

**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'S RESPONSE TO ICANN'S MOTION TO DISMISS

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I.	INTRODUCTION	1
II.	STANDARD OF REVIEW	2
	A. THE RATIONALE FOR A STANDING REQUIREMENT	2
	B. THE IRP’S STANDING REQUIREMENT.....	2
	C. HARM CAN BE PAST, CURRENT OR FUTURE HARM	2
	D. NO THRESHOLD OR QUANTIFICATION IS REQUIRED.....	6
	E. IN CASE OF AMBIGUITY, THE RULE OF <i>CONTRA PROFERENTEM</i> APPLIES	7
III.	ARGUMENT	8
	A. ICANN’S NARROW READING OF THE STANDING REQUIREMENT IS UNFOUNDED	8
	B. NAMECHEAP HAS IDENTIFIED ACTUAL HARM AS A RESULT OF ICANN’S REMOVAL OF THE PRICE CONTROL PROVISIONS.....	9
	C. NAMECHEAP HAS IDENTIFIED ACTUAL HARM AS A RESULT OF ICANN’S ACTIONS AND INACTIONS REGARDING THE CHANGE OF CONTROL REQUESTS.....	10
	D. NAMECHEAP’S THEORIES OF HARM ARE BASED ON EVIDENCE AND ROBUST ECONOMIC THEORY	14
	1. <i>Namecheap’s theory of harm as a result of ICANN’s removal of the price control provisions is based on evidence and robust economic theory</i>	14
	2. <i>Namecheap’s theory of harm as a result of ICANN’s actions and inactions regarding the change of control requests is based on evidence and robust economic theory</i>	16
	E. EVEN IF THE NEGATIVE EFFECTS OF ICANN’S HARMFUL ACTION WILL MOSTLY ACCRUE IN THE FUTURE, NAMECHEAP IS HARMED AS OF THE DATE OF ICANN’S VIOLATIONS OF ITS ARTICLES AND BYLAWS.....	17
	F. NAMECHEAP COULD NOT, AND SHOULD NOT, HAVE WAITED UNTIL ALL OF THE HARMFUL EFFECTS CAME TO PASS	17
	G. ICANN’S DEFENSE THAT NAMECHEAP COULD PASS THROUGH PRICE INCREASES WITHOUT LOSING CUSTOMERS IS SPURIOUS AND BASELESS.....	18
	H. ICANN’S DEFENSE THAT NAMECHEAP’S HARM RESULTS FROM THE ACTIONS OF THIRD PARTIES IS SPURIOUS AND BASELESS 20	
	I. ICANN’S DEFENSE THAT NAMECHEAP SELLS DOMAIN NAME REGISTRATIONS IN DIFFERENT TLDs IS IRRELEVANT.....	22
	J. ICANN’S DEFENSE THAT NAMECHEAP HAS NOT QUANTIFIED ITS HARM IS IRRELEVANT	23
IV.	CONCLUSION	23

I. INTRODUCTION

1. The present Response to ICANN's Motion to Dismiss of 13 January 2021 is submitted in accordance with Procedural Order (P.O.) 3, as amended by P.O. 4.

2. On 21 December 2020, Namecheap submitted its *prima facie* showing of standing together with two Affidavits and an expert report. Together, this evidence unequivocally shows that Namecheap suffers harm from ICANN's violations of its Articles and Bylaws that are the subject of this IRP and Namecheap thus meets the applicable standing requirement.

3. An earnest reading of Namecheap's evidence should have detained ICANN from submitting a motion to summarily dismiss Namecheap's Request for IRP. A previous request for summary dismissal had already been denied by the Emergency Arbitrator on the basis of non-binding, yet persuasive reasoning. That the Emergency Arbitrator was correct in his reasoning on the question of Namecheap's standing has now been confirmed by undisputed evidence and robust economic theory.

4. Without disproving or contradicting any of the evidence submitted by Namecheap, ICANN nevertheless moved to dismiss Namecheap's Request for IRP. ICANN's motion to dismiss is aimed at avoiding accountability for manifest violations of ICANN's Articles and Bylaws. How? By applying an extremely narrow and unsupported interpretation of the standing requirement for initiating an IRP. Through its narrow and ill-founded interpretation of the standing requirement, ICANN tries to impose an exceedingly high burden upon Namecheap as a Claimant for pursuing an IRP. It appears that ICANN seeks to avoid accountability by imposing additional burdens which would require enormous efforts and significant costs for a claimant to meet.

5. ICANN's motion to dismiss is based entirely on rhetoric and spurious arguments. It is

exceedingly repetitive, contains factual inaccuracies¹ and uses quotation marks to refer to either (i) ICANN’s own arguments or self-serving statements rather than to authorities², or (ii) extracts of Namecheap’s evidence which ICANN presents completely out of context.

6. Below, Namecheap submits a correct reading of the IRP standing requirement and of the evidence submitted. For the purposes of this response, Namecheap focuses on the standing requirement and argument only. Namecheap reserves the right to respond to ICANN’s summary of relevant facts once its document production has been completed.

