

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Namecheap, Inc.,) ICDR CASE NO. 01-20-0000-6787
)
 Claimant,)
)
 and)
)
 INTERNET CORPORATION FOR ASSIGNED)
 NAMES AND NUMBERS,)
)
 Respondent.)
 _____)

ICANN'S MOTION TO DISMISS

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby moves to dismiss Namecheap Inc.’s (“Namecheap”) Request for Independent Review Process submitted on 25 February 2020 (“IRP Request”).

1. Namecheap’s IRP Request states that Namecheap initiated this IRP regarding two discrete issues: (i) ICANN’s decision to transition the .ORG, .BIZ, and .INFO Registry Agreements to the Base Registry Agreement in June 2019 (together, the “2019 Registry Agreements”), thereby not including a provision setting the maximum price increase the registry operators could charge to registrars for domain registrations per year (“price control provision”); and (ii) ICANN’s consideration of a request by the .ORG registry operator (Public Interest Registry or “PIR”) for an indirect change of control (“Change of Control Request”), which sought to transfer the ownership of PIR to a for-profit company, Ethos Capital.

2. Namecheap’s IRP Request, however, failed to explain how Namecheap had suffered any harm as a result of the conduct alleged in the IRP Request. ICANN, therefore, has argued since the outset of this IRP that Namecheap lacks standing to pursue this IRP under the terms of ICANN’s Bylaws that set forth the rules for initiating an IRP. ICANN has challenged Namecheap’s standing at every opportunity—in ICANN’s response to Namecheap’s IRP Request, in response to Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection (“Emergency Request”) and during the hearing on the Emergency Request, in response to Namecheap’s request for production of documents, in ICANN’s motion to compel, in response to Namecheap’s motion to compel, and during the hearing on the motions to compel.

3. In conjunction with the briefing and hearing on its motion to compel, ICANN sought leave from the Panel to move to dismiss this IRP because, despite the fact that ICANN had been arguing since the outset of the IRP that Namecheap had failed to demonstrate harm

sufficient to qualify as a Claimant under the Bylaws, Namecheap still had failed to make any showing of harm. In response, the Panel issued a briefing schedule on ICANN’s motion to dismiss and required Namecheap to make an evidentiary submission—which the Panel assumed would be a client affidavit with supporting exhibits—reflecting the harm Namecheap allegedly has suffered as a direct result of the conduct alleged in the IRP Request.

4. Despite having had ten months from the filing of the IRP Request to try to demonstrate its harm, Namecheap’s evidentiary submission, provided to ICANN and the Panel on 21 December 2020, was devoid of any actual evidence or demonstrated harm to Namecheap. Instead, Namecheap provided two extremely short client affidavits, which amounted to six total pages but did not identify a single harm that Namecheap had suffered as a result of the conduct alleged in the IRP Request. Namecheap also provided an “expert” report by Dr. Verboven and Dr. Langus (“Expert Report”) that theorized that Namecheap might—in the future—be harmed, albeit that the possible future harm is entirely speculative at this point. Namecheap also submitted an unauthorized brief reflecting attorney arguments that do not comprise actual evidence and, in all events, simply parrot what the client affidavits and “expert” report state.

5. After reviewing Namecheap’s evidentiary submission, there is no doubt that Namecheap has not suffered any harm (and is unlikely to suffer any future harm) that would be sufficient to classify Namecheap as a “Claimant” under ICANN’s Bylaws. The 2019 Registry Agreements were renewed in June 2019, yet Namecheap does not point to a single concrete harm it has suffered in the past year and a half, and Namecheap’s attempt to have economists speculate that Namecheap might be harmed in the future simply confirms that Namecheap has not suffered a harm sufficient to qualify Namecheap as an IRP “Claimant.”

6. In fact, Namecheap’s submission truly confirms that Namecheap has not suffered any harm. Instead, the “harms” Namecheap proffers consist entirely of speculative future harm.

Indeed, the affidavits and Expert Report employ the concept of “may be injured” and “potential” injury dozens of times. But, as discussed below, the Bylaws and the Interim Supplementary Procedures are clear that potential future harm is not sufficient for Namecheap to qualify as a Claimant.

7. Even if potential future harm could be sufficient to confer “Claimant” status, the evidentiary submission fails to establish that such harm is anything other than unsupported conjecture. As to the price control provisions, Namecheap’s affiants speculate about lost registrations or renewals and increased costs, but the affiants fail to offer a single concrete explanation, or a single piece of evidence in support. And at least one of the theories of harm actually demonstrates that Namecheap is unlikely to lose a single customer if a registry operator increases prices that Namecheap passes through to its customers. The Expert Report similarly fails to support any theory of harm with any data or concrete explanation.

8. Namecheap has argued during this IRP that it is one of the largest Internet registrars in the world. Surely it has considerable data regarding trends for registry pricing and the number of registrations for the .ORG, .INFO, and .BIZ TLDs. By failing to include any analysis based on any actual data, Namecheap essentially admits that it has no actual evidence of current or even future harm related to the price control provisions.

9. As to the Change of Control Request, this claim should be dismissed for two separate and independent bases: (i) the claim is moot because ICANN *did not grant* the request; and (ii) Namecheap lacks standing to pursue it in any event. To be clear, Namecheap’s affiants do not even address any actual or potential harm related to the Change of Control Request. Only Namecheap’s experts discuss the potential harm, but their explanation is entirely theoretical or relates to third-party transactions that are simply not at issue in this IRP. The absence of any actual harm resulting from the Change of Control Request is unsurprising inasmuch as ICANN

did not consent to the request. The notion that Namecheap might have been injured by some alleged lack of transparency on ICANN's part in making its decision to deny the Change of Control Request is nonsensical and, in all events, not supported by Namecheap's submission.

10. In sum, Namecheap has had since July 2019 to determine that it has suffered some sort of harm, and it has had nearly a year since it initiated this IRP to try to articulate an actual, concrete harm it has suffered. Namecheap's inability to show, much less prove, an actual harm means that this IRP should be dismissed now, before the parties are required to engage in expensive discovery and a hearing on the merits.

