandated competition role is narrow. For instance, the text of the Core Value regarding competition makes clear that ICANN should only act “[w]here feasible and appropriate” and “depending on market [conditions.]” Moreover, Ms. Burr explains that ICANN was not, in fact, created to regulate pricing in the DNS. Rather, it was formed to ensure the stability and global interoperability of the DNS.²¹⁵

²¹¹ Namecheap’s Pre-Hearing Brief, ¶ 49.

²¹² *Id.*, ¶ 241.

²¹³ Bylaws, Art. 1, § 1.2(b)(iv).

²¹⁴ *Id.*, Art. 1, § 1.2(b)(iii).

²¹⁵ Burr Witness Stmt., ¶ 11.

126. Ms. Burr and fellow Board member and Board Chair Mr. Botterman provide a clear explanation of how ICANN complies with its Core Values and Bylaws as to competition. To start, Ms. Burr explains that, taken together, the Bylaws provisions regarding competition obligate ICANN to coordinate the community’s development of, and implement, policy that facilitates market-driven competition.²¹⁶ This is precisely what ICANN did in implementing the New gTLD Program on behalf of the Internet community and introducing over 1,200 new gTLDs.

127. As Ms. Burr and Mr. Botterman further explain, ICANN is not a regulator of competition or registry pricing responsible for taking affirmative actions to set prices that registry operators offer to registrars (or that registrars like Namecheap offer to registrants).²¹⁷ In fact, ICANN’s Bylaws make clear that ICANN is *prohibited* from acting like a government regulator: Article 1, section 1.1(c) of the Bylaws states that “[f]or the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”²¹⁸

128. Moreover, ICANN does not have the resources or expertise necessary to serve as a competition or price regulator for the DNS.²¹⁹ ICANN is not in a position to determine what the appropriate price for each gTLD registration should be, or which gTLDs should have a price control provision. Instead, as Ms. Burr and Mr. Botterman confirm, ICANN refers any competition concerns to the appropriate government regulator—such as DOJ or DOC—for market regulation. Those competition authorities, and not ICANN, possess the skill and expertise to address competition and pricing concerns.²²⁰ And, to be clear, the U.S. government

²¹⁶ *Id.*, ¶ 13.

²¹⁷ Burr Witness Stmt., ¶¶ 11, 19; Botterman Witness Stmt., ¶ 8.

²¹⁸ Bylaws, Art. 1, § 1.1(c).

²¹⁹ Burr Witness Stmt., ¶ 19; Botterman Witness Stmt., ¶ 8; Ex. R-34 (“ICANN org is not a competition authority or price regulator and ICANN has neither the remit nor expertise to serve as one.”).

²²⁰ Burr Witness Stmt., ¶ 17; Botterman Witness Stmt., ¶¶ 8, 10.

does not require a price control provision in any of these three gTLDs; it only requires a price control provision in the .COM registry agreement.

129. The claimant in the recent *Afilias* IRP made substantially similar arguments regarding ICANN’s so-called “regulatory authority” related to competition. The Panel, however, rejected Afilias’ argument:

[T]he Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct.²²¹

130. Thus, Namecheap’s assertion that ICANN has a competition mandate that requires ICANN to set registry prices is simply wrong. ICANN is not a regulator, it has no regulatory authority, and it lacks the institutional capability to make the competition and price determinations that Namecheap demands. Rather, ICANN complies with its Core Value regarding competition by coordinating and implementing policies that facilitate market-driven competition and, when necessary, defers to competition regulators’ evaluation of potential competition concerns associated with the DNS.

V. NAMECHEAP’S CLAIM THAT THE PUBLIC INTEREST REQUIRES ICANN TO MAINTAIN THE PRICE CONTROLS IN .BIZ, .INFO, AND .ORG IS BASELESS.

131. Namecheap claims that the public interest required ICANN to include price control provisions in the 2019 Registry Agreements based on several “studies” and the market power allegedly inherent in these gTLDs. Namecheap’s argument, however, is based on outdated, inapposite, and easily rebutted evidence.

A. The “Studies” And Correspondence That Namecheap Relies Upon Pre-Date The New gTLD Program And Relate To A Very Different DNS.

²²¹ *Afilias v. ICANN* IRP, Corrected Final Decision ¶ 352, Ex. R-43.

132. The majority of the “studies” or correspondence that Namecheap relies upon were issued well before the New gTLD Program launched and thus well before the introduction of over 1,200 new gTLDs.²²² For instance, to support its claim that .BIZ, .INFO and .ORG have “attributes of market power,” Namecheap cites to a **2001** statement by ICANN’s then-General Counsel.²²³ Forgetting for a moment that .BIZ and .INFO were not even in existence at the time of this statement, the statement goes on to explain that concerns about market power are addressed by a number of ICANN initiatives, including the creation of a robust registrar-accreditation system.²²⁴ There is no discussion of a need for price caps or price controls.

