

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. )  
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**ICANN'S SUR-REBUTTAL BRIEF ON THE MERITS**

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14 March 2022

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) submits this Sur-Rebuttal Brief on the Merits in response to Namecheap’s Rebuttal to ICANN’s Pre-Hearing Brief on the Merits submitted on 8 February 2022 (“Namecheap’s Rebuttal Brief”).

1. Namecheap’s Rebuttal Brief was supposed to be merely a vehicle for Namecheap to submit limited rebuttal witness statements and evidentiary exhibits to address *unanticipated* factual allegations in ICANN’s Pre-Hearing Brief. Instead, Namecheap submitted a 55-page brief (along with 700 pages of new evidentiary materials) mostly constituting a repeat of its prior arguments along with a denial of what should be undisputed, a rejection of objectively true facts as being untrue, and an unsupported, baseless suspicion of ICANN witnesses. For example, Independent Review Process (“IRP”) standing requirements, this Panel’s standard of review, and the scope of this Panel’s authority are not new or “unanticipated” and, moreover, should not be up for debate in that the applicable standards are expressly set forth in the Bylaws in clear and concise terms. Namecheap, however, continues to argue that standing requirements are not really requirements, that this Panel can adopt a standard of review divorced from the text of the Bylaws, and that this Panel can award affirmative relief that simply is not permitted in IRPs. Rather than just admitting that the Bylaws regarding these issues say what they say, Namecheap selectively pulls quotes from other parts of the Bylaws that do not speak to these issues to claim that the Bylaws say what Namecheap wants them to say. The text of the Bylaws controls on the issues of standing, standard of review, and this Panel’s authority.

2. As to the facts established in ICANN’s Pre-Hearing Brief that undermine Namecheap’s case, Namecheap simply pretends, and therefore declares, that these facts are untrue. For instance, ICANN Board members, Maarten Botterman and J. Beckwith Burr, both

submitted witness statements explaining that the ICANN Board is an oversight board that provides direction and advice on major policy issues; it is not a managing board that makes day-to-day operational decisions. Despite these witnesses' personal knowledge of ICANN Board operations, Namecheap's Rebuttal Brief dismisses these witnesses' explanation as "unfounded." Likewise, Mr. Botterman, Ms. Burr and ICANN's other fact witness, Russell Weinstein, all explained in their witness statements that long ago the ICANN Board delegated to the ICANN President and CEO, along with the ICANN staff, the authority to manage the day-to-day operations of ICANN, which includes the negotiation and execution of agreements between ICANN and third parties, such as registry agreements with registry operators. Despite these witnesses' first-hand knowledge of this delegation of authority, as well as the existence of corroborating documents, Namecheap claims in its Rebuttal Brief that such a delegation just never occurred. Similarly, Mr. Botterman and Mr. Weinstein both testified in their witness statements that, consistent with its oversight role, the Board was provided briefings regarding the 2019 negotiation of the .BIZ, .INFO, and .ORG Registry Agreements at Board workshop sessions held in January and June of 2019. Namecheap, ignoring the evidence from these witnesses, proclaims in its Rebuttal Brief that ICANN has no evidence of such briefings and then retreats to its mantra of calling these Board workshop sessions "secret meetings." A final example of how Namecheap's Rebuttal Brief turns a blind eye to evidence that is inconsistent with Namecheap's version of the case is the unbelievable assertion that Dr. Carlton "did not contest" Namecheap's claim that Namecheap is unable to pass-on registry price increases to customers. Not only did Dr. Carlton "contest" this claim as a matter of economic theory, he presented quantitative evidence establishing [Redacted - Confidential Information] including those in .BIZ and .INFO. The

evidence that ICANN's witnesses have presented cannot be avoided by merely pretending it does not exist.

3. Indeed, the only reason Namecheap gives for disregarding evidence from ICANN's witnesses is the conclusory (and unsupported) statement that the witnesses' "*post factum* statements" are "unreliable" because ICANN's actions are "under discussion" in this IRP. The assertion that these witnesses would perjure themselves to fabricate Board views that do not exist, a delegation of authority that never happened, or false descriptions of Board workshops for the sole purpose of defending this IRP is absurd and offensive. And it is a baseless assertion that will be exposed through these witnesses' live testimony.

4. What is relevant to this Panel's review are the issues of standing and Namecheap's substantive claims that ICANN has acted contrary to its Articles of Incorporation ("Articles") and Bylaws by transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Namecheap has failed to carry its burden on both issues.

5. Foundationally, a threshold issue remains whether Namecheap has demonstrated that it qualifies as a proper "Claimant" in this IRP with standing to pursue its claims. Nearly three years have passed since the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. But Namecheap still has not come forward with any quantitative or qualitative evidence that Namecheap has been—or even likely will be—materially and adversely affected by a lack of price controls for the .BIZ, .INFO, or .ORG gTLDs. Nor has Namecheap identified a single fact witness to testify to any alleged harm Namecheap has or likely will suffer. Rather, it was ICANN's expert economist, Dr. Carlton, who actually reviewed the pricing history in .BIZ, .INFO, and .ORG, as well as Namecheap's available costs and sales data, and demonstrated that: (i) .BIZ, .INFO, or .ORG registry prices

are unlikely to increase to levels that are significantly higher than those permitted under the previous price control provisions (which allowed increases of up to 10% per year); and (ii) even if registry prices increase, Namecheap is not likely to be harmed because it will pass through any price increases to registrants— [Redacted - Confidential Information]

[Redacted] The notion that Namecheap cannot pass-through price increases is also completely undermined by Namecheap’s own statements to its customers in which it has explained “*if a registry increases its domain prices, we have to as well. Our price increase reflects theirs and considers other costs, such as operational expenses.*”<sup>1</sup> If Namecheap could not pass-through price increases it would have gone out of business long ago. And if passing on price increases were likely to result in economic harm to Namecheap from lost registrations or complementary services, that would have been evidenced in Namecheap’s internal data it has refused to provide.

6. With its Rebuttal Brief, Namecheap submits a third report from Dr. Langus and Prof. Verboven in which they briefly describe (but do not present details of) their own regression analyses that they claim refute Dr. Carlton’s pass-through findings. Dr. Carlton confirmed, however, that these regressions are not reliable because their results are driven by a couple of data anomalies. After removing those anomalies, these regressions demonstrate that, even over the short time periods, [Redacted - Confidential Information] and so there is no reason to expect that Namecheap will suffer harm from reduced margins if wholesale registry prices rise.

7. Even if the Panel considers the merits of Namecheap’s claims, the record demonstrates that Namecheap has failed to carry its burden because ICANN fully complied with

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<sup>1</sup> “Price Increase News for Donuts Domains,” Namecheap Blog (25 September 2019), Ex. R-56.

its Articles and Bylaws when the .BIZ, .INFO, and .ORG Registry Agreements were transitioned to the Base Registry Agreement. Specifically, ICANN has shown that the Board’s delegation of authority to ICANN staff to run the day-to-day operations of the organization, which includes negotiating and executing agreements, such as registry agreements, is clearly within the scope of its reasonable business judgment and must be given due deference. In addition, the Bylaws clearly state that “[t]he President shall be the Chief Executive Officer (CEO) of ICANN *in charge of all of its activities and business*.”<sup>2</sup> Further, the record demonstrates that ICANN staff performed the requisite due diligence prior to deciding to execute the 2019 Registry Agreements, complied with ICANN’s core values, applied its policies fairly and equitably, and operated with the requisite transparency. Therefore, this Panel should deny Namecheap’s requests for relief and declare ICANN the prevailing party in this IRP.

## ARGUMENT

### I. NAMECHEAP CONTINUES TO MISSTATE THE STANDARD OF REVIEW.

8. The standard of review applicable to this Panel’s evaluation of whether ICANN acted consistently with its Articles or Bylaws should not be controversial as the standard is expressly set forth in ICANN’s Bylaws.<sup>3</sup> Namely, section 4.3 provides that “[e]ach IRP PANEL shall conduct an objective, de novo examination of the Dispute.”<sup>4</sup> However, “[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 so long as the Board’s action or inaction is within the realm of reasonable business judgment.”<sup>5</sup> Taken together, and applying the natural and ordinary

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

<sup>3</sup> See ICANN’s Pre-Hearing Brief ¶ 58; Bylaws Art. 4, § 4.3(b)(iii)(A), RM 2 (defining “Disputes” in relevant part as “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]”).

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

<sup>5</sup> *Id.*, Art. 4, § 4.3(i)(iii).



meaning of the text, these provisions allow the Panel to apply a *de novo* review in making findings of fact, but expressly limits the Panel’s review of actions or inactions of the ICANN Board to determining whether they were within the realm of reasonable business judgment.<sup>6</sup>

9. In its Rebuttal Brief, Namecheap seeks to evade the express carve out mandated by section 4.3(iii) by resorting to a contorted interpretation of the purpose behind the changes made to the standard of review in 2016.<sup>7</sup> As a threshold matter, Namecheap’s interpretation of the purpose of the standard of review provisions is irrelevant to the standard of review and does not override the plain and ordinary meaning of the text. Furthermore, Namecheap’s interpretation is wrong. In this case, the most natural interpretation of the purpose behind section 4.3(iii) is that it was intended to require IRP panels to defer to the reasonable business judgment of the ICANN Board.<sup>8</sup> In any event, Namecheap fails to provide any reason as to why the application of the business judgment rule is counter to a purpose of increasing ICANN’s accountability or strengthening the effectiveness of the IRP. Indeed, as explained in ICANN’s Pre-Hearing Brief, incorporating the business judgment rule into the Bylaws ensures that IRPs operate under the same standard of review applied in every United States jurisdiction, including California.<sup>9</sup> The universal adoption of the business judgment rule clearly supports the conclusion that the rule is effective at holding boards of directors accountable and effective in dispute resolution.

10. Lastly, Namecheap attempts to significantly expand the scope of this Panel’s jurisdiction by arguing that if the business judgment rule does in fact apply, this Panel may replace the Board’s decision with its own so long as it finds “the Board’s action or inaction is not

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<sup>6</sup> See ICANN’s Pre-Hearing Brief ¶¶ 59–60.

<sup>7</sup> See Namecheap’s Rebuttal Brief ¶ 97.

<sup>8</sup> See ICANN’s Pre-Hearing Brief ¶ 61.

<sup>9</sup> See *Id.*, ¶ 63.

within the realm of reasonable business judgment.”<sup>10</sup> But as detailed below, such a reading cannot be reconciled with Article 4.3(o) of the Bylaws, which expressly limits the scope of the Panel’s authority, in relevant part, to “[d]eclar[ing] whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]”<sup>11</sup>

11. In sum, as established in ICANN’s Pre-Hearing Brief, the Panel must apply the standard of review set out in Article 4, section 4.3(i)–(iii) of the Bylaws and Rule 11 of the Interim Supplementary Procedures.<sup>12</sup> Under this standard, the Panel applies a *de novo* standard in making findings of fact and determining whether actions or inactions by ICANN’s officers or staff violated the Articles or Bylaws, but the Panel may only evaluate the actions or inactions of ICANN’s Board if they are outside the realm of reasonable business judgment.