SUMMARY OF RELEVANT FACTS

I. NAMECHEAP'S IRP REQUEST RAISES TWO DISCRETE ISSUES.

11. Namecheap instituted this IRP in February 2020 challenging two specific and narrow issues: the lack of price control provisions in the 2019 Registry Agreements; and PIR's Change of Control Request.¹ Regarding the price control provisions, Namecheap alleged that "the dispute relates to ICANN's decision to remove the provisions according to which the operators of .org, .info and .biz were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another."²

12. Before the .ORG, .BIZ, and .INFO Registry Agreements were set to expire on 30 June 2019, ICANN engaged in negotiations with the respective registry operators to renew the 2019 Registry Agreements. ICANN staff consulted with the ICANN Board and concluded that, following the trend of other legacy TLDs, the 2019 Registry Agreements should

¹ See generally, IRP Request.

² *Id.* ¶ 2.

substantially mirror the Base Registry Agreement, which applies to the over 1,200 new gTLDs, and many of the legacy TLDs.³ But before executing the 2019 Registry Agreements, ICANN opened a public comment period, seeking input from the Internet community on the proposed 2019 Registry Agreements. As to the price control provisions, ICANN explained: “This change will not only allow the .org [.info and .biz] renewal agreement[s] to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.”⁴

13. ICANN received numerous public comments from the Internet community. ICANN analyzed the public comments and published a Report of Public Comments for each TLD (collectively, the “Public Comment Reports”).⁵ In the Public Comment Reports, ICANN explained: “Removing the price cap provisions in the .org [.info, and .biz] Registry Agreement[s] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community.”⁶ ICANN also 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.”⁷

14. In June 2019, ICANN staff conferred again with the ICANN Board and decided to proceed with the 2019 Registry Agreements as proposed, without price control provisions.⁸ Executed on 30 June 2019, the 2019 Registry Agreements did not include price control

³ RE-8, at p. 2.

⁴ Proposed Renewal of .org Registry Agreement, RE-12; Claimant’s Annex 3, at 4; Claimant’s Annex 4, at 4.

⁵ RE-12, at p. 1; Claimant’s Annex 3, at p. 1; Claimant’s Annex 4, at p. 1.

⁶ Claimant’s Annex 5, at p. 8; Claimant’s Annex 7, at pp. 6-7; Claimant’s Annex 6, at p. 7.

⁷ Claimant’s Annex 5, at pp. 1, 8; Claimant’s Annex 7, at pp. 1, 7; Claimant’s Annex 6, at pp. 1, 7.

⁸ RE-8, at p. 2.

provisions but included the same pricing protections afforded by the Base Registry Agreement: thirty days' advance notice for price increases for initial domain name registrations; six months' advance notice of price increases for renewal domain name registrations; and the option for initial domain name registrations to renew for up to ten years, among others.⁹

15. Regarding PIR's Change of Control Request, Namecheap challenged ICANN's consideration of a request in late 2019 by PIR, the registry operator for .ORG, that ICANN permit a change of control of PIR that would have resulted in Ethos Capital becoming the owner of PIR. Pursuant to the terms of the 2019 .ORG Registry Agreement, PIR was required to give ICANN the opportunity to consent or withhold consent to the Change of Control Request. At the time of the filing of the IRP Request, ICANN had not yet made a decision on PIR's request.

16. In the course of its consideration of the Change of Control Request, ICANN received and responded to multiple letters from interested parties (including the California Attorney General) regarding the request. ICANN published the relevant correspondence on its website (contrary to Namecheap's professed concern about lack of transparency).¹⁰

17. When Namecheap initiated the IRP, Namecheap suggested that ICANN would violate its Articles and Bylaws should ICANN consent to the Change of Control Request.¹¹ After ICANN filed its Response to Namecheap's IRP Request, ICANN elected to withhold its consent to the Change of Control Request (which is what Namecheap had argued for in its IRP Request).¹² ICANN's decision not to approve the Change of Control Request rendered moot this

⁹ 2019 .ORG Registry Agreement, § 2.10, RM 29; 2019 .INFO Registry Agreement, § 2.10, RM 30; 2019 .BIZ Registry Agreement, § 2.10, RM 31.

¹⁰ *See, e.g.*, Compilation of correspondence on ICANN's website regarding the Change of Control Request, R-17.

¹¹ *See* IRP Request ¶¶ 51–54.

¹² To be clear, ICANN did not withhold its consent because of Namecheap's arguments in its IRP Request. Rather, ICANN followed its process (as it does for all decisions it makes) and, as a result of that process, decided to withhold consent from the Change of Control Request.

portion of Namecheap's IRP Request. Nevertheless, Namecheap has refused to withdraw this portion of its IRP Request.

18. To be clear, Namecheap's IRP Request does not relate to vertical integration between registries and registrars, and does not relate to any other third-party transactions (including the proposed acquisition of Neustar by GoDaddy, or the proposed acquisition of Afilias by Donuts).¹³ Indeed, the IRP Request was filed before these transactions were even proposed, and Namecheap has not otherwise challenged these transactions.

II. NAMECHEAP'S ALLEGATIONS REGARDING HARM.

19. Namecheap's IRP Request contains only two allegations regarding the purported harm Namecheap has suffered, and these allegations are wholly conclusory. First, Namecheap alleged that it "has suffered direct harm as a result of ICANN's breaches of its Articles [] and Bylaws."¹⁴ Second, Namecheap claimed that it "is an ICANN-accredited registrar that is directly impacted by this decision."¹⁵ Namecheap did not, however, explain *how* it had been *harmed* by either the absence of the price control provisions or the Change of Control Request, nor did it offer any evidence with its IRP Request (or otherwise) to support that it had been harmed.¹⁶ Therefore, in ICANN's Response to Namecheap's IRP Request, ICANN argued that Namecheap is not a proper Claimant under the Bylaws, and has no standing to pursue this IRP.¹⁷ Specifically, ICANN argued that, in order to qualify as a Claimant, "Namecheap must demonstrate that it 'has been materially affected by a Dispute,' meaning that it 'must suffer an injury or harm that is directly and causally connected to the alleged violation'" of ICANN's

¹³ See generally IRP Request.