133. Likewise, Namecheap relies on correspondence from DOJ and DOC from **2008**, approximately five years before the first new gTLD was delegated into the DNS.²²⁵ These letters, however, were based on the very first version of the Guidebook and focus on protections for trademarks holders, which later versions of the Guidebook addressed. Moreover, Namecheap’s reliance on this correspondence completely ignores the much more probative fact that DOC and DOJ did not submit *any* correspondence or public comment regarding the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement in 2019, even though they easily could have.²²⁶

134. Since the time of these statements and correspondence, the DNS has changed dramatically, from just a handful of gTLDs (and even fewer that were unsponsored) to nearly 1,250 gTLDs. Thus, these outdated materials have little relevance in the current era, and

²²² See, e.g. RM 184 (2001 correspondence); RM 21 (2008 correspondence); RM 185 (2004 OECD report).

²²³ RM 134.

²²⁴ *Id.*

²²⁵ RM 21.

²²⁶ For the same reason, Namecheap’s focus on the correspondence in 2020 from the California Attorney General to ICANN regarding the proposed indirect change in control of PIR (the .ORG registry operator) is irrelevant. Namecheap’s Pre-Hearing Brief, ¶ 377. The California Attorney General intervened in ICANN’s consideration of that proposed change in control, but did not intervene at all in the execution of the 2019 Registry Agreements.

Namecheap offers no explanation as to how they are still relevant to today’s remarkably different DNS. Nor has Namecheap explained how these outdated materials relate to any ICANN violation of its Articles or Bylaws now.

B. Price Controls In The .BIZ, .INFO, And .ORG Registry Agreements Are Not Justified Given The Competitive Landscape.

135. Namecheap relies heavily on Expert Report II to claim that .BIZ, .INFO, and .ORG have “market power” and, thus, ICANN should have maintained the price control provisions over them. The “conclusions” reached in Expert Report II, however, ignore the fact that .BIZ, .INFO, and .ORG have an extremely small and steadily declining share of domain name registrations, that competition provides robust market-based protections against supra-competitive price increases in these gTLDs, that the Base Registry Agreement protects registrants against abusive pricing, and that the societal costs of price regulation outweigh any benefit from price regulation in these gTLDs, as set forth below

136. As an initial matter, nowhere do Namecheap’s experts explain how three gTLDs with extremely low shares of all registered domain names—.BIZ, .INFO, and .ORG account for *0.4%*, *1.1%*, and *3.0%* of registered domains respectively²²⁷—could possibly possess, let alone exercise, market power. Instead, empirical evidence demonstrates that shares of registered domain names in .BIZ, .INFO, and .ORG has steadily declined since September 2013, the month before the first new gTLDs were delegated,²²⁸ which is patently inconsistent with Namecheap’s argument that these gTLDs possess market power.

137. Next, as Dr. Carlton concludes and Expert Report II ignores, “TLD competition and other factors limit .ORG, .INFO, and .BIZ’s ability to raise wholesale prices and that they

²²⁷ Carlton Expert Report, ¶ 50.

²²⁸ *Id.*

are unlikely to raise such prices significantly above the levels that would have been allowed under the prior price controls.”²²⁹ All TLDs, including .BIZ, .INFO and .ORG, face competition from .COM, which is by far the most popular gTLD, accounting for 74% of registered domains and 67% of new registrations on gTLDs.²³⁰ With its popularity, and relatively-low, regulated price, .COM acts as a check on any registry, including .BIZ, .INFO, and .ORG, that seeks to increase prices above competitive levels.²³¹

138. Another market-based check on the ability of .BIZ, .INFO, and .ORG to raise prices to supracompetitive levels comes in the form of ICANN’s introduction of over 1,200 new gTLDs and the rise of “open” ccTLDs that allow domain name registrations that can be used by any registrant regardless of where the registrant resides.²³² While Namecheap claims that ICANN has not introduced increased competition at the registry level, the numbers and marketplace dynamics tell a far different story. There are over 1,200 new gTLDs in the DNS that account for roughly 26.5 million registered domains, and there are over 300 ccTLDs that collectively have 153 million registered domain names.²³³ Indeed, some new gTLDs and ccTLDs have registrations far in excess of those in .BIZ, .INFO, and .ORG combined.²³⁴ The growing number of new gTLDs and the number of ccTLDs mute any ability for the registry operators of .BIZ, .INFO, and .ORG to effectively raise prices. This level of competition is precisely why, since the price controls were removed in 2019, these registries have not increased prices above those previously permitted under the price controls. Indeed, since the price controls

²²⁹ *Id.*, ¶ 46.