II. STANDARD OF REVIEW

A. The rationale for a standing requirement

7. A standing requirement aims at avoiding frivolous claims by uninterested parties.

B. The IRP’s standing requirement

8. Under ICANN’s Bylaws, a Claimant must have standing (*locus standi*) to pursue an IRP claim. A ‘Claimant’ includes a legal entity that ‘has been materially affected by a Dispute.’³ ‘To be materially affected, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.’⁴

C. Harm can be past, current or future harm

9. The New Oxford American Dictionary defines harm as ‘*actual or potential ill effect or danger*’ (**RM 60**).

10. Nothing in the Bylaws or Interim Supplementary Procedures precludes a Claimant from

¹ *E.g.*, ICANN argues that ICANN staff consulted with the ICANN Board regarding the 2019 Registry Agreements *inter alia* at the Board’s workshop in Los Angeles (25-28 January 2019) (**RE-8**, p. 2). However, the agenda and the recordings of this workshop, available at <https://www.icann.org/resources/pages/2019-board-meetings>, make no mention of any such consultations.

² *See e.g.*, ICANN’s Motion to Dismiss of 13 January 2021, §22 *in fine*.

³ Bylaws, Article IV(3)(b)(i) (**RM 2**).

⁴ *Id.*

pursuing an IRP on the basis of future harm. The Bylaws and the Interim Supplementary Procedures require that the Claimant ‘*must suffer an injury or harm that is directly and causally connected to the alleged violation*’.⁵ This language does not permit a conclusion that a Claimant is not materially affected if the negative effects of the harmful action accrue in the future.

11. What is more: Future injury or harm was also considered when ICANN revised its accountability mechanisms, and the IRP in particular. ICANN’s efforts to enhance accountability were led by a Cross-Community Working Group on Accountability (‘CCWG-Accountability’) in preparation of the U.S. relinquishing its oversight over ICANN. The CCWG-Accountability proposed amendments to ICANN’s Bylaws with respect to the IRP that were ultimately adopted and that resulted in the present standing requirement. Statements by Becky Burr confirm that future harm is sufficient for a Claimant to be materially affected by a Dispute. Becky Burr is currently a member of the ICANN Board. She was an active member of the CCWG-Accountability⁶ and chaired the so-called IRP Implementation Oversight Team (IRP-IOT), *i.e.*, the team that was charged with overseeing the implementation of the enhancements to the IRP and that drafted the Interim Supplementary Procedures. When dealing with the issue of summary dismissal for not meeting the standing requirement in the IRP-IOT, Ms. Becky Burr referred to a scenario where a claimant fails to demonstrate that ‘*they are harmed, that they have been harmed, or that they will be harmed*’.⁷ In other words, past, current and future harm were considered. And it is clear from this statement that past, current **or** future harm meets the standing requirement.

12. Finally, Article IV(3)(p) of the Bylaws allows a Claimant to request ‘*interim relief*’ which ‘*may include prospective relief*’ to prevent ‘*[a] harm for which there will be no adequate remedy in the absence of such relief*’. This possibility of prospective relief to prevent harm

⁵ Bylaws, Article IV(3)(b)(i) (**RM 2**); IRP Interim Supplementary Procedures, Sections 1 and 9.

⁶ Commenting on her role on the CCWG, see <https://www.icann.org/news/multimedia/629>.

⁷ IRP-IOT Meeting #4, 6 July 2016, *Transcripts* (**RM 61**), p. 13.

further demonstrates that future injury or harm is sufficient to meet the standing requirement.

13. If the intent was to exclude future harm – *quod non* –, the Bylaws would read that a Claimant ‘*must have suffered*’ or ‘*is suffering*’ or ‘*must have suffered and is suffering*’ an injury or harm that has occurred. However, such intent would be completely irrational and unjustifiable. Indeed, as DNS regulator, ICANN’s decisions, actions and inactions are forward-looking and generate their effects prospectively.

14. Also, it would make no sense to require a Claimant to wait until the effects of a violation of ICANN’s Bylaws by the Board have materialized before challenging a violation. The point is all the stronger as most forms of injury and harm have a future component. By analogy, a landowner that has no plans to build may still be harmed by the adoption of new regulations prohibiting new construction projects because they impact the value at which her land can be sold in the future.

15. Also, potential harm constitutes injury. This is true under the various instruments drafted by ICANN and governing the IRP.

16. It is equally true under U.S. law on the question of standing:

- In the equal protection context, the United States Supreme Court has held that the relevant injury a person suffers from unlawful discrimination is the loss of opportunity that results from discrimination, regardless of the other consequences of that discrimination. Thus, where a state discriminates against a job applicant on the basis of race, the denial of opportunity to compete on equal footing for the job is the relevant injury; not the denial of the job. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (stating that injury occurs when a ‘*discriminatory classification prevent[s] the plaintiff from competing on an equal footing*’ (alteration in original) (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993)) (internal quotation marks omitted) (**RM 62**)).

Loss of opportunity to compete on a level playing field is essentially a risk injury: the discrimination increases the probability that the discriminated-against individual will not get the job.

- The Supreme Court has also implicitly recognized this point in cases alleging procedural injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009) (**RM 63**); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (**RM 64**). Similar to the situation presented here, procedural injuries occur when agencies undertake actions without affording the statutory procedures due to the plaintiff – for example, when an agency promulgates a rule without addressing substantive comments submitted by the plaintiff on that rule. *See Summers*, 555 U.S. at 496–97.

In those cases, courts have insisted that the injury supporting standing is not the failure of the agency to observe the procedures; rather, the injury stems from the interest that is affected by the agency’s failure to observe the procedures. *See id.* But it is clear that the injury is not the effect of the agency action on the plaintiff. Courts have explained that standing is appropriate only if the court can redress the injury in fact to the plaintiff. *See Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (**RM 65**).