¹⁴ *Id.* ¶ 1.

¹⁵ *Id.* ¶ 2.

¹⁶ See generally, IRP Request.

¹⁷ Response to IRP Request ¶¶ 40–44.

Articles or Bylaws.¹⁸ Namecheap’s failure to do so demonstrates that it does not qualify as a Claimant with standing to bring this IRP.¹⁹

III. NAMECHEAP’S REQUEST FOR EMERGENCY RELIEF.

20. In February 2020, Namecheap submitted an Emergency Request, seeking an order preventing ICANN from approving the Change of Control Request and essentially reinstating the price control provision in the .ORG Registry Agreement.²⁰ ICANN opposed Namecheap’s Emergency Request; in so doing, ICANN argued again that Namecheap is not a proper Claimant under the Bylaws.²¹

21. During the extensive briefing on the Emergency Request, Namecheap did not provide the Emergency Panelist with a single piece of evidence demonstrating its harm. During the hearing on the Emergency Request, Namecheap for the first time offered to produce a two-page affidavit from its CEO as to its potential monetary harm.²² The Emergency Panelist did not permit the affidavit because it was untimely and would unduly prejudice ICANN.²³

22. The Emergency Panelist then denied Namecheap’s Emergency Request.²⁴ As to standing, the Emergency Panelist concluded that a risk of future harm to Namecheap was sufficient at that phase of the proceeding,²⁵ but made clear that “this finding does not bind the IRP Panel.”²⁶ And, as ICANN has already argued and also explains below, the Emergency Panelist’s decision in this respect was “improperly predicated entirely on potential *future*

¹⁸ *Id.* ¶ 40.

¹⁹ *Id.* ¶ 40.

²⁰ Emergency Request ¶ 56.

²¹ Response to Emergency Request ¶¶ 35–38.

²² Decision on Emergency Request ¶ 32 n.2.

²³ *Id.*

²⁴ *Id.* ¶ 141.

²⁵ *Id.* ¶ 92–94.

²⁶ *Id.* ¶ 94.

harm[,]” which contradicts the express provisions in the Bylaws and the Interim Supplementary Procedures.²⁷

IV. ICANN PROPOUNDED REQUESTS FOR PRODUCTION REGARDING NAMECHEAP’S ALLEGED HARM.

23. To follow up on ICANN’s contention that Namecheap had not suffered a harm sufficient to qualify as an IRP Claimant, ICANN propounded requests for production seeking documents “reflecting the alleged harm Namecheap has suffered or will suffer as a result of removal of the price control provisions” in the 2019 Registry Agreements, and “as a result of ICANN’s consideration and/or rejection” of the Change of Control Request.”²⁸ Namecheap initially refused to produce any documents on the ground that any responsive documents were protected by the work product doctrine.²⁹ Namecheap then changed its position and agreed to produce a limited set of “qualitative and quantitative data reflecting Namecheap’s harm” but *only* “together with a comprehensive study, that will be commissioned, to perform an objective [*sic*] and fact-based assessment of the harmful effects of ICANN’s decisions on price caps (both on Namecheap and on the market as a whole).”³⁰ Effectively, Namecheap objected to producing *any* documents in response to these requests, and instead agreed to produce only an expert report and the underlying data at some later time.

24. ICANN then moved to compel production of documents reflecting Namecheap’s alleged harm and also requested leave from the Panel to move to dismiss this IRP for lack of standing.³¹ The Panel granted ICANN’s motion to compel and permitted ICANN to submit a

²⁷ Response to IRP Request ¶ 41 (emphasis in original).

²⁸ ICANN’s Requests for Production, Request Nos. 1, 2.

²⁹ Annex 30.

³⁰ Annex 32.

³¹ Procedural Order No. 3 ¶ 3.

motion to dismiss.³² The Panel also ordered Namecheap to “make an evidentiary submission – presumably in the form of an affidavit with exhibits – articulating the harm that supports its claim of standing under the ICANN Bylaws” on or before 16 December 2020.³³

25. In response to the Panel’s order, Namecheap submitted a three-page affidavit from Hillan Klein (“Klein Affidavit”), the Chief Operating Officer of Namecheap, and a three-page affidavit with a one-page appendix from Maryna Zhuravlova (“Zhuravlova Affidavit”), the Head of Marketing for Namecheap.³⁴ The affidavits relate only to the alleged harm resulting from the absence of the price control provisions, and only reflect the possibility for potential and theoretical future harm; there is no discussion of any actual present or past harm. Notably, the affidavits do not discuss the Change of Control Request whatsoever.³⁵

26. Although not requested by the Panel, Namecheap also provided the Expert Report and two data files.³⁶ The Expert Report concedes at the outset that the experts “have not quantified Namecheap’s harm,”³⁷ and contains discussion of hypothetical and theoretical harms that Namecheap might, in the future, suffer. The data files comprise: (i) the “average costs by TLD and provider”; and (ii) Namecheap’s domain names under management for five TLDs as of a single date, 30 November 2020 (which is not over the same period of time as the average

³² *Id.* ¶¶ 4–5, Appendix A.

³³ *Id.* ¶¶ 4–5. On 16 December 2020, Namecheap sought an extension of this deadline to 21 December, which the Panel granted. *See* Procedural Order No. 4.

³⁴ *See generally*, Klein Affidavit; Zhuravlova Affidavit. And, interestingly, Namecheap did not submit an affidavit from its CEO who, according to Namecheap, was the affiant that Namecheap offered during the hearing before the Emergency Panelist.

