

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 Post-Hearing Brief**

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## PANEL ISSUES

ICANN thanks the Panel for its preparation of the set of issues it raised for the Parties.

ICANN has endeavored to address each of the issues where appropriate throughout this brief.

For ease of reference, ICANN’s responses to the Panel’s questions can be found as follows:

Issue Number	Panel Issue	Location
Issue 1	Do the parties disagree with any of principles on standing and harm set forth by the Panel in Procedural Order No. 8, paragraphs 21-28, 40-44?	Paragraphs 15-22
Issue 2	As of which date should standing be determined? Is it when the IRP is filed or some other date?	Paragraphs 23-27
Issue 2(a)	a. Are events after the IRP is filed relevant to standing?	Paragraph 24
Issue 2(b)	b. If a current risk of harm in the future is relevant to standing, what is the relevant period here? Is it the ten-year term of the 2019 Registry Agreements for .ORG, .INFO, and .BIZ (the “2019 Registry Agreements”)?	Paragraphs 24-27
Issue 3(a)	Please briefly summarize what you consider to be the key evidence in the record of harm or lack of harm as to the following items, with citations to the testimony / evidence (bullet points are welcome and, in fact, encouraged)  a. Risk of future price increases that will reduce Namecheap’s profits and/or customers, especially in comparison to vertically integrated competitors.	Paragraphs 28-31
Issue 3(b)	Please briefly summarize what you consider to be the key evidence in the record of harm or lack of harm as to the following items, with citations to the testimony / evidence (bullet points are welcome and, in fact, encouraged)  ...  b. Harm to Namecheap’s brand equity or reputation	Paragraph 32
Issue 4	The Panel notes that Namecheap listed the following issue: “Did ICANN respect its Board-approved processes when removing cross-ownership restrictions in .ORG, .INFO, and .BIZ?” ICANN has asserted that claims based on Vertical Integration (or cross-ownership restrictions) and the	Paragraphs 36-39

	<p>Feb06 Policy are barred. The Panel’s preliminary view is that (1) standalone claims that ICANN improperly removed cross-ownership restrictions or violated the Feb06 Policy are beyond the scope of this IRP as framed by Namecheap’s IRP Request and Reconsideration Request 19-2; but (2) cross-ownership restrictions and the Feb06 Policy may be relevant as a factual matter to standing and Namecheap’s claim that ICANN improperly removed price caps The parties are invited to comment on this preliminary view.</p>	
Issue 5(a)	<p>Rule 11.c. of the Interim Supplementary Procedures for ICANN Independent Review Process provides that “[f]or 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 ....” Please comment on the meaning of “exercise of its fiduciary duties,” especially as to the following points.</p> <p>a. Do all ICANN board actions constitute the “exercise of its fiduciary duties” or certain actions only (and if so, which ones)?</p>	Paragraph 41
Issue 5(b)	<p>Rule 11.c. of the Interim Supplementary Procedures for ICANN Independent Review Process provides that “[f]or 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 ....” Please comment on the meaning of “exercise of its fiduciary duties,” especially as to the following points.</p> <p>...</p> <p>b. Does the Board’s inaction constitute an “exercise of its fiduciary duties”?</p>	Paragraph 41
Issue 5(c)	<p>Rule 11.c. of the Interim Supplementary Procedures for ICANN Independent Review Process provides that “[f]or 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 ....” Please comment on the meaning of “exercise of its fiduciary duties,” especially as to the following points.</p> <p>...</p>	Paragraph 41

	c. Does the Board’s interpretation of ICANN’s Articles of Incorporation or Bylaws constitute the “exercise of its fiduciary duties”?	
Issue 5(d)	<p>Rule 11.c. of the Interim Supplementary Procedures for ICANN Independent Review Process provides that “[f]or 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 ....” Please comment on the meaning of “exercise of its fiduciary duties,” especially as to the following points.</p> <p>...</p> <p>d. Do informal Board actions or inactions at workshops that do not meet the requirements of a formal Board meeting constitute the “exercise of its fiduciary duties”?</p>	Paragraph 41
Issue 6	For ICANN, what “exercise of [the Board’s] fiduciary duties” is at issue here? When does ICANN contend that the Board delegated to ICANN staff the decision to renew the 2019 Registry Agreements? Is that delegation of authority and its scope memorialized in anything beyond the ICANN Delegation of Authority Guidelines (R-37)?	Paragraph 42
Issue 7	If the decision to renew the 2019 Registry Agreements without price caps was made by the ICANN staff and not by the ICANN Board, what standard of review applies to that decision?	Paragraph 44
Issue 8	Please explain your position on whether this Panel is reviewing ICANN’s denial of Reconsideration Request 19-2, ICANN’s underlying decision that was the subject of Reconsideration Request 19-2, or both? Do prior IRP decisions draw any distinctions between review of denial of reconsideration and review of the underlying decision?	Paragraph 43
Issue 9	Namecheap states, in the context of the Panel’s authority, that “the ICANN community proposed new language for the Bylaws, which the Board adopted with the purpose of enhancing its accountability mechanism following the 2016 IANA transition.” (Namecheap’s 8 February 2022 Rebuttal, ¶ 103 & n. 101.) What new language does Namecheap contend was adopted by the Board, and when was it adopted?	Paragraph 80

Issue 10	ICANN states: “the history of IRPs demonstrates that independent determinations of whether ICANN has violated its Articles or Bylaws is an effective mechanism at ensuring compliance and resolving disputes.” (14 March 2022 ICANN Rebuttal, ¶ 82.) Can ICANN provide examples of other IRPs that support this statement? If Namecheap disagrees with this statement, please explain why and provide examples. Please submit any cited IRP decisions that were not previously submitted.	Paragraphs 81-85
Issue 11(a)	<p>Does ICANN’s obligation to operate in an open and transparent manner include the following:</p> <p>a. Seeking comments from stakeholders on the decision to renew the 2019 Registry Agreements without price caps and providing a detailed explanation to stakeholders of the basis for ICANN’s decision, in light of such comments.</p> <p>...</p> <p>If so, did ICANN comply with any such obligations?</p>	Paragraphs 66-67
Issue 11(b)	<p>Does ICANN’s obligation to operate in an open and transparent manner include the following:</p> <p>...</p> <p>b. Creating records in a manner that ensures that the attorney-client privilege and attorney work product doctrine do not prevent disclosure of significant information about the negotiation and decision-making process and reasons for the decision that is needed to evaluate whether ICANN complied with its obligations under its Bylaws and Articles of Incorporation.</p> <p>If so, did ICANN comply with any such obligations?</p>	Paragraph 68
Issue 12	In evaluating the decision to renew the 2019 Registry Agreements without price caps, may the Panel properly consider information that was not available to ICANN as of the date of the decision, such as events after that date?	Paragraphs 45-46
Issue 13	What weight, if any, should be given to reasons for renewing the 2019 Registry Agreements without price caps that ICANN identified during this IRP that were not in ICANN’s public statement of reasons?	Paragraphs 47-48

Issue 14	Please briefly summarize the key reasons that you contend that price caps on .ORG, .INFO, and .BIZ are or are not warranted, given that .COM continues to be subject to price caps?	Paragraphs 72-77
Issue 15	Please provide a concise bullet-point summary of key evidence regarding removal of price caps that relates specifically to .ORG (in contrast to .INFO and .BIZ).	Paragraph 78



The Internet Corporation for Assigned Names and Numbers (“ICANN”) submits this Post-Hearing Brief pursuant to the schedule memorialized in the Panel’s 8 April 2022 email.

### INTRODUCTION

1. The threshold issue this Panel must decide is whether Namecheap has standing as a “Claimant” to pursue its claims in this IRP. The text of ICANN’s Bylaws is clear that a Claimant is one that “*has been* materially affected by a Dispute,” meaning that it must have “suffer[ed] an injury or harm that is directly and causally connected to the alleged violation.”<sup>1, 2</sup> Not only is there no evidence that Namecheap has suffered harm to date, there is now evidentiary confirmation that Namecheap *has not been harmed* to date due to the lack of price controls in the 2019 registry agreements for .BIZ, .INFO and .ORG (“2019 Registry Agreements”).

2. Specifically, when Namecheap’s economic expert, Dr. Langus, was asked at the hearing whether he agrees that “Namecheap has not been materially harmed since the cessation of price controls in 2019,” Dr. Langus testified as follows: “Yeah, I think, depending on how you define ‘materially,’ but I think that I would agree that so far, I have no strong presumption or something that until now, Namecheap has been significantly harmed.”<sup>3</sup> Likewise, Dr. Langus confirmed on cross-examination that he and Dr. Verboven are not offering an economic opinion that Namecheap has been harmed to date as a result of the lack of price caps.<sup>4</sup> Dr. Langus also confirmed on cross-examination that neither he nor Dr. Verboven performed any quantitative analysis of whether the lack of price controls in .BIZ, .INFO and .ORG has caused Namecheap to lose customers or has had a negative impact on Namecheap’s profits, profit margins, or market value.<sup>5</sup> These are stunning admissions from the experts retained by Namecheap to provide an “independent opinion as to the injury or harm to the Claimant, if any, that is directly and causally connected to the alleged violations of the Respondent.”<sup>6</sup>

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<sup>1</sup> Bylaws, Art. 4, § 4.3(b)(i), RM 2.

<sup>2</sup> All citations to the Bylaws in this brief are to the version as amended 28 November 2019 unless otherwise noted.

<sup>3</sup> See 5 Hr’g Tr. (Langus), 141:16–142:12.

<sup>4</sup> See 4 Hr’g Tr. (Langus), 149:17–150:1.

<sup>5</sup> See 4 Hr’g Tr. (Langus), 146:13-25 (no customer retention analysis), 147:1-5 (no profits analysis), 147:6-10 (no profit margins analysis), 147:11-15 (no market value analysis).

<sup>6</sup> Dr. Gregor Langus (12 Dec. 2020) Report ¶ 4.

3. Given that Namecheap's experts admit that Namecheap has not been materially harmed to date, Namecheap contends that if a prospective claimant can show the mere theoretical possibility that it *might* experience some modicum of potential *future* harm as a result of ICANN conduct, that party has standing to institute an IRP regardless of the probability or materiality of the speculated future harm. Such a standard, however, is irreconcilable with the plain text of the Bylaws and is unmanageable because it has no bounds.

4. To the extent the Panel maintains its preliminary finding in Procedural Order No. 8 that possible future harm is sufficient to confer standing, the relevant time period for evaluating such possible future harm must be reasonably narrow, as it is in other forums. That is, in the case of standing predicated on the risk of future harm, a prospective claimant should be required to present evidence establishing that at the time it initiated its IRP there was an imminent risk of material harm that is directly and casually connected to the alleged violation of the Articles of Incorporation ("Articles") or Bylaws.

5. Accordingly, if the Panel chooses to evaluate potential, future harm in its standing analysis, the only question this Panel should consider with respect to standing is whether Namecheap has established that when it filed its IRP Request there was an imminent and material threat that the .BIZ, .INFO and .ORG registry operators would increase registry prices to levels not previously permitted (*i.e.*, more than 10% per year) *and* that Namecheap would not be able to effectively pass-through those price increases. Namecheap failed to satisfy this burden as of the time it filed its IRP Request, and cannot satisfy it even today, some two years later. But in any event, the record and economic evidence demonstrate that .BIZ, .INFO and .ORG registry prices are not likely to soar to unprecedented levels and, even if they did, Namecheap will pass-on such price increases, as economic theory predicts all registrars would do (of which there are nearly 2,500 who have not challenged the 2019 Registry Agreements) and as Namecheap has historically and consistently done.

6. On the issue of potential future harm, what is past is prologue. Since the price controls were removed almost three years ago, the .BIZ, .INFO and .ORG registry operators have not increased prices above levels permitted under the previous price controls. This is

significant, real-world evidence regarding the tendencies of these registry operators and the high-levels of competition they face from other TLDs, as confirmed by Dr. Carlton at the hearing.<sup>7</sup> Dr. Carlton demonstrated that there is no reason to expect that .BIZ, .INFO or .ORG registry prices will increase to levels above those permitted under the previous price control provisions.<sup>8</sup> This is due primarily to the competition .BIZ, .INFO and .ORG face from other TLDs, including the most popular TLD, .COM, which is covered by price caps set by the U.S. government that keep the .COM price constrained. Thus, the .COM price is a significant competitive threat to any TLD seeking to increase price significantly above the .COM price, including .ORG.<sup>9</sup> ICANN Board Chair, Maarten Botterman, who previously served as board chair for Public Interest Registry (“PIR”), the .ORG registry operator, testified at the hearing that “[w]e never came close or even considered getting towards the price cap in my time of the board of PIR” and Mr. Botterman confirmed that when setting prices, PIR considered: “So how do our prices compare to those with .com, .net, other registries and [ccTLDs]? That was much more important for our understanding of how we could do well in the market than the price cap itself. The price cap -- we knew it was there, but it was never a part of discussion or dispute at the PIR board.”<sup>10</sup> There is no evidence, or any reason to expect, that the .BIZ, .INFO and .ORG registry operators will change course in the future and increase prices materially above levels permitted under the previous price controls given the state of competition in the Domain Name System (“DNS”).

7. Even if there was some possibility that this would happen, the evidence is clear that Namecheap would pass through any such increase to its customers in order to maintain its margins.<sup>11</sup> Dr. Carlton’s regression analysis demonstrates that Namecheap has on average passed through <sup>Redacted - Confidential Information</sup> of historical price increases for both new and renewal

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<sup>7</sup> 5 Hr’g Tr. (Dr. Carlton), 19:8-12 (“If anything, .org, .info and .biz face more competition rather than less as time goes on. In fact, if you look at the registrations on .org, .info and .biz, they’ve been declining in both absolute terms and in terms of share.”).

<sup>8</sup> Dr. Dennis Carlton (14 Jan. 2022) Expert Report ¶¶ 47–68 (“Carlton Expert Report”).

<sup>9</sup> *Id.*

<sup>10</sup> 2 Hr’g Tr. (Botterman), 86:12-13, 113:13-19.

