

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Namecheap, Inc.,	)	ICDR CASE NO. 01-24-0007-7322
	)	
Claimant,	)	
	)	
and	)	
	)	
INTERNET CORPORATION FOR ASSIGNED	)	
NAMES AND NUMBERS,	)	
	)	
Respondent.	)	

**ICANN'S RESPONSE TO NAMECHEAP'S
REQUEST FOR INDEPENDENT REVIEW PROCESS**

Jeffrey A. LeVee
Kelly Watne
Christine E. Cheung
JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071
Tel: +1.213.489.3939

Counsel to Respondent
The Internet Corporation for
Assigned Names and Numbers

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to and opposes the Request for Independent Review Process (“IRP Request”) submitted on 13 September 2024 by Namecheap, Inc. (“Namecheap”).

1. This is the second IRP that Namecheap has filed relating to the terms of the 2019 Registry Agreements between ICANN and the registry operators of .INFO and .ORG (to which Namecheap is neither a party nor a third-party beneficiary); and this is in addition to the ongoing lawsuit that Namecheap filed in Los Angeles Superior Court in January 2024 on the exact same issue. Not only is it improper to maintain the same claims in two different forums, but Namecheap has repeatedly mischaracterized, and at times completely disregarded, the findings and explicit language of the IRP Panel in the first Namecheap v. ICANN IRP, ICDR Case No. 01-200-0000-6787 (the “First IRP”). The First IRP Panel issued its Final Declaration on 23 December 2022 (the “IRP Final Declaration”).

2. Namecheap is not happy that the 2019 Registry Agreements for .INFO and .ORG do not contain registry price control provisions (sometimes referred to in the First IRP as the “Price Cap Decision”). Namecheap is also not happy that the First IRP Panel refused to provide Namecheap with the relief it requested. This does not, however, give Namecheap the right to bring its claims across multiple forums, misrepresent the First IRP Panel’s findings, attempt to convert Panel recommendations into alleged requirements, or disregard the parameters of an IRP panel’s authority.

3. At the outset, Namecheap is seeking relief from this Panel that the First IRP Panel explicitly stated an IRP panel is not permitted to give. Namecheap asks this Panel to “[o]rder that ICANN annul its Price Cap Decision removing price caps in .org and .info registry

agreements.”¹ This is in direct contravention of the First IRP Panel’s finding “that a declaration that the Price Cap Decision ‘must be annulled’ is effectively an order that ICANN take specific action to nullify that decision. *The Panel lacks authority to make such an order.*”²

4. Furthermore, in its new IRP Request, Namecheap tries to imply that the First IRP Panel ruled that the “Price Cap Decision” was a substantive violation of ICANN’s Articles of Incorporation (“Articles”) and Bylaws. That is not what the First IRP Panel ruled. In fact, the Panel specifically stated that it was *not* making a finding on the merits of Namecheap’s claim; instead, the Panel explained that its findings were entirely procedural (regarding the process by which the decision was made). The First IRP Panel stated: “the end result of ICANN’s decision-making process is not at issue here. This Panel is not issuing a declaration that price controls should have been retained. This declaration is focused solely on the process underlying the Price Cap Decision, not its merits.”³

5. Namecheap then tries to convert the First IRP Panel’s “recommendations” into mandatory requirements by blatantly ignoring the First IRP Panel’s very explicit language to the contrary regarding the nature of its “recommendations.” No less than *seven times* in the IRP Final Declaration does the Panel confirm that an IRP Panel’s authority is limited and that its “recommendations” are non-binding. Indeed, as quoted below in paragraph 21, the First IRP Panel devoted several paragraphs of its Final Declaration to discussing the distinction between what the Panel may “declare” and what the Panel “can only ‘recommend’.”⁴

6. Namecheap also fails to mention, much less acknowledge, ICANN’s extensive review and consideration the IRP Final Declaration, including the Panel’s recommendations,

¹ IRP Request, at p. 19.

² Claimant’s Annex 25, IRP Final Declaration, ¶ 484 (emphasis added).

³ *Id.*, ¶ 404.

⁴ *Id.*, ¶ 472.

which has spanned eight meetings of the ICANN Board Accountability Mechanisms Committee (“BAMC”) and two meetings of the ICANN Board, in addition to ICANN’s retention of an expert economist to prepare a comprehensive report regarding the current domain name system (“DNS”) marketplace as it relates to the market power of .INFO and .ORG (“Economic Report”), review of Namecheap’s response to the Economic Report, and decision to have the economist prepare a supplemental report addressing the comments in Namecheap’s response, all of which are posted on ICANN’s website.

7. Given that the IRP Request disregards and, at times, directly contravenes the First IRP Panel’s findings—this IRP should be dismissed and Namecheap should be admonished for its attempt to mislead this Panel. Indeed, there are at least three separate and independent reasons for dismissal of this IRP. First, Namecheap is improperly bringing the same claims in two different forums—the state court litigation it has already filed and this IRP. The law does not permit a party to split its claims across multiple forums. Second, Namecheap is not a proper “Claimant” under ICANN’s Bylaws and has no standing to pursue this IRP Request because Namecheap has not established that it has suffered *any* harm as a result of the ICANN conduct it is challenging in this IRP. Third, Namecheap has failed to demonstrate that ICANN violated its Articles or its Bylaws in any of the respects identified in Namecheap’s IRP Request. Not only has ICANN acknowledged the First IRP Panel’s declarations, but it has also extensively considered the Panel’s declarations and recommendations and taken actions that directly address the recommendations. As a result of the fatal flaws in the IRP Request, ICANN intends to move under Rule 9 of the Interim Supplementary Procedures for a summary dismissal of this IRP.

