

**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 LIMITED REBUTTAL TO ICANN'S PRE-HEARING  
BRIEF ON THE MERITS**

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## **I. INTRODUCTION**

1. The Claimant, Namecheap, submits this rebuttal in accordance with Procedural Order ('P.O.') No. 14. Namecheap reserves all rights to supplement this rebuttal following the disclosure of documents for which ICANN has invoked legal privilege, and the examination and cross-examination of witnesses. Namecheap also reserves all rights with respect to the fact that it was ordered to submit this rebuttal before the Panel ruled on the disclosure of the communications between ICANN's counsel and Prof. Carlton, including the memorandum Prof. Carlton prepared in 2019. Without access to this information, Prof. Carlton should be excluded as an expert witness, his written testimony should be given no probative value, and the Panel should draw adverse inference regarding the content of the 2019 communications and memorandum of Prof. Carlton.

2. In its Pre-Hearing Brief on the Merits of 30 November 2021, Namecheap has demonstrated that ICANN has violated its Articles of Incorporation and Bylaws 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 and in particular in its decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they can charge to ICANN-accredited registrars for registering and renewing domain names and for transferring a domain name registration from one ICANN-accredited registrar to another.

3. Namecheap has demonstrated how it is directly impacted and harmed by this decision.

4. In response, ICANN argues in its Pre-Hearing Brief on the Merits of 14 January 2022 that Namecheap is not harmed, and that ICANN complied with its processes, when deciding to

remove the price caps in .ORG, .INFO and .BIZ. However, ICANN fails to address many of Namecheap's arguments which remain undisputed.<sup>1</sup>

5. In this limited rebuttal, Namecheap will demonstrate why ICANN's defense is meritless. In Section II, Namecheap explains how ICANN's defense is based on factual inaccuracies. In Section III, Namecheap explains how ICANN misrepresents the rules governing these proceedings. In Section IV, Namecheap shows that ICANN misrepresents and makes an incorrect application of the standing requirement. Section V deals with ICANN's deficient response to the many violations of its Articles of Incorporation and Bylaws. Finally, in section VI, Namecheap explains how ICANN misrepresents Namecheap's claim in an ill-founded attempt to limit the scope of these proceedings.

## **II. ICANN'S DEFENSE IS BASED ON FACTUAL INACCURACIES, MISREPRESENTATIONS OF ICANN'S ROLE AND ITS ACTIONS AND INACTIONS THAT LED TO THE REMOVAL OF THE PRICE CAPS**

### **A. The ICANN Board is not a mere oversight board**

6. ICANN repeatedly claims that its Board is an oversight Board, which delegated to the ICANN staff the authority to renew the .ORG, .INFO and .BIZ registry agreements ('RAs') without price caps.<sup>2</sup>

7. First, the numerous repetitions of such claim do not substantiate it.

8. Second, the claim is unfounded. As explained in Namecheap's Pre-Hearing Brief, both California law and ICANN's Bylaws require that all of ICANN's corporate powers be exercised by, or under the ultimate direction, of its Board.<sup>3</sup>

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<sup>1</sup> ICANN has been given the opportunity to respond to these arguments in its Pre-Hearing Brief on the Merits, which it submitted on 14 January 2022. To the extent ICANN were to use its sur-rebuttal to address these arguments now, that part of ICANN's sur-rebuttal should be disregarded. ICANN makes a general statement in its Pre-Hearing Brief on the merits that its decision not to address part of the historical account provided by Namecheap does not suggest that ICANN agrees in any way with Namecheap's assertions in that account (ICANN Pre-Hearing Brief on the Merits of 14 January 2022, p. 6, footnote 2). If ICANN disagreed with the detailed and substantiated account of ICANN's history, it should have contradicted Namecheap in its Pre-Hearing Brief.

<sup>2</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 5, 37, 89, 93, 101.

<sup>3</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 29-33.

9. In a Congressional hearing, ICANN's President and CEO, Mr. Göran Marby, explained his role as follows:

*'First of all, let me explain a little bit my role. I'm the President and CEO of the ICANN organization, which is a supporting organization to the community and to the Board. **Any decision that is made, it has to be made by the community and not by me.** That is the way that this is set up. I am here to execute the visions of the community.'*<sup>4</sup>

10. That is consistent with ICANN's bottom-up, consensus-driven, multi-stakeholder model, where the Board acts upon the initiative of the community. Only the Board can exercise ICANN's corporate powers, and the ICANN organization (staff, under the leadership of the President and CEO) supports the Board to conduct its business and affairs.<sup>5</sup>

11. There is not a single ICANN governance document that changes the nature of the ICANN Board into a mere oversight Board. And, as previously shown, California corporate law requires that all corporate powers be exercised under the ultimate direction of the Board.<sup>6</sup>

**B. ICANN fails to prove that ICANN Board delegated the authority to renew RAs to ICANN staff**

12. ICANN also repeatedly claims that ICANN Board delegated the authority to renew RAs to ICANN staff.<sup>7</sup>

13. Again, first, the numerous repetitions of such claim do not substantiate it.

14. Second, ICANN fails to prove that the ICANN Board ever delegated that authority.

15. ICANN has invited ICANN Board members Becky Burr and Maarten Botterman to make *post factum* statements confirming the alleged delegation. Their testimonies cannot make up for the fact that the authority was not delegated at the time the questioned decision was

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<sup>4</sup> U.S. Senate, Committee of the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, *Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet*, 14 September 2016, <https://www.judiciary.senate.gov/meetings/protecting-internet-freedom-implications-of-ending-us-oversight-of-the-internet>, recording at around 01:26:00. Later in the hearing, Mr. Marby repeats the role of ICANN as a support organization to the community and the Board, as well as his limited mandate.

<sup>5</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 34-39.

<sup>6</sup> Cal. Corp. Code §300; Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, para. 29.

<sup>7</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 5, 37, 40, 43, 88, 93, 100, 105, 179.

taken. Also, both persons are part of the Board whose actions are under discussion in this IRP. The actions of the Board and inherently of all Board members who took part in the actions are under discussion. These Board members statements – whether on questions of a regulatory nature or on questions of facts – are unreliable.<sup>8</sup>

16. Third, ICANN pretends that “(T)he Board’s delegation of authority was memorialized in November 2016 when the ICANN Board adopted ICANN’s Delegation of Authority Guidelines (“Guidelines”) The purpose of these Guidelines was to “identify the respective key roles of the Board and the Chief Executive Officer (CEO) and the delegation of authority from the Board to the CEO and key staff.” ... The Board explained that its “approval of the Guidelines will have positive impact on the community as it provides additional transparency and clarity about the roles and responsibilities of key members in the ICANN organization.” ... By way of example only, the ICANN Board delegated to the President and CEO the following responsibilities: (i) “Interact[] with the broader Internet community and other interested parties within the scope of ICANN’s Mission and Board’s directives”; and (ii) “Lead[] and oversee[] ICANN’s day-to-day operations.”<sup>9</sup>

17. However, the decisions at stake in this IRP are not part of any of the roles and responsibilities for which the authority was delegated from the ICANN Board to its CEO and key staff. ICANN fails to show how, under its Delegation of Authority Guidelines, ICANN’s CEO and/or staff would have acquired the authority to decide to remove the price caps for .ORG, .INFO and .BIZ.

18. Less drastic decisions were left to the ICANN Board to decide. For instance, in the resolution immediately following the resolution adopting the Delegation of Authority

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<sup>8</sup> Their testimonies are also contradicted by ICANN’s own Ombudsman, who stated that the specific reaffirmation, directing the CEO and Staff to negotiate and execute registry agreement ‘appears to have happened in June 2019’ (Annex 124, p. 4). However, ICANN has been unable to provide a single contemporaneous document showing such specific directions.

<sup>9</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 39.

Guidelines, the ICANN Board issued an explicit resolution authorizing the renewal of the non-price capped .TEL gTLD. Many months later, on 16 March 2017, the renewal of the .MOBI gTLD was also carried out pursuant to an explicit Board resolution. On 24 June 2017, the Board issued a resolution authorizing the ICANN President and CEO (or his designee) to take such actions as appropriate to finalize and execute the new .NET RA, maintaining the price caps.<sup>10</sup> This practice shows that the Delegation of Authority Guidelines did not cover the renewal of RAs for legacy gTLDs, let alone of major legacy gTLDs with market power, such as .ORG, .INFO and .BIZ, especially if in combination with a removal of the price caps.

19. ICANN staff was also clear in its communications that it needed the ICANN's Board approval before ICANN could renew the .ORG, .INFO and .BIZ RAs.<sup>11</sup>

**C. ICANN staff asked ICANN Board for approval of the renewal of RAs which proves that there was no delegation**

20. In contradiction with its unfounded argument that the ICANN Board allegedly delegated the authority to renew RAs to ICANN staff, ICANN has repetitively pointed out that, in reality, ICANN staff has consulted with ICANN Board with a view to making a decision on the renewal RAs.

21. ICANN admitted that: *'As always, ICANN staff committed to "consider the feedback from the community on this issue" and, ... "in consultation with the ICANN Board of Directors, [to] make a decision regarding the proposed registry agreement," which it did.'* and that *'ICANN committed to consider "the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement[s]," which it did.'*<sup>12</sup>

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<sup>10</sup> ICANN, *Adopted Board Resolution 2017.06.24.22*, 24 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.e> (RM 124).

<sup>11</sup> See Section II.C.

<sup>12</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 53, 90, 120.

22. In addition, Redacted - Confidential Information , as is apparent from Annexes 67 and 67bis,<sup>13</sup> and Annexes 82 and 83.<sup>14</sup>

23. It is clear from the above that ICANN's argument regarding the delegation of authority is baseless.<sup>15</sup>

**D. While not a governmental regulator, ICANN is an economic regulator of the DNS**

24. ICANN maintains that it is not a competition or price regulator.<sup>16</sup> ICANN relies on the following Bylaws provision to support its argument<sup>17</sup>:

*'ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any **governmentally authorized** regulatory authority.'*

25. ICANN goes as far as arguing that this provision makes clear that ICANN is '**prohibited** from acting like a government regulator' (no emphasis added).<sup>18</sup> ICANN claims not having the resources or expertise necessary to serve as a competition or price regulator for the DNS.<sup>19</sup> In this respect, ICANN also invokes an IRP panel's opinion (in the *Afilias* IRP case) which it considers precedential and where that panel accepted, in an *obiter dictum*, '*the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct.*'<sup>20</sup>

26. The *obiter dictum* reads:

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<sup>13</sup> See Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 153-154.

<sup>14</sup> See Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 173-176.

<sup>15</sup> ICANN also argues that '*[t]here are hundreds, if not thousands, of other agreements that ICANN has entered into with various other third parties in the Internet community*' and that '*[i]t would be nearly impossible for the Board to complete its other tasks if it were required to negotiate, consider, or issue formal resolutions each time an agreement was negotiated, renewed, or entered into.*' (ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 94). That argument is a red herring. Even if no formal resolution may be necessary for each and every agreement, the Board cannot abdicate its authority with respect to a drastic decision such as the removal of the price caps in legacy gTLDs which may change the future of the Internet forever.

<sup>16</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 6, 9, 10, 45, 102, 109, 124, 127.

<sup>17</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 14.

<sup>18</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 128.

<sup>19</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 128.

<sup>20</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 9 and 129.



*‘[E]ven though it is not strictly necessary to decide the question, the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct. Compelling evidence to that effect was presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain, and it is consistent with a public statement once endorsed by the Claimant, in which it was asserted:*

While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators. Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.’<sup>21</sup>

27. First, contrary to ICANN’s argument, Article I(1)(c) of the ICANN Bylaws does not affirm that ICANN has no regulatory authority or that it would be prohibited from acting like a governmental authority; only that it does not hold any ‘*governmentally authorized regulatory authority*’.

28. This provision was inserted in ICANN’s Bylaws in October 2016 against the context of the IANA transition and the relinquishment of U.S. government oversight over ICANN. The Internet community and the U.S. were jointly concerned that any government would have control over ICANN and that ICANN would be exercising *governmentally authorized* regulatory authority on behalf of such foreign power. In this respect, the Assistant Secretary of the NTIA, Lawrence E. Strickling, testified before the U.S. Senate:

*‘There is no possibility of governments being able to take control of ICANN through the provisions that have now been put in the Bylaws. This was one of our core criteria, when we announced the transition in 2014 and the community responded quite thoroughly in making sure that the plan that they have crafted would prevent that from ever happening.’<sup>22</sup>*

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<sup>21</sup> 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. 352 (emphasis added).

<sup>22</sup> U.S. Senate, Committee of the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, *Protecting Internet Freedom: Implications of Ending U.S. Oversight of the Internet*, 14 September 2016, <https://www.judiciary.senate.gov/meetings/protecting-internet-freedom-implications-of-ending-us-oversight-of-the-internet>, recording at around 1:12:45

29. The Bylaws provision thus affirms that ICANN is independent from governments and exercises no governmental authority. That is what the Bylaws reflect. Nothing more.