<sup>11</sup> While possible increased prices to Namecheap’s customers are not relevant to the Panel’s analysis of whether Namecheap has standing, it is important to note that the 2019 Registry Agreements provide price protections by requiring six-months’ notice of price increases and allowing a lock-in of the then-current pricing for up to ten years.

registrations in .BIZ, .INFO and .ORG, as predicted by economic theory and confirmed by Namecheap's public statements to its customers.<sup>12</sup> In fact, Namecheap's Chief Operating Officer, Mr. Klein, conceded during cross-examination that, Redacted - Confidential Information

<sup>13</sup> if, for instance, .BIZ, .INFO or .ORG were to increase their prices by more than what was previously allowed under the prior price control provisions.

8. Further, Namecheap has failed to come forward with evidence that it has lost customers or has suffered a loss of brand equity or reputation as a result of any previous price increases. In fact, Dr. Langus' concession that Namecheap has *not* been materially harmed to date speaks volumes about the future. If Namecheap has not lost customers and its brand equity and reputation have not suffered over the last three years, there is no reason to suspect that Namecheap would suffer such harms in the future due to the removal of price caps in .BIZ, .INFO and .ORG three years ago.

9. Accordingly, Namecheap has failed to establish that it has standing as a Claimant, regardless of whether the Panel considers only harm to date or potential future harm as well, and Namecheap's IRP should be dismissed, as set forth in the Bylaws. And even though the final hearing has now occurred, standing remains a significant issue for ICANN as it may be relevant to future IRPs. Thus, ICANN respectfully requests the Panel find that Namecheap lacks standing to proceed.

10. Evidence elicited during the hearing also established that ICANN fully complied with its Articles and Bylaws in connection with the 2019 Registry Agreements. ICANN organization was responsible for deciding to enter into the 2019 Registry Agreements pursuant to its authority to manage ICANN's day-to-day operations provided for in the Bylaws, which was documented with more specificity in the August 2016 Delegation of Authority Guidelines

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<sup>12</sup> Carlton Expert Report ¶¶ 17–21; Carlton Reply Report ¶¶ 4, 6–9.

<sup>13</sup> 4 Hr'g Tr. (Klein), 32:2–9

(“Guidelines”).<sup>14</sup> Prior to transitioning the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement, which does not include price control provisions, ICANN organization considered numerous relevant factors including the maturation of the DNS, ICANN’s obligation to not treat the registry operators of .BIZ, .INFO and .ORG differently than new gTLD and legacy gTLD operators that had previously transitioned to the Base Registry Agreement, the fact that ICANN lacks the authority, capacity, and expertise to regulate prices, the goal of ensuring consistency across registry operators, and the Bylaws mandate that, where feasible, ICANN is to rely on market mechanisms to enhance competition in the DNS.<sup>15</sup> ICANN organization likewise considered the benefits gained by moving these TLDs to the Base Registry Agreement.

11. Moreover, ICANN’s deliberative process was transparent. Before making any final decision, ICANN posted the proposed registry agreements for public comment and expressly highlighted the fact that the proposed agreements did not contain the previous price control provisions and provided an explanation for their absence.<sup>16</sup> After receiving public comments, ICANN fully considered and analyzed them prior to making its ultimate decision to move forward with executing the 2019 Registry Agreements consistent with the proposed drafts. Indeed, ICANN published reports that summarized the public comments and provided detailed explanations of the reasons why ICANN was still considering execution of the 2019 Registry Agreements to be the best course of action.<sup>17</sup> ICANN then explained the next steps it would take in making the final decision of whether to execute the agreements. After executing the 2019 Registry Agreements, ICANN posted them on the ICANN website and shortly thereafter explained its reasoning to the press and in a letter publicly posted on ICANN’s website.

12. In sum, ICANN conducted due diligence and ensured that the Internet community was kept informed and involved at key stages in the decision-making process. The fact that

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<sup>14</sup> 3 Hr’g Tr. (Weinstein), 98:9–99:20 (Mr. Weinstein explaining that Board resolutions are not required for contract negotiations because that falls clearly within ICANN Organization’s remit).

<sup>15</sup> See, e.g., 3 Hr’g Tr. (Weinstein), 46:13-23, 78:3-11, 128:25-129:19.

<sup>16</sup> 3 Hr’g Tr. (Weinstein), 85:12-88:12.

<sup>17</sup> 3 Hr’g Tr. (Weinstein), 88:13-90:22.

Namecheap disagrees with ICANN's ultimate decision does not obviate the fact that ICANN fully complied with its Articles and Bylaws obligations.

13. Lastly, although the ICANN Board did not pass any resolutions regarding the 2019 Registry Agreements, the Board did properly exercise its oversight role of receiving briefings on the work ICANN was doing on this front. And because the Board did not pass any resolutions regarding the 2019 Registry Agreements, the Board cannot have violated any Articles or Bylaws relating thereto. Despite Namecheap's protestations to the contrary, the Articles and Bylaws do not require the Board to approve contracts. To the contrary, the Bylaws expressly provide that ICANN's President and CEO is in charge of all of ICANN's activities and business, and the Guidelines made clear to the Internet community that the role of ICANN's President and CEO includes managing the day-to-day operations of ICANN. Namecheap does not identify a single Article or Bylaws provision that required the Board to convene a formal meeting to receive information regarding the 2019 Registry Agreements pursuant to its oversight role.

14. In short, now that all of the evidence is in, Namecheap has failed to show that ICANN acted inconsistently with the Articles or Bylaws regarding the 2019 Registry Agreements. Nor has Namecheap shown that it has even been harmed by those agreements. ICANN urges the Panel to resolve these matters in ICANN's favor.

## ARGUMENT

### **I. NAMECHEAP LACKS STANDING TO PURSUE THIS IRP.**

#### **A. The Proper Test For Standing.**

15. Only a "Claimant," as defined by the Bylaws, may institute an IRP.<sup>18</sup> To qualify as a "Claimant," the Bylaws require Namecheap to show that it "*has been* materially affected by a Dispute," meaning that it must have "suffer[ed] an injury or harm that is directly and causally connected to the alleged violation."<sup>19</sup> Namecheap cannot meet this standard given the lack of evidence and expert opinion that it has been harmed to date. Namecheap knows that it cannot meet this standard and instead argues that a different standard applies: Namecheap contends that

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<sup>18</sup> Bylaws, Art. 4, § 4.3(a), RM 2.

<sup>19</sup> Bylaws, Art. 4, § 4.3(b)(i), RM 2.

if a prospective claimant can show the mere theoretical possibility that it *might* experience some modicum of potential *future* harm as a result of ICANN conduct, that party has standing to institute an IRP regardless of the actual probability or materiality of the speculated future harm.

16. Namecheap’s interpretation of the standing requirement is irreconcilable with the plain text of the Bylaws and common sense. Section 4.3(a) expressly requires that a Claimant “*has been* materially affected” by an ICANN action in order to institute an IRP, which precludes an assertion that a sheer risk of unquantified future harm is sufficient to satisfy the test. Rule 9 of the Interim Supplementary Procedures similarly provides that the Panel may “summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it *has been* materially affected by a DISPUTE.”<sup>20</sup> The fact that the Bylaws and Rule 9 use the present perfect tense is significant and indicative of a clear intent to limit standing to parties that can show they have already been materially harmed.<sup>21</sup> Indeed, if the Bylaws drafters or the ICANN community, which was integrally involved in the drafting of the Bylaws and was represented by its own counsel, had intended the risk of *future* harm to be sufficient, they could have simply provided that a Claimant is a party that “has been *or will be* materially affected by the DISPUTE.”

17. Accordingly and respectfully, ICANN disagrees with the Panel’s preliminary determination in Procedural Order No. 8 that the showing of potential future harm is sufficient to establish standing.<sup>22</sup> Although the Panel was correct in noting that the Bylaws should be construed and administered in a manner consistent with the purposes of the IRP,<sup>23</sup> that general rule does not authorize an IRP panel to override the plain meaning of a Bylaws provision if the panel feels that a certain purpose was not sufficiently furthered. Any interpretation of the Bylaws must be constrained by the plain meaning of the text itself.

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<sup>20</sup> Interim Supplementary Procedures, Rule 9, Ex. RE-1.

<sup>21</sup> *Cf. United States v. Wilson*, 503 U.S. 329, 333 (1992), Ex. RLA-10 (finding that the “use of a verb tense is significant in construing statutes” and holding that the use of the past and present perfect tenses indicate an intent that an event has occurred before a certain power was triggered).

<sup>22</sup> Procedural Order No. 8 ¶ 40.

<sup>23</sup> Bylaws, Art. 4, § 4.3(a), RM 2.

18. In fact, requiring a Claimant to have suffered a material injury furthers the IRP's purposes by consciously balancing the IRP's (at-times) competing objectives. For example, requiring Claimants to have suffered an actual injury serves the purposes of: (i) providing meaningful, affordable and accessible expert review of Covered Actions by ensuring that claims are sufficiently ripe to lend themselves to efficient and meaningful adjudication (*cf.* Bylaws, Section 4.3(a)(ii)); (ii) securing the consistent, coherent, and just resolution of disputes by ensuring that a Claimant is sufficiently invested in the IRP and has the capacity to present evidence and make appropriate arguments relating to their harm for a panel to reach a decision that is just to the parties and does not prejudice future Claimants by generating precedential awards based on an insufficient and speculative record (*cf.* Bylaws, Section 4.3(a)(vii)); and (iii) protecting the accessibility and efficiency of IRPs for future Claimants by avoiding frivolous or costly arbitration proceedings where a Claimant has only presented evidence of speculative *de minimis* harm (*cf.* Bylaws, Section 4.3(a)(vii)).

19. To the extent the Panel's preliminary determination in Procedural Order No. 8 was based in part on a perceived risk that a registry operator could effectively postpone any future price increases by at least "366 days" to avoid giving rise to actual harm,<sup>24</sup> there is no evidence to substantiate that concern and the chance of a registry temporarily altering its business model for such a purpose is extremely remote. And in this instance, it has been far longer than 366 days since the price controls were removed from .BIZ, .INFO and .ORG and the specter of delayed, significant price increases has not materialized. In addition, with regard to Namecheap, Namecheap has argued that the mere idea that prices may increase in the future (as a result of the lack of price control provisions) could harm the present value of its business and, according to Mr. Klein, that harm would be reflected in ordinary course documents that assess the present value of Namecheap's business. Yet, Namecheap has provided no such evidence, despite ICANN's repeated requests and multiple rounds of briefing on Namecheap's theories of

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<sup>24</sup> Procedural Order No. 8 ¶ 42.



standing. This lack of evidence is persuasive, and in fact determinative, that Namecheap has not and will not be harmed.

20. Further, the Panel’s stated belief in paragraph 44 of Procedural Order No. 8 that the “risk of future increase in prices . . . is the natural and expected consequence of removing price controls”<sup>25</sup> was addressed by the evidence that ICANN has subsequently provided.<sup>26</sup> To the extent the Panel deems it appropriate to assess the likelihood of future harm, the appropriate question is not whether there will be future price increases in .BIZ, .INFO and .ORG, but whether there will be future price increases in .BIZ, .INFO and .ORG that *exceed* those permitted by the prior price controls *and* that Namecheap would be unable to effectively pass-through to its customers. As set forth in detail in Section I.C, below, the past nearly three years have shown that the .BIZ, .INFO and .ORG registry operators have not significantly increased prices and are unlikely to significantly increase prices despite the lack of price controls, which demonstrates (along with additional evidence and testimony provided at the IRP hearing) that the prior price controls were not the limiting factor in these registries’ pricing behavior. In addition, as set forth in Section I.C, below, Dr. Carlton confirmed that there is not a material risk that prices will be increased substantially more than was already permitted under the previous price control provisions.

21. Lastly, the Panel’s preliminary conclusion in Procedural Order No. 8 was premised on the notion that the “removal of price controls serves no purpose other than making it possible for prices to be increased without restrictions.”<sup>27</sup> But evidence from the hearing indicates that the removal of price controls served many purposes, including: (i) allowing free market mechanisms to dictate pricing and competition in the DNS, rather than arbitrary price caps; (ii) ensuring that ICANN not act as a pricing regulator given its lack of authority, capacity, or expertise; (iii) eliminating the risk that the price caps were set at the wrong levels, which could have negative effects within the DNS; (iv) improving organizational efficiency within the

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<sup>25</sup> Procedural Order No. 8 ¶ 44.

<sup>26</sup> *See, supra* Section I.C.

<sup>27</sup> Procedural Order No. 8 ¶ 44.

DNS by transitioning more registry agreements to the same Base Registry Agreement; and (v) fulfilling ICANN’s commitment to “not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause . . . .”<sup>28</sup>

22. For the foregoing reasons, ICANN respectfully requests that the Panel reconsider its preliminary finding in Procedural Order No. 8 and hold that Namecheap is required to establish that it had suffered a material harm as of the time it initiated the IRP to qualify as a Claimant under the plain meaning of the Bylaws. Alternatively, to the extent that the Panel maintains its position regarding consideration of future harm, the Panel should amend it and hold that only a showing of imminent, material future harm can give rise to standing, as set forth below.

**B. Standing Must Be Established At The Commencement Of An IRP.**

23. A party seeking to commence an IRP must show that it qualifies as a “Claimant” at the time the IRP is initiated. To hold otherwise would render meaningless the requirement that only a “Claimant” may initiate such a proceeding and would therefore be irreconcilable with the text of the Bylaws.<sup>29</sup> Requiring parties bringing claims to possess the requisite standing at the time an IRP is initiated is consistent with Section 4.3(o)(i) of the Bylaws, which states that the IRP Panel shall have the authority to “[s]ummarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious.” By providing that IRPs brought without standing may be summarily dismissed, the Bylaws indicate an intent that the determination as to a party’s standing be made at the time the IRP is initially brought. Lastly, allowing parties to initiate IRPs before they have standing would invite IRPs that are not ripe for adjudication, IRPs that have an undefined factual basis, and IRPs that may never be necessary because they are based on possible future events that may never come to pass. Such a result would be inconsistent

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<sup>28</sup> Bylaws, Art. 2, § 2.3, RM 2.

<sup>29</sup> Bylaws, Art. 4, § 4.3(a), RM 2.

with the purposes of the IRP, including the purpose of “[s]ecuring the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.”<sup>30</sup>

24. Because standing should be determined as of the date that an IRP is initiated, events that occur after the IRP is filed are not relevant for the purposes of establishing a prospective Claimant’s standing. To the extent the Panel maintains its position in Procedural Order No. 8 that possible future harm may confer standing, the relevant time period for evaluating such possible future harm must be reasonably narrow in order to be manageable. In the case of standing predicated on the risk of future harm, a prospective Claimant should be required to present evidence that at the time it initiated the IRP there was an imminent risk of material harm that is directly and casually connected to the alleged violation of the Articles or Bylaws. Such a standard is consistent with standing principles established by the U.S. Supreme Court, which require a showing of “actual or imminent” harm.<sup>31</sup> A standard without an imminence requirement would sap the ability of an IRP panel to efficiently and effectively adjudicate whether a party’s alleged risk of future harm is sufficiently tethered to the challenged ICANN action so as to confer standing.