## **II. NAMECHEAP’S FAILURE TO PRODUCE EVIDENCE OF HARM CAUSED BY ICANN ACTIONS IS DISPOSITIVE AND CONFIRMS THAT NAMECHEAP DOES NOT QUALIFY AS A “CLAIMANT” WITH STANDING TO PURSUE THIS IRP.**

12. IRP standing requirements also should not be controversial in that they are expressly set forth in the Bylaws. Only a “Claimant,” as defined by the Bylaws, may institute an IRP.<sup>13</sup> The Bylaws define a “Claimant” as a person or entity “that has been *materially affected* by a Dispute,” meaning that it “must suffer an injury or harm that is directly and causally connected to the alleged violation.”<sup>14</sup> And this IRP Panel is authorized to “[s]ummarily dismiss Disputes that are brought without standing[.]”<sup>15</sup>

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<sup>10</sup> Namecheap’s Pre-Hearing Brief ¶ 98.

<sup>11</sup> Bylaws, Art 4.3(o)(iii), RM 2. As a last resort, Namecheap argues that, to the extent there is ambiguity, the standard of review should be construed against ICANN because “it was drafted by ICANN.” Namecheap’s Rebuttal Brief ¶ 99. But this argument fails because: (i) there is no ambiguity; and (ii) the ICANN community was deeply involved in drafting the Bylaws, and the community had two separate law firms representing it during that drafting process. Therefore, Namecheap’s reference to the principle of *contra proferentem* is inapplicable.

<sup>12</sup> ICANN’s Pre-Hearing Brief ¶ 64.

<sup>13</sup> *Id.*, ¶ 65; Bylaws, Art. 4, § 4.3(b)(i), RM 2.

<sup>14</sup> ICANN’s Pre-Hearing Brief ¶ 65; Bylaws, Art. 4, § 4.3(b)(i) (emphasis added), RM 2.

<sup>15</sup> ICANN’s Pre-Hearing Brief ¶ 65; Bylaws, Art. 4, § 4.3(o)(i), RM 2.

13. As with its previous opportunities to produce evidence that Namecheap has been, or is likely to be, materially affected by the execution of the 2019 Registry Agreements, Namecheap fails to do so again in its Rebuttal Brief. Instead of even attempting to do so in its Rebuttal Brief, Namecheap ignores the clear text of the Bylaws, fashions a new standard that allegedly fits its situation, offers theories of harm that are unsupported by witness testimony, financial records, data or internal Namecheap documents, and continues to rely on expert reports that merely speculate as to the possibility that Namecheap *may* experience some unquantified harm in the future. This repeated failure to come forward with any evidence of harm since the filing of this IRP in February 2020, compels the conclusion that Namecheap has not been, and is unlikely to be, materially harmed by ICANN’s conduct and, therefore, that Namecheap does not qualify as a proper Claimant. It is Namecheap’s burden to establish standing and it has failed to do so, yet again, in its Rebuttal Brief.

**A. To Have Standing, Namecheap Must Show That It Has Been Materially Affected By The Execution Of The 2019 Registry Agreements.**

14. In its Rebuttal Brief, Namecheap contends that in order to have standing it must merely show that it has experienced some trivial level of harm as a result of ICANN’s actions, regardless of its materiality.<sup>16</sup> Namecheap gets to this argument by simply ignoring the text of the Bylaws. Article 4, section 3(b)(i) of the Bylaws, however, expressly defines a “Claimant” as a person, group or entity “that has been *materially* affected” by the challenged ICANN conduct. Under Namecheap’s interpretation of the Bylaws, the materiality threshold would be rendered meaningless and thus cannot be reconciled with the plain text.

15. Though Namecheap argues—without support—that the standing requirement for IRPs was merely introduced to avoid frivolous claims, a materiality threshold does much more

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<sup>16</sup> See Namecheap’s Rebuttal Brief ¶¶ 116–120.

than that. Namely, requiring that claimants show they have been materially affected by ICANN conduct ensures that the time and expense of ICANN’s Accountability Mechanisms are only incurred when warranted by evidence of material harm. Further, Namecheap’s biased interpretation of the Bylaws is clearly foreclosed by its text, which distinguishes between Disputes which are brought without standing and those that are simply frivolous.<sup>17</sup>

**B. Namecheap Has Failed To Establish That It Has Suffered, Or Is Likely To Suffer, Any Injury, Much Less A Material Injury.**

16. Instead of presenting evidence of material harm, Namecheap claims in its Rebuttal Brief that ICANN’s Board Accountability Mechanism Committee (“BAMC”) “admitted that Namecheap was materially harmed” when it determined that Reconsideration Request 19-2 was sufficiently stated to proceed to a consideration of its merits.<sup>18</sup> The BAMC, of course, made no such factual finding. Rather, as explained by the ICANN Board in its determination of the Reconsideration Request, the BAMC merely found that Namecheap’s allegation of harm in Reconsideration Request 19-2 was sufficient to survive summary dismissal of that Reconsideration Request; the BAMC did not reach a determination of the merits of Namecheap’s alleged harm.<sup>19</sup> As this Panel itself has recognized, a finding that harm is sufficiently asserted to proceed to a merits determination is far from equivalent to a finding that an entity was in fact materially harmed.<sup>20</sup>

17. Given the weakness of Namecheap’s BAMC argument, Namecheap continues to rely on unsubstantiated and speculative theories to assert harm, which are controverted by even a cursory examination of the data and Namecheap’s business.

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<sup>17</sup> Bylaws, Art. 4, § 4(o)(i), RM 2 (granting IRP Panels authority to “[s]ummarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious”).

<sup>18</sup> Namecheap’s Rebuttal Brief ¶¶ 122–124.

<sup>19</sup> See Board Proposed Determination or Reconsideration Request 19-2, 3 November 2019, Annex 127, pp. 21–22.

<sup>20</sup> Cf. Procedural Order No. 8 ¶ 48 (holding that a finding that Namecheap sufficiently made out a *prima facie* case for standing to proceed does not require finding that Namecheap’s factual allegations are well-founded or true).

18. First, Namecheap repeats its unsupported claim that Namecheap’s expected profits and net present value are reduced by the mere expectation that it may be harmed in the future by increased registry prices.<sup>21</sup> This theory, however, is rebutted by concrete economic evidence. Far from losing expected profits, Dr. Carlton’s report demonstrates that: (i) it is unlikely that registry prices will increase to levels that are significantly higher than those permitted under the previous price control provisions (which allowed increases of up to 10% per year);<sup>22</sup> (ii) even if registry prices increase, Namecheap is not likely to be harmed because it will fully pass through any price increases to registrants—Redacted - Confidential Information  
[REDACTED]<sup>23</sup> and (iii) Namecheap is unlikely to have reduced sales as a result of increased registry prices.<sup>24</sup> In addition, as ICANN pointed out in its Pre-Hearing Brief, Namecheap has failed to produce any sort of financial projection, profit and loss statement, or other ordinary course document to substantiate Namecheap’s alleged harm.<sup>25</sup> That Namecheap has failed yet again to do so should be dispositive. Not only have numerous gTLDs over the past several years increased their prices, but renewal prices for .BIZ and .INFO have also increased since the filing of this IRP, meaning that if Namecheap were in fact injured by registry price increases, Namecheap would have evidence of such harm. But Namecheap’s repeated failure to provide evidence of lost profits or decreased present value as a result of price increases in the very gTLDs at issue in this IRP demonstrates that no such harm has or is likely to occur due to the execution of the 2019 Registry Agreements.

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<sup>21</sup> See Namecheap’s Rebuttal Brief ¶ 127.

<sup>22</sup> See Expert Report of Dennis W. Carlton, Ph.D. (“Carlton Expert Report”) ¶¶ 47–68.

<sup>23</sup> See *Id.*, § II.A.

<sup>24</sup> See *Id.*, § II.B.

<sup>25</sup> See ICANN’s Pre-Hearing Brief ¶ 74.

19. Second, Namecheap continues to assert that it has no ability to pass on increased costs without losing customers, leading to lost profits.<sup>26</sup> But contrary to Namecheap's claim, Dr. Carlton has demonstrated that Namecheap is unlikely to suffer any such harm.<sup>27</sup> As with its previous theory, Namecheap's speculative claim is undercut by the low risk that wholesale prices in .BIZ, .INFO, or .ORG will increase to levels that are significantly higher than those that were permitted under the previous price controls.<sup>28</sup> Additionally, Dr. Carlton performed a quantitative analysis showing [Redacted - Confidential Information]

[Redacted]

<sup>29</sup> And contrary to Namecheap's claims, Dr. Carlton's quantitative analysis demonstrates that Namecheap is unlikely to be harmed by any such increases because: (i) [Redacted - Confidential Information]

[Redacted] (ii) Namecheap's customers are unlikely to divert to other registrars; and (iii) price increases in .BIZ, .INFO, and .ORG are not likely to significantly reduce overall demand for domain names.<sup>30</sup> Finally, if Namecheap truly was unable to pass-on registry price increases without losing customers or profits, that would be of a major concern to Namecheap, as it would to any business, and that concern would be reflected in Namecheap's internal business documents, financial reports, and financial data. Namecheap's failure to produce a single piece of evidence of an inability to pass-on registry price increases without losing customers is in fact telling evidence that Namecheap has not been harmed by previous price increases and is therefore not likely to be harmed by any future increases.

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<sup>26</sup> See Namecheap's Rebuttal Brief ¶ 127.

<sup>27</sup> See Carlton Expert Report § II.B. It is unclear how Namecheap could make the patently false statement that Dr. Carlton did not address this speculative theory of harm when Dr. Carlton dedicated an entire section of his report to demonstrating it is unsupported by the evidence.

<sup>28</sup> See *Id.*, ¶¶ 47–68.

<sup>29</sup> *Id.*, ¶¶ 23–27. Registry prices in .ORG have not changed in the last five years.

<sup>30</sup> *Id.*, ¶¶ 29–38.

