

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 OPPOSITION TO NAMECHEAP'S REQUEST FOR
EMERGENCY ARBITRATOR AND INTERIM MEASURES OF PROTECTION**

Jeffrey A. LeVee
Kelly M. Ozurovich
JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071
Tel: +1.213.489.3939

Counsel to Respondent
The Internet Corporation for
Assigned Names and Numbers

11 March 2020

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
SUMMARY OF RELEVANT FACTS.....	3
I. ICANN AND ITS ACCOUNTABILITY MECHANISMS	3
II. THE .ORG TLD AND REGISTRY AGREEMENT	5
III. ICANN’S NEW GTLD PROGRAM.....	5
IV. ICANN REMOVES THE PRICE CONTROL PROVISIONS FOR SEVERAL LEGACY TLDS	7
V. PROPOSED CHANGE OF INDIRECT CONTROL OF PIR.....	9
VI. NAMECHEAP’S RECONSIDERATION REQUESTS AND COOPERATIVE ENGAGEMENT PROCESS.....	11
STANDARD OF REVIEW	12
ARGUMENT	13
I. NAMECHEAP IS NOT A CLAIMANT UNDER THE BYLAWS AND THEREFORE HAS NO STANDING TO REQUEST INTERIM RELIEF	13
II. NAMECHEAP WILL NOT SUFFER IMMEDIATE, IRREPARABLE HARM IN THE ABSENCE OF INTERIM RELIEF	14
III. NAMECHEAP’S REQUEST FOR IRP DOES NOT COME CLOSE TO RAISING “SUFFICIENTLY SERIOUS QUESTIONS” THAT COULD JUSTIFY INTERIM RELIEF	16
A. Namecheap has not raised serious questions related to the evaluation process of the Change of Control Request.....	16
B. Namecheap has not raised serious questions related to ICANN’s decision not to include a price control provision in the 2019 .ORG Registry Agreement.....	17
IV. THE BALANCE OF HARDSHIPS DOES NOT TIP IN NAMECHEAP’S FAVOR.....	20
CONCLUSION.....	22

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to and opposes the Request for Emergency Arbitrator and Interim Measures of Protection (“Emergency Request”) submitted by Namecheap, Inc. (“Namecheap”).

1. Both the Independent Review Process (“IRP”) proceeding and the Emergency Request should be dismissed: Namecheap lacks standing; Namecheap has not identified (much less suffered) any material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of ICANN’s Articles of Incorporation (“Articles”), Bylaws or other policies and procedures.

2. The Emergency Request seeks to require ICANN to amend unilaterally a contract between ICANN and Public Interest Registry (“PIR”) by adding a price control provision in the registry agreement for the .ORG top-level domain (“TLD”)—a contract that has been in place since June 2019. The Emergency Request also seeks to halt ICANN’s evaluation of a proposed change of indirect control of PIR to a third party, Ethos Capital, LLC (“Ethos Capital”). Namecheap is not a party to the .ORG registry agreement, Namecheap is not involved whatsoever in the proposed change of control of PIR, and Namecheap has not established any harm that has or could result from ICANN’s conduct.

3. The Emergency Request should be denied for four separate and independent reasons. First, Namecheap does not have standing to request the relief it seeks (or to pursue this IRP at all) because it has not established any harm as a result of ICANN’s conduct. ICANN and PIR entered into a new .ORG registry agreement that did not include a price control provision over eight months ago, yet Namecheap does not point to any harm it has suffered, or