

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

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

ICDR Case No. 01-20-0000-6787

CLAIMANT NAMECHEAP'S POST-HEARING BRIEF ON THE MERITS

Flip Petillion,
Jan Janssen,
PETILLION
Guido Gezellestraat 126
B-1654 Huizingen
Belgium
Counsel for Claimant

Table of Contents

I.	The Test for Standing.....	1
	A. The Panel correctly interpreted the principles on standing and harm in Procedural Order No. 8	1
	B. Standing should be determined at the date of filing the claim for IRP, taking into account the risk of future harm	3
II.	Namecheap has Met the Test for Standing	4
III.	None of Namecheap’s Claims or Arguments are barred	11
IV.	The applicable standard of Review is an objective, de novo examination of the dispute; the business judgment rule finds no application in the present dispute, even if the Board silently endorsed the approval of the Registry Agreements	11
	A. The applicable standard of review	12
	B. This IRP is not about claims arising out of the Board’s exercise of its fiduciary duties	13
	C. ICANN’s conduct in violation of its Articles of Incorporation and Bylaws falls outside the business judgment rule and ICANN cannot be its own judge	16
	D. The Board’s inaction does not constitute an exercise of its fiduciary duties	17
	E. The ICANN Board’s informal actions and inactions do not constitute an exercise of its fiduciary duties	18
	F. Even if the business judgment rule were applicable to Namecheap’s claim, ICANN’s lack of transparency and the fact that the decision was made without a reasonable inquiry and by ICANN’s staff precludes ICANN from invoking it	18
V.	The Panel must review both ICANN’s denial of Namecheap’s Reconsideration Requests and the underlying actions and inactions that were subject of the Reconsideration Requests	20
VI.	Scope of Panel Authority	22
	A. The applicable version of the Bylaws grants the Panel the authority to resolve the dispute in a binding, final award.....	22
	B. A mere declaration that ICANN has violated its Articles of Incorporation or Bylaws is an insufficient mechanism to serve the purposes of the IRP.....	24
	C. The question analyzed by ICANN’s expert aims at awarding affirmative relief ..	32
VII.	ICANN failed to comply with its transparency obligations.....	33
VIII.	Merits of Price Cap Decision	36
	A. The relevant information that should be considered in evaluating ICANN’s actions and inactions	36
	B. There are strong reasons why price caps on .ORG, .INFO and .BIZ are warranted and ICANN had no valid reason to remove them.....	37
	C. In any event, ICANN should have maintained price caps for .ORG	40
IX.	Relief Requested	50

I. THE TEST FOR STANDING

A. The Panel correctly interpreted the principles on standing and harm in Procedural Order No. 8¹

1. The *locus standi* requirement for IRPs is that a Claimant ‘must suffer **an** injury or harm that is directly and causally connected to the alleged violation’ and that ICANN’s interpretation of the standing requirement in these proceedings is anathema to the stated purposes of the IRP.²

2. In Procedural Order (‘P.O.’) No. 8, paras. 21-22, the Panel correctly pointed out that, according to ICANN Bylaws and the Interim Supplementary Proceedings, the standing requirement is met if a claim is brought by an entity ‘that has been materially affected by a Dispute,’ meaning that it ‘must suffer an injury or harm that is directly and causally connected to the alleged violation’ of ICANN’s Articles of Incorporation or Bylaws.

3. In particular, Namecheap agrees with the Panel’s reasoning and interpretation of the ICANN Bylaws in paragraphs 40 to 44 of P.O. No. 8, which respects the principle of integration (requiring that a set of rules is to be interpreted as a whole). Indeed, the standing requirement cannot be separated from the overall purposes of IRPs, as stated in the Bylaws. As Namecheap pointed out during the opening statement, ICANN’s *contra legem* interpretation of the standing requirement invoking a non-existent materiality threshold would go against the stated purposes of an IRP, which includes the need (i) to ensure that ICANN complies with its Articles and Bylaws, and (ii) to empower the global Internet community and claims to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review. If ICANN’s interpretation of the Bylaws were withheld, it would force Claimants such as Namecheap to carry out extremely complex and costly economic investigations which would involve billings of several hundreds of thousands of dollars or even

¹ Section I.A provides Namecheap’s response to the Panel’s question I.1: ‘Do the parties disagree with any of [the] principles on standing and harm set forth by the Panel in Procedural Order No. 8, paragraphs 21-28, 40,44?’

² Namecheap’s Pre-Hearing Brief of 30 November 2021, paras. 268 *et seq.*; Namecheap’s Limited Rebuttal Brief on the Merits of 8 February 2022, paras. 116 *et seq.*; Bylaws, Article IV(3)(b)(i) (**RM 2**).

millions³ just to meet the standing requirement and to be able to bring a claim to ensure that ICANN complies with its Articles of Incorporation and Bylaws. Such an interpretation would make these proceedings anything but affordable and go against the stated purposes of IRPs. It would also be uncommon.⁴ While Namecheap agrees with the Panel’s finding that ‘U.S. federal court decisions have limited utility here’⁵, Namecheap is unaware of any U.S. federal court imposing a Claimant to go beyond a showing of potential harm to establish standing.

4. Finally, Namecheap agrees with the Panel’s finding that the Articles on Responsibility of States for Internationally Wrongful Acts (‘ARSIWA’)⁶ are not directly applicable here. Neither are the Articles on the Responsibility of International Organizations (‘ARIO’).⁷ Nevertheless, these instruments are testimony of customary international law that, when the obligation breached is owed to the international community as a whole, entities other than the injured state or international organization may also invoke the responsibility of the State or international organization committing the breach.⁸ This principle of customary international law calls for a relaxed standing requirement when dealing with breaches of obligations to the ‘international community as a whole’.⁹ ICANN is created to act in the interests of the ‘Internet community as a whole’. When ICANN is breaching its obligations to the ‘Internet community as a whole’, ICANN is acting against this principle by advancing a narrower and *contra legem* interpretation of the standing requirement. In this respect, Article 4(3)(y) of the Bylaws provides that ‘ICANN shall seek to establish means by which community, non-profit Claimants

³ Transcripts Day V, p. 175, where Dr. Langus testifies that for this type of exercises, ‘the bills can be \$300,000, \$400,000, \$500,000, or a million, and I’ve seen merger cases, you know, where this type of exercises were carried out. Five million.’

⁴ See Transcripts Day IV, pp. 166-167.

⁵ P.O. No. 8, para. 26.

⁶ Articles on Responsibility of States for Internationally Wrongful Acts (‘ARSIWA’) (**RM 234**).

⁷ Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (‘ARIO’) (**RM 235**)

⁸ M. MÖLDNER, “Responsibility of International Organizations – Introducing the ILC’s DARIO” in Max Planck Yearbook of United Nations Law Online, 16(1), 2012, pp. 281-327 (**RM 236**).

⁹ Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (**RM 235**), Article 49.

and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.’ As explained in Namecheap’s rebuttal brief, in bringing this IRP, Namecheap is also acting to prevent harm to its customers, whose interest Namecheap legitimately represents.¹⁰ Without Namecheap’s action, these customers would not be able to meaningfully participate in and have access to the IRP process. By insisting on a narrower and *contra legem* interpretation of the standing requirement in the context of this IRP, ICANN is also acting against its obligation under Article 4(3)(y) of its Bylaws.

B. Standing should be determined at the date of filing the claim for IRP, taking into account the risk of future harm¹¹

5. Standing should be determined at the date of filing the claim for IRP, assessing the existence of a risk of future harm connected to the alleged violation. Events that occur after an IRP is filed, may be relevant to standing, particularly if they demonstrate that the risk of future harm effectuates. Harm that effectuates post filing constitutes clear and convincing real-life evidence that a claimant is harmed. However, the situation where the risk of future harm did not effectuate during the pendency of the IRP proceedings – but only at a later stage – does not make the risk of future harm any less real. This risk of future harm connected to the alleged violation still impacts the (enterprise value of the) Claimant as from the moment this risk is created. There can be multiple reasons why certain harm did not effectuate during the pendency of the IRP proceedings. In the case at stake, one possible and reasonable explanation could be that the registry operators, who are aware of these proceedings and who commercially benefit from the price caps removal, do not want to provide Namecheap with direct, clear and

¹⁰ Namecheap’s Limited Rebuttal Brief on the Merits of 8 February 2022, para. 132.

¹¹ Section I.B provides Namecheap’s response to the Panel’s question I.2: ‘As of which date should standing be determined? Is it when the IRP is filed or some other date?’

a. Are events after the IRP is filed relevant to standing?

b. If a current risk of harm in the future is relevant to standing, what is the relevant period here? Is it the ten-year term of the 2019 Registry Agreements for .ORG, .INFO, and .BIZ (the “2019 Registry Agreements”)?’

convincing evidence of the damaging effects of the removal of price caps by increasing their prices during the pendency of the IRP proceedings.

6. The relevant period for assessing the current risk of harm in the future is the foreseeable future. Because the 2019 RAs are subject to presumptive renewal, the relevant period for assessing the current risk of harm goes beyond the ten-year term of the 2019 Registry Agreements.

II. NAMECHEAP HAS MET THE TEST FOR STANDING¹²

7. Throughout the proceedings, Namecheap has shown that harm from a registry cost increase is likely, because there are multiple factors which put a negative pressure on Namecheap's profits (*i.e.*, incomplete pass-on, loss of demand for .ORG, .INFO and .BIZ, loss of sales in complementary registrations and services, loss of brand value). The 'available data does not allow to make reliable inferences' that the negative pressure on Namecheap's profits will effectuate, but 'the economic theory is robust' and the experts are in agreement about this.¹³ As explained by Dr. Langus, and un rebutted by Dr. Carlton, possible future harm affects the value of a company today.¹⁴ Expected harm to a company or to an owner is reflected in the harm today as well. Dr. Langus testified that harm to Namecheap is 'very likely', as all factors he identified 'are pointing in the direction of harm' and he did not see any factors from which Namecheap could benefit from these cost increase[s], even if they were common, which, to some extent, they are, sa[ve] for th[e] vertical [integration] issue'.¹⁵

¹² Section II provides Namecheap's response to the Panel's Question II. 3, summarizing the key evidence in the record of harm as to (a) the risk of future price increases that will reduce Namecheap's profits and/or customers, especially in comparison to vertically integrated competitors, and (b) the harm to Namecheap's brand equity or reputation.

¹³ Transcripts, Day V, pp. 171 *et seq.*

¹⁴ Transcripts Day IV, p. 150: 'However, you know, the possible future harm, of course, affects, or would affect, the value of the company today. Expected harm to a company, to an owner is reflected in the harm today as well.'

¹⁵ Transcripts Day V, p. 149.

8. Key evidence of harm of the risk of future price increases that will reduce Namecheap's profits and/or customers, especially in comparison to vertically integrated competitors, can be found in the record:

- Regarding incomplete pass-on:

- o Transcripts Day IV, p. 19 et seqq.: Mr. Klein explains that Namecheap

Redacted - Confidential Information

.¹⁶

- o Transcripts Day IV, p. 25 et seqq. and pp. 57 et seqq.: Mr. Klein explains that

Redacted - Confidential Information

.¹⁷ In addition, Mr. Klein testified that Namecheap understands 'the implications for [its] business that [it's] going to see a reduction in sales, [it's] going to see a reduction in our complementary sales and [it's] going to see a squeeze in our margin regardless of what [Namecheap] do[es].'¹⁸

- o The available data – even if limited – shows that Namecheap

Redacted -
Confidential
Information

These

¹⁶ Transcripts Day IV, p. 19:

Redacted - Confidential Information

¹⁷ Transcripts Day IV, p. 25:

Redacted - Confidential Information

¹⁸ Transcripts Day IV, p. 26.

Redacted - Confidential Information are shown in slides 12 and 13 of Dr. Langus' presentation¹⁹ and explained at pp. 132 to 135 and 141 to 147 of the Transcripts on Day IV.²⁰ To the extent that Namecheap has Redacted - Confidential Information

To the extent that Namecheap Redacted - Confidential Information, Namecheap suffers harm. Moreover, even if later, at some point in time, Redacted - Confidential Information. Indeed, 'Namecheap Redacted - Confidential Information

²¹ Dr. Carlton agrees that the demand for domain name registrations is unlikely to be perfectly inelastic.²² Dr. Langus has shown examples that is the Redacted - Confidential Information

As Dr. Langus explained, Redacted - Confidential Information²³ Moreover, the 'curvature of the demand also matters in this assessment', and as the experts agree that demand is unlikely to be perfectly inelastic, even if Namecheap

¹⁹ G. Langus and F. Verboven, *Removal of price caps on ORG, INFO and BIZ*, Powerpoint presentation of 31 March 2022, pp. 12-13.