20. It is not surprising that Namecheap has not presented evidence that it is unable to profitably pass-on increased registry prices because, like all retailers, pass-through is at the very heart of Namecheap’s business, as reflected in ordinary-course materials that Namecheap presents to its customers. For example, in a 22 July 2019 blog post, entitled *Why Domain Extensions Aren’t All Created Equal*, Namecheap explained to its customers that:

You purchase domain names through a ‘registrar’ like Namecheap, but registrars get their TLDs supplied by ‘registries’. These are the ones who actually control each TLD. So just like a standard store or shop, the registry sets the price **and the registrar (like Namecheap) adds its markup**.<sup>31</sup>

21. Likewise, in a 24 April 2019 blog post entitled *Help Keep Domain Prices in Check*, Namecheap described its pricing practices as follows:

The wholesale registry charges Namecheap a set fee per domain name per year. **Namecheap then adds a little markup to cover things like support, provisioning domain services, transaction fees, etc.**<sup>32</sup>

22. In a 20 July 2017 blog post entitled *Renew Your Domains in Advance to Save Money*, Namecheap described its pricing practices regarding registry price increases as follows:

Registries set a price on each TLD they offer, and the prices may change over time. **They usually adjust prices upward, forcing domain registrars to increase their own prices for their customers.**<sup>33</sup>

23. In terms of real-world registry price increases, Namecheap’s documents clearly state that Namecheap has done exactly what Dr. Carlton’s analysis confirmed: Namecheap passed the increases on to its customers. For example, in January 2019, Namecheap explained to its customers that it would be increasing prices on over 30 TLDs due to wholesale price increases:

One of our larger partner registrars has increased the price of some of the TLDs they supply to us. **This means we will be increasing the price of several of our**

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<sup>31</sup> “Why Domain Extensions Aren’t All created Equal” Namecheap Blog (22 July 2019), Ex. R-57.

<sup>32</sup> “Help Keep Domain Prices in Check,” Namecheap Blog (24 April 2019), Ex. R-49.

<sup>33</sup> “Renew Your Domains in Advance to Save Money,” Namecheap Blog (20 July 2017), Ex. R-58.

*TLDs from January 10, 2019.* In most cases, this extra cost will only be for renewals and reactivations, but the registrations of some TLDs will increase as well.<sup>34</sup>

24. Similarly, in September 2019, Namecheap informed its customers that it would be increasing prices on approximately 218 TLDs due to wholesale price increases:

On October 1st, 2019, domain registry Donuts will be increasing the standard prices of the majority of their top-level domains. Unfortunately, in response to the news from Donuts, *we must raise our prices on these domains as well.*<sup>35</sup>

25. In that same September 2019 statement, Namecheap confirmed the most basic economic principle of pass-through that Namecheap fights so hard against in this IRP:

As a registrar, Namecheap’s job is to tell the registry to reserve your dream domain, meaning that no one else can have it. We also provide customer support, account management and other helpful features that make your life as a domain owner easier. *Because of this, if a registry increases its domain prices, we have to as well. Our price increase reflects theirs and considers other costs, such as operational expenses.*<sup>36</sup>

26. In its Rebuttal Brief, Namecheap tries to dismiss its statements to customers that Namecheap may have to increase prices if price controls are removed from .BIZ, .INFO, and .ORG<sup>37</sup> as a “non-committal statement [that] constitutes no evidence of an actual pass-on,”<sup>38</sup> but the materials cited above are certainly evidence of “actual pass-on,” which only confirm Dr. Carlton’s quantitative analysis concluding [Redacted - Confidential Information]

[Redacted] The claim that Namecheap cannot profitably pass-on price increases was created for purposes of this IRP and was conveniently unexplored by Namecheap’s economic experts. If Namecheap could not pass on price increases, it would not be in business.

<sup>34</sup> “Price Increase on Certain Domains,” Namecheap Blog (7 January 2019), Ex. R-59.

<sup>35</sup> “Price Increase News for Donuts Domains,” Namecheap Blog (25 September 2019), Ex. R-56.

<sup>36</sup> *Id.* (emphasis added).

<sup>37</sup> ICANN Pre-Hearing Brief ¶ 82; EX. R-45 .

<sup>38</sup> Namecheap’s Rebuttal Brief, p. 42.



27. Third, Namecheap argues in its Rebuttal Brief that if wholesale registry prices increase, and Namecheap passes those increases on to customers, Namecheap may suffer lost profits if customers purchase fewer complementary services from Namecheap, presumably because customers have less money to spend.<sup>39</sup> As with its other theories of harm, however, this is just speculation. Namecheap has provided no evidence of a reduction in demand for complementary services [Redacted - Confidential Information]. Namecheap has failed to demonstrate any likelihood that registration prices will increase to levels that are materially higher than those permitted under the previous price control provisions (which allowed increases of up to 10% per year); and Namecheap has not even addressed, much less refuted, the likelihood that any such speculative losses would be counterbalanced by increased profit margins Namecheap would likely experience to the extent registrants shift their registrations to [Redacted - Confidential Information]. Indeed, as Dr. Carlton demonstrates in his reply report, Namecheap's experts continue to provide no theoretical reason or empirical evidence supporting their conclusions.<sup>40</sup> Furthermore, as with Namecheap's claimed losses in registration profits from registrants switching to alternative TLDs, Namecheap actually could [Redacted - Confidential Information]. This is because, as Dr. Carlton demonstrates in his reply report, Namecheap [Redacted]

[Redacted - Confidential Information]

[Redacted] <sup>41</sup>

28. Fourth, in its Rebuttal Brief, Namecheap seeks to rely on an entirely new report from its experts that attempts to respond to Dr. Carlton's analysis. In their third report, Dr.

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<sup>39</sup> See *Id.*, ¶¶ 127–128.

<sup>40</sup> See Reply Report of Dennis W. Carlton, Ph.D. (“Carlton Reply Report”) ¶ 34.

<sup>41</sup> *Id.*, ¶ 35.

Langus and Prof. Verboven describe three alternative regression analyses focused on shorter time periods than Dr. Carlton’s three-and-a-half-year analysis, and they claim that their results demonstrate that changes in registry wholesale costs are not fully passed through into the retail registration prices that Namecheap charges its customers, at least for renewal registrations.<sup>42</sup>

First, Dr. Langus and Prof. Verboven do not challenge Dr. Carlton’s findings of [REDACTED]

[Redacted - Confidential Information] Second, Dr. Carlton establishes in his Reply Report that, with respect to renewal registrations, the regressions presented by Dr. Langus and Prof. Verboven are not reliable because their results are completely driven by a couple of data anomalies.<sup>43</sup> After removing these anomalies, the regressions demonstrate that, even over the short time periods,

[Redacted - Confidential Information] and so there is no reason to expect that Namecheap will suffer harm (in the form of reduced margins) if wholesale registry prices rise.<sup>44</sup>

29. Lastly, Namecheap asserts that even if Namecheap has not been harmed, it is entitled to bring a claim to prevent harm to its customers whose interest Namecheap represents.<sup>45</sup> However, Namecheap makes no attempt to reconcile this novel position with the applicable rules governing this IRP. Nor can it. The Bylaws and IRP procedures are clear that a Claimant must have personally suffered the injury or harm. Claimants may not bring representative claims on the basis of harms allegedly suffered by third parties.

30. Because Namecheap has failed to provide any persuasive evidence to support even its claims of theoretical future harm, ICANN urges the Panel to dismiss this IRP on the ground that Namecheap has not been materially and adversely affected by the Dispute and therefore does not qualify as a Claimant.

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<sup>42</sup> Third Economic Expert Report by Drs. Verboven and Langus (“Expert Report III”) ¶ 37.

<sup>43</sup> Carlton Reply Report ¶¶ 11–28.

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

<sup>45</sup> See Namecheap’s Rebuttal Brief ¶ 132.

### **III. THE ICANN BOARD FULLY COMPLIED WITH THE ARTICLES AND BYLAWS IN CONNECTION WITH THE .BIZ, .INFO, AND .ORG REGISTRY AGREEMENTS.**

31. Namecheap continues to claim that the ICANN Board violated the Articles and Bylaws in connection with the Board’s purported “decision” to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement at the Board workshops.<sup>46</sup> In addition to the fact that Namecheap does not identify which ICANN action(s) violated which Article or Bylaws provision(s), Namecheap has failed to carry its burden on this front for two reasons. First, the Board did not make the renewal decisions or negotiate the agreements. Rather, as explained in ICANN’s Pre-Hearing Brief, ICANN’s President and CEO, along with ICANN staff, had the authority (long ago delegated to it by the Board) to negotiate and execute registry agreements, which ICANN staff did.<sup>47</sup> Second, the Board workshop sessions at which the Board was briefed on the underlying negotiations and proposed registry agreements were not formal Board meetings under the Bylaws, and therefore are not subject to the same notice and disclosure requirements on which Namecheap’s transparency allegations are based.<sup>48</sup>

#### **A. The ICANN Board Reasonably Delegated Day-to-Day Operations To ICANN Staff, Including Negotiation And Execution Of Registry Agreements.**

32. As established in ICANN’s Pre-Hearing Brief, the ICANN Board is an oversight board that provides direction and advice on major policy issues and initiatives; it is not a managing or executive board that directly makes day-to-day operational decisions for ICANN.<sup>49</sup> Consistent with its oversight role, the ICANN Board delegated to the ICANN President and CEO, and staff, the authority to manage the day-to-day operations of ICANN with the Board’s oversight—which includes the authority to negotiate and execute contracts, including registry

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<sup>46</sup> See *id.*, ¶¶ 75–82.

<sup>47</sup> See ICANN’s Pre-Hearing Brief ¶¶ 89–96.

<sup>48</sup> See *id.*, ¶¶ 98–99.

<sup>49</sup> See *id.*, ¶ 37; Witness Statement of J. Beckwith Burr (“Burr Witness Stmt.”) ¶ 26; Witness Statement of Maarten Botterman (“Botterman Witness Stmt.”) ¶ 11.

agreements. This authority was duly delegated long before the renewal process for the .BIZ, .INFO, and .ORG Registry Agreements began. Indeed, the delegation of authority, which existed long before, was memorialized in November 2016 when the ICANN Board adopted and published ICANN’s Delegation of Authority Guidelines (“Guidelines”).<sup>50</sup> While Namecheap claims this never happened (even though the Guidelines have been published on ICANN’s website for over five years), the fact that this delegation exists is apparent from the text of the Guidelines, was recognized by ICANN’s Ombudsman (the “Ombudsman”),<sup>51</sup> and has been confirmed in this IRP by the sworn testimony of Mr. Botterman, Ms. Burr and Mr. Weinstein. Indeed, this delegation is consistent with the Bylaws, which state that “[t]he President shall be the Chief Executive Officer (CEO) of ICANN *in charge of all of its activities and business.*”<sup>52</sup> Namecheap’s feigned ignorance that this delegation occurred does not rebut the fact that it did.