30. Second, the Bylaws provision cannot undo the fact that ICANN *de facto* acts as an economic regulator. It cannot undo the fact that, since its creation, ICANN has been regulating prices of major legacy gTLDs, in contract provisions or otherwise, and continues to do so for some. It cannot undo the fact that ICANN has years of experience in regulating prices and related aspects, such as vertical integration.<sup>23</sup>

31. ICANN's own expert, Prof. Carlton, affirms ICANN's regulatory role. He recognizes that through contractual price restrictions ICANN subjected the registry price of certain gTLDs to 'price regulation'. In this respect, Prof. Carlton distinguishes between (i) regulation through '*contractual price restrictions that have been in the registry agreements for various registries*', and (ii) '*government regulation*'.<sup>24</sup> It is common ground that ICANN is not a *government* regulator; however, ICANN is an economic regulator, regulating registry prices.

32. Third, ICANN's regulatory role is part of the reason why it was created and it has been confirmed by the DoJ and DoC. The DoJ stressed ICANN's '*obligation to promote competition at the registry level*' and to '*manage gTLDs in the interests of registrants and to protect the public interest in competition*', urging ICANN to fulfil this obligation by developing '*a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices*'.<sup>25</sup> The DoJ highlighted that '**ICANN should create rules**

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<sup>23</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021 paras. 81-85, 389. As Namecheap also made clear, ICANN must step in when market mechanisms are insufficient to create economic openness of the DNS and the Internet. (Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 238-241).

<sup>24</sup> ICDR Case No. 01-20-0000-6787, Expert Report of Dennis W. Carlton of 14 January 2022, para. 11, footnote 8. Contractual restrictions can be included in individual contracts or be made applicable to all registry operators through a consensus policy.

<sup>25</sup> Letter from Deborah A. Garza, Acting Assistant Attorney General (U.S. Department of Justice) to Meredith A. Baker, Acting Assistant Secretary for Communications and Information (NTIA), 3 December 2008, attached (Continued...)

*fostering a competitive environment to the greatest extent possible*’ and explained why that is the case.<sup>26</sup> That is, *‘the antitrust laws generally do not proscribe a registry operator’s unilateral decisions made under the processes established by ICANN – such as, for instance, pricing decisions.’*<sup>27</sup> The DoJ thus recognized ICANN’s role in making pricing decisions and explained why this role of ICANN is critical in fostering a competitive environment.

33. The DoC echoed these directions by the DoJ and transmitted them to ICANN.<sup>28</sup>

34. ICANN’s economic regulatory role was also confirmed before the U.S. House of Representatives, where the following statements were made by the Chairman of the Subcommittee on Oversight and Investigations:

*‘Most notably, ICANN is responsible for introducing competition into the registration of domain names.’*<sup>29</sup>

35. Another Subcommittee Member echoed this by stating that ICANN *‘was established [...] to bring competition to the business of registering Internet domain names and moving it from the control of the Department of Commerce to a non-governmental organization.’*<sup>30</sup>

36. In the same meeting, Andrew J. Pincus, the DoC’s General Counsel, testified that the registry operator of *‘the commercially significant domains, .com, .net, and .org [had to] agree*

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to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (RM 21), pp. 4 and 8.

<sup>26</sup> Letter from Deborah A. Garza, Acting Assistant Attorney General (U.S. Department of Justice) to Meredith A. Baker, Acting Assistant Secretary for Communications and Information (NTIA), 3 December 2008, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (RM 21), p. 6, footnote 10.

<sup>27</sup> Letter from Deborah A. Garza, Acting Assistant Attorney General (U.S. Department of Justice) to Meredith A. Baker, Acting Assistant Secretary for Communications and Information (NTIA), 3 December 2008, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (RM 21), p. 6, footnote 10.

<sup>28</sup> Letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (RM 21).

<sup>29</sup> U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, *Domain Name System Privatization: is ICANN out of Control*, 22 July 1999 (RM 192), p. 2.

<sup>30</sup> U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, *Domain Name System Privatization: is ICANN out of Control*, 22 July 1999 (RM 192), p. 2.

to principles that will produce real competition'. In his prepared statement, he noted that the agreement between ICANN and NSI had to 'assure reasonable supervision to prevent the exercise of [...] market power in a way that injures consumers.'<sup>31</sup>

37. Finally, the *obiter dictum* in the *Afilias* IRP case is not precedential for this IRP. The *Afilias* IRP is not comparable to the present case. The *Afilias* IRP case was not about ICANN's actions and inactions as a price regulator. Instead, it related to ICANN's acceptance of the public auction result of the .WEB gTLD, followed by Verisign's acquisition of the .WEB applicant who prevailed in the auction. The panel in that case was not presented with (i) ICANN's long-lasting history of regulating prices and related aspects, such as vertical integration, (ii) Claimant's convincing evidence and unrebutted expert opinion that ICANN has been acting as an economic regulator in the DNS<sup>32</sup>, (iii) ICANN's own expert witness confirming ICANN's regulatory role<sup>33</sup>, and (iv) ICANN's withholding of its approval of a change of control of the .ORG registry operator, PIR.

38. Instead, the *Afilias* panel was presented with the registry operator of .INFO as a claimant, who abandoned its competition claim<sup>34</sup> and who publicly endorsed the claim that ICANN is not an antitrust regulator.<sup>35</sup> It is not surprising that a registry operator like Afilias would endorse such a claim. They would benefit from a toothless ICANN that does not oppose the acquisition of Afilias by Donuts after it abolished price caps on its major legacy gTLD, .INFO. If the *Afilias* panel meant that ICANN is no governmental antitrust regulator, Namecheap agrees. However, while rooted in the private sector, ICANN remains an economic

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<sup>31</sup> U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, *Domain Name System Privatization: is ICANN out of Control*, 22 July 1999 (**RM 192**), p. 18.

<sup>32</sup> **Economic Expert Report II**, paras. 58-62.

<sup>33</sup> ICDR Case No. 01-20-0000-6787, Expert Report of Dennis W. Carlton of 14 January 2022, para. 11, footnote 8.

<sup>34</sup> 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**), paras. 234 and 245.

<sup>35</sup> 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. 352.

regulator of the DNS. It has the authority and the expertise to set price caps for legacy gTLDs.<sup>36</sup> ICANN used this authority until 2019, when it removed the price caps.

39. And, ultimately, removing the price caps is also a regulatory decision. If, as ICANN argues, it was prohibited from acting like a regulator, then it was prohibited from taking a regulatory decision to remove the price caps.

**E. ICANN’s rationale for removing the price caps is based on a misrepresentation of the DNS space**

40. ICANN argues that *‘.BIZ, .INFO, and .ORG have an extremely small and steadily declining share of domain name registrations’*, and that *‘competition provides robust market-based protections against supra-competitive price increases in these gTLDs.’*<sup>37</sup> It considers that the domain name market *‘has matured from just a handful of gTLDs in the early 2000s [...] to over 1,200 gTLDs today’* and that *‘[t]he introduction of significant competition into the DNS thus has created a materially different competitive landscape where the number of TLDs, as opposed to price control provisions, are more than likely to constrain registry pricing.’*<sup>38</sup>

41. First, ICANN’s argumentation is based on the share of registered domain names within the entire DNS space. This argumentation shows ICANN fundamental misunderstanding (or misrepresentation) of the DNS space. Indeed, ICANN effectively assumes that the DNS space operates as one single market. ICANN assumes that potential new and existing registrants in each TLD – including in .ORG, .INFO and/or .BIZ – could relatively easily substitute their preferred TLD for just any other TLD. As we will explain below, such understanding of the functioning of the DNS space is incorrect and it is incomprehensible that ICANN makes such a mistake or that it develops such position just for the sake of its defense in this very case. One would expect ICANN to know better.

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<sup>36</sup> **Economic Expert Report III**, paras. 76-95; *See also* **Economic Expert Report II**, paras. 58-62, 91.

<sup>37</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, paras. 10, 135-139.

<sup>38</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, paras. 135-139.

42. As demonstrated at length in both the Second and the Third Economic Expert Report, the ‘*share of a TLD in total registrations, and the dynamics of this share, are not reliable indicators of market power of the TLD unless the relevant market in which the TLD belongs has have first been correctly defined.*’<sup>39</sup> Yet, ICANN uses the share of a TLD in total registrations as its sole indicator of the alleged absence of market power, without any evidence contradicting Prof. Dr. Verboven and Dr. Langus’ expert analysis and without properly identifying the TLD markets.

43. ICANN does so, while it has itself recognized the need to examine ‘*whether the domain registration market is one market or whether each TLD functions as a separate market*’, and relatedly ‘*whether registrations in different TLDs are substitutable.*’<sup>40</sup>

44. In 2006, the ICANN Board directed ICANN’s President to commission a study to these specific questions. In 2008, when observing that ICANN had not yet commissioned or performed this study, the DoC and the DoJ urged ICANN to carry out such study.<sup>41</sup> As Namecheap made clear in its Pre-Hearing Brief, there are no signs that ICANN ever commissioned or engaged in such study. Yet, without such study, ICANN is treating the DNS space as one single market.

45. In other words, ICANN is using TLDs, such as .EU (which is limited for registration by EU residents only), .DE (which is targeted to Germany), .LAW (which is a highly specialized gTLD which is restricted to qualified lawyers and authorized legal institutions), as perfect substitutes for .ORG, .INFO and .BIZ. No sound non-legal organization outside the EU would consider any of these examples as a substitute for .ORG, .INFO or .BIZ. These are just

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<sup>39</sup> **Economic Expert Report III**, para. 141.

<sup>40</sup> **Regulatory Expert Report**, para. 100; ICANN, *Minutes of the Special Meeting of the Board of 18 October 2006*, <https://www.icann.org/resources/board-material/minutes-2006-10-18-en> (**RM 193**).

<sup>41</sup> Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, para. 370-373; **Regulatory Expert Report**, para. 100; Letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**); **Economic Expert Report III**, para. 144.

a few examples. A thorough analysis as to why new gTLDs and other TLDs are not close substitutes for .ORG, .INFO and .BIZ is provided in the **Economic Expert Reports II and III**.<sup>42</sup>

46. In contrast with ICANN's flawed analysis of market power, based on the unsupported assertion that the DNS space operates as one single market, Prof. Dr. Verboven and Dr. Langus have made a thorough analysis of the market power of .ORG, .INFO and .BIZ, assessing the characteristics of supply and demand for registry services and using multiple reliable indicators of market power like margins and evolution of prices, which jointly support the fact that .ORG, .INFO and .BIZ have market power.<sup>43</sup>

47. With respect to .ORG, ICANN's own expert does not even contest Prof. Dr. Verboven and Dr. Langus' view that .ORG likely holds considerable market power.<sup>44</sup>

48. With respect to .INFO and .BIZ, Prof. Dr. Verboven and Dr. Langus show that they score high on reliable indicators of market power. ICANN's expert only engaged with some of the observations made by Prof. Dr. Verboven and Dr. Langus. Even where ICANN's expert commented on these observations, his reasoning does not convince. In part, he relies on misleading statements, which are forcefully rebutted by Prof. Dr. Verboven and Dr. Langus.<sup>45</sup>

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<sup>42</sup> **Economic Expert Report II**, paras. 111-131; **Economic Expert Report III**, paras. 105-106, 118, 121-129, 135-140, 158-170.

<sup>43</sup> **Economic Expert Report II**, paras. 132-192; **Economic Expert Report III**, paras. 114-185.

<sup>44</sup> Instead, Prof. Carlton argues that price caps would not be justified on .ORG for reasons other than absence of market power. Prof. Dr. Verboven and Dr. Langus explain in their response why these other reasons provide no justification for the removal of price caps (See **Economic Expert Report III**, paras. 147-157).

<sup>45</sup> For a detailed analysis, see **Economic Expert Report III**, paras. 159-185, where Prof. Dr. Verboven and Dr. Langus *inter alia* explain that several statements by Prof. Carlton are misleading:

*'Several statements in this passage are misleading. We have already explained why the statement that our reasoning "ignores the costs of regulation" is false and misleading in Section 5.3.3. As for the rest, nothing in our reasoning in relation to price differentials between .ORG, .INFO, and .BIZ and certain popular new gTLDs implies that we would "want to regulate many new gTLDs".*

*[...]*

*Prof. Carlton's statements above are also misleading because they suggest that we relied solely on price differentials for conclusions on market power in our Second Report. This is not the case. In our analysis we have assessed the characteristics of supply and demand for registry services and used several indicators of market power like margins and evolution of prices.'* (paras. 166-170)

In other parts, his reasoning is inconsistent with the position he took in another case, where he served as ICANN's expert witness.<sup>46</sup>

49. Second, ICANN's argument that the DNS space has matured into a competitive landscape is unsupported and disputed by substantiated evidence of the contrary.

50. In 2016, a study commissioned by ICANN<sup>47</sup> observed no effect of new gTLD entry or registrations on legacy TLDs:

*'We also have evaluated how the entry of new gTLDs is related to the registration activity of other TLDs, such as legacy TLDs. Since legacy TLD registrations have not fallen and new gTLD registrations are growing, total TLD registration has increased since the beginning of the New gTLD Program. In both our Phase I and Phase II Assessments, we found no aggregate (worldwide) effect of new gTLD entry or registrations on legacy TLD registrations: registrations of legacy TLDs continued to follow the same pattern before and after the beginning of the New gTLD Program. This is consistent with new gTLDs generally not being treated as substitutes for legacy TLDs.'*<sup>48</sup>

51. ICANN provides no evidence showing that these observations were no longer valid when it decided to remove price caps in .ORG, .INFO and .BIZ. And ICANN provides no evidence that these observations would no longer be valid today.

