

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process (IRP) Panel

NAMECHEAP, INC.,

Claimant

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

ICDR Case No. 01-20-0000-6787

DECISION ON REQUEST FOR EMERGENCY RELIEF

Gary L. Benton,
Emergency Panelist

Date

20 March 2020

This is the Decision on a request for emergency relief in an Internet Corporation for Assigned Names and Numbers (“ICANN”) Independent Review Process (“IRP”) administered by the International Centre for Dispute Resolution (“ICDR”) on a claim between Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) and Respondent ICANN (“ICANN” or “Respondent”) pursuant to the ICDR International Arbitration Rules (“ICDR Rules”) and the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (“IRP Supplementary Procedures”). The request for emergency relief was made pursuant to ICDR Rules, Article 6, Emergency Measures of Protection.

I, THE UNDERSIGNED EMERGENCY PANELIST, having been designated as the Emergency Panelist under the ICDR Rules with respect to the IRP between Claimant Namecheap and Respondent ICANN, as provided for in the ICANN Bylaws and IRP Supplementary Procedures, and, accordingly, having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby DECIDE as follows:

I. INTRODUCTION

A) PARTIES

1. Claimant is Namecheap, Inc. (“Claimant” or “Namecheap”), a corporation organized under the laws of Delaware, USA.

2. Respondent is Internet Corporation for Assigned Names and Numbers (ICANN), a corporation organized under the laws of California, USA.

B) PARTY APPEARANCES AND REPRESENTATIVES

3. Claimant Namecheap appeared through and is represented by represented by Flip Petillion, Esq. and Jan Janssen, Esq. of the law firm Petillion in Huizingen, Belgium.

4. Respondent ICANN appeared through and is represented by Jeffrey A. LeVee, Esq., Kelly M. Ozurovich, Esq. and Eric P. Enson, Esq. of the law firm Jones Day in Los Angeles, California, USA.

C) REQUEST OVERVIEW

5. The dispute giving rise to this IRP arises from alleged breaches of the ICANN Articles of Incorporation (“AOI”) and Bylaws with respect to the renewal provisions of the registry agreements for the .ORG, .INFO and .BIZ generic top-level domains (gTLDs), particularly with respect to price control provisions and with respect to a potential change of control of the .ORG Registry Operator.

6. Claimant Namecheap has limited its request for emergency relief to the .ORG gTLD registry. Namecheap seeks an order requiring Respondent ICANN (1) to stay all actions that further the change of the control of the .ORG registry operator to a for-profit entity during the pendency of the IRP and (2) to take all actions that are necessary to prevent the .ORG registry operator from charging fees that exceed the maximum fees that were applicable before the renewal execution of the 30 June 2019 .ORG Registry Agreement.

7. ICANN is a public benefit corporation. Its stated mission is to ensure the stable and secure operation of the Internet’s unique identifier systems. ICANN is required to act for the interests of the global Internet community as a whole. Namecheap is an ICANN accredited .ORG Registrar. Public Interest Registry (PIR) is the .ORG Registry Operator. In anticipation of the 30 June 2019 expiration of the .ORG Registry Agreement between ICANN and PIR, ICANN negotiated a renewal with PIR. The proposed renewal was based on ICANN’s base generic TLD Registry Agreement that excludes the historic price controls contained in prior versions of the .ORG Registry Agreements. The proposed Registry Agreement was submitted for public comment. ICANN received over 3700 responsive comments, including a substantial number opposing removal of price control provisions. ICANN Staff nonetheless concluded that removal of the price controls was appropriate and, following Board consultation, renewed .ORG Registry Agreement without price controls. Later, PIR requested that ICANN consent to a change of control of PIR’s parent company from the Internet Society (ISOC) to

Ethos Capital, a for-profit entity. The request for approval on the change of control is pending. ICANN has provided notification that the deadline for approval has been extended to 20 April 2020.

8. Namecheap contends that ICANN's renewal of .ORG Registry Agreement without price control provisions and ICANN's change of control review process violate ICANN's AOI and Bylaws with respect to its Commitments and Core Values, including to "seek input from the public, for whose benefit ICANN in all events shall act" and to "ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent." Namecheap contends that ICANN failed to follow the required policy setting process, has not been open and transparent and has failed to consider material information concerning the nature of the .ORG gTLD when it renewed the .ORG Registry Agreement and in its current consideration of the change of control of PIR. Namecheap contends that it, its customers and the Internet community will suffer harm as a result of the removal of the price control provisions and an approval of the change of control.

9. ICANN contends that Namecheap has no standing to assert its claim and ICANN has not committed any violation of its AOI or Bylaws. ICANN contends that it has properly addressed the renewal, including giving due consideration to public comments and reporting thereon, and it properly concluded that removing the price control provisions was consistent with ICANN Commitments and Core Values, would advance having uniform registry agreements and would "promote competition in the registration of domain names." Further it contends that its investigation regarding the change of control request is being properly conducted. ICANN contends that an injunction as to the .ORG Registry Agreement or the change of control provision contained therein would be improper, Namecheap has not met its burden on this request and the balance of hardship weighs in favor of ICANN's positions.

10. As detailed in this Decision, the request for emergency relief is denied. Namecheap has raised serious questions but those questions do not rise to the level to justify the interim relief requested, particularly in considering the balance of harms. Namecheap may renew this request and present its full case on the merits to the IRP Panel.

D) PROVISION FOR IRP

11. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in the Emergency Relief Procedural Order No. 1 (“ER PO 1”), this IRP is made in accordance with the ICANN AOI filed 3 October 2016 (Cl. RM-1) and the ICANN Bylaws dated 28 November 2019 (Cl. RM-2), in particular, the Bylaws, Section 4.3 Independent Review Process for Covered Actions. The parties have agreed that these versions of the AOI and the Bylaws are deemed the governing documents with respect to the IRP and the emergency relief sought. As specified in the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018 (“IRP Supplementary Procedures”), the ICDR is the designated provider under the Bylaws.

E) DEMAND FOR IRP

12. This IRP was commenced by the submission of Claimant’s form Notice of Independent Review dated 25 February 2020 (“IRP Notice”). The IRP Notice was submitted with Claimant’s Request for Independent Review Process by Namecheap (“IRP Request”), Claimant Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection (“Emergency Relief Request”) and supporting submissions.

F) PLACE OF REVIEW

13. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, and in accordance with the place of review request in the IRP Notice, the place of review (seat) is Los Angeles, California, USA.

G) APPLICABLE LAW AND RULES

14. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, California law is the substantive law governing the interpretation of the AOI and Bylaws and the substantive law governing the issues in the IRP, and particularly this ICDR Rules, Article 6 proceeding.

15. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, the Emergency Panelist has proceeded on the basis that the procedural law applicable to this proceeding is the U.S. Federal Arbitration Act and to the extent either party is of the view that a different procedural law applies and a determination thereon is material to the outcome of any issue addressed in the course of this Article 6 proceeding, they would be allowed to present their position accordingly. No such requests have been made.

16. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, the ICDR International Arbitration Rules, contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of 1 July 2014, and the IRP Supplementary Procedures, apply to this ICDR Rules, Article 6 proceeding.

H) APPOINTMENT OF THE PANELIST

17. The Emergency Panelist, Gary L. Benton, was duly appointed by the ICDR in accordance with the ICDR Rules including ICDR Rules, Article 6.

18. The ICDR duly formalized the appointment of the Emergency Panelist, notified all parties of such appointment and gave the parties an opportunity to object to the appointment in writing. No objection was made as to the appointment. The Emergency Panelist proceeded to conduct this Article 6 proceeding in accordance with the applicable laws and rules and accordingly serves as the Emergency Panelist in this IRP proceeding.

II. PROCEDURAL HISTORY

A) CLAIMANT'S IRP REQUEST AND EMERGENCY RELIEF REQUEST

19. In Claimant Namecheap's IRP Request, Namecheap contends that this dispute arises out of breaches of ICANN's AOI and Bylaws by the ICANN Board and staff by inter alia, making a non-transparent, discriminatory and unfair application of the rules and policies governing the operation of the .ORG, .info and .biz generic top-level domains. In particular, the dispute relates to ICANN's decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. Namecheap contends that it is an ICANN-accredited registrar that is directly impacted by this decision. Namecheap further contends that, with respect to .ORG, the removal of the price control provisions is aggravated by the fact that the operation of .ORG risks being moved from a non-profit entity to a for-profit entity.