25. For example, in the present case, nearly three years have passed since the 2019 Registry Agreements went into effect. Despite multiple rounds of briefing at all stages of this proceeding, Namecheap has failed to present *any* evidence – economic or otherwise – that it has been injured. Indeed, Namecheap’s economist conceded that Namecheap has not suffered material harm in the preceding three years due to the lack of the price control provisions<sup>32</sup> and he offered no economic opinion as to whether Namecheap has suffered any harm to date.<sup>33</sup>

26. Without an imminence requirement, speculative risks such as those asserted by Namecheap are simply too attenuated to be able to determine whether any future economic harm

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<sup>30</sup> Bylaws, Art. 4, § 4.3(a)(vii), RM 2.

<sup>31</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), Ex RLA-7 (to establish standing “the plaintiff must have suffered an ‘injury in fact’—an invasion of a protected interest which is (a) concrete and particularized; and (b) **actual or imminent**, not conjectural or hypothetical.” (internal quotation marks and citations omitted) (emphasis added); *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021), Ex. RLA-9 (same); *Carney v. Adams*, 141 S.Ct. 493, 498 (2020), Ex. RLA-6 (same).

<sup>32</sup> See 5 Hr’g Tr. (Langus), 141:16–142:12.

<sup>33</sup> See 4 Hr’g Tr. (Langus), 149:17–151:1

would truly be proximately caused by the challenged action. The more time that passes, the more likely it is that intervening events, such as a change in market dynamics, a previously unforeseeable event such as a global pandemic or unprecedented inflation, or shifts in consumer preferences regarding certain TLDs, would break the causal connection between the challenged action and a party's theory of harm. The Panel's question in Issue No. 2b presents a situation where there may be such a break in the causal chain. If the relevant time period for assessing harm were as long as the ten-year term of the 2019 Registry Agreements, then any financial harm that Namecheap may suffer over that decade could be the result of some economic factor that has nothing to do with the 2019 Registry Agreements, such as a Namecheap business decision to lower its margins, change its business model, or react in kind to other registrars that slash prices for some reason, just to name a few.

27. Therefore, in order to remain consistent with the text of the Bylaws and for IRPs to remain effective mechanisms for resolving disputes in an efficient, consistent, and just manner, this Panel must enforce a requirement that standing be established at the commencement of an IRP and that standing predicated on possible future harm, if considered, be supported by evidence of an imminent risk of material harm that is directly and casually connected to the alleged violation of the Articles or Bylaws. Namecheap failed to meet this standard at the time it filed this IRP and cannot satisfy it even today, two years later.

**C. Namecheap Has Suffered No Harm To Date And Is Not Likely To Suffer Material Harm In The Future As A Result Of The Transition Of .BIZ, .INFO And .ORG To The Base Registry Agreement.**

28. As was made clear during the hearing, there is no dispute on the issue of whether Namecheap has actually been harmed to date by the lack of price controls in .BIZ, .INFO and .ORG – Namecheap has not and concedes that it has not. When Chairman Hendrix asked Dr. Langus whether he agrees that “Namecheap has not been materially harmed since the cessation of price controls in 2019,” Dr. Langus testified as follows: “Yeah, I think, depending on how you define ‘materially,’ but I think that I would agree that so far, I have no strong presumption or

something that until now, Namecheap has been significantly harmed.”<sup>34</sup> Likewise, Dr. Langus confirmed on cross-examination that he and Dr. Verboven, Namecheap’s other expert witness who did not testify at the hearing, are not offering an economic opinion that Namecheap has been harmed to date as a result of the lack of price caps.<sup>35</sup> Dr. Langus also confirmed that neither he nor Dr. Verboven performed any quantitative analysis of whether the removal of price controls in .BIZ, .INFO and .ORG in 2019 has caused Namecheap to lose customers or negatively impacted Namecheap’s profits, profit margins, or market value.<sup>36</sup> Thus, not only is there no evidence of harm to Namecheap to date, Claimant has conceded that *Namecheap has not been harmed* to date due to the removal of price caps in .BIZ, .INFO and .ORG.

29. Accordingly, assuming that the Panel chooses to evaluate potential future harm in its standing analysis, the only question this Panel should be addressing with respect to standing is whether Namecheap has established that, as of the date of initiating the IRP, there was an imminent and material threat that the .BIZ, .INFO and .ORG registry operators would increase registry prices to levels not previously permitted (*i.e.*, more than 10% per year every year) *and* that Namecheap will not be able to effectively pass-through those price increases. The answer to this question is a definitive no. This has not occurred in the almost-three years since the price controls were removed from .BIZ, .INFO and .ORG, which also encompasses the two years since Namecheap initiated this IRP. Thus, the evidence demonstrates that there was no imminent threat of any future harm at the time Namecheap filed its IRP. And even if this Panel were to adopt some longer temporal scope to evaluating potential, future harm, Namecheap would still lack standing. The record and economic evidence demonstrate that .BIZ, .INFO and .ORG registry prices are not likely to soar to unprecedented levels and, even if they did, Namecheap is not likely to lose profits because Namecheap will effectively pass-on such price increases as it has consistently done in the past.

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<sup>34</sup> See 5 Hr’g Tr. (Langus), 141:16–142:12.

<sup>35</sup> See 4 Hr’g Tr. (Langus), 149:17–151:1.

<sup>36</sup> See 4 Hr’g Tr. (Langus), 146:13–:25 (no customer retention analysis), 147:1–:5 (no profits analysis), 147:6–147:10 (no profit margins analysis), 147:11–:15 (no market value analysis).

30. Key evidence supporting the conclusion that .BIZ, .INFO and .ORG prices are unlikely to increase to levels above those previously permitted includes the following:

- Since the transition to the Base Registry Agreement in 2019, the .BIZ, .INFO and .ORG registry operators have not increased prices above levels previously permitted under the prior price controls. This is significant, real-world evidence regarding the tendencies of these registry operators and the high levels of competition faced by them from other TLDs, as confirmed by Dr. Carlton during the hearing.<sup>37</sup>
- As Dr. Carlton testified, “[i]f anything, .org, .info and .biz face more competition rather than less as time goes on. In fact, if you look at the registrations on .org, .info and .biz, they’ve been declining in both absolute terms and in terms of share.”<sup>38</sup> Thus, with increasing competition and declining shares, there is no reason to expect that the .BIZ, .INFO and .ORG registry operators will change course in the future and increase prices materially above levels previously permitted under the price controls.
- For its part, .ORG is operated by a non-profit organization, PIR, that has publicly vowed to not significantly increase prices.<sup>39</sup> Indeed, PIR has not increased .ORG registry prices since 2016.<sup>40</sup> And, as Dr. Langus confirmed on cross examination, .ORG price increases before 2016 were “substantially less” than 10% per year.<sup>41</sup> Mr. Botterman, a former chair of the PIR board, testified similarly: “the price cap was never an issue. We never came close or even considered getting towards the price cap in my time of the board of PIR. So, I remember there was a price cap, but I don’t know how high it was. We never

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<sup>37</sup> 5 Hr’g Tr. (Carlton) 10:11-19 (“First, as I’ve just said, the evidence so far is that over the past roughly three years there have been forces, including competitive constraints, no doubt, that have kept registry prices of .org, .biz and .info in check. Well, there’s no reason to think that that won’t continue. And therefore, if there are no registry price increases above what would have otherwise occurred, you don’t gain anything by reimposition of the price controls.”).

<sup>38</sup> *Id.*, 19:8-12.

<sup>39</sup> “An Open Letter to the .ORG Community” (1 May 2019), Ex. R-51 (“**Rest assured, we will not raise prices unreasonably. In fact, we currently have no specific plans for any price increases for .ORG.** We simply are moving to the standard registry agreement with all of its applicable provisions that already is in place for more than 1,200 other top-level domain extensions.” (emphasis in original)).

<sup>40</sup> Carlton Expert Report ¶ 67.

<sup>41</sup> 4 Hr’g Tr. (Langus), 137:2-14.

got close and we never considered that in setting our prices when I was at the PIR board.”<sup>42</sup>

- Dr. Carlton demonstrated that it is unlikely that .BIZ, .INFO, or .ORG registry prices will increase to levels above those permitted under the previous price control provisions.<sup>43</sup> This is due primarily to the competition .BIZ, .INFO and .ORG face from other TLDs, including the most popular TLD, .COM, which is covered by price caps (set by the United States Department of Commerce) that keep the .COM price low and a significant competitive threat to any TLD seeking to increase price significantly above the .COM price, including .ORG.<sup>44</sup> Mr. Botterman confirmed as much in his testimony that when setting prices, PIR considered: “So how do our prices compare to those with .com, .net, other registries and [ccTLDs]? That was much more important for our understanding of how we could do well in the market than the price cap itself. The price cap -- we knew it was there, but it was never a part of discussion or dispute at the PIR board.”<sup>45</sup> Mr. Botterman also testified that with respect to price increases in .ORG: “I don’t know exact increases, I just know that we did keep in touch with our community. We did look at the price of .com, at others, and the price setting was based on that. We never got pushback from our community anyway, and ISOC,<sup>46</sup> from its perspective, also never came back on that. We never had a problem with what we did with the prices.”<sup>47</sup>
- Lastly, Dr. Langus conceded on cross-examination that he did not consider or evaluate the Department of Commerce’s findings, in 2019, that because of increased competition

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<sup>42</sup> 2 Hr’g Tr. (Botterman), 86:11-17; 89:1-4 (“I don’t know about .info or .biz, but in .org, I think, the quality of service was pretty good, and we didn’t even need to consider getting close to the price cap at the time that I was at the PIR as chair.”); 102:7-11 (“Even for .org, because it was never an issue even at the PIR board because we were never hampered at the PIR board by the price caps, in setting our prices.”)

<sup>43</sup> Carlton Expert Report ¶¶ 47–68.

<sup>44</sup> *Id.*

<sup>45</sup> 2 Hr’g Tr. (Botterman), 113:13-19.

<sup>46</sup> In 2002, The Internet Society (“ISOC”), created PIR, a 501(c)(3) not-for-profit corporation, to manage, enhance and expand the .org TLD. *See* <https://www.internetsociety.org/>

<sup>47</sup> *Id.*, 115:15-21; 117:11-19 (“I think if we would have -- our thinking at that moment was that if we would truly increase --because one thing was to run the entire registry, the other one was to also generate income from ISOC, that a true increase would lead to decline of the .org base, and that’s why -- one of the reasons also why we felt we shouldn’t. If we wanted to grow, if we wanted -- we should not go to prohibitive prices, we should look at the market.”)

in the DNS from new gTLDs, ccTLDs and the use of social media, the price controls on .COM would be loosened to account for these changes.<sup>48</sup> The Department of Commerce’s finding of increased competition in the DNS is as applicable, if not more applicable, to .BIZ, .INFO and .ORG as it is to .COM,<sup>49</sup> yet it is something Dr. Langus did not consider.

31. Key evidence supporting the conclusion that Namecheap will pass through price increases in .BIZ, .INFO and .ORG, particularly large price increases, includes the following:

- Namecheap has repeatedly and publicly affirmed that it passes through price increases to registrants.<sup>50</sup> Indeed, Mr. Klein conceded during cross-examination Redacted - Confidential Information, <sup>51</sup> for instance, if .BIZ, .INFO, or .ORG were to increase their prices by more than what was previously allowed under the prior price control provisions.
- Economic theory predicts that, in a competitive market with conditions such as those present in the DNS, registrars will fully pass on price increases, particularly since they will all face the same price increases given ICANN’s prohibition on differential pricing to registrars.<sup>52</sup>
- Dr. Carlton’s regression analysis demonstrates that Namecheap has on average Redacted - Confidential Information for both new and renewal registrations.<sup>53</sup> As Dr. Carlton explained during the hearing, this regression analysis controlled for potentially confounding factors and was robust, with the estimated pass-through rate never being Redacted - Confidential Information despite multiple robustness checks.<sup>54</sup>

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<sup>48</sup> 4 Hr’g Tr. (Langus), 161:8–163:25.

<sup>49</sup> Cf. Carlton Expert Report ¶¶ 49–51.

<sup>50</sup> See, e.g., “Why Domain Extensions Aren’t All created Equal” Namecheap Blog (22 July 2019), Ex. R-57; “Help Keep Domain Prices in Check,” Namecheap Blog (24 April 2019), Ex. R-49; “Renew Your Domains in Advance to Save Money,” Namecheap Blog (20 July 2017), Ex. R-58; “Price Increase on Certain Domains,” Namecheap Blog (7 January 2019), Ex. R-59; “Price Increase News for Donuts Domains,” Namecheap Blog (25 September 2019), Ex. R-56.

<sup>51</sup> 4 Hr’g Tr. (Klein), 32:5-9.

<sup>52</sup> 5 Hr’g Tr. (Carlton), 10:20–12:5; 58:5-11, 159:25–160:20; Carlton Expert Report ¶¶ 17–21; Carlton Reply Report ¶ 29.

<sup>53</sup> Carlton Expert Report ¶¶ 17–21; Carlton Reply Report ¶¶ 4, 6–9.

<sup>54</sup> 5 Hr’g Tr. (Carlton), 12:22–14:11; Carlton Expert Report ¶¶ 26–27.