³⁵ *See generally*, Klein Affidavit; Zhuravlova Affidavit.

³⁶ Additionally, Namecheap submitted to the Panel an unauthorized brief by its attorneys titled “Claimant’s *Prima Facie* Showing of Standing.” Attorney argument is not evidence and the brief, which largely just summarizes the client affidavits and Expert Report, is therefore irrelevant. ICANN addresses the two affidavits and the Expert Report in this motion.

³⁷ Expert Report ¶ 6.

costs).³⁸ Namecheap did not submit—and apparently did not provide its experts with—any sort of financial projection, profit and loss statement, strategy plan for addressing the absence of the price control provisions or the Change of Control Request, or any other ordinary course document related to Namecheap’s supposed harm. In Appendix I of the Expert Report, the experts explain that, during the course of their review, they relied upon the briefs in this IRP, two emails to and from counsel for the parties, one of the client affidavits, and the two data files.³⁹ Notably, the experts did not review the other client affidavit or the CEO affidavit that had apparently been signed before the hearing on Namecheap’s Emergency Request.

STANDARD OF REVIEW

27. The IRP is a creation of ICANN’s Bylaws developed over a period of years with extensive input from the ICANN community, and the Bylaws provide that only a “Claimant” can institute an IRP.⁴⁰ Under the Bylaws and the Interim Supplementary Procedures that ICANN has adopted for IRPs, a Claimant is an entity “that has been materially affected by a Dispute,” meaning that it “**must suffer an injury or harm that is directly and causally connected to the alleged violation**” of ICANN’s Articles or Bylaws.⁴¹ A Dispute is defined as a claim that ICANN action or inaction “violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that . . . exceeded the scope of the Mission.”⁴²

28. Under the Bylaws, the IRP Panel is authorized to “[s]ummarily dismiss Disputes that are brought *without standing*, lack substance, or are frivolous or vexatious.”⁴³ Similarly,

³⁸ See generally, Datasets. The five TLDs include .ORG, .BIZ, .INFO, .MELBOURNE, and .SYDNEY. The relevance of the final two TLDs is unknown to ICANN.

³⁹ Expert Report, Appendix I.

⁴⁰ Bylaws, Art. 4, § 4.3(b), RM-2.

⁴¹ *Id.*, Art. 4, § 4.3(b)(i) (emphasis added); Interim Supp. Proc. Rule 1, RE-1.

⁴² *Id.*, Art. 4, § 4.3(b)(iii)(A).

⁴³ *Id.*, Art. 4, § 4.3(o)(i).

Rule 9 of the Interim Supplementary Procedures provides that the Panel may “summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it *has been* materially affected by a DISPUTE.”⁴⁴

ARGUMENT

I. NAMECHEAP’S FAILURE TO IDENTIFY ANY ACTUAL HARM IT HAS SUFFERED WARRANTS DISMISSAL OF THIS IRP.

29. The Bylaws and the Interim Supplementary Procedures are clear that a party qualifies as a Claimant only where it “*has been* materially affected by a Dispute”—in other words, harmed.⁴⁵ There is nothing in the Bylaws or Interim Supplementary Procedures that permits a Claimant to proceed on the basis of possible harm in the future. For instance, the Bylaws could have provided that a party qualifies as a Claimant where it has been or will be materially affected by a Dispute. But that is *not* what the Bylaws provide. Therefore, Namecheap qualifies as a Claimant in this IRP only if it can demonstrate that it *already* has suffered some harm that is directly and causally connected to the alleged violations of ICANN’s Articles and Bylaws.

30. Namecheap’s entire theory of harm, however, is predicated on the risk of *speculative future* harm. In fact, nearly every explanation of Namecheap’s purported harm includes the words “may” or “potential.” Namecheap has not identified a single actual, concrete harm it has suffered.

31. As to the price control provisions, Namecheap’s experts opine, by way of example only, that there is a “significant *potential* future harm” in the absence of the price

⁴⁴ Interim Supp. Proc. Rule 9.

⁴⁵ Bylaws, Art. 4, § 4.3(b)(i); Interim Supp. Proc. Rule 1 (emphasis added).

control provisions, but admit that they “have not quantified Namecheap’s harm.”⁴⁶ They also claim that “removal of the price controls *may* increase registry prices.”⁴⁷ Namecheap’s COO also speculates that “it is *likely* that Namecheap will need to incur additional costs,” and that “there will be *potential* damage to Namecheap’s brand equity and reputation.”⁴⁸ Despite ample opportunity to do so, Namecheap has not demonstrated any actual harm it has suffered in the year and a half since the 2019 Registry Agreements were executed. And simply being a registrar that sells .ORG, .BIZ, and .INFO domain names does not establish that Namecheap “has been materially affected” (i.e., harmed) by ICANN’s actions with respect to specific TLDs.

32. As to the Change of Control Request, Namecheap’s experts opine that the lack of transparency “*may* harm Namecheap” and “*may* increase uncertainty.”⁴⁹ Speculation about

⁴⁶ Expert Report ¶ 6.

⁴⁷ *Id.* ¶ 56.