52. In contrast, Namecheap has shown that the introduction of new gTLDs had no significant effect on the market power of .ORG, .INFO and .BIZ.

53. Indeed, Prof. Dr. Verboven and Dr. Langus have shown that .ORG's margins have been increasing since 2012, which is a reliable indicator that its market power has not decreased with the introduction and growth of new gTLDs. .ORG's increasing margins also indicate that .ORG has been exercising its market power by setting high prices.<sup>49</sup> Furthermore, .INFO and

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<sup>46</sup> In the *Afilias* IRP, ICANN's expert issued a report on 30 May 2019 (**RM 194**). In this report, he recognized certain characteristics of demand and supply for TLDs that give rise to market power. Despite having recognized their relevance in his report of 30 May 2019, he fails to recognize them here. See **Economic Expert Report III**, paras. 18, 133-134, 137-140.

<sup>47</sup> The study assessed the competitive effects associated with the new gTLD program. It does not analyze the specific questions for which the ICANN Board instructed its President to commission a study.

<sup>48</sup> G. Rafert and C. Tucker (2016), *Phase II Assessment of the Competitive Effects Associated with the New gTLD Program*, <https://newgtlds.icann.org/en/reviews/cct/competitive-effects-phase-two-assessment-11oct16-en.pdf> (**RM 195**), p. 53.

<sup>49</sup> **Economic Expert Report II**, paras 136 and 159.



.BIZ also set prices for new registrations high above the prices of most popular new gTLDs, which again indicates that .INFO and .BIZ command high margins as a result of their considerable market power.

54. Prof. Dr. Verboven and Dr. Langus have also analyzed whether the demand for registrations in .ORG, .INFO and .BIZ reacted promptly to the entry of new gTLDs. They made the following observations:

*‘.ORG’s registration volumes were not visibly negatively affected by the entry of new gTLDs between 2015 and 2016 when registrations in new gTLDs grew fast. This is consistent with lack of .ORG’s response in price, which is why it strengthened our conclusion that new gTLDs do not effectively compete with .ORG.*

*[...]*

*The evolution of registration volumes in .INFO is consistent with the hypothesis that the entry of new gTLDs has not had a strong competitive impact on .INFO.*

*[...]*

*[R]egistration in .BIZ did not respond much to the entry of new gTLDs (which indicates that these are not close substitutes for .BIZ) as can be seen by the fact that its domains have been, in fact, relatively stable compared to many popular new gTLDs.*

*[T]he volumes of registrations in .BIZ are indeed relatively stable compared to the volumes of the most popular new gTLDs.’<sup>50</sup>*

55. Finally, Prof. Dr. Verboven and Dr. Langus have established that significant switching costs of existing registrants limit effective competition between TLDs for existing registrants.<sup>51</sup>

56. On the basis of comprehensive evidence, Prof. Dr. Verboven and Dr. Langus concluded that .ORG, .INFO and .BIZ continue to hold considerable market power and that therefore, the scope for price caps to improve the economic outcomes in the DNS is significant.<sup>52</sup>

57. ICANN’s rationale for the removal of the price caps – i.e., that the DNS space (which, without any substantiation, ICANN considers as one single market) has matured into a competitive landscape – is just empty rhetoric.

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<sup>50</sup> **Economic Expert Report III**, paras. 171-185.

<sup>51</sup> **Economic Expert Report II**, paras. 124-131; **Economic Expert Report III**, paras. 135-140.

<sup>52</sup> **Economic Expert Report II**, para. 9.

**F. The alleged ‘protections’ in the base RA are inept for curtailing the market power of .ORG, .INFO and .BIZ**

58. ICANN makes much of the alleged ‘*protection against price gauging [...] built directly into the Base Registry Agreement currently applicable to .BIZ, .INFO and .ORG.*’ ICANN argues that the registry operators ‘*must give sufficient notice of any upcoming price increases and registrars (and therefore registrants can then lock in existing pricing for up to ten years, thereby nullifying any impact from a price increase.*’<sup>53</sup>

59. The ‘protection’ that ICANN refers to is taken up in Section 2.10 of the Base RA, which ICANN seems to present as a *new* protection offered by the Base RA.<sup>54</sup> Section 2.10 of the Base RA essentially provides that registry operators must provide advance notice of any price increases (30 days for new registrations and 180 days for renewals) and offer the possibility to register the domain name at their current price for up to ten years. This protection (albeit in simpler terms) already existed in the 2006 and 2013 RAs for .ORG, .INFO and .BIZ. In accordance with Section 7.3(b) of the 2006 and 2013 RAs and in addition to the price caps, registry operators had to give prior notice of *any* price increase (*i.e.*, both renewals and new registrations) and continue offering domain name registrations for periods of up to 10 years:

2006 .ORG RA <sup>55</sup>	2013 .ORG RA <sup>56</sup>
<u>Section 7.3. Pricing for Domain Name Registrations and Registry Services.</u>	<u>Section 7.3. Pricing for Domain Name Registrations and Registry Services.</u>

<sup>53</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 140.

<sup>54</sup> See ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, paras. 41, 44, 45: ‘*The preference was to transition the legacy gTLDs to the Base Registry Agreement to promote consistency across all registry operators so that the legacy gTLDs would have the same agreement as all of the new gTLDs, to the extent possible, including the **new protections** contained in the Base Registry Agreement. [...] ICANN’s preference was to transition the 2013 Registry Agreements to the Base Registry Agreement, given its **additional protections** for registrars and registrants and increased operational efficiencies for ICANN, registry operators, registrars, and registrants. [...] ICANN considered [...] the **additional protections** afforded to registrars (and therefore hopefully passed on to registrants) by the Base Registry Agreement **from a pricing perspective.** [...] **Aligning with the Base gTLD Registry Agreement would also afford protections to existing registrants.** The registry operator must provide six months’ notice to registrars for price changes and enable registrants to renew for up to 10 years prior to the change taking effect, thus enabling a registrant to lock in current prices for up to 10 years in advance of a pricing change.’ (emphasis added)*

<sup>55</sup> The .INFO and .BIZ RAs contain similar clauses, offering the same advance notice and lock-in requirement.

<sup>56</sup> The .INFO and .BIZ RAs contain similar clauses, offering the same advance notice and lock-in requirement.

(a) Pricing. From the Effective Date through six (6) months following the Effective Date, the price 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, shall not exceed a total fee of US\$6.00 (the "Maximum Service Fee"). Commencing on 1 January 2007, the Maximum Service Fee charged during a calendar year for each annual increment of a new and renewal domain name registration and for transferring a domain name registration from one ICANN-accredited registrar to another, may not exceed the Maximum Service Fee during the preceding calendar year multiplied by 1.10. The same Service Fee shall be charged to all ICANN-accredited registrars for new and renewal domain name registrations. Volume discounts and marketing support and incentive programs may be made if the same opportunities to qualify for those discounts and marketing support and incentive programs is available to all ICANN-accredited registrars.

7.3(a) Pricing. From the Effective Date through 31 December 2013, the price 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, shall not exceed a total fee of US\$8.25 (the "Maximum Service Fee"). Commencing on 1 January 2014, the Maximum Service Fee charged during a calendar year for each annual increment of a new and renewal domain name registration and for transferring a domain name registration from one ICANN-accredited registrar to another, may not exceed the Maximum Service Fee during the preceding calendar year multiplied by 1.10. The same Service Fee shall be charged to all ICANN-accredited registrars for new and renewal domain name registrations. Volume discounts and marketing support and incentive programs may be made if the same opportunities to qualify for those discounts and marketing support and incentive programs is available to all ICANN-accredited registrars.

(b) Adjustments to Pricing for Domain Name Registrations. Registry Operator shall provide no less than six months prior notice in advance of any price increase for domain name registrations and shall continue to offer domain name registrations for periods of up to ten years. Registry Operator is not required to give notice of the imposition of the Variable Registry-Level Fee set forth in Section 7.2(c).

7.3(b) Adjustments to Pricing for Domain Name Registrations. Registry Operator shall provide no less than six months prior notice in advance of any price increase for domain name registrations and shall continue to offer domain name registrations for periods of up to ten years. Registry Operator is not required to give notice of the imposition of the Variable Registry-Level Fee set forth in Section 7.2(c).

60. In other words, the protection offered by the advance notice of price increases and the possibility to register domain names for up to 10 years at the existing price level **existed already since 2006**.

61. More importantly, this long-term registration and renewal option offers **no effective protection**. First, the option is available only for existing registrations or registrations that are

to take place within 6 months. Any registration beyond that period is unprotected. Second, the option requires a costly long-term commitment. Only few organizations operate with 10-year budgets or horizons. Namecheap’s data confirms that the vast majority of registrations (around 97%) is for one year. Only a tiny fraction of registrations with Namecheap was for long periods (around 0.5% for 5-year registrations and renewals and 0.17% *c.q.* 0.13% for 10-year registrations *c.q.* 9-year renewals).<sup>57</sup> As Prof. Dr. Verboven and Dr. Langus explain, ‘*the fact that a very small share of registrants purchase two-year or longer contracts upon registering a new domain indicates that many registrants prefer to pay a somewhat higher renewal price at the end of the first year rather than committing to a two-year or longer contract at the time of a new registration.*’<sup>58</sup> Hence, the long-term registration and renewal option offers no adequate protection against a registry ‘*exercising its market power by increasing prices gradually over time in the future, instead of by means of a one-time larger price increase.*’<sup>59</sup>

**G. The costs of price regulation are minimal, and the benefits of price regulation largely outweigh these minimal costs**

62. ICANN claims that Prof. Dr. Verboven and Dr. Langus ‘*do not adequately consider the costs of price regulation in these gTLDs, including the difficulty of setting an optimal price that is typically left to market forces*’ and that ‘*[s]et against these costs, any benefits of price controls are quite small.*’<sup>60</sup> It argues that ‘*the societal costs of price regulation outweigh any benefit from price regulation in [the .ORG, .INFO and .BIZ] gTLDs*’.<sup>61</sup>

63. ICANN’s argumentation is flawed.

64. First, ICANN grossly overestimates the costs of price regulation on .ORG, .INFO and .BIZ. While ICANN has over 20 years of experience in regulating prices in major legacy

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<sup>57</sup> **Economic Expert Report III**, para. 161, footnote 141.

<sup>58</sup> **Economic Expert Report III**, para. 189.

<sup>59</sup> **Economic Expert Report III**, para. 189

<sup>60</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 10

<sup>61</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, paras. 135, 141-142.

gTLDs and over 15 years of experience in the joint administration of price caps in .ORG, .INFO and .BIZ, ICANN provides no evidence of the costs associated to it. Yet again, ICANN's argumentation is just empty rhetoric.

65. Prof. Dr. Verboven and Dr. Langus demonstrate that the cost of determining, monitoring, and enforcing the price caps are low.<sup>62</sup> If ICANN's expert had been consistent in the application of his assumptions to his reasoning (*quod non*), he would have concluded that *'the costs of determining price caps would likely be zero, or close to zero.'*<sup>63</sup> And even if ICANN's expert used a proper counterfactual, he should have reached the conclusion that the costs of price regulation in .ORG, .INFO and .BIZ are limited:

*'There is no evidence that the renewal of registry agreements with price caps required (or would require) prolonged negotiations or that it involved (or would involve) complex calculations. In any case, ICANN has been using price caps for over 20 years (and they are still in force on .COM and .NET). It can therefore be presumed that ICANN has acquired significant experience about how to set them efficiently (and that ICANN has information about the likely effects of price caps, including potentially negative ones).*

*As for monitoring costs, registrars themselves have been monitoring the compliance with price caps almost automatically, as part of their daily business interactions with registries. They still do so in relation to .COM and .NET. In these interactions, registrars would likely promptly detect any breaches of price caps immediately. Given the immediate effect and an unambiguous record of registry prices in transactions between registries and registrars, monitoring the registries' compliance with price caps can indeed be fully automated at minimal additional costs.*

*Enforcing price cap provisions on .ORG, .INFO, and .BIZ did not likely result in significant costs either. Indeed, we understand that the registries of .ORG, .INFO, and .BIZ generally complied with price cost provisions. If evidence to the contrary exists, it must be in ICANN's possession.'*<sup>64</sup>

66. Second, the balancing of costs and benefits of price caps by ICANN's expert is methodologically flawed. Either his views are inconsistent, or he fails to respect the basic rule that a balancing exercise must be done using the same parameters, *i.e.*, the same price cap

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<sup>62</sup> Economic Expert Report III, paras. 80-83.

<sup>63</sup> Economic Expert Report III, para. 80.