- Dr. Carlton's calculation

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which is in keeping with economic theory, has been confirmed by Namecheap's public statements, and was proven by Dr. Carlton's regression analysis.<sup>55</sup>

- Dr. Carlton's initial report establishes that, because Namecheap's competitors will also likely be compelled to pass along any wholesale price increases, Namecheap is unlikely to lose customers or profits if it does the same since Namecheap will not be at a competitive disadvantage to other ICANN-accredited registrars.<sup>56</sup>
- Dr. Carlton's unrefuted analysis demonstrates that, even if registrants were to shift to other TLDs, Namecheap's profit margins may in fact *increase* because  
Redacted - Confidential Information .<sup>57</sup> Therefore, even if some registrants felt the need to choose an alternative TLD given price increases for .BIZ, .INFO, or .ORG, there is no evidence that Namecheap would be harmed by such a shift.
- If Namecheap had any evidence that it has lost any profits or any customers as a result of increases in the wholesale prices of .BIZ, .INFO, or .ORG, Namecheap surely would have produced such evidence. Yet, Namecheap produced no such evidence in this IRP. Indeed, Mr. Klein conceded during cross-examination that Namecheap possesses customer retention data that would establish whether or not Namecheap has lost customers due to previous price increases,<sup>58</sup> and that such data would have been relevant to the analysis of Drs. Langus and Verboven.<sup>59</sup> Namecheap did not, however, provide that data to Drs. Langus and Verboven and refused to produce it to ICANN.<sup>60</sup>

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<sup>55</sup> Carlton Expert Report ¶¶ 22–25; 5 Hr'g Tr. 161:14–162:2

<sup>56</sup> 5 Hr'g Tr. (Carlton), 10:20–12:5; 158:5–11, 159:25–160:20; Carlton Expert Report ¶¶ 17–21, 34; Carlton Reply Report ¶ 29.

<sup>57</sup> Carlton Expert Report ¶¶ 29–33.

<sup>58</sup> 4 Hr'g Tr. (Klein), 51:23–53:23.

<sup>59</sup> 4 Hr'g Tr. (Klein), 52:14–53:3.

<sup>60</sup> 4 Hr'g Tr. (Langus), 146:18–146:25.

Namecheap's refusal to disclose such documents and internal data creates a strong presumption that such data undermines Namecheap's speculative theories of harm.

- Furthermore, the credibility of Mr. Klein's testimony about purported instances in which Namecheap Redacted - Confidential Information is undercut by clear examples of reliance on incorrect data and mistaken assumptions about Namecheap's practices. For example, while Mr. Klein testified that Namecheap would never pass on Redacted - Confidential Information, <sup>61</sup> Dr. Langus admitted on cross-examination that his data analysis shows that Namecheap Redacted - Confidential Information <sup>62</sup> Further, Mr. Klein testified that .BIZ increased its renewal prices in August 2017 by roughly 10 percent and that Namecheap delayed passing through that increase,<sup>63</sup> but the actual data produced by Namecheap demonstrates that .BIZ raised its price by the alleged amount in March 2017 (not August 2017), Redacted - Confidential Information, a point Dr. Langus confirmed.<sup>64</sup>
- Dr. Langus conceded that he and Dr. Verboven did not perform quantitative analyses on Namecheap's customer retention data, profits, profit margins, or market value,<sup>65</sup> which grossly undermines the robustness of his and Dr. Verboven's claims regarding pass-through and customer retention.
- Although ICANN maintains that the impact of vertically integrated registrars is not properly before this Panel, there is no evidence that Namecheap is likely to be harmed as a result of vertical integration.
  - First and foremost, there are protections in place that prevent registry operators from favoring one registrar (related or otherwise) over other registrars.<sup>66</sup>

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<sup>61</sup> 4 Hr'g Tr. (Klein), 57:21–59:2.

<sup>62</sup> 4 Hr'g Tr. (Langus), 139:23–143:13.

<sup>63</sup> 4 Hr'g Tr. (Klein), 44:2–45:14.

<sup>64</sup> 4 Hr'g Tr. (Langus), 143:15–144:17.

<sup>65</sup> See 4 Hr'g Tr. (Langus), 146:13-25 (no customer retention analysis), 147:1-5 (no profits analysis), 147:6-10 (no profit margins analysis), 147:11-15 (no market value analysis).

<sup>66</sup> See, e.g., 2019 .BIZ Registry Agreement Specification 9: Registry Operator Code of Conduct, RM 31.

- Notably, neither Namecheap nor its experts provided any quantitative evidence demonstrating that Namecheap has been harmed by the operation of .INFO or .BIZ since they became vertically integrated.<sup>67</sup> As with Namecheap’s failure to produce other readily accessible sources of evidence, Namecheap’s failure is a telling signal that ICANN’s policies prohibiting vertically integrated registry operators from discriminating against registrars are effective and that Namecheap has not been harmed and is not likely to be harmed in the future.
- Moreover, the data shows just the opposite.
  - With regard to .BIZ, as Dr. Carlton explains, if vertically integrated registries improperly favored their own registrar, one would anticipate that GoDaddy would have a greater share of .BIZ registrations. The data, however, Redacted - Confidential Information, indicating that it is not improperly benefiting from vertical integration.<sup>68</sup>
  - In addition, Namecheap’s share of .BIZ registrations has actually Redacted - Confidential Information.<sup>69</sup> This indicates that, if anything, Namecheap has benefited from the vertical integration of .BIZ.

32. The record also demonstrates that Namecheap has not been harmed due to injury to its brand equity or reputation and is not likely to suffer such harm in the future. Key evidence supporting this conclusion includes the following:

- As a threshold matter, Namecheap has the burden of proving that it has been—or at the least, likely will be—materially harmed by the lack of price control provisions in the 2019 Registry Agreements. It is not ICANN’s burden to disprove Namecheap’s unsubstantiated assertions that its brand equity or reputation has or will suffer.

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<sup>67</sup> There is no mention of .ORG in this section because .ORG is not vertically integrated.

<sup>68</sup> Carlton Reply Report ¶ 31.

<sup>69</sup> 4 Hr’g Tr. (Klein), 64:16–66:2.

Therefore, the fact that Namecheap’s experts did not even attempt to analyze whether Namecheap’s value has decreased since the execution of the 2019 Registry Agreements or whether Namecheap has lost customers due to passing on prior price increases should be dispositive as to Namecheap’s failure to carry its burden.

- Furthermore, Dr. Langus’ concession that Namecheap has not been materially harmed to date speaks volumes about whether there might be harm in the future.<sup>70</sup> There is simply no evidence or basis to conclude that what has occurred in the past three years – minor or no price increases in .BIZ, .INFO and .ORG Redacted - Confidential Information

will not continue into the future. If Namecheap’s brand equity and reputation has not suffered over the last three years, why would it suffer in the future due to the lack of price caps in the 2019 .BIZ, .INFO and .ORG Registry Agreements?

- Namecheap’s theories of future harm are insufficient to establish standing because they are entirely speculative and not quantified. For example, Mr. Klein testified—without providing any supporting evidence—that when Namecheap increases prices,

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<sup>71</sup> Yet, there is no evidence that it *has* or *will*.

Moreover, Dr. Langus testified that neither he nor Dr. Verboven “compared the value of Namecheap before the removal of price caps with the value of Namecheap after the removal of price caps,” to provide empirical support to Namecheap’s claims.<sup>72</sup> If Namecheap had any actual evidence to support its assertion that price increases harm Namecheap’s brand equity or reputation, Namecheap would have produced such evidence. No such evidence has ever been produced in this IRP. Namecheap has historical data, operational documents, financial projections, and customer retention data, as Mr. Klein conceded.<sup>73</sup> Yet, Namecheap failed to produce any empirical data to support its claims. Namecheap’s failure to produce such data demonstrates that these

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<sup>70</sup> See 5 Hr’g Tr. (Langus), 141:16–142:12.

<sup>71</sup> 4 Hr’g Tr. (Klein), 35:11-15 (emphasis added).

<sup>72</sup> 4 Hr’g Tr. (Langus), 149:24–150:12.

<sup>73</sup> See 4 Hr’g Tr. (Klein), 51:8–53:23.

documents likely would, in fact, have shown exactly what Dr. Carlton has persuasively established in this case – namely, that Namecheap has not been harmed nor is it likely to be harmed by the lack of price controls in the 2019 Registry Agreements.

- Furthermore, the credibility of Mr. Klein’s speculative testimony on Namecheap’s brand equity is undercut by Mr. Klein’s inability to provide accurate testimony regarding Namecheap’s pass-through practices, as set forth above.<sup>74</sup>
- Lastly, Namecheap’s theory of harm relating to its brand equity and reputation rests on the theory that *if* .BIZ, .INFO, or .ORG increase prices in a manner that would not have been permitted under the previous price control provisions, Namecheap must either absorb the increases by accepting a lower margin on its sales or pass through to its customers.<sup>75</sup> But Dr. Carlton’s testimony demonstrates that it is unlikely that registry prices will increase to levels that are higher than those permitted under the previous price control provisions (*i.e.*, more than 10 percent per year every year).<sup>76</sup> Therefore, Namecheap is unlikely to be harmed by any possible negative repercussions from such hypothetical price increases.

33. Regardless of whether this Panel requires Namecheap to demonstrate actual material harm to date or likely material harm in the future, the result is the same: Namecheap has failed to satisfy either standard, irrespective of whether it is measured at the time Namecheap filed its IRP or today, and lacks standing as a “Claimant.” Accordingly, Namecheap’s IRP should be dismissed.

## **II. NAMECHEAP’S CLAIMS REGARDING .BIZ AND REGARDING VERTICAL INTEGRATION ARE EACH TIME BARRED.**

34. Namecheap’s claims regarding the 2019 .BIZ Registry Agreement should be dismissed because they are time barred. It is uncontested that Namecheap was required to have initiated an Accountability Mechanism on or before 29 October 2019 to preserve any claims relating to the 2019 .BIZ Registry Agreement. Namecheap’s assertion that its Reconsideration

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<sup>74</sup> See, *supra* at 17-18.

<sup>75</sup> See 4 Hr’g Tr. (Langus), 150:13–151:10.

<sup>76</sup> See, *e.g.*, Carlton Expert Report ¶¶ 47–68.

Request 19-2 encompassed claims relating to .BIZ is foreclosed by Namecheap's clear statements in Reconsideration Request 19-2, which sought review of the decision to "renew[] the registry agreement for the .org and .info TLD without the historic price caps," without making any mention or reference to .BIZ or the .BIZ Registry Agreement. Moreover, Namecheap expressly reaffirmed that the scope of Reconsideration Request 19-2 was limited to the .INFO and .ORG Registry Agreements in its rebuttal to ICANN's Proposed Determination regarding Reconsideration Request 19-2<sup>77</sup> and was on notice that the Board rightly understood that to be the case.<sup>78</sup> Namecheap's *post hoc* twisting of a handful of vague references in Reconsideration Request 19-2 to "all legacy TLDs" cannot overcome Namecheap's express and repeated affirmations of the scope of its Reconsideration Request.

35. Moreover, Namecheap's claims in its briefs that Ms. Burr recused herself from Reconsideration Request 19-2 because it included the .BIZ Registry Agreement was proven false at the hearing. Ms. Burr testified that Reconsideration Request 19-2 clearly did not cover the .BIZ Registry Agreement, but because she was previously employed by Neustar, the .BIZ registry operator, and Reconsideration Request 19-2 touched on issues about .INFO and .ORG that were also present in the 2019 .BIZ Registry Agreement, meaning the lack of price caps, Ms. Burr recused herself out of an abundance of caution.<sup>79</sup> Reconsideration Request 19-2 did not cover .BIZ, and Namecheap's claims regarding .BIZ are therefore time barred.

36. Namecheap's claims regarding alleged violations of ICANN's "policies and processes on vertical integration" and the Feb06 Policy are also untimely. The fact that Namecheap did not initiate an Accountability Mechanism challenging the alleged failure to

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<sup>77</sup> See generally Annex 10, p. 1.

<sup>78</sup> See Proposed Determination of the ICANN Board of Directors, Reconsideration Request 19-2 (3 November 2019) (identifying Namecheap's Reconsideration Request 19-2 as relating to the registry agreements for .ORG and .INFO, without mentioning .BIZ), Ex. R-53.

<sup>79</sup> 1 Hr'g Tr. (Burr) 117:24–118:14 ("Q. Do you remember what you said when you recused your name from Namecheap's reconsideration request review? A. Yes. So, Namecheap's reconsideration request challenged or asked the board to reconsider the org and info renewals; it did not include .biz. I thought, since the same issues applied, even though it was clear that the renewal for .biz was not being challenged, that I would just recuse myself because the same issues would have been in play, because they all moved from the Legacy agreements that they had onto the Base Registry Agreement, and all of the changes that were associated with that. And even though, on the face of it, it was not a challenge to the .biz renewal, I believe it was more appropriate for me not to participate in the conversation."); Burr Witness Statement ¶ 32.

implement and apply these policies in connection with the 2019 Registry Agreements is fatal to Namecheap's position.<sup>80</sup> As explained in ICANN's Sur-Rebuttal Brief, Namecheap's claim presented in the IRP Request with respect to the 2019 Registry Agreements was limited to the decision to not include price control provisions. Therefore, Namecheap's belated introduction in its Pre-Hearing Brief (almost two years after initiating the IRP) of allegations regarding entirely distinct policies and procedures is inappropriate, prejudicial, and time-barred.

37. Based on the preceding analysis, ICANN agrees with the Panel's preliminary view expressed in the Panel's List of Issues that Namecheap's claims that ICANN improperly removed cross-ownership restrictions or violated the Feb06 Policy are barred. However, ICANN disagrees with the Panel's secondary conclusion that cross-ownership restrictions and the Feb06 Policy may be relevant to the issues of standing and Namecheap's claim that ICANN improperly removed price caps, for several reasons.

38. First, arguments relating to the removal of cross-ownership restrictions and the Feb06 Policy are not relevant because they are not properly before the Panel. Although Namecheap could have elected to challenge any alleged violations of these policies up to one year after the underlying actions took place, Namecheap did not do so. Indeed, Mr. Klein conceded that Namecheap is not challenging anything relating to vertical integration, stating that "GoDaddy, as a registry operator, or Donuts or PIR, as a registry operator, is not in question here" and further admitting that "[w]hat we're talking about is the removal of price caps, and irrespective of the registry operator, the impact that that would have to our business."<sup>81</sup>

39. Second, vertical integration and the alleged violations of these policies are not relevant to this action because any harm to Namecheap resulting from alleged competitive advantages arising therefrom (which ICANN disputes) would be proximately caused by the change in vertical integration policy itself or violations of ICANN's non-discrimination policy, not the removal of price control provisions. Indeed, registry operators are expressly prohibited from directly or indirectly showing any preference or providing any special consideration to any

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<sup>80</sup> ICANN's Sur-Rebuttal Brief ¶¶ 70–72.