20. In Namecheap's Emergency Relief Request, Namecheap seeks a stay of all ICANN actions that further the change of control of the .ORG registry operator to a for-profit entity during the pendency of the IRP, including but not limited to, (i) the renewal of any registry agreement for .ORG, (ii) the approval of any direct or indirect change of control of the .ORG registry operator or of any other assignment of the .ORG registry agreement. Namecheap also requests that, in order to maintain the status

quo, ICANN take all actions that are necessary to prevent that the .ORG registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .ORG registry agreement of 30 June 2019. Namecheap contends this interim relief is warranted because (i) Namecheap and an important part of the Internet community will suffer irreparable harm barring such a stay and interim relief; (ii) Namecheap raises serious questions regarding ICANN's compliance with its AOI and Bylaws in (a) removing the price control provisions for the .ORG, .biz and .info gTLDs, and (b) the process for evaluating the .ORG registry operator's request for approving a change of control; and (iii) ICANN will suffer no harm should the interim relief request be granted. Namecheap contends that the balance of hardships weighs decidedly in favor of Namecheap.

21. No Answering Statement has been submitted in response to the IRP Request; however, ICANN denied the claim in the course of its appearances and briefing in this ICDR Article 6 proceeding.

B) EMERGENCY RELIEF PREPARATORY CONFERENCE and ER PO 1

22. A telephonic Emergency Relief Preparatory Conference ("ER Preparatory Conference") was conducted by the Emergency Panelist on 3 March 2020. Both parties were represented by counsel. The ICDR offered the parties the opportunity for transcription of the conference; no requests were made.

23. In the course of the ER Preparatory Conference, both parties made brief presentations on the merits and procedures.

24. Upon inquiry from the Emergency Panelist, the parties confirmed there were no jurisdictional objections as to the claims, administration by the ICDR or the appointment of Emergency Panelist. ICANN objected to the standing of Namecheap to assert claims.

25. In the ER Preparatory Conference, the Emergency Panelist and the parties addressed the governing law and rules as set forth earlier in this Decision. The Emergency Panelist and the parties addressed any need for disclosures, expert testimony, and other prehearing matters and hearing procedures. Upon inquiry from the Emergency Panelist, the parties also briefly discussed the status of the pending California Attorney General investigation reported by ICANN and ICANN's communications with PIR regarding the date for responding on the change of control request. The Panelist and the parties discussed the anticipated length of the emergency hearing and the parties agreed on the scheduling for ICANN's briefing and the date and time for the emergency hearing to be held on 14 March 2020 in anticipation that the Emergency Panelist's decision would be issued on or before 20 March 2020. No interim orders with respect to emergency relief were requested but ICANN agreed to provide notification if it intended to take any material action in advance of the planned issuance date of the Panelist's decision. (Following the hearing on the matter, counsel for ICANN provided notification that the deadline for ICANN's change of control decision had been extended to 20 April 2020.)

26. In the ER Preparatory Conference, it was addressed that Claimant made a request for costs in its request for emergency relief and the parties agreed that cost awards shall be reserved for determination by the IRP Panel.

27. A report on the ER Preparatory Conference was set forth in ER PO 1 dated 3 March 2020. The Panelist requested that the parties submit any objections within three days and no objections were received.

C) RESPONDENT'S OPPOSITION TO THE REQUEST FOR EMERGENCY RELIEF

28. On 11 March 2020, ICANN submitted its Opposition to Namecheap's Request for Emergency Panelist and Interim Measures of Protection. ICANN contended that both the Independent Review Process ("IRP") including the Emergency Relief Request should be dismissed on the ground

that Namecheap lacks standing; Namecheap has not identified (much less suffered) any material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of ICANN's AOI, Bylaws or other policies and procedures.

29. ICANN contends that the Emergency Relief Request seeks to require ICANN to amend unilaterally a contract between ICANN and PIR that has been in place since June 2019 by adding a price control provision and seeks to halt ICANN's evaluation of a proposed change of indirect control of PIR to Ethos Capital even though Namecheap is not a party to the .ORG registry agreement, Namecheap is not involved in the proposed change of control of PIR, and Namecheap has not established any harm that has or could result from ICANN's conduct. ICANN contends the Emergency Relief Request should be denied for four separate and independent reasons. First, Namecheap does not have standing to request the relief it seeks because it has not established any harm as a result of ICANN's conduct. Second, Namecheap has not identified any irreparable harm it would suffer in the absence of interim relief. Third, Namecheap has not carried its burden of demonstrating either a likelihood of success on the merits or sufficiently serious questions related to the merits. And, fourth, Namecheap has not and cannot demonstrate that the balance of hardships tips decidedly in its favor. Accordingly, ICANN asked that Namecheap's Request for Emergency Relief be denied.

30. There were no further prehearing activities.

D) EMERGENCY RELIEF REQUEST HEARING

31. As agreed by the parties during the ER Preparatory Conference, as confirmed in ER PO 1, and in further communications between the parties, as confirmed in correspondence submitted to the Emergency Panelist, the Emergency Relief Request Hearing was conducted by audio conference on 14

March 2020. The hearing lasted approximately three hours.¹ In addition to outside counsel for the parties, ICANN corporate counsel attended the hearing.

32. As agreed by the parties, the hearing consisted of oral argument by counsel and questions from the Emergency Panelist. No witness statements were provided in advance of the hearing and no witness examination was planned or conducted.² The evidentiary record consists of the documentary submissions, including reference materials, submitted by the parties with their briefing submissions. No objection was made to any of these documentary submissions. In addition to the evidentiary record, the Emergency Panelist has considered the pleadings, briefs and all arguments both oral and written offered by the parties.

33. As detailed previously herein, the parties reserved any costs submissions for consideration by the IRP Panel.

34. No post-hearing briefing was requested. Accordingly, the emergency hearing was initially closed on 14 March 2020.

35. On 16 March 2020, Claimant requested leave to submit ICANN's 15 March 2020 Response to its Request for Documentary Information. On the same date, ICANN agreed and provided the Response. The Emergency Panelist instructed there would be no briefing on the Request unless stipulated by counsel. As the Emergency Panelist has not been notified of any such stipulation, and no

¹ As requested by the parties, the hearing was recorded on Zoom with the understanding the recording would be made available to the parties for transcription upon request. As addressed during the hearing, due to a technical issue, approximately six minutes of Respondent's opening argument was not recorded. Respondent declined the invitation to restate or summarize its argument for the recording.

² During the course of Namecheap's argument, Namecheap offered to provide a two-page affidavit from its CEO as to its potential monetary harm. The affidavit was not provided to opposing counsel or the Emergency Arbitrator in advance of or during the hearing and ICANN objected to its admission on the ground it was untimely and would be prejudicial given the time restraints as it could require a responsive submission and a further hearing. The Emergency Arbitrator invited an offer of proof as to the contents of the affidavit. Thereafter, admission of the affidavit was denied; however, as detailed further herein, the Emergency Arbitrator accepts Claimant's position that it faces economic harm given that the price controls are no longer in place.

other request has been made to reopen the record, the Emergency Panelist has not considered correspondence regarding the Response submitted by the parties with and following transmission of the Response to the Emergency Panelist.

36. Accordingly, the emergency relief request hearing was deemed closed as of 16 March 2020.

37. On 18 March 2020, counsel for ICANN provided notice that the deadline for ICANN to respond to the PIR request for approval of change of control was extended to 20 April 2020.

III. ANALYSIS

A) JURISDICTION

38. As stipulated by the parties, jurisdiction is proper. Jurisdiction is provided for in the Bylaws and the ICANN IRP Supplementary Procedures. Claimant has submitted a Notice on its claim that was submitted to the ICDR in accordance with requisite procedures and the Emergency Panelist was appointed without objection. Respondent's standing defense is addressed herein separately.