²⁰ See also Transcripts Day IV, p. 27.

²¹ Transcripts Day IV, p. 132. See also pp. 148-149.

²² Transcripts Day V, p. 46: 'MR. JANSSEN: It's related to the question I was asking of whether he agreed that it's unlikely that the demand for domain registration is perfectly inelastic. THE WITNESS: I didn't say that, just to make the record clear. I did not say that it was unlikely that it was perfectly -- well, I just want to make sure there's nothing -- I agree with that. I agree with that statement. It's unlikely to be perfectly inelastic. It's -- and therefore -- but it's highly inelastic, and that means that it's unlikely that there would be a significant harm for Namecheap from losing customers.'

²³ Transcripts Day V, p. 161.

- Regarding the effect of vertically integrated competitors:
 - o Transcripts Day IV, pp. 61 et seqq.: Mr. Klein explains that the market is not completely even. If a vertically integrated registry-registrar operator like Donuts/Name.com for .INFO or GoDaddy for .BIZ ‘increase their wholesale retail costs and their registrars maintain their prior retail costs, they’re effectively shuffling their revenue between their businesses, and so that makes it, in my opinion, unfair, and it's challenging for us to compete with that. [...] that enables them to remain more competitive in the market, arguably, if their retail price -- if they are willing to absorb the loss in their margin because of their -- as far as we see it, they're effectively shuffling the costs between them.’
 - o This dynamic has been recognized by ICANN’s expert, Dr. Carlton, stating that, as the owner of .BIZ, GoDaddy ‘would just be charging itself’ and affirming that Name.com, being the registrar that is owned by the .INFO registry operator, would not experience a wholesale price increase in the same way as Namecheap.²⁴
 - o Dr. Langus explained that vertically integrated registrars experience wholesale prices differently because ‘a common cost increase may not become a common

²⁴ Transcripts Day V, pp. 90-91: ‘Would GoDaddy experience a wholesale price increase for .biz in the same manner as Namecheap? A. Well, if GoDaddy owns .biz, it would be just charging itself. So that would be different. [...] Q. Would Name.com experience a wholesale price increase for .info in the same way as Namecheap? A. Would Name.com? Q. Yes. A. Is that what you said? Q. Yes, Name.com is the registrar that's owned by the operator of .info. A. I thought .info has been vertically integrated for a long time, if I'm remembering correctly. Q. In that scenario, would they experience a wholesale price increase? Would their registrar experience a wholesale price increase in the same way as Namecheap? A. The answer would be "no,"

cost increase,' but merely an internal transfer between vertically integrated companies.²⁵

- Dr. Carlton acknowledged that, in economic theory, the incentives for vertically integrated firms to raise the price of inputs to their standalone downstream rivals are well recognized.²⁶

- Regarding the effects on the demand for domain names and ancillary services:

- Dr. Langus explained that 'pass-on is not the only thing that will cause costs' and, hence, a loss in profits. Dr. Langus testified that Namecheap is also likely to lose registrations, as '[r]egistrants often register multiple domains and [in] multiple TLDs [...a]nd this is a significant phenomenon'. Ultimately, 'you might have some registrants also dropping out of the market completely, and here it doesn't matter what the valuation of your average registrant is for your domain. What matters is how many registrants are just indifferent between the registry or not. And if there are many registrants who are just indifferent between the registrants in .org or not -- and even a small price increase could matter and could have a significant effect on how many registrants will register.'²⁷

9. In addition, key evidence in the record of harm to Namecheap's brand equity or reputation can be found in:

- Transcripts Day IV, pp. 33 *et seq.*: Mr. Klein explains that a marketing blog explaining to customers why Namecheap increases its prices is an 'attempt to help

²⁵ Transcripts Day V, pp. 143-144: 'DR. LANGUS: That's right, yeah, except it doesn't affect in the same way GoDaddy, and we were speaking about Name.com. PRESIDENT HENDRIX: If you're both the wholesale and the retailer -- DR. LANGUS: Right, that is basically internal transfer. And in that regard, the economic theory predicts that you would pass on the cost in a different way. And then, because of this factor, what is a common cost increase may become not a common cost increase. It's no longer a common cost increase, and then, the extent to which you can best pass on your cost increases is -- considerations are different. So it may be lower.'

²⁶ See discussion at Transcripts Day V, pp. 167-171.

²⁷ Transcripts Day V, p. pp. 146-147.

educate and inform [its] customers and also to try and take some of that burden away from our customer support team.’ He describes it as ‘a means for [Namecheap] to try to reduce that impact to [its] business’ and to ‘reduce that impact to [its] brand equity.’ He explains: ‘Once again, customers recognize their relationship with Namecheap as a registrar; they don't recognize that in doing so, Namecheap has upstream providers. They may assume so, but frankly that's not their concern. So when we increase prices, it can have an impact on our brand equity and it can affect our customers negatively, which can cost us customers and cost us business, and so this is what we're attempting to overcome here through this blog post.’

- Transcripts Day IV, p. 58, where Mr. Klein explains that, in order to keep its margin, Redacted - Confidential Information and that this is ‘not something that [Namecheap would] be able to do, from a branding standpoint and a competitive standpoint, because that's going to have an impact on [Namecheap's] competitiveness in market, it's going to have an impact on [Namecheap's] customers' perception of [its] brand and [its] -- particularly sensitive, especially given [its] brand name, Namecheap -- are particularly sensitive around pricing. That's what attracts many customers to [Namecheap], and so it will have an impact.’
- Transcripts Day V, pp. 147-148: Dr. Langus recognizes the economic effect of price increases on Namecheap's goodwill with its customers: ‘Yet, another factor is the effect that price increases have on the goodwill of the registrants, for example, with Namecheap. They don't know who is increasing the prices. Is it the upstream or the downstream firm? Is it the registry or is it Namecheap that is? And that's why -- I think, that's why they go through those great lengths to inform the customers it's not us who are doing that. You know, if customers feel that -- or, you know, would infer

that -- wrongly, that it's Namecheap that's doing it, they might decide that they want to switch away from Namecheap, or they might buy fewer services, and that's why Namecheap goes through these costs in great lengths to actually inform them.'

10. Finally, Dr. Langus explained that Dr. Carlton's calculations of pass on of .INFO and .BIZ are inadequate, because, among other reasons, Dr. Carlton did not consider

Redacted - Confidential Information

²⁸ As Dr. Langus demonstrated at the hearing, Redacted - Confidential Information

. As a result, Namecheap

Redacted - Confidential Information When Namecheap Redacted - Confidential Information

11. In addition, Dr. Langus explained that Dr. Carlton's Redacted - Confidential Information, if at all. As such, they do not allow for any conclusions about pass on specific to .ORG, .INFO, and .BIZ. Dr. Carlton argued that .ORG, .INFO, and .BIZ must be just like the 'average' TLD fully passing on registry price increases.²⁹ But this claim is refuted by direct evidence on registry and registrar prices for .INFO and .BIZ.³⁰

²⁸ See Transcripts Day V, p. 162,

Redacted - Confidential Information

²⁹ Transcripts Day V, p. 163, lines 11-16.

³⁰ Transcripts Day V, pp. 160-161. In addition, Dr. Langus also explained that, contrary to Dr. Carlton's assertions, economic theory does not predict that the pass on will be 100 percent, except in conditions of perfect competition. Dr. Carlton agreed but contended that the theory nevertheless predicts a full pass on when the supply curve is flat. Dr. Langus refuted this claim, as direct evidence yields opposite results. Moreover, the pass on can still be imperfect for some curvature of the demand, even when the supply curve is flat (*See* E. Glen WEYL and Michal FABINGER, "Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition" June 2013, *Journal of Political Economy* Vol. 121, No. 3. (RM 252)).

III. NONE OF NAMECHEAP’S CLAIMS OR ARGUMENTS ARE BARRED

12. As explained in Namecheap’s Rebuttal brief, Namecheap is not making a separate claim with respect to ICANN’s failure to apply fairly its policies and processes on vertical integration and on the Feb06 Policy, but in connection to ICANN’s opaque decision to renew the .ORG, .INFO and .BIZ RAs without price caps. These issues are relevant as a factual matter, in particular to Namecheap’s claim that ICANN improperly removed the price caps. Indeed, ICANN failed to implement, apply and abide by these policies when it decided to remove the price caps. As Namecheap explained in its Rebuttal brief, these inactions continue until the moment that ICANN implements, applies and abides by these policies and that moment is yet to come.³¹

IV. THE APPLICABLE STANDARD OF REVIEW IS AN OBJECTIVE, DE NOVO EXAMINATION OF THE DISPUTE; THE BUSINESS JUDGMENT RULE FINDS NO APPLICATION IN THE PRESENT DISPUTE, EVEN IF THE BOARD SILENTLY ENDORSED THE APPROVAL OF THE REGISTRY AGREEMENTS³²

13. In the section below, Namecheap explains the standard of review of this IRP, which is developed with the specific purpose of ensuring that ICANN complies with its Articles of Incorporation and Bylaws and that such compliance can be reviewed independently, objectively, and *de novo* (Section IV.A).

14. For the sake of completeness, Namecheap explains the additional standard of review – the so-called business judgment rule, combined with a reasonableness check – that applies in the event an IRP seeks to replace the Board’s judgment with its own with respect to claims arising out of the Board’s exercise of its fiduciary duties. However, this IRP is not about claims

³¹ Namecheap’s Limited Rebuttal to ICANN’s Pre-Hearing Brief on the Merits of 8 February 2022, paras. 157-159.

³² Section IV provides Namecheap’s response to the Panel’s Question IV.5: ‘Rule 11.c. of the Interim Supplementary Procedures for ICANN Independent Review Process provides that “[f]or Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own” Please comment on the meaning of “exercise of its fiduciary duties,” [...]’.

arising out of the Board’s exercise of its fiduciary duties (Section IV.B). As a threshold matter, the business judgment rule can only protect the Board in making corporate decisions and can only apply to ‘qualifying decisions made by a corporation’s board of directors’. No such decision was made in the present case (Sections IV.D and IV.E). Namecheap nevertheless explains the additional standard of review.

15. Even more, ICANN committed an *ultra vires* act, in turn also resulting in the inapplicability of the business judgment rule (Sections IV.C and 26).

A. The applicable standard of review

16. As explained in Namecheap’s pre-hearing briefs, the standard of review in this IRP is an ‘objective, *de novo* examination of the dispute’, requiring the Panel to make its own independent interpretation of the ICANN Articles of Incorporation and Bylaws.³³ This standard of review applies irrespective as to whether the action under review is an action by the ICANN Board or an action by the ICANN organization.

17. With respect to ‘*claims arising out of the Board’s exercise of its fiduciary duties*’, there is an additional standard in the event an IRP Panel seeks to replace the Board’s judgment with its own. Rule 11(c) of ICANN’s Interim Supplementary Rules and Article 4(3)(i) of the Bylaws provides that, ‘[f]or claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment’. In accordance with the plain meaning of the text, there are three conditions for this additional standard to apply: (i) the claim must arise out of the Board’s exercise of its fiduciary duties’, (ii) the Board must have exercised its business judgment, and (iii) the IRP Panel must seek to replace the Board’s business judgment. In the instant case, none of the conditions are present for this additional

³³ Namecheap’s Pre-Hearing Brief of 30 November 2021, paras. 243 *et seq.*; Namecheap’s Limited Rebuttal Brief of 8 February 2022, paras. 94 *et seq.*

standard to apply.

B. This IRP is not about claims arising out of the Board’s exercise of its fiduciary duties³⁴

18. Not all ICANN Board actions constitute the ‘exercise of its fiduciary duties’. Only to the extent the ICANN Board fulfils its managerial responsibility towards the corporation, it exercises its fiduciary duties. Towards the parties to whom a Board owes a fiduciary duty (the corporation, its shareholders or creditors), the business judgment rule can apply.³⁵ The business judgment rule provides a ‘judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.’³⁶ It is a procedural defense in U.S. Courts, which protects directors from personal liability (typically in shareholder suits) when directors have made good faith business decisions on behalf of the corporation. As codified, the California business judgment rule explains the standard of care under which a director must perform his or her duties: ‘A director shall perform the duties of a director ... in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.’³⁷ The California Supreme Court confirmed that the statutory rule only offers protection for individual directors and that any business judgment rule can apply only to ‘qualifying decisions made by a corporation’s board of directors’.³⁸ It is a similar protection for individual directors that ICANN had in mind when providing in Rule 11(c) of ICANN’s Interim Supplementary Rules and Article 4(3)(i)(iii) of

³⁴ Section IV.B includes Namecheap’s response to the Panel’s Question IV.5.a: ‘Do all ICANN board actions constitute the “exercise of its fiduciary duties” or certain actions only (and if so, which ones)?’