<sup>81</sup> 4 Hr'g Tr. (Klein) 65:20-25.

registrar (whether vertically integrated with the registry operator or otherwise) with respect to operational access to registry systems.<sup>82</sup> In addition, when a registry operator or an affiliated entity acts as a registrar, it is required to: (i) ensure that such registrar's services are offered through a legally separate entity; (ii) maintain separate books of account with respect to its registrar operations; and (iii) conduct internal reviews at least once per calendar year to ensure compliance with the Registry Operator Code of Conduct, including the prohibition on favoring any registrar, and certify its compliance to ICANN.<sup>83</sup> Because Namecheap's entirely speculative theories of potential harm that theoretically could arise from a registry operator favoring a vertically-integrated registrar would flow from a distinct ICANN action, such theories are not a proper basis to determine whether or not ICANN violated its Articles or Bylaws with respect to its decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement, which did not include price control provisions.

### III. STANDARD OF REVIEW.

40. The Panel's task in adjudicating Namecheap's claims is straightforward: the Panel is to make "findings of fact to determine whether the Covered Action[s] constituted an action or inaction that violated the Articles of Incorporation or Bylaws."<sup>84</sup> In doing this analysis, the Panel should apply "an objective, de novo examination of the Dispute."<sup>85</sup> However, Article 4, section 4.3(i)(iii) of the Bylaws creates an express carve-out from the general de novo review for claims that arise out of the Board's exercise of its fiduciary duties. When adjudicating such claims, the Panel's review is expressly limited to determining whether the Board's conduct was "within the realm of reasonable business judgment."<sup>86</sup> Taken together, the Bylaws require the Panel to apply a *de novo* standard when making findings of fact and reviewing the actions or inactions of individual Directors, Officers, or Staff members, but confine the Panel's review of Board actions to determining whether they fell within the realm of reasonable business judgment.

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<sup>82</sup> See, e.g., 2019 .BIZ Registry Agreement Specification 9: Registry Operator Code of Conduct, RM 31.

<sup>83</sup> See, e.g., 2019 .BIZ Registry Agreement Specification 9: Registry Operator Code of Conduct, RM 31.

<sup>84</sup> Bylaws, Art. 4, § 4.3(i)(i), RM 2 ; Interim Supplementary Procedures Rule 11(a), Ex. RE-1.

<sup>85</sup> Bylaws, Art. 4, § 4.3(i), RM 2; Interim Supplementary Procedures Rule 11, Ex. RE-1.

<sup>86</sup> Bylaws, Art 4., § 4.3(i)(iii), RM 2; Interim Supplementary Procedures Rule 11(c), Ex. RE-1.



**A. The Scope Of The Business Judgment Rule.**

41. Under California law, boards of directors owe their corporation the fiduciary duties of loyalty and care.<sup>87</sup> These fiduciary duties include the obligation to operate “in good faith, in a manner [the] director believes to be in the best interests of the corporation and its shareholders.”<sup>88</sup> Because the Board is obliged to exercise its fiduciary duties whenever it operates as the ICANN Board, whether that be in Board meetings, workshops, or informational calls, claims relating to Board conduct, both action and inaction, inherently arise from the Board’s exercise of its fiduciary duties.

42. The dispute properly at issue in this IRP is limited to Namecheap’s claim that ICANN violated its Articles and Bylaws in relation to the decision to approve the 2019 .INFO and .ORG Registry Agreements,<sup>89</sup> and Namecheap’s claim that the Board failed to comply with certain transparency obligations relating to its denial of Namecheap’s Reconsideration Request 19-2 seeking review of that decision. Because it was ICANN organization that took all relevant actions relating to the 2019 Registry Agreements—not the Board, as explained below—the only Board action relating to Namecheap’s claims was the Board’s denial of Namecheap’s Reconsideration Request 19-2.

**B. The Standard Of Review For Denials Of Reconsideration Request.**

43. An IRP Panel is tasked with reviewing Disputes, as defined by the Bylaws. The Bylaws define “Disputes” as “Claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members . . . constituted an action or inaction that violated the Articles of Incorporation or Bylaws . . . .”<sup>90</sup> IRP Panels therefore do not directly review the merits of ICANN’s denial of Reconsideration Requests, but may—as here—be tasked with reviewing whether the Board violated its Articles or Bylaws in

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<sup>87</sup> Cal. Corp. Code § 309(a), Ex. RLA-11.

<sup>88</sup> Cal. Corp. Code § 309(a), Ex. RLA-11.

<sup>89</sup> As established above, *supra* Section II, Namecheap’s claims relating to .BIZ are time-barred.

<sup>90</sup> Bylaws, Art. 4, § 4.3(b)(ii)–(iii), RM 2.

denying the Reconsideration Request. As with all IRP reviews of Board actions, the Panel's determination is governed by the Business Judgment Rule.<sup>91</sup>

**C. The Standard Of Review For ICANN Organization Actions.**

44. Because ICANN organization made the decision to transition the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement, this Panel should apply a *de novo* review to determine whether ICANN organization violated the Articles or Bylaws. As set forth below, ICANN organization complied with ICANN's Articles and Bylaws in making this decision.

**IV. NAMECHEAP HAS FAILED TO ESTABLISH THAT ICANN ACTED CONTRARY TO ITS ARTICLES OR BYLAWS.**

**A. The Evidence This Panel Should Consider.**

45. The Panel's Issue No. 12 asks whether the Panel may properly consider information not available to ICANN when it made the decision to enter into the 2019 Registry Agreements. In evaluating ICANN's conduct, the Panel's authority is limited to determining whether the action taken by ICANN was consistent with the Articles and Bylaws at the time that decision was made.<sup>92</sup> But events occurring after that decision could be viewed as evidence to support the reasonableness of ICANN's determinations. For example, since the 2019 Registry Agreements went into effect, .BIZ, .INFO and .ORG have continued to set prices that would have been permitted under the previous price control provisions.<sup>93</sup> Although this information was not available to ICANN at the time it entered into the 2019 Registry Agreements, the fact that these registries have not significantly increased prices may be considered by the Panel as evidence that the due diligence conducted ICANN leading up to execution of the 2019 Registry Agreements, such as consideration of the maturation of the DNS and seeking advice from competition counsel, among the many other things identified during the IRP, was sound.

46. This kind of *post hoc* evidence, however, should not detract from the Panel's key consideration of whether ICANN's actions were consistent with the Articles and Bylaws at the

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<sup>91</sup> See Bylaws, Art. 4, § 4.3(i)(iii), RM 2.

<sup>92</sup> See Bylaws, Art. 4, § 4.3(i)(i), RM 2.

<sup>93</sup> Dr. Dennis Carlton (14 March 2022) Reply Report ¶ 38.

time they were taken. And to be clear, *post hoc* evidence will not always be relevant because the Panel is not tasked with determining whether ICANN’s decision was right or wrong, only whether it complied with the Articles and Bylaws at the time the decision was made.

47. In Issue No. 13, the Panel asks “[w]hat weight, if any, should be given to reasons for renewing the 2019 Registry Agreements without price caps that ICANN identified during this IRP that were not in ICANN’s public statement of reasons?” Because the Panel is charged with determining whether an action or inaction violated the Articles or Bylaws, it should give full weight to ICANN’s reasons for entering into the 2019 Registry Agreements that ICANN identified during this IRP to the extent the basis of ICANN’s decision is relevant to the ultimate determination, regardless of whether the reason was expressly included in ICANN’s publications.

48. As set forth below, ICANN was open and transparent in its deliberations and reasoning for transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement and made statements to the Internet community on this topic on several different occasions. It is possible that not all of ICANN’s reasons and justifications for transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement were fully disclosed to the community or were disclosed without precisely the same wording. But there is no Bylaws provision requiring ICANN to provide a detailed and precise explanation of all of its conduct, just a rationale for its decisions. Indeed, the Bylaws state that ICANN “shall operate to the maximum extent *feasible* in an open and transparent manner.”<sup>94</sup> It is not feasible for ICANN to always disclose and reveal all of its inner-workings and internal discussions.

**B. The ICANN Board Fully Complied With The Articles And Bylaws Relating To The 2019 Registry Agreements.**

49. Throughout this IRP, Namecheap has asserted that the Board was involved in rendering a so-called “decision” to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.<sup>95</sup> But testimony at the hearing confirmed that the Board did no

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<sup>94</sup> Bylaws, Art. 3, §3.1, RM 2 (emphasis added).

<sup>95</sup> Namecheap’s Pre-Hearing Brief, pp. 90–99.

such thing.<sup>96</sup> Rather, as confirmed by Mr. Botterman and Mr. Weinstein in their witness statements and hearing testimony, it was ICANN organization that handled the renewals of the .BIZ, .INFO, and .ORG Registry Agreements and transitioned them to the Base Registry Agreement.<sup>97</sup>

50. Furthermore, although the Board received briefings during workshops regarding the background relating to the draft 2019 .BIZ, .INFO, and .ORG Registry Agreements, the results of the public comments, and ICANN’s intended course of action pursuant to the Board’s oversight role,<sup>98</sup> the receipt of those briefings did not result in the Board passing any resolutions regarding the 2019 Registry Agreements.<sup>99</sup> Indeed, after a week-long hearing, Namecheap failed to identify a *single* piece of evidence indicating that the Board, rather than the organization, made the ultimate decision to enter into the 2019 Registry Agreements or otherwise to not include the price control provisions at issue in this IRP.

51. In addition, the Board did not, and did not need to, delegate some type of special authority to ICANN organization relating to ICANN’s decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement. Such particularized authority was not needed because the Bylaws expressly provide that “[t]he President shall be the Chief Executive Officer (CEO) of ICANN *in charge of all of its activities and business.*”<sup>100</sup> Therefore, the authority for ICANN organization to enter into registry agreements is derived directly from the broad grant of authority enshrined in the Bylaws.

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<sup>96</sup> 2 Hr’g Tr. (Burr), 61:9-24 (“Q. But wasn’t a decision made here with regard to the price cap in the workshop, or how do I have to understand that? A. No. So, what would have happened – and again, I’m telling you what generally would have happened -- is there was a briefing, org would have said, we’re moving the contracts onto the Base Registry Agreement, the consequences are -- of that are X, Y and Z, including the price caps would be lifted. This is within the delegation of authority. If the board had disagreed with that, the board could have said, we want to withdraw that authority and bring it back to the board. But because this went -- this proceeded, presumably, the board, in fact, thought that what org was doing was appropriate and did not act.”).

<sup>97</sup> Botterman Witness Statement ¶¶ 18–30; Weinstein Witness Statement ¶¶ 11–25; Day 3 Transcript (Weinstein), 125:25–126:8 (“So you could come back to the board workshop . . . involved, is that -- they could reconsider, basically? A. That’s correct. They never made a decision, to my knowledge, in January whether this needed resolution or not. They understood our recommendation and instructed -- or were comfortable with ICANN proceeding, is the way I understood the direction that came out of that meeting.”).

<sup>98</sup> Botterman Witness Statement ¶¶ 19–23, 25–26; Weinstein Witness Statement ¶¶ 23–24; see also ICANN’s Pre-Hearing Brief ¶¶ 101–103.

<sup>99</sup> See, *supra* at pp. 26–29.

<sup>100</sup> Bylaws, Art. 15, § 15.4 (emphasis added), RM 2.

52. Moreover, in order to further the interests of clarity and transparency as to the various roles and responsibilities within ICANN, the Board memorialized ICANN organization’s already existing authority, just in more detail than set forth in the Bylaws, through the “Delegation of Authority Guidelines” on November 8, 2016 (the “Guidelines”). Consistent with the Bylaws, the Guidelines clearly provide that ICANN’s President and CEO have the responsibility of “[l]ead[ing] and oversee[ing] ICANN’s day-to-day operations” and that the President and CEO and senior management have the role of “[p]erform[ing] operational work in accordance with the strategic direction of the Board.”<sup>101</sup> As Mr. Botterman and Mr. Weinstein testified, ICANN organization acted pursuant to its powers under the Bylaws, and consistent with its role and responsibilities as documented in the Guidelines, when ICANN organization transitioned .BIZ, .INFO and .ORG to the Base Registry Agreement following bilateral negotiations with each of the relevant registry operators.<sup>102, 103</sup>

53. In an effort to salvage its claims, Namecheap transformed its position in its Rebuttal Brief to assert that, even if the Board did not make the decision regarding the 2019 Registry Agreements, the Board was required to do so. But Namecheap cannot point to a single provision of the Articles or Bylaws that requires the Board to manage ICANN’s day-to-day operations, including contracting with third parties. Instead, the Bylaws expressly place ICANN’s President and CEO “in charge of all of its activities and business,”<sup>104</sup> clearly establishing that ICANN organization possesses the requisite authority to manage contracting. As Ms. Burr explained at the hearing, “the board doesn’t pass resolutions on items that are within the CEO’s delegated authority and day-to-day operations . . . the board is kept apprised of what the organization is doing. We do have the authority if we disagree or if we think something should be pulled back for board consideration, we can do that. So we are providing oversight by

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<sup>101</sup> ICANN’s Delegation of Authority Guidelines (8 November 2016), Ex. R-37.

<sup>102</sup> 3 Hr’g Tr. (Weinstein), 98:8-99:20 (Mr. Weinstein explaining that contract negotiations are clearly within the remit of the ICANN Organization’s authority); *see also* Weinstein Witness Statement ¶¶ 10–11; Botterman Witness Statement ¶¶ 11–14, 30.

<sup>103</sup> The authority of ICANN organization to negotiate and execute agreements is encompassed in Article 15, Section 15.4 of the Bylaws and is memorialized in the Guidelines; there is not a separate delegation of authority relating to the 2019 Registry Agreements because one was not required.

<sup>104</sup> Bylaws Art. 15, § 15.4, RM 2.

being aware of and understanding what's going on, acting where we are required to by the [B]ylaws and by California law, and otherwise overseeing the carrying out of the authorities delegated to the CEO and the organization.”<sup>105</sup>

54. Another fallback position on this point that was suggested by Namecheap during the hearing was the claim that transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement should be considered ICANN “policy development” work that must include Board decision making. This is not the case.

55. As Mr. Botterman and Ms. Burr explained at the hearing, ICANN’s policy development process is a defined process in which one, or multiple, ICANN supporting organizations or constituencies from the ICANN community ask the ICANN Board to approve new policies developed by the community through ICANN’s bottom-up, multistakeholder processes.<sup>106</sup> But Mr. Botterman was clear that transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement was not part of ICANN’s policy development process work.<sup>107</sup> Ms. Burr likewise testified that transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement was

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<sup>105</sup> 2 Hr’g Tr. (Burr), 56:11-21.