Prevailing on a procedural claim does not necessarily prevent the agency from undertaking the same action. But the successful claim does reduce the probability that the agency will promulgate the same rule; the comments may lead the agency to promulgate a different rule. Thus, the relevant injury that is redressed in a procedural claim is the increased probability of harm. *See Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (*‘the risk of real harm can [] satisfy the requirement of concreteness.’*) (emphasis added) (**RM 66**).

17. Similarly, in this case, Namecheap has suffered an injury stemming from its own interests which are affected by ICANN's failures to comply with its own Articles, Bylaws and processes, which can be redressed by a Panel decision in its favor. Thus, Namecheap's potential harm would constitute an 'injury' sufficient to confer standing under both the IRP's procedural rules and U.S. legal principles.

18. Namecheap's experts have testified *inter alia* that Namecheap faces a '*significant potential future harm*' due to the absence of the price control provisions. While ICANN argues that Namecheap has failed to present evidence of increased registry prices, the fact that the particular injury that would result from an increase in registry prices might not occur does not render the claim nonjusticiable. Otherwise, by analogy to U.S. law on the question of standing, federal courts would lack jurisdiction to hear any claims for prospective relief because all potential future injuries have some chance of not transpiring. Rather, it is the possibility that the injury might occur that creates Namecheap's interest and renders its claim justiciable. That is because risk of harm itself – apart from the particular harm that is threatened – may also constitute an 'injury in fact'.

19. In any event, as demonstrated before and repeated below, Namecheap has demonstrated that it already suffered harm resulting from ICANN's violations.

D. No threshold or quantification is required

20. ICANN's Bylaws and the Interim Procedural Procedures require a Claimant to suffer '*an injury or harm*'. The existence of an injury or harm is sufficient, irrespective of the extent of the injury or harm.

21. A quantification of injury or harm suffered or to be suffered is not required and is irrelevant to assess whether a Claimant has standing under ICANN's Bylaws.

22. Requiring a Claimant to go through the difficult and expensive exercise of quantifying

its harm would go against the purpose to empower Claimants to enforce ICANN's compliance with its Articles and Bylaws through 'meaningful, affordable and accessible' expert review.

23. It would be unreasonable to require a Claimant to quantify its harm before the IRP Panel establishes ICANN's violations of its Bylaws. A quantification of damages would put an undue burden upon a Claimant's access to an IRP. That would be even more true as damages may accrue over time, as is the case in the current matter. IRPs would be anything but affordable and accessible if a Claimant were required to quantify its harm from the outset of the proceedings.

24. In any event, as demonstrated before and repeated below, Namecheap has demonstrated that the harm resulting from ICANN's violations is and will be significant.

E. In case of ambiguity, the rule of *contra proferentem* applies

25. To the extent that the language of the various instruments drafted by ICANN and governing the IRP is ambiguous on the standing requirements – *quod non* –, the panel should construe that language *contra proferentem*. The relation between ICANN and an IRP Claimant is clearly an adhesive one. In such a situation, the rule of *contra proferentem* applies.⁸ As the drafter and architect of the IRP Procedure, it was open to ICANN to adopt a procedure that expressly and clearly announced more stringent and detailed standing requirements, identifying the nature of harm a claimant must suffer. ICANN has not done so, and it cannot impose additional requirements by putting forward a more stringent standard in its motion to dismiss which is aimed at avoiding accountability to the Internet community and to a company that is directly affected by ICANN's violations of its Articles and Bylaws.

⁸ ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Panel Declaration on the IRP Procedure, 14 August 2014, §§ 108–109 (**RM 67**).

III. ARGUMENT

A. ICANN's narrow reading of the standing requirement is unfounded

26. The purpose of the standing requirement under ICANN's Bylaws can never mean that ICANN can avoid its accountability or prevent an impacted party from having the challenged action reviewed by an independent body. Any interpretation of a standing requirement that would bar an interested party from challenging violations of ICANN's Articles and Bylaws would go against ICANN's commitment to '*remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness*'.⁹

27. Pursuant to its Bylaws ICANN is committed to '*remain accountable*'. The primary purpose of the IRP is (i) to '*ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws*', (ii) to '*empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review*' of ICANN's actions and inactions, and (iii) to '*ensure that ICANN is accountable to the global Internet community and Claimants*'.¹⁰

28. Because of the IRP's purpose, ICANN should not, and cannot, impose additional burdens for interested parties to initiate IRPs. Anyone who is impacted by an ICANN action or inaction in violation of ICANN's Articles and/or Bylaws should be able to enforce compliance by having ICANN's actions and inactions reviewed by an IRP Panel.

29. However, in its motion to dismiss, ICANN is advancing a particularly narrow reading of the standing requirement in an attempt to escape accountability from a party with a clearly demonstrated and legitimate interest in pursuing an IRP. ICANN's reading of the standing requirement implies that a Claimant must demonstrate that it has already suffered harm and

⁹ ICANN Bylaws, Article I(2)(a)(vi) (**RM 2**).

¹⁰ ICANN Bylaws, Article IV(3)(a)(i)-(iii) (**RM 2**).

ICANN suggests that such harm must be quantified. Such reading finds no support in the language or purpose of the standing requirement as taken up in the ICANN Bylaws.