8. Further, Namecheap’s allegations regarding the Cooperative Engagement Process (“CEP”) between Namecheap and ICANN are both: (i) false, in that ICANN, at all times, acted in good faith; and (ii) improper, in that Namecheap references the content of those confidential

verbal and written communications. As the parties well know, and as established by IRP precedent, the CEP is essentially a mediation or settlement discussion, and the communications therein (whether verbal or written) are considered confidential. Accordingly, ICANN not only denies Namecheap's claims related to the CEP, but also requests that the Panel order Namecheap to immediately amend its IRP Request to remove reference to the content of the CEP discussions and remove the related exhibits.

9. It should also be noted that ICANN reached out to Namecheap in mid-October 2024 and proposed that the parties agree to a stay of this IRP in light of the potentially significant impact of both the pending lawsuit (which is scheduled for a final hearing in January 2025) and the upcoming further consideration of the First IRP Final Declaration by the ICANN Board (which is currently on a November Board meeting agenda). Given the likelihood that Namecheap's claims would change as a result of these events and that Namecheap would likely seek to amend its IRP Request, ICANN suggested the stay in advance of filing its IRP Response. Namecheap would not agree.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

10. ICANN is a California nonprofit, public benefit corporation formed in 1998. ICANN's mission "is to ensure the stable and secure operation of the Internet's unique identifier systems."⁵ Among other things, ICANN is responsible for overseeing the technical coordination of the Internet's DNS on behalf of the Internet community.⁶ ICANN's Bylaws make clear that

⁵ Bylaws, Art. 1, § 1.1(a), RM 2.

⁶ *Id.*

ICANN is not a price regulator.⁷

11. ICANN contracts with registry operators to operate generic top-level domains (“gTLDs”) via “Registry Agreements.” Registry operators separately contract with registrars—entities through which individuals and entities (registrants) 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 over 2,500 ICANN-accredited registrars across the world.⁸ Namecheap is not a registry operator; and registrars are not parties to or third-party beneficiaries of Registry Agreements.

12. To ensure that ICANN remains accountable, 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 to determine if those actions are consistent with ICANN’s Articles, Bylaws, and other internal policies and procedures. 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 Claimant must suffer an injury or harm that is *directly and causally* connected to the alleged violation.”⁹

II. ICANN’S NEW gTLD PROGRAM.

13. Prior to 2004, there were only approximately fifteen gTLDs in the DNS.¹⁰ In 2004 and 2005, seven additional gTLDs were added to the DNS.¹¹ These early gTLDs, which

⁷ See *id.*, Art. 1, § 1.1(c) (“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, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”); see also ICANN Decides on .COM Amendment and Proposed Binding Letter of Intent between ICANN and Verisign, 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.”).

⁸ <https://www.icann.org/registrar-reports/accreditation-qualified-list.html>.

⁹ *Id.*, Art. 4, § 4.3(b)(i) (emphasis added).

¹⁰ New gTLD Fact Sheet, R-2.

¹¹ *Id.*

include .INFO and .ORG, are often referred to as “legacy gTLDs.”

14. As part of its Core Value “to promote and sustain a competitive environment in the DNS market,”¹² ICANN and its Generic Names Supporting Organization (“GNSO”) sought to introduce new competition into the DNS through the introduction of new gTLDs.¹³ In 2012, ICANN opened the application window for what is referred to as the New gTLD Program, through which any interested entity could apply for the opportunity to operate one or more new gTLDs. In 2012, ICANN received 1,930 applications, which led to over 1,200 new gTLDs being added to the DNS.

15. Simultaneously, ICANN and the community developed a “Base Registry Agreement” that all registry operators that secured the right to operate a new gTLD via the New gTLD Program would execute. The Base Registry Agreement does not contain a price control provision;¹⁴ however, it contains various other protections for registrars and registrants.

III. THE 2019 .INFO AND .ORG REGISTRY AGREEMENTS.

16. The 2013 .INFO and .ORG Registry Agreements (the “2013 Registry Agreements”) were due to expire in June 2019. In advance, ICANN entered into bilateral negotiations with the respective registry operators to renew the agreements (collectively, the “2019 Registry Agreements”). As with other legacy gTLD 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 .INFO and .ORG registry operators also requested to transition to the Base Registry Agreement. The Base

¹² Bylaws, Art. 1, § 1.2(b)(iii), RM 2.

¹³ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 Aug. 2007), R-3; ICANN Adopted Board Resolutions (26 June 2008), R-4.

¹⁴ See, e.g., Base Registry Agreement (31 July 2017), § 2.10, R-5. The Base Registry Agreement has been amended several times, but the lack of a price control provision has remained unchanged since the first version.

Registry Agreement does not contain price control provisions, whereas the 2013 Registry Agreements previously contained provisions that, in part, limited increases in wholesale domain name registration prices to no more than 10% per year.

17. Prior to transitioning the .INFO and .ORG Registry Agreements to the Base Registry Agreement, ICANN considered numerous relevant factors and posted the proposed 2019 .INFO and .ORG Registry Agreements for public comment on ICANN's website. ICANN then considered and analyzed all public comments received and published reports that summarized the public comments and explained the reasons why ICANN still considered execution of the 2019 .INFO and .ORG Registry Agreements to be the best course of action.¹⁵

18. After conducting its due diligence and briefing the Board regarding the rationale for transitioning .INFO and .ORG to the Base Registry Agreement, ICANN proceeded to renew the Registry Agreements in June 2019 on the Base Registry Agreement as proposed.