²³⁰ *Id.*, ¶ 47.

²³¹ *Id.*

²³² *Id.*, ¶ 48.

²³³ *Id.*

²³⁴ *Id.*

were removed, .ORG has reduced its initial registration prices and has not changed its renewal prices.

139. As Dr. Carlton notes, the increase in competition resulting from the addition of more than 1,200 gTLDs, along with ccTLDs, was recognized by the DOC in 2018 when it decided to allow for a relaxation of the price controls on .COM. “[T]he Department [found] that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace” and “given the more dynamic DNS marketplace, the Department [determined] that it [was] appropriate to amend the Cooperative Agreement to provide pricing flexibility for the registration and renewal of domain names in the .com registry.”²³⁵ This same competitive dynamic is equally applicable in .BIZ, .INFO, and .ORG, if not more.

140. Yet another protection against price gauging is built directly into the Base Registry Agreement currently applicable to .BIZ, .INFO, and .ORG. The registry operators must give sufficient notice of any upcoming price increases and registrars (and therefore registrants) can then lock in existing pricing for up to ten years, thereby nullifying any impact from a price increase.

141. Finally, Namecheap’s experts fail to recognize what Dr. Carlton makes clear that the likely harms of price regulation in these three gTLDs outweigh the likely benefits of price controls. ICANN lacks the expertise to set optimal prices. Without such expertise, the danger is that ICANN could set the wrong price—one that impairs efficient market outcomes—which would ultimately harm registrants rather than protect them.

142. In short, Namecheap cannot demonstrate that the public interest required ICANN to maintain price control provisions in the .BIZ, .INFO, and .ORG Registry Agreements,

²³⁵ *Id.*, ¶ 49.

especially given that the majority of evidence they cite either pertains to a drastically different DNS or pertains to potential harm to registrants, not registrars.

VI. ICANN APPLIED ITS POLICIES FAIRLY AND EQUITABLY WHEN THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS WERE TRANSITIONED TO THE BASE REGISTRY AGREEMENT.

143. Namecheap is persistent in arguing that ICANN must apply its documented policies “consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”²³⁶ Namecheap then advocates for the exact opposite: it claims that ICANN should reinstate price control provisions for just three gTLDs, treating those gTLDs differently than the over 1,200 new gTLDs and several legacy gTLDs that do not have any such provisions. Namecheap’s argument is illogical. It is the *absence* of a price control provision—not the preservation of it—that has resulted in ensuring consistency across nearly all registry operators. Indeed, this was a clear motivation for aligning the 2019 Registry Agreements with the Base Registry Agreement.

144. Namecheap also recycles its argument that Section 4.2 of the 2013 Registry Agreements suggests that ICANN could never transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement without price control provisions.²³⁷ Notwithstanding that Namecheap is not a party to those agreements, and thus has no standing to assert any arguments with respect to those agreements, Namecheap is just simply wrong: Section 8.6 of the 2013 Registry Agreements confirms that parties mutually can agree to modify the agreements, and the 2019 Registry Agreements reflect the parties’ intent to do so. Moreover,

²³⁶ Namecheap’s Pre-Hearing Brief, ¶ 388 (quoting ICANN’s Bylaws, Art. 1, § 1.2(a)(v)).

²³⁷ *Id.*, pp. 126–127.

the 2019 Registry Agreements supersede the prior registry agreements; accordingly, Section 4.2 of the 2013 Registry Agreements has no force or effect.

145. Namecheap then questions why ICANN is treating .BIZ, .INFO, and .ORG differently from three other gTLDs that have a price control provision: .COM, .NET, and .NAME, all of which are operated by Verisign.²³⁸ As to .COM, that registry agreement is still subject to oversight by DOC, which is common knowledge.²³⁹ Pursuant to that oversight, the .COM registry agreement must contain a price control provision.²⁴⁰ No other gTLD is subject to similar oversight by the U.S. government. Thus, .COM is dissimilar to all other gTLDs in the DNS in critical respects.

146. As to .NET and .NAME, these registry agreements have not transitioned to the Base Registry Agreement, and thus still contain a price control provision, by Verisign's choice. As discussed above, renewal of a registry agreement is subject to bilateral negotiations between ICANN and the registry operator. During the most recent renewal negotiations for .NET and .NAME, Verisign chose not to transition the .NET and .NAME registry agreements to the Base Registry Agreement.²⁴¹ By contrast, the registry operators for .BIZ, .INFO, and .ORG requested to transition to the Base Registry Agreement.²⁴²

147. To be clear, many other legacy TLDs have already made the transition to the Base Registry Agreement.²⁴³ As a result, there are only a small handful of gTLDs in the entire DNS that do not use the Base Registry Agreement. With the 2019 Registry Agreements, ICANN is

²³⁸ *Id.*, pp. 127–128.