B. Namecheap has identified actual harm as a result of ICANN’s removal of the price control provisions

30. Namecheap has clearly identified actual harm it suffers and will suffer as a result of ICANN’s removal of the price control provisions. Namecheap’s business intelligence team correctly projected a decline in domain name registration, renewal and other revenue for Namecheap as a result of the removal of the price control provisions.¹¹ Such a decline is clear evidence of actual harm caused by ICANN’s removal of the price control provisions.

31. In addition, the expert report by the reputable economists, Professor Dr. Frank Verboven and Dr. Gregor Langus (the ‘Experts’) (the ‘Expert Report’), shows that ICANN’s removal of the price control provisions harms Namecheap *inter alia* ‘if there is a mere likelihood that price controls are effective in keeping future prices low compared to the level in the counterfactual without price control provisions.’¹² The Experts conclude that ‘there is indeed a significant likelihood that price controls would be effective in the future’.¹³ Hence, because this likelihood exists, Namecheap is harmed by ICANN’s removal of the price control provisions. Not only does this likelihood exist; it is significant.

32. The Experts established that registries hold market power in relation to the gTLDs concerned and that the price caps have been effective in keeping prices of these TLDs closer to competitive levels.¹⁴ It follows, as the Experts explain – using straightforward and robust economic logic – that the removal of price caps will likely result in an increase in Namecheap’s

¹¹ CL-Aff. 1, para. 7.

¹² Expert Report, §78.

¹³ Expert Report, §79.

¹⁴ Expert Report, §49.

costs for registry services.¹⁵ This cost increase harms Namecheap.¹⁶ A mere expectation of an increase in registry prices is sufficient to show harm.¹⁷ This is because such expectation reduces Namecheap's expected profits and its net present value.¹⁸

C. Namecheap has identified actual harm as a result of ICANN's actions and inactions regarding the change of control requests

33. ICANN's actions and inactions regarding the change of control requests result in '*significant uncertainty and confusion and it is likely that Namecheap will need to incur additional costs to inform existing and potential registrants for .org, .info and .biz of these changes, promote other services to them, and/or offer other incentives to attract and retain the customers.*'¹⁹

34. The fact that ICANN is not transparent about its deliberations regarding changes of control, harms Namecheap. The lack of openness and transparency about *inter alia* the timing and the criteria that ICANN uses to evaluate changes of control, makes it impossible to make reliable business projections and to stay abreast of important market developments. This generates uncertainty and affects Namecheap's ability to compete effectively, compared to a situation where ICANN's decision-making process is transparent.

35. As the Expert Report demonstrates with ample references to economic literature, it is generally accepted that an increase in the uncertainty in the business environment harms market participants.²⁰ ICANN's motion does not contest this fact. As a matter of fact, ICANN's own documents prove that it is indeed ICANN's opinion that uncertainty can be harmful to TLD

¹⁵ Expert Report, §50.

¹⁶ Expert Report, §55.

¹⁷ Expert Report, §§10, 78.

¹⁸ Expert Report, §10, 79-80.

¹⁹ CL-Aff. 1, §7.

²⁰ Expert Report, §§81-87.

markets and their participants.²¹

36. ICANN misses the point where it argues that ICANN's decision to withhold its consent to PIR's Change of Control Request is exactly what Namecheap had advocated for. The fact that ICANN withheld its consent is no excuse for refusing to provide full transparency with respect to the actions surrounding the proposed acquisition and ICANN's approval process. Namecheap's claims relate to the non-transparent process; not the outcomes of such process. Irrespective of the outcome, lack of transparency increases the level of systemic risk in Namecheap's business environment.

37. How did ICANN come to its decision? Was an imminent request for a change of control known to ICANN, when it took the decision to remove the price control provisions? What was discussed in over 30 hours of secret meetings between ICANN org and the Board²²? What discussions took place between ICANN, PIR and other entities involved? All these questions remain unanswered.

38. Moreover, in its decision to withhold its consent to PIR's Change of Control Request, ICANN mentions explicitly that this decision is '*without prejudice to PIR to submit a new notice of indirect change of control and entity conversion for consideration if PIR successfully achieves an entity conversion approval in Pennsylvania through the Pennsylvania Court, which the ICANN Board and org will consider when evaluating any new notice*'.²³ What is the context in which this promise to evaluate any new notice was made? Should Namecheap anticipate a renewed request by PIR for a change of control and is ICANN likely to grant such request to PIR?

39. The uncertainty about the circumstances surrounding PIR's Change of Control Request

²¹ See Expert Report, §98 and references there.

²² 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> (RM 68).

²³ ICANN, *Approved Board Resolution 2020.04.30.02 – Special Meeting of the ICANN Board*, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>, 30 April 2020 (RM 69).

and about drastic changes to the business environment, is the direct result of ICANN's failure to be open and transparent about *inter alia* the process and criteria ICANN uses in evaluating such requests. Namecheap's harm is thus directly and causally connected to the alleged violation.

40. The same applies to other changes of control dramatically affecting Namecheap's business environment. The lack of openness and transparency about *inter alia* the timing and the criteria that ICANN uses to evaluate changes of control, makes it impossible to make reliable business projections and to stay abreast of important market developments. This affects Namecheap's ability to compete effectively, compared to a situation where ICANN's decision-making process is transparent.