B) MERITS CONTENTIONS

1. CLAIMANT'S CONTENTIONS

39. In its IRP Request, Namecheap alleges that a key driver leading to the creation of ICANN was to promote competition and consumer choice, and it was also required that ICANN's processes be "fair, open and pro-competitive" and "sound and transparent" to protect the Internet user community against capture by a self-interested faction. Request at 10. The U.S. Government's White Paper that led to the appointment of ICANN as the custodian of the DNS made it clear that the creation of a competitive environment was a key task. IRP Request at 11; Cl. ER Brief at 9.

40. Namecheap alleges that the 2002 reassignment of the .ORG gTLD to PIR was done following a policy development process by ICANN's policy making body, [then named] the DNSO, to

assist in the orderly selection of a successor to NSI. ICANN organized a request for proposals and created evaluation criteria for selecting the new registry operator. IRP Request at 13; Cl. ER Brief at 11.

41. Namecheap alleges that ISOC/PIR made important commitments including price controls on fees charged to accredited registrars so that fees would be as low as feasible consistent with the maintenance of good quality service and that PIR made commitments recognizing the unique public-interest focused nature of the .ORG and committed to be responsive to the non-commercial Internet community. On that basis, the .ORG Registry Agreement was entered between ICANN and PIR in 2002 and renewed in 2006 and 2013. IRP Request at 14-15. Cl. ER Brief at 12-13.

42. Namecheap alleges that in 2000, following recommendations from the DNSO, ICANN's Board introduced new gTLDs on a proof of concept basis, finding no need to impose price controls on the new sponsored gTLDs given their community purpose but imposing price controls on the new non-sponsored gTLDs such as .info and .biz. Thereafter, ICANN did not impose price controls under the New gTLD Program. Namecheap alleges this decision was supported by the expert report of Dennis Carlton that determined the existence of price controls in major legacy gTLDs limits the prices that new gTLDs can charge. IRP Request at 16-19

43. Namecheap alleges that on this basis, ICANN started contracting with New gTLDs under the terms of the ICANN base Registry Agreement for New gTLDs but continued to renew legacy gTLD Registry Agreements with price control provisions. IRP Request at 20.

44. Namecheap alleges that in March 2019, ICANN announced that it planned to renew .ORG and .info Registry Agreements along terms similar to the base Registry Agreement and without price controls. Specifically, in its public announcement, ICANN stated,

In alignment with the base registry agreement, the price control provisions in the current .ORG agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG renewal agreement. Protections for existing registrants will remain in place, in line with the base

registry agreement. This change will not only allow the .ORG renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.

IRP Request at 21, Annex 2; Cl. ER Brief at 14.

45. Namecheap contends that ICANN received over 3500 comments from a broad spectrum of the Internet community, including about 20% from Namecheap customers, all opposing the removal of price controls. Claimant contends ICANN rejected all these comments with a conclusory statement as follows:

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

IRP Request at 23, Annexes 5-7; CL. ER Brief at 15. Namecheap contends these conclusions and the various pricing accommodations ignore significant information and turn a blind eye to budget planning for registrars and their customers. IRP Request at 24; Cl. ER Brief at 16-17.

46. The .ORG Registry Agreement was renewed without the price control provisions on 30 June 2019. IRP Request at 26-29; RM-29.

47. On 12 July 2019, Namecheap submitted a Request for Reconsideration to remove the price control requirement in .ORG, .INFO and .BIZ on the ground the decision was made in disregard

of ICANN's fundamental rules and obligations (Reconsideration Request 19-2).³ IRP Request at 26-29. Namecheap also entered into a Cooperative Engagement Process with ICANN.

48. On 13 November 2019, it was announced that PIR was being sold to investment firm Ethos Capital. Namecheap suggests that the timing of the transaction and the involvement of former ICANN executives, including ICANN's former CEO, was suspicious and Claimant raised these concerns with ICANN as the alleged pricing policy violation would be exacerbated if ICANN were to allow PIR to be acquired by a for-profit company. Namecheap indicates that ICANN responded by saying that PIR's corporate structure was not relevant to the initial Reconsideration Request. IRP Request at 27-29; Cl. ER Brief at 20-22.

49. On 8 January 2020, Namecheap submitted a second Reconsideration Request and a document request with respect to the price controls and the ongoing change of control evaluation. (Reconsideration Request 20-1).⁴ Namecheap alleges the document production revealed no information on the price controls and limited information on the change of control. IRP Request at 30-31, Annex 16-18; Cl. ER Brief at 23.

50. Namecheap alleges that on 23 January 2020, ICANN received a request from the Office of the Attorney General of the State of California regarding the proposed transfer to PIR asking to extend the deadline for approval on the change of control. The deadline was extended to 29 February 2020. IRP Request at 32-37; Cl. ER Brief at 26-28. (In course of this matter, ICANN provided notice that the extension was further extended until 20 March 2020, although it had requested additional time from PIR.

³ The dispute was also considered by the ICANN Ombudsman, who concluded that contract renewal was delegated to staff and there was no violation of the AOI or Bylaws by the Board.

⁴ The decision on Reconsideration Request 19-2 was scheduled for release following the hearing in this emergency relief request.

Following the emergency relief request hearing, counsel for ICANN provided notification that the deadline had been extended to 20 April 2020.)

51. As alleged, Namecheap urged ICANN to make clear to PIR that PIR's request for an indirect change of control cannot be processed until (i) the Attorney General terminated its investigation and authorized ICANN to proceed with the process for reviewing the proposed change of control, (ii) all challenges with respect to the renewal of the .ORG registry agreement have been appropriately addressed, (iii) Namecheap and the Internet community are given the necessary transparency with respect to the change of control approval process, and (iv) there are no challenges remaining with respect to the change of control approval process or a possible approval of the change of control by ICANN. If PIR cannot agree to a suspension of its request for approving the change of control, Namecheap wrote that ICANN should make clear to PIR that such approval is reasonably withheld. IRP Request at 35; Cl. ER Request at 29.

52. Namecheap alleges ICANN declined to provide Namecheap a timely response and, accordingly, Namecheap filed its IRP Request. IRP Request at 37-38; Cl. ER Brief at 30-31.

53. Namecheap contends that Namecheap, its clients and the Internet community will suffer irreparable harm in the emergency relief request is not granted. Namecheap contends there is no meaningful remedy if the status quo is not preserved. Namecheap cites to customer concern and the potential of unrestricted price increases in combination with .ORG being run by a nonprofit. Namecheap argues the change of control approval cannot be readily undone and the approval would frustrate the California Attorney General's investigation, risking a possible suspension or revocation of ICANN's corporate registration and resulting harm to Namecheap and others in the Internet community. Cl. ER Brief at 35-39.

54. Namecheap contends that there are serious questions with respect to the price control removal. Claimant alleges ICANN failed to take due account of the circumstances of the major legacy gTLDs by removing the price controls for .ORG, .info and .biz., resulting in prohibited disparate treatment in violation of its Bylaws, Article II(3). Claimant argues these legacy TLDs are not comparable to any new gTLD given their substantially larger domains under management (DUMs). Likewise, Claimant argues ICANN has provided no justification for disparate treatment for .com and .net gTLDs. Further, Claimant contends there are serious issues with ICANN's "after-the-fact" justification based on the 2002 "Preliminary Analysis" of Dennis Carlton, including that the report supports the conclusion legacy gTLD price controls should be maintained. IRP Request at 44-49; Cl. ER Brief at 44-49.

55. Namecheap also contends that the renewal violates the renewal clause of the 2014 Registry Agreement and is thereby contrary to the interest of the Internet community as a whole. Specifically, Section 4.2 appears to require that terms be similar for all legacy gTLDs and "terms of this Agreement regarding the price of Registry Services...shall remain unchanged." IRP Request at 48-50, RM 18, 27-28; Cl. ER Brief at 50.