33. In its Rebuttal Brief, Namecheap attempts to sidestep this evidence by asserting that ICANN failed to show how the Guidelines provided staff with the requisite authority to negotiate and execute agreements. But the Guidelines, that mimic the Bylaws, clearly provide that the Board delegated to ICANN’s President and CEO the responsibility of “[l]ead[ing] and oversee[ing] ICANN’s day-to-day operations” and to ICANN’s President and CEO and senior management the role of “[p]erform[ing] operational work in accordance with the strategic direction of the Board.”<sup>53</sup> These responsibilities include the role of negotiating and executing the

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<sup>50</sup> See ICANN’s Delegation of Authority Guidelines (8 November 2016), Ex. R-37.

<sup>51</sup> See Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2 (7 September 2019), RE-13, p. 3 (“ICANN’s Board delegated such authority to negotiate and renew Registry Agreements to the CEO and Staff long ago, utilizing the executive authority resident in the Chief Executive and its powers[.]” The Ombudsman’s speculation relied on by Namecheap as to whether the delegation was unnecessarily reaffirmed in June 2019—which to be clear, did not occur—does not address the factual finding that the requisite authority was delegated long ago.

<sup>52</sup> Bylaws, Art. 15, § 15.4 (emphasis added), RM 2.

<sup>53</sup> ICANN’s Delegation of Authority Guidelines (8 November 2016), R-37, pp. 2–3.

thousands of agreements, renewals, amendments, and addendums with third parties which ICANN must execute pursuant to ICANN's ordinary operations. In addition to being proven by Mr. Botterman's, Ms. Burr's, and Mr. Weinstein's sworn testimony,<sup>54</sup> the fact that ICANN's Board delegated this authority as documented in the Guidelines has been consistently explained by ICANN's Board and staff to the ICANN community.<sup>55</sup> Namecheap tellingly did not even attempt to address this additional evidentiary support cited in ICANN's Pre-Hearing Brief.

34. Namecheap also contends that the fact that ICANN's Board has considered certain proposed registry renewal agreements at ICANN Board meetings and issued subsequent resolutions authorizing their execution since November 2016 negates the scope of its delegation. However, as explained in ICANN's Pre-Hearing Brief, such resolutions represent the exception to the rule and simply reflect the fact that the Board has occasionally elected to directly consider and vote on proposed registry agreements that ICANN staff have negotiated with registry operators. Indeed, Namecheap does not contest the fact that ICANN's Board has issued resolutions regarding registry agreements for very few of the over 1,200 gTLDs in the DNS and does not engage in this practice as a matter of course—clearly reflecting the correct understanding that the requisite delegation to negotiate and execute these agreements has already been made.<sup>56</sup>

35. Namecheap further claims that ICANN staff requested the ICANN Board's approval of the .BIZ, .INFO, and .ORG Registry Agreements, thereby demonstrating that there was no prior delegation of authority. But ICANN staff did no such thing, as confirmed in the witness statements of Mr. Botterman and Mr. Weinstein, and Namecheap has failed to cite a

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<sup>54</sup> Botterman Witness Stmt., ¶ 11, Burr Witness Stmt., ¶ 26, Witness Statement of Russell Weinstein ("Weinstein Witness Stmt.") ¶ 10.

<sup>55</sup> See ICANN's Pre-Hearing Brief ¶¶ 37, 90, 92.

<sup>56</sup> See *id.*, ¶¶ 40, 91.

single piece of evidence that supports its assertion. Rather, ICANN staff simply and properly consulted with the Board in making its decisions with respect to .BIZ, .INFO, and .ORG. As explained in ICANN’s Pre-Hearing Brief, even though the Board decided in its reasonable business judgment to delegate the authority to negotiate and execute contracts to ICANN staff, “the Board is available as a resource for ICANN staff whenever staff seeks Board consultation.”<sup>57</sup> Namecheap’s contention fails because it conflates consulting with the ICANN Board with requesting the ICANN Board’s approval. While ICANN staff certainly consulted with the ICANN Board, it was ICANN staff that made the decision to execute the registry agreements for .BIZ, .INFO, and .ORG. ICANN’s Board did not, and was not required to, negotiate the 2019 Registry Agreements or make any decision regarding them.

36. Namecheap also claims that the Board must operate as more than an oversight Board based on Namecheap’s interpretation of the requirement that ICANN’s corporate powers be exercised by, or under the ultimate direction of, the Board.<sup>58</sup> However, this requirement does not preclude the Board from delegating broad decision-making authority with respect to ICANN’s day-to-day operations to ICANN’s executives and staff with the Board’s oversight.<sup>59</sup> Namecheap failed to respond to this argument in its Rebuttal Brief and has not identified a single source of authority for its novel proposition that California law requires the board of a corporation to issue formal resolutions with respect to every contract negotiation or agreement execution.<sup>60</sup>

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<sup>57</sup> *id.*, ¶ 94.

<sup>58</sup> Namecheap’s Rebuttal Brief ¶ 8.

<sup>59</sup> ICANN’s Pre-Hearing Brief ¶¶ 93, 95.

<sup>60</sup> Namecheap also cites an isolated quotation from Göran Marby for the proposition that ICANN organization supports the Board and, therefore, cannot exercise ICANN’s corporate powers. See Namecheap’s Rebuttal Brief ¶¶ 9–10. However, that the ICANN organization supports the Board does not refute the organization’s authority to exercise appropriately delegated corporate power under the Board’s oversight.

37. As a last resort, Namecheap argues in a footnote that even if a formal resolution is not necessary for every agreement, the Board cannot “abdicate its authority” with respect to what Namecheap characterizes as a “drastic” decision. This argument is equally deficient. First, ICANN’s Board in no way abdicated its authority; rather, it appropriately delegated the authority to negotiate and execute contracts in its reasonable business judgment consistent with its oversight role. Indeed, Namecheap fails to contest the fact that “it would be nearly impossible for the Board to complete its other tasks if it were required to negotiate, consider, or issue formal resolutions each time an agreement was negotiated, renewed, or entered into.”<sup>61</sup>

38. Second, Namecheap cites no authority and provides no rationale to support its suggestion that ICANN’s Board may generally delegate the authority to negotiate and execute contracts, but only so long as they do not involve legacy gTLDs or involve the lack of a price control provision. None exists. Tellingly, Namecheap failed to identify a single provision in the Articles or Bylaws to support its contention and did not contest ICANN’s position that “not a single Bylaws provision requires or even provides for the ICANN Board to enter into contract negotiations or otherwise execute contracts with registry operators” or “issue formal resolutions regarding registry agreement renewals.”<sup>62</sup>

39. Third, contrary to Namecheap’s exaggerated claims, there was nothing drastic about ICANN’s decision to transition the .BIZ, .INFO, and .ORG registry agreements to the Base Registry Agreement. This is particularly apparent in that: (i) over 1,200 new gTLDs operate under the Base Registry Agreement; (ii) most legacy gTLDs (in addition to .BIZ, .INFO, and .ORG) have transitioned to the Base Registry Agreement; (iii) Namecheap, a registrar with a

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<sup>61</sup> ICANN’s Pre-Hearing Brief ¶ 94; *see also* Botterman Witness Stmt. ¶ 14, Burr Witness Stmt. ¶ 29.

<sup>62</sup> ICANN’s Pre-Hearing Brief ¶ 95; *see also* Bylaws, Art. 15, § 15.4, RM 2 (“The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business.”).

relatively low market share, is the only registrar out of close to 2,500 ICANN-accredited registrars that has formally challenged this decision; and (iv) Namecheap has yet to identify any actual harm it has suffered as a result of these transitions. Therefore, even if the Board’s ability to delegate negotiation and execution authority turned on a contract’s relative importance, which it does not, no special grounds exist to warrant the usurpation of the Board’s reasonable delegation authority with respect to these particular TLDs.

40. Lastly, Namecheap failed to address ICANN’s argument that the Board’s delegation of this decision-making authority was a reasonable exercise of the Board’s judgment.<sup>63</sup> Specifically, Namecheap did not attempt to contest that “[i]t would be nearly impossible for the Board to complete its other tasks if it were required to negotiate, consider, or issue formal resolutions each time an agreement was negotiated, renewed or entered into.”<sup>64</sup> Nor did Namecheap counter the fact that the Board’s delegation of authority allows the Board to better “focus on high-level strategic and policy initiatives, and engagement with ICANN’s Supporting Organizations and Advisory Committees[.]”<sup>65</sup> Therefore, because this delegation arises “out of the Board’s exercise of its fiduciary duties” and is “within the realm of reasonable business judgment[.]” the Panel must defer to the Board’s reasonable business judgment and cannot replace it with the Panel’s own judgment.<sup>66</sup>

**B. ICANN’s Board Was Kept Apprised Of The Status Of The 2019 Registry Agreements Consistent With The Articles And Bylaws.**

41. Namecheap continues to mistakenly claim in its Rebuttal Brief that ICANN conducted “secret meetings” regarding the 2019 Registry Agreements in violation of the Articles

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<sup>63</sup> ICANN’s Pre-Hearing Brief ¶¶ 93–96.

<sup>64</sup> *id.*, ¶ 94.

<sup>65</sup> *Id.*

<sup>66</sup> Bylaws, Art. 4, § 4.3(i)(iii), RM 2; ICANN’s Pre-Hearing Brief ¶ 96.



and Bylaws.<sup>67</sup> In particular, Namecheap contends that: (i) there is insufficient evidence to support the conclusion that the Board was properly briefed on the 2019 Registry Agreements; and (ii) ICANN violated its Articles and Bylaws by failing to publicly disclose certain records and the rationale for its “decision.”<sup>68</sup> Both of these arguments fail for the reasons set out below.

42. First, contrary to Namecheap’s assertions, ICANN presented substantial evidence showing that the Board was provided appropriate briefings regarding the 2019 Registry Agreements consistent with its oversight role. Indeed, both Mr. Botterman and Mr. Weinstein testified in their witness statements that the Board was kept fully apprised of the status of the negotiations through privileged briefings provided at Board workshops held in January and June 2019, respectively.<sup>69</sup> Though information regarding the precise contents of the briefings cannot be divulged without waiving the attorney-client privilege,<sup>70</sup> Mr. Botterman’s and Mr. Weinstein’s witness statements confirm that between these two workshop sessions the Board was briefed on, inter alia, the history of price control provisions in various gTLD contracts, how the concepts of price control and price protection were considered by the Internet community during the development of the Base Registry Agreement, ICANN’s rationale for why transitioning to the Base Registry Agreement was the right approach, and the results of the public comment process.<sup>71</sup> Moreover, this sworn testimony is corroborated by multiple documents indicating that

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<sup>67</sup> See Namecheap’s Rebuttal Brief ¶¶ 75–82.

<sup>68</sup> *Id.*

<sup>69</sup> Botterman Witness Stmt. ¶¶ 19–23, 25–26; Weinstein Witness Stmt. ¶¶ 23–24; see also ICANN’s Pre-Hearing Brief ¶¶ 101–103.