41. In addition, as the Expert Report establishes, based on robust economic reasoning and ample references to authorities, the acquisition of .biz registry operator Neustar by GoDaddy could increase Namecheap's costs or otherwise harm its profits.²⁴ Because ICANN has withheld due transparency in its review of that transaction, and continues to do so prospectively in similar situations, Namecheap will find it more difficult to prevent harm to Namecheap or its customers from ICANN's decisions on such changes of control now and in the future. The very reduction in Namecheap's capability to do so represents actual harm to Namecheap.

42. With respect to the proposed change of control of .info registry operator Afilias, the process is equally opaque. This change of control was on the ICANN Board's agenda of 17 December 2020. No Resolutions were taken on this topic.²⁵ However, according to the preliminary report of the meeting, ICANN's Chair has '*stated that the Afilias change of control approval request has been discussed by the Board, and that the ICANN President and CEO,*

²⁴ Expert Report, §§81-87 and §§88-93.

²⁵ ICANN, Approved Board Resolutions – Special Meeting of the ICANN Board of 17 December 2020, 21 December 2020, <https://www.icann.org/resources/board-material/resolutions-2020-12-17-en#2.c> (**RM 70**).

*or his designee(s), has the support of the Board to move forward on the request’.*²⁶

43. The content of these Board discussions is unknown. How will the ICANN President and CEO (or his designee(s)) move forward on the request? What criteria will they apply? What will the process look like? These are all questions that remain unanswered.

44. As the Expert Report establishes, by robust economic reasoning and ample references to authorities, a horizontal merger such as the one between Afilias and Donuts is capable of increasing prices and the costs for downstream firms, in this case Namecheap.²⁷ A non-transparent review of such mergers makes it more difficult for Namecheap to participate as a legitimately interested party in such merger review and to prevent ICANN from approving a harmful change of control.

45. The fact that some of the events, including ICANN’s actions and inactions with respect to changes of control, postdate Namecheap’s request for IRP is irrelevant. The more recent events only confirm that ICANN systematically fails to provide the requisite openness and transparency. ICANN’s removal of price control provisions and its actions and inactions regarding changes of control are related to one another. The changes of control have the potential of exacerbating the harmful effects of the removal of the price control provisions. Hence, these issues should not be considered individually. It would not be procedurally economical if Namecheap were required to initiate separate proceedings on these related issues. Therefore, to the extent necessary, Namecheap seeks leave to have ICANN’s actions and inactions regarding its consideration of the Neustar and Afilias changes of control reviewed by this IRP Panel. If, *per impossibile* such leave is not granted, Namecheap reserves all rights to initiate separate proceedings on these issues.

²⁶ ICANN, *Preliminary Report – Special Meeting of the ICANN Board of 17 December 2020*, 5 January 2021, <https://www.icann.org/resources/board-material/prelim-report-2020-12-17-en> (**RM 71**).

²⁷ Expert Report, §§81-87 and §§94-95

D. Namecheap’s theories of harm are based on evidence and robust economic theory

46. Namecheap’s theories of harm are supported by evidence and economic principles that are widely accepted by academic and practicing economists, antitrust authorities, courts in various damage claim proceedings and other authorities.

47. ICANN cannot criticize Namecheap’s theories of harm simply because, in part, they rely on economic theory, especially when this economic theory is rock-solid.

48. ICANN does not provide any evidence that disproves Namecheap’s theories of harm. Instead, ICANN’s counsel simply opine that Namecheap’s theories of harm are ‘*speculative and theoretical*’. To use ICANN’s own words: ‘*Attorney argument is not evidence*’.²⁸ By contrast, the Expert Report is evidence and none of the statements made in the Expert Report are contradicted by ICANN.

49. Namecheap’s theories of harm are not speculative but based on evidence and established economic principles.

1. Namecheap’s theory of harm as a result of ICANN’s removal of the price control provisions is based on evidence and robust economic theory

50. With respect to the removal of the price control provisions, the Expert Report *establishes* that registry operators hold market power²⁹, and that the price caps had been effective in

²⁸ ICANN’s Motion to Dismiss, 13 January 2021, §26 (footnote 36).

²⁹ Among others, the Expert Report presents the following pieces of evidence of market power in relation to the gTLDs concerned:

- Facts on the market structure, specifically that each gTLD, including .org, .info and .biz, is operated by a single registry operator by an exclusive appointment by ICANN (where the appointment process does not include any competitive bidding process for the right to operate, or continue to operate, the gTLD) (*See* Expert Report, §57);
- Evidence of significant costs of switching gTLDs, whose presence and effect was also acknowledged by Dennis Carlton in a report for ICANN (*See* Expert Report, §§58-59);
- Evidence of continued levels of higher trust of registrants in legacy gTLDs (*See* Expert Report, §§60-61);

(Continued...)

preventing the registry operators from fully exercising it.³⁰ Absent effective alternative mechanisms to constrain the exercise of market power, the registries will increase prices.³¹ There are no equally effective mechanisms in place to constrain this market power.³² Namecheap is directly harmed by ICANN's removal of the price caps as it creates the potential of a cost increase which Namecheap cannot pass through without losing customers.³³

51. ICANN's own documents and studies confirm the findings of the Experts. Specifically, in its 2018 report, ICANN's Competition, Consumer Trust and Consumer Choice Review Team confirmed that the registry operators of legacy gTLDs (such as the ones concerned in this IRP) enjoy market power where it concludes that *'while the New gTLD Program has led to a dramatic increase in consumer choice, it only led to a modest, albeit important, increase in competition, and has had a minimal impact on consumer trust.'*³⁴

52. The 2010 report by Katz, Rosston and Sullivan prepared for ICANN also confirms the importance of switching costs in the DNS and the market power of registries with large installed customer bases:

*'If a registry has to treat all domain names equally, then, **absent price regulation**, registries with large installed bases could be expected to pursue relatively high-price strategies to "milk" their registrant customer base, while registries with relatively few existing registrants can be expected to compete for new registrants. Competition for new registrants could be expected to be intense because the value of a new registrant is high—*

-
- Evidence from previous empirical studies commissioned by ICANN that concluded that new gTLDs are generally not being treated as substitutes for legacy gTLDs (*See* Expert Report, §§62-65).