²³⁹ Amendment No. Thirty-Five to Cooperative Agreement Between Verisign, Inc. and the Department of Commerce, R-50.

²⁴⁰ .COM Registry Agreement, RE-3.

²⁴¹ Weinstein Witness Stmt., ¶ 12.

²⁴² *Id.*, ¶ 13.

²⁴³ RE-8, p. 1.

treating .BIZ, .INFO, and .ORG no differently from new gTLDs and many other legacy gTLDs. Accordingly, there is no support for Namecheap’s argument that ICANN somehow is treating .BIZ, .INFO, and .ORG inequitably.

VII. ICANN DID NOT APPLY ITS POLICIES UNFAIRLY WITH RESPECT TO .ORG.

148. Namecheap claims that ICANN has applied its policies unfairly with respect to .ORG. But there was no policy to “unfairly” apply. Namecheap bases its argument on a *recommendation* to the ICANN Board from 2002 regarding the selection criteria for the .ORG registry operator and a request for proposal (“RFP”) that ICANN issued in 2002 soliciting applications for the next registry operator of the .ORG TLD.

149. In June 2001, the ICANN Board tasked ICANN’s Domain Name Supporting Organization (“DNSO”)²⁴⁴ with developing a recommendation to the Board regarding the transition of the .ORG gTLD from Verisign to a new registry operator.²⁴⁵ The DNSO created a task force (the “Dot ORG Task Force”) to “prepare[] a report” and “make[] several recommendations” to the ICANN Board regarding selection of a new .ORG registry operator.²⁴⁶ One of the factors referenced in the Dot ORG Task Force’s recommendations was that the “registry fee charged to accredited registrars should be as low as feasible, consistent with the maintenance of good-quality service.”²⁴⁷

150. Notably, this report and the subsequent RFP *never was and never* became an ICANN “policy.” Therefore, they cannot form the basis for an IRP. Also, the recommendation and RFP did not relate to whether the .ORG registry agreement should contain a price control

²⁴⁴ The DNSO is the precursor to the Generic Names Supporting Organization (“GNSO”).

²⁴⁵ RM 10.

²⁴⁶ RM 10.

²⁴⁷ See generally *id.*; RM 11.

provision. They related only to the selection criteria for the next .ORG registry operator. Moreover, the ICANN Board made clear that the paramount concern for selecting the .ORG registry operator was not the registry fees to be charged, but the “demonstrated technical ability” of the registry operator to operate a TLD with a large volume of domains under management.²⁴⁸

151. Namecheap’s argument also ignores the fact that price control provisions are not necessary to constrain .ORG pricing in a market saturated with over 1,200 other gTLDs. This is especially true when the dominant registry, .COM, is still subject to a price control provision imposed by DOC.

152. Indeed, Public Interest Registry’s (“PIR”) recent pricing decisions as the .ORG registry operator confirm as much. PIR has not raised .ORG registration prices in nearly six years, despite being able to do so by 10 percent per year under the 2013 Registry Agreement, and being able to do so under the current registry agreement since June 2019.²⁴⁹ PIR has also committed publicly not to unreasonably increase prices. In a blog post following the closure of the public comment proceeding, PIR advised its registrants, “Rest assured, we will not raise prices unreasonably. In fact, we currently have no specific plans for any price increases for .ORG.”²⁵⁰ PIR further explained, “keep in mind that .ORG is constrained by the competitive market; we cannot dramatically increase prices for .ORG, as we recognize and understand that both our .ORG end users and our .ORG registrars would turn away from .ORG.”²⁵¹

153. In sum, the DNSO’s recommendations and the RFP criteria in 2002 are not a basis on which to bring an IRP. But even if they somehow were, ICANN in no way violated

²⁴⁸ RM 10 (One of the points “supported by the majority of the Board” was “the crucial importance of demonstrated technical ability, without unduly restricting the pool of applicants.”).

²⁴⁹ Carlton Expert Report, ¶ 67.

²⁵⁰ “An Open Letter to the .ORG Community” (1 May 2019), Ex. R-51.

²⁵¹ *Id.*

them. And, price control provisions simply have not impacted PIR’s pricing decisions in the recent past and are not necessary to constrain .ORG registry pricing.

VIII. NAMECHEAP’S REMAINING ARGUMENTS FAIL TO DEMONSTRATE THAT ICANN VIOLATED ITS ARTICLES OR BYLAWS.

154. Namecheap raises a number of other arguments regarding collateral issues that do not demonstrate whatsoever that ICANN violated its Articles or Bylaws. Several of these claims were not raised in the IRP Request and therefore should not be considered by this Panel.