56. Namecheap further contends that there are serious questions related to the change of control process. Namecheap contends the reassignment of .ORG to PIR/ISOC (and related endowment) in 2002 involved various commitments with respect to delegation to a non-profit organization and operation for the non-profit community. Namecheap contends that it fails to see how these commitments are compatible with a private investment firm and consideration of transition to a for-profit entity without involving the community breaches its obligation to apply documented policies neutrally, objectively and fairly. Additionally, Namecheap contends that ICANN is not open and transparent in its evaluation of the proposed change of control. IRP Request at 51-54; Cl. ER Brief at 41-43.

57. Namecheap also contends that ICANN will not suffer significant hardships or financial harm from a stay on the change of control and the balance of hardships decidedly tips in Namecheap's favor. Claimant contends that as ICANN has already requested an extension on the change of control decision a stay would not significant prejudice ICANN and that any prejudice caused by delay is counterbalanced by the advancement of the integrity of the IRP process. Cl. ER Brief at 52-54.

58. Based on the foregoing, Namecheap requests an order requiring ICANN to:

- stay all actions that further the change of control of the .ORG registry operator to a for profit entity during the pendency of the IRP, including but not limited to, staying all actions that would lead to (i) the renewal of any registry agreement for .ORG, (ii) the approval of any direct or indirect change of control of the .ORG registry operator or of any other assignment of the .ORG registry agreement;
- take all actions that are necessary to prevent that the .ORG registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .ORG registry agreement of 30 June 2019;
- ICANN pay costs and for any other relief that the Emergency Panelist may consider necessary or appropriate in the circumstances. Cl. ER Brief at 56.

2. RESPONDENT'S CONTENTIONS

59. In its Opposition Brief, ICANN contends that both the IRP and this Emergency Relief Request should be dismissed. ICANN contends that Namecheap lacks standing, has not identified (or suffered) and material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of the ICANN AOI, Bylaws or other policies and procedures. Opp. Brief at 1.

60. In background, ICANN explains that its mission, in its Bylaws, “is to ensure the stable and secure operation of the Internet’s unique identifier systems” and ICANN is responsible for overseeing the technical coordination of the Internet’s DNS on behalf of the Internet community. ICANN’s Bylaws contain a number of “Core Values” to ensure ICANN is carrying out its mission, including encouraging ICANN to maintain a competitive DNS environment. Opp. Brief at 8, 10.

61. ICANN also observes that to remain accountable to the global Internet community, ICANN has established accountability mechanisms for review of the ICANN actions and decisions, one such mechanism being the IRP and only a “Claimant” as defined by the Bylaws can institute an IRP. Further ICANN observes that the Interim Supplementary Procedures allow a Claimant to request interim relief “to maintain the status quo until such time as the opinion of the IRP Panel is considered by ICANN. Opp. Brief at 11-12.

62. ICANN acknowledges PIR has been the registry operator for the .ORG gTLD since 2002 and the 2002 Registry Agreement, renewed in 2006 and 2013, contained a price control provision specifying the maximum price PIR may charge for registry services, and that many of the initial registry agreements for legacy TLDs contained price control provisions. Opp. Brief at 13-14.

63. ICANN contends that ICANN and its GNSO sought to introduce new competition into the DNS through new gTLDs and the Base Registry Agreement was developed simultaneously with the New gTLD Program. ICANN contends that the Base Registry Agreement does not contain price any price control provision but does contain price protections, including thirty day advance notice of price increases for new registration, six month advance notice of price increases for renewals and allowing initial registrants to renew for up to ten years prior to any price changes. Opp. Brief at 15-16.

64. ICANN contends that after finalizing the Base Registry Agreement, ICANN began working with legacy TLD registry operators to transition them to the Base Registry Agreement for consistency across all registry operators. Opp. Brief at 19.

65. ICANN contends that in anticipation of the 2019 expiration of the .ORG Registry Agreement, ICANN staff consulted with the ICANN Board and concluded that the .ORG Registry Agreement should substantially mirror the Base Registry Agreement. ICANN opened a public comment period, seeking input from the Internet community on the proposed agreement, including the price control provision. Opp. Brief at 20.

66. ICANN contends that it received mixed comments on the removal of the price control provision and ICANN analyzed the public comments and published a Report (RE-12).⁵ As detailed, the Report explained that removing price control provisions is consistent with ICANN Core Values and these values guide ICANN to introduce and promote competition, where feasible and appropriate. Opp. Brief at 20-22.

67. ICANN contends that, in June 2019, the ICANN staff conferred again with the Board and decided to proceed with the Registry Agreement renewal as proposed. The renewed Registry Agreement does not contain price control provisions but it includes the pricing protections and Public Interest Commitments as to transparency and openness as afforded by the Base Registry Agreement. Opp. Brief at 24-25.

68. ICANN confirms that on 14 November 2019, PIR submitted a request for indirect change of control and informed ICANN that PIR's parent entity ISOC had entered into a purchase agreement with Ethos. In its submission to ICANN, PIR stated that PIR would remain the registry operator and

⁵ ICANN contends that the number of unique public comments is difficult to quantify but the ICANN Ombudsman concluded that many of the comments seem to be clearly generated and were equivalent to spam. Id. at fn. 32; RE-13.

affirmed Ethos would further PIR's mission and values including its deep commitment to the community support. PIR also stated Ethos intended to create a PIR Stewardship Council to support PIR founding values. Opp. Brief at 26.

69. ICANN confirms that it has sought additional information from PIR. ICANN also confirms that it received a letter from the California Attorney General seeking information regarding the proposed change in control in order to "(a)nalyze the impact to the nonprofit community..." ICANN contends that it is cooperating with the Attorney General's investigation. ICANN further contends that in light of its own investigation and the Attorney General's investigation, additional extensions of time from PIR regarding the deadline to respond to the request and PIR granted an extension until 20 March 2020. Opp. Brief at 27-28.

70. ICANN also confirms that Namecheap submitted its 12 July 2019 Reconsideration Request, and the Request was denied by the Board Accountability Mechanics Committee ("BAMC") based on a finding that Namecheap failed to establish ICANN violated its AOI or Bylaws when it decided to not to include price controls in the renewed .ORG Registry Agreement.

71. ICANN contends that Namecheap is not a "Claimant" under the Bylaws and, accordingly, lacks standing to pursue the IRP, including this emergency relief request. ICANN contends Namecheap has neither offered evidence of a direct impact nor explained how it has been harmed. ICANN adds that Namecheap is not a party to the Registry Agreement and non-parties, including registrars, are expressly excluded as third-party beneficiaries. Opp. Brief at 36-38.

72. ICANN contends that Namecheap will not suffer irreparable harm in the absence of interim relief. It contends that Namecheap offers no evidentiary support and does not explain how it will be impacted negatively and fails to identify material harm that would occur as a result of the alleged potential unrestricted price increases or .ORG being run by a for-profit company. Opp. Brief at 39.

73. ICANN further contends that Namecheap is not seeking to maintain the status quo but is, instead, actually asking ICANN to unilaterally amend the .ORG Registry Agreement that has been in place for eight months. ICANN contends that a mandatory injunction is subject to a higher degree of scrutiny as it is disfavored by law.⁶ Opp. Brief at 40 and fn. 65.

74. As to irreparable harm, ICANN contends that Namecheap's assertion of irreparable injury with respect to the California Attorney General's investigation is speculative and inappropriate as there is no evidence that ICANN will do anything other than cooperate with the investigation. Opp. Brief at 41 and fn. 69; Cl. Annex 17-18.

75. ICANN contends that Namecheap has not attempted to show likelihood of success on the merits and has not raised sufficiently serious questions that justify interim relief. ICANN contends that Namecheap's contention that PIR made commitments to public interest when it secured the right to operate .ORG are incompatible with operation by a private investment firm is not at issue because the purpose of an IRP is to consider whether ICANN complied with its charter documents not to evaluate third party conduct. Further ICANN contends that Namecheap has not provided evidence to support the contention that a private investment firm should not be involved in the operation of .ORG. Further, ICANN contends that despite any change of control, the obligation to comply with all provisions of the Registry Agreement, including Public Interest Commitments, is mandated. Opp. Brief at 43-45.