³⁰ The Expert Report provides the following evidence on the effectiveness of price controls in the past, which also indicates that price controls would be effective in the future:

- References to instances of past price increases where the price caps effectively constrained the pricing of .org, .info and .biz (*See* Expert Report, §68-69);
- Evidence on price differentials between new registrations and renewals, showing that TLDs that were not subject to a price cap tend to exhibit a significantly higher price differential when compared to TLDs with a price cap (*See* Expert Report, §72);
- References to economic studies commissioned by ICANN where the experts viewed price caps as effective in constraining the prices for the TLDs concerned (*See* Expert Report, §71).

³¹ *See* Expert Report, §48.

³² *See* Expert Report, §§47 (footnote 10), 65.

³³ *See* Expert Report, §§47, 52-55.

³⁴ ICANN, *Competition, Consumer Trust, and Consumer Choice Review Final Report*, 8 September 2018 (**RM 72**).

*once that registrant has been attracted, it is unlikely later to switch.*³⁵ (emphasis added)

53. This report further explains that the U.S. Department of Justice concluded that legacy gTLDs ‘*already have market power*’ and ‘*that the market power of existing gTLDs [...] would not be constrained by new gTLDs*’.³⁶

54. ICANN fails to address the abundant and robust evidence presented by Namecheap and confirmed by ICANN’s own documents. Instead, ICANN merely presents conclusory statements by its lawyers, (i) opining that Namecheap’s affidavits and the Expert report contain unsupported speculation and conjecture, and (ii) misrepresenting Namecheap’s theory of harm, as if it were predicated on the risk of speculative future harm.

2. **Namecheap’s theory of harm as a result of ICANN’s actions and inactions regarding the change of control requests is based on evidence and robust economic theory**

55. As mentioned above, the Expert Report demonstrates, with ample references to economic literature, that an increase in the uncertainty in the business environment harms market participants.³⁷ ICANN’s own documents confirm that uncertainty is harmful to TLD markets and their participants.³⁸

56. The fact that ICANN is not transparent about its deliberations regarding changes of control, harms Namecheap. The lack of openness and transparency about *inter alia* the timing and the criteria that ICANN uses to evaluate changes of control, makes it impossible to make reliable business projections and to stay abreast of important market developments. This affects Namecheap’s ability to compete effectively, compared to a situation where ICANN’s decision-

³⁵ Michael L. Katz, Gregory L. Rosston, Theresa Sullivan, *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names prepared for ICANN*, June 2010 (**RM 73**), p. 19.

³⁶ Michael L. Katz, Gregory L. Rosston, Theresa Sullivan, *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names prepared for ICANN*, June 2010 (**RM 73**), p. 11.

³⁷ Expert Report, §§81-87.

³⁸ See Expert Report, §98 and references there.

making process is transparent.

57. The uncertainty created by ICANN's lack of transparency increases Namecheap's cost of business, particularly in view of the magnitude of the changes of control that are currently under review behind closed doors.

E. Even if the negative effects of ICANN's harmful action will mostly accrue in the future, Namecheap is harmed as of the date of ICANN's violations of its Articles and Bylaws

58. Namecheap's theory of harm is not about future harm. Removal of price caps reduces the flow of profits that Namecheap can expect to realize. While the large part of Namecheap's loss of profits as a result of the removal of the price control provisions will accrue over time in the future, this does not mean that Namecheap is not harmed by this action today. Just like a downward adjustment in a person's expected earnings immediately and actually harms the person, the removal of price caps harms Namecheap today, even if negative effects of harmful action will mostly accrue in the future.

F. Namecheap could not, and should not, have waited until all of the harmful effects came to pass

59. It would make no sense to wait until all of the harmful effects have materialized before filing a request for IRP. Waiting for the effects to materialize would increase the extent of the harm and would make it more difficult for ICANN to anticipate when a claim can be filed.

60. The Interim Supplementary Procedures provide that an IRP request must be filed '*no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.*' If it is apparent as from the date of the action or inaction that material effects will occur and a Claimant nevertheless waits more than 120 days until the effects materialize, such Claimant

may anticipate an ICANN defense that its request for IRP is time barred. Moreover, if the effects take more than twelve months to materialize, a Claimant who is materially affected by ICANN's decision might never be in a position to challenge ICANN's action or inaction under ICANN's erroneous interpretation of the standing requirement. If one follows ICANN's incorrect reading of the standing requirement, ICANN could try to escape its accountability simply by adding to its decisions that they will take effect twelve months and one day after the date of the decision. It would make any action by an interested party impossible. That can never have been the intent of the standing requirement.