³⁵ See *Francis T. v. Village Green Owners Association* (1977) 42 Ca.3d 490 (**RM 237**) at p. 507 ruling that the business judgment rule ‘applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation’, but ‘does not abrogate the common law duty to refrain from conduct that imposes an unreasonable risk of injury on third parties’; see also *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 87 Cal.Rptr.2d 237; 980 P.2d 940 (**RM 238**).

³⁶ See *Lee v. Interinsurance Exchange* (1996) 50 Cal. App. 4th 694 (**RM 239**).

³⁷ California Corp. Code, Section 7231, subd. (a); see also *F.D.I.C. v. Castetter*, 184 F.3d 1040, 1044 (9th Cir. 1999) (**RM 240**).

³⁸ *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 87 Cal.Rptr.2d 237; 980 P.2d 940 (**RM 238**).

the Bylaws that ‘[f]or claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment’. Also for these types of claims, the standard of review is more severe than the California business judgment rule. IRP panels that are invited to examine such claims must analyse whether the Board’s action or inaction is ‘within the realm of **reasonable** business judgment’. IRP panels are thus authorized to assess the reasonableness of the business judgment, exercised by ICANN Board members and they must do so in an ‘objective, *de novo* examination’, as required by Rule 11(c) of ICANN’s Interim Supplementary Rules and Article 4(3)(i) of the Bylaws.

19. At the risk of stating the obvious, this IRP is not about a court action seeking to impose individual liability on the ICANN Board or any of its directors. This IRP is also not about a court case asserting common law or statutory claims against ICANN. Nor is this a case where there is any danger of a court entering the boardroom without the invitation of the corporation and unduly interfering with the Board’s day-to-day decisions. Rather, this is an Independent Review Process – established under ICANN’s Bylaws – with the specific purpose of ‘ensur[ing] that ICANN [...] complies with its Articles of Incorporation and Bylaws’, ‘enforc[ing] compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review’, ‘ensur[ing] that ICANN is accountable to the global Internet community and [the] Claimant’, ‘secur[ing] the accessible, transparent, consistent, coherent, and just resolution of [the] Dispute’, resulting in the ‘binding, final resolution[...] of the Dispute] consistent with international arbitration norms that [is] enforceable in any court with proper jurisdiction’, and ‘provid[ing] a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions’.³⁹

³⁹ Bylaws, Article 4(3)(a)(i)-(iii), (vii)-(ix)

20. As the California courts have explicitly stated, ‘the rule of judicial deference to board decision-making can be limited . . . by the association’s governing documents.’⁴⁰ That is precisely what ICANN has done by providing in its Bylaws for this Independent Review Process – *i.e.*, an international arbitration – set up by ICANN itself to provide greater ‘accountability’ and ‘transparency’. It is a process meant to establish – to paraphrase again ICANN’s President and CEO’s testimony before US Congress – an alternative to litigation and a means to resolve a dispute.⁴¹ This alternative to litigation is not limited to US litigations or jurisdictions that make application of a business judgment rule, but also offers an alternative to litigation in ‘other jurisdictions’ that do not offer the business judgment rule as a procedural defense.

21. The existence of fiduciary duties towards a corporation does not abrogate the duties of the corporation towards third parties, such as ‘the common law duty which every person owes to others – that is a duty to refrain from conduct that imposes an unreasonable risk of injury on third parties’⁴² or, in ICANN’s case, the duty to act in the public interest and to ‘operate in a manner consistent with the[...] Articles [of Incorporation] and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets.’ That is a duty which ICANN has towards the community as a whole, including the Claimant

⁴⁰ *Ritter & Ritter, Inc. v. Churchill Condominium Assn.*, (2008) 166 Cal. App. 4th 103, 122 (citing *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.*, 980 P.2d 940 (Cal. 1999)) (**RM 241**).

⁴¹ ICANN, “Marby Responses to Blumenthal Questions for the Record” in U.S. Committee on the Judiciary – Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, *Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet*, available at <https://www.judiciary.senate.gov/meetings/protecting-internet-freedom-implications-of-ending-us-oversight-of-the-internet> (**RM 200**).

⁴² See *Francis T. v. Village Green Owners Association* (1977) 42 Ca.3d 490 at p. 507 (**RM 237**) ruling that the business judgment rule ‘applies to parties (particularily shareholders and creditors) to whom the directors owe a fiduciary obligation’, but ‘does not abrogate the common law duty to refrain from conduct that imposes an unreasonable risk of injury on third parties’; see also *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 87 Cal.Rptr.2d 237; 980 P.2d 940 (**RM 238**).

in this case; not a duty of the ICANN Board towards the corporation.⁴³

C. ICANN’s conduct in violation of its Articles of Incorporation and Bylaws falls outside the business judgment rule and ICANN cannot be its own judge⁴⁴

22. For a claim to arise out of the exercise of the Board’s fiduciary duties, the Board must exercise them, not breach its fiduciary duties or fail to exercise them. There can be circumstances where the Board breaches its fiduciary duties or fails to exercise them, resulting in the inapplicability of the business judgment rule. For example, if the Board allows for a delegation of authority without following the proper process, then it fails to exercise its fiduciary duties. California case law is clear that conduct contrary to governing documents, such as Articles of Incorporation and/or Bylaws, falls outside the business judgment rule.⁴⁵

23. By the same token, the Board’s interpretation of ICANN’s Articles of Incorporation or Bylaws constitutes no exercise of its fiduciary duties. Otherwise, the ICANN Board could effectively shield itself from accountability by interpreting its governing documents *contra legem* and arguing that it exercised reasonable business judgment to avoid litigation by misinterpreting ICANN’s Articles of Incorporation and/or Bylaws. That would effectively make ICANN its own judge. The IRP was created and enhanced to serve as an external accountability mechanism that must ensure the independent, ‘objective *de novo* examination’ of disputes and ICANN’s compliance with its Bylaws. IRPs have been used in the past to

⁴³ The distinction between ICANN’s obligations and the Board’s exercise of its fiduciary duties is also made clear in Annex B to the ICANN Bylaws, the ccNSO Policy-Development Process, where it states under heading 15 that the Board must adopt specific ccNSO policy recommendations ‘unless 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board **to the Company**’ (emphasis added) (**RM 2**, p. 248).

⁴⁴ Section IV.C includes Namecheap’s response to the Panel’s question IV.5.c: ‘Does the Board’s interpretation of ICANN’s Articles of Incorporation or Bylaws constitute the “exercise of its fiduciary duties?”’

⁴⁵ *Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 283 (**RM 242**) (considering causes of action against a nonprofit’s President (and board members) for breach of fiduciary duty and violation of the nonprofit’s governing documents); *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1123 (**RM 243**) (‘Even if the Board was acting in good faith and in the best interests of the community as a whole, its policy of excepting all palm trees from the application of section 7.18 was not in accord with the CC & Rs, which require all trees be trimmed so as to not obscure views. The Board’s interpretation of the CC & Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference.’).

examine the Board's interpretation of the Articles of Incorporation and Bylaws in the handling of reconsideration requests. This was done in an objective, *de novo* examination.⁴⁶

D. The Board's inaction does not constitute an exercise of its fiduciary duties⁴⁷

24. A Board's inaction does not automatically constitute an 'exercise of its fiduciary duties'. Otherwise, all of ICANN Staff's actions which are not performed according to the expressly delegated authority by the ICANN Board could qualify as an inaction by the ICANN Board amounting to the exercise of its fiduciary duties. That is clearly not the purpose of making the IRP an accountability mechanism for 'any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.'⁴⁸ There would be no reason to distinguish between the Board, individual Directors, and Staff members, if all of ICANN's actions could qualify as an 'inaction of the ICANN Board'. There would also be no reason to distinguish between actions/inactions 'by or within' ICANN and between claims against ICANN and 'Claims arising out of the Board's exercise of its fiduciary duties', which according to ICANN's argumentation creates a '*carve-out from [the] general standard*' of Article 4(3)(i) of the Bylaws. If all inactions by the Board could qualify as the 'Board's exercise of its fiduciary duties', then there would not be a reason for such a 'carve-out'. For the avoidance of doubt, Namecheap rejects the notion that Article 4(3)(i)(iii) creates a carve-out to the rule that the Panel must conduct an 'objective *de novo* examination of the DISPUTE'. Article IV(3)(i)(iii) merely establishes, with respect to claims arising out of the Board's exercise of its fiduciary duties, when the IRP Panel may replace the Board's decision with its own.

⁴⁶ ICDR Case No. 50-20-1400-0247, *Booking.com B.V. v. ICANN*, Final Declaration, 3 March 2015 (**RM 170**), para. 111; ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Final Declaration, 9 July 2015 (**RM 165**), para. 76; ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015 (**RM 4**), paras. 123-126; ICDR Case No. 01-14-0001-5004, *Dot Registry LLC v. ICANN*, Declaration of the Independent Review Panel, 29 July 2016 (**RM 175**), paras. 68-69.

⁴⁷ Section IV.D provides Namecheap's response to the Panel's question IV.5.b.

⁴⁸ ICANN Bylaws, Article IV(3)(b)(ii).

25. Moreover, as a threshold matter, in order to rely upon the business judgment rule as a defense, the Board needs to have made a decision, which must be disclosed in accordance with the requirements of the Bylaws or justified in writing why it was not disclosed. As explained above, the business judgment rule can only protect the Board in making corporate decisions and can only apply to ‘qualifying decisions made by a corporation’s board of directors’. An inaction by the Board can only qualify as an exercise of its fiduciary duties if the decision not to take action was a deliberate, documented corporate decision, done in accordance with applicable law, the Articles of Incorporation, and the Bylaws. Absent such a decision, the ICANN Board’s actions or inactions do not constitute the exercise of its fiduciary duties.

E. The ICANN Board’s informal actions and inactions do not constitute an exercise of its fiduciary duties⁴⁹

26. Hence, informal Board actions or inactions at workshops that do not meet the requirements of a formal Board meeting cannot constitute the exercise of its fiduciary duties. ICANN’s own witnesses testified that no formal decisions are taken at workshops and that these are to be taken in formal Board meetings.⁵⁰

F. Even if the business judgment rule were applicable to Namecheap’s claim, ICANN’s lack of transparency and the fact that the decision was made without a reasonable inquiry and by ICANN’s staff precludes ICANN from invoking it⁵¹

27. ICANN made a narrative around its Board workshops, but then proceeded to hide almost every relevant document that could have shed light on what actually happened at the workshops, cloaking it in privilege-based secrecy. The evidence shows that, following these

⁴⁹ Section IV.E provides Namecheap’s response to the Panel’s question IV.5.d: ‘Do informal Board actions or inactions at workshops that do not meet the requirements of a formal Board meeting constitute the “exercise of its fiduciary duties”?’.

⁵⁰ Transcripts Day I, p. 94. Ms. Burr Testimony (‘Well, if decisions -- formal actions occur in board meetings -- so, I’m not sure there really aren’t decisions made in the workshops. They’re not formal decisions, there’s no formal documentation. But the staff prepared materials I may have received.’)

⁵¹ Section 26 includes Namecheap’s response to the Panel’s questions IV.6 and IV.7: ‘When does ICANN contend that the Board delegated to ICANN staff the decision to renew the 2019 Registry Agreements? Is that delegation of authority and its scope memorialized in anything beyond the ICANN Delegation of Authority Guidelines (R-37)?’ and ‘If the decision to renew the 2019 Registry Agreements without price caps was made by the ICANN staff and not by the ICANN Board, what standard of review applies to that decision?’

workshops, ICANN staff proceeded with the removal of the price caps and the execution of the registry agreements with .ORG, .INFO and .BIZ without the formal approval by the Board.

28. As far as Namecheap is aware, no delegation of authority was ever memorialized in anything beyond the ICANN Delegation of Authority Guidelines (R-37). These guidelines contain no delegation of authority for legacy RA renewal negotiations and execution of such RAs.