<sup>70</sup> Namecheap suggests that if these briefings did occur, there would in its view be no reason for ICANN to invoke attorney-client privilege to prevent their production. See Namecheap’s Rebuttal Brief ¶ 76. However, while Namecheap may have a low regard for the inherent importance of protecting privileged communications, ICANN does not. And invoking the protections legally afforded to ICANN implies nothing more than ICANN’s desire to ensure that it maintains the right to seek legal advice in confidence, which is enjoyed by all parties to IRPs, including Namecheap.

<sup>71</sup> Botterman Witness Stmt. ¶¶ 19–23, 25–26; Weinstein Witness Stmt. ¶¶ 23–24; see also ICANN’s Pre-Hearing Brief ¶¶ 101–103.

the 2019 Registry Agreements were indeed discussed at these Board workshop sessions.<sup>72</sup> This evidence is more than sufficient to establish that the Board was briefed on the issues relevant to the 2019 Registry Agreements.

43. Second, Namecheap’s claims with respect to these alleged “secret” meetings fail because they are predicated on a faulty premise. Namecheap contends that ICANN violated its transparency obligations “by shielding from public disclosure the agendas, deliberations, minutes, decisions, voting record, and rationale [of the Board].”<sup>73</sup> However, as explained above, the Board did not vote on or render a decision regarding the 2019 Registry Agreements; thus, there were no agendas, minutes or voting records that were “shielded,” they simply do not exist. As stated several times now, the authority to enter into contracts and agreements was part of the general delegation of authority to ICANN’s President and CEO, and staff, to be able to maintain day-to-day operations. As part of that delegation of authority, ICANN staff made the decision to enter into the 2019 Registry Agreements.<sup>74</sup>

44. Additionally, as set out in detail in ICANN’s Pre-Hearing Brief, the disclosure requirements on which Namecheap’s transparency claims substantially rely relate to annual, regular, and special Board meetings under the Bylaws.<sup>75</sup> However, those requirements do not apply to Board workshops and informational calls, which are essentially working sessions for the ICANN Board where the Board exchanges information, is briefed on certain topics relevant to

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<sup>72</sup> See, e.g., Letter from Cryus Namazi to Zak Muscovitch (26 July 2019), RE-8 (“During the course of renewal negotiations with the respective registry operators for .biz, .info and .org, the ICANN org provided a briefing and held a discussion with the ICANN Board at the Board’s workshop in Los Angeles (25-28 January 2019).”); *id.* (“In addition, briefing papers were provided to the Board in advance of its workshop in June 2019 in Marrakech.”); Email from Brad White (ICANN) to Kevin Murphy (journalist) of 9 July 2019 and attachment, Annex 105 (explaining that the Board was briefed on these topics during the January 2019 and June 2019 workshops); Internal ICANN correspondence of 25 September 2018 regarding the planning of an ICANN Board meeting, Annex 64 (identifying “Price Caps in legacy gTLD renewals” as a topic for discussion at the next Board workshop).

<sup>73</sup> Namecheap’s Rebuttal Brief ¶ 80.

<sup>74</sup> ICANN’s Pre-Hearing Brief ¶ 89.

<sup>75</sup> *Id.*, ¶ 98.

ICANN and the Internet community, address various housekeeping matters, and the like.<sup>76</sup> As such, Namecheap has failed to identify how the operation of the January and June workshop sessions at which the Board did not make any decision or issue a resolution violate any Article or Bylaws provision. By contrast, ICANN explained in its Pre-Hearing Brief that the ability to hold working sessions that are not subject to the same requirements as Board meetings is essential to the ability of the ICANN Board to conduct its work and fulfill its mandate to ICANN.<sup>77</sup> It is therefore fully consistent with ICANN's obligation to "operate to the maximum extent feasible in an open and transparent manner."<sup>78</sup> Namecheap has failed to carry its burden to prove otherwise.

45. Lastly, these facts distinguish Namecheap's claims from those at issue in the *Dot Registry* IRP. In that case, the Panel considered whether the Board fulfilled its transparency obligations in relation to the Board Governance Committee's consideration of the claimant's Reconsideration Request. In other words, it involved a decision by the Board made at a formal Board meeting. Here, there can be no transparency violation in connection with the Board's purported decision relating to the 2019 Registry Agreements because no such decision was made and the Board briefing was not at a formal Board meeting. That Namecheap failed to adequately address these two points in either its Pre-Hearing Brief or its Rebuttal Brief is fatal to its claims.

#### **IV. ICANN STAFF FULLY COMPLIED WITH THE ARTICLES AND BYLAWS IN TRANSITIONING THE 2019 REGISTRY AGREEMENTS TO THE BASE REGISTRY AGREEMENT.**

46. In its Rebuttal Brief, Namecheap regurgitates many of the same arguments it presented in its Pre-Hearing Brief for the proposition that ICANN violated the Articles and

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<sup>76</sup> *Id.*, ¶ 99.

<sup>77</sup> *Id.*, ¶ 99.

<sup>78</sup> Bylaws, Art. 3. §3(1), RM 2.

Bylaws in transitioning the 2019 Registry Agreements to the Base Registry Agreement. Specifically, Namecheap focuses on alleged violations of the requirements that ICANN “operate to the maximum extent feasible in an open and transparent manner” and “make decisions by applying documented policies consistently, neutrally, objectively, and fairly.”<sup>79</sup> However, despite ICANN pointing out the many ways Namecheap failed to demonstrate any violations in its Pre-Hearing Brief, Namecheap did not rectify those deficiencies in its Rebuttal Brief. Namecheap has therefore failed to carry its burden.

**A. ICANN Staff Considered Numerous Factors Before Proposing To Transition The 2019 Registry Agreements To The Base Registry Agreement.**

47. ICANN’s Pre-Hearing Brief established that ICANN staff considered many factors before making the decision to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.<sup>80</sup> These factors are discussed at length in ICANN’s Pre-Hearing Brief, and include:

- ICANN’s goal of treating the .BIZ, .INFO, and .ORG registry operators equally with the operators of new gTLDs and other legacy gTLDs;
- That transitioning to the Base Registry Agreement would ensure consistency for registries, registrars, and registrants, and provide increased operational efficiencies;
- That the Base Registry Agreement, which was drafted with the Internet community, contained a number of safeguards and security and stability requirements that were more robust than the 2013 Registry Agreements;
- The additional protections afforded to registrars (and therefore hopefully passed on to registrants) by the Base Registry Agreement from a pricing perspective;
- The maturation of the domain name market since ICANN’s inception and the introduction of significant consumer choice and competition through the New gTLD Program;
- The extremely low number of registrations in these three gTLDs relative to the number of registrations in all TLDs;

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<sup>79</sup> Bylaws, Art. 1, § 1.2(a)(v) and Art. 3, § 3.1, RM 2.

<sup>80</sup> ICANN’s Pre-Hearing Brief § III.A.

- The fact that ICANN is not a price or competition regulator and therefore should not be required to monitor the prices registry operators charge registrars for registrations in these gTLDs; and
- The absence of any government mandate requiring price control provisions, as compared to .COM.<sup>81</sup>

48. In response, Namecheap again baselessly suggests that Mr. Weinstein’s sworn testimony is somehow unreliable and discounts the evidence contained in Annex 67

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.<sup>82</sup> And Namecheap’s Rebuttal Brief completely ignores the fact that many of ICANN staff’s deliberations took place in telephonic or in-person staff meetings and not via email, or involved ICANN’s internal and external legal counsel and are thus privileged.<sup>83</sup> Moreover, Namecheap’s critique fails to address the fact that the basis of ICANN staff’s decision is reflected in the publicly available Staff Report of Public Comment Proceedings that ICANN published for the respective gTLDs at the conclusion of the public comment period, and in public correspondence.<sup>84</sup> These reports corroborate Mr. Weinstein’s accounting of the factors ICANN staff considered in determining whether the 2019 Registry Agreements should be transitioned to the Base Registry Agreement.

49. Namecheap also makes the alternative argument that the factors ICANN staff considered do not support the lack of price control provisions in the 2019 Registry Agreements.<sup>85</sup> That Namecheap disagrees with ICANN’s decision was already clear from this proceeding. But disagreeing with a decision ICANN makes is not a cognizable basis for relief in an IRP.

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<sup>81</sup> See ICANN’s Pre-Hearing Brief ¶¶ 45, 107–111; see also Weinstein Witness Stmt. ¶ 15; ICANN-NC-008499, Ex. R-35; Annex 105.

<sup>82</sup> Namecheap’s Rebuttal Brief ¶ 71.

<sup>83</sup> ICANN’s Pre-Hearing Brief ¶ 45 n.88.

<sup>84</sup> *Id.*; see also, e.g., RE-8; Annexes 5–7.

<sup>85</sup> Namecheap’s Rebuttal Brief ¶¶ 72–74.

Moreover, as explained in detail in the related sections of this brief, Namecheap’s analysis is simply wrong, which provides yet another ground for rejecting Namecheap’s claim.

50. For example, Namecheap asserts that the small and steadily declining share of domain name registrations for .BIZ, .INFO, and .ORG is not a reliable indicator of their relative market power because it is unclear whether the DNS space operates as a single market.<sup>86</sup> However, in so doing, Namecheap misunderstands the import of Dr. Carlton’s analysis. Regardless of whether every TLD is a perfect substitute for .BIZ, .INFO, and .ORG, Dr. Carlton persuasively demonstrates through quantitative analysis that the declining share of domain name registrations is indicative “that their competitive importance is waning in the face of competition from other TLDs.”<sup>87</sup> Moreover, Namecheap completely ignores the fact that products do not need to be perfect substitutes to constrain each other’s prices<sup>88</sup> and that there are many TLDs that are clearly strong substitutes for .BIZ, .INFO, and .ORG, including .COM—which will continue to provide a strong competitive check on pricing due its popularity and ongoing price controls imposed by the DOC.<sup>89</sup> Lastly, Namecheap mistakenly relies on an outdated 2016 study and the flawed analysis of Namecheap’s experts for the proposition that legacy gTLDs and new gTLDs are not treated as substitutes. This conclusion, however, is belied by the robust quantitative analysis performed by Dr. Carlton demonstrating that effective competition exists in the TLD market.<sup>90</sup>

51. Similarly, the premise of Namecheap’s claim in this IRP is that the benefits of price controls outweigh its costs. However, as demonstrated in Dr. Carlton’s initial and reply

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<sup>86</sup> *Id.*, ¶¶ 40–57.

<sup>87</sup> Carlton Expert Report ¶¶ 13, 48–51; Carlton Reply Report ¶¶ 49–51.

<sup>88</sup> Carlton Reply Report ¶ 46.

<sup>89</sup> Carlton Expert Report ¶¶ 13, 48–51; Carlton Reply Report ¶¶ 49–51.