76. ICANN contends that Namecheap's argument that ICANN is not as open and transparent as it should be about the evaluation of PIR's request for change of control is deficient of facts and a review of the ICANN website shows ICANN has been extremely transparent in posting updates and correspondence. Opp. Brief at 46.

⁶ ICANN also contends, in fn. 66, that Claimant's contention that IRP Panels have always granted request to preserve the status quo is misplaced because, in all the cited proceedings, claimants were challenging a decision to proceed to contracting/delegation.

77. ICANN contends that Namecheap's arguments regarding lack of price controls are similarly baseless because ICANN staff has involved "the Internet community and those most affected" by posting the proposed Registry Agreement for public comment, analyzed the comments and published a Report and consulted with the Board in making a decision. ICANN contends that it is not under a duty to yield to public comments but instead "make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment." ICANN argues that Namecheap's disagreement with ICANN's decision is not a basis for an IRP. Opp. Brief at 47-50.

78. ICANN contends that the removal of the price controls is not contrary to the policy requirement that the registry fee charged to accredited registrars be "as low as feasible consistent with the maintenance of good quality service" because price control provisions are not necessary to constrain pricing in a market with 1,200 other gTLDs that are not subject to price control provisions.⁷ Opp. Brief at fn. 83. Further it contends that it is treating .ORG no differently than other legacy TLDs and all New gTLDs do not have price control provisions. ICANN contends that the absence of the price control provisions, not preservation of them, ensures consistency across the market in treating "like cases alike." Opp. Brief at 51.

79. ICANN contends that, contrary to Namecheap's position, the absence of price controls does not violate the renewal clause in Section 4.2 of the 2013 version of the Registry Agreement because the 2019 Registry Agreement supersedes the prior agreement, Section 8.6 specified that the parties can mutually agree to modify the agreement and ICANN and PIR have engaged in good faith negotiations regarding changes to the terms as required by the prior agreement. Opp. Brief at 52-54, RM-18.

⁷ ICANN also rejects Namecheap's contention that ICANN's only justification for removal of the price controls is its "after-the-fact" reliance on the 2009 Dennis Carlton Report. ICANN contends the BAMC found numerous justifications for not including the price control provisions. Opp. Brief at fn. 85.

80. As to the balance of hardships, ICANN contends that Namecheap has failed to demonstrate the hardships tip decidedly in Namecheap's favor as Namecheap has not suffered any harm since the 2019 Registry Agreement was executed and it is unclear how Namecheap will be harmed by the proposed change of control. Opp. Brief at 55-56.

81. ICANN contends that, in contrast, it faces significant hardship if the requested interim relief is granted because Namecheap essentially asks ICANN to breach its contract with PIR and unilaterally add a price control provision, which could subject ICANN to legal claims. Opp. Brief at 57.

82. ICANN contends that, in regard to the change of control request, interim relief would result in real harm to ICANN by disrupting its processes and precluding it from considering the request in accordance with those processes. ICANN rejects Namecheap's argument that ICANN faces no hardship because it has already requested extensions because the IRP will last for months. Opp. Brief at 59-60. In oral argument, ICANN elaborated further that the delay may put at risk funding for the transaction as well as significant funding offered to support .ORG non-profit community-directed programs.

C) RELEVANT CHARTER PROVISIONS

83. ICANN's AOI, Article III, provides in pertinent part,

[ICANN] shall operate in a manner consistent with these Articles 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....

This provision requirement is reiterated in the Commitments provision in ICANN's Bylaws, Section 1.2.(a).

84. ICANN's Bylaws, Section 1.2.(a) Commitments, sets forth specific ICANN Commitments, including the following:

(iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;

(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and,

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

85. ICANN Bylaws, Section 1.2.(b) Core Values, provides Core Values to guide decisions and actions of ICANN, including the following:

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market...

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

86. ICANN's Bylaws, Section 2.3 Non-Discriminatory Treatment, provides,

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment

unless justified by substantial and reasonable cause, such as the promotion of effective competition.

87. ICANN's Bylaws, Section 3.1 Open and Transparent, provides, in pertinent part,

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work.

D. DISCUSSION

1. STANDARDS

88. The standard for interim relief in an IRP is set forth in the ICANN Bylaws and IRP Supplementary Procedures. The ICANN Bylaws, Article IV(3)(o), and the Supplementary Procedures, Article 10, provide:

A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered [...], in order to maintain the status quo. [...] Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

89. As to consideration of the merits, a de novo review standard applies. See ICANN Bylaws, Section 4.3(i). ICANN Bylaws Section 4.3(i)(iii) provides "(f)or Claims arising out of the Board's

exercise of 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.”⁸

2. STANDING

90. A “Claimant” includes a legal entity that “has been materially affected by a “Dispute.” Bylaws, Section 4.3(b)(i). “To be materially affected, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.” Id. “Covered Actions” are defined in the ICANN Bylaws as any actions or failures to act by or within ICANN committed by the Board...or Staff members that give rise to a Dispute.” Bylaws, Section 4.3(b)(ii). “Disputes” are “Claims that Covered Actions constituted an action or inaction that violated the [AOI] or Bylaws....” Bylaws, Section 4.3(b)(iii). This includes Claims that Covered Actions exceeded the scope of the Mission. Id.

91. Namecheap is a legal entity that alleges ICANN has violated the ICANN AOI and Bylaws, including the transparency and openness requirements, and has exceeded the scope of its Mission in its consideration and action to renew the .ORG Registry Agreement without price control provisions and in its consideration of the change of control request. Namecheap has filed a written statement of the Dispute, constituting a Claims as to these Covered Actions. See Bylaws, Section 4.3(d).

92. As alleged as to the price control provisions, as a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and casually related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary

⁸ The parties addressed the appropriate standard upon inquiry from the Emergency Arbitrator in oral argument. Claimant argued the business judgment rule does not apply referring to cited cases. See, e.g. ICM Registry v. ICANN, ICDR Case No. 50,117 T 00224 08 (2010) (Cl. RM-3). However, the Bylaws, as amended, require application of the rule with respect to Board exercises of fiduciary judgment. Bylaws, Section 4.3(i)(3).

support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.

93. Likewise, as a result of the alleged violations of the change of control process, Namecheap is at risk of being exposed to decision-making by Ethos and PIR that potentially harms Namecheap's financial and other business interests. This is a harm that is directly and casually related to the alleged violation that ICANN has not followed proper procedure in consideration of the change of control request

94. Accordingly, Namecheap has standing for purposes of this Emergency Relief Request.⁹ To be clear, in making this determination, there is no finding of any violation by ICANN or any third party. Rather, the finding, in response to ICANN's standing defense, is limited to the determination that Namecheap is a "Claimant" as defined in the Bylaws and has standing to assert its claims for purposes of this Emergency Relief Request. As with the entirety of this Decision, this finding does not bind the IRP Panel.

95. Accordingly, ICANN's request for summary dismissal of this ICDR Article 6 proceeding is denied.

3. FORM OF RELIEF REQUESTED – STATUS QUO

96. In accordance with the ICANN Bylaws and Supplementary Procedures, a Claimant may seek injunctive relief, and specifically may include a stay of the challenged ICANN action or decision

⁹ Namecheap has also asserted its claim on behalf of its customers and the broader Internet community. Undoubtedly Namecheap .ORG customers and the broader Internet community have an interest in this matter. For purposes of standing, however, the determination that Namecheap as the Claimant has direct and causal harm, and therefore has standing, is all that is required.

until such time as the opinion of the IRP Panel is considered. ICANN Bylaws, Article IV(3)(o), and IRP Supplementary Procedures, Article 10.

97. Accordingly, prohibitory injunctions are expressly allowed to maintain the status quo and mandatory injunctions to change the status quo are not expressly prohibited in an IRP Process. ICANN correctly points out, however, that a mandatory injunction is subject to a higher degree of scrutiny and is disfavored by law. A stronger showing on the merits is required where the balance of harm does not sharply favor the moving party. See Opp. Brief at 40 and fn. 65.