<sup>106</sup> 2 Hr’g Tr. (Botterman), 150:6-17; 2 Hr’g Tr. (Burr), 57:20–58:13 (Q. “And particularly, you mentioned policy issue by the board. So where would you put the line? A. Well, the ICANN bylaws are very specific about the role of the board with respect to policy. And the board cannot delegate under the bylaws, it cannot delegate policy -- its policy responsibility, which is not policy development, but it is the looking at receiving policy recommendations from the community, evaluating those recommendations to ensure that they are consistent with ICANN’s mission and within ICANN’s remit, and rejecting those policies only if a super-majority concludes that the community development -- developed policies are not in the global public interest. Once the board has approved the policy, the board will then direct the organization to implement those policies, and the organization is responsible for implementation, subject to oversight of the board.”); 62:6-63:2 (“So, is it correct that the community is involved via deliberations, or how do you involve the community in your decision-making? A. So, there are a couple of ways. First, with respect to policy, there’s a very highly articulated policy development process that follows. You know, there’s an issue-spotting memorandum, there is the creation of a policy development group. They create a charter. They go and do their policy development work, and then the work comes to the -- the policy development recommendations from the policy development group go to the generic name-supporting organization council. The council then either approves or doesn’t approve those recommendations. If they approach them, that comes to the board and the board considers those recommendations and, as I said, approves them unless they are inconsistent with the global public interest or exceed ICANN’s mission, or something like that. So that’s the formal policy development process.”).

<sup>107</sup> 2 Hr’g Tr. (Botterman), 150:23–151:1 (“Q. And the decision whether to transition .biz, .org and .info to the Base Registry Agreement, that was not a policy development process, correct? A. Correct.”). Likewise, because the decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement was not part of ICANN’s policy development process, ICANN was not required by the Bylaws to seek “expert advice” on the decision pursuant to Section 1.2(a)(iv) of the Bylaws, which is limited to ICANN’s policy development processes, as Namecheap insinuated during the hearing, but Mr. Botterman clarified. 2 Hr’g Tr. 149:12–151:1.

not part of ICANN's policy development work.<sup>108</sup> In fact, as explained by Ms. Burr, the only ICANN policy development work with respect to price caps came in connection with the New gTLD Program and development of the Base Registry Agreement, which ultimately led to the decision (by the community and ICANN) to not include price caps in the Base Registry Agreement.<sup>109</sup>

56. Importantly, the following exchange between Mr. Kim and Ms. Burr during the hearing provides good insight into why the Board was not required to, and did not feel the need to, involve itself in the decision regarding transitioning the .BIZ, .INFO and .ORG to the Base Registry Agreement:

Q. I understand that for the purpose of whether the board acts, you have to draw a bright line, but the world is not all black and white. There are things in between.

A. Sure. I think that's a really good question.

In this case, the board had acted in the context of the new gTLD program and it had made a determination that the community-developed policy that said "no price caps" was the correct -- that was -- that served the global public interest, and that was a -- that policy was adopted.

So, in many ways, the consideration about sort of the public policy issues with respect to price caps in registries other than .com had been resolved. The other issue, of course, is that in between 2001, when the Legacy contracts were negotiated, and 2006, when they were repeated, 1,200 new, additional, competing top-level domains -- generic top-level domains had been added by the time this came up.

So, in -- again, I didn't participate in this discussion, but the board had the benefit of, one, a community-developed process that had been -- that the board had acted on, that the board had experience with -- following that of significant

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<sup>108</sup> 2 Hr'g Tr. (Burr), 58:24-59:22 ("Q. Okay. This IRP is part of a removal of price caps, so what you're saying, the general decision -- not the implementation, but the general decision, is this a policy decision which I understand should be decided by the board? Or can this decision be delegated? A. The price caps were not a policy decision. There's no policy, no community-developed policy that says there should be price caps. In fact, the community-developed policy for new gTLDs in the 2012 round does not include price caps at all. So the -- now, having said that, the board is briefed by the organization on changes. I did not participate, but in the standard course -- and we know here that the board was briefed by the organization about the changes of moving these three registries onto the standard new gTLD contract. The board understood and would have been briefed on what those changes were, and had the board determined that, for some reason, it disagreed with the organization's view, it could have said, no, we're going to draw that back, we're going to -- we're going to act on that. So the board was aware of these changes, the board did not object to the changes, and org continued to carry through.")

<sup>109</sup> 2 Hr'g Tr. (Burr), 64:4-9 ("So, as I said, the policy must develop with the community, and in the current situation, right now, the community-developed policy is reflected in the policy governing new gTLDs, and there are no price caps in that. That's the policy, that's the general state of play with respect to community-developed policy.").

new competition, and I think it would be a relatively clear-cut answer that the policy that was developed for the new gTLD round -- all of the reasons that the policy was developed there, and more, in the form of 1,200 new additional top-level domains -- made it clear that price controls were not necessary to prevent bad anticompetitive behavior in the environment that we found ourselves in, in 2019, which was significantly different than it was in 2001 or even 2006.

Q. Thank you.

Just to clarify, though, I wasn't asking about the rationale for the decision. I was just saying, you know, if you have a scale 1 to 10, you know, 10 being a really important policy decision and 1 being extremely -- you know, very contract-specific detail oriented, a decision -- this decision to remove price controls from Legacy TLDs, regardless of whether it was consistent with other policies, it just strikes me that it's not a 1, it's not a 10, and, you know -- I mean, where would you put it?

It seems to me more significant than the typical kind of issue.

A. I mean, I suppose that's right but it's hard for me to take it out of context because I think it's closer to 1 than 10 in the situation that existed in 2019.

Q. All right. You're saying, if it had never been addressed, it might be a higher number, but you think basically the new gTLD program addressed it so that made it less significant?

A. The new gTLD program addressed it and 1,200 new competing top-level domains had been introduced. And to be clear, I mean, I think this point may have been a little obscure. In fact, the board had been briefed all along on the value of moving contracts into -- onto the new gTLD Base contract and, in fact, in 2013 -- I know this from being on the other side of this -- org and the board, presumably, very much wanted those Legacy TLDs to move onto the Base contract in 2013. The decision not to do that in 2013 was taken by the Legacy registry operators, not by ICANN board or org, and ICANN board or org had -- ICANN board had long been of the view that there was significant value to moving the Legacy contracts onto the new gTLD Base Agreement.<sup>110</sup>

57. Finally, not only is the Board's oversight of ICANN organization's decision-making process in keeping with the Bylaws, it is within the Board's reasonable business judgment,<sup>111</sup> to which the Panel must defer. Indeed, Namecheap has not contested Mr. Botterman's and Ms. Burr's testimony that it would be nearly impossible for the Board to complete its other tasks if it were somehow required to intervene in every contract ICANN enters.<sup>112</sup> In addition, as Ms. Burr testified in her witness statement, allowing ICANN organization to exercise the authority vested in ICANN's President and CEO by the Bylaws

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<sup>110</sup> 2 Hr'g Tr. (Burr), 67:16-70:10.

<sup>111</sup> Bylaws, Art. 4, § 4.3(i)(iii), RM 2.

<sup>112</sup> Botterman Witness Statement, ¶ 14, Burr Witness Statement, ¶ 29.



greatly improves organizational efficiencies and allows the Board to focus on high-level strategic and policy initiatives and engagement with the broader Internet community, among other direct Board responsibilities. As such, this Panel cannot “replace the Board’s reasonable judgment with its own” in this IRP.<sup>113</sup>

**C. ICANN Organization Fully Complied With The Articles And Bylaws In Transitioning .BIZ, .INFO and .ORG To The Base Registry Agreement.**

58. Namecheap has likewise failed to carry its burden of showing that ICANN organization violated any Articles or Bylaws provision relating to the transition of .BIZ, .INFO and .ORG to the Base Registry Agreement. To the contrary, the record demonstrates that ICANN organization conducted a thorough analysis that took into consideration a number of factors before taking action and was open and transparent throughout its decision-making process.

**1. ICANN organization employed a robust deliberative process in deciding to transition .BIZ, .INFO and .ORG to the Base Registry Agreement.**

59. Before transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement, ICANN conducted its due diligence over months of internal meetings and discussions, as set forth below. Indeed, bilateral discussions with each of the registries began in or around May 2018, over one year before these registries were transitioned to the Base Registry Agreement.<sup>114</sup> Pursuant to this process, ICANN organization considered a variety of factors, each of which demonstrates that transitioning these registries furthered the public interest. For example, ICANN considered its commitment to treat similarly-situated registry operators in an equitable fashion consistent with its obligations under Article 2, section 2.3 of the Bylaws.<sup>115</sup> As Mr. Weinstein testified, given that over 1,200 registries were already operating under the Base Registry Agreement—including many legacy gTLD registries—ICANN organization concluded that providing the same

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<sup>113</sup> Bylaws, Art. 4, § 4.3(i)(iii), RM 2

<sup>114</sup> 3 Hr’g Tr. (Weinstein), 83:15-20 (explaining that ICANN organization engaged in separate discussions with each individual registry beginning around May 2018).

<sup>115</sup> Bylaws, Art. 2, §2.3, RM 2 (“ICANN . . . shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”)

opportunity to .BIZ, .INFO and .ORG to transition to the Base Registry Agreement furthered this principle.<sup>116</sup>

60. Moreover, in evaluating the net benefits the Base Registry Agreement offered over the existing registry agreements for .BIZ, .INFO, and .ORG, Mr. Weinstein emphasized that the Base Registry Agreement was thoroughly vetted by and developed with significant input from the Internet community and contains enhanced safeguards and security and stability requirements over the previous registry agreements.<sup>117</sup> For instance, Mr. Weinstein explained that—unlike the 2013 registry agreements for .BIZ, .INFO, and .ORG—the Base Registry Agreement strengthens the protection of legal rights through the Uniform Rapid Suspension System, requires registry operators to only utilize registrars that are on the 2013 registrar accreditation agreement (which provides additional protections for registrants), and requires registry operators to adopt various public interest commitments, including provisions requiring registry operators to monitor and analyze the zone files for registries relating to DNS security threats, and flow down prohibitions to registrars relating to the misuse of domains.<sup>118</sup> Although Namecheap has repeatedly suggested that ICANN could have transitioned to the Base Registry Agreement and included price control provisions, Mr. Weinstein made clear that ICANN organization concluded that importing price control provisions into the Base Registry Agreement was not required given its already robust pricing protections,<sup>119</sup> and that selectively adding or

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<sup>116</sup> 3 Hr’g Tr. (Weinstein), 128:25–130:23 (explaining ICANN’s obligation to treat registries and registrars fairly and ICANN’s conclusion that transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement ensured that these registries were treated consistently with the over 1,200 other gTLDs and majority of legacy gTLDs that had already transitioned to the Base Registry Agreement).

<sup>117</sup> 3 Hr’g Tr. (Weinstein), 103:1-21 (explaining that ICANN generally favors transitioning legacy gTLDs to the Base Registry Agreement when possible given that the Base Registry Agreement was thoroughly vetted and developed through the community engagement process for the New gTLD Program and provides enhancements over other agreements).

<sup>118</sup> 3 Hr’g Tr. (Weinstein), 90:23–92:14 (detailing specific protections that are included in the Base Registry Agreement that were not in the prior registry agreements for .BIZ, .INFO, or .ORG, which formed part of the basis for ICANN’s decision to transition .BIZ, .INFO, and .ORG to the Base Registry Agreement).

<sup>119</sup> 3 Hr’g Tr. (Weinstein), 131:23–132:5 (explaining that ICANN organization considered many factors and concluded that the Base Registry Agreement “had adequate pricing protections in the form of the advanced notice provisions and the requirement against the anti-discriminatory pricing provisions in the Base Registry Agreement, and so, to add price caps back into the Base Registry Agreement was not necessary . . .”), 139:22–142:14 (testifying that ICANN organization assessed the state of market competition and robust protections relating to pricing in determining that it was not necessary to import price controls into the Base Registry Agreement for .BIZ, .INFO, and .ORG).

removing terms from the Base Registry Agreement would fundamentally undermine the benefits it provides in terms of ensuring that registry operators are treated consistently and equitably<sup>120</sup> and enhancing operational efficiency.<sup>121</sup>

61. Mr. Weinstein further confirmed that ICANN organization considered many other relevant factors in reaching its determination, including: (1) the maturation of the DNS from just a handful of TLDs to over 1,200 gTLDs and hundreds of ccTLDs;<sup>122</sup> (2) that the .BIZ, .INFO and .ORG TLDs do not possess a significant share of total domains, approximately only 5% collectively;<sup>123</sup> (3) the lack of any government mandate or position on pricing within these TLDs, as there is in .COM,<sup>124</sup> despite government authorities being notified of the potential removal of the price control provisions;<sup>125</sup> (4) the Internet community's view that price caps should not be imposed on new gTLDs and the lack of such provisions in the Base Registry Agreement;<sup>126</sup> (5) the combined impact of removing price control provisions and relaxing cross-

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<sup>120</sup> 3 Hr'g Tr. (Weinstein), 137:23–138:11 (explaining that ICANN organization's preference for not changing the terms of the Base Registry Agreement stems in part from its commitment to ensuring equitable treatment of all parties that operate and may in the future operate under the Base Registry Agreement).

<sup>121</sup> See, e.g., 3 Hr'g Tr. (Weinstein), 19:8-20:16 (detailing how the Base Registry Agreement is crafted to “account for all of the different transactions that need ICANN's approval based on the contract” and that TLDs operating under alternative registry agreements “require[] special handling as opposed to a very systematic process”), 22:3–23:7 (testifying that changing the Base Registry Agreement “erodes the consistency of the Base principal”), 135:9–137:7 (describing the administrative burden negotiating specific additions or subtractions from the Base Registry Agreement poses for ICANN organization both for a specific negotiation and what it would portend for future negotiations).

<sup>122</sup> Weinstein Witness Statement 15(e), 3 Hr'g Tr. (Weinstein), 46:11-23 (confirming that ICANN organization looked at the facts as outlined in his witness statement at paragraph 15).