⁴⁸ Klein Affidavit ¶¶ 7, 8. *See also*, Expert Report ¶ 9 (“The evidence that we have reviewed indicates that registries operating .ORG, .INFO or .BIZ TLDs have significant market power that creates *potential* for high prices.”), ¶ 50 (“[T]he removal by ICANN of the price control provisions in relation to the domains in this dispute *may* result in an increase of registry prices, i.e., Namecheap’s costs.”), ¶ 51 (“If the removal of the price control provisions is unexpected, a mere likelihood that price controls will be effective in the future *may be enough* for the registrar’s expected profits – and its market value – to drop after a removal of price control provisions.”), ¶ 70 (“The periodic review *may* have deterred the relevant registries from fully displaying their market power in the hope to avoid triggering a corrective action and tightening of the price controls in the next round of ICANN’s review.”), ¶ 74 (“PIR, despite being a not-for-profit organization, *may* have an incentive to increase its price above competitive levels, even if that incentive may be less pronounced because of its status. While not-for-profit organizations cannot distribute profits to owners, they *may* still pursue objectives other than serving their customers.”), ¶ 75 (“The value of this bid *may* suggest that the investors saw a significant scope for the .ORG registry to profitably increase the price over the levels set in the past when they were constrained by price controls.”), ¶ 76 (“It is *possible* that the removal of price caps for .ORG, .BIZ and .INFO is viewed by registrars, registrants, as well as registries, as an indication that ICANN is less willing than it had been prior to this removal also to maintain price caps in relation to .NET. The removal of price caps *could* also indicate that the continued maintenance of price caps in relation to .COM has now become less certain.”), ¶ 80 (“Therefore, the removal of the price control provisions in relation to these TLDs *may* result in an increase of registry prices of affected gTLDs, i.e., Namecheap’s costs.”) (emphasis added).

⁴⁹ Expert Report ¶ 11 (“[W]e find that ICANN’s withholding of due transparency about its decision-making process – *if* ICANN indeed unduly withheld this transparency – *may* harm Namecheap.”), ¶ 14 (“Withholding transparency *may* harm Namecheap irrespectively of whether the adverse effects on Namecheap have materialized – an increase in uncertainty is sufficient for that.”), ¶ 86 (“A reduction in the level of transparency *may* increase uncertainty[.]”). *See, also, id.* ¶ 13 (“Withholding transparency *can* increase Namecheap’s uncertainty about the variables relevant to Namecheap’s ability to generate profits. This increase in uncertainty has at least two *possible* adverse effects on Namecheap: (1) increasing investment risk and therefore the cost of financing such investment; (2) increasing Namecheap’s costs of optimal decision making.”), ¶ 86 (“An increase in uncertainty *can* harm a firm when it concerns variables, such as costs, that are important to the firm’s ability to effectively compete.”); ¶ 95 § C

future harm is especially problematic in this instance because, in April 2020, ICANN did not consent to the Change of Control Request (which was what Namecheap had advocated for). As a result, there is no conceivable way that Namecheap could have suffered any harm.

Namecheap's evidentiary submission confirms as much because Namecheap has not identified any harm it has suffered.

II. EVEN IF POSSIBLE FUTURE HARM COULD BE SUFFICIENT, NAMECHEAP HAS NOT DEMONSTRATED THE LIKELIHOOD OF ANY POTENTIAL FUTURE HARM.

33. Even if potential future harm were sufficient to establish standing (which it is not), the supporting affidavits and the Expert Report do not establish the likelihood of any such harm.

A. Namecheap's Theory Of Future Harm Related To The Price Control Provisions Is Entirely Speculative And Theoretical.

34. Namecheap's two affidavits and the Expert Report contain unsupported speculation and conjecture.⁵⁰ The affidavits and Expert Report also rely entirely on the actions of third parties—the registry operators—and require an assumption that the registry operators

(continued...)

("Change of control over a registry from a not-for-profit to a for-profit organization *may* result in higher costs for registrars."). ¶ 96 ("[A] change of control over an input supplier *can* introduce the incentive for the supplier to increase its prices or otherwise degrade its supply terms.), ¶ 97 (The Change of Control Request "presented a *risk* of an increase in input costs for Namecheap. This is because, if consummated, the acquisition *could have* enhanced an incentive for PIR to increase the price for registry services in relation to .ORG.") (emphasis added).

⁵⁰ Although ICANN's Bylaws are unique in establishing the IRP and the basis on which a Claimant can initiate an IRP, court decisions in the United States are useful in providing analysis that courts undertake in similar situations. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), RLA-3 (To establish standing, "a litigant first must clearly demonstrate that he has suffered an 'injury in fact.' That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'") (internal citations omitted); *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 893 (3d Cir. 2020), RLA-2 (determining whether litigants had standing by considering "whether an alleged harm, even if concrete, is hypothetical or conjectural," which "is intended to weed out claims that are nothing 'more than an ingenious academic exercise in the conceivable.'") (citation omitted).

will increase prices meaningfully above the 10 percent allowed under the price control provisions, rendering these theories even more speculative.⁵¹

1. Namecheap's affidavits do not demonstrate that Namecheap has been, or is even likely to be, harmed.

35. Even if future harm were sufficient to establish standing, which it is not, neither the Klein Affidavit nor the Zhuravlova Affidavit demonstrates that Namecheap is likely to suffer any future harm from ICANN's decision to transition the 2019 Registry Agreements to the Base Registry Agreement. Klein claims that "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."⁵² Klein also claims that there "will be potential damage to Namecheap's brand equity and reputation[.]"⁵³ Of course, this harm is entirely theoretical, and Namecheap does not present a single fact to support that any such "potential" harm is "likely" to occur, and certainly none to show that it has occurred.

36. For example, Klein could have provided historical data to demonstrate the effect (if any) of prior increases in .ORG, .BIZ, and .INFO registry prices; such increases have occurred several times in the past few years according to the Expert Report.⁵⁴ Conspicuously absent from Klein's Affidavit is any such information, presumably because the relevant data in fact confirms that Namecheap suffered no harm.

⁵¹ See *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1087 (E.D. Cal. 2015), RLA-1 ("Courts . . . are reluctant to grant standing where the alleged future injury depends on the actions of an independent third party.") (citation omitted); see also *id.* ("[P]laintiffs bear the burden of pleading . . . concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court.") (citation omitted).

⁵² Klein Affidavit ¶ 7.

⁵³ *Id.* ¶ 8.

⁵⁴ Expert Report ¶¶ 67–68.