<sup>90</sup> *See, e.g.*, Carlton Reply Report §§ II.B, II.C.

report, this premise is fatally flawed. Contrary to Namecheap's unsupported position,<sup>91</sup> any potential benefits to imposing price control provisions on the 2019 Registry Agreements is outweighed by the likely costs.<sup>92</sup>

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

52. In addition to its consideration of the above factors, ICANN staff sought input from the Internet community and kept the community apprised of its decision-making process and rationale.<sup>93</sup> Indeed, Namecheap does not contest that ICANN initiated public comment periods relating to each of the registry agreements, which highlighted key changes which were proposed, including the lack of price control provisions. Nor does Namecheap attempt to rebut the fact that ICANN prepared reports analyzing the substance of the comments, which also provided ICANN's evaluation of the issue of price control provisions in light of those comments.<sup>94</sup> And Namecheap does not question the fact that ICANN is not under a duty to yield to all public comments or to side with any one position—whether or not it is in the majority of the comments received. Rather, as explained in ICANN's Pre-Hearing Brief—and uncontested by Namecheap—ICANN is obliged to consider the public comments, and then make an independent, informed decision, based on its expertise and determination of what is in the best interests of the Internet community.<sup>95</sup> That is precisely what ICANN staff did in deciding to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement.

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<sup>91</sup> Namecheap's Rebuttal Brief ¶¶ 62–69.

<sup>92</sup> See Carlton Expert Report § III; Carlton Reply Report §§ III–IV.

<sup>93</sup> ICANN's Pre-Hearing Brief § III.B.

<sup>94</sup> See *id.*, ¶¶ 112–114.

<sup>95</sup> See ICANN's Pre-Hearing Brief ¶¶ 115.

53. Despite tacitly accepting the majority of ICANN’s arguments, Namecheap’s position now appears to be limited to contending that ICANN improperly “disregarded all comments as spam.”<sup>96</sup> But ICANN did no such thing. Namecheap attempts to support its argument by citing to the Ombudsman’s finding that many of the public comments appeared to be akin to spam, due to the fact that they were computer-generated and largely identical in substance.<sup>97</sup> However, at no point did ICANN ever suggest that it simply ignored or disregarded any public comments—nor did ICANN do so. To the contrary, ICANN fully considered every comment that was submitted and evaluated them on their merits.<sup>98</sup> In other words, ICANN did precisely what it is required to do by the Articles and Bylaws.

54. Additionally, the Ombudsman’s finding is supported by the evidence. Despite Namecheap’s displeasure with the fact that some comments were characterized by the Ombudsman as akin to spam, it failed to address any of the substantive reasons supporting such a finding that were set forth in ICANN’s Pre-Hearing Brief. Specifically, Namecheap, along with the Internet Commerce Association (“ICA”), rallied registrants to submit form public comments utilizing a tool prepared by the ICA without providing registrants complete information about the proposed transition of .BIZ, .INFO, and .ORG to the Base Registry Agreement.<sup>99</sup> For example, Namecheap did not disclose that customers have the ability to lock in the current price, before any potential increase, for up to ten years or that the registry price will likely be constrained through, inter alia, competition among gTLDs and price controls that remain for .COM. Moreover, the options provided to registrants to automatically populate the form were all negative and generated a uniform script that was reflected in hundreds (if not thousands) of

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<sup>96</sup> Namecheap’s Rebuttal Brief ¶¶ 88–93.

<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.*, ICANN’s Pre-Hearing Brief ¶ 120.

<sup>99</sup> *Id.*, ¶ 116.



public comments.<sup>100</sup> Given these facts, the Ombudsman had support for his views regarding these form public comments.

55. Lastly, Namecheap’s contention that ICANN failed to properly consider the form public comments is without merit.<sup>101</sup> As a threshold matter, the Ombudsman’s finding came *months after* ICANN staff made the decision to transition the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Therefore, while ICANN staff certainly recognized that many comments were substantively identical,<sup>102</sup> the Ombudsman’s finding that many were akin to spam could not and was not relied on as a rationale in evaluating the public comments submitted in reaching ICANN’s decision. Moreover, it is clear from the reports prepared by ICANN staff that the comments were appropriately considered. Indeed, by way of example, in the report prepared for .ORG, ICANN analyzed at length public comments relating to the lack of the price control provisions and highlighted the fact that many commenters indicated a belief that price controls were warranted due to their views of the distinctions between legacy TLDs and new gTLDs, a point that features prominently in the ICA-generated public comments.

## **V. ICANN COMPLIED WITH ITS CORE VALUES REGARDING COMPETITION.**

56. Namecheap continues to contend that ICANN possesses authority as a competition and pricing regulator and was created in part based on an envisioned regulatory role.<sup>103</sup> Namecheap’s contention, however, is mistaken for several reasons.

57. First, as set out in ICANN’s Pre-Hearing Brief, one of ICANN’s Core Values is indeed to promote competition in the registration of domain names “where practicable and

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<sup>100</sup> *Id.*, ¶ 51.

<sup>101</sup> Namecheap’s Rebuttal Brief ¶¶ 92–93.

<sup>102</sup> Weinstein Witness Stmt. ¶ 21.

<sup>103</sup> *See* Namecheap’s Rebuttal Brief ¶¶ 24–38.

beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”<sup>104</sup> But the Bylaws provide further context to this core value, encouraging ICANN to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market” “[w]here feasible and appropriate.”<sup>105</sup> Indeed, Ms. Burr provided a thorough account demonstrating that ICANN was by no means created to regulate pricing in the DNS. ICANN was instead formed to ensure the stability and global interoperability of the DNS.<sup>106</sup> This fact is fatal to Namecheap’s version of ICANN’s authority and purported historical regulatory mandate. Indeed, as explained in Ms. Burr’s witness statement, and uncontested in Namecheap’s Rebuttal Brief, taken together ICANN’s Core Value and the Bylaws provision regarding competition obligate ICANN to coordinate the community’s development and implementation of policy that facilitates market-driven competition.<sup>107</sup> The imposition of *sua sponte* regulation runs directly counter to this core obligation.<sup>108</sup>

58. Second, Namecheap glosses over Article 1, section 1.1(c) of the Bylaws which expressly states that “ICANN does not hold any governmentally authorized regulatory authority.”<sup>109</sup> Specifically, in an effort to avoid the plain meaning of the text, Namecheap makes

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<sup>104</sup> See ICANN’s Pre-Hearing Brief ¶ 125; Bylaws, Art. 1, § 1.2(b)(iv), RM 2.

<sup>105</sup> *Id.*, Art. 1, 1.2(b)(iii).

<sup>106</sup> Burr Witness Stmt. ¶ 11.

<sup>107</sup> *Id.*, ¶ 13.

<sup>108</sup> Namecheap continues to rely on citations to correspondence from the Department of Justice and the Department of Commerce from 2008. However, in so doing, Namecheap completely ignored ICANN’s argument in its Pre-Hearing Brief that this correspondence was based on the very first version of the New gTLD Program Applicant Guidebook (“Guidebook”) and focused on protections for trademark holders, an issue that later versions of the Guidebook addressed. See ICANN’s Pre-Hearing Brief ¶ 133. Additionally, Namecheap fails to address the highly probative fact that neither the DOC nor the DOJ submitted any correspondence or public comment regarding the transition of the 2019 Registry Agreements to the Base Registry Agreement. *Id.* That these agencies did not do so is indicative of the fact that the concerns underlying their previous correspondence is no longer present or, at the very least, no longer expresses the agencies’ views. Indeed, that the DOC can and continues to regulate pricing relating to the .COM registry demonstrates that there is not a regulatory void which ICANN purportedly is required to fill with respect to registry pricing. The additional government sources which Namecheap cites notably only reiterate ICANN’s Core Value of promoting competition, a value that does not equate to the authority to act as a regulator absent government authorization.

<sup>109</sup> See ICANN’s Pre-Hearing Brief ¶ 127 (quoting Bylaws, Art. 1, § 1.1(c), RM 2).

the strained argument that the fact that ICANN does not hold any governmentally authorized regulatory authority does not mean that it does not possess regulatory authority from a separate source.<sup>110</sup> But Namecheap's argument is fundamentally flawed because it fails to identify any other source from which ICANN could legitimately derive regulatory authority.

59. Third, Namecheap fails to adequately address the binding decision in the *Afilias v. ICANN* IRP, in which the Panel rejected similar arguments regarding ICANN's purported regulatory authority relating to competition.<sup>111</sup> Though Namecheap attempts to dismiss the Panel's holding as dicta, the issue of ICANN's authority was briefed by the parties and the Panel concluded that the evidence presented by Ms. Burr and Mr. Kneuer was compelling. That panel's finding that ICANN is not an economic regulator is, at the very least, persuasive authority that should be relied on by the Panel.

60. Fourth, as a last ditch effort to save its position, Namecheap asserts that ICANN has acted as a *de facto* economic regulator for the last twenty years, regardless of whether it is required to do so under the Articles or Bylaws.<sup>112</sup> The fact that a minority of registry agreements historically included price control provisions, most of which were just following in the footsteps of .COM (which had U.S. government required price controls), does not turn ICANN into an economic or price regulator. Moreover, if the U.S. government opposed the lack of price controls in the .BIZ, .INFO, or .ORG Registry Agreements, it certainly could have raised such concerns. But it did not.

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<sup>110</sup> See Namecheap's Rebuttal Brief ¶¶ 27–28.

<sup>111</sup> See ICANN's Pre-Hearing Brief ¶¶ 129–130.

<sup>112</sup> See Namecheap's Rebuttal Brief ¶¶ 30–31.

## VI. ICANN APPLIED ITS POLICIES FAIRLY AND EQUITABLY.

### A. ICANN Applied Its Policies Fairly And Equitably When It Transitioned The .BIZ, .INFO, And .ORG Registry Agreements To The Base Registry Agreement.

61. ICANN must apply its documented policies “consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>113</sup> Namecheap has conceded as much as it has not provided any evidence to the contrary, which is its burden to do.<sup>114</sup> Accordingly, this claim fails on its face. However, rather than recognizing that this Bylaws commitment in fact supports the transition of the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement, Namecheap actually argues that ICANN has the obligation to treat these three registries in a manner that is *inconsistent* with the vast majority of other TLDs by refusing to allow these registry operators to make that transition.<sup>115</sup>

62. In its Rebuttal Brief, Namecheap seeks to defend this position by claiming that this discriminatory treatment is justified because of the alleged market power of these registries and the need to protect the Internet community against its potential abuse.<sup>116</sup> However, because Namecheap has failed to demonstrate that price control provisions for .BIZ, .INFO, and .ORG are necessary to protect the Internet community from the abuse of market power—or even that these registries possess sufficient market power to exploit the lack of price control provisions—this rationale fails to justify treating these registry operators differently than those with registry agreements that have already transitioned to the Base Registry Agreement.