98. Here, the parties dispute whether the requested relief as to the 30 June 2019 .ORG Registry Agreement (Cl. RM 29) is a mandatory or prohibitory injunction. In its request for interim relief, Namecheap asks that ICANN take actions to prevent PIR from charging registry fees that exceed the maximum fees allowed in the prior agreement. ICANN contends, given that the June 2019 .ORG Registry Agreement is already in place, this request is for mandatory relief.

99. ICANN is correct that the request as to the Registry Agreement is a mandatory injunction that would alter the status quo. The revised Registry Agreement has been in place since 30 June 2019, PIR has operating under that agreement and, accordingly, has been entitled to request price increases in accordance with the terms of the agreement.¹⁰ Accordingly, a higher degree of scrutiny is required to alter the status quo.

100. Although ICANN could “take actions” with respect to PIR increasing fees, as a practical matter, those actions are more complex than would be required by a prohibitory injunction enjoining ICANN from entering into a renewal agreement without the price control provisions. Essentially,

¹⁰ As addressed in oral argument, ICANN does not raise a defense on the ground that Namecheap’s Emergency Relief Request is untimely. Indeed, Namecheap promptly filed its first Reconsideration Request shortly after it was announced ICANN and PIR entered into the June 2019 Registry Agreement. Thereafter, Namecheap engaged in good faith in the Cooperative Engagement Process and only initiated the IRP only after it became aware of the change of control request and the pending deadline.

Namecheap asks ICANN to renegotiate or terminate the renewed Registry Agreement or, at a minimum, engage PIR in not exercising rights it has under the Registry Agreement.

101. As to the request for relief requiring that ICANN stay all actions that further the change of control, including actions that lead to the renewal of any registry agreement for .ORG or the approval of the change of control, there appears to be no dispute this request is prohibitory in nature and seeks to preserve the status quo. Nonetheless, the request as stated is not entirely practical for at least two reasons. First, the renewal of the Registry Agreement that Namecheap seeks to enjoin has already occurred and, second, pursuant to the terms of the Registry Agreement, ICANN's failure to timely object to the change of control will constitute an approval of the change of control under the terms of the agreement. To avoid a change of control, ICANN must timely reject the change of control request. See Cl. RM 29, Sec. 7.5. Accordingly, this emergency relief request is properly read as a request for a prohibitory injunction enjoining ICANN from effecting an approval of the change of control during the pendency of this IRP.

4. HARM AND SUCCESS ON THE MERITS - REGISTRY AGREEMENT RENEWAL

102. As detailed above, Namecheap does face financial harm if registry prices are increased above those previously allowed by price protections. ICANN's response that prices have not been increased yet, PIR has committed to limit increases for several years and the base Registry Agreement price protections are in place, do not diminish the fact that Namecheap faces potential price increases. ICANN's suggestion that Namecheap does not know if will be harmed because it can pass on price increases to its customers similarly does not diminish the fact that Namecheap's costs may be increased beyond the prior price control levels during the term of the renewed Agreement. On this basis, Namecheap has demonstrated harm and urgency.

103. Further, Namecheap contends that the wrongdoing is not just the renewal but the process leading to the renewal by ICANN's failure to engage in an open and transparent process, failure to give

public commentary proper weight, and failure to give proper consideration to removal of the maximum price protections in processing and entering into the renewed Registry Agreement. ICANN rejects Namecheap's allegations and contends it has done no wrong.

104. Namecheap appears to base its request for interim relief on the requirement for serious questions as to the merits rather than likelihood of success on the merits. By relying on this lower standard, a greater showing in the balancing of harm is required.

105. As to the Registry Agreement renewal process, ICANN was open and transparent in posting the proposed Registry Agreement online and soliciting public commentary. The parties dispute the volume of comments for and against removal of the price controls and ICANN questions the integrity of the comments opposing removal of the cap.¹¹ The Staff report appears to fairly convey the context of comments from both sides although it does not acknowledge most were negative. Report, Cl. Annex 5. The Emergency Panelist accepts Namecheap's accounting that the comments were overwhelmingly against removal of price controls. Reconsideration Request, Cl. Annex 8. It is not surprising that most consumers would be opposed to lifting price caps.

106. Nonetheless, ICANN is correct that it is not obligated to blindly yield to public comment but must instead "make decisions by applying documented policies consistently, neutrally objectively and fairly, without singling out any particular party for discriminatory treatment." With respect to the public comments, ICANN has sufficiently demonstrated for purposes of this emergency proceeding that it took the comments into consideration, even if it reached a determination contrary to the weight of the comments. Namecheap is correct that the Internet community would have been better served by a more

¹¹ The Ombudsman equated identical, computer generated comments to spam. With all due respect to the Ombudsman, unless it was determined that the comments came from the same sender, the comments nonetheless represent the views of many interested persons in the Internet community.

detailed explanation, particularly as to exactly how the price cap removal would be procompetitive with respect to .ORG. Nonetheless, the comments process was largely sufficient.

107. ICANN's compliance with the broader policy process is less clear. Namecheap contends the removal of price controls from legacy TLDs, particularly .ORG, rises to the level of a policy decision that should be considered by ICANN's policy making bodies and not made in the course of a Registry Agreement renewal. ICANN disagrees, suggesting the policy was already considered in the course of development of New gTLDs and the Base Registry Agreement.

108. To resolve this dispute, consideration must be given to important role of policymaking ICANN is obligated to undertake. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization," including ICANN itself, ICANN is charged with "promoting the global public interest in the operational stability of the Internet..." See AOI, Article 2. Accordingly, the AOI requires that "(a)ny determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process. *Id.* The Bylaws further detail requirements for multistakeholder policy development. See, e.g., Bylaws, Sections 1.1(a)(i) and Annexes G-1 and G-2, 1.2(a), 1.2(b)(i). Moreover, the Bylaws establish various policymaking bodies, including the Generic Names Supporting Organization ("GNSO") to be responsible for developing and recommending to the Board substantive policies relating to gTLDs. Bylaws, Article 11.

109. ICANN contends that its action here is implementation of prior policy decision-making regarding gTLDs generally and it has satisfied its transparency and policymaking obligations. (See also Final Determination and Board resolution, Cl. Annex 11 and 12). Further, ICANN contends that it is satisfying Core Values and acting to maintain a competitive DNS environment through the removal of the price controls in the .ORG Registry Agreement. Principally, ICANN contends that the decision as to

removal of the price controls from the .ORG Registry Agreement is a contract administration matter, not a policy matter.

110. Namecheap has not pointed to any AOI or Bylaw requirement that compels decisions as to .ORG be made by policymaking bodies rather than the Board.¹² However, Namecheap contends that the removal of price controls from legacy gTLDs is a policy matter, and the policy determinations in creating the New gTLDs do not apply and expressly preclude removal of legacy gTLD price controls.

111. Although it may well be in the interest of the Internet community to have the decision as to removal of price controls from legacy gTLDs addressed as a policymaking matter, at this preliminary stage, it would be delving too far into a controverted merits issue for the Emergency Panelist to determine whether a new policymaking process was required. More to the point, it is not appropriate for the Emergency Panelist to reject the Board's decision-making as to the best course of action so long as the action is within the realm of reasonable business judgment.

112. On the latter point, on its face, the removal of price controls appears inconsistent with the policy requirement that registry fees be "as low as feasible consistent with the maintenance of good quality service." ICANN has offered limited support and explanation for its proposition that, with respect to .ORG, price control provisions are not necessary because there are 1,200 other gTLDs that are not subject to price controls. IRP Request at 23, Annexes 5-7. This summary conclusion does not clearly take into consideration market characteristics of the .ORG gTLD and its unique positioning in the non-profit community.¹³ Neither party submitted expert economic analysis of market definition and product

¹² Namecheap notes that, in 2008, the ICANN Board adopted the GNSO recommendation that there should be a policy guiding registry agreement renewal. <https://www.icann.ORG/resources/board-material/minutes-2008-01-23-en> Any failure by ICANN staff to effectuate a renewal policy is not grounds to enjoin the renewal of the .ORG in this emergency proceeding.