<sup>123</sup> 3 Hr'g Tr. (Weinstein), 78:3-14 (stating that ICANN organization considered that the percentage of domains under management for .BIZ, .INFO and .ORG were relatively low, which ICANN concluded was evidence these registry operators did not possess substantial market power), 131:13-22 (reiterating that ICANN organization considered the fact that .BIZ, .INFO and .ORG accounted for “roughly 5 percent under [sic] of the total domains under management.”), 132:25–133:8 (same).

<sup>124</sup> 3 Hr'g Tr. (Weinstein), 46:13-23 (“We looked at the fact that there was no government or competition authority advice or mandate regarding price caps for these particular TLDs.”), 131:13-22 (stating that one of the qualitative factors considered by ICANN organization was that “[t]here's no governmental authority or competition authority recommending or requiring price caps for these registries.”).

<sup>125</sup> 3 Hr'g Tr. (Weinstein), 138:12–139:3 (explaining that government agencies had “ample opportunity to inform [ICANN organization] of their positions as to the price control provisions if they desired them to remain in place).

<sup>126</sup> Weinstein Witness Statement ¶ 15; 3 Hr'g Tr. (Weinstein), 46:11-23 (confirming that ICANN organization looked at the facts as outlined in his witness statement at paragraph 15); Annexes 5-7; see also, *supra* note 109 (3 Hr'g Tr. 103:1-21 (explaining that ICANN organization generally favors transitioning legacy gTLDs to the Base Registry Agreement when possible in part because the Base Registry Agreement was thoroughly vetted and developed with significant input from the Internet community)).

ownership restrictions;<sup>127</sup> (6) the 2009 Carlton report and its conclusion that price caps are not required to promote competition;<sup>128</sup> and (7) the legal advice ICANN organization obtained from competition counsel on the issue of price caps, as confirmed by Mr. Weinstein at the hearing.<sup>129</sup>

62. In addition ICANN organization provided two briefings to the Board regarding the proposed 2019 Registry Agreements pursuant to the Board's oversight role.<sup>130</sup> In January 2019 ICANN organization included in its briefing to the Board information relating to the price control provisions<sup>131</sup> and its preliminary determination that .BIZ, .INFO, and .ORG should transition to the Base Registry Agreement based on its consideration of the aforementioned factors and its discussions with the relevant registry operators.<sup>132</sup> Following the public comment period described below, ICANN organization again briefed the Board on, *inter alia*, the substance of those comments and its conclusion that nothing in the public comments changed any of the underlying relevant factors identified above to transition .BIZ, .INFO and .ORG to the Base Registry Agreement.<sup>133</sup> Although the Board possesses the inherent power to intervene in decisions made by ICANN organization if deemed appropriate, the Board did not do so with

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<sup>127</sup> 3 Hr'g Tr. (Weinstein), 80:19–81:7 (explaining that the impact of the removal of cross-ownership restrictions with the lack of price control provisions was considered pursuant to the development of the Base Registry Agreement).

<sup>128</sup> 3 Hr'g Tr. (Weinstein), 114:17–115:14.

<sup>129</sup> Day 3 Transcript (Weinstein), 78:3-14 (“Q. Before moving to the Base Registry Agreement without price caps, did you or your team analyze whether the registry operators of .org, .info and .biz had market power? A. As I say in my witness statement, we understood the percentage of total domains under management relative to total domains under management in all TLDs -- did not believe that conveyed market power to these registry operators. Q. Did you have that investigated? A. We consulted with counsel, competition counsel.”), 112:2-12 (“Let me ask you another question. I certainly understand why legal advice could be here as to certain issues, but my reaction is, generally speaking, this is primarily a business decision, although there are legal aspects. Would you agree with that? A. Yeah, I think the registry agreement generally is a business contract, but competition issues are something we consult with our competition counsel on. So I think that aspect is particularly something where we need legal advice.”); 2 Hr'g Tr. (Burr) 76:6-15 (“Q. That's just background. I guess, the question I have is: Is the issue of whether you remove price caps or not, is that kind of issue on which it may be helpful for ICANN to get advice, either from a third-party expert or, you know, from its own staff on to what is the likely economic impact of removing price caps from the Legacy TLDs? A. ICANN does have outside counsel. It uses outside counsel extensively. It does have access to the antitrust experts.”)

<sup>130</sup> 3 Hr'g Tr. (Weinstein), 42:5-16 (testifying that the Board was consulted and briefed on ICANN organization's plans at the January and June workshops), 83:21–85:8 (same).

<sup>131</sup> Botterman Witness Statement, ¶¶ 18–23; Day 3 Transcript (Weinstein), 75:19–76:4 (identifying price caps as being one issue ICANN organization flagged as an issue that would be briefed for the Board).

<sup>132</sup> 3 Hr'g Tr. 109:14–110:4, 112:13-22.

<sup>133</sup> Weinstein Witness Statement, ¶ 24; 3 Hr'g Tr. 118:11-19 (testifying that the Board was provided the summary of public comments prepared by ICANN organization).

regard to the 2019 Registry Agreement during or following these consultations.<sup>134</sup> In short, ICANN organization engaged in an extremely robust deliberative process before transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement.

**2. ICANN organization was open and transparent in making its decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement.**

63. Far from shielding its deliberations from the Internet community, as Namecheap suggests, ICANN was transparent about its work and its rationale. First, ICANN published the proposed registry agreements well before it took any final action on them in order to consider the Internet community's comments on the matter.<sup>135</sup> Specifically, ICANN called for public comment on the draft agreements and expressly identified, among other things, the fact that the price control provisions that had been applicable to .BIZ, .INFO and .ORG were not included in the proposed 2019 Registry Agreements.<sup>136</sup> After the public comment period ended, ICANN prepared and published a report that summarized and analyzed the public comments and, with regard to price controls, the report also provided a preliminary explanation as to why ICANN believed that proceeding without price control provisions would be beneficial, including: (1) the fact that the price caps were imposed years ago before there was meaningful registry competition; (2) the expansion of TLDs since that time; (3) ICANN's Bylaws provisions requiring ICANN to "depend upon market mechanisms to promote and sustain a competitive environment in the DNS market"; (4) the registrant pricing protections in the Base Registry Agreement; and (5) ICANN's goal of treating legacy registry operators equitably with other registry operators.<sup>137</sup> In this same public report, ICANN organization clearly stated that "*ICANN org* will consider the public comments received and, in consultation with the ICANN Board of Directors, *make a decision* regarding the proposed registry agreement."<sup>138</sup> Thus, not only was ICANN's rationale for continuing to consider the transition to the Base Registry

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<sup>134</sup> 3 Hr'g Tr. (Weinstein), 95:14-96:1.

<sup>135</sup> Annexes 2-4.

<sup>136</sup> Annexes 2-4.

<sup>137</sup> Annexes 5-7.

<sup>138</sup> Annex 5, pp. 1, 8; Annex 7, pp. 1, 8; Annex 6, pp. 1, 7 (emphasis added).

Agreement open and transparent, it was also clear that ICANN organization, not the Board, would be making the decision.

64. Then, after ICANN transitioned .BIZ, .INFO and .ORG to the Base Registry Agreement, ICANN publicly posted copies of the 2019 Registry Agreements on ICANN’s website. Days later, ICANN responded to a press inquiry regarding execution of the 2019 Registry Agreements setting forth in an open and transparent manner ICANN’s deliberative process and a summary of its reasons for transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement.<sup>139</sup>

65. Shortly thereafter, ICANN publicly posted on its website a letter explaining ICANN’s rationale for transitioning the 2019 Registry Agreements to the Base Registry Agreement, which included: (1) community involvement in the drafting of the Base Registry Agreement; (2) the “additional safeguards and security and stability requirements compared to legacy agreements;” (3) the fact that “several legacy gTLDs have renewed their agreements adopting the Base [Registry Agreement],” including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL and .ASIA; (4) the “requirements to provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals;” (5) the registrant pricing protections; (6) that the removal of the price caps “is consistent with the gTLDs launched via the new gTLD program and will further reduce ICANN org’s role in domain pricing;” (7) ICANN’s Bylaws requirement that “where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market;” (8) inclusion of the “Uniform Rapid Suspension (URS) system, a rights protection dispute resolution mechanism” in the Base Registry Agreement; and (9) a summary of consultations with the Board on these issues and review of the public comment.<sup>140</sup>

66. In Issue No. 11(a), the Panel asks about ICANN’s transparency obligations and whether they include “[s]eeking comments from stakeholders on the decision to renew the 2019

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<sup>139</sup> Annex 105.

<sup>140</sup> 26 July 2019 Letter from Cyrus Namazi to Zak Muscovitch, Ex. RE-8.

Registry Agreements without price caps and providing a detailed explanation to stakeholders of the basis for ICANN’s decision, in light of such comments.” Public comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback on ICANN’s work. Public comment contributes to both ICANN’s transparency and accountability. Consistent with these principles, ICANN sought public comment on the proposed 2019 Registry Agreements and prepared reports that provided a summary and analysis of the public comments, as well as a detailed explanation to the Internet community as to why ICANN organization nevertheless saw value in transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement, as set forth above.

67. Notably, however, the public comment process is not a voting mechanism. ICANN is not required to yield to all public comments or adopt what appears to be a majority position among public commenters. Yielding to majority rule would transform ICANN into an organization that does not make reasoned decisions, but simply makes decisions based on voiced public sentiment. Ms. Burr expressed this precise point when asked by Mr. Siefarth how the Board generally deals with situations in which public comment may be opposed to an ICANN action: “the board is not a representative board in the sense that we just take whatever the comments are and say, we got 3,200 comments and X number were in this position and others are Y. We have to exercise our judgment. . . . Now, the community is quite large, and you also have to evaluate sort of what is the nature of those comments? Who are they coming from? What are the interests that are reflected in those comments? And all of those things go into the balance, and then there’s a judgment made.”<sup>141</sup> Mr. Botterman testified in a similar fashion.<sup>142</sup> Indeed, the Articles and Bylaws do not require ICANN to adopt majority rule, but instead require ICANN to make “decisions by applying documented policies consistently, neutrally, objectively,

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<sup>141</sup> 2 Hr’g Tr. (Burr), 63:22–65:4.

<sup>142</sup> 2 Hr’g Tr. (Botterman), 172:22–173:10 (“Q. What do you remember of these comments? How many were against the removal of the price caps and how many were in favor? A. Well, I know the large number of similar arguments were against. But the arguments -- it's not about the number of votes. I mean, [in] the world with more than five billion users, it's not about one more or less, it's about the arguments and -- that are there, convincing in nature, about how many people say it, basically. So, I think, if you count the numbers, you would say that most were against. If you look at the arguments, I think that it made sense to continue as had been proposed in the public-comment period.”).

and fairly, without singling out any particular party for discriminatory treatment.”<sup>143</sup> That is what ICANN organization did here by reaching a well-reasoned decision based on a consideration of relevant factors in consultation with the Internet community and the Board and doing so transparently.

68. Finally, in response to Issue No. 11(b), ICANN’s transparency obligations do not prohibit ICANN from obtaining privileged advice from its attorneys. Indeed, it is well recognized that preserving the confidentiality of communications between attorneys and their client is critical to protecting a party’s right to freely and fully confer and confide in their legal counsel in order to obtain competent legal advice.<sup>144</sup> Given the complex legal issues that routinely arise in the ordinary course of ICANN’s day-to-day operations, ICANN’s ability to obtain privileged and confidential advice from counsel is critical to ICANN’s ability to fulfill its mission. Namecheap’s suggestion that ICANN should not be permitted to obtain legal advice and keep it confidential is contrary to how corporations, non-profit or otherwise, function in the United States. Not only that, IRP precedent states that ICANN is entitled to invoke the attorney-client privilege. The panel in the *Afilias* IRP addressed this precise issue and found that ICANN’s accountability and transparency commitments **do not** “somehow imply a waiver of its right to invoke privilege.”<sup>145</sup>

69. With respect to the privileged materials regarding transitioning the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement, the Board received privileged briefing materials at Board workshops pursuant to its oversight role. Mr. Weinstein further explained during his testimony that ICANN received advice from competition counsel with respect to the price control issue.<sup>146</sup> Although ICANN cannot divulge the contents of the privileged materials without waiving the attorney-client privilege, ICANN fulfilled its transparency obligation throughout the decision-making process by communicating to the

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<sup>143</sup> Bylaws, Art. 1, §1.2(a)(v) and Art. 3 § 3.1.

<sup>144</sup> See, e.g., *Mitchell v. Superior Court*, 37 Cal.3d 591, 599 (1984), Ex. RLA-8.

<sup>145</sup> See *Afilias v. ICANN* IRP, Procedural Order No. 4 ¶ 42, Ex. R-18A; see also Interim Supplemental Procedures, Rule 8, RE-1 (permitting ICANN to withhold from production in IRPs documents “subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law.”).

<sup>146</sup> 3 Hr’g Tr. (Weinstein), 78:3-14, 112:2-12.



Internet community what was being considered, the decision that ICANN made, and why ICANN decided that not including price control provisions in the 2019 Registry Agreements was an appropriate step, as set forth above.

**D. The Board Fulfilled Its Transparency Obligations With Respect To Its Denial Of Reconsideration Request 19-2.**

70. Namecheap's contention that ICANN violated its transparency obligations with respect to the Board's denial of Reconsideration Request 19-2 due to ICANN's invocation of its right to consult with attorneys is unsupported. As with receiving legal advice relating to a contract that raises complex contract and competition issues, ICANN is entitled to receive legal advice regarding the underlying issues raised in a reconsideration request. Consistent with the *Afilias* IRP panel's finding, ICANN's general transparency obligations do not require the Board to disclose privileged materials in connection with a reconsideration request.

71. Furthermore, the record shows that ICANN was extremely transparent in its consideration of Reconsideration Request 19-2. Indeed, ICANN published 142 pages of briefing and reference materials that the Board considered pursuant to its decision as well as publishing a detailed explanation of its determination at the 21 November 2019 Board meeting. As such, the ICANN Board fully complied with its obligation to operate in as transparent a manner as feasible in connection with its adjudication of Reconsideration Request 19-2.

**E. Price Controls On .BIZ, .INFO And .ORG Are Not Warranted.**

72. Whether or not price controls on .BIZ, .INFO and .ORG are warranted as a matter of public interest or otherwise is outside the scope of this IRP. Indeed, the Panel does not have authority to issue a judgment based on what it believes is the best decision in that regard. Rather, the Panel's authority is limited to determining whether or not ICANN violated its Articles or Bylaws in connection with transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement following negotiation with the relevant registry operators. ICANN need not prove that the decision to remove price controls from .BIZ, .INFO and .ORG was the optimal outcome in order to prevail in this proceeding.