A. Namecheap’s Newly-Raised Claims Should Not Be Considered.

155. In its Pre-Hearing Brief, Namecheap improperly raises, for the first time, several claims that were not included in its IRP Request. First, Namecheap claims that “ICANN failed to apply fairly its policies and processes on vertical integration,” which refers to vertical integration between registry operators and registrars.²⁵² Yet, none of the claims in Namecheap’s IRP Request relate to vertical integration or cross-ownership. Even further, this Panel already ruled that such claims were not relevant to this IRP in rejecting Namecheap’s document production requests on this issue.²⁵³

156. Second, Namecheap claims that ICANN “failed to apply fairly its policies and processes on the Feb06 Policy.” Again, however, Namecheap did not raise any such claim in its IRP Request, nor is this policy even mentioned.

²⁵² Namecheap’s Pre-Hearing Brief, pp. 122–123.

²⁵³ Procedural Order No. 5, at Appendix B, Namecheap’s Request Nos. 4 and 5 (denying Requests related to acquisition of registry operators by registrars, unless they also related to price control provisions); *see also* Procedural Order No. 6, ¶ 6 (“In responding to ICANN’s motion, Namecheap raised the issue of the acquisition of the .biz registry business by GoDaddy, Inc. and the acquisition of the .info registry operators (Afilias, Inc.) by Donuts Inc., stating that these acquisitions could increase Namecheap’s costs or otherwise harm its profits. The Panel will not issue a ruling on the propriety of these acquisitions. To the extent that Namecheap seeks any relief with respect to these acquisitions, it must do so in a different proceeding.”).

157. Namecheap’s belated introduction of these new claims—just before the merits hearing and after two years of litigation—is completely inappropriate and prejudicial. The claims also are clearly time-barred because the Board decisions with respect to these claims occurred years ago when the Bylaws required an IRP to be initiated within 30 days of the Board decision. Accordingly, the belated claims in paragraphs 390–393 and 400–402 of Namecheap’s Pre-Hearing Brief should be summarily denied.²⁵⁴

B. ICANN Did Not “Hide” Information Or Mislead The Board In Any Way.

158. Namecheap makes unsupported and outlandish arguments that ICANN “hid” information and ICANN staff misled the Board. Namecheap’s conspiracy theories, however, not only require numerous leaps in logic, but they also are irrelevant to the merits of the case.

159. For instance, Namecheap claims that the former Chair of the ICANN Board, Cherine Chalaby, allegedly “hid” information based on an email—between two other ICANN personnel that did not include the former Board Chair—that Mr. Chalaby allegedly did not want to use the term “price caps” in a session description for a Board workshop.²⁵⁵ It is unclear, however, how a preference for a term different from “price caps” in the title of a workshop session is hiding information. It is also unclear from whom Mr. Chalaby supposedly hid information. The workshop was not an annual, regular, or special Board meeting and, therefore, no such session description was posted (or was required to be publicly posted) on ICANN’s website. Thus, there is no support for a claim that Mr. Chalaby was “hiding” information from the Internet community through this internal email.

²⁵⁴ To the extent the Panel is inclined to consider these claims, ICANN reserves its right to submit a short brief in response.

²⁵⁵ Namecheap’s Pre-Hearing Brief, ¶¶ 149–151.

160. To the extent Namecheap is claiming that the former Board Chair was “hiding” information from the Board, this argument is nonsensical. The ICANN Board conducted two workshop sessions in January and June 2019, at which the Board discussed the renewal of the .BIZ, .INFO, and .ORG Registry Agreements. The workshop sessions included a discussion of the price control provisions; thus the session description (whether it included the phrase “price caps” or not) clearly did not prevent the Board from discussing this topic, as Mr. Weinstein and Mr. Botterman have confirmed. In any event, more than just the price control provisions were discussed during these Board workshop sessions, making it more likely, and a much more reasonable interpretation of the email, that Mr. Chalaby preferred a broader session description to encompass all potential issues related to the renewals of the .BIZ, .INFO, and .ORG Registry Agreements.

161. Namecheap also raises a number of complaints about ICANN’s privileged communications with ICANN’s retained economic consultant, Dennis Carlton.²⁵⁶ First, Namecheap argues that ICANN inappropriately withheld documents and communications between its internal and external legal counsel and Dr. Carlton as privileged. As ICANN has explained in detail, however, ICANN appropriately withheld these communications as privileged and will not disclose their substance.²⁵⁷

²⁵⁶ Namecheap’s Pre-Hearing Brief, ¶¶ 159, 332–336.