¹³ Nor, as Namecheap suggests, does it appear to take into account budget planning considerations of registrars and their customers.

substitution in support of its position.¹⁴ Lacking expert analysis on the immediate question, there is no clear basis to conclude that the removal of price controls would favor or disfavor competition.

113. Relatedly, Claimant contends that ICANN's reliance on the Preliminary Analysis of Dennis Carlton with respect to New gTLDs is misplaced as it was not directed to .ORG and appears to rely on the existence of price controls for legacy gTLDs to support the conclusion that price controls should not be required for the New gTLDs.¹⁵ ICANN rejects Namecheap's interpretation.¹⁶

114. Nonetheless, ICANN contends and articulated in the process additional reasons to remove the price control from the .ORG Registry Agreement. Apart from an economic analysis, the Board has articulated a preference to have uniformity among Registry Agreements. IRP Request at 21, Annex 2. ICANN contends that the revised .ORG Registry Agreement terms now track the New gTLD terms as well as recently revised legacy gTLD terms. In the Final Determination on the Reconsideration Request, ICANN stated that the base Registry Agreement, as a whole, benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end users. Reconsider Request 19-2. Namecheap is correct that, in announcing this position, ICANN did not articulate what benefits as to stability and security are to be gained or how it generates a more predictable environment for end users. Undoubtedly however, there is some administrative upside in implementing a single form Registry Agreement. On the whole, ICANN's reasoning comes across as bootstrapping, and it may conflict with the requirement to have the lowest price feasible, but it is an arguably reasonable business judgment.

¹⁴ In the course of questioning by the Emergency Arbitrator, ICANN's counsel stated he was unaware of any economic analysis specific to the .ORG gTLD.

¹⁵ Namecheap's criticism that the Carlton analysis was an after-the-fact justification raised only in the Final Determination of Namecheap's Reconsideration Request (Cl. Annex 11 and 12) may be valid but it does not advance Namecheap's position. One of the purposes of the Reconsideration process is to allow the Board an opportunity to review its decisions and the fact that the Board finds further support for its decision does not diminish the decision.

¹⁶ To ICANN's point, the Carlton Report does state that new gTLDs could "enhance consumer welfare by creating new products and fostering innovation, and promoting future competition" with .com and other TLDs.

115. It has not been fully detailed as to exactly what details were discussed with and considered by the Board for it to reach the conclusion that removal of the price control provisions from .ORG Registry Agreement. At this preliminary stage, however, it is sufficient that ICANN has given the subject consideration and reached a conclusion that is within the realm of a reasonable business judgment. To the extent there are competing Core Values involved, it is for the Board to exercise its judgment as to which competing Core Values are most relevant and to find an appropriate balance.¹⁷

116. Further, there is no showing that ICANN did not meet its obligation to make decisions by applying documented policies consistently, neutrally objectively and fairly, without singling out any particular party for discriminatory treatment. To the contrary, ICANN has made the case that it has policies favoring removal of price controls and application of the base Registry Agreement and it has applied those policies in this instance without singling out any particular party. The decision to remove the price controls directly affects all .ORG Registrars not Namecheap alone (and indirectly affects all .ORG domain customers). There is no showing that Namecheap has been singled out for discriminatory treatment.¹⁸

117. In sum, at this preliminary stage, it would be inappropriate to impose emergency interim relief where it appears the Board has acted in a neutral, objective and fair manner and has given reasoned consideration to whether it is appropriate to remove the price controls from the .ORG Registry Agreement. Given the record, the Emergency Panelist is not in a position to substitute his judgment for that of the Board as to whether removing the price controls for .ORG is procompetitive or advances other stated policy interests.

¹⁷ See *Vistaprint Ltd. v. ICANN*, ICDR Case No 01-14-000-6505 at 187 (2015) (RM-4).

¹⁸ The removal of price controls in the renewal of the .ORG Registry Agreement may harm the .ORG Internet community but there is no showing that any particular party was discriminated against.

118. Finally, Claimant's position that 2013 Registry Agreement, Section 4.2, compels that price control provisions be included in the 2019 Registry Agreement is misplaced. ICANN is correct that parties to an agreement remain free to revise terms in the course of amendments or renewals. However, the inclusion of Section 4.2 does suggest that price control provisions were of particular import and, in that regard, as a matter of contracting practice, additional scrutiny would be justified in revising or eliminating the provisions.

119. In summary, ICANN conducted a public comments process with respect to renewal of the .ORG Registry Agreement but there are serious questions whether ICANN was required to do more in engaging the .ORG community with respect to policymaking in removing the price controls. As well there are open questions as to whether its business judgment that eliminating price controls in the .ORG Registry Agreement was reasonable. Namecheap may ultimately prevail after fuller examination by the IRP Panel. At this preliminary stage, however, the evidence presented does not rise to the level to conclude Namecheap has a likelihood of success on the merits with respect to renewal of the .ORG Registry Agreement and price controls. Moreover, given the balance of harms discussed further herein, the questions presented do not rise to the level to justify interim relief.

5. HARM AND SUCCESS ON THE MERITS – APPROVAL OF CHANGE OF CONTROL

120. ICANN rejects the tie asserted by Namecheap between the removal of the price controls from the Registry Agreement and the risk that a change of control will lead to further harm. Although these are two separate actions, Namecheap is justified in asserting that its claims regarding these actions are related.

121. ICANN has demonstrated that it is engaging in due diligence to evaluate the change of control request. In assessing whether to approve the change of control ICANN is obligated to consider whether the change is in the public benefit. In doing so, ICANN should consider whether it has been

provided all required and requisite information, including information as to Ethos Capital, including its corporate management and ownership structure, financial situation and business plans, to make a proper assessment as to whether a change of control is reasonable and in the public benefit. At present, there is no indication that ICANN will approve the change of control request if it is unjustified. Namecheap is correct that the change of control approval cannot be readily undone but that alone is not a ground for enjoining ICANN from engaging in its duties.

122. As to the merits, here too, Namecheap seeks to meet the lower standard that it has raised serious questions on the merits.

123. Namecheap has correctly pointed out that operation by a non-profit corporation was a major factor in the original grant to PIR.¹⁹ Presumably PIR's nonprofit status was given consideration in renewals as well. However, Namecheap has not pointed to any requirement that compels continuing control by a non-profit corporation. Here again, Namecheap raises a proper question as to whether this is a matter for policymaking rather than contract renewal.

124. Without an express policy requiring that the .ORG Registrar be controlled by and operated as a non-profit corporation, this is just one factor, among many, that ICANN would be expected to properly consider in evaluating the change of control request. ICANN appears to be proceeding reasonably on that basis.²⁰

125. Similarly, Namecheap is correct that PIR made commitments to support the non-profit community and that was a factor in the original grant. Presumably, its ongoing contractual and non-

¹⁹ The DNSO Final Report of the .org Task Force, Section 1 Characteristics of the Organization to Administer, provides in pertinent part, "1a. The **initial delegation** of the .org TLD should be to a non-profit organization that is noncommercial in orientation and the initial board of which includes substantial representation of noncommercial .org registrants." (emphasis added). See Cl. RM-10.

²⁰ See, e.g., 13 February 2020 ICANN counsel letter to PIR counsel, Cl. Annex 23.

contractual commitments to support the community were given consideration in the course of renewals. This is a proper topic of inquiry by ICANN in the course of its due diligence on the change of control request and if ICANN is aware of evidence that PIR, under control by Ethos, will not support its community commitments, ICANN would be expected to take such facts into consideration in evaluating the request.