29. As explained above, California case law establishes that the business judgment rule does not extend to *ultra vires* actions, namely where, as here, ICANN acted contrary to its Articles of Incorporation and Bylaws. Consequently, ICANN's lack of transparency with respect to the decision to remove the price caps precludes ICANN from invoking business judgment rule. As also explained above, the business judgment rule 'does not shield actions taken without reasonable inquiry'. As the record shows, ICANN and its Board did not make a reasonable inquiry as to the effects of the decision on the Internet community as a whole, on the openness of the DNS, on competition in Internet-related markets, on those entities most affected. It also failed to inquire and comply with the policies and processes that were in place for making fundamental changes to registry agreements of legacy gTLDs regarding pricing and vertical integration. Also for that reason, the business judgment rule finds no application to the case at hand.

30. Finally, the business judgment rule does not apply to Namecheap's claims in this IRP that are based on ICANN staff's conduct. California law affirms that the business judgment rule only applies to actions by a corporation's board of directors and not to its staff.⁵²

⁵² See e.g., *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694 (1996), (applying the business judgment rule to corporate directors) (**RM 239**); *Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 283 (**RM 242**), ('The common law "business judgment rule" refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.... Under this rule, a director is not liable for a mistake in business judgment which is made in good faith and in what he or she believes to be the best interests of the corporation, where no conflict of interest exists.' (internal quotation omitted))

Accordingly, the Panel must apply a *de novo* standard in making findings of fact and in determining whether actions or inactions by ICANN’s officers or staff violated the Articles of Incorporation and/or Bylaws. In the case at hand, the decision to renew the 2019 RAs without the price caps was made by the ICANN staff and not by the ICANN Board, as made clear during the testimony of ICANN’s witnesses. The issue of the removal of price caps was allegedly presented to the Board during a workshop, but no decisions are taken during workshops as is apparent from the testimonies of Ms. Burr⁵³, Mr. Botterman⁵⁴, and Mr. Weinstein.⁵⁵

V. THE PANEL MUST REVIEW BOTH ICANN’S DENIAL OF NAMECHEAP’S RECONSIDERATION REQUESTS AND THE UNDERLYING ACTIONS AND INACTIONS THAT WERE SUBJECT OF THE RECONSIDERATION REQUESTS⁵⁶

31. The Panel should review both ICANN’s denial of Namecheap’s reconsideration requests and the underlying decisions that were the subject Namecheap’s reconsideration requests. The reason is simple. Pursuant to Article 4(3) of ICANN’s Bylaws, the IRP is intended to hear and resolve Disputes. Disputes are defined as ‘claims that Covered Actions

⁵³ Transcripts Day II, pp. 60-61: In response to Panelist Siefarth’s question as to ‘[w]hat happens at workshops’, ICANN’s Board Member, Ms. Burr, responds: ‘[...] So, largely briefings, education of the board in terms of activities, and preparation for our interactions with the community, but **no decisions**. No decisions are made on actions where the board must take actions.’ Panelist Siefarth asked a follow up question with the same response: ‘Q. But wasn’t a decision made here with regard to the price cap in the workshop, or how do I have to understand that? A. No.’

⁵⁴ Transcripts Day II, p. 154, where Mr. Botterman testifies: ‘The public meeting, that’s where decisions are taken, considered, discussed and concluded.’ *See also* Transcripts Day II, pp. 157-162, where Mr. Botterman explains that no formal decisions are taken during workshops and that nobody on the Board ‘felt like, oh, but now we need to decide on that’ and that the decision to renew the RAs with or without the price caps could be left to the ICANN ‘organization to handle’.

⁵⁵ Mr. Weinstein testified that (i) he did not believe that the Board needed to give its approval before ICANN staff could execute a renewal of legacy gTLDs (Transcripts Day III, p. 39); (ii) the issue of renewing the .ORG, .INFO and .BIZ without price caps ‘wasn’t something [ICANN staff was] looking for a decision on’ (Transcripts Day III, pp. 47-48) and (ii) ‘Contract negotiation was something that we believed -- that we think is clearly within the org’s remit, and so those are things where we bring matters of importance to the board’s attention, brief them on our plans, and if they choose to, they can always pull something up to their level to make the decision on, but in this case, they did not.’ (Transcripts Day III, p. 98).

⁵⁶ Section 30 provides Namecheap’s response to the Panel’s Question V.8, explaining Namecheap’s position on whether ‘this Panel is reviewing ICANN’s denial of Reconsideration Request 19-2, ICANN’s underlying decision that was the subject of Reconsideration Request 19-2, or both’ and whether ‘prior IRP decisions draw any distinctions between review of denial of reconsideration and review of the underlying decision’.

constituted an action or inaction that violated the Articles of Incorporation or Bylaws’. Covered Actions are defined as ‘**any** actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.’ IRPs thus cover all actions and failures to act giving rise to a dispute, regardless of who committed these actions and inactions. Both the conduct by ICANN’s Staff and by ICANN’s Board have resulted in Namecheap’s claims and are to be reviewed within this IRP.

32. The provision according to which the IRP Panel’s scope includes ‘any actions or failures to act by or within ICANN’ was introduced on 1 October 2016. Prior to this Bylaws’ change, IRP panels were ‘charged with comparing contested actions of the **ICANN Board** to ICANN’s Articles of Incorporation and Bylaws, and with declaring whether or not the **Board** has acted consistently with the provisions of the Articles of Incorporation and Bylaws’.⁵⁷ Hence, under the prior rules, IRPs were limited to review the conduct of the ICANN Board. IRP declarations rendered under these prior rules thus have limited relevance in this respect. However, as is apparent from *inter alia* the Booking.com and DCA cases, under the prior rules, IRP panels did not limit themselves to evaluating ICANN’s handling of the reconsideration requests, but also assessed the underlying actions and inactions.⁵⁸

33. In the only IRP declaration that has been rendered under the new rules, the panel determined that ‘a proper analysis of the Claimant’s claims requires an examination of the

⁵⁷ See ICANN Bylaws as amended 11 February 2016 (**RM 74**), Article IV(3)(4). Prior version of the Bylaws containing the same provision are available on <https://www.icann.org/resources/pages/governance/bylaws-archive-en>.

⁵⁸ In the *Booking.com* IRP the panel ruled that its ‘role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed’ (ICDR Case No. 50-20-1400-0247, *Booking.com B.V. v. ICANN*, Final Declaration, 3 March 2015 (**RM 170**), para. 110); in the *DCA* IRP, the panel not only ruled that the ICANN Board violated its Articles of Incorporation and Bylaws not only through its failure to conduct a meaningful review during the reconsideration process, but also with respect to the underlying actions before the reconsideration process. The panel found the following actions and inactions to be inconsistent with the Articles of Incorporation and Bylaws and with ICANN’s obligation to have procedures designed to ensure fairness: the failure to give DCA notice or an opportunity to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice, and the failure of the ICANN Board to address this issue. See ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Final Declaration, 9 July 2015 (**RM 165**), paras. 107-109.

Respondent’s conduct – that of its Board, individual Directors, Officers and Staff – against the backdrop of the entire chronology of events leading to the Respondent’s decision of 6 June 2018 [(i.e., the ICANN Board’s decision to deny the Claimant’s reconsideration request in that case)].⁵⁹ Hence, this panel did not limit its review to the Board’s denial of the claimant’s reconsideration request, but investigated all events and the actions of the ICANN Board, its individual Directors, Officers and Staff. That is exactly what the Bylaws mandate the Panel to do.

VI. SCOPE OF PANEL AUTHORITY

A. The applicable version of the Bylaws grants the Panel the authority to resolve the dispute in a binding, final award⁶⁰

34. As made clear in Namecheap’s rebuttal, the ICANN community proposed new language for the Bylaws, which the Board adopted with the purpose of enhancing its accountability mechanism following the 2016 IANA transition. The new language was adopted on 1 October 2016. A comparison between (i) the Bylaws applicable between 11 April 2013 and 30 September 2016 and (ii) the Bylaws applicable as from 1 October 2016 shows that important changes were made to Articles IV(1) and IV(3), setting forth the rules of the IRP:

- As from 1 October 2016, Article IV(1) of the Bylaws provides that ‘ICANN **shall** be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article I of these Bylaws.’ The previous versions of this Article provided that ‘ICANN **should** be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.’

⁵⁹ ICDR Case No. 01-18-0004-2702, *Afilias Domains No. 3 Limited v. ICANN*, Final Decision, 20 May 2021 (Corrected version dated 15 July 2021) (**RM 190**), para. 289.

⁶⁰ Section VI.A provides Namecheap’s response to the Panel’s question VI.9: ‘9. Namecheap states, in the context of the Panel’s authority, that “the ICANN community proposed new language for the Bylaws, which the Board adopted with the purpose of enhancing its accountability mechanism following the 2016 IANA transition.” (Namecheap’s 8 February 2022 Rebuttal, ¶ 103 & n. 101.) What new language does Namecheap contend was adopted by the Board, and when was it adopted?’

The language has become much more affirmative. In addition, Article I of ICANN's Bylaws now makes a distinction between Commitments and Core Values, as explained in Namecheap's Pre-Hearing Brief.⁶¹

- As of 1 October 2016, Article IV(3) of the Bylaws contains stated purposes of the IRP:

'The IRP is intended to hear and resolve Disputes for the following purposes ("Purposes of the IRP"):

(i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

*(ii) Empower the global Internet community and Claimants to **enforce compliance with the Articles of Incorporation and Bylaws** through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).*

(iii) Ensure that ICANN is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

*(vii) Secure the **accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.***

*(viii) Lead to **binding, final resolutions consistent with international arbitration norms that are enforceable** in any court with proper jurisdiction.*

*(ix) Provide a mechanism for the resolution of Disputes, as an **alternative to legal action in the civil courts** of the United States or other jurisdictions.*

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.'

⁶¹ Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 211 *et seq.*

- Since 1 October 2016, Article IV(3) of the Bylaws further provides that ‘[t]he IRP is intended as a final, binding arbitration process’, ‘IRP Panel decisions are binding final decisions to the extent allowed by law’, ‘IRP Panel decisions [...] are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel [...] with respect to factual findings or conclusions of law’, ‘[i]f the Board rejects an IRP Panel decision [...] the Claimant [...] may seek enforcement in a court of competent jurisdiction, and ‘[b]y submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant’.

35. These provisions clearly provide that the IRP is designed as an alternative to civil litigation and aims at resolving the dispute in a final, binding, and meaningful way. To offer final resolution of a dispute, the Panel has the authority not only to determine that ICANN has violated its Articles and/or Bylaws, but also to order that ICANN puts an end to the actions and inactions in violation of its Articles and/or Bylaws.

B. A mere declaration that ICANN has violated its Articles of Incorporation or Bylaws is an insufficient mechanism to serve the purposes of the IRP⁶²

36. The history of IRPs from before the October 2016 change does not support ICANN’s contention that independent determinations of whether ICANN has violated its Articles of Incorporation or Bylaws is an effective mechanism at ensuring compliance and resolving disputes.

37. In the very first IRP, which was organized under a different set of rules⁶³, the Panel

⁶² Section VI.B provides Namecheap’s response to the Panel’s question VI.10: ‘ICANN states: “the history of IRPs demonstrates that independent determinations of whether ICANN has violated its Articles or Bylaws is an effective mechanism at ensuring compliance and resolving disputes.” (14 March 2022 ICANN Rebuttal, ¶ 82.) Can ICANN provide examples of other IRPs that support this statement? If Namecheap disagrees with this statement, please explain why and provide examples. Please submit any cited IRP decisions that were not previously submitted.’

⁶³ The ICM Registry case was administered under the Bylaws, as amended on 29 May 2008.

considered its findings to be only advisory in nature. Ultimately, the ICANN Board elected to accept the majority opinion in the IRP declaration (that ICANN should not have reconsidered the decision that ICM's application met the criteria), long after the declaration was issued.⁶⁴

38. More recent case law, administered under the Bylaws applicable between 11 April 2013 and 30 September 2016⁶⁵, suggested that IRP declarations are binding (albeit only partially, according to one panel).⁶⁶

39. Following the Bylaws change of 1 October 2016, any ambiguity that might have existed as to the binding nature of IRP declarations was removed. As explained above, since 1 October 2016, the Bylaws provide that the IRP 'is intended as a final, binding arbitration process' and that IRP declarations may be enforced if ICANN fails to comply with the decision.