<sup>64</sup> Economic Expert Report III, paras. 81-83.

scheme must be used throughout the balancing exercise. Prof. Dr. Verboven and Dr. Langus demonstrate that ICANN's expert's position on the likely costs and benefits of price caps is therefore untenable.<sup>65</sup>

67. Finally, ICANN overestimates the societal costs of price regulation. As Prof. Dr. Verboven and Dr. Langus demonstrate, the risk that price caps in .ORG, .INFO and .BIZ would be detrimental to welfare is limited.<sup>66</sup> ICANN's expert's opinion on societal costs (the fear that quality will be provided only to a minimal level) is purely hypothetical and making abstraction of the concrete situation of .ORG, .INFO and .BIZ. At the same time, ICANN's expert himself observes that the services of Verisign (.NET and .COM) and of PIR (.ORG) go beyond the minimum level of services. Price caps have thus not prevented these registries from providing a higher level of service than the minimum required.<sup>67</sup> In other words, price caps have not limited their incentives to innovate and provide high levels of service. It is not clear why this would be any different in relation to the registries of .INFO and .BIZ.<sup>68</sup>

68. Prof. Dr. Verboven and Dr. Langus have analyzed the likely costs of price caps on .ORG, .INFO and .BIZ in over five pages in the **Economic Expert Report II**. They identified four ways in which price caps could have costs if they hindered the competitive process in the DNS space. They analyzed each of these concerns in detail, specifically in relation to price caps on .ORG, .INFO and .BIZ. Their analysis shows that the risks that price caps would lead to costs are limited and concerns are not significant.<sup>69</sup>

69. ICANN and its expert did not engage with this analysis. Instead, they hypothesize on a theoretical risk and make several sweeping and misleading statements, trying to

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<sup>65</sup> **Economic Expert Report III**, paras. 69-75.

<sup>66</sup> **Economic Expert Report III**, paras. 84-87.

<sup>67</sup> **Economic Expert Report III**, para. 86.

<sup>68</sup> **Economic Expert Report III**, para. 86.

<sup>69</sup> **Economic Expert Report II**, paras. 193-211; **Economic Expert Report III**, paras. 88-95.

mischaracterize statements made by Namecheap and the economic experts.<sup>70</sup>

**H. ICANN failed to exercise the necessary due diligence in its purported deliberative process on the price cap removal**

70. ICANN argues that it performed ‘*its own due diligence and deliberations when considering the best course of action for the upcoming renewals*’ of the .ORG, .INFO and .BIZ RAs.<sup>71</sup> ICANN claims that its staff ‘*discussed the .BIZ, .INFO, and .ORG Registry Agreements at several ICANN staff meetings (some of which included ICANN’s in-house counsel), and considered a variety of factors before proposing a way forward.*’

71. The only evidence that ICANN adduces in support of its contention is (i) one email chain,

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<sup>72</sup>, and (ii) a witness statement by Mr. Weinstein that was made for the purpose of these proceedings.

72. This purported evidence is not demonstrative of any exercise of due diligence. Rather, if Mr. Weinstein’s untested testimony is correct, it shows that ICANN proceeded on the basis of unsupported assumptions which prove to be incorrect. That is not the reasonable due diligence and care that one would expect from a public benefit organization that must operate in the interest of the Internet community as a whole, especially when taking such a drastic decision on the removal of price caps.

73. In the table below, we list the factors that ICANN allegedly considered in its deliberations (left column), and we show why none of these factors, taken individually or together, warranted a removal of the price caps (right column):

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<sup>70</sup> For example, ICANN’s expert states that Prof. Dr. Verboven and Dr. Langus ‘*appear to assume that ICANN is the perfect regulator, one capable of setting an optimal price that protects registrants against unwarranted large price increases, yet simultaneously incentivizes the investments important to consumers.*’ (Carlton 14 January 2022 Report, para. 43). However, Prof. Dr. Verboven and Dr. Langus by no means relied on any such assumption. See **Economic Expert Report III**, paras. 91-95.

<sup>71</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 45.

<sup>72</sup> **Annex 67bis**.

<b>ICANN allegedly considered:</b>	<b>While:</b>
<p>‘ICANN’s goal of treating the .BIZ, .INFO, and .ORG registry operators equally with the operators of new gTLDs and other legacy gTLDs’</p>	<p>It is unjustified to treat major legacy gTLD operators with market power the same as new gTLD operators.</p> <p>Other legacy gTLD operators remain subject to price caps.</p> <p><i>See Namecheap’s Pre-Hearing Brief, paras. 96-102, 410, 412-414.</i></p>
<p>‘That transitioning to the Base Registry Agreement would ensure consistency for registries, registrars, and registrants, and provide increased operational efficiencies’</p>	<p>Consistency and increase operational efficiencies should never trump the interests of the Internet community as a whole and put the openness of the Internet at risk.</p> <p>Nothing prevented ICANN from transitioning to the Base RA, while maintaining price caps in .ORG, .INFO and .BIZ.</p>
<p>‘That the Base Registry Agreement, which was drafted with the Internet community, contained a number of safeguards and security and stability requirements that were more robust than the 2013 Registry Agreements’</p>	<p>Nothing prevented ICANN from adopting the allegedly more robust safeguards and security and stability requirements, while maintaining price caps in .ORG, .INFO and .BIZ.</p>
<p>‘The additional protections afforded to registrars (and therefore hopefully passed on to registrants) by the Base Registry Agreement from a pricing perspective’</p>	<p>As demonstrated in Section 0, these so-called ‘additional’ protections already existed under the 2006 and 2013 RAs for .ORG, .INFO and .BIZ.</p> <p>Moreover, they are ineffective in curtailing the market power of .ORG, .INFO and .BIZ.</p>
<p>‘The maturation of the domain name market since ICANN’s inception and the introduction of significant consumer choice and competition through the New gTLD Program’</p>	<p>As demonstrated in Section II.E, the alleged maturation is unsubstantiated and contradicted by a 2016 study performed on ICANN’s behalf. Prof. Dr. Verboven and Dr. Langus demonstrate that the finding that the introduction of new gTLDs had no demonstrable effect on the market power of .ORG, .INFO and .BIZ is still valid today.</p> <p>Moreover, ICANN is making unsupported assumptions about a domain name <i>market</i>, while it never properly defined the relevant market. While being ordered to do so, ICANN never assessed whether the domain</p>



<b>ICANN allegedly considered:</b>	<b>While:</b>
	registration market is one market or whether each TLD functions as a separate market.
‘The extremely low number of registrations in these three gTLDs relative to the number of registrations in all TLDs’	<p>This consideration factor is building further on ICANN’s incorrect and unsupported characterization of the DNS space as one single market.</p> <p>As demonstrated in the <b><u>Economic Expert Reports II and III</u></b> and explained in Section II.E, market shares are an unreliable factor to determine market power and the need for price caps.</p> <p>Moreover, by qualifying the number of registrations in .ORG, .INFO and .BIZ as ‘extremely low’, ICANN shows that it was biased in its decision-making. While the number of registrations may seem low relative to .COM, which is by far the largest TLD, .ORG, .INFO and .BIZ are among the largest TLDs with a stable customer base.</p>
‘The fact that ICANN is not a price or competition regulator and therefore should not be required to monitor the prices registry operators charge registrars for registrations in these gTLDs.’	That is simply incorrect, as shown in Section II.D.
‘The absence of any government mandate requiring price control provisions, as compared to .COM.’	The absence of any government mandate is of no relevance and provides no justification for ICANN violating its Articles of Incorporation and Bylaws.

74. ICANN’s alleged consideration factors can only be interpreted as window-dressing in the context of these proceedings. Many factors are factually incorrect and demonstrative of ICANN’s bias. None of the factors invoked warrants a removal of price caps in .ORG, .INFO and .BIZ.

**I. ICANN’s privilege claim cannot make up for not providing the Board’s independent rationale in approving the price cap removal**

75. ICANN further maintains that ‘*the ICANN Board received a privileged Board briefing*

*setting forth the relevant background and the intended course of action.*<sup>73</sup> While invoking privilege for this briefing, ICANN submits that *‘ICANN staff presented the history of price control provisions in various gTLD contracts, how the concept of price controls was considered by the community during the development of the Base Registry Agreement for the New gTLD Program, and the rationale for transitioning to the Base Registry Agreement.’*<sup>74</sup>

76. ICANN adduces no contemporaneous evidence in support of this contention. If ICANN had indeed presented such overview and rationale, then there is no reason for ICANN to cloak it in privilege. Indeed, there is nothing privileged about a presentation regarding *‘the history of price control provisions in various gTLD contracts’*. Such a presentation would give a factual overview; not legal advice. The same applies to the alleged presentation as to *‘how the concept of price controls was considered by the community during the development of the Base Registry Agreement for the New gTLD Program’*. These are elements of fact; not advice, let alone legal advice.

77. Finally, the alleged *‘rationale for transitioning to the Base Registry Agreement’* cannot qualify as legal advice. Such rationale should come from the Board that is elected to do so<sup>75</sup> and has a fiduciary duty to perform this role; not from ICANN’s legal counsel.

78. As already explained in Namecheap’s Pre-Hearing Brief, ICANN and its constituent bodies are required to document and publicly disclose the rationale for their decisions, which must include detailed and fact-based explanations.<sup>76</sup> As determined by the IRP Panel in the *Dot Registry case*, the Board must exercise independent judgment in its decision-making. Its

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<sup>73</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 47.

<sup>74</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 47.

<sup>75</sup> A cross-section from the ICANN community nominates Board members in accordance with Article 7 of the ICANN Bylaws.

<sup>76</sup> Namecheap’s Pre-Hearing Brief of 30 November 2021, para. 326.

consideration of the issue must go beyond rubberstamping the memoranda that ICANN staff prepared.<sup>77</sup>

79. ICANN only comments on the *Dot Registry* case with respect to the ICANN Board's consideration of Namecheap's Reconsideration Request 19-2. ICANN argues that it was transparent about its consideration of this Reconsideration Request. That is incorrect, as ICANN cloaks many of the documents in relation to the Board's consideration of this reconsideration request in privilege.<sup>78</sup> More importantly, that is not the only transparency violation at issue here. The lack of transparency also relates to the alleged deliberations of ICANN and its Board in its consideration of the removal of price caps.

80. As explained in Namecheap's Pre-Hearing Brief, by shielding from public disclosure the agenda's, deliberations, minutes, decisions, voting record, and rationale, ICANN has put itself in contravention of Articles II and III of its Articles of Incorporation, Article 1(2)(a) of its Bylaws, Article 2(1) *juncto* Article 3(6)(a)-(c) of its Bylaws, Article 3(1) of its Bylaws, and Article 3(6)(c) of its Bylaws.

81. ICANN cannot deny this by simply claiming that the Board was briefed about the deficient and secret rationale for removing the price caps.

82. The available evidence shows that the Board was not briefed appropriately and failed to consider the removal of price caps with an appropriate amount of facts. As Namecheap explained: together with the rationale for rejecting Namecheap's Reconsideration Request 19-2, the minutes of the Board's 21 November 2019 meeting show that the ICANN Board did not consider the economic impact of the renewal of the .ORG, .INFO and .BIZ RAs without price caps and its adverse effect on the Internet community as a whole.<sup>79</sup> Hence, Mr. Cherine

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<sup>77</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel, 29 July 2016 (Dot Registry IRP Declaration, **RM 175**), §§147-149.

<sup>78</sup> See Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 417-424.

<sup>79</sup> Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 192-193, 329-330.

Chalaby, and potentially others who attended the secret Board meetings, may have been very effective in shifting the Board's focus away from the sensitive price caps issue.<sup>80</sup> ICANN does not even disclose who, apart from its Board members and unidentified legal counsel, attended these secret meetings. The record shows that Mr. Cherine Chalaby, Mr. Cyrus Namazi and Ms. Vinciane Koenigsfeld were directly involved in the preparation of the secret meetings.<sup>81</sup> ICANN opposes to the testimony of any of those key witnesses.

**J. The public comments on the proposed RA renewals were bona fide, justifiable and authoritative**

83. ICANN claims that hundreds of public comments were identical because people used a template prepared by the Internet Commerce Association (ICA).

84. First, the number of comments was 3,200. Many comments came from reputable organizations, who expressed their genuine concern.<sup>82</sup>

85. Second, what this organization appears to have done is suggest language that people interested to send in comments on ICANN's proposed actions. People could use the language in the template or extract it and reuse the language in a self-generated mail. And people could edit their comments.<sup>83</sup>

86. Third, people use templates all the time, especially when they support the same cause. Standard language helps structure and understand people's views.

87. ICANN uses templates all the time. Here are some examples:

- 'Public Comments'<sup>84</sup> can now be made exclusively through ICANN's form available on ICANN's website. Any individual or organization can submit comments to any open proceeding located at: <https://www.icann.org/public->

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<sup>80</sup> See Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 149-161, 337-339

<sup>81</sup> **Annexes 66 and 66bis**, Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 149-151.

<sup>82</sup> **Annex 111**; Namecheap's Pre-Hearing Brief of 30 November 2021, para. 166.

<sup>83</sup> For the sake of clarity, Namecheap is not a member of ICA and was not involved in ICA's template creation.

<sup>84</sup> <https://www.icann.org/en/public-comment> (**RM 197**)

comment. People will need to create or log in to ICANN Account in order to leave a comment on an open proceeding.<sup>85</sup>

- ‘Submitting a Complaint to ICANN Contractual Compliance’, which ICANN accompanies with the following message: *‘To submit a complaint, select the form next to the issue which best describes your concern in the chart below. Before submitting your complaint, please read the information on this page in its entirety.’*<sup>86</sup>

‘Complaints web-form’<sup>87</sup> which ICANN recognizes help the Complaints office<sup>88</sup> in centralizing the location to submit complaints related to the ICANN org, i.e., receiving complaints, researching them, collect facts, reviews analyze, and resolve issues as openly as possible, helps the ICANN org build on its effectiveness, and contribute to increased transparency from the Org, and aggregates the data from complaints to identify and solve for operational trends that should be improved. The form is the only way for interested parties to submit complaints.