IV. FIRST NAMECHEAP IRP FINAL DECLARATION.

19. Namecheap (an ICANN accredited registrar) initiated its First IRP in February 2020, challenging, among other things, the lack of price control provisions in the 2019 Registry Agreements. In the Final Declaration, issued in December 2022, the Panel declared that ICANN had violated its Articles and Bylaws in that: (a) ICANN did not reach its renewal decisions regarding the .INFO and .ORG Registry Agreements in an open and transparent manner; (b) ICANN's renewal of these legacy agreements involved a policy decision to be made by the ICANN Board rather than the ICANN organization (i.e., ICANN staff); and (c) ICANN did not comply with the procedural requirements for ensuring that it promotes the global public interest and acts for the benefit of the Internet community as a whole.¹⁶

¹⁵ Claimant's Annex 5, at p. 8; Claimant's Annex 7, at pp. 6-7; Claimant's Annex 6, at p. 7.

¹⁶ Claimants' Annex 25, IRP Final Declaration, ¶ 486.

20. The Panel further explained that the noted violations were “procedural rather than substantive in nature” and that “the end result of ICANN’s decision-making process is not at issue here. This Panel is not issuing a declaration that price controls should have been retained. This declaration is focused solely on the process underlying the Price Cap Decision, not its merits.”¹⁷

21. The Panel then provided certain recommendations (summarized in paragraph 22) for “the ICANN Board [to] consider.” Before setting forth those recommendations, the Panel repeatedly and explicitly noted that its recommendations were not to be construed as requiring ICANN to take any specific actions:

- “IRPs, however, are special, *sui generis* proceedings created and governed by the Bylaws and IRP Procedures. Section 4.3 draws a clear distinction between the Panel’s power to ‘declare’ and its power to ‘recommend.’ An IRP Panel may ‘declare’ that ICANN action violates the Articles and Bylaws, ***but can only ‘recommend’ that ICANN take specific action.***”¹⁸
- “The [ICANN] Bylaws have ***distinguished between the power to ‘declare’ and the power to ‘recommend’*** ever since provision was made for IRPs [in] the Bylaws in December 2002.”¹⁹
- “[T]he [ICANN] Bylaws were amended in October 2016 to strengthen the IRP process; however, those amendments did not change the longstanding distinction between the power to ‘declare’ and the power to ‘recommend.’ In particular, ***they did not authorize IRP Panels to ‘order’ (as opposed to merely recommend) that ICANN take a specific action.***”²⁰
- “The October 2016 Amendments added the ‘Purposes of the IRP,’ which include ensuring that ICANN complies with the Articles and Bylaws. But those amendments ***did not expand panel authority to ‘recommend’ remedial action to include the power to ‘order’ such action.***”²¹

¹⁷ *Id.*, ¶ 404.

¹⁸ *Id.*, ¶ 472 (emphasis added).

¹⁹ *Id.*, ¶ 473 (emphasis added).

²⁰ *Id.*, ¶ 474 (emphasis added).

²¹ *Id.*, ¶ 475 (emphasis added).

- “[P]rior IRP panels that have declared that ICANN violated the Articles or Bylaws have only recommended remedial action and have declined to order ICANN to take specific actions.”²²
- “[T]he Panel will only declare whether ICANN violated the Articles or Bylaws, and will limit itself to *recommending (not ordering)* remedial action to the extent a violation is found.”²³
- “[T]he *Panel’s authority is limited* to ‘declaring’ that the challenged ICANN action or inaction violates the Articles or Bylaws, and ‘recommending’ that ICANN take specific action.”²⁴
- “[T]he Panel *recommends* that the ICANN Board *consider* taking the following actions.”²⁵

22. The Panel then made the following recommendations for the ICANN Board’s consideration: (1) “decisions as to how to implement the Panel’s rulings in this IRP should be made by the ICANN Board”; (2) “the ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest” that “encourage[s] participation of diverse stakeholders” and “should be conducted in an open and transparent manner that avoids the violations found by the Panel”; (3) “while the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO”; (4) “the Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable” or “[i]f the Board decides not to conduct further expert analysis, it should explain the reasons for that decision”; (5) “if the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public

²² *Id.*, ¶ 480.

²³ *Id.*, ¶ 482 (emphasis added).

²⁴ Claimant’s Annex 25, IRP Final Declaration, ¶ 483 (emphasis added).

²⁵ *Id.*, ¶ 497 (emphasis added).

interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls”; (6) “the ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above”; and (7) “the Board consider revisions to ICANN's decision making process to reduce the risk of similar procedural violations in the future[,]” such as “adopt[ing] guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained.”²⁶

V. ICANN’S CONSIDERATION OF THE FIRST IRP FINAL DECLARATION.

23. The Panel issued its Final Declaration on 23 December 2022. On 21 January 2023, the ICANN Board reviewed the Final Declaration and issued a Board Resolution (2023.01.21.06)²⁷ “acknowledge[ing] that the IRP Panel declared the following: (i) Namecheap prevailed on certain of its claims in the Namecheap, Inc. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Namecheap the sum of US\$58,750.”²⁸ The ICANN Board also resolved that “further consideration is needed regarding the IRP Panel’s non-binding recommendations set forth in the Final Declaration” and “ask[ed] the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider.”²⁹

²⁶ *Id.*, ¶¶ 498-504.

²⁷ Claimant’s Annex 28, Resolution (2023.01.21.06).

²⁸ The Final Declaration declared “ICANN shall reimburse Namecheap the sum of \$58,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Namecheap.” Claimant’s Annex 25, IRP Final Declaration ¶ 505(c).

²⁹ *Supra* fn. 52.