²⁵⁷ Namecheap is also incorrect in stating that ICANN has engaged in “obstinate refusal to provide any documents showing ICANN’s deliberations.” Namecheap’s Pre-Hearing Brief, ¶ 335. As set forth above, ICANN staff opened and published a public comment period for each of the .BIZ, .INFO, and .ORG gTLD renewals, summarized the public comments received, and published Reports explaining the reasoning for transitioning to the Base Registry Agreement. Other documents in ICANN’s production, public correspondence, and Mr. Weinstein’s Witness Statement also reflect the reasons for this transition. Namecheap’s wish that there were more or different types of non-privileged documents in no way amounts to an “obstinate refusal.”

162. Second, Namecheap claims that ICANN improperly “hid” these communications with Dr. Carlton from its own staff and the ICANN Board.²⁵⁸ Namecheap has no basis to make any such argument about what ICANN’s legal counsel did or did not share with other members of ICANN staff or the ICANN Board. And any communications between ICANN’s in-house legal department and the ICANN Board or staff on this topic are protected by the attorney-client privilege. ICANN will not be goaded into divulging privileged information.

163. Namecheap also claims that the ICANN Board was misled as to the scope of Dr. Carlton’s **2009** Report, which again, is nonsensical. Namecheap refers to the Board’s consideration of its Reconsideration Request 19-2, which cites to and quotes from Dr. Carlton’s 2009 Report, thus clearly demonstrating that the ICANN Board reviewed that report and understood its scope. There is no evidence that the Board was misled, or by whom it was purportedly duped.²⁵⁹

164. In any event, even if Namecheap’s far-fetched claims were true (which they are not), Namecheap still does not demonstrate how they amount to a violation of ICANN’s Articles or Bylaws or how such things harmed Namecheap in any way. As set forth extensively above, the ICANN Board did **not** make any decision or resolution regarding the 2019 Registry Agreements so any alleged “misleading” of the Board would have had no impact on the negotiations of the 2019 Registry Agreements. To the extent Namecheap claims that it was

²⁵⁸ Namecheap’s Pre-Hearing Brief, ¶¶ 159, 332–336.

²⁵⁹ In fact, it is Namecheap that exaggerates Dr. Carlton’s conclusions in his 2009 reports. Namecheap suggests throughout its Pre-Hearing Brief that Dr. Carlton concluded that price control provisions in legacy gTLDs must remain indefinitely in the .BIZ, .INFO, and .ORG Registry Agreements because those provisions were a main justification for introduction of the Base Registry Agreement without price control provisions. *See, e.g.*, Namecheap’s Pre-Hearing Brief, ¶ 114–115. To be clear, however, Dr. Carlton was not asked to opine on the appropriateness of price control provisions in legacy gTLD registry agreements, including the .ORG, .BIZ, and .INFO Registry Agreements, and even acknowledged that such provisions might not be appropriate. RM 23, ¶ 73 (acknowledging that “the appropriateness of these price caps may be debatable”).

ICANN staff who was “misled,” again, Namecheap does not demonstrate who was misled and to what effect. ICANN staff clearly considered a plethora of relevant information, including the full agreement from the respective registry operators, prior to transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, notwithstanding Namecheap’s various red-herring arguments.

C. ICANN Was Open And Transparent In Its Consideration Of Namecheap’s Reconsideration Request.

165. In yet another attempt to distract from the actual issues in this IRP and Namecheap’s glaring lack of standing, Namecheap claims that ICANN violated its transparency obligations in its consideration of Reconsideration Request 19-2 because ICANN invoked the attorney-client privilege over documents that plainly are protected by the privilege.²⁶⁰ Namecheap’s arguments are again meritless.

166. Namecheap is correct that ICANN’s Bylaws provide that the “Board Accountability Mechanisms Committee may ask ICANN staff for its views on a Reconsideration Request” and that those “comments shall be made publicly available on” ICANN’s website.²⁶¹ This requirement, however, does not override the attorney-client privilege or the work product doctrine unless any such information from staff was relied upon in the Board’s decision. And in that case, the information will be found in the BAMC Recommendation on the Reconsideration Request and/or the Board’s adoption of that recommendation.

167. Indeed, ICANN did publish on its website numerous documents reflecting ICANN staff’s input on Reconsideration Request 19-2, and the Board’s determination of this request at its 21 November 2019 Board meeting. Specifically, ICANN published on its website

²⁶⁰ Namecheap’s Pre-Hearing Brief, ¶¶ 417–424.

²⁶¹ Bylaws, Art. 4, § 4.2(m).