37. Klein then claims that Namecheap’s business intelligence team prepared “forecast models” and projected a “decline in domain name registration, renewal and other revenue for Namecheap.”⁵⁵ Klein does not provide any forecast model or other evidence of the projected decline, and instead claims that Namecheap presented these findings to Namecheap’s experts.⁵⁶ The experts, however, do not reference any such forecast model at all, and they do not even include the model as one of the materials on which they rely.⁵⁷ Nor do they appear to have relied upon—or even reviewed—the Klein Affidavit.⁵⁸ Thus, this supposed forecast model or “projected decline” is not in Namecheap’s evidentiary submission. Once again, if there is evidence that would show a harm to Namecheap, Namecheap has not presented it to the Panel.

38. Finally, Klein “understand[s] that the alleged violations result in significant uncertainty and confusion.”⁵⁹ What is uncertain, and who is confused? Namecheap does not explain and, in all events, “uncertainty” and “confusion” are not actual harm. In fact, Namecheap even acknowledges (as it must) that uncertainty is inherent in all markets: “Markets change. Change is inherent to all markets. They tend to evolve over time. Businesses adapt to changes in the markets in which they operate.”⁶⁰ But even if ICANN’s conduct created some type of “uncertainty” or “confusion” (which ICANN doubts), that is inherent in any decision that any business might make to change the status quo and does not create a “harm” that would be sufficient for Namecheap (or any other of the hundreds of registrars) to be an IRP Claimant.

⁵⁵ Klein Affidavit ¶ 5.

⁵⁶ *Id.* ¶ 5. Nor does Klein attach any other evidence to his Affidavit.

⁵⁷ *See generally*, Expert Report.

⁵⁸ *Id.*

⁵⁹ Klein Affidavit ¶ 7.

⁶⁰ Prima Facie Showing of Standing ¶ 9.

39. Similarly, the Zhuravlova Affidavit fails to establish that Namecheap has been harmed or will be harmed. To the contrary, Zhuravlova's statements actually confirm that Namecheap is *unlikely* to be harmed by the lack of price control provisions. Specifically, Zhuravlova opines that the costs for registrants to switch from one TLD domain to another are high.⁶¹ She describes the process as "complicated" and "painful," and she identifies a number of barriers to switching for registrants.⁶² The entire affidavit thus relates to switching costs for registrants, not for registrars such as Namecheap.

40. Rather, the affidavit suggests that, if there is a price increase, and even if Namecheap passes on the entirety of that price increase to registrants for .ORG, .BIZ, and .INFO domain name renewals, Namecheap's customers are highly unlikely to switch to another TLD. To make the situation even more concrete, suppose that the wholesale price charged to renew a .BIZ domain name increased by 20 percent (instead of the 10 percent allowed under the price control provisions). Namecheap currently charges about \$17 per year for a .BIZ name renewal. The 20% increase would amount to a \$3.40 increase in the wholesale cost of the domain name registration, which Namecheap could pass on to its customers.⁶³ If Zhuravlova is correct, Namecheap's customer is highly likely to absorb the \$3.40 per year price increase, rather than incur the switching costs that Zhuravlova opines are complicated and painful.

41. In short, Namecheap's affiants do not provide any concrete evidence that Namecheap has suffered any harm or is likely to suffer future harm as a result of ICANN's conduct, and future harm is insufficient under the Bylaws in any event.

⁶¹ Zhuravlova Affidavit ¶ 4.

⁶² *Id.* ¶¶ 4–9.

⁶³ Namecheap's Domain Name Price and Registration, R-18.

2. Namecheap's Expert Report does not demonstrate that Namecheap has been, or is likely to be, harmed.

42. As noted above, Namecheap's experts acknowledge that they have not quantified any actual harm that Namecheap has suffered related to either of Namecheap's two theories of harm. The Expert Report likewise fails to establish that Namecheap is likely to be harmed by the lack of price control provisions (notwithstanding that future harm is insufficient to confer standing under the Bylaws).

43. The experts' theory of harm is that registry operators *may* have market power, which *may* lead to an increase in registry prices, which *may* harm Namecheap because Namecheap *may* either absorb the price increases, or pass through the price increases to registrants and *may* lose customers as a result. This theory requires numerous assumptions, but the experts have not provided any actual evidence that a single assumption is warranted.⁶⁴

44. First, Namecheap's experts claim that the .ORG, .BIZ, and .INFO registry operators have "market power" and an incentive to raise registry prices above competitive levels, which "may increase registry prices."⁶⁵ The question of whether the registry operators have market power is irrelevant for purposes of this motion because Namecheap's experts do not explain how any alleged market power equates to harm to Namecheap, other than the potential for increased registry prices.⁶⁶ Even so, the experts admit that they have not performed any analysis of the current market conditions, including whether new gTLDs constrain any alleged

⁶⁴ See *Thorne*, 980 F.3d at 893 (finding that plaintiff lacked standing because the threat of future harm "consists of a highly speculative chain of future events that does not constitute a material risk of harm"); *id.* at 894 ("This chain of conceivable events poses some new non-zero risk to Thorne, but her absolute chances of harm are miniscule.").

⁶⁵ Expert Report ¶ 56. They also opine that even though PIR is a non-profit organization, it still "may have an incentive to increase its price above competitive levels, even if that incentive may be less pronounced because of its status." *Id.* ¶¶ 74–75.

⁶⁶ Drs. Verboven and Langus also rely on the Zhuravlova affidavit in opining that registrants face significant switching costs when switching from one TLD registry to another. Expert Report ¶¶ 58–59. As discussed above, high switching costs support that Namecheap is unlikely to lose customers if it increases registration or renewal fees.

market power: “To make more precise statements on the competitive effect of the introduction of new TLDs on original and legacy TLDs would require a careful analysis, using historical data on registry prices and the evolution of demand. We have not carried out any such analysis for the purposes of this report.”⁶⁷

45. As to the opinion that registry operators may increase registry prices above the 10 percent increase that was allowed under the price control provisions, the Expert Report is completely speculative, and does not, standing alone, identify any harm to Namecheap.⁶⁸ Instead, to constitute any harm to Namecheap, the experts rely on even more assumptions discussed below.