G. ICANN's defense that Namecheap could pass through price increases without losing customers is spurious and baseless

61. Without any evidence or support, ICANN makes a simplistic reasoning, arguing that Namecheap could pass through wholesale price increases to its customers and that Namecheap's customers are likely to absorb the price increase.³⁹ ICANN hypothesizes about a 20% price increase.

62. ICANN's reasoning is spurious and baseless.

63. The only scenario where Namecheap would not be harmed by passing through price increases is a situation where all of Namecheap's customers carry the price increase. In other words, only if the market demand were perfectly inelastic, Namecheap might not be harmed by a wholesale price increase. However, there is no example of a market with perfectly inelastic demand in real life, and ICANN cannot point to such an example. In relation to domain name registrations, ICANN cannot pretend that it truly believes that the total number of registrations for a TLD would not decrease if prices for a TLD increased by 20% as hypothesized in ICANN's argument.

³⁹ ICANN's Motion to Dismiss, 13 January 2021, § 40.

64. As far as new registrations are concerned, Namecheap could only pass through a full price increase without losing customers if (i) the aggregate demand for new registrations were completely insensitive to price such that demand would not decrease when prices increase, and (ii) all Namecheap's rival registrars equally fully pass through the cost increase. If some of Namecheap's rivals do not fully pass through the price increase, Namecheap would lose customers to those cheaper rivals. The point is all the stronger if rivals are vertically integrated with any of the TLD operators concerned.⁴⁰

65. It is undeniable that the registrants who consider, as their best option, to register a domain name in the affected TLD space would suffer harm from the price increase. While many registrants considering an affected TLD would absorb the harm from a price increase and register a domain nevertheless (this is precisely why registries have market power), some will walk away because of the higher price. The registrants could try to reduce, but cannot fully avoid, the harm by considering another TLD. First, for many registrants, the alternative would not be a perfect substitute for their preferred TLD. Second, to the extent that the alternative TLD would be a good substitute for many registrants (the unlikely counterfactual scenario where the affected TLDs compete with new ones intensely for new registrations), the registries operating these alternative TLDs would follow the price increase for an affected TLD by similarly increasing their prices (again as a matter of straightforward economics). This general price hike would reduce the space for registrants to escape harm from the price increase for an affected TLD. As a consequence, many would forgo a registration altogether. This business reality means that Namecheap could not fully pass through a cost increase without losing prospective customers. Switching costs are irrelevant to this argument and the conclusion is a matter of straightforward and well-established economic theory that does not require a separate

⁴⁰ See Expert Report, §§88-93.

proof.⁴¹

66. As far as domain name renewals are concerned, it is also a matter of straightforward business reality and straightforward economics, that Namecheap would not be able to pass through fully the price increase for renewals. Significant switching costs may indeed lower the incentive for an average registrant to switch to another TLD in the face of a price increase. But switching costs, as must be known to ICANN, do not stop existing registrants from negatively responding to a price increase. Of the customers that would decide not to renew a domain name as Namecheap attempts to pass through a price increase, some would switch to another domain. Namecheap could recapture some of those customers on other TLDs. Other customers would simply decide no longer to maintain a domain name or to switch to another registrar (who may offer registrations under different TLDs or who may benefit from being vertically integrated with any of the registry operators concerned). It unambiguously follows that Namecheap could not fully pass through a price increase without losing customers or profits.⁴²

H. ICANN's defense that Namecheap's harm results from the actions of third parties is spurious and baseless

67. Namecheap's harm results directly from ICANN's actions and inactions. If ICANN's violations of its Articles and Bylaws had not occurred, (i) the price control provisions would still be in place (possibly imposing more stringent requirements than the 2013 Registry Agreements), and (ii) Namecheap would have benefited from the necessary transparency that allows Namecheap to stay abreast of important market developments and gives Namecheap a useful opportunity to contribute to ICANN's review of any such developments.

68. These violations and their consequences are fully attributable to ICANN.

69. ICANN's contention that Namecheap's affidavits and the Expert Report '*rely entirely on*

⁴¹ See Expert Report, §§52-55.

⁴² See Expert Report, §§52-55.

*the actions of third parties – the registry operators*⁴³ is incorrect.

70. While actions by the registry operators concerned could potentially increase the harmful effects of ICANN’s violations to Namecheap, such actions would not change the fact that the harm is directly and causally connected to ICANN’s violations. Namecheap does not rely on the actions of the registry operators to establish its harm.

71. Moreover, the registry operators concerned are not third parties that are independent of ICANN. Indeed, ICANN is the party that appoints these registries as the exclusive operators of TLDs and that imposes the terms and conditions under which these registry operators can provide their registry services.

72. Even if these registry operators were considered third parties, independent of ICANN – *quod non* –, their actions would have no bearing on the standing requirement. All that is required is a direct and causal connection between Namecheap’s injury or harm and the alleged violation. This direct and causal connection between Namecheap’s harm and ICANN’s violations is established, irrespective of any subsequent action that a registry operator may take. In this respect, it is worth mentioning that the IRP’s standing requirement was lowered as a result of the CCWG-Accountability’s efforts to enhance ICANN’s accountability mechanisms.

Prior to the CCWG-Accountability’s efforts, ICANN’s Bylaws stated:

*‘In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board’s action.’*⁴⁴ (emphasis added)

The applicable version of the Bylaws state:

*‘To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.’*⁴⁵

73. The reference to third parties acting in line with ICANN’s violations was removed,

⁴³ ICANN’s Motion to Dismiss, 13 January 2021, §34.