40. IRP declarations, administered under the previous set of rules, were seldom an effective mechanism at ensuring compliance and resolving disputes. Salient examples are ICANN's handling of the *Dot Sport Limited*, the *GCC* and the *Vistaprint* cases:

- The *Dot Sport Limited* IRP was about ICANN Board's failure to reconsider ICANN's acceptance of an Expert Determination issued by an expert with an appearance of bias. The IRP panel in this case consisted of eminent experts in the field of rules of ethics and conflicts of interests. The panel's chair, Ms. Wendy Miles, acted as Vice President of the ICC Court of Arbitration and as Vice Chair of the IBA Arbitration Committee, is regularly called upon to deal with questions of ethics and conflicts of interest, and is seen as an authority in this field. The eminent panel declared '*that the action of the ICANN Board in failing substantively to consider the evidence of apparent bias of the*

⁶⁴ It ultimately took the ICANN Board until 18 March 2011 to approve ICM Registry's gTLD application, that is more than a year after the IRP panel's final declaration on 19 February 2010; ICANN, *Adopted Board Resolution 2011.03.18.23*, <https://www.icann.org/resources/board-material/resolutions-2011-03-18-en> (**RM 244**).

⁶⁵ Between 11 April 2013 and 1 October 2016, there have been different iterations of the ICANN Bylaws, but the procedural rules governing IRPs remained the same throughout this period.

⁶⁶ ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015 (**RM 171**), paras. 130 *et seq.*

Expert arising after the Expert Determination had been rendered was inconsistent with the Articles, Bylaws and/or the Applicant Guidebook'. The panel recommended that the ICANN Board '*reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines*'. This declaration and recommendation was based on the following factual determinations: (i) ICANN '*failed to take into account the problems that arise from what the Expert **did not** disclose in his Statement of Impartiality and Independence*'⁶⁷, (ii) '*[a]ll or some of these matters may give rise to apparent bias and the fact that they were not disclosed cannot be preclusive of any reconsideration in relation to them*'⁶⁸, (iii) '*the duty to disclose information is an ongoing one; the duty to disclose information that may, **in the eyes of a party**, give rise to concerns as to the impartiality or independence of the Expert continues throughout the dispute resolution process until a final decision is rendered*'⁶⁹, (iv) the IBA Conflict Guidelines apply in repeated respects⁷⁰, (v) the actual evidence alleged by the Claimant '*gives rise to apparent bias*'⁷¹, and (vi) '*[i]n the event that [the expert who rendered the expert determination] were lacking in independence or impartiality, or there were otherwise an appearance of bias, then it is the ICANN Board that must redress that bias.*'⁷² In making these factual determinations and recommending the ICANN Board to reconsider its decision, the

⁶⁷ ICDR Case No. 1-15-0002-9483, *Dot Sport Limited v. ICANN*, Final Declaration of the Independent Review Panel, 31 January 2017 (**RM 204**), para. 7.83.

⁶⁸ ICDR Case No. 1-15-0002-9483, *Dot Sport Limited v. ICANN*, Final Declaration of the Independent Review Panel, 31 January 2017 (**RM 204**), para. 7.83.

⁶⁹ ICDR Case No. 1-15-0002-9483, *Dot Sport Limited v. ICANN*, Final Declaration of the Independent Review Panel, 31 January 2017 (**RM 204**), para. 7.57 (emphasis added).

⁷⁰ ICDR Case No. 1-15-0002-9483, *Dot Sport Limited v. ICANN*, Final Declaration of the Independent Review Panel, 31 January 2017 (**RM 204**), para. 7.92

⁷¹ ICDR Case No. 1-15-0002-9483, *Dot Sport Limited v. ICANN*, Final Declaration of the Independent Review Panel, 31 January 2017 (**RM 204**), para. 7.89.

⁷² ICDR Case No. 1-15-0002-9483, *Dot Sport Limited v. ICANN*, Final Declaration of the Independent Review Panel, 31 January 2017 (**RM 204**), para. 7.72.

IRP panel may have given discretion to the ICANN Board with respect to the specific redress mechanism; however the IRP panel was abundantly clear about the fact that apparent bias existed and that the ICANN Board must offer redress. Instead, the ICANN Board accepted only ‘aspects of the Final Declaration’ in the *Dot Sport Limited* IRP⁷³ and ultimately decided, based on its own narrow reading of the IBA Conflict Guidelines, that the evidence of bias did not give rise to doubts as to the expert’s impartiality or independence.⁷⁴ In a 14 June 2017 letter, the Claimant had made clear that this decision (i) did not take due account of the IRP panel’s Declaration, (ii) was based on a mischaracterization of the conflict of interest, an incorrect appreciation of the IBA Conflict Guidelines, and on inaccurate, irrelevant and incomplete information, and (iii) was made without examining, and failing to disclose, the discussions between ICANN and the International Olympic Committee who benefited from ICANN’s acceptance of the Expert Determination, rendered by an apparently biased individual.⁷⁵ The ICANN Board rejected these arguments by stating that it had ‘carefully considered’ the 14 June 2017 letter and ‘conclude[d] that the letter provide[d] no additional argument or evidence to support reconsideration’.⁷⁶ The ICANN Board did not examine whether, in the eyes of a party, the Expert’s failure to disclose relevant information gave rise to concerns as to his impartiality or independence. It is clear from the above that ICANN’s handling of the *Dot Sport*

⁷³ ICANN, *Adopted Board Resolution 2017.03.16.09-10*, 16 March 2017,

<https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.c> (RM 112).

⁷⁴ ICANN, *Adopted Board Resolution 2017.06.24.20*, 24 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.c> (RM 245); ICANN, *Revised Recommendation of the Board Governance Committee on Reconsideration Requests 13-16 and 14-10*, 1 June 2017, <https://www.icann.org/en/system/files/files/reconsideration-13-16-et-al-dot-sport-revised-bgc-recommendation-attachment-1-01jun17-en.pdf> (RM 246).

⁷⁵ Letter from F. Petillion to ICANN Board of 14 June 2017,

<https://www.icann.org/en/system/files/files/reconsideration-13-16-et-al-dot-sport-crowell-moring-to-icann-board-redacted-14jun17-en.pdf> (RM 247).

⁷⁶ ICANN, *Adopted Board Resolution 2017.06.24.20*, 24 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.c> (RM 245).

Limited IRP Declaration was not an effective mechanism at ensuring compliance and resolving disputes. The only reason why the dispute was ultimately resolved is because the claimant chose no longer to pursue its claim following the ICANN's Board continued refusal to offer redress. Absent this choice by the claimant, ICANN's handling of the Final Declaration in the *Dot Sport Limited* IRP could have given rise to a renewed claim. It seems that ICANN's defense strategy to tire out the claimant until he abandons the proceedings paid off in this instance.

- The *GCC* IRP was about ICANN's intention to approve the application by Asia Green for the .PERSIANGULF gTLD, despite the sensitivities regarding the 'Persian Gulf' and 'Arabian Gulf' naming dispute. The IRP panel declared that '[t]he action of the ICANN Board with respect to the application of Asia Green relating to the ".persiangulf" gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN' and recommended 'that the ICANN Board take no further action on the ".persiangulf" gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the ".persiangulf" gTLD.'⁷⁷ Instead of accepting and implementing the IRP declaration, the ICANN Board started to impugn some of the panel's findings. On 16 March 2017, the ICANN Board determined that further consideration and analysis of the IRP declaration was needed and 'direct[ed] the ICANN President and CEO, or his designee(s), to conduct or cause to be conducted a further analysis of the Panel's factual premises and conclusions, and of the Board's ability to accept certain aspects of the Final Declaration while potentially rejecting other aspects of the Final Declaration.'⁷⁸ The ICANN Board considered that the IRP

⁷⁷ ICDR Case No. 01-14-0002-1065, *Gulf Cooperation Council (GCC) v. ICANN*, Partial Final Declaration of the Independent Review Process Panel, 19 October 2016 (**RM 176**).

⁷⁸ ICANN, *Adopted Board Resolution 2017.03.16.08*, 16 March 2017, <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b> (**RM 112**).

Panel ‘may not have given due consideration to the Board’s awareness of, and sensitivity to, the GCC’s concerns’ and ‘even though the Panel references Module 3.1 of the Guidebook, the Panel may have disregarded the fact that the GAC did not provide advice to the ICANN Board that required further inquiry or dialogue’.⁷⁹ The ICANN Board found that it had to determine whether the IRP panel ‘misunderstood the facts, misconstrued the Bylaws, or exceeded the scope of the IRP’.⁸⁰ However, there is no basis for the ICANN Board to call into question the factual and legal findings of an IRP panel and/or to pick and choose those aspects it accepts and those aspects it (potentially) rejects. Even if there were ground to vacate the *GCC* IRP Declaration – which the ICANN Board never claimed publicly – the ICANN Board would not have the authority to make an order to vacate the award; only a competent authority with jurisdiction would have such authority⁸¹ on limited grounds.⁸² On 15 March 2018, the ICANN Board noted that it did not ‘agree with or accept all of the Panel’s underlying factual findings and conclusions.’⁸³ The Board decided to have its own Board Accountability Mechanism Committee (BAMC) provide the Board with a recommendation as to whether or not the application for .PERSIANGULF should proceed.⁸⁴ Ultimately, on 3 October 2018 (*i.e.*, almost two years after the IRP panel had issued its final IRP declaration), the ICANN Board ‘adopt[ed] the portion of the IRP Panel’s recommendation that the application for .PERSIANGULF submitted in

⁷⁹ ICANN, *Adopted Board Resolution 2017.03.16.08*, 16 March 2017, <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b> (**RM 112**).

⁸⁰ ICANN, *Adopted Board Resolution 2017.03.16.08*, 16 March 2017, <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.b> (**RM 112**).

⁸¹ See Article V(1)(e) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).

⁸² For international arbitrations in the United States, see 9 U.S. Code § 10.

⁸³ ICANN, *Adopted Board Resolutions 2018.03.15.12-14*, 15 March 2018, <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.b> (**RM 248**).

⁸⁴ ICANN, *Adopted Board Resolutions 2018.03.15.12-14*, 15 March 2018, <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.b> (**RM 248**).

the current new gTLD round not proceed'.⁸⁵ The ICANN Board added that, 'in exercising **its own independent judgment**, [it] thinks that adopting the portion of the Panel's recommendation that the application for .PERSIANGULF submitted in the current new gTLD round not proceed is the right thing to do based upon, among other things, **the Board's own review and analysis** of the 28 June 2018 dialogue with concerned members of the GAC, all materials relevant to the .PERSIANGULF matter (some of which were available only after the NGPC's 10 September 2013 decision), **the discretion conferred upon the Board** by the Guidebook, and the Mission and core values set forth in ICANN's Bylaws.'⁸⁶ In other words, rather than implementing the *GCC* IRP Declaration when it was issued, it took ICANN close to two years to perform its own review and analysis, ultimately leading to a result that is similar to the one ordered by the panel. The fact that it took the ICANN Board close to two years to reach this result and that it considered it retained the discretion to reject parts of the *GCC* IRP Declaration, shows that this IRP was not an effective mechanism at ensuring compliance and resolving disputes.

- The *Vistaprint* IRP was about ICANN's refusal to have an unreasonable and inconsistent expert determination regarding a so-called string confusion objection or 'SCO' re-evaluated. The *Vistaprint* IRP panel could not agree whether ICANN's refusal "to expand the scope of the proposed review mechanism to include other [SCO] Expert Determinations" would meet the standard of non-discrimination imposed by Article II, § 3 of the Bylaws, as well as the relevant core values in Article 1, § 2 of the Bylaws (e.g., applying documented policies neutrally and objectively,

⁸⁵ ICANN, *Adopted Board Resolution 2018.10.03.01*, 3 October 2018, <https://www.icann.org/resources/board-material/resolutions-2018-10-03-en#1.a> (RM 249).

⁸⁶ ICANN, *Adopted Board Resolution 2018.10.03.01*, 3 October 2018, <https://www.icann.org/resources/board-material/resolutions-2018-10-03-en#1.a> (RM 249).

with integrity and fairness).⁸⁷ The panel considered that the ICANN Board had not yet considered Vistaprint’s claim of disparate treatment, and that the Board would risk violating its Bylaws, including its core values, if it refused to exercise its independent judgment on the question.⁸⁸ On 22 October 2015, the ICANN Board accepted the panel’s findings and the panel’s recommendation that the Board exercise its independent judgment on the question of ‘whether an additional review mechanism is appropriate to re-evaluate the Third Expert’s determination in the Vistaprint SCO, in view of ICANN’s Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in [the IRP] Declaration.’⁸⁹ However, the ICANN Board misquoted the IRP Declaration in stating that the IRP panel ‘found that ICANN did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination.’⁹⁰ That is precisely the issue that was left undecided in the IRP. In any event, the ICANN Board did agree to consider Vistaprint’s claim of disparate treatment, and, when it finally did so on 3 March 2016, it concluded that ‘the Vistaprint SCO Expert Determination is not sufficiently “inconsistent” or “unreasonable” such that the underlying objection proceedings resulting in the Expert Determination warrants re-evaluation.’⁹¹ It added that it found ‘as it has previously found, that ICANN’s Bylaws concerning core values and non-discriminatory treatment and the particular circumstances and developments noted in the Final Declaration do not support re-evaluation of the objection

⁸⁷ ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015 (**RM 171**), para. 189.