63. Namecheap’s attempt to make much of the need to treat unlike cases differently<sup>117</sup> actually supports ICANN’s position. As explained in ICANN’s Pre-Hearing Brief, the reason

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<sup>113</sup> ICANN’s Bylaws, Art. 1, § 1.2(a)(v), RM 2.

<sup>114</sup> See Namecheap’s Pre-Hearing Brief, ¶ 388 (quoting ICANN’s Bylaws, Art. 1, § 1.2(a)(v), RM 2).

<sup>115</sup> See Namecheap’s Rebuttal Brief ¶ 145.

<sup>116</sup> See *id.*, ¶ 145.

<sup>117</sup> See *id.*, ¶ 145.

why price control provisions remain in a limited number of legacy TLDs is due to factors that are not present in the cases of .BIZ, .INFO, or .ORG.<sup>118</sup> In the case of .COM, for example, the registry agreement continues to include a price control provision because it is required by the DOC.<sup>119</sup> As such, it is dissimilar to all other gTLDs in the DNS in critical respects and, by Namecheap’s own argument, cannot be used as a justification to maintain price control provisions in the 2019 Registry Agreements.<sup>120</sup> And in the case of .NET and .NAME, the registry agreements have not transitioned to the Base Registry Agreement due to the choice of its registry operator, which happens to operate .COM as well.<sup>121</sup> By contrast, the registry operators for .BIZ, .INFO, and .ORG did request to make that transition. This distinction—which Namecheap did not challenge—is fatal to Namecheap’s position.<sup>122</sup>

64. Namecheap’s remaining attempts to revive its claim that .BIZ, .INFO, and .ORG should be treated differently from virtually all other TLDs are equally deficient. Namecheap first asserts that for twenty years ICANN has recognized a need for price caps in “major legacy gTLDs.”<sup>123</sup> Once again, Namecheap is making unsupported declarations in order to fit its narrative. As explained at length in ICANN’s Pre-Hearing Brief, price control provisions were first introduced into registry agreements by government mandate (with regard to .COM) and subsequent legacy TLDs included similar provisions pursuant to customary practice at that time.<sup>124</sup> The state of play within the DNS has changed dramatically since that time and there is no need for price controls in gTLDs like .BIZ, .INFO, and .ORG.

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<sup>118</sup> ICANN’s Pre-Hearing Brief ¶¶ 145–146.

<sup>119</sup> *Id.*, ¶ 145.

<sup>120</sup> *Id.*, ¶ 145.

<sup>121</sup> *Id.*, ¶ 146.

<sup>122</sup> *Id.*, ¶ 146.

<sup>123</sup> Namecheap’s Rebuttal Brief ¶ 146.

<sup>124</sup> *See* ICANN’s Pre-Hearing Brief ¶¶ 23–25.

65. Namecheap next relies on the text from one clause of the 2013 Registry Agreements for .BIZ, .INFO, and .ORG to contend that ICANN recognized that these registries are comparable to .NET and .COM.<sup>125</sup> This section related to the terms upon which the 2013 registry agreements would be renewed and provided in relevant part:

Upon renewal, in the event that the terms of this Agreement are not similar to the terms generally in effect in the Registry Agreements of the five most reasonably comparable gTLDs (provided however that if less than five gTLDs are reasonably comparable, then comparison shall be made with such lesser number, and .com, .info, .net and .biz are hereby deemed comparable), renewal shall be upon terms reasonably necessary to render the terms of this Agreement similar to such terms in the Registry Agreements for those other gTLDs (the “Renewal Terms and Conditions”). ***The preceding sentence, however, shall not apply to the terms of this Agreement regarding the price of Registry Services***; standards for the consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN in the consideration process; the terms or conditions for the renewal or termination of this Agreement; ICANN’s obligation to Registry Operator under Section 3.2(a), (b) and (c); the limitations on Consensus Policies or Temporary Specifications or Policies; or the definition of Registry Services, ***all of which shall remain unchanged***.<sup>126</sup>

The highlighted language undercuts Namecheap’s contention. Indeed, while providing that the identified registries were comparable for the limited purpose of that section, the provision expressly precluded that being used as a rationale to require price control provisions in .BIZ, .INFO, and .ORG. In other words, this text demonstrates that ICANN has long recognized that price control provisions contained in historical iterations of certain registry agreements are predicated on considerations unique to each gTLD.

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<sup>125</sup> See Namecheap’s Rebuttal Brief ¶ 147; see also Namecheap’s Pre-Hearing Brief ¶ 406.

<sup>126</sup> See .org Registry Agreement of 22 August 2013, RM 018, p. 8 (emphasis added). The 2013 .ORG Registry Agreement is quoted by way of example, but its contents are substantively the same as Section 4.2 in the 2013 .BIZ and .INFO Registry Agreements.

**B. ICANN Applied Its Policies, Procedures, And Practices Fairly With Respect To .ORG**

66. Namecheap maintains that ICANN failed to apply its policies, procedures, and practices fairly with respect to .ORG based on Namecheap’s misunderstanding of a 2002 recommendation relating to the selection of a new registry operator for .ORG.<sup>127</sup> Namely, as ICANN previously explained, in June 2001 the ICANN Board tasked ICANN’s Domain Name Supporting Organization (“DNSO”) with developing recommendations to the Board regarding the transition of the .ORG gTLD from Verisign to a new registry operator.<sup>128</sup> Pursuant to that request, a task force made several recommendations to the ICANN Board regarding the selection of a new .ORG registry operator.<sup>129</sup> One factor referenced in the task force’s recommendations was that the “registry fee charged to accredited registrars should be as low as feasible, consistent with the maintenance of good-quality service.”<sup>130</sup> In considering the DNSO’s recommendations, the ICANN Board made clear at the time that the paramount concern for selecting the .ORG registry operator was demonstrated technical ability, not the registry fees to be charged.<sup>131</sup>

67. In its Rebuttal Brief, Namecheap effectively concedes that the task force’s recommendations never became an ICANN “policy.”<sup>132</sup> However, Namecheap inexplicably maintains that this recommendation was somehow incorporated into ICANN’s standards and processes,<sup>133</sup> which is simply not true. Despite Namecheap’s assertions, the task force’s recommendation never formed part of ICANN’s standards or processes, and therefore cannot form the basis for an IRP.

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<sup>127</sup> See ICANN’s Pre-Hearing Brief ¶¶ 148–150.

<sup>128</sup> *Id.*, ¶ 149.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, ¶ 150 & n.248.

<sup>132</sup> Namecheap’s Rebuttal Brief ¶ 149.

<sup>133</sup> *Id.*, ¶ 149.

68. More fundamentally, Namecheap failed to contest the fact that these recommendations and the subsequent request for proposal to interested .ORG operators did not relate in any way to the issue of whether the .ORG registry agreement should contain a price control provision. Rather, they only related to selection criteria for the next .ORG registry operator.<sup>134</sup> Namecheap likewise chose to ignore the fact that: (i) price control provisions are not necessary to constrain .ORG pricing given that .COM is still subject to a price control provision imposed by DOC; and (ii) .ORG’s operator, the Public Interest Registry (“PIR”), is a not-for-profit organization and PIR has not raised .ORG registration prices in nearly six years.<sup>135</sup>

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

69. Namecheap’s Rebuttal Brief fails to revive the remaining collateral grounds Namecheap has previously raised to assert that ICANN violated the Articles and Bylaws.

### **A. Namecheap’s Argument Regarding Vertical Integration And The Feb06 Policy Are Untimely And Meritless.**

70. As ICANN established in its Pre-Hearing Brief, Namecheap’s belated introduction of new claims relating to ICANN’s “policies and processes on vertical integration” and the “Feb06” policy after two years of litigation and just before the merits hearing is inappropriate and prejudicial.<sup>136</sup> Moreover, the claims are clearly time-barred.<sup>137</sup>

71. In response, Namecheap argues in its rebuttal that these arguments do not represent new claims because they relate to ICANN’s alleged failures to implement and apply these policies in connection with the 2019 Registry Agreements.<sup>138</sup> This is misleading at best. Contrary to Namecheap’s suggestion, the claim it presented in its IRP Request with respect to the

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<sup>134</sup> ICANN’s Pre-Hearing Brief ¶ 150.

<sup>135</sup> *Id.*, ¶ 151–152.

<sup>136</sup> *Id.*, ¶¶ 155–157.

<sup>137</sup> *Id.*, ¶ 157.

<sup>138</sup> Namecheap’s Rebuttal Brief ¶ 158.



2019 Registry Agreements related to “ICANN’s decision to remove the provisions according to which the operators of .org, .info and .biz were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another.”<sup>139</sup> Therefore, while Namecheap did preserve its claim that the decision to enter into the .INFO and .ORG Registry Agreements without price caps violated the Articles and Bylaws, Namecheap did not preserve the distinct claims that entering into the 2019 Registry Agreements allegedly violated a process relating to the removal of cross-ownership restrictions or a purported “Feb06 policy” regarding re-bids on registry agreements.

72. In the alternative, Namecheap now contends that its claims are not time-barred because the alleged “failure to implement, apply and abide by these policies . . . continue until the moment that ICANN implements, applies and abides by these policies.”<sup>140</sup> This position is absurd. To accept Namecheap’s unsupported proposition would effectively render all time limitations meaningless, as any alleged violation could be characterized as ongoing so long as a Claimant’s preferred remedy has not yet been effectuated. Moreover, Namecheap cites no authority for the proposition that it can incorporate entirely new claims into an IRP involving a distinct Dispute, particularly a claim that is clearly time barred.

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

73. Namecheap continues to argue that ICANN was not transparent in its consideration of Namecheap’s Reconsideration Request because ICANN has “cloaked” in

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<sup>139</sup> Namecheap’s IRP Request ¶ 2. This scope is also consistent with Namecheap Reconsideration Request 19-2, in which Namecheap sought reconsideration of ICANN’s renewal of the 2019 Registry Agreements without price caps. *See* Namecheap’s Reconsideration Request 19-2, 12 July 2019, Annex 8, p. 2.

<sup>140</sup> Namecheap’s Rebuttal Brief ¶ 159.

privilege documents relevant to that consideration.<sup>141</sup> Yet in its Pre-Hearing Brief, ICANN demonstrated that it was open and transparent in its consideration of Namecheap's Reconsideration Request.<sup>142</sup> Specifically, ICANN explained that while the Bylaws provide that the BAMC "may ask ICANN staff for its views on a Reconsideration Request" and that "comments shall be made publicly available" on ICANN's website, that requirement does not override the attorney-client privilege or the work product doctrine. Namecheap failed to address this critical point.