126. Further, ICANN must consider whether Ethos and PIR will honor PIR contractual commitments if the change of control is approved. At present, PIR has the right to make price increases subject to the terms of the renewed Registry Agreement. According to ICANN, PIR has announced, through pending Public Interest Commitments (PICs), that it will limit price increases for several years to the maximum levels previously allowed. Namecheap may well be correct that, following approval, Ethos and PIR may not be inclined to honor these obligations. ICANN, in evaluating the change of control request, is properly enabled to take that possibility into consideration by asking for appropriate contractual commitments. Further, ICANN remains free to reject the request for change of control if it is not satisfied with PIR responses or determines more time for evaluation is required.²¹ Compelling ICANN to reject the approval outright does not appear justified based on the record presented.²²

127. Likewise, there is no basis to compel ICANN to reject the request now in response to the investigation by the California Attorney General. Namecheap contends that ICANN risks losing its California non-profit status if it approves the change of control. The record does not support that to be an imminent risk justifying interim relief. The evidence suggests that ICANN is cooperating in the

²¹ While ICANN is correct that the purpose of the IRP process is to consider whether ICANN has complied with its charter documents not to evaluate third party conduct, ICANN is clearly obligated to consider both conduct by Ethos and PIR, and persons related to them, for purposes of making its decision on change of control. Any suggestion that Ethos is not a subject of the change of control evaluation because it is not the contract party would be misplaced and constitute a failure on the part of ICANN.

²² Further, without evidence of wrongdoing by ICANN, Namecheap's suspicions regarding the timing of the announcement and role of former ICANN executives do not justify interim relief. These too are matters ICANN is enabled to investigate.

investigation. Should the California Attorney General determine more time is required, it can make the request of ICANN and, if ICANN refuses, the Attorney General has legal remedies available to it. It does not require Namecheap to provide those remedies through this interim relief request.

128. Namecheap appears correct that various communications have not been made public by ICANN in the course of ICANN's evaluation of the change of control request and with respect to the Attorney General's investigation²³; however, enjoining ICANN from approving the change of control, if that is what it ultimately chooses to be the appropriate course, is not the proper remedy.²⁴ As a general proposition, ICANN should require full disclosure from PIR and has every reason to be open and transparent in its review process. A refusal by PIR to fully disclose would, presumably, be a strong ground for ICANN to reject PIR's change of control request.

129. As with the related question of removal of the price controls, Namecheap may ultimately prevail on the merits. However, at this stage, ICANN is engaged in the approval process and Namecheap has not established significant harm, the likelihood of success on the merits or sufficiently serious questions on the merits justifying interim relief with respect to the ICANN's review process.

130. In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel. Further this preliminary assessment of the merits has no bearing on the Attorney General's investigation.²⁵

²³ At Claimant's request, the hearing was reopened to receive ICANN's 15 March 2020 Response to Claimant's Document Information Request regarding the Attorney General's investigation. The Report shows various communications have been withheld. The Emergency Arbitrator has not been asked to evaluate what has been withheld. ICANN is properly entitled to take reasonable steps to protect proprietary business information and attorney-client privileged communications. ICANN has not justified why all PIR responses to ICANN inquiries have not been posted for public review.

²⁴ A more proper remedy, if there was wrongdoing, may be for the removal or reprimand of involved ICANN participants.

²⁵ To be clear, this decision on the Interim Relief Request does not resolve the merits to be fully addressed by the IRP Panel and has no bearing on the Attorney General's investigation.

6. BALANCING OF HARDSHIPS

131. Namecheap contends the balance of hardships decidedly tips in its favor. ICANN disagrees.

132. Namecheap does not fully address the balance of hardships as to the Registry Agreement renewal in its brief. Namecheap has argued that it may be harmed by price increases during the course of the IRP but ICANN argues PIR has committed not to raise prices above previously allowed levels for three years. Accordingly, on the present record, Namecheap has limited, if any, immediate risk of significant harm during the course of the IRP.

133. ICANN contends that it may suffer considerable harm if the requested mandatory injunction is ordered and ICANN is effectively ordered to amend, breach or terminate the 2019 Registry Agreement. Whether PIR would willingly agree to revise the Registry Agreement if ICANN is enjoined is speculation at this point. PIR has operated under the agreement for eight months and has engaged in significant business planning during that period.²⁶ Accordingly, ICANN's suggestion that ICANN will suffer legal challenges and potential disruption with respect to the .ORG registry is credible.

134. On the whole, the balance of hardships as to enjoining ICANN with respect to the renewal of the .ORG Registry Agreement and price control provisions tips in favor of ICANN.

135. As to the change of control decision, Namecheap is correct that it may suffer harm if ICANN wrongly approves the change of control request. It may be difficult to undo the approval. However, as detailed above, there will be no undue harm if ICANN properly engages in the requisite decision-making process..

²⁶ On the other hand, Ethos Capital and PIR are presumably on notice of this IRP and the Attorney General's investigation and would reasonably already be factoring into their business planning the risk of an adverse ruling by the IRP or action by the Attorney General that would preclude or require reversal of the change of control.

136. Namecheap contends that ICANN will not suffer significant hardships from a stay as to the change of control because it has already requested an extension and any prejudice caused by delay is counterbalanced by the integrity of the IRP process. ICANN responds that the extension is for a brief period (until April) not until the final determination by the IRP Panel and there is already integrity to the process.

137. Although ICANN has not submitted evidence to support its position that it will be harmed, it makes a reasonable argument that an extended delay would interfere with the PIR acquisition and could affect PIR funding, operations and community support, resulting in harm to ICANN, particularly as to the .ORG gTLD and with support for non-profit community.²⁷

138. ICANN also makes the argument that an injunction would disrupt its processes and preclude it from considering the request in accordance with its processes. This is a given; however, the integrity of the change of control review process is a larger concern. ICANN is required to balance the competing interests in favor and against approval within the framework of an open, transparent, objective and fair review process that serves the public benefit.

139. On the whole, there is limited basis to question the integrity of ICANN's review process. The balance of hardships as to enjoining a change of control decision tips in favor of ICANN.

IV. COSTS AND FEES

140. As stipulated by the parties, and confirmed in ER PO 1, any costs and fees requests are to be assessed and allocated by the IRP Panel. Accordingly, no costs are awarded.

²⁷ ICANN asked in oral argument that the hardship to Ethos Capital, ISOC and PIR also be considered. However, those entities are not parties to this IRP (nor have they asked to intervene or appear as amici.). Accordingly, the analysis here is focused on balancing hardship between Namecheap and ICANN. Nonetheless, the interests of the global Internet community as a whole bear weight in the process.

V. CONCLUSION

141. Namecheap has not attempted to demonstrate and has not demonstrated a likelihood of success on the merits. Namecheap has, however, sought to demonstrate and has raised serious questions as to the merits, particularly as to (1) any obligation by ICANN to engage in policymaking with respect to the removal of price controls on registry services for legacy gTLDs including .ORG; (2) ICANN's decision-making process in renewing the .ORG Registry Agreement without the historic price controls; and, (3) any obligation by ICANN to engage in policymaking with respect to direct or indirect operation of the .ORG registry by entities other than non-profit entities. Although these questions are raised, the balance of hardships with respect to the requested interim relief tips in favor of ICANN. Accordingly, the request for interim relief is denied. The merits are appropriately further addressed by the IRP Panel to be appointed in this proceeding.²⁸

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²⁸ Although the requested interim relief is denied, the Emergency Arbitrator recognizes that the role of ICANN as a public benefit corporation, its transparency and openness, and the .ORG gTLD are matters of considerable importance to the global Internet community, including both parties. Accordingly, the Emergency Arbitrator encourages further discussion and, as provided for in the IRP Supplemental Procedures, urges the parties to participate in conciliation discussions for the purpose of attempting to narrow the issues and, ideally, reach a sound resolution of this matter.

DECISION

For the reasons stated above, I decide as follows:

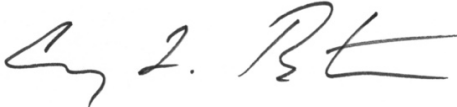
A. Claimant Namecheap, Inc.’s request for interim relief is denied.

B. As stipulated by the parties, any award of costs and fees is to be decided by the IRP Panel and, accordingly, no costs or fees are awarded at this time.

This Decision is an Interim Order and does not constitute an IRP Decision or settlement of the claim submitted in this IRP. In accordance with the ICDR Arbitration Rules, this Decision may be accepted, rejected or revised by the duly appointed IRP Panel.

I hereby certify this Decision was made in Los Angeles, California, United States of America.

20 March 2020
Date



Gary L. Benton, Emergency Panelist