88. Fourth, ICANN disregarded all comments as spam, seeking support from the ICANN ombudsman who had *‘recognized that many of the public comments “seem clearly to be computer generated,” and equated them to “spam.”’*<sup>89</sup>

89. The ombudsman reported as follows:

*‘[S]eeing as how the public comments can be filled out and submitted electronically, it is not unexpected that many of the comments are, in actuality, more akin to spam.’*<sup>90</sup>

90. The ombudsman and ICANN org deliberately decided to ignore the thousands of public comments from concerned stakeholders, which were duly submitted through the ICANN comment portal. The letter sent by ICA general counsel to the ombudsman on this matter speaks

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<sup>85</sup> <https://itp.cdn.icann.org/en/files/communications-tool/icann-public-comment-submission-guidelines26july2021-en.pdf> (RM 198)

<sup>86</sup> <https://www.icann.org/compliance/complaint> (RM 196).

<sup>87</sup> <https://survey.clicktools.com/app/survey/response.jsp>

<sup>88</sup> <https://www.icann.org/complaints-office> (RM 199).

<sup>89</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 51.

<sup>90</sup> Evaluation by the ICANN Ombudsman of Reconsideration Request 19-2, 7 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf> (Annex 124).

volumes and the many arguments demonstrating ICANN's and the ICANN ombudsman's mistake deserve to be cited here.<sup>91</sup> Here is only an extract:

*'There was an unprecedented groundswell of public opposition to the Proposed .org Renewal Registry Agreement as demonstrated by the 3,200 Comments which were properly submitted. Each of these comments expressed the genuine perspective of the person or organization that submitted the comment. Many of these Comments were from major non-profit organizations, community groups, small associations, religious organizations, environmental groups, academics, and individual registrants. One could reasonably conclude that these Comments are indicative of the tens of thousands of other individuals and organizations with similar concerns that either were not aware of the Comment Period or who did not take the time and trouble to submit a Comment.*

*You however, attempted to denigrate and dismiss the volume of Comments on the purported basis of many of them being "spam". You attempted to justify your conclusion on the basis that many of the comments were, according to you, "computer generated" and were "identical, with only the email address of the comment submitter changing." This is misleading.*

*As a way to facilitate engagement with ICANN by the millions of .org registrants who would be harmed by the terms of the .org renewal agreement drafted by ICANN staff, and who are largely unfamiliar with ICANN's public comment procedure and who may be intimidated by what can only be construed as a user un-friendly procedure requiring individual email correspondence on complex policy matters, the Internet Commerce Association ("ICA") established a web page which facilitated a user-friendly and simple way for concerned stakeholders to make their voice heard. Any interested person could use the user-friendly ICA form to send a Comment to ICANN. Hundreds and perhaps thousands of individuals on their own initiative used the comment form as an aid to participating in the ICANN comment process. The vast majority of Commenters who used the ICA web page facility had no affiliation with the ICA and were unknown to the ICA.*

*The form allowed Commenters to write their own original Comment, or to choose from a selection of possibly applicable comments, or to create a comment from a combination of both. This is something that ICANN itself should have done long ago, and indeed ICANN is currently seeking feedback from stakeholders about changing the current procedure for submitting comments. In the ICANN survey (See; <http://input.icann.org/app/survey/response.jsp>), ICANN asks in part, "Would you (or a group you directly contribute to) respond more often to Public Comments if the consultation included short and precise questions regarding the subject matter in a Survey Monkey or similar format?"*

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<sup>91</sup> Letter from Zak Muscovitch (General Counsel, ICA) to Mr. Herb Wayne (Ombudsman, ICANN) of 12 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf> (**Annex 125**).

*Accordingly, human interaction was present in each and every one of the Comments which were submitted via the ICA user-friendly form. Each person who used the form took the time and effort to submit the form and select the comments that they wished to make or used the form to submit their own comments. All followed the established procedures which do not exclude emails submitted through a user-friendly portal. Most of these Commenters were from outside of the usual ICANN community of Commenters, as they learned of this important issue from their registrar, from the press, from blogs, from online forums, and from each other.*

*Furthermore, contrary to your claim that these Comments “only [included] the email address”, and did not otherwise identify the sender, each Comment submitted generally included the Commenter’s name and email address, both of which are normally transmitted by a sender’s own email application as with all correspondence and Comments submitted by email in the usual course. This was not “spam” as you alleged. “Spam” is unwelcome, unsolicited commercial messages sent from an unknown source. Contrary to your mischaracterization, these Comments expressed the genuine opinions of individuals from the community that ICANN purports to serve, and who took the trouble to share their viewpoints to better inform ICANN’s decision- making process, only to find their views scorned and disregarded.*

*Rather than dismiss and effectively disenfranchise thousands of Commenters who duly expressed their views using this method, an Ombudsman should have embraced them and encouraged them. As you yourself admit, an Ombudsman’s job is to listen. You failed to listen or were otherwise determined not to listen. Instead, you dismissed and deprecated legitimate Comments from members of the public and that is a disappointing dereliction of duty for someone in your position. In our view, your mischaracterization of much of the Comments submitted by the public as “spam” ostensibly submitted by spammers, calls into question your ability to fairly and impartially carry out your primary function which is to encourage and respect stakeholders who express themselves to ICANN. Moreover, you failed to conduct any meaningful research prior to reaching your conclusions on the nature of the Comments, other than apparently by visiting a web page. You could have and should have made inquiries of the ICA which would have informed you of the actual nature of its facilitation efforts.’*

91. ICA had asked the ICANN ombudsman to apologize but to our knowledge to date he refused to do so.

92. ICANN’s refusal to change its course of action in response to genuine concern by a cross-section of the Internet community is also inconsistent with ICANN’s past behavior. As Namecheap explained in its Pre-Hearing Brief, identical concerns were raised previously by the Internet community when ICANN agreed with Verisign to lift the price caps in .NET. Despite having already executed the renewed .NET agreement, ICANN reversed its decision

to lift the price caps in .NET, a decision which ICANN now tries to hide.<sup>92</sup> The issues and concerns raised in the public comments related to .NET are identical to the issues and concerns in the public comments related to .ORG, .INFO and .BIZ.<sup>93</sup> Yet this time, ICANN fails to address them without any justification.

93. Finally, insofar as this still needs to be pointed out, ICANN does not prove that these comments were indeed properly considered, nor the basis on which it chose to dismiss them.

### **III. ICANN MISREPRESENTS THE RULES GOVERNING THE CURRENT PROCEEDINGS**

#### **A. ICANN misrepresents the standard of review**

94. As clearly laid out in Rule 11 of ICANN's Interim Supplementary Rules and Article 4(3)(i) of the Bylaws, the Panel must conduct an '*objective de novo examination of the DISPUTE*'. ICANN agrees.

95. Yet, with respect to ICANN Board actions and inactions, ICANN submits that the Panel must '*apply a more limited review [...], which can be disturbed only if they are outside the realm of reasonable business judgment.*'<sup>94</sup> ICANN argues that Article 4(3)(i)(iii) of its Bylaws '*creates a carve-out from [the] general standard [of Article 4(3)(i)] for claims arising from the Board's exercise of its fiduciary duties.*'<sup>95</sup>

96. ICANN provides no support for such a 'carve-out'. Rule 11 of ICANN's Interim Supplementary Rules and Article 4(3)(i)(i-iii) of the Bylaws should be understood on the basis of their actual texts, in their natural and ordinary meaning. Nothing in the text suggests such a carve-out. In its Pre-Hearing Brief, Namecheap already explained that nothing in the text points to a deviation from the objective and *de novo* standard that the IRP Panel must apply to assess

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<sup>92</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, para. 99.

<sup>93</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 96-102.

<sup>94</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 64.

<sup>95</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 60.



a violation of ICANN's Articles and/or Bylaws.<sup>96</sup> ICANN does not engage with that argument. It merely avers that Article 4(3)(i)(iii) of its Bylaws creates a carve-out.

97. Moreover, as Namecheap explained in its Pre-Hearing Brief, the standard of review was modified in 2016 with a view to increase ICANN's accountability and strengthening the effectiveness of the IRP. ICANN's interpretation of Article 4(3)(i)(iii) would be diametrically opposed to this stated purpose.

98. Even if one were to assume that Article 4(3)(i)(iii) constitutes an exception to the general rule (*quod non*), it must be interpreted narrowly. Consequently, nothing prevents the IRP Panel to replace the Board's decision with its own, if the IRP Panel determines that the Board's action or inaction is not within the realm of reasonable business judgment.<sup>97</sup>

99. Finally, to the extent that the language of the standard of review is ambiguous (*quod non*), the Panel should construe that language *contra proferentem*, because it was drafted by ICANN.

#### **B. ICANN misrepresents the Panel's authority**

100. ICANN argues that Namecheap's request for relief '*far exceed[s] the scope of the IRP Panel's authority*'.<sup>98</sup> ICANN's argument relies solely on a narrow and isolated reading of Article 4(3)(o) of its Bylaws, ignoring the stated purposes of an IRP.

101. Namecheap explained in its Pre-Hearing Brief that the Panel is fully empowered under the Bylaws to resolve disputes by ordering remedies that ensure ICANN complies with its Articles of Incorporation and Bylaws. In this respect, Namecheap referred to specific Bylaws provisions which make clear *inter alia* that the IRP (i) is designed to '*[e]nsure that ICANN **complies** with its Articles of Incorporation and Bylaws [..., and] is accountable to the global*

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<sup>96</sup> Namecheap's Pre-Hearing Brief of 30 November 2021, para. 254.

<sup>97</sup> Namecheap's Pre-Hearing Brief of 30 November 2021, para. 255.

<sup>98</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 177.

*Internet community and Claimants*’, (ii) must lead to ‘**binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction**’, and (iii) provides ‘*a mechanism for the **resolution** of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.*’<sup>99</sup>

102. ICANN does not engage with Namecheap’s argument and ignores these provisions completely. Instead, ICANN avers, without any support, that Article 4(3)(o) of its Bylaws ‘*expressly establishes and circumscribes the authority of an IRP Panel.*’<sup>100</sup> ICANN’s narrow and isolated reading of Article 4(3)(o) of the Bylaws completely ignores the principle of integration (requiring that a set of rules is to be interpreted as a whole) and the maxim of *ut magis valeat quam pereat* (requiring that provisions are to be interpreted so as to give them the fullest effect consistent with the normal sense of the words and with the text as a whole in such a way that a reason and meaning can be attributed to every part of the text). If ICANN’s isolated interpretation were withheld, Articles 4(3)(a), 4(3)(v); and 4(3)(x) would be rendered meaningless.

103. Moreover, ICANN’s interpretation also makes no sense from a logical point of view and would destroy the very purpose of the IRP as ICANN’s supreme accountability mechanism. Indeed, ICANN’s reasoning comes down to arguing that this Panel has the authority to declare that ICANN has violated its Articles of Incorporation and Bylaws, but that ICANN retains its discretion to maintain the violation. That would be absurd and make the IRP proceedings meaningless. It would be as if the U.S. Supreme Court only had the power to declare that an act of Congress is unconstitutional, but not the power to strike down the law. It

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<sup>99</sup> Article 4(3)(a) of ICANN’s Bylaws; Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, paras. 261-266.

<sup>100</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, para. 175.

is because of this absurd reasoning, which ICANN invoked in IRPs under the previous rules<sup>101</sup>, 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. IRPs are ICANN’s supreme accountability mechanisms and the only mechanism to ensure that ICANN complies with its fundamental obligations. Such compliance would not be assured if one adopts ICANN’s views on the Panel’s authority in the context of these proceedings. The U.S. Government did not relinquish its oversight on ICANN before it obtained the assurance that ICANN had strong and effective accountability mechanisms in place. ICANN agreed and presented the IRP as an alternative to litigation and a means to resolve a dispute.<sup>102</sup> ICANN cannot argue now that the IRP was meant to be a toothless mechanism, incapable of providing resolution to a dispute.

### C. ICANN misrepresents the evidentiary rules

104. ICANN also seriously misrepresent the evidentiary rules. It argues that the ICDR Rules and the IRP Interim Supplementary Procedures ‘*preclude this Panel from ordering testimony from a person who has not provided a written witness statement*’. ICANN does so by offering a narrow and unsupported reading of the ICDR Rules and the IRP Interim Supplementary Procedures, making complete abstraction of the *lex arbitri* and general practice in international arbitration. ICANN goes as far as claiming that neither the Federal Arbitration Act (‘FAA’)

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<sup>101</sup> See e.g., ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015 (**RM 4**). The *Vistaprint* Panel determined, under the previous set of IRP rules, that it had no authority to award affirmative relief, but that it could instead recommend that the ICANN Board take, or refrain from taking, actions or decisions (**RM 4**, para. 149). The *Vistaprint* panel recommended that the Board consider *Vistaprint*’s claim of disparate treatment, and added that, without the exercise of judgment by ICANN’s Board on this question, the Board would risk violating its Bylaws. The panel stated that the Board’s actions or omissions in this area bore the scrutiny of independent and objective review, without any presumption of correctness (**RM 4**, paras. 180, 190, 196).