46. Second, assuming that the registry operators have market power, and assuming that they will increase registry prices more than the 10 percent increase that was allowed under the price control provisions (despite the fact that there is no evidence they have done so since the price controls were removed a year-and-a-half ago), the experts claim that a “removal of a wholesale price control provision generates an injury or harm to a downstream reseller if the removal creates the potential of a cost increase and the downstream reseller cannot pass through the cost increase without losing customers.”⁶⁹ They also opine that Namecheap “would likely absorb part of the cost increase.”⁷⁰ The experts, however, provide absolutely no evidence that Namecheap cannot pass through price increases without losing customers (evidence that Namecheap itself should have been able to provide if it existed). Nor do the experts provide any evidence demonstrating that Namecheap will absorb any registry price increases.

⁶⁷ Expert Report ¶ 62.

⁶⁸ In any event, this theory depends entirely on the actions of the independent registry operators, which is insufficient to confer standing. *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d at 1087 (“Courts . . . are reluctant to grant standing where the alleged future injury depends on the actions of an independent third party.”) (citation omitted).

⁶⁹ Expert Report ¶¶ 47, 52–55.

⁷⁰ *Id.* ¶ 53.

47. Indeed, there have been numerous price increases in the .ORG, .BIZ, and .INFO TLDs over the past several years, and therefore ample data for Namecheap (or its experts) to analyze. Namecheap has had eighteen months since the 2019 Registry Agreements were renewed and ten months since it filed its IRP Request to marshal such evidence (if it existed), yet its affiants are silent on this issue. Likewise, the experts could have analyzed whether Namecheap has absorbed prior price increases, or whether Namecheap lost customers when it has previously increased registration prices (regardless of its reason for doing so). But they did not conduct any such analysis and did not even mention that they wanted to do so; therefore, their opinions comprise only unsupported conjecture.

48. Third, the experts claim that if “the removal of the price control provisions is unexpected, a mere likelihood that price controls will be effective in the future may be enough for the registrar’s expected profits – and its market value – to drop.”⁷¹ But, again, the Expert Report provides absolutely no factual support or analysis demonstrating that Namecheap’s expected profits or its market value has dropped in the year and a half since the 2019 Registry Agreements were executed, or is likely to drop in the future. Indeed, Namecheap sells domain name registrations for hundreds of TLDs, and there is no evidence that its expected profits or market value will drop if just three of those TLDs increase their prices above the 10 percent allowed under the prior price control provisions. Nor is there any analysis showing that, historically, Namecheap’s expected profits and market value dropped at all when the .ORG, .BIZ, and .INFO registry operators raised registry prices in the past. Simply put, there

⁷¹ *Id.* ¶¶ 51, 66–73, 78–79. There is also no evidence that the lack of price control provisions was unexpected, given that the Base Registry Agreement does not have a price control provision, and given that numerous legacy TLD registry agreements were transferred to the Base Registry Agreement before the 2019 Registry Agreements.

is no evidence that Namecheap’s future expected profits or market value are likely to drop if those three registry operators raise prices again in the future.

49. Importantly, the experts clarify that they “have not yet carried out a detailed analysis of the effectiveness for price controls in constraining the exercise of market power[.]”⁷² They then proceed to provide an overview of price increases for the .ORG, .BIZ, and .INFO TLDs over the past five years, and opine that the increases demonstrate that price controls were effective.⁷³ Clearly, the experts had data available to them regarding registry price increases, but they did nothing with this data that would support a theory of harm. And, more importantly, if Namecheap truly believed that it had been harmed by prior price increases, its executives could have submitted affidavits explaining the fact and nature of that harm—Namecheap should not have needed experts to theorize that such harm might occur in the future.

50. Finally, Namecheap’s experts opine that the market may infer that the price control provisions will be removed from the .NET and .COM registry agreements, which “results in a drop of profits that Namecheap can expect, and a reduction in Namecheap’s present value[.]”⁷⁴ This IRP, however, is about the absence of price control provisions in the .ORG, .BIZ, and .INFO Registry Agreements, not about price control provisions in any other registry agreements. There can be no harm to Namecheap resulting from any “market perception” regarding two other unrelated registry agreements.⁷⁵

⁷² *Id.* ¶ 68.

⁷³ *Id.* ¶¶ 68–69. The experts suggest that “the fact that a registry under price controls did not price its services at the cap level in some years does not necessarily indicate that price caps were not effective in those years . . . because ICANN had the possibility to review the evaluation of prices and . . . adjust the relevant price cap.” *Id.* ¶ 70. The price control provisions, however, are set by contract and ICANN cannot unilaterally adjust them during the term of the contract, nor is there any indication that ICANN has ever done so.

⁷⁴ *Id.* ¶¶ 76–77.

⁷⁵ The experts also acknowledge that the .COM Registry Agreement is “subject to an oversight by the US Department of Commerce.” Expert Report ¶ 76 n.35.

51. The documents or “evidence” that the experts rely on further demonstrate that the assumptions they are asking this Panel to make are not warranted. As reflected in Appendix I, the only documents that the experts relied upon in the course of their review are the attorney briefs and attorney emails, one (not both) of the Namecheap affidavits, and two data files: one identifying the average costs by TLD and provider, and one relating to the number of domain names under management for just five TLDs as of a single date, and not over time.⁷⁶ By failing to include the number of domain names under management over time, the experts could not even perform any analysis to determine whether there is a correlation between an increase in registry prices and a decrease in domain name registrations sold by Namecheap, nor have they apparently asked to do so.

52. Because Namecheap has established absolutely no actual harm and because a risk of future harm is insufficient under the Bylaws (and Namecheap failed to establish the likelihood of any potential future harm in any event), Namecheap does not have standing to pursue this IRP and the IRP should be dismissed.

B. Namecheap’s Claims Related To The Change Of Control Request Should Be Dismissed.

53. Namecheap’s claims related to the Change of Control Request should be dismissed because ICANN’s decision *not* to consent to the request renders these claims moot and, separately, Namecheap cannot demonstrate any harm resulting from this decision.