⁸⁸ ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015 (**RM 171**), para. 190.

⁸⁹ ICANN, *Approved Resolutions 2015.10.22.17-2015.10.22.18 – Regular Meeting of the ICANN Board*, 22 October 2015, <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en> (**RM 250**).

⁹⁰ ICANN, *Preamble to Approved Resolutions 2015.10.22.17-2015.10.22.18 – Regular Meeting of the ICANN Board*, 22 October 2015, <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en> (**RM 250**).

⁹¹ ICANN, *Approved Board Resolution 2016.03.03.02 – Regular Meeting of the ICANN Board*, 3 March 2016, <https://www.icann.org/resources/board-material/resolutions-2016-03-03-en> (**RM 251**).

proceedings leading to the Vistaprint SCO Expert Determination.’⁹² Just like in the *Dot Sport Limited* case, there were grounds to initiate a new claim against ICANN and to have an IRP panel review the ICANN Board’s denial of a re-evaluation for consistency with ICANN’s Articles of Incorporation and Bylaws. However, a new IRP involves renewed efforts and delays in bringing the gTLD to market with no guarantee that it would resolve the dispute. *E.g.*, if the panel in a new IRP decided that the ICANN Board violated its Bylaws in failing to provide a reasonable justification, it could still consider under the then applicable rules that it should not substitute its judgment for that of the ICANN Board and refer the matter back to ICANN. In such a scenario, it seems unlikely that the ICANN Board would reconsider its position; it would merely be likely to try to provide a better justification for its disparate treatment and conclude, ‘as it has previously found’, that it did not discriminate Vistaprint. The parties would end up in a deadlock situation that could only be resolved by an IRP panel granting affirmative relief.

C. The question analyzed by ICANN’s expert aims at awarding affirmative relief

41. ICANN did not ask its expert, Dr. Carlton, whether it took a reasoned decision when removing price caps. Instead, ICANN’s expert examined whether there are reasons to reintroduce the same price cap that existed before. That is not the question before this Panel. The Panel can decide that the removal of price caps constitutes a violation of ICANN’s Articles and/or Bylaws and that price caps must be reinstalled without determining the amount of the price caps that should be reimposed. While ICANN retains the discretion to determine the exact amount of the price caps, the Panel can determine, on the basis of the evidence presented in

⁹² ICANN, *Approved Board Resolution 2016.03.03.03 – Regular Meeting of the ICANN Board*, 3 March 2016, <https://www.icann.org/resources/board-material/resolutions-2016-03-03-en> (**RM 251**).

this IRP, that the introduction of the same price cap that existed before is insufficient to put an end to ICANN’s violation of its Articles of Incorporation and Bylaws and that ICANN must impose a more stringent price cap.

VII. ICANN FAILED TO COMPLY WITH ITS TRANSPARENCY OBLIGATIONS⁹³

42. As explained in Namecheap’s Pre-Hearing Brief – and never rebutted by ICANN – ICANN is committed to the most developed notion of transparency.⁹⁴ ICANN’s obligation to operate in an open and transparent manner includes the obligation of (i) seeking comments from stakeholders on the decision to renew the 2019 Registry Agreements without price caps and providing a detailed explanation to stakeholders of the basis for ICANN’s decision, in light of such comments, and (ii) creating records in a manner that ensures that the attorney-client privilege and attorney work product doctrine do not prevent disclosure of significant information about the negotiation and decision-making process and reasons for the decision that is needed to evaluate whether ICANN complied with its obligations under its Articles of Incorporation and Bylaws. Indeed, Article III of ICANN’s Bylaws explicitly provides that ICANN and its constituent bodies shall operate ‘to the maximum extent feasible in an open and transparent manner’. ‘To a maximum extent feasible’ means that ICANN may not organize itself to shield any policy or business decisions behind attorney-client privilege. Legal privilege may only be invoked scarcely. That is also apparent from Article III(5)(d) of ICANN’s Bylaws which provide that legal matters shall not be included in the minutes made publicly available,

⁹³ Section VII provides Namecheap’s Response to the Panel’s question VII.11: ‘Does ICANN’s obligation to operate in an open and transparent manner include the following:

- a. Seeking comments from stakeholders on the decision to renew the 2019 Registry Agreements without price caps and providing a detailed explanation to stakeholders of the basis for ICANN’s decision, in light of such comments.
- b. Creating records in a manner that ensures that the attorney-client privilege and attorney work product doctrine do not prevent disclosure of significant information about the negotiation and decision-making process and reasons for the decision that is needed to evaluate whether ICANN complied with its obligations under its Bylaws and Articles of Incorporation.

If so, did ICANN comply with any such obligations?’

⁹⁴ Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, paras. 225 *et seqq.*

but only ‘to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN’. In addition, for any such matters that the Board determines not to disclose, ‘the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure’.⁹⁵ Hence, also legal matters must be disclosed, unless disclosure would jeopardize the interests of ICANN. How disclosure would put the interests of ICANN at risk must be explained publicly. Article III of ICANN’s Bylaws further provides that ICANN must ‘maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations)’. The *ratio legis* for such elaborate transparency obligations and the need to involve the Internet community in the decision-making process is clear. ICANN must act in the interests of the Internet community as a whole. Without involving the different stakeholders of the Internet community in the decision-process, ICANN risks to be captured and to engage in arbitrary decision-making. As has been explained at length in Namecheap’s previous submissions, ICANN was created to avoid just that.⁹⁶

43. When, as here, the matter concerns the interests of the Internet community as a whole, the interests of ICANN and the public interest are the same. ICANN never explained how the removal of price caps in legacy gTLDs is a legal matter and how disclosure of its reasons for removing the price caps would put the interests of ICANN at risk. The opposite is true. By operating in a non-transparent way and by failing to disclose its consideration factors, economic studies, and erroneous assumptions, ICANN deprived the community from pointing out the flaws in ICANN’s reasoning and the evidence that ICANN failed to consider. By operating in secrecy, ICANN effectively jeopardizes the multistakeholder model that forms the foundation on which ICANN’s authority is based. Operating in secrecy on such an important

⁹⁵ Article III(5)(d) *in fine* of ICANN’s Bylaws.

⁹⁶ Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, paras. 38, 213, 219, 224, 237, Namecheap’s Limited Rebuttal of 8 February 2022, paras. 138-143.

matter as the price caps of legacy gTLDs, undermines ICANN's legitimacy. Namecheap fails to understand how that can be in the interests of ICANN.

44. In previous briefing, Namecheap has already explained how ICANN failed to comply with its transparency obligations.⁹⁷ As is apparent from the record, ICANN did not comply with its transparency obligations, described above:

- Mr. Botterman confirmed that there were no minutes of the Board workshops in January and June 2019, when decisions on the removal of the price caps were taken.⁹⁸
- Despite receiving over 3,000 public comments, the majority of which opposing the removal of the price caps, the only justification ICANN provided to the community were two paragraphs containing conclusory statements in its reports of the public comments related to the renewal of 2019 Registry Agreements.⁹⁹ ICANN never engaged in a proper analysis supporting its conclusory statements and the drafters of these statements never were presented with an economic report.¹⁰⁰
- ICANN organized itself to cloak all relevant aspects of the decision-making in privilege. *E.g.* Mr. Weinstein explained that (i) there were internal discussions about the need for a formal Board resolution on the renewal of a registry agreement, but that those discussions included counsel and were therefore privileged¹⁰¹; (ii) when ICANN 'dug in the price cap issue and some other issues further in the process, [they] did make a formal recommendation in writing. [Mr. Weinstein] think[s] they were in the form of the papers and materials [they] provided to the board', but 'it was done in the context of preparing a board information paper, which are privileged documents [as

⁹⁷ See in particular Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 282-311, 332-336, 337-356 Namecheap's Limited Rebuttal of 8 February 2022, paras. 70-82, 88-93, 138-143.

⁹⁸ Transcripts Day II, pp. 163-164.

⁹⁹ Transcripts Day III, p. 69. See also p. 89.

¹⁰⁰ Transcripts Day III, p. 50.

¹⁰¹ Transcripts Day III, p. 100.

ICANN does] that in conjunction with the legal team.’¹⁰²; (iii) ICANN staff consulted with counsel to get competition advice and that ‘the result of the privileged advice was that price caps were not needed’¹⁰³; (iv) the email he received from non-legal staff member Cyrus Namazi confirming that ICANN could proceed as planned with the renewal of the Base RA without price caps was not produced as he believed that this document was ‘under privilege because it was consulting with counsel’¹⁰⁴; (v) ‘all these conversations were in the presence and with guidance from counsel so [he] believe[d] those are privileged’¹⁰⁵; (vi) when he sent summary emails confirming the content of negotiations between ICANN and the registry operators via telephone or in person, he made sure to include ‘the lawyers on it’, making the documents allegedly privileged.¹⁰⁶

VIII. MERITS OF PRICE CAP DECISION

A. The relevant information that should be considered in evaluating ICANN’s actions and inactions¹⁰⁷

45. In evaluating the decision to renew the 2019 Registry Agreements without price caps, the Panel should not ordinarily consider information that was not available to ICANN as of the date of the decision, such as events after that date. ICANN cannot invoke more recent events *ex post facto* as a justification for having violated its Articles of Incorporation and Bylaws. At most, the Panel may consider more recent information in recommending how ICANN should reinstall price caps without violating its Articles of Incorporation and Bylaws.

¹⁰² Transcripts Day III, pp. 106-107.

¹⁰³ Transcripts Day III, pp. 116 and 134.

¹⁰⁴ Transcripts Day III, p. 44.

¹⁰⁵ Transcripts Day III, p. 46.

¹⁰⁶ Transcripts Day III, pp. 143-144.

¹⁰⁷ Section VIII.A provides Namecheap’s response to the Panel’s questions VIII.12 and VIII.13: ‘In evaluating the decision to renew the 2019 Registry Agreements without price caps, may the Panel properly consider information that was not available to ICANN as of the date of the decision, such as events after that date?’ and ‘What weight, if any, should be given to reasons for renewing the 2019 Registry Agreements without price caps that ICANN identified during this IRP that were not in ICANN’s public statement of reasons?’

46. The Panel must examine whether ICANN’s decision is reasoned and justified. In other words, the Panel must examine whether ICANN could have expected that the removal of price caps on .ORG, .INFO and .BIZ would improve the economic outcomes in the DNS space and that there were no risks that economic outcomes would worsen.

47. In making this analysis, no weight should be given to reasons for renewing the 2019 RAs without price caps that ICANN identified during this IRP that were not in ICANN’s public statement of reasons. Any such *post factum* justification shows that ICANN’s decision to remove the price caps was made in an arbitrary and non-transparent fashion, thereby violating ICANN’s fundamental obligations. Indeed, when ICANN decided to remove the price caps in .ORG, .INFO and .BIZ, there was not a single reason that justified such decision.

B. There are strong reasons why price caps on .ORG, .INFO and .BIZ are warranted and ICANN had no valid reason to remove them¹⁰⁸

48. The opposite is true. There are key reasons why price caps on .ORG, .INFO and .BIZ are warranted:

- .COM continues to be subject to price caps and ICANN may not discriminate.
- Like .COM, .ORG, .INFO and .BIZ are legacy gTLDs – .ORG and .COM are both part of the original gTLDs that predate ICANN – with a potential of exercising market power.
- While ICANN’s expert, Dr. Carlton, never contested the claim that .ORG may hold more market power than .COM, he agreed that .COM should remain regulated.¹⁰⁹
- It is likely that the removal of price caps on .ORG, .INFO and .BIZ will harm registrants and the Internet community as a whole. As Dr. Langus explained, even if

¹⁰⁸ Section VIII.B provides Namecheap’s response to the Panel’s question VIII.14: ‘Please briefly summarize the key reasons that you contend that price caps on .ORG, .INFO, and .BIZ are or are not warranted, given that .COM continues to be subject to price cap.’