<sup>102</sup> Article 4(3)(a) of ICANN’s Bylaws; See also 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**).

nor the California International Arbitration and Conciliation Act ('CIACA') apply in these procedures.<sup>103</sup> ICANN submits that neither the FAA nor the CIACA are cited or referenced in any ICANN IRP materials and no Panel has ever applied any portion of these statutes in an IRP for any purpose.<sup>104 105</sup>

105. While IRP proceedings may contain specific rules that deviate from general arbitration practice, any such *sui generis* rules do not operate in a legal vacuum. Just like any other international arbitration, this IRP cannot be detached from the *lex arbitri* at the seat of arbitration. In P.O. No. 1, the Panel already ruled that this IRP '*proceeding falls within the CIACA, to the extent that statute is not preempted by the Federal Arbitration Act.*' ICANN never objected to the Panel's ruling, nor did it ask the Panel to reconsider its ruling. ICANN explicitly agreed that California, U.S. be the seat of arbitration.

106. ICANN's contention that neither the FAA nor the CIACA are cited or referenced in any ICANN IRP materials and no Panel has ever applied any portion of these statutes in an IRP for any purpose is thus contradicted at least by this Panel's ruling in P.O. No. 1, which ICANN omits. The timing in these proceedings did not permit Namecheap to check whether there might be other IRPs, applying specific portions of the FAA and/or the CIACA. But in any event, that is of no relevance. Quite evidently, the ICANN IRP materials do not refer to the FAA or the CIACA, as IRPs are international in nature and ICANN cannot determine the seat of arbitration before a claim is being raised. For example, in the *Afilias* IRP, the parties

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<sup>103</sup> ICANN's Brief in opposition to the subpoenaing of additional witnesses and Claimant's motion of an in-person hearing of 7 February 2022, paras. 4-11.

<sup>104</sup> ICANN's Brief in opposition to the subpoenaing of additional witnesses and Claimant's motion of an in-person hearing of 7 February 2022, para. 8.

<sup>105</sup> ICANN also argues that, in case of ambiguity, the rule of *contra proferentem* is inapplicable, because the ICANN community was involved in drafting the Interim Supplementary Procedures. ICANN's argument is a red herring. The ICANN community's involvement does not undo the fact that the drafting occurred under ICANN's control. ICANN selected who was on the drafting team and, at all times, ICANN kept the authority to approve or disapprove the Interim Supplementary Procedures and/or to request changes.

agreed that the seat of the IRP be London, England.<sup>106</sup> Accordingly, the panel in the *Afilias* IRP made application of the English Arbitration Act, English common law, and general international arbitration practice.<sup>107</sup> It would have been quite absurd for that panel to refer to the FAA and/or the CIACA and ignore the parties' agreement on the seat of arbitration.

107. Leading case law and legal authority contradicts ICANN's narrow and unsupported reading of the ICDR Rules and the IRP Interim Supplementary Procedures. In the case of *Industrial Risk Insurers v. Man Gutehoffnungshutte*, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit affirmed the basic authority of arbitral tribunals to call witnesses to a hearing. The Court found that an AAA tribunal, operating under the AAA Supplementary Procedures for International Commercial Arbitration, which have since evolved into the ICDR Rules<sup>108</sup>, had not acted unfairly, and acted within its power by calling a witness *sua sponte*. The arbitral tribunal summoned a witness to testify about his involvement in a redesign of an industrial facility. The individual had been an expert retained by the respondent to review the site, and to analyze the effect of a prior accident and the prospects of a new design. The respondent refused to summon him and objected to claimant's request to do so. The tribunal acted on its own motion and requested his attendance at the hearing.<sup>109</sup>

108. The international arbitration community welcomed this decision, as it '*affirms the basic authority which a tribunal has to call witnesses to a hearing.*'<sup>110</sup>

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<sup>106</sup> 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 194**), para. 22: '*The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 January 2019, the Respondent has confirmed its agreement with this proposal.*'

<sup>107</sup> ICDR Case No. 01-18-0004-2702, *Afilias Domains No. 3 Limited v. ICANN*, Decision on Afilias' Article 33 Application, 21 December 2021 (**RM 201**), e.g., paras. 92-103.

<sup>108</sup> Gary B. BORN, *International Commercial Arbitration (Third Edition)*, 3rd edition, Kluwer Law International 2021, p. 204, footnote 1510.

<sup>109</sup> U.S. Court of Appeals, Eleventh Circuit, *Industrial Risk Insurers v. Man GHH*, 141 F.3d 1434 (11<sup>th</sup> Cir. 1998), 22 May 1998 (**RM 202**).

<sup>110</sup> Judith LEVINE, "Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)" in Albert Jan VAN DEN BERG (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (Kluwer Law International; ICCA & Kluwer Law International 2015), pp. 315-356, p. 331 and references there.

109. Namecheap's common sense reading of the ICDR Rules (as echoed in the IRP Supplementary Procedures) is also supported by the purpose of these rules. In describing these rules, Gary Born explains that the '*AAA/ICDR's international rules are based principally on the UNCITRAL Rules, and were intended to permit a maximum of flexibility.*'<sup>111</sup> ICANN's narrow reading of the rules would put the proceedings into a straight-jacket, thereby destroying the very purpose of the rules that govern the proceedings, which is to allow for the flexibility that characterizes international arbitration.

110. ICANN tries to destroy the flexibility of proceedings even further by invoking a meritless time bar.<sup>112</sup> Namecheap already explained in its brief of 26 January 2022 that its request was timely.<sup>113</sup>

111. ICANN tries to counter Namecheap's showing by making an expansive interpretation of the Panel's P.O.'s, which would not allow for any flexibility. ICANN is not well placed in making this request, as ICANN has failed to meet the deadlines for producing documents multiple times and, most recently, failed to meet the deadline, set in P.O. No. 14, to '*communicate to the Panel whether the Hearing should be remote or in person, and if in person, the venue*'. ICANN thus requests flexibility from the Panel when it unambiguously fails to meet deadlines (including the deadline to communicate about the nature of the hearing provided in of P.O. No. 14), but insists on the strict observance of any other deadlines, combined with an expansive interpretation of what is covered by the deadline. It would be a serious due process violation to admit ICANN's belated objection to an in-person hearing, while rejecting Namecheap's timely request that the Panel summon key witnesses. Even if Namecheap's

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<sup>111</sup> Gary B. BORN, *International Commercial Arbitration (Third Edition)*, 3rd edition, Kluwer Law International 2021, p. 205.

<sup>112</sup> ICANN's Brief in opposition to the subpoenaing of additional witnesses and Claimant's motion of an in-person hearing of 7 February 2022, paras. 12-15.

<sup>113</sup> Namecheap's Brief on the need to subpoena designated witnesses and motion for an in-person hearing of 26 January 2022, paras. 40-46.

request were late (*quod non*), the Panel cannot at the same time accept to consider ICANN's untimely objection to an in-person hearing while rejecting Namecheap's request to summon witnesses. The Panel would not be treating the parties with equality and would unduly limit Namecheap's right to be heard and to be given a fair opportunity to present its case.

112. ICANN's interpretation of the P.O.'s regarding the identification of witnesses is also at odds with general practice in international arbitration. In their commentary on the *Expedited* procedures in international arbitration, Christophe Seraglini and Patrick Baeten recognized the need for flexibility throughout the proceedings, notably with respect to the calling of witnesses, which is best dealt with when the arbitral tribunal has a better understanding of the case:

*'There might be some procedural elements which cannot or should not be determined at the first case management conference, and which will therefore be decided later on, when the arbitral tribunal has a better understanding of the case. **These notably include the necessity of holding a hearing, and of calling witnesses and experts.** Moreover, case management must remain **flexible** during the whole proceedings. If the procedure and the key issues of the case should be determined as early as possible, it does not and cannot mean that all such determinations are cast in stone. The arbitral tribunal will have to consider modifying the procedure at a later stage, notably accepting new claims, taking into account the particularities of the case: ensuring compliance with party autonomy and balancing due process with time management considerations.'*<sup>114</sup>

113. In the present case, the Panel deferred its ruling on an in-person hearing and held multiple case management conferences to allow for flexibility in tailoring these proceedings as they progress.

114. Finally, ICANN assumes that the ICANN witnesses that Namecheap identified would offer cumulative testimony to ICANN's friendly witnesses.<sup>115</sup> There is no basis for such assumption. ICANN has offered only witnesses, whose actions and inactions are challenged in

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<sup>114</sup> Christophe SERAGLINI and Patrick BAETEN, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted", in Laurent LÉVY and Michael POLKINGHORNE (eds), *Expedited Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Volume 16, (Kluwer Law International; International Chamber of Commerce (ICC) 2017), pp. 34-69, p. 57, para. 127.

<sup>115</sup> ICANN's Brief in opposition to the subpoenaing of additional witnesses and Claimant's motion of an in-person hearing of 7 February 2022, paras. 16-21.

these proceedings. As shown throughout this rebuttal, their testimony is unreliable. Namecheap anticipates that the witnesses it identified for subpoena will be able to confirm the unreliable nature of the testimony provided by ICANN's friendly witnesses.

115. ICANN argues that no additional witnesses are necessary by trying to minimize the importance of these proceedings. In this respect, ICANN takes issue with Namecheap's claim that this IRP is probably about '*the most drastic decision that ICANN has ever taken.*'<sup>116</sup> Namecheap stands corrected. This IRP is probably about the most drastic decision that ICANN has ever taken, going against the expressed will of the community and disregarding the interests of the Internet community as a whole.

#### **IV. ICANN MISREPRESENTS AND MAKES AN INCORRECT APPLICATION OF THE STANDING REQUIREMENT**

116. As explained in Namecheap's *prima facie* showing of standing and reiterated in Namecheap's Pre-Hearing Brief, 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*'.<sup>117</sup>

117. This standing requirement was introduced to avoid frivolous claims.

118. In these proceedings, ICANN seeks to have a non-frivolous claim dismissed by changing the standing requirement. ICANN tries to convince the Panel that, instead of *an* injury or harm, Namecheap must show *material* harm.<sup>118</sup> There is no basis for this *contra legem* interpretation of the standing requirement.

119. Not only is ICANN's interpretation in clear contradiction with the text of the Bylaws and the IRP Interim Supplementary Procedures; it is also anathema to the purpose of the IRP

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<sup>116</sup> ICANN's Brief in opposition to the subpoenaing of additional witnesses and Claimant's motion of an in-person hearing of 7 February 2022, para. 20.

<sup>117</sup> Bylaws, Article IV(3)(b)(i) (**RM 2**).

<sup>118</sup> See ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 1, 3, 74.



as an accountability mechanism. In response to questions by the U.S. Senate, ICANN's President and CEO explained in writing:

*'The transition actually increases the ability for **those who believed they are harmed** by ICANN's actions (or inaction) to bring challenges against ICANN. Instead of only having to resort to litigation, **with the transition comes enhanced accountability measures** through which ICANN can be required to reconsider its action or be subject to an independent review of whether its actions were consistent with its Bylaws.'*<sup>119</sup>

120. In the current proceedings, ICANN tries to do the exact opposite: it tries to decrease the ability for those who are harmed by ICANN's actions and inactions and limit its accountability by adding a non-existent criterion to the standing requirement.

121. And even with this non-existent criterion added, ICANN fails in its objection to Namecheap's standing.

122. First, ICANN initially admitted that Namecheap was materially harmed, but then changed its strategy. On 23 August 2019, ICANN's Board Accountability Mechanism Committee (BAMC) '*determined that [Namecheap's Reconsideration] Request 19-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.*'<sup>120</sup> The referenced Bylaws article provides:

*'The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.'*

123. The requirements for bringing a reconsideration request (which are different to the standards for bringing a request for IRP) immediately precede this Bylaws provision and

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<sup>119</sup> 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).

<sup>120</sup> Annex 123.

include that ‘[e]very Requester must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request’.

124. By determining that Namecheap’s Reconsideration Request 19-2 is sufficiently stated, the BAMC thus accepted that Namecheap met the requirements for bringing its Reconsideration Request and has been materially harmed and adversely impacted by ICANN’s decision to remove the price caps.

125. Probably upon instigation of ICANN’s internal and external legal counsel<sup>121</sup>, the ICANN Board came back on the BAMC’s determination, now claiming that Namecheap had not demonstrated that it has been adversely affected by the decision. On 3 November 2019, the ICANN Board stated in its proposed determination:

*‘The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/.INFO Renewed RAs create an “uncertainty of price increases.”[...] **That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty itself is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently stated.**[...] However, the BAMC’s conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm. The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs.’<sup>122</sup>*

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<sup>121</sup> ICANN’s Privilege Log mentions numerous communications between ICANN staff and both internal and external counsel regarding Reconsideration Request 19-2, in the period between the BAMC’s determination and the Board’s actions on the Reconsideration Request. These communications include emails seeking and providing legal advice, sometimes including attachments, and notes and memoranda from ICANN’s internal and external counsel (see [Annex 84](#), e.g., REV00010413 (Draft notes prepared by ICANN external counsel, dated 29 August 2019), REV00026772 and REV00026773 (Drafts of a memorandum providing legal advice from ICANN external counsel, both dated 25 October 2019)).

ICANN’s Privilege Log also shows that ICANN was anticipating litigation regarding Namecheap’s Reconsideration Request 19-2 (see [Annex 84](#), e.g., REV00005081 relating to a memorandum ‘from ICANN external counsel to ICANN counsel providing legal advice in anticipation of litigation re Reconsideration Request 19-2’). The expectation of litigation must be the reason why ICANN attempted to reverse the determination by the BAMC, thereby opening a new (albeit frivolous) line of defense.