⁴⁴ ICANN Bylaws as amended 11 February 2016 (**RM 74**), Article IV(3)(2).

⁴⁵ ICANN Bylaws (**RM 2**), Article IV(3)(b)(i).

making it clear that harm can be directly and causally connected to a violation of ICANN's Articles or Bylaws, even if the injury or harm is the result of third parties acting in line with ICANN's violation. If ICANN wanted to exclude injury or harm that is the result of third parties, it would have done so explicitly as per the previous version of its Bylaws.

I. ICANN's defense that Namecheap sells domain name registrations in different TLDs is irrelevant

74. ICANN argues that '*Namecheap sells domain name registrations for hundreds of TLDs and that there is no evidence that Namecheap's expected profits or market value will drop if just three of those gTLDs increase their prices above the 10 percent allowed under the prior price control provisions*'.⁴⁶

75. In making this argument, ICANN assumes that it would not violate its Articles and Bylaws if it had maintained the price control provisions of the 2013 Registry Agreements. That is a question for the merits of this case. It may well be that compliance with the Articles and Bylaws warranted the inclusion of more stringent price control provisions when renewing the Registry Agreements.

76. More importantly, for the purposes of Namecheap's standing, ICANN's argument is irrelevant. The fact that Namecheap sells domain name registrations for different TLDs does not change the fact that Namecheap suffers harm from ICANN's violations. Even if Namecheap were able to mitigate the effects of ICANN's harmful actions and inactions (e.g., by diversifying its TLD portfolio), such mitigation efforts are external to the harm that is caused by ICANN. By analogy, when the value of bonds held by a portfolio investor goes down because an error in the bonds' credit rating, the value of the portfolio investor's other bonds

⁴⁶ ICANN's Motion to Dismiss, §48.

will be irrelevant to establish that the investor is harmed by the erroneous credit rating. The same applies here. The fact that Namecheap has diversified its business is irrelevant to the fact that Namecheap suffers harm from ICANN's violations.

J. ICANN's defense that Namecheap has not quantified its harm is irrelevant

77. ICANN makes much of the fact that Namecheap and its experts have not (yet) gone through the time-consuming and expensive exercise of quantifying Namecheap's harm.

78. Namecheap should not be required to incur such costs simply to get standing in this dispute.

79. Moreover, such analysis, that Namecheap intends to carry out, can only fully be made once Namecheap has obtained information from ICANN that it is requesting. Specifically, communication with registries of the affected TLDs, and ICANN's internal communications in relation to the past and expected future pricing, will help Namecheap reconstruct the extent to which price controls were effective, and the extent of market power of the relevant registries, which, in turn will allow Namecheap to quantify harm.

IV. CONCLUSION

80. In conclusion, Namecheap has hereby demonstrated evidence, supported by an independent expert report, specifically identifying the harm that Namecheap is suffering, and may suffer in the future, directly and causally connected to ICANN's violations that resulted in the change of the price control policy of the Registries. Namecheap has thus demonstrated *prima facie* standing.

81. For the reasons set out above, ICANN's Motion to Dismiss must be rejected.

82. Namecheap seeks leave to have ICANN's actions and inactions regarding its consideration of the Neustar and Afilias changes of control reviewed by this IRP Panel and reserves all rights to initiate separate proceedings on these issues in the event that this request


is denied.

83. Namecheap reserves all rights to recover its costs in connection with its defense to ICANN's frivolous motion to dismiss.

84. If, *per impossibile*, the Panel were to require that Namecheap quantifies its harm to establish standing, Namecheap requests that it be given the opportunity to do so once ICANN has completed its document production to Namecheap.

Respectfully submitted,
26 January 2021


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Counsel for Claimant


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Counsel for Claimant

List of Affidavits

- CL-Aff. 1. Affidavit of Mr. Hillan Klein of 21 December 2020
- CL-Aff. 2. Affidavit of Ms. Maryna Zhuravlova

Expert Report and Appendices

- Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus with appendices
- Namecheap data files (**HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY**) sent in attachment as a secured zipped file together with the Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus

List of Annexes
(See Namecheap's Motion to Compel and Namecheap's Response to ICANN's Motion to Compel)

List of Reference Material (RM)
(cont'd from Namecheap's Response to ICANN's Motion to Compel)

60. Extract from the New Oxford American Dictionary: definition of 'harm'
61. ICANN, IRP-IOT Meeting #4, 6 July 2016, *Transcripts*
62. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)
63. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009)
64. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992)
65. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)
66. *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)
67. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Panel Declaration on the IRP Procedure, 14 August 2014
68. 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>
69. ICANN, *Approved Board Resolution 2020.04.30.02 – Special Meeting of the ICANN Board*, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>, 30 April 2020
70. ICANN, *Approved Board Resolutions – Special Meeting of the ICANN Board of 17 December 2020*, 21 December 2020, <https://www.icann.org/resources/board-material/resolutions-2020-12-17-en#2.c>
71. ICANN, *Preliminary Report – Special Meeting of the ICANN Board of 17 December 2020*, 5 January 2021, <https://www.icann.org/resources/board-material/prelim-report-2020-12-17-en>
72. ICANN, *Competition, Consumer Trust, and Consumer Choice Review Final Report*, 8 September 2018
73. Michael L. Katz, Gregory L. Rosston, Theresa Sullivan, *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names prepared for ICANN*, June 2010
74. ICANN Bylaws as amended 11 February 2016