74. Namecheap likewise failed to address the fact that ICANN did publish numerous documents on its website reflecting ICANN staff's input on Reconsideration Request 19-2 and the Board's determination of the request at the 21 November 2019 Board meeting.<sup>143</sup> Indeed, ICANN published 142 pages of briefing materials and reference materials that the Board considered, some of which reflect ICANN staff's input, along with documents setting out a detailed rationale for the Board's decision to deny Reconsideration Request 19-2. Perhaps for this reason, Namecheap did not choose to defend its claim that "it is impossible to determine whether . . . the Board's discussion went beyond rubberstamping the memoranda that ICANN staff had prepared."<sup>144</sup>

75. Lastly, Namecheap failed to respond to the facts that distinguish this case from those underlying the *Dot Registry* Final Declaration. As noted in ICANN's Pre-Hearing Brief, the public record for the relevant Board meeting in the *Dot Registry* IRP contained only an agenda and high-level minutes.<sup>145</sup> Here, by contrast, ICANN published extensive briefing and

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<sup>141</sup> *Id.*, ¶ 143.

<sup>142</sup> See ICANN's Pre-Hearing Brief ¶¶ 165–168.

<sup>143</sup> *Id.*, ¶ 167.

<sup>144</sup> *Id.* (quoting Namecheap's Pre-Hearing Brief ¶ 422).

<sup>145</sup> ICANN's Pre-Hearing Brief ¶ 168.

reference materials that the Board considered and its rationale for doing so. As such, Namecheap's reliance on the *Dot Registry* Final Declaration is misplaced.

### **VIII. NAMECHEAP'S CLAIMS REGARDING .BIZ REMAIN UNTIMELY.**

76. Namecheap's claims with respect to .BIZ are time-barred. Namecheap does not dispute that, in order to have been timely, Namecheap was required to institute an Accountability Mechanism on or before 29 October 2019.<sup>146</sup> In its Rebuttal Brief, Namecheap simply attempts, yet again, to re-write history to insert claims regarding .BIZ into Reconsideration Request 19-2. But its protestations cannot change the fact that, at the time it initiated the Reconsideration Request, the specific action that Namecheap sought to have reconsidered was the decision to “renew[] the registry agreement for the .org and .info TLD without the historic price caps, despite universal widespread public comment supporting maintain [sic] the price caps.”<sup>147</sup> Namecheap expressly reaffirmed this fact in multiple filings and Namecheap was clearly on notice that the Board rightly understood the scope of its request to relate only to .ORG and .INFO.<sup>148</sup> As ICANN explained, vague references to “all legacy TLDs” does not change Namecheap's express affirmation of the scope of the Reconsideration Request.<sup>149</sup>

77. Namecheap also argues that the fact that Ms. Burr recused herself from consideration of Reconsideration Request 19-2 indicates an acknowledgement that the request directly implicated the .BIZ Registry Agreement. Namecheap is wrong. As Ms. Burr explains in her witness statement, her recusal was out of an abundance of caution “even though it did not challenge the absence of price control provisions in the .BIZ Registry Agreement (and only

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<sup>146</sup> *Id.*, ¶ 170.

<sup>147</sup> Annex 8, p. 2.

<sup>148</sup> ICANN's Pre-Hearing Brief ¶¶ 171–173.

<sup>149</sup> *Id.*, ¶ 171.

challenged .INFO and .ORG.)”<sup>150</sup> Specifically, her recusal was to avoid the appearance of impropriety given that the reconsideration of ICANN’s decision to execute Registry Agreements for .INFO and .ORG without price caps would address issues that also arose in connection with the extension of the .BIZ registry agreement. By contrast, Ms. Burr did not abstain from considering Reconsideration Request 19-3 because it “raised issues specific to a registry serving a non-profit community, as .ORG does.”<sup>151</sup> In other words, there was no risk of even the appearance of impropriety due to Ms. Burr’s previous work with Neustar.

78. Namecheap next asserts, without explanation, that because the decisions regarding the .BIZ, .INFO, and .ORG Registry Agreements were taken at the same time, those decisions are non-severable. This claim is baseless and is not supported by any authority whatsoever. Rather, ICANN arrived at the decision to execute these Registry Agreements separately pursuant to distinct public comment periods, reports, and underlying negotiations. Though the issues ICANN considered certainly overlapped in significant respects, the outcome of each decision was in no way dependent on the others.

79. Lastly, Namecheap contends that it is not in ICANN’s interest to raise a time bar objection regarding the .BIZ gTLD because similar IRPs may be brought in the future. ICANN disagrees with Namecheap’s assessment of its interests. Furthermore, such considerations cannot undo Namecheap’s failure to timely raise its claims relating to the .BIZ gTLD.

#### **IX. NAMECHEAP SEEKS RELIEF THAT EXCEEDS THE PANEL’S AUTHORITY.**

80. Namecheap’s requested relief, and its entire IRP, should be denied because Namecheap has failed to establish that it has standing to pursue its claims and has failed to establish that ICANN violated the Articles or Bylaws. In addition, much of Namecheap’s

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<sup>150</sup> Burr Witness Stmt. ¶ 32.

<sup>151</sup> *Id.*, ¶ 33.

requested relief should also be denied for the separate and independent reason that this Panel lacks the authority to award it. In its Pre-Hearing Brief, ICANN explained how the scope of this Panel’s authority is expressly set out and circumscribed by the text of Article 4, section 4.3(o) of the Bylaws.<sup>152</sup> Subsection 4.3(o)(iii) sets forth the Panel’s authority and empowers the Panel to declare whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.<sup>153</sup>

81. Because Namecheap is not content to abide by the express limits of this Panel’s authority, it has persistently sought to exponentially increase the scope of this IRP by seeking relief that far exceeds the remedies provided for in section 4.3(o). Indeed, ICANN’s Pre-Hearing Brief explains that, even though Namecheap’s requests are disguised in the language of requests for “declarations,” in reality Namecheap is asking this Panel to annul the 2019 Registry Agreements and ICANN’s denial of Reconsideration Request 19-2.<sup>154</sup> Such requests clearly go far beyond the confines of declarations as to whether an action or inaction violated the Articles or Bylaws. And Namecheap effectively concedes that, by focusing its Rebuttal Brief on the proposition that a Panel’s power should effectively extend to the additional remedies available in a court of law.<sup>155</sup> Namecheap is wrong.

82. In its Rebuttal Brief, Namecheap offers several purported justifications for this Panel to override the plain meaning of section 4.3(o). Namecheap first repeats its contention, without any supporting evidence, that IRP Panels possess the authority to order remedies outside the express limitations of section 4.3(o) based on Namecheap’s interpretation of the Purposes of

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<sup>152</sup> ICANN’s Pre-Hearing Brief ¶ 175.

<sup>153</sup> *Id.*, ¶ 176.

<sup>154</sup> *Id.*, ¶ 177.

<sup>155</sup> Namecheap’s Rebuttal Brief ¶ 103 (implicitly arguing that the power to declare an act violates the Articles or Bylaws must be accompanied by the power to strike down the act).

the IRP. In particular, Namecheap relies on its view that declaratory relief is not sufficiently effective at ensuring that ICANN complies with the Articles and Bylaws; that IRPs provide a binding, and final resolution of disputes; and that IRPs serve as an alternative to legal action in civil courts.<sup>156</sup> However, Namecheap's position fails because Namecheap provides no evidence or authority to support its proposition that these purposes are undermined or insufficiently protected by the remedies provided for in section 4.3(o). To the contrary, 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.

83. In addition, Namecheap's position must be rejected because it is simply incompatible with the plain meaning of the text of the Bylaws. Namecheap's argument amounts to a request that this Panel ignore the express limitations of authority set out in section 4.3(o). But while Namecheap protests that limitations of the Panel's authority must be interpreted in light of the rest of the Bylaws and with the aim to give meaning to every part of the text, it is Namecheap's position that runs afoul of these canons of interpretation. Indeed, the scope of authority set out in section 4.3(o) represents the balance that was struck pursuant to ICANN's bottom-up, multistakeholder process regarding what the limits of an IRP Panel's authority should be in order to accomplish the Purposes of the IRP. Therefore, far from rendering meaningless the Purposes of the IRP, respecting this balance ensures that each purpose is given meaning without rendering meaningless the limitations on an IRP's scope.

84. Namecheap's final rationales are equally without merit. Namecheap argues that this Panel must have the power to affirmatively annul ICANN's actions because the Bylaws were amended in 2016 to enhance the accountability mechanisms.<sup>157</sup> However, Namecheap's

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<sup>156</sup> *Id.*, ¶ 102.

<sup>157</sup> *Id.*, ¶ 103.

reasoning is actually fatal to its position. Namecheap concedes that previous IRP panels have found that they lack the authority under previous iterations of the Bylaws to provide more than declaratory relief.<sup>158</sup> Therefore, the fact that new language was not incorporated into the Bylaws authorizing IRP Panels to award affirmative relief is persuasive evidence that the ICANN community as a whole saw no need to expand the scope of the IRP Panel’s authority.<sup>159</sup>

85. Lastly, this Panel is bound by the precedential determination in the *Afilias* IRP to limit its award to declaratory relief. In that IRP, the Claimant argued—like Namecheap—that IRP Panels have the authority to provide affirmative relief despite the limitations set forth in section 4.3(o). However, though the Claimant’s position was supported by substantively the same reasoning relied on by Namecheap in the present dispute, the Panel in the *Afilias* IRP refused to award any affirmative relief.<sup>160</sup> Rather, the Panel limited its relief to a declaration that the Respondent violated its Articles and Bylaws; a declaration that was within the limitations set by section 4.3(o)(iii) of the Bylaws.<sup>161</sup> Accordingly, a panel’s form of relief must similarly be limited to a declaration as to whether or not ICANN’s actions were consistent with the Articles and Bylaws.

## CONCLUSION

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

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<sup>158</sup> *Id.*, ¶ 103, n.101.

<sup>159</sup> Namecheap argues in passing that the U.S. Government did not relinquish its oversight over ICANN prior to obtaining assurance that ICANN had a strong and effective accountability mechanism in place. *See Id.*, ¶ 103. However, Namecheap cites no evidence for the proposition that the U.S. Government believed, or that ICANN represented, that IRP Panels have the authority to provide more than declaratory relief. More fundamentally, Namecheap’s argument fails because it is predicated on the unsupported premise that declaratory relief is ineffective at achieving the purposes of the IRP and ensuring accountability.

<sup>160</sup> *Afilias v. ICANN* IRP, Corrected Final Decision ¶¶ 361–364, Ex. R-43.

<sup>161</sup> *Id.*, ¶¶ 361–364.

Respectfully Submitted,  
JONES DAY

Dated: March 14, 2022

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

Counsel for Respondent ICANN