<sup>122</sup> [Annex 127](#), pp. 21-22

126. The ICANN Board reiterated this statement in its final determination of 21 November 2019.<sup>123</sup> However, this statement cannot undo the fact that ICANN first determined that Namecheap has been materially harmed and adversely affected.

127. Second, Namecheap has shown that it can be expected that the removal of price caps will harm Namecheap and that this expectation in itself constitutes harm, because such expectation reduces Namecheap's expected profits and its net present value.<sup>124</sup> As Prof. Dr. Verboven and Dr. Langus explained, Namecheap has no ability to pass-on the increased costs by increasing retail registration fees without losing customers, thereby reducing Namecheap's profits.<sup>125</sup> ICANN's own expert did not contest this. Namecheap also showed that the price caps removal can be expected to harm the profits it makes by providing value-added services.<sup>126</sup> ICANN's expert completely ignored the reduction in profits from complementary services in his report.<sup>127</sup>

128. ICANN's expert focuses entirely on trying to downplay the magnitude of Namecheap's harm on the basis of unreliable assumptions, misleading arguments, and ignoring the effects of the price cap removal on Namecheap's profits from complementary services.<sup>128</sup>

129. As shown above, the magnitude of Namecheap's harm is irrelevant for *locus standi*. Moreover, quantifying harm would be particularly difficult because most harm will occur in the future.<sup>129</sup>

130. Third, ICANN and their expert fail in downplaying the extent of harm that is expected:

- First, ICANN's expert starts his 'analysis' on the incorrect presumption that, because

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<sup>123</sup> Annex 11, pp. 24-25.

<sup>124</sup> Economic Expert Report I, paras. 10, 79-80.

<sup>125</sup> Economic Expert Report I, paras. 52-55; Economic Expert Report II, para. 221; Economic Expert Report III, para. 20.

<sup>126</sup> Economic Expert Report II, para. 226; Economic Expert Report III, paras. 23, 54-56 (Subsection 4.7).

<sup>127</sup> Economic Expert Report III, paras. 23, 54-56 (Subsection 4.7).

<sup>128</sup> Economic Expert Report III, paras. 20-56 (Section 4).

<sup>129</sup> Economic Expert Report III, para. 22.

of intense competition between registrars, Namecheap will be able to pass-on a wholesale price increase in full. Prof. Dr. Verboven and Dr. Langus explain why that presumption is incorrect.<sup>130</sup>

- Second, ICANN's expert so-called empirical analysis is seriously flawed and provides no reliable evidence on the extent of pass-on.<sup>131</sup>
- Third, ICANN's expert relies on a non-committal announcement by Namecheap to warn their customers about the implications of the price cap removal. This non-committal statement constitutes no evidence of an actual pass-on, let alone the extent of such pass-on, by Namecheap.<sup>132</sup> Yet, ICANN's expert relies on it to argue that Namecheap would pass-on any price increase in full.
- Fourth, ICANN's expert assumes that Namecheap's registrants are unlikely to divert to other registrars because, he argues, a common cost shock would not disadvantage any competitor. This unsupported assumption makes abstraction of the effects of vertical integration. As Prof. Dr. Verboven and Dr. Langus explain, a wholesale price increase could result in Namecheap's registrants diverting to a vertically integrated registrar. They explain that even if a vertically-integrated registry operator/registrar might not yet have favored its downstream arm so far, this is likely to happen in the future, given that the incentives to do so are well recognized by economic theory.<sup>133</sup>
- Fifth, ICANN's expert fails to recognize the significance of the differences in Namecheap's margins on new registrations and renewals. As Prof. Dr. Verboven and Dr. Langus explain, he thereby substantially overweighs any benefits that Namecheap

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<sup>130</sup> **Economic Expert Report III**, paras. 24-29.

<sup>131</sup> **Economic Expert Report III**, paras. 30-38.

<sup>132</sup> **Economic Expert Report III**, paras. 39-40.

<sup>133</sup> **Economic Expert Report III**, paras. 41-44.

could get from customers that switch away from .ORG, .INFO, and .BIZ relative to the immediate loss of profit on these TLDs.<sup>134</sup>

- Sixth, ICANN's expert incorrectly assumes that a registry price increase is unlikely to result in a significant reduction in overall demand. Prof. Dr. Verboven and Dr. Langus explain that price increases may significantly reduce overall demand for domain names, clearly resulting in harm to Namecheap via lost sales. A reduction in overall demand is likely, because (i) customers often register multiple domain names and a price increase may trigger a decision not to register some of the domain names that would have been registered otherwise; (ii) what may seem like a negligibly small sum to ICANN's expert may be a significant cost item for a one-person small local enterprise or a volunteer organization that decides whether to extend its offline activities online, especially in developing countries.<sup>135</sup>
- Finally, Namecheap makes substantial profits from sales of complementary services.<sup>136</sup> ICANN's expert ignores this completely. These profits will inevitably be affected by a price increase, either via decrease in pricing of complementary services, or via a decrease in volume, or both.<sup>137</sup>

131. Hence, Namecheap has clearly demonstrated that it suffers an injury or harm that is directly and causally connected to the alleged violation. Namecheap's harm is also apparent from the important number of customers who publicly opposed ICANN's plans to remove the price caps. Namecheap's customer service had to deal with the concerns by these customers, which represents a cost that would not have been made absent ICANN's unwarranted plan to proceed with the removal of price caps in .ORG, .INFO and .BIZ.

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<sup>134</sup> **Economic Expert Report III**, paras. 45-49.

<sup>135</sup> **Economic Expert Report III**, paras. 50-53.

<sup>136</sup> **Economic Expert Report III**, para. 54.

<sup>137</sup> **Economic Expert Report III**, paras. 54-56.

132. Finally, in bringing this IRP, Namecheap is also acting to prevent harm to its customers, whose interest Namecheap legitimately represents, as is apparent from the sheer number of Namecheap's customers that opposes ICANN's removal of the price caps.<sup>138</sup> For these individual customers, the costs for bringing an IRP would be disproportionate. However, that should not give ICANN a free pass to violate its Articles of Incorporation and Bylaws to the detriment of the average Internet user.

## **V. ICANN FAILED TO COMPLY WITH ITS FUNDAMENTAL OBLIGATIONS**

133. In its Pre-Hearing Brief, Namecheap provided a thorough explanation of ICANN's fundamental obligations. Namecheap demonstrated how ICANN (i) must comply with general principles of international law, (ii) is bound by six specific Commitments, and must be guided by eight Core Values, (iii) must act in good faith, (iv) must act neutrally, fairly and without discrimination, (v) must operate in an open and transparent manner, (vi) must act in the public interest for the benefit of the Internet Community as a whole, (vii) must preserve and enhance the openness of the DNS and the Internet, enable competition and open entry in Internet-related markets, and (viii) must remain accountable.<sup>139</sup> ICANN did not comment on a single one of these fundamental obligations and how they must be interpreted.

134. ICANN simply avers that it (i) fully complied with its Articles of Incorporation and Bylaws and its Core Values regarding competition, (ii) applied its policies fairly and equitably when the .ORG, .INFO and .BIZ registry agreements were transitioned to the base RA, and (iii) did not apply its policies unfairly with respect to .ORG.

135. ICANN fails to respond to the specific violations that Namecheap demonstrated at length in its Pre-Hearing Brief. Where ICANN does respond, its response is based on the

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<sup>138</sup> **Annexes 8 and 112**, Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, para. 166.

<sup>139</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, Section VII, paras. 205-242.

fallacies that Namecheap pointed out in Section II of this limited rebuttal.

136. ICANN fails to show how its decision to remove the price caps benefits the Internet community as a whole. In this respect, the question that ICANN asked to its expert is quite telling. ICANN did not ask whether the removal of price caps was justified and in the interest of the Internet community as a whole and the openness of the DNS; it asked whether price caps should be reintroduced. As Prof. Dr. Verboven and Dr. Langus show, ICANN's expert also fails in providing a justification against the reintroduction of price caps.

137. ICANN also fails in rebutting its failure to comply with its openness and transparency obligations (Section V.A below), and its unfair and discriminatory application of its policies and processes (Sections V.B and V.C below).

**A. ICANN's makes an inconsistent and unsupported application of its openness and transparency obligations**

138. Without commenting on Namecheap's description of ICANN's openness and transparency obligations, ICANN claims that it was '*open and transparent, to the maximum extent feasible, in its negotiations of the 2019 Registry Agreements and its rationale for transitioning the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement.*'<sup>140</sup> It goes even as far as claiming that it '*is difficult to conceive of a more transparent process than the one ICANN engaged in here.*'<sup>141</sup> ICANN seeks support for that argument in the *pro forma* public comment phase it had organized.<sup>142</sup>

139. ICANN's organization of a *pro forma* public comment phase cannot make up for the lack of openness and transparency in its decision-making. For the first time in these proceedings, ICANN submits the alleged consideration factors it took into account when deciding to remove the price caps. ICANN does not do so by providing contemporaneous

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<sup>140</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 7.

<sup>141</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 7.

<sup>142</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, para. 7.

evidence, such as the memoranda that were allegedly prepared. Instead, ICANN provides witness testimony – created for the purpose of these proceedings – by one employee, Mr. Russel Weinstein, who may or may not have attended the secret Board meetings on the issue.

140. As already demonstrated in this rebuttal, ICANN’s alleged consideration factors are deficient. Transparency about these consideration factors during ICANN’s decision-process would have given the ICANN community the opportunity to point out the flaws in ICANN’s assumptions and the evidence that ICANN failed to consider. This behavior is in sharp contrast with the past, when ICANN shared economic reports on the issue of price caps in their preliminary form to give the ICANN community an opportunity to comment and the economic experts an opportunity to revisit their conclusions in view of the input by the community.

141. Here, ICANN commissions an economic report without sharing the question that it asked or the report itself. The findings of this report remain secret. ICANN even fails to show whether the report was shared with the ones who decided to remove the price caps. The available evidence points in the other direction:.

- There is no sign in ICANN’s privilege log that the report was ever shared with an ICANN executive or Board member.<sup>143</sup>
- Mr. Weinstein’s communication of 6 January 2019 Redacted - Confidential Information

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- The rationale for rejecting Namecheap’s Reconsideration Request 19-2 and the minutes of the Board’s 21 November 2019 meeting show that the ICANN Board was never presented with the 22 January 2019 memorandum that ICANN’s internal and external

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<sup>143</sup> **Annexes 84 and 85.**

<sup>144</sup> Namecheap’s Pre-Hearing Brief of 30 November 2021, para. 157.



counsel commissioned with Prof. Carlton. If the report was shared, ICANN's Board member, Mr. Matthew Shears, would not have inquired about the need for an economic study on the issue.<sup>145</sup> If the report was beneficial to ICANN's position, there would be no reason to hide it and ICANN would have had any interest in using the report in its attempt to justify its decision to reject Namecheap's Reconsideration Request 19-2.

- ICANN did not contradict Namecheap's contention that there is '*no sign that the emails and memoranda then shared between ICANN staff and Dennis Carlton were presented to the Board*'.<sup>146</sup> The written testimony submitted by ICANN also makes no mention of any report that was prepared by Prof. Carlton in connection to the secret meetings in which the renewal of the .ORG, .INFO and .BIZ RAs were discussed.

142. Hence, it is clear that ICANN was anything but transparent in its decision-making on the removal of price caps.

143. ICANN was also not transparent in its consideration of Reconsideration Request 19-2, as ICANN cloaks many of the documents in relation to the Board's consideration of this reconsideration request in privilege.<sup>147</sup>

#### **B. ICANN makes an inconsistent and unsupported application of the non-discrimination requirement**

144. ICANN submits that '*Namecheap effectively is asking ICANN to **discriminate** against .BIZ, .INFO, and .ORG without any justifiable basis. Namecheap's positions are irreconcilable. It is the **absence** of price control provisions, not the imposition of them, that ensures consistency (and equal treatment) across nearly all registry agreements between ICANN and gTLD registry operators.*'<sup>148</sup>

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<sup>145</sup> Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 192-198, 329-330; **Annexes 11 and 115**.

<sup>146</sup> Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 193, 330.

<sup>147</sup> See Namecheap's Pre-Hearing Brief of 30 November 2021, paras. 417-424.

<sup>148</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 8, 115, 143.

145. Namecheap has demonstrated at length why a different treatment of major legacy gTLDs compared to new gTLDs is justified. Indeed, the principle of non-discrimination and ICANN's public benefit mission require tailored protections against the abuse of market power in .ORG, .INFO and .BIZ. With reference to authoritative and settled case law, Namecheap has explained why international law and ICANN's fundamental obligations require ICANN to refrain from arbitrary decision-making and treat unlike cases differently to protect the internet community as a whole against the abuse of market power.<sup>149</sup> Since its inception, ICANN was prohibited from '*singling out one party for disparate treatment*' and taking '*unjustified or arbitrary actions*'.<sup>150</sup> ICANN comments on not a single case invoked by Namecheap. It only provides a conclusory statement in return.