¹⁰⁹ Transcripts Day V, p. 75 (cross-examination of Dr. Carlton): ‘Q. Do you believe .com should continue to be regulated in the future? A. Yes. For now. In other words, if you ask me now, do I want to get rid of the regulation on .com? I think, based on what I know, I would probably say no.’

the price caps were maintained at the same level as the price caps in the 2013 RAs, at least ‘they could limit the extent to which [the registry] can, in some years, increase [wholesale prices] by 15 percent’ or any amount more than 10 percent.¹¹⁰ ‘At least, it would protect [Internet users] from the price increases year on year of 15 percent or 20 percent. At least some safeguard. At the same time, such a price cap is very unlikely to stifle incentives.’¹¹¹ ICANN never explained how removing such safeguard is in the interest of the Internet community as a whole.

- ICANN never engaged in a proper cost-benefit analysis prior to its decision to remove the price caps. The available evidence shows that ICANN had no reasons to expect that the removal of price caps would improve the economic outcomes in the DNS and that it could not exclude that such removal would worsen the economic outcomes in the DNS space.¹¹² However, the ICANN Board was never presented with an economic study regarding the likely effects of a price cap removal, nor did it care to investigate the issue. ICANN’s current Chair, Mr. Botterman, testified that he does not recall ever reviewing or hearing about any reports from Dr. Carlton.¹¹³ In its decision to deny Namecheap’s Reconsideration Request 19-2, the ICANN Board relied on a 2009 preliminary study by Dr. Carlton, being unaware of the publicly available 2009 final studies by Dr. Carlton¹¹⁴, which identify reasons not to remove price caps in the .ORG, .INFO and .BIZ gTLDs. None of the witnesses presented by ICANN was aware as to whether ICANN had obtained advice on the likely impact of the price cap removal.¹¹⁵

¹¹⁰ Transcripts Day V, p. 106.

¹¹¹ Transcripts Day V, p. 114.

¹¹² See Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, paras. 378-387; Namecheap’s Rebuttal Brief of 8 February 2022, para. 56; **Economic Expert Report II**, paras. 9, 212-219.

¹¹³ Transcripts Day II, p. 171.

¹¹⁴ Transcripts Day II, pp. 143-145.

¹¹⁵ Transcripts Day II, p. 77.

Yet, ICANN's Chair testified that ICANN recently hired an economist because it must obtain economic insights in considering competition and understanding the market.¹¹⁶

- The only report that ICANN commissioned *in tempore non suspecto* was never finalized, never shared with the ICANN Board, and never shared with key personnel negotiating the renewal RAs. Nobody was aware that ICANN's legal staff commissioned Dr. Carlton in 2019. Redacted - Confidential Information

.117

49. ICANN did not properly examine the effects on the Internet community of removing the price caps on .ORG, .INFO and .BIZ, while it should have examined whether price caps should have been maintained, tightened, or relaxed. The fact that ICANN failed to properly examine the effects of removing the price caps is confirmed in the testimony of Mr. Weinstein, who led the discussions with the registry operators. Mr. Weinstein admitted that ICANN did not investigate the possibility of strengthening the price caps and clarified that the combined effects of removing the price caps and relaxing cross-ownership restrictions were taken under consideration when ICANN 'designed the Base Agreement.'¹¹⁸ In other words, ICANN

¹¹⁶ Transcripts Day II, pp. 97-98 (cross-examination of Mr. Botterman): 'Q. Is it true that you just hired an economist to serve on ICANN staff? A. I have not spoken to the person yet, but the CEO has announced that an economist has now been selected and hired. Q. Would you describe -- A. One of the reasons is, indeed, in considering competition and understanding the market, it is good to have the insights from that as well.'

¹¹⁷ **Annex 131.**

¹¹⁸ Transcripts Day III, pp. 80-81.

analyzed these effects with respect to new gTLDs; it never did so with respect to legacy gTLDs.

C. In any event, ICANN should have maintained price caps for .ORG ¹¹⁹

50. Particularly with respect to .ORG, there is strong evidence in the record that ICANN should not have removed the price caps, but that it should have maintained or strengthened them:

- While Dr. Carlton agreed that .COM should remain regulated¹²⁰, he did not contest the claim that .ORG may hold more market power than .COM. In addition, he recognized that the same characteristics which justify regulation of .COM are present in .ORG and that .ORG has a specific meaning and value to the non-profit sector:
 - o Transcripts Day V, p. 67, where Dr. Carlton recognized the first-mover advantage and specific connotation of .ORG: ‘I’ve not done a detailed study of cross elasticity for .org, but my general understanding of .org is that because it was one of the early TLDs, a lot of not-for-profits use .org and they like using .org because it has the connotation of a not-for-profit.’
 - o Transcripts Day V, p. 96, where Dr. Carlton recognized the first-mover advantage and special meaning of .ORG: ‘But, I mean, when you say "could," they might have already benefited from it, I think is what you mean. They had a first-move advantage. Now, it's also the case that, as I point out, .org is a not-for-profit and that is a separate consideration.’
- The unique characteristics of .ORG and its special position within the DNS is also endorsed by ICANN’s current Chair, who previously was the Chair of PIR, Mr. Botterman:

¹¹⁹ Section VIII.C provides Namecheap’s response to the Panel’s question VIII.15: ‘Please provide a concise bullet-point summary of key evidence regarding removal of price caps that relates specifically to .ORG (in contrast to .INFO and .BIZ.’

¹²⁰ Transcripts Day V, p. 75 (cross-examination of Dr. Carlton): ‘Q. Do you believe .com should continue to be regulated in the future? A. Yes. For now. In other words, if you ask me now, do I want to get rid of the regulation on .com? I think, based on what I know, I would probably say no.’

- Transcripts Day II, pp. 176-177, where Mr. Botterman explains the unique position of .ORG within the DNS: ‘One of the things with .org, as you rightly -- and I know you know that -- it's not a domain like .com, .net. It's just that the reputation that PIR has given it over the years that gives it added value for many nonprofits. [...] I do remember, my kids always had a hard time explaining at school what your father is doing. [...] But one of the things that they came back with is -- they were at school in Belgium. If they would go to a .org site, then, at least, they could trust the information. And this was the perception that comes with it [...].’
- As Dr. Langus explained, .ORG has likely more market power than .COM. If, as ICANN’s own expert believes, price caps have merit for .COM, then they certainly have merit for .ORG:
 - Transcripts Day V, p. 104, where Dr. Langus testifies: ‘Well, you see, I have not assessed the merits of reinstating price controls. But I do think that .org plausibly, likely, in my view, has more market power than .com. If we believe price caps have merit when it comes to .com, then, to me, the conclusion is immediate when it comes to .org.’
 - Transcripts Day V, pp. 120-121, where Dr. Langus testifies: ‘.org has been there since the birth of Internet when there was no alternative to .org, and in those 30 -- it took 20 years for new gTLDs to enter. .org had a 20-year of first-mover advantage that it could use to lock in all these ten million registrants that it has now -- not all, but a significant number of registrants. And that is a factor that is distinguishing .org from all those new gTLDs. It's the same as .com and .net in that respect, and I see no reason, no evidence, nothing -- in fact, I see a lot of intuition that .org actually has more market power than .com or .net, and that is because it's targeting a very specific customer base, you know, probably more specific than .com or .net,

and that customer base has [fewer] alternatives, if any [g]ood alternatives[,] available.’

- .ORG has been exercising its market power in recent years:
 - o Transcripts Day V, p. 115, where Dr. Carlton admits ‘Dr. Langus had a picture showing that .org has a margin. And it's increased over time. And the price of .org is higher than the price of .com. I agree with that.’
 - o Economic Expert Report II, para. 158: ‘.ORG has been increasing its headline wholesale fees^[...] before and during the introduction of new gTLDs, until 2016, often up to the level allowed by the price cap implemented in .ORG RA.^[...] This indicates that price cap was effective in the past.^[...]’
 - o Transcripts Day V, p. 118-119, where Dr. Langus responds to President Hendrix’ question as to how price controls did constrain price in the past, given that .ORG never hit the full 10 percent: ‘Well, it did hit 9.7 percent a number of times, and a number of times it hit 7 percent, 6 and a half. I don't have the figures right now in front of me. You can see -- you could see on the chart that I've shown you that price -- prices of .com and .org have co-moved rather closely until 2013, and .com was price-constrained in a very similar way -- price-capped in a similar way as .org until that time, and that's why, I think, we saw this effect. In 2013, .com's price was frozen and .org's price allowed to continue under the previous price caps, and the trend is exactly the same as it was before. So, that says to me that it kind of internalized the price caps that were in place and just kept going along that trajectory.’
 - o Transcripts Day V, p. 119, where Dr. Langus explains that the mere fact that the headline wholesale registration fee for .ORG has been flat since 2016 offers no

indication that PIR is not exercising market power and that it would not do so in the future even more than it is doing now.¹²¹

- Transcripts Day IV, pp. 129-130, where Dr. Langus provides context to his Powerpoint presentation, slides 5 and 6, explaining that PIR has been exercising market power and still does today. First, Dr. Langus explained how PIR raised the prices for .ORG significantly, creating a wedge between .ORG and the more strictly regulated .COM. As Dr. Langus testified, this price increase cannot be explained by an increase in the cost of .ORG, because costs did not increase. Second, Dr. Langus explained that PIR's costs 'decreased significantly in recent years', while 'at the same time, the revenue per domain name has been increasing.' So, the margins for .ORG had been increasing and, as Dr. Langus testified, increasing margins are a 'reliable indicator of market power, and increasing margins do not conclude typically that market power has decreased. You would rather conclude the opposite.'
- Transcripts Day V, pp. 114-115, where Dr. Langus explains that it is likely that PIR will exercise its market power in the future, based on its past and current behavior, putting existing and new registrants at risk of significant price increases: 'Now, let me just briefly come back to how likely it is or not that .org will actually exercise this market power in the future. I think it's already doing that, and that chart that I have shown you shows that, because, as you said yourself, it didn't pass on the cost decreases, significant cost reductions. [...] But it didn't pass on the cost

¹²¹ Transcripts Day V, p. 119: DR. LANGUS 'It's true, in 2016 -- since 2016, it hasn't increased -- the prices. There's no dilemma there. But is that an indication that it's not exercising its market power? I don't think it is. Does that give us a high level of confidence that it won't do so in the future even more than it is already now? It doesn't. And it doesn't because in the past it has been doing so. So, yeah -- and, you know, perhaps in these three years since 2019, PIR watching these proceedings, maybe that also explains why it hasn't increased the prices so far. But here, I'm speculating.'; *See also* Economic Expert Report II, paras. 159-164.

reductions, and that's an indication. In the past, before 2016, it was increasing the price, and that price went high above .com. What is high or not is debatable, but 25 percent, 30 percent. And you know, if it really didn't exercise market power, why didn't it leave it at the .com's level? I don't see a reason. Its costs were stable, and then in the recent years, decreasing.'

- Dr. Carlton did not challenge any of the evidence brought forward by Dr. Langus. As a matter of fact, the experts agree on the definition of market power, and Dr. Carlton also agrees with the factors of market power that have been identified by Dr. Langus.¹²² Where Dr. Carlton said he disagrees is – in connection to the limited question as to whether the price caps from 2019 should be reimposed – whether ‘just because you have market power whether you should be regulated’.¹²³ However, that is a mischaracterization of Dr. Langus’ testimony, as explained during testimony.¹²⁴ Moreover, as Panelist Kim correctly pointed out, the relevant question before the Panel is not whether the specific price caps from 2019 should be reimposed, but ‘whether ICANN made the correct decision in 2019’ by removing the price caps altogether.¹²⁵ During his entire testimony, Dr. Carlton did not address the question

¹²² Transcripts Day V, pp. 122-124: ‘PANELIST KIM: [...] I mean, first of all, there's a definition of market power. I think, Dr. Langus quoted a definition the ability to raise prices above some competitive level or benchmark price in a profitable way. So, Dr. Carlton, you generally agree with that definition? DR. CARLTON: I do [...] PANELIST KIM: [...] Then, Dr. Langus identifies some factors to consider in assessing whether there's market power, and I think -- I mean, everybody has been arguing about how to weigh those factors. I think there's also agreement on those factors. I think the ones that were mentioned include semantic differentiation, popularity, network effects, first-mover advantage -- I kind of lumped those together because I think they overlap -- switching costs, the information about registry/registrar prices, volumes, margins. Dr. Carlton, I mean, without saying how important those are, do you agree those are kind of factors you might want to look at? DR. CARLTON: Yes, I have a textbook where I discuss all that. Exactly. I think those -- I don't think we have a fundamental disagreement between us on those types of factors.’