1. Namecheap’s claims are moot because ICANN did not consent to the Change of Control Request.

54. As explained above, Namecheap’s IRP Request advocates that ICANN should not consent to the request by the .ORG registry operator, PIR for indirect change of control, and

⁷⁶ *Id.*, Appendix I.

suggested that ICANN would violate its Articles and Bylaws if it did consent. After ICANN responded to Namecheap's IRP Request, ICANN elected to withhold its consent to the Change of Control Request (which is exactly what Namecheap had advocated for). ICANN made this decision after following its typical process, and not because of any argument by Namecheap, but nonetheless arrived at the result Namecheap desired. Therefore, there are no longer any ripe claims related to the Change of Control Request, and this claim should be dismissed as moot.

2. Namecheap has not demonstrated any harm resulting from ICANN's decision not to consent to the Change of Control Request.

55. Namecheap's theories of harm related to the Change of Control Request are even more theoretical. As noted above, neither of Namecheap's affiants even address the "harm" from ICANN's decision to withhold consent from the Change of Control Request; Namecheap's experts address the alleged harm, but their discussion is woefully speculative. Indeed, their entire theory of harm either relates to a purely philosophical "risk of uncertainty," or relates to transactions that are *not at issue* in this IRP.

56. Namecheap's experts claim that the proposed acquisition of PIR by Ethos Capital "presented a risk of an increase in input costs for Namecheap . . . because, if consummated, the acquisition could have enhanced an incentive for PIR to increase the price for registry services in relation to .ORG."⁷⁷ But whatever "risk of an increase in input costs" might have occurred, the transaction was *not* consummated because ICANN *withheld its consent* from the Change of Control Request. As a result, these speculative "harms" have not occurred and could not occur because the transaction did not occur.⁷⁸

⁷⁷ Expert Report ¶ 97.

⁷⁸ Namecheap's experts claim that ICANN has "implicitly acknowledged that the acquisition of PIR by a for-profit Ethos could harm Namecheap." Expert Report ¶ 100. In no way has ICANN implicitly acknowledged as much. But even so, the fatal flaw in Namecheap's experts' logic is that the proposed transaction *did not occur*.

57. Namecheap’s experts also assume that “ICANN has violated its Articles and/or Bylaws by not providing transparency on proposed and actual changes of controls,”⁷⁹ notwithstanding the numerous correspondence that ICANN publicly posted on its website. Based on that assumption, they opine that ICANN “introduced uncertainty which represents harm to Namecheap.”⁸⁰ Again, however, Namecheap’s experts fail to connect any alleged “uncertainty” with any actual or likely harm to Namecheap. ICANN withheld its consent from the Change of Control Request over nine months ago; accordingly, any harm resulting from some alleged “uncertainty” before ICANN made that decision should have been realized or at the very least, identifiable. But the experts do not state what harm might have occurred and, as already noted, Namecheap’s affiants are silent on the issue. And since Namecheap admits that uncertainty is inherent to all markets, it is hard even to imagine how Namecheap might have been harmed by events that, ultimately, went exactly as Namecheap hoped they would go.⁸¹

58. Namecheap’s experts also opine on the purported harm resulting from the proposed acquisition of Neustar (the parent of the .BIZ registry operator) by GoDaddy (Namecheap’s largest registrar competitor), and the proposed acquisition of Afilias (the .INFO registry operator) by Donuts (another third party).⁸² This IRP, however, does *not* relate to any of these third party transactions. Namecheap’s IRP Request only alleges that ICANN violated its Articles and Bylaws as a result of the price control provisions and the Change of Control Request. In fact, the transaction between Neustar and GoDaddy was announced in May 2020, and the transaction between Afilias and Donuts was announced in November 2020, long after

⁷⁹ Expert Report ¶ 46.

⁸⁰ *Id.* ¶ 100; *see also id.* ¶¶ 86, 101–103.

⁸¹ Prima Facie Showing of Standing ¶ 9.

⁸² Expert Report ¶¶ 88–95.

Namecheap filed its IRP Request. The Panel appeared to acknowledge the irrelevance of these transactions (except to the extent they relate to the price control provisions) when it denied Namecheap's requests for production seeking documents related to these third-party transactions.⁸³ Therefore, the experts' opinions on these third-party transactions are irrelevant.⁸⁴

59. In any event, many of the experts' opinions relate to anticompetitive effects of horizontal and vertical mergers. There are at least two governmental bodies in the United States—and numerous other governmental entities worldwide—that are tasked with assessing the possible anticompetitive effects of a proposed merger. ICANN is *not* one of those bodies. And simply being a registrar does not mean that Namecheap can institute an IRP against ICANN if unrelated, independent registry operators consider entering into a proposed transaction.

60. Despite having nearly a year to identify any harm Namecheap has suffered (or even likely will suffer) as a result of ICANN's consideration—and rejection—of the Change of Control Request, Namecheap utterly has failed to do so. Namecheap's claims related to the Change of Control Request should be dismissed.

CONCLUSION

61. Only a "Claimant" can file an IRP under ICANN's Bylaws. Namecheap has not demonstrated that it is a "Claimant" because it has not demonstrated that it has suffered a harm from ICANN's actions. Namecheap thus has no standing to pursue this IRP, and ICANN respectfully requests that Namecheap's IRP Request be dismissed in its entirety. Namecheap's claims related to the Change of Control Request are also moot, and ICANN requests that they be dismissed for this separate and independent reason.

⁸³ Procedural Order No. 5, Appendix B. The expert's "understand[ing] that Namecheap is asking for transparency about ICANN's role in, and deliberations on, these transactions," is therefore incorrect. Expert Report ¶ 41.

⁸⁴ For this reason, ICANN does not address the merits of these opinions, or whether they are sufficient to establish standing.

Respectfully submitted,
JONES DAY

Dated: 13 January 2021

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

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