73. Nevertheless, the record and economic evidence establishes that price controls in .BIZ, .INFO and .ORG are not warranted, as set forth in Section 4.E, above, and summarized below. First, ICANN lacks the authority to regulate registry pricing. The Bylaws expressly state that “ICANN does not hold any governmentally authorized regulatory authority,”<sup>147</sup> and Namecheap has failed to identify an alternative source from which ICANN could legitimately derive regulatory authority. Moreover, the definition of regulator employed by Namecheap’s own economic experts identifies it as an entity that’s authorized by statute to use legal tools to achieve policy objectives.<sup>148</sup> No statute authorizes ICANN to act in that capacity to mandate price caps against the will of the registry operator. Lastly, the *Afilias* Panel found that ICANN is not an economic regulator.<sup>149</sup> Because ICANN lacks the requisite authority to act as a price regulator, removing price control provisions in contracts where the registry operator does not wish them to remain in place (and they are not mandated by a government entity with the requisite regulatory power) is consistent with the limits of ICANN’s authority.

74. Second, ICANN lacks the expertise, capacity, and resources to set effective price controls for registries. As such, there is a substantial risk that the imposition of price control provisions from ICANN could harm the Internet community, including registrants, by distorting the incentives registries have to innovate and provide quality products for registrants.<sup>150</sup>

75. Third, as suggested in the Panel’s question on this issue, price control provisions are not warranted for .BIZ, .INFO, or .ORG given that the prices for those registries are constrained by the price of .COM, which continues to be subject to government-set price controls.<sup>151</sup> Dr. Carlton’s report demonstrates that .COM’s price controls tether pricing for other registry operators, including .ORG.<sup>152</sup> And as set forth above, Mr. Botterman testified that, when he was the chair of the PIR board, PIR never considered the price cap in its pricing decisions but,

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<sup>147</sup> Bylaws, Art. 1, § 1.1(c); Day 2 Testimony, 26:9-21.

<sup>148</sup> Dr. Langus (25 Nov. 2021) Expert Report ¶¶58; 4 Hr’g Tr. (Langus), 138:8-23.

<sup>149</sup> *Afilias v. ICANN* IRP, Corrected Final Decision ¶ 352, Ex. R-43; Bylaws, Art 4, § 4.3(g).

<sup>150</sup> Carlton Expert Report ¶ 42; 5 Hr’g Tr. (Carlton), 20:13-22:3, 37:4-21.

<sup>151</sup> Carlton Expert Report ¶¶ 13, 48-51; Carlton Reply Report ¶¶ 49-51.

<sup>152</sup> 5 Hr’g Tr. (Carlton), 63:17-63:24.

rather, looked to the pricing within other TLDs, in particular .COM and ccTLDs, when setting .ORG registry prices. Ms. Burr expressed a similar sentiment at the hearing:

Sitting where I sit now, and admittedly perhaps with hindsight, I really don't think that those price caps [that were in the earlier .BIZ, .INFO and .ORG registry agreements] were necessary. The point was that these new gTLDs [.BIZ, .INFO and .ORG] were always going to be trying to compete with .com, and there was a price, you know, that was out there, and in order to be competitive, I think it would have been shooting themselves in the foot to raise their prices high. And I think time has borne that out, that price caps have not been necessary to prevent gouging or anything like that because all of these have had the ability to raise prices by a percentage for many years, and sometimes they have done that and often they have not done it. So, I think, in fact, you know, had I been at the table knowing what I now know, I would have concluded that there was no reason to put any kind of price caps on those registries.<sup>153</sup>

76. Fourth, in addition to competition from .COM, the record indicates that .BIZ, .INFO and .ORG are facing ever increasing competition from new gTLDs and ccTLDs as evidenced by their declining shares of new registrations.<sup>154</sup> Competition remains a potent force that will keep registry prices in check regardless of whether price control provisions are formally included in the registry agreements. As Ms. Burr explained in her testimony, "there was pretty clear evidence that something other than the price caps were constraining prices" in .BIZ, .INFO and .ORG.<sup>155</sup>

77. Fifth, the transition of the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement, which does not contain price control provisions, was proper because ICANN cannot discriminate against registry operators "unless justified by substantial and reasonable cause." Indeed, Namecheap's own regulatory expert testified that he previously has

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<sup>153</sup> 2 Hr'g Tr. (Burr), 53:18–54:12.

<sup>154</sup> 5 Hr'g Tr. (Carlton), 19:5-19.

<sup>155</sup> 2 Hr'g Tr. (Burr), 77:10-11; 76:24–77:12 ("I just want to point out that in this case we also had very concrete evidence about what the price caps would or would not do, and what they were or were not doing, because all of the Legacy gTLDs, and .com, to some extent, had the ability to increase prices; it's not like they were flat caps that they couldn't increase. They had the ability to increase prices, and for the most part -- I believe .org actually never increased prices, notwithstanding the fact that its cap went up. It never went up to the cap. Now, .biz increased its prices sometimes but not always. And so I think that there was pretty clear evidence that something other than the price caps were constraining prices.").

taken the position that maintaining price caps on .BIZ would have violated ICANN's non-discrimination obligation absent substantial and reasonable cause.<sup>156</sup>

**F. Key Evidence Supporting The Removal of Price Caps For .ORG.**

78. The Panel's Issue No. 15 asks the parties to provide a concise bullet-point summary of key evidence regarding removal of price caps that relates specifically to .ORG (in contrast to .INFO and .BIZ). In addition to the reasons set forth in the preceding section that are equally applicable to .BIZ, .INFO, and .ORG, the following bullet-point summary lists additional factors that price control provisions on .ORG are particularly unwarranted, almost all of which was available to and considered by ICANN organization at the time it decided to enter into the 2019 .ORG Registry Agreement.

- The .ORG registry is operated by PIR, a non-profit entity with non-commercial objectives.<sup>157</sup> As such, there is little risk that .ORG's registry operator will exploit the lack of price control provisions to increase the .ORG wholesale price significantly.
- Indeed, .ORG has not raised prices in more than five years, even though it has had the ability to raise prices 10 percent a year, every year, and for the last three years has had no limitation on price increases.<sup>158</sup> That fact not only demonstrates that price control provisions were not a material factor in controlling registry prices prior to the 2019 Registry Agreements, but also provides empirical support for the conclusion that PIR is not likely to substantially increase .ORG registry prices on its customers.
- .ORG's operator recognizes the limitations on its ability to raise prices, including competition and registrants' rights to long-term contracts,<sup>159</sup> as Mr. Botterman confirmed that when setting prices, PIR considered: "So how do our prices compare to those with .com, .net, other registries and [ccTLDs]? That was much more important for our understanding of how we could do well in the market than the price cap itself."<sup>160</sup>

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<sup>156</sup> 4 Hr'g Tr. (Neuman), 93:10–94:20.

<sup>157</sup> Carlton Expert Report ¶ 66; 5 Hr'g Tr. 19:20-25.

<sup>158</sup> Carlton Expert Report ¶ 67.

<sup>159</sup> Carlton Expert Report ¶ 68; "An Open Letter to the .ORG Community" (1 May 2019), Ex. R-51.

<sup>160</sup> 2 Hr'g Tr. (Botterman), 86:12-13, 113:13-19.

- .ORG’s operator has pledged not to significantly increase prices.<sup>161</sup>
- .ORG’s share of new registrations has declined over time,<sup>162</sup> suggesting that customers are finding alternative TLDs that they find to be good substitutes for .ORG.
- Dr. Carlton’s Reply Report demonstrates that, even if other TLDs are not perfect substitutes for .ORG, they still can maintain a competitive check on .ORG’s price.<sup>163</sup>

**V. RELIEF REQUESTED AND THE SCOPE OF THIS PANEL’S AUTHORITY.**

79. Many of the remedies Namecheap seeks exceed this Panel’s authority, which is expressly delineated in Article 4 of the Bylaws. As applied in the present action, the Panel is only empowered to make findings of fact to determine whether ICANN violated its Articles or Bylaws in relation to ICANN’s transitioning the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement.<sup>164</sup> Notwithstanding this express limit on the Panel’s authority, Namecheap is effectively seeking the annulment of the 2019 Registry Agreements and ICANN’s denial of Reconsideration Request 19-2.<sup>165</sup> Such over-reaching requests for relief are incompatible with the Bylaws, would completely undermine the established limits of an IRP’s Panel’s authority developed through extensive community input, and are contrary to the restrained findings of other IRP panels. Accordingly, this Panel must deny Namecheap’s requests.<sup>166</sup>

**A. New Language In The Bylaws Does Not Support Namecheap’s Expansive Theory Of IRP Power.**

80. In Panel Issue No. 9, the Panel asks Namecheap to identify language that Namecheap asserts was proposed by the Internet community for the purpose of enhancing ICANN’s accountability mechanisms following the 2016 IANA transition. Although ICANN cannot anticipate what language Namecheap will attempt to twist into a justification for its expansive interpretation of the Bylaws, Namecheap’s previous briefing on this issue is fatal to

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<sup>161</sup> “An Open Letter to the .ORG Community” (1 May 2019), Ex. R-51.

<sup>162</sup> Carlton Expert Report ¶ 13; 5 Hr’g Tr. (Carlton), 19:5-19:19.

<sup>163</sup> Carlton Reply Report ¶¶ 45-46.

<sup>164</sup> Bylaws, Art. 4, s 4.3(i)(i). Again, Namecheap’s claims regarding .BIZ are time barred.

<sup>165</sup> ICANN’s Pre-Hearing Brief ¶ 177.

<sup>166</sup> ICANN’s Sur-Rebuttal Brief ¶¶ 80–85.

any position it may now take. Indeed, through its prior briefing, Namecheap essentially concedes that IRP panels previously and currently are limited with regard to what relief they may grant. As this Panel is aware, prior IRP panels have found that they lacked the authority to award more than declaratory relief as to whether or not ICANN violated its Articles and Bylaws. Namecheap admits as much when it contended that certain unidentified members of the ICANN community allegedly expressed dissatisfaction about this limitation. Regardless, no new or different language was incorporated into the Bylaws to empower IRP panels to award affirmative relief. Thus, there is no change with respect to the limits on an IRP panel's authority.

**B. Independent Declarations From IRP Panels Are Effective At Achieving The Purposes Of The IRP.**

81. In Issue No. 10, the Panel requested that ICANN provide examples that exemplify the fact that “the history of IRPs demonstrates that independent determinations of whether ICANN has violated its Articles or Bylaws is an effective mechanism at ensuring compliance and resolving disputes.” Below are three examples of IRP awards that exemplify the effectiveness of the declaratory relief provided for in the Bylaws.

82. First, in the *Afilias* IRP, Afilias initiated an IRP challenging Nu DotCo, LLC's (“NDC”) participation in an auction for .WEB because NDC's bids were funded by Verisign, Inc. pursuant to a Domain Acquisition Agreement (“DAA”).<sup>167</sup> Ultimately, the *Afilias* panel issued an award declaring that ICANN acted contrary to its Articles and Bylaws by, inter alia, failing to pronounce on the question of whether the DAA violated the terms of the New gTLD Guidebook that governed the applicant process.<sup>168</sup> In addition to its declaration, the panel recommended that ICANN take no action on .WEB until the Board evaluated the claimant's allegations regarding the DAA.<sup>169</sup> In response, the ICANN Board acknowledged the panel's finding that ICANN acted contrary to the Articles and Bylaws and resolved to further evaluate the Panel's non-binding recommendation just as the Panel recommended it do.<sup>170</sup> After further

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<sup>167</sup> *Afilias v. ICANN* IRP, Corrected Final Decision ¶ 3, Ex. R-43.

<sup>168</sup> *Afilias v. ICANN* IRP, Corrected Final Decision ¶ 413, Ex. R-43.

<sup>169</sup> *Afilias v. ICANN* IRP, Corrected Final Decision ¶ 413, Ex. R-43.

<sup>170</sup> <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#2.b>

evaluation, the Board resolved to ask the BAMC “to review, consider and evaluate the allegations relating to the Domain Acquisition Agreement (DAA) between NDC and Verisign and the allegations relating to Afiliias' conduct during the Auction Blackout Period.”<sup>171</sup> That review is currently underway.

83. In the .AMAZON IRP, the panel declared that ICANN acted contrary to its Articles and Bylaws relating to its evaluation of the applications for the .AMAZON gTLD and issued a non-binding recommendation that ICANN reevaluate the .AMAZON applications.<sup>172</sup> As in the case of .WEB, the Board acknowledged the panel’s finding that ICANN acted contrary to the Articles and Bylaws. ICANN also undertook reevaluation of the .AMAZON applications, just as the Panel recommended it do, and requested additional information from the GAC regarding the GAC advice that was the subject of the IRP, worked to facilitate discussions between the applicant and the objecting parties, reviewed proposals from the applicant, and ultimately granted operation of the gTLDs to the applicant.<sup>173</sup>

84. Likewise, in the .AFRICA IRP, the panel declared that ICANN’s actions were inconsistent with Articles and Bylaws relating to its evaluation of the claimant’s application for the .AFRICA gTLD and issued a non-binding recommendation that ICANN place the claimant’s application back into processing.<sup>174</sup> As with other IRP declarations, the ICANN Board reviewed the .AFRICA declaration, acknowledged the panel’s findings, and placed the application back into processing,<sup>175</sup> just as the Panel recommended it do.

85. Taken together, ICANN’s acceptance of these declarations and the robust steps it took to address the identified violations demonstrate the effectiveness of the IRP declarations (as provided for in the Bylaws) at ensuring ICANN’s compliance with its Articles and Bylaws and resolving disputes.

## **CONCLUSION**

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<sup>171</sup> <https://www.icann.org/resources/board-material/resolutions-2022-03-10-en#2.c>

<sup>172</sup> *Amazon v. ICANN* IRP, AMAZON Final Declaration ¶¶ 124–25, RM 177.

<sup>173</sup> <https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>

<sup>174</sup> <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> at ¶ 149.

<sup>175</sup> <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en>

86. For the reasons stated herein and in ICANN's Pre-Hearing and Sur-Rebuttal Briefs, this Panel should deny each of Namecheap's claims and requests for relief.

Respectfully submitted,

JONES DAY

Dated: 27 May 2022

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Jeffrey A. LeVee

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