24. Pursuant to the Board’s 21 January 2023 Resolution, the BAMC reviewed the Panel’s Final Declaration and recommendations at its meetings on 2 March 2023,³⁰ 20 April 2023,³¹ and 2 June 2023,³² and provided its input to the Board. At its 11 June 2023 meeting, the Board adopted a Resolution (2023.06.11.07)³³ directing ICANN “to retain an economist to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .INFO and .ORG[.]” The ICANN Board explained, in the Rationale, that:

The Board agrees with the BAMC’s recommendations and notes that, in light of certain of the Panel’s findings and recommendations, it is an appropriate and prudent first step to retain an economist to provide input regarding the current DNS marketplace as it relates to the market power of .INFO and .ORG. Obtaining this expert input is in keeping with the Board’s commitment to ICANN’s Mission, Commitments and Core Values, and may be useful information for the BAMC and the Board to consider in determining next steps and in considering any future process improvements that ICANN may decide to implement.³⁴

25. Pursuant to the Board’s 11 June 2023 resolution,³⁵ ICANN retained Gregory K. Leonard, Ph.D., a highly regarded economist with a globally recognized economic consulting firm. Dr. Leonard issued his report on 14 February 2024, addressing the issues identified in the Board’s 11 June 2023 resolution (“Economic Report”), which was provided to the BAMC.³⁶ Based on his extensive review and analysis of the DNS marketplace, market economies, the history of .INFO and .ORG registration pricing, and competitive market forces and other factors within the DNS marketplace, Dr. Leonard concluded, among other things, that “price controls are disfavored in market economies except in narrow circumstances where a firm has substantial

³⁰ The BAMC’s 2 March 2023 Meeting Minutes, R-6, can be found at <https://www.icann.org/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-02-03-2023-en>.

³¹ The BAMC’s 20 April 2023 Meeting Minutes, R-7, can be found at <https://www.icann.org/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-20-04-2023-en>.

³² Claimant’s Annex 38, the BAMC’s 2 June 2023 Meeting Minutes.

³³ Claimant’s Annex 39, Resolution (2023.06.11.07).

³⁴ *Id.*

³⁵ *Supra*, fn. 32.

³⁶ Claimant’s Annex 45.

and durable ‘market power,’” and that “.info and .org do not have substantial and durable market power.”³⁷ Dr. Leonard also found that, since the execution of the 2019 .INFO and .ORG Registry Agreements, “the .org price has not increased at all and the .info price has not increased more than the price control provision would have allowed, had it been in place,”³⁸ which further supports Dr. Leonard’s conclusion that competitive market forces, rather than the price control provisions, have historically restrained pricing in .INFO and .ORG.³⁹

26. At its 22 February 2024 meeting, the BAMC further reviewed the matter and “agreed that it would be prudent and useful to post the economic report on ICANN’s website and to provide Namecheap with an opportunity to submit any comments it might have in response to the economic analysis.”⁴⁰

27. ICANN posted the Economic Report on its website and provided Namecheap the opportunity to provide a written response,⁴¹ which Namecheap submitted (via a letter from its attorneys and not a responding economic report) in April 2024.⁴² At its 8 June 2024 Meeting, the BAMC directed ICANN to ask Dr. Leonard to provide a supplemental report addressing the comments raised in Namecheap’s response letter.⁴³ Dr. Leonard issued a supplemental report on 31 August 2024 (“Supplemental Report”), responding to Namecheap’s letter and explaining that Namecheap’s response did not, in any way, alter the conclusions that Dr. Leonard had reached in the Economic Report or the appropriateness of the methods Dr. Leonard used to reach those

³⁷ Claimant’s Annex 45, at pp. 2, 22.

³⁸ *Id.*, at p. 2.

³⁹ *Id.*, at pp. 10-20.

⁴⁰ The BAMC’s 22 February 2024 Meeting Minutes, R-8, can be found at <https://www.icann.org/fr/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-22-02-2024-en>.

⁴¹ Claimant’s Annex 46.

⁴² Claimant’s Annex 49.

⁴³ The BAMC’s 8 June 2024 Meeting Minutes, R-9, can be found at <https://www.icann.org/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-08-06-2024-en>.

conclusions.⁴⁴ Namecheap’s letter and Dr. Leonard’s Supplemental Report are both posted on ICANN’s website.

28. The BAMC further reviewed and considered the materials relevant to this matter (including, but not limited to, the Namecheap IRP Panel’s Final Declaration, the Economic Report, Namecheap’s response letter, and the Supplemental Report) at its meetings on 17 September 2024⁴⁵ and 17 October 2024.⁴⁶ The BAMC has extensively discussed the matter and options regarding next steps relating to the IRP Final Declaration and the Panel’s recommendations and, after careful consideration, provided its recommendations for the Board’s consideration. This matter is currently on the Board’s agenda for further consideration at its 10 November 2024 meeting.⁴⁷

VI. NAMECHEAP’S PENDING LAWSUIT AGAINST ICANN.

29. On 31 January 2024, Namecheap filed a petition with the Superior Court of the State of California, County of Los Angeles, Case No. 24SMCP00066 (the “Petition”) seeking “confirmation” of the First IRP Final Declaration and improperly requesting that the Court issue an order converting the IRP Panel’s recommendations into requirements, on a time schedule proposed by Namecheap.⁴⁸ In its Petition, Namecheap alleges that “ICANN has not implemented any recommendations of the IRP Panel” and seeks a mandatory injunction

⁴⁴ The Supplemental Report is available at <https://www.icann.org/en/system/files/files/irp-namecheap-economist-supplemental-report-31aug24-en.pdf>.