¹²³ Transcripts Day V, p. 124: ‘DR. CARLTON: [...] The essence of the disagreement is whether -- I think, just because you have market power whether you should be regulated. That's a different question than reimposing the price caps from 2019. Those are really two different questions. PANELIST KIM: Yeah. So -- PRESIDENT HENDRIX: -- regulation being advocated here is reimposition of the price caps. MR. CARLTON: Yeah, that's what I thought. That's all. And I'm saying those are going to be useless.’

¹²⁴ Transcripts Day V, p. 117 and p. 120.

¹²⁵ Transcripts Day V, p. 125.

whether in 2019, the decision should have been made to keep or strengthen the price caps. His conclusions are based entirely on a different issue and his opinion that ‘for .org, .biz and .info, [price regulation] wasn't effective as of 2019.’¹²⁶ It is clear from the record and the evidence presented by Namecheap that ICANN did not make the correct decision in 2019 when arbitrarily removing the price caps. ICANN did not even investigate whether the registry operators of .ORG, .INFO and .BIZ had market power, nor the extent to which they utilized their market power.¹²⁷

51. In the context of this IRP, ICANN and its expert rely heavily – if not exclusively¹²⁸ – on the not-for-profit status of PIR, the .ORG registry operator. It is only in the context of these proceedings that ICANN invokes the not-for-profit status as a justification not to reinstall the price caps. ICANN did not rely on the not-for-profit status of PIR to justify its decision to remove the price caps in 2019.

Redacted - Confidential Information

52. Moreover, this *post factum* invocation of PIR’s status as a not-for-profit offers no justification for ICANN’s removal of the price caps. Indeed, ICANN’s own expert acknowledged (in the context of hospitals) that the not-for-profit status of a corporation does

¹²⁶ Transcripts Day V, p. 138.

¹²⁷ Transcripts Day III, p. 78, where Mr. Weinstein testifies that ICANN did not analyze the extent of market power held by the registry operators of .ORG, .INFO and/or .BIZ: ‘Q. Before moving to the Base Registry Agreement without price caps, did you or your team analyze whether the registry operators of .org, .info and .biz had market power? A. As I say in my witness statement, we understood the percentage of total domains under management relative to total domains under management in all TLDs -- did not believe that conveyed market power to these registry operators. Q. Did you have that investigated? A. We consulted with counsel, competition counsel. Q. Did you or your team assess the extent to which these registry operators exercised market power? A. Exercise it? Meaning tried to utilize it? Q. Uh-huh. A. We did not, to my knowledge, but -- yeah, we did not, to my knowledge.’

¹²⁸ See Transcripts Day V, p. 115, where Dr. Langus submits that Dr. Carlton is ‘almost exclusively, if not exclusively’, relying on the not-for profit nature of PIR. Dr. Carlton did not seek to contradict Dr. Langus in this respect.

not mean that the corporation should be treated differently.¹²⁹ ICANN offers no evidence why that should be any different here. Based on a limited analysis of a short period of time from 2016 onwards – a large part of which pending this IRP – ICANN’s expert jumps to the conclusion that PIR did not behave in the same way as a for-profit. However, as Dr. Langus demonstrated, PIR has been increasing its prices close to the price caps in recent years. Moreover, in those years where PIR did not increase its prices, PIR has been increasing its margins. If PIR did not exercise market power, then why did the non-profit PIR increase the .ORG prices above the level of the for-profit .COM?¹³⁰ Dr. Langus has shown that one cannot confidently determine that PIR’s non-profit status would play a key role in keeping prices in check. As a matter of fact, there is ‘clear evidence that .org holds persistent market power and that it is exercising its market power.’¹³¹ As Dr. Langus explained, ‘this indicates that reliance on .org -- on .org's not-for-profit status is not a safe thing to do because it has proven in the past that it has been exercising market power.’¹³²

53. Price caps could be effective in constraining the exercise of market power without any substantial costs to ICANN and without the risk of any adverse effects on the Internet community as a whole. Even if one were to take the position that ICANN has insufficient experience or expertise in setting price caps, ICANN could set them at the same level as the price caps on .COM, as determined by the DoC. As Dr. Langus explained, ‘there is no evidence that .org would -- that .org's incentives to invest in quality, to provide good reliable service to registrants -- there's no evidence that this price would be too low. And there's no evidence that

¹²⁹ Transcripts Day V, p. 111: ‘I should say, this question about how not-for-profits should be dealt with has come up in another context, and comes up under the antitrust laws a lot, and I have a paper that says that just because a hospital is a not-for-profit doesn't mean it should be treated differently. And I reached that conclusion because the behavior in a very large database that I looked at showed that not-for-profits behaved in the same way as for-profits.’

¹³⁰ See Transcripts Day V, pp. 114-115.

¹³¹ Transcripts Day V, p. 105.

¹³² Transcripts Day V, p. 105.

price caps did have such an effect in the past.¹³³ Dr. Carlton did not contradict Dr. Langus on this issue. Dr. Langus further explained:

‘Now, you know, even if you said simply, if you just took the DOC's price cap on .com, you know, you would still be at a level of prices, which would not unduly constrain the incentives or hamper the efficient incentives of .org to invest and provide a quality of services, because its margin would still be increasing. If you set the prices as .com and you looked at that chart, the revenue per domain under management, the revenue that .org gets per one domain, it would stay more or less constant as it was in year 2013. But its costs were dropping, so its margin would still be decreasing [sic] nevertheless. So you could take, for example -- in the case of .org, you could take guidance from that price cap. And you would not be -- it would not -- I do not see any significant risk that it would lead to the outcomes -- the bad outcomes that I spoke about also in my opening statement.’¹³⁴

54. Dr. Carlton did not contradict Dr. Langus in any of these respects. In fact, he agreed that ‘.org has a margin. And it's increased over time. And the price of .org is higher than the price of .com.’¹³⁵ ICANN did not provide any evidence that setting the price caps of .ORG at the same level as .COM would generate any costs or negative effects. And ICANN’s own expert acknowledged that ‘price controls on .com are justified and [he does] believe are effective.’¹³⁶

55. If ICANN set the price cap of .ORG at the same level as .COM (which ICANN testified it could do¹³⁷), PIR would still be able to generate a profitable margin and ICANN would have a mechanism in place to ensure that the .ORG registry fees remain ‘as low as feasible, consistent with the maintenance of good-quality service’, as required according to the criteria for the operation of .ORG as established by ICANN’s multistakeholder model.¹³⁸ While Namecheap is not asking the Panel to set the price cap at a specific level, this Panel has the authority to determine that ICANN’s imposition of such a price cap on .ORG would not be

¹³³ Transcripts Day V, p. 106.

¹³⁴ Transcripts Day V, p. 113.

¹³⁵ Transcripts Day V, p. 115.

¹³⁶ Transcripts Day V, p. 139.

¹³⁷ ICANN acknowledged that, while this would be a significant change, it could mirror the price caps, as approved by the DoC for .COM in .ORG (See Transcripts, Day III, pp. 79-80).

¹³⁸ **Regulatory Expert Report**, para. 46; **RM 11**, <https://archive.icann.org/en/tlds/org/criteria htm>.

contrary to ICANN's Articles of Incorporation and Bylaws.

56. While leaving the price caps as they were prior to the removal in 2019 may not be sufficient to preserve and enhance the openness of the DNS and the Internet, enable competition and open entry in Internet-related markets, it would not have the same detrimental effect to the Internet community as the outright removal of the price caps. As Dr. Langus explained, 'at least to some extent, they would protect the existing registrants and new registrants that really don't have much choice, if you're an NGO or an organization that wants to register in .org. At least, it would protect them from the price increases year on year of 15 percent or 20 percent. At least some safeguard. At the same time, such a price cap is very unlikely to stifle incentives in the way that Professor Carlton is afraid.'¹³⁹

57. ICANN had identified no negative effects associated to keeping the price caps.¹⁴⁰ In addition, Dr. Carlton acknowledged that there are no costs or negative effects associated to keeping the price caps as they were. When asked whether there are costs he is concerned about in maintaining the 10 percent price cap of 2019 other than the possibility of a too-low price, Dr. Carlton identified none.¹⁴¹ Dr. Carlton argued that nothing would be different compared to today's situation. As of 2019, the price caps had no effect, he opined.¹⁴² However, as Dr. Langus testified, at least, consumers would be protected from a steep price increase in any given year, which is a likely possibility.¹⁴³ Indeed, it cannot be excluded .ORG would raise prices above 10% in any given year and the fact that .ORG did not raise prices between 2016

¹³⁹ Transcripts Day V, pp. 113-114.

¹⁴⁰ Transcripts Day III, p. 77, where Mr. Weinstein testified that he did not encounter any evidence showing any negative effects of the price caps in .ORG, .INFO and/or .BIZ.

¹⁴¹ Transcripts Day V, p. 125-126: 'PANELIST KIM: [...] But if the question is, should you keep 10 percent price cap or not? First of all, as to the difficulty -- I think Dr. Langus mentioned this in his report -- it wouldn't be difficult to do it. You would simply leave it as it is. Of course, it might be the wrong number, but are there other costs you're concerned about other than the possibility of a too-low price in this particular context? DR. CARLTON: Well, price regulator -- if you set the wrong price -- I mean, I agree with you entirely. Set the right price, we're all set. If you set the wrong price, you distort incentives of the firm.'

¹⁴² Transcripts Day V, p. 127 and 129.

¹⁴³ Transcripts Day V, p. 114, where Dr. Langus describes how registrants would be protected from steep price increases and testifies that it is likely that PIR 'will actually exercise this market power in the future.'

and 2019 (or even today) does not tell us anything about the ability and the risk that .ORG might raise prices above 10% in any given year in the foreseeable future.¹⁴⁴ So, there would be benefits without there being any costs in maintaining the price caps. Hence, the decision to remove price caps was not a reasonable decision. There may have been and there may be reasons to strengthen the price caps and ICANN should have investigated those reasons.

58. In addition, price caps had another effect on registries. As Dr. Langus explained, with the price caps in place, ICANN had the ability to revise and tighten price caps during renewal negotiations when a registry operator is hitting, or increasing its prices close to the price cap with no other reason than the exercise of its market power (*e.g.*, hitting the price cap in 8 out of 10 years).¹⁴⁵ Also, if .ORG exercises market power too much for too long, ICANN had the ability to limit it.¹⁴⁶ This effect would no longer be present if ICANN takes the position that it should no longer regulate prices and its decision to remove the price caps is not reversed.

59. Dr. Carlton did not deny this additional ‘psychological’ effect of the price caps. Arguably, he acknowledged this effect when he envisioned the possibility that PIR was scared to raise prices from 2016 onwards and during the pendency of these proceedings.¹⁴⁷

*

60. Thus, the only ‘evidence’ that ICANN provides to justify its removal of the price caps is the *ex post facto* opinion by Dr. Carlton (on the basis of limited data, which is likely impacted by the existence of these proceedings) that, as from 2019, price caps – if kept to the same level – had no effect and should therefore not be reinstalled. However, as demonstrated above, this

¹⁴⁴ Transcripts Day V, pp. 131-132.

¹⁴⁵ Transcripts Day V, p. 133.

¹⁴⁶ Transcripts Day V, p. 134.

¹⁴⁷ Transcripts Day V, p. 119, where Dr. Carlton discusses PIR’s past behavior regarding .ORG: ‘they didn’t raise price even though they could have in 2016, 2017, 2018, and they could have in 2019, 2020, and 2021, and they chose not to. Now, maybe they were scared, I don’t know, but I don’t have any -- I’ve seen nothing to suggest that.’

opinion by Dr. Carlton is hardly relevant in these proceedings. It offers no justification for the removal of the price caps. The only relevance of Dr. Carlton's opinion for the purpose of these proceedings is that ICANN's own expert hereby acknowledges that, in order to curtail the market power of .ORG, .INFO and .BIZ, ICANN should have strengthened the price caps in the 2019 renewal RAs.

IX. RELIEF REQUESTED


61. Based on the above, and its previous submissions, Namecheap incorporates by reference herein its request for relief as stated in Namecheap's Limited Rebuttal Brief of 8 February 2022.

62. In addition, Namecheap requests the opportunity to specify in a further submission its costs of this IRP that Namecheap asks the Panel to order ICANN to pay to Namecheap.

Respectfully submitted,

27 May 2022


Flip Petillion
Counsel for Claimant


Jan Janssen
Counsel for Claimant