142 pages of briefing materials and reference materials that the Board considered, some of which reflect ICANN staff's input.²⁶² ICANN also published the Board's Approved Board Resolutions denying Reconsideration Request 19-2, along with its detailed rationale for that decision.²⁶³ ICANN further published the minutes from the 21 November 2019 Board meeting, again reflecting the basis for the Board's decision to deny Reconsideration Request 19-2.²⁶⁴ Thus, Namecheap's claims that "it is impossible to determine whether . . . the Board's discussion went beyond rubberstamping the memoranda that ICANN staff had prepared" is categorically false.²⁶⁵

168. For these reasons, Namecheap's reliance on the *Dot Registry* Final Declaration is another red herring.²⁶⁶ In that IRP, the public record for the relevant Board meeting (where the Board Governance Committee considered that claimant's Reconsideration Request) contained only an agenda and high-level minutes.²⁶⁷ By contrast and as set forth above, ICANN published the briefing materials and the reference materials considered by the ICANN Board, and also published detailed minutes regarding what the Board considered when it denied Reconsideration Request 19-2, and its rationale for doing so. Accordingly, the ICANN Board was open and transparent in its denial of Namecheap's Reconsideration Request 19-2, and Namecheap's disagreement with that decision is not an appropriate basis for an IRP.

²⁶² ICANN Board Briefing Materials, Reconsideration Request 19-2 (21 November 2019), Ex. R-52.

²⁶³ Approved Board Resolutions | Special Meeting of the ICANN Board (21 November 2019), Annex 12.

²⁶⁴ Minutes | Special Meeting of the ICANN Board (21 November 2019), Annex 115.

²⁶⁵ Namecheap's Pre-Hearing Brief, ¶ 422.

²⁶⁶ Namecheap's Pre-Hearing Brief, ¶ 423.

²⁶⁷ *Compare* Minutes | Board Governance Committee (BGC) Meeting (24 July 2014), Ex. R-55 with Annex 12, Annex 115, and R-52.

IX. NAMECHEAP’S CLAIMS REGARDING THE .BIZ GTLD ARE UNTIMELY.

169. Namecheap attempts to re-write history in order to argue that its claims regarding the .BIZ gTLD are timely. The evidence clearly demonstrates, however, that all of Namecheap’s claims regarding .BIZ are long since time barred.

170. ICANN’s Interim Supplementary Procedures provide that a Claimant must institute an IRP “no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE,”²⁶⁸ which Namecheap acknowledges.²⁶⁹ Namecheap also agrees that it became aware of the “material effect of the action or inaction” on 1 July 2019, the day after the 2019 Registry Agreements were executed, meaning that it was required to institute an Accountability Mechanism on or before 29 October 2019.²⁷⁰ Where Namecheap errs is in arguing that Reconsideration Request 19-2, which relates only to .ORG and .INFO, somehow modified the statute of limitations with respect to .BIZ. In so doing, Namecheap claims (erroneously) that Reconsideration Request 19-2 encompassed .BIZ, or that if there was any confusion as to the scope of the request, it was incumbent upon the ICANN Board to request clarification. There was no such confusion.

171. Namecheap points to a number of vague references in Reconsideration Request 19-2 to “all legacy TLDs” as evidence that somehow .BIZ was encompassed by this request.²⁷¹ These vague references are not substitutes for what Namecheap made abundantly clear throughout the Reconsideration Request process. In the section titled “Description of specific action you are seeking to have reconsidered,” Namecheap stated: “On 30 June 2019,

²⁶⁸ Interim Supplementary Procedures, § 4, RE-1.

²⁶⁹ Namecheap’s Pre-Hearing Brief, ¶ 275.

²⁷⁰ *See also*, Annex 8, Section 5 (acknowledging that Namecheap became aware of the action or that action would not be taken on 1 July 2019).

²⁷¹ Namecheap’s Pre-Hearing Brief, ¶¶ 277–278.

ICANN org renewed the registry agreement *for the .org and .info TLD* without the historic price caps”²⁷² Namecheap then cited to the public link for the .ORG and .INFO registry agreements only.²⁷³ There was absolutely no reference in this section to .BIZ, and vague, generic references to “legacy TLDs” simply are insufficient.

172. Then, on 3 November 2019, the ICANN Board published a Proposed Determination of the ICANN Board of Directors regarding Reconsideration Request 19-2, and afforded Namecheap the opportunity to submit a rebuttal. The first line of the Proposed Determination states, “The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs).”²⁷⁴ Namecheap clearly was on notice that, consistent with Section 3 of Namecheap’s Reconsideration Request 19-2, the ICANN Board understood the scope of the request to relate only to .ORG and .INFO.