⁴⁵ The BAMC’s 17 September 2024 Meeting Minutes, R-10, can be found at <https://www.icann.org/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-17-09-2024-en>.

⁴⁶ The BAMC’s 17 October 2024 Meeting Minutes, R-11, can be found at <https://www.icann.org/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-17-10-2024-en>.

⁴⁷ The agenda for the 10 November 2024 Regular Meeting of the ICANN Board, R-12, can be found at <https://www.icann.org/en/board-activities-and-meetings/materials/agenda-regular-meeting-of-the-icann-board-10-11-2024-en>.

⁴⁸ Claimant’s Annex 44.

requiring ICANN “to comply with the directives and recommendations of the IRP Panel”⁴⁹

30. In response to the Petition, ICANN has argued that, because the ICANN Board has already considered and acknowledged the IRP Final Declaration and has already paid the expenses that the IRP Panel determined ICANN owed to Namecheap, there is nothing for the Court to order ICANN to do, and therefore the Petition is moot. Moreover, the relief that Namecheap requests goes far beyond the scope of the relief that is available on a petition to confirm an arbitration award. The final hearing on the Petition is scheduled for 24 January 2025.

VII. NAMECHEAP’S PRESENT IRP.

31. Namecheap initiated the present IRP on 13 September 2024. Like in the Petition Namecheap filed in the Superior Court, Namecheap’s IRP Request alleges that “the ICANN Board considered the *declarations* of the IRP Declaration, but, to date, ICANN never considered the IRP Panel’s *recommendations*.”⁵⁰ Namecheap also similarly seeks an “[o]rder that ICANN implement the recommendations set forth in Section XIII.D.2 of the IRP Declaration . . . within 90 days from the Panel’s order.”⁵¹

32. Namecheap also goes further to request relief that is fundamentally inconsistent with the First IRP Panel’s ruling. Namecheap requests a declaration that “ICANN’s failure to annul its Price Cap Decision” is inconsistent with the Bylaws and Articles and requests the Panel to “[o]rder that ICANN annul its Price Cap Decision.”⁵² This is inconsistent with the First IRP Panel’s ruling because the First IRP Panel explicitly stated that its ruling was limited to the process by which ICANN reached its decision and, specifically, was not regarding the substance of the decision itself, stating that “[t]his Panel is *not* issuing a declaration that price controls

⁴⁹ Claimant’s Annex 44, ¶ 58 and Prayer for Relief ¶ 2.

⁵⁰ IRP Request, at p. 12.

⁵¹ *Id.*, at p. 19.

⁵² *Id.*

should have been retained.”⁵³ Moreover, the request to order ICANN to annul the Price Cap Decision is in contravention with the First IRP Panel’s ruling— the First IRP Panel denied this same request for relief, explaining that “a declaration that the Price Cap Decision ‘must be annulled as inconsistent with and violative of’ the Articles and Bylaws...is effectively an order that ICANN take a specific action to nullify that decision. *The Panel lacks authority to make such an order.*”⁵⁴

STANDARD OF REVIEW⁵⁵

33. An IRP Panel is asked solely to evaluate whether an ICANN action or inaction was consistent with ICANN’s Articles, Bylaws, and internal policies and procedures.⁵⁶ With respect to IRPs challenging the ICANN Board’s exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.⁵⁷ Rather, the core task of an IRP Panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁵⁸

34. Only a proper “Claimant” can institute an IRP.⁵⁹ As noted above, and as set forth in the Bylaws, a Claimant is an entity “that has been materially affected by a Dispute,” meaning that it “must suffer an injury or harm that is directly and causally connected to the alleged

⁵³ Claimant’s Annex 25, IRP Final Declaration, ¶ 404 (emphasis added).

⁵⁴ Claimant’s Annex 25, IRP Final Declaration, ¶ 484 (emphasis added).

⁵⁵ Namecheap claims 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. IRP Request, at p. 14. 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 determines whether ICANN has complied with its Articles and Bylaws, *not* whether ICANN complied with recommendations of its supporting organizations.

⁵⁶ Bylaws, Art. 4, § 4.3(b), RM 2.

⁵⁷ *Id.*, § 4.3(i)(iii); see also Final Declaration, *Booking.com v. ICANN*, ICDR Case. No. 50-20-1400-0247 ¶ 115 (3 Mar. 2015), R-13.

⁵⁸ Bylaws, Art. 4, § 4.3(b), RM 2.

⁵⁹ *Id.*, Art. 4, § 4.3(b).

violation.”⁶⁰ A “Dispute” is defined as a claim that ICANN action or inaction “violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that . . . exceeded the scope of the Mission.”⁶¹ An IRP Panel is authorized to “[s]ummarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious.”⁶²

ARGUMENT

35. Namecheap’s characterization of the IRP Final Declaration and ICANN’s actions thereafter are designed to mislead this Panel into believing that ICANN has disregarded the First IRP Final Declaration. Namecheap is not being truthful. Furthermore, Namecheap does not have the right to bring its claims across multiple forums, misrepresent the First IRP Panel’s findings, attempt to convert Panel recommendations into alleged mandatory requirements, or disregard the parameters of an IRP panel’s authority.

I. NAMECHEAP’S IRP SHOULD BE DISMISSED AS IMPROPER CLAIM SPLITTING.

36. Namecheap has improperly brought the same claims in multiple forums—this IRP and the Superior Court Litigation. California follows the “primary rights” theory of claim splitting. *People v. Damon*, 51 Cal. App. 4th 958, 974 (1996) (“The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.”), RLA-2; *Zakaryan v. The Men’s Wearhouse, Inc.*, 33 Cal. App. 5th 659, 671 (2019), *disapproved on other ground in ZB, N.A. v. Superior Court*, 8 Cal. 5th 175 (2019) (“California follows the primary rights theory. This theory provides that ‘one injury gives rise to only one claim for relief’”), RLA-3.