146. Moreover, for over 20 years ICANN has recognized the need for price caps in major legacy gTLDs. It distinguished between sponsored and unsponsored gTLDs, where only the latter were subject to price caps. It later distinguished between legacy gTLDs and new gTLDs. Prior to the removal of price caps in .ORG, .INFO and .BIZ, ICANN removed price caps in a legacy gTLD once before, namely for the tiny .PRO registry. That decision passed hardly unnoticed with no comments opposing the removal of the fixed wholesale price in .PRO.<sup>151</sup> Not once did ICANN remove price caps in a major legacy gTLD with market power, let alone in an original gTLD (.COM, .NET and .ORG are original gTLDs, which predate the existence of ICANN). In 2005, ICANN agreed with Verisign to lift the price caps in .NET, but immediately reversed this decision.<sup>152</sup> The price caps for .NET remain in place to date and have been reaffirmed recently in an ICANN Board resolution.<sup>153</sup>

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<sup>149</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, para. 224.

<sup>150</sup> See also: U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, *Domain Name System Privatization: is ICANN out of Control*, 22 July 1999 (**RM 192**), p. 15.

<sup>151</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 103-108.

<sup>152</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 69, 96-102.

<sup>153</sup> ICANN, *Adopted Board Resolution 2017.06.24.22*, 24 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.e> (**RM 124**).

147. ICANN explicitly recognized the special character of .ORG, .INFO and .BIZ in its 2013 RA, confirming that these gTLDs are comparable to each other and the .NET and .COM legacy gTLDs. Yet, without any proper justification, ICANN treats these gTLDs differently since its acceptance of the 2019 RAs in .ORG, .INFO and .BIZ. Namecheap has shown in its Pre-Hearing Brief why this arbitrary decision constitutes a clear violation of ICANN’s Articles of Incorporation and Bylaws.<sup>154</sup> ICANN has offered only a conclusory statement in return.

**C. ICANN failed to apply fairly its standards, policies and processes on .ORG**

148. In its Pre-Hearing Brief, Namecheap demonstrated that ICANN's abandonment of price caps in .ORG is inconsistent with the standards and processes that ICANN put in place for the operation of .ORG.<sup>155</sup> ICANN tries to counter this claim by arguing that it never formally adopted a policy on .ORG that the ‘*registry fee charged to accredited registrars should be as low as feasible, consistent with the maintenance of good-quality service.*’<sup>156</sup>

149. ICANN’s defense is irrelevant. The absence of formal adoption of this requirement as a policy is no reason for ICANN to abandon its standards and processes. The point is all the stronger as these standards and processes were in place for over 17 years, were reconfirmed by ICANN’s current Chair on 13 February 2020,<sup>157</sup> and were applied in the ICANN Board decision to withhold the approval of PIR’s proposed change of control.<sup>158</sup>

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<sup>154</sup> Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, paras. 219, 224, 404.

<sup>155</sup> Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, paras. 394-399.

<sup>156</sup> ICANN’s Pre-Hearing Brief on the Merits of 14 January 2022, paras. 148-153.

<sup>157</sup> Namecheap’s Pre-Hearing Brief on the Merits of 30 November 2021, para. 396; ICANN, *Correspondence from Maarten Botterman, Chair, ICANN Board of Directors to Gonzalo Camarillo, Chair, ISOC Board of Trustees*, 13 February 2020, <https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf> (**Annex 117**), p. 2.

<sup>158</sup> ICANN, Approved Board Resolutions 2020.04.30.01 – 2020.04.30.02, Special Meeting of the ICANN Board, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en> (**Annex 129**) ICANN, Minutes – Special Meeting of the ICANN Board of 30 April 2020, 21 May 2020, <https://www.icann.org/resources/board-material/minutes-2020-04-30-en> (**Annex 130**).

## VI. ICANN MISREPRESENTS NAMECHEAP'S CLAIMS

### A. ICANN misrepresents Namecheap's claims in an ill-founded attempt to invoke a statute of limitations regarding .BIZ

150. ICANN submits that '*all of Namecheap's claims regarding .BIZ are long since time barred.*'<sup>159</sup> It argues, quite audaciously, that '*Namecheap attempts to re-write history in order to argue that its claims regarding the .BIZ gTLD are timely.*'<sup>160</sup>

151. ICANN ignores the evidence, showing that Reconsideration Request 19-2 was targeted against all previously price capped legacy TLDs for which ICANN renewed the RA on 1 July 2019. Namecheap has referred to specific sections in its Reconsideration Request 19-2 that explicitly confirm this.<sup>161</sup> ICANN tries to rebut this evidence by referring to other statements made in connection to Reconsideration Request 19-2 that make no explicit mention of .BIZ. However, the fact that some sections in the documents submitted by Namecheap make no explicit mention of .BIZ does not imply that Namecheap modified or abandoned its request for relief that ICANN '*reverse its decision and include (or maintain) price caps in all legacy TLDs.*'<sup>162</sup>

152. As Namecheap explained, should there have been any unclarity regarding the scope of Namecheap's Reconsideration Request 19-2 (*quod non*), it was the ICANN Board's duty to request for clarification.<sup>163</sup> ICANN did not deny this. Yet, no such request has ever been made.

153. No such unclarity existed, as is apparent from Ms. Becky Burr's decision to abstain in the Board's consideration of the issue. In abstaining, she declared:

*'Because **this addresses issues that were arised (sic) in connection with the extension of the BIZ contract and I was at Neustar and advised Neustar, I'm going to recuse***

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<sup>159</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 169-174.

<sup>160</sup> ICANN's Pre-Hearing Brief on the Merits of 14 January 2022, paras. 169.

<sup>161</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, para. 278.

<sup>162</sup> Section 9 of Namecheap's Reconsideration Request 19-2 (**Annex 8**).

<sup>163</sup> Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, para. 280.

*myself from 19-2*<sup>164</sup>

154. Ms. Burr did not recuse herself in connection with Reconsideration Request No. 19-3, which raised similar issues, but only in connection to .ORG.<sup>165</sup>

155. In any event, ICANN's decisions regarding .ORG, .INFO and .BIZ were jointly taken. ICANN's actions and inactions which resulted in the removal of price caps in these gTLDs are non-severable. They were taken at the same time in a single and non-severable decision.

156. ICANN's attempt to invoke a time bar defense as to the effects of the challenged decision is artificial and would lead to an unworkable outcome. Even if the Panel were to exclude .BIZ from its decision, ICANN would need to ensure that its implementation of the decision does not result in disparate treatment. ICANN's actions and inactions in this respect could be subject to a new challenge. Hence, ICANN has no interest in raising a time bar objection regarding .BIZ, lest a new IRP be raised on exactly the same issue.

**B. ICANN misrepresents Namecheap's claims in an ill-founded attempt to limit the scope of this IRP**

157. ICANN submits that '*[i]n its Pre-Hearing Brief, Namecheap improperly raises, for the first time, several claims that were not included in its IRP Request.*'<sup>166</sup> ICANN refers to Namecheap's arguments regarding ICANN's failure to apply fairly its policies and processes on vertical integration and on the Feb06 Policy.<sup>167</sup>

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<sup>164</sup> ICANN, Regular Meeting of the ICANN Board of 3 November 2019, recording available at [https://icann.zoom.us/recording/share/otENxZLjIldYrqrKCue\\_r1A6j2hajlEKzhKLeWVpArmwlumekTziMw?startTime=1572795524000](https://icann.zoom.us/recording/share/otENxZLjIldYrqrKCue_r1A6j2hajlEKzhKLeWVpArmwlumekTziMw?startTime=1572795524000) at 00:03:22.

<sup>165</sup> **Annex 128**, ICANN, Regular Meeting of the ICANN Board of 3 November 2019, recording available at [https://icann.zoom.us/recording/share/otENxZLjIldYrqrKCue\\_r1A6j2hajlEKzhKLeWVpArmwlumekTziMw?startTime=1572795524000](https://icann.zoom.us/recording/share/otENxZLjIldYrqrKCue_r1A6j2hajlEKzhKLeWVpArmwlumekTziMw?startTime=1572795524000) at 00:12:23.

<sup>166</sup> ICANN's Pre- Hearing Brief on the Merits of 14 January 2022, para. 155.

<sup>167</sup> ICANN's Pre- Hearing Brief on the Merits of 14 January 2022, paras. 155-157. ICANN also misrepresents the Panel's ruling in P.O. Nos. 5 and 6, alleging that the Panel ruled that claims regarding the vertical integration between registry operators and registrars are irrelevant to this IRP. The Panel decided that, if Namecheap seeks relief with respect to the acquisition of the .BIZ registry business by GoDaddy and the acquisition of the .INFO registry operator by Donuts, it should do so in separate proceedings. However, the change of control issue – which occurred after the introduction of this IRP – is unrelated to the issue of the impact of vertical integration on the price control provisions and how ICANN should have (i) considered this issue in its deliberative process on the price cap provisions in the .ORG, .INFO and .BIZ RAs, and (ii) fairly applied its standards, policies and processes on vertical integration in the renewal of these RAs.

158. However, 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.<sup>168</sup> ICANN's failure to implement and apply these policies in renewing the .ORG, .INFO and BIZ RAs is at issue here. These are elements of fact; not new claims.

159. *Arguendo*, even if a separate claim was raised regarding these issues (*quod non*), such claim would not be time-barred as ICANN submits.<sup>169</sup> ICANN is correct that the Board decisions on vertical integration and on the Feb06 Policy occurred years ago. However, Namecheap does not challenge these Board decisions. Instead, Namecheap challenges ICANN's failure to implement, apply and abide by these policies. These inactions continue until the moment that ICANN implements, applies and abides by these policies. That moment is yet to come.

## VII. RELIEF REQUESTED

160. Based on Namecheap's Pre-Hearing Brief on the Merits and on the foregoing, and reserving all rights, including but not limited to the right (i) to amend the relief requested below, *inter alia*, to further evidence, and (ii) to rebut ICANN's response in further briefs and during a hearing, Claimant respectfully requests that the Panel, in a binding Declaration:

- Declare that ICANN's decision to remove the price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
  - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination or arbitrariness;
  - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN

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<sup>168</sup> See Namecheap's Pre-Hearing Brief on the Merits of 30 November 2021, paras. 85, 390-393, 402 *in fine*.

<sup>169</sup> ICANN's Pre- Hearing Brief on the Merits of 14 January 2022, para. 157.

Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;

- Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
  - Articles 1(2)(a)(i), (iv) and (vi) of ICANN's Bylaws;
  - Articles 1(2)(b)(iii), (iv) and (vii) of ICANN's Bylaws,
  - Article 1(2)(c) of ICANN's Bylaws
  - Article 2(1) *juncto* Article 3(6)(a)-(c) of ICANN's Bylaws;
  - Article 3(1) of ICANN's Bylaws;
  - Article 3(6)(c) of ICANN's Bylaws;
  - Article 7(6) of ICANN's Bylaws; and
  - Article 7(17) of ICANN's Bylaws;
- Declare that ICANN's stated objective and requirement that .ORG be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service is violated by ICANN's decision to remove price caps in .ORG and must therefore be annulled as inconsistent with and violative of:
    - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
    - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
    - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
    - Article 1(2)(a) of ICANN's Bylaws;
    - Article 1(2)(a)(v) of ICANN's Bylaws;
    - Article 2(3) of ICANN's Bylaws;
    - Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN's Bylaws
  - Declare that ICANN's entering into registry agreements for .ORG, .INFO and .BIZ that do not contain price caps must be annulled as inconsistent with and violative of:
    - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;

- Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
  - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
  - Article 1(2)(a) of ICANN’s Bylaws
  - Article 1(2)(a)(v) of ICANN’s Bylaws
  - Article 2(3) of ICANN’s Bylaws because ICANN’s actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably
  - Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN’s Bylaws;
- Declare that ICANN’s entering into the 2019 registry agreements for .ORG, .INFO and .BIZ without the cross-ownership restrictions that were in place for .ORG, .INFO and .BIZ at the date of the Board’s adoption of the ICANN Board Resolution 2012.10.18.01 must be annulled as inconsistent with and violative of:
    - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
    - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
    - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
    - Article 1(2)(a) of ICANN’s Bylaws
    - Article 1(2)(a)(v) of ICANN’s Bylaws
    - Article 2(3) of ICANN’s Bylaws because ICANN’s actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably
    - Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN’s Bylaws.
- Declare that ICANN’s rejection of Namecheap’s Reconsideration Request No. 19-2 must be annulled as inconsistent with and violative of Article 4(2)(m) of ICANN’s Bylaws;
- Declare that ICANN’s actions and inactions to maintain the removal of price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
    - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;




- Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
  - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
  - Articles 1(2)(a)(i), (iv) and (vi) of ICANN's Bylaws;
  - Articles 1(2)(b)(iii), (iv) and (vii) of ICANN's Bylaws,
  - Article 1(2)(c) of ICANN's Bylaws
  - Article 2(1) *juncto* Article 3(6)(a)-(c) of ICANN's Bylaws;
  - Article 3(1) of ICANN's Bylaws;
  - Article 3(6)(c) of ICANN's Bylaws;
  - Article 7(6) of ICANN's Bylaws;
  - Article 7(17) of ICANN's Bylaws;
- Declare Namecheap the prevailing party in this IRP;
  - Award Namecheap its costs in this proceeding, including but not limited to its internal costs, legal advice and representation costs, costs of expert witnesses, and any other costs such as for document review and transportation, made or still to be made until the final resolution of this IRP; and
  - Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,

8 January 2022

  
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