173. Namecheap then confirmed as much. Approximately two weeks later, on 18 November 2019, Namecheap submitted a rebuttal to the Proposed Determination. Nowhere in that rebuttal does Namecheap clarify that it also was seeking reconsideration of ICANN’s decision to renew the .BIZ Registry Agreement.²⁷⁵ Rather, Namecheap confirmed that Request 19-2 relates only to .ORG and .INFO:

The Requestor, Namecheap Inc., submits this Rebuttal to the ICANN Board’s Proposed Determination on Reconsideration Request (RfR) 19-2 (the ‘Recommendation’). The Recommendation concerns Requestor’s request that the Board

²⁷² Annex 8, p. 2 (emphasis added).

²⁷³ Annex 8, p. 2.

²⁷⁴ Proposed Determination of the ICANN Board of Directors, Reconsideration Request 19-2 (3 November 2019), Ex. R-53.

²⁷⁵ See generally Annex 10.

reverse ICANN org and the ICANN Board decision of 30 June 2019 to renew the registry agreement *for the .org and .info TLDs* without the historic price caps²⁷⁶

174. The claims Namecheap makes in its Pre-Hearing Brief are nothing more than attorney-created arguments that belie the facts. Namecheap was required to challenge ICANN’s conduct related to .BIZ on or before 29 October 2019, rendering its claims submitted in February 2020 untimely. ICANN requests that the Panel summarily dismiss all of Namecheap’s claims related to .BIZ.

X. NAMECHEAP SEEKS RELIEF THAT EXCEEDS THE PANEL’S AUTHORITY.

175. This IRP Panel is not empowered to award Namecheap much of the relief it seeks. Article 4, section 4.3(o) of the Bylaws expressly establishes and circumscribes the authority of an IRP Panel: “Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

- (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
- (ii) Request additional written submissions from the Claimant or from other parties;
- (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN’s contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
- (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
- (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

²⁷⁶ Annex 10, p. 1 (emphasis added).

- (vi) Determine the timing for each IRP; and
- (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).²⁷⁷

176. The only provision of Article 4, section 4.3(o) relevant to Namecheap’s claims in this IRP is subsection (iii), which gives the Panel authority to declare whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.²⁷⁸ Under subsection (iv), the IRP Panel may also recommend that ICANN take certain actions, but it does not have the authority to require ICANN to do so. Thus, Namecheap is wrong in its argument that the “Panel has broad inherent discretion to fashion relief.”²⁷⁹

177. The relief Namecheap seeks—although disguised as a “declaration”—is tantamount to an order that ICANN reinstate price control provisions for .BIZ, .INFO, and .ORG and nullify the 2019 Registry Agreements. Specifically, Namecheap asks the Panel to “declare” that ICANN’s decision to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement “must be annulled” for various reasons; and that “ICANN’s rejection of Namecheap’s Reconsideration Request No. 19-2 must be annulled.”²⁸⁰ These requests far exceed the scope of the IRP Panel’s authority and therefore should be denied. Namecheap’s requested relief, and its entire IRP, should also be denied for the separate and independent reason that Namecheap has failed to establish that ICANN violated its Articles or Bylaws.²⁸¹

²⁷⁷ Bylaws, Art. 4, § 4.3(o).

²⁷⁸ Subsection (i) is also relevant to ICANN’s argument that this IRP should be dismissed because Namecheap lacks standing to pursue its claims.

²⁷⁹ Namecheap’s Pre-Hearing Brief, ¶ 266.

²⁸⁰ Namecheap’s Pre-Hearing Brief, ¶ 425.

²⁸¹ Even if the Panel were authorized to award affirmative relief (which it is not), Namecheap’s requested relief is baseless for the additional reason that none of the registry operators that negotiated in good faith are a party to this IRP, and therefore the IRP has no authority to issue any relief impacting non-parties.

CONCLUSION

178. After two years of intense litigation, and two and a half years after the execution of the 2019 Registry Agreements, Namecheap has failed to provide any evidence, much less demonstrate, that it has suffered or is likely to suffer any harm resulting from the 2019 Registry Agreements. Namecheap therefore is not a “Claimant” under the Bylaws; Namecheap has no standing to pursue this IRP; and the IRP should be dismissed on that basis alone.

179. Further, Namecheap has not established that ICANN acted inconsistently with its Articles or Bylaws in transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Rather, the evidence clearly shows that the ICANN Board appropriately delegated the authority to negotiate and execute contracts (including registry agreements) to ICANN staff, that ICANN staff exercised due diligence in negotiating with these registry operators, and that ICANN was open and transparent to the extent feasible in entering into the 2019 Registry Agreements. ICANN requests that the Panel deny each of Namecheap’s claims and requests for relief.

Respectfully submitted,
JONES DAY

Dated: January 14, 2022

By: /s/ Jeffrey A. LeVee
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