⁶⁰ *Id.*, Art. 4, § 4.3(b)(i).

⁶¹ *Id.*, Art. 4, § 4.3(b)(iii)(A).

⁶² *Id.*, Art. 4, § 4.3(o)(i).

37. The primary rights theory “prohibits a plaintiff from divid[ing] a primary right and enforc[ing] it in two suits whether in a judicial or arbitral forum.” *Zakaryan*, 33 Cal. App. 5th at 671 (quoting *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 904 (2002), RLA-4) (internal quotation marks omitted); *Galarsa v. Dolgen Cal. LLC*, 88 Cal. App. 5th 639, 654, *as modified on denial of reh’g* (Feb. 24, 2023), RLA-5, *review dismissed, cause remanded sub nom. Galarsa v. Dolgen Cal.*, 534 P.3d 925 (Cal. 2023) (“The prohibited division can occur in judicial or arbitral fora.”). In *Zakaryan*, the court prohibited a court from splitting a PAGA claim for underpaid wages and a claim for statutory penalties into two separate claims—sending the underpaid wages claim to arbitration but retaining jurisdiction to award the statutory penalties—because “it impermissibly divides a single primary right[, since] an individual employee bringing a PAGA claim is vindicating one and only one ‘particular injury’[.]” 33 Cal. App. 5th at 671-672.

38. Here, Namecheap seeks to vindicate one and only one particular “injury”—the “injury” it claims to have sustained by ICANN’s alleged inaction related to the recommendations in the IRP Final Declaration. In the Petition, Namecheap’s Prayer for Relief seeks “Confirmation of the Final Declaration of the IRP Panel” and “Mandatory injunctive relief to comply with the directives and recommendations of the IRP Panel in the form of the Proposed Judgment attached hereto as Exhibit B.”⁶³ In other words, the Petition seeks to convert the Panel’s recommendations into mandatory requirements. Similarly, in its IRP Request, Namecheap’s Relief Requested seeks to convert the Panel’s recommendations into mandatory requirements,⁶⁴ requesting an “[o]rder that ICANN implement the recommendations set forth in Section XIII.D.2 of the IRP Declaration of 23 December 2022 in ICDR Case No. 01-20-0000-

⁶³ Claimants’ Annex 44, at pp. 12-13.

⁶⁴ IRP Request, at p. 19.

6787 within 90 days from the Panel’s order.”⁶⁵

39. Because the alleged injury that is the basis for all of Namecheap’s requested relief—in both the Superior Court Litigation and this IRP—is identical, it is improper for Namecheap to split its claims between the two forums. On this basis alone, Namecheap’s IRP Request should be summarily dismissed.

II. NAMECHEAP IS NOT A “CLAIMANT” UNDER THE BYLAWS AND THEREFORE HAS NO STANDING TO PURSUE THIS IRP.

40. In order to be a Claimant, Namecheap must demonstrate that it “has been materially affected by a Dispute,” meaning that it “must suffer an injury or harm that is directly and causally connected to the alleged violation.” Namecheap’s only allegation regarding the harm it has allegedly suffered is a conclusory statement that it “has suffered direct harm as a result of ICANN’s breaches of its Articles of Incorporation,” without providing *any* detail as to what that harm is.⁶⁶ Namecheap does not provide a *single allegation* to support that assertion.

41. It would be one matter if Namecheap had alleged that ICANN completely disregarded the IRP Final Declaration such as by refusing to pay the expenses the IRP Panel ordered ICANN to pay to Namecheap. Namecheap, however, admits that ICANN has acknowledged the IRP Final Declaration and paid the expenses the IRP Panel ordered ICANN to pay. Namecheap’s alleged injury, therefore, stems from its dissatisfaction with the steps ICANN has taken in response to the First IRP Panel’s recommendations. But dissatisfaction does not equate to harm (much less a violation of ICANN’s Bylaws). Moreover, as explained in detail above, the First IRP Panel was very clear in distinguishing between its declarations, which are binding, and its recommendations, which by definition are not binding.⁶⁷ Thus, Namecheap

⁶⁵ IRP Request, at p. 19.

⁶⁶ IRP Request, at p. 1.

⁶⁷ See *supra* paragraph 21; Claimant’s Annex 25, IRP Final Declaration ¶¶ 472-475, 482-483, 497.

cannot have suffered a material injury based on whether or not ICANN has addressed (to Namecheap's satisfaction) the Panel's non-binding recommendations.

42. Even the underlying basis for Namecheap's alleged, but unspecified, "injury" is false. As set forth above in the Summary of Relevant Facts at paragraphs 23 through 28, and as admitted by Namecheap,⁶⁸ the ICANN Board and the BAMC have extensively considered and reviewed the IRP Final Declaration and have taken or directed the ICANN organization to take various actions in response to the IRP Final Declaration. This includes, but is not limited to: (i) paying the amount ordered by the First IRP Panel; (ii) acknowledging the First IRP Panel's declarations; (iii) retaining an expert economist to prepare the Economic Report (which is a comprehensive report regarding the current DNS marketplace as it relates to the market power of .INFO and .ORG); (iv) reviewing Namecheap's response to the Economic Report; (v) requesting that the economist prepare a Supplemental Report; and (vi) carefully reviewing the IRP Final Declaration and these further materials over the course of ten BAMC or Board meetings (thus far). This is not in dispute and is all publicly available on ICANN's website.

43. Accordingly, not only has Namecheap failed to identify any harm that it has allegedly suffered, it has also failed to establish the underlying basis for its (unspecified) injury claim. Thus, Namecheap does not meet the definition of a Claimant under the Bylaws. On this basis alone, Namecheap's IRP Request should be summarily dismissed.

III. ICANN HAS ACTED CONSISTENT WITH ITS ARTICLES AND BYLAWS IN ITS CONSIDERATION OF THE IRP FINAL DECLARATION.

44. Namecheap has not demonstrated (because it cannot) that ICANN did anything other than act fully consistent with its Articles and Bylaws in its actions following the IRP Final Declaration.

⁶⁸ See IRP Request, at pp. 12-14 (citing Claimant's Annexes 38, 39, 45, 46, and 47).

A. ICANN Has Carefully Considered and Taken Appropriate Action Following Consideration of The First IRP Final Declaration.

45. Namecheap's entire argument stems from either a misunderstanding of or an intentional mischaracterization of the First IRP Panel's ruling. Namecheap tries to imply in its IRP Request that the First IRP Panel ruled that the "Price Cap Decision" was a substantive violation of ICANN's Articles and Bylaws, *e.g.* that the decision itself to transition the .INFO and .ORG Registry Agreements to the Base Registry Agreement was the violation. That is not what the First IRP Panel ruled. The First IRP Panel was very clear and explained that its findings were entirely procedural (regarding the process by which ICANN made the decision), not substantive (the decision itself). More specifically, the First IRP Panel stated: "the end result of ICANN's decision-making process is not at issue here. *This Panel is not issuing a declaration that price controls should have been retained.* This declaration is focused solely on the *process* underlying the Price Cap Decision, not its merits."⁶⁹ The Panel did *not* conclude that the decision to adopt the 2019 Registry Agreements without price controls was wrong; instead, the Panel disapproved of the process ICANN undertook.⁷⁰

46. Furthermore, at the risk of being repetitive, the First IRP Panel was also very clear in its analysis and conclusions regarding what an IRP Panel has the authority to declare, and what it only has the authority to recommend.⁷¹ The First IRP Panel was explicit in stating that the Bylaws do "not authorize IRP Panels to 'order' (as opposed to merely recommend) that ICANN take a specific action."⁷² Namecheap literally ignores the First IRP Panel's repeated statements in the Final Declaration (*see* paragraph 21, above) that "the Panel's authority is

⁶⁹ *Id.*, ¶ 404 (emphasis added).

⁷⁰ *See id.*, at ¶¶ 406, 435, 486, 494.

⁷¹ Claimant's Annex 25, IRP Final Declaration, at ¶¶ 472-475, 482-483, 497.

⁷² *Id.*, at ¶ 474.

limited to ‘declaring’” whether ICANN acted consistent with its Articles and Bylaws and to “recommending” that ICANN “consider taking” a specific action.”⁷³

47. Given that the difference between the Panel’s declarations and its recommendations is clear (even though Namecheap intentionally ignores the clear difference), there can be no dispute that ICANN has acted consistently with its Articles and Bylaws. The ICANN Board has carefully considered the IRP Final Declaration and the First IRP Panel’s recommendations and has taken, or directed the ICANN organization to take, appropriate action following the Board’s consideration—as set forth above in the Summary of Relevant Facts at paragraphs 23 through 28, as admitted by Namecheap, and as publicly available on ICANN’s website.

48. Over the course of ten meetings of the ICANN BAMC and Board and countless hours of consideration: (i) ICANN’s Board has acknowledged the First IRP Panel’s declarations in the IRP Final Declaration and paid the expenses the IRP Panel declared that ICANN owed to Namecheap;⁷⁴ (ii) the Board resolved that “further consideration is needed regarding the IRP Panel’s non-binding recommendations set forth in the Final Declaration” and “ask[ed] the [BAMC] to review, consider, and evaluate the IRP Panel’s Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider”;⁷⁵ (iii) the BAMC reviewed the IRP Final Declaration and recommendations at several meetings, and provided its input to the Board;⁷⁶ (iv) the Board adopted a Resolution (2023.06.11.07) directing ICANN “to retain an economist to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power

⁷³ *Id.*, at ¶ 483.

⁷⁴ IRP Request, at p. 1.

⁷⁵ Claimant’s Annex 28; IRP Request at p. 12.

⁷⁶ *Supra* fn. 30, 31, 32, 40, 43; *see also* Claimant’s Annex 38.

of .INFO and .ORG”;⁷⁷ (v) ICANN retained an economist, who prepared a comprehensive Economic Report regarding the current DNS marketplace as it relates to the market power of .INFO and .ORG;⁷⁸ (vi) the BAMC provided Namecheap an opportunity to respond,⁷⁹ which Namecheap did;⁸⁰ (vii) the BAMC then asked the expert economist to prepare a Supplemental Report responding to Namecheap’s letter;⁸¹ and (viii) the BAMC then further reviewed the materials relevant to this matter at two additional meetings and prepared recommendations for the Board’s consideration regarding next steps relating to the IRP Final Declaration.⁸²

49. Simply because Namecheap is not happy with the well-researched conclusions that Dr. Leonard reached in his Economic Report, and reaffirmed in his Supplemental Report, does not mean, and does not even come close to proving, that ICANN acted inconsistently with its Articles and Bylaws. The facts, all of which are publicly posted on ICANN’s website in an open and transparent manner, demonstrate quite the opposite.

50. In sum, it is clear that the ICANN Board has extensively considered the IRP Final Declaration as well as the First IRP Panel’s non-binding recommendations and has taken specific and well-reasoned actions following its consideration of the IRP Final Declaration.

IV. NAMECHEAP’S REQUESTED RELIEF EXCEEDS THE SCOPE OF THE IRP AND THIS PANEL’S AUTHORITY.

51. The relief Namecheap seeks (disguised as a “declaration”) is tantamount to a request for a mandatory injunction that ICANN “annul its Price Cap Decision removing price caps in .org and .info registry agreements” and that ICANN “implement the recommendations

⁷⁷ Claimant’s Annex 39, IRP Request at p. 13.

⁷⁸ Claimant’s Annex 45.

⁷⁹ Claimant’s Annex 46.

⁸⁰ Claimant’s Annex 49.

⁸¹ The Supplemental Report is available at <https://www.icann.org/en/system/files/files/irp-namecheap-economist-supplemental-report-31aug24-en.pdf>.

⁸² *Supra*, fn. 45, 46.

set forth in Section XIII.D.2 of the IRP Declaration of 23 December 2022...within 90 days from the Panel’s order.”⁸³ This directly contravenes the Bylaws and the First IRP Panel’s ruling.

52. ICANN’s Bylaws provide that an IRP Panel’s authority is limited to, among other things, declaring whether an ICANN action or inaction violates the Articles or Bylaws, “[r]ecommend[ing] that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered,” designating the prevailing party and, if applicable, cost shifting.⁸⁴ The Bylaws further state that an 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 reasonably business judgment.”⁸⁵

53. Moreover, the IRP Final Declaration could not have been clearer in denying the same request that Namecheap seeks here—stating “that a declaration that the Price Cap Decision ‘must be annulled’ is effectively an order that ICANN take specific action to nullify that decision. *The Panel lacks authority to make such an order.*”⁸⁶

54. Namecheap’s requests are inappropriate, far exceed the scope of the IRP Panel’s authority, and should be denied.

V. REQUEST FOR ORDER REQUIRING NAMECHEAP TO AMEND ITS IRP REQUEST TO REMOVE IMPROPER REFERENCES TO THE CEP.

55. In advance of filing this IRP, Namecheap initiated the Cooperative Engagement Process (“CEP”) with ICANN.⁸⁷ Under the Bylaws, an entity intending to initiate an IRP is encouraged to participate in a CEP with ICANN prior to initiating that IRP in the hope of resolving or narrowing the issues that may be the subject of an IRP. The CEP is essentially a

⁸³ IRP Request, at p. 19.

⁸⁴ See Bylaws Art. 4, § 4.3(o)(iii), (iv), RM 2.

⁸⁵ *Id.*, § 4.3(i)(iii).

⁸⁶ Claimant’s Annex 25, IRP Final Declaration, ¶ 484 (emphasis added).

⁸⁷ Claimant’s Annex 33.

mediation or settlement discussion. To foster open and candid settlement communications, CEP communications have always been considered confidential. This confidentiality standard mirrors applicable state and federal law, as well as the International Centre for Dispute Resolution's ("ICDR") Mediation Procedures, all of which are designed to promote the resolution of disputes by making settlement discussions confidential and prohibiting the use of confidential settlement discussions as evidence before the ultimate factfinder.

56. The CEP involving Namecheap and ICANN (in advance of the present IRP) lasted over fifteen months and involved several CEP discussions and written communications; nevertheless, the parties were unable to reach a resolution. Despite the confidential nature of CEP communications, Namecheap's IRP Request contains several allegations and arguments regarding Namecheap's version of discussions during the CEP, including recitation of portions of the confidential discussions and even attaching written correspondence exchanged during the CEP. As such, ICANN is requesting that the Panel order Namecheap to amend its IRP Request to remove reference to the content of the CEP discussions and remove the related exhibits. Without disclosing the content of any such discussions, ICANN does note that, at all times during the CEP, it acted in good faith. Namecheap seemed, and seems, to have a misunderstanding as to the parameters and purpose of the CEP. ICANN explained the applicable limitations as to the type of information appropriate for discussion during a CEP several times; however, Namecheap became frustrated and continued to request information outside the scope of the CEP. Ultimately, after fifteen months of communications, the parties were unable to resolve the issues and the CEP was closed in June 2024. Accordingly, while ICANN denies Namecheap's claims related to the CEP, ICANN will not respond in detail given the confidentiality of the proceeding, and ICANN requests that the Panel order Namecheap to amend

its IRP Request immediately and remove any reference to the content of those discussions (including the related exhibits).

CONCLUSION

57. Namecheap is not happy that the 2019 Registry Agreements for .INFO and .ORG do not contain registry price control provisions or that the First IRP Panel refused to provide Namecheap with the relief it requested. Namecheap is also not happy with the well-researched conclusions that Dr. Leonard reached in his Economic Report, and reaffirmed in his Supplemental Report, that “price controls are disfavored in market economies except in narrow circumstances where a firm has substantial and durable ‘market power’” and that “.info and .org do not have substantial and durable market power.”⁸⁸ But the filing of a second IRP, on the heels of filing a Superior Court lawsuit, is completely inappropriate. Namecheap does not have the right to bring its claims across multiple forums, misrepresent the First IRP Panel’s findings, attempt to convert Panel recommendations into alleged mandatory requirements, or disregard the parameters of an IRP panel’s authority. Namecheap is not a proper Claimant, its requests for relief are verboten, and it has not established that ICANN acted inconsistently with its Articles or Bylaws. Accordingly, ICANN respectfully requests that Namecheap’s IRP Request be denied.

Respectfully submitted,

JONES DAY

Dated: November 8, 2024

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Counsel for Respondent ICANN

⁸⁸ Claimant’s Annex 45, at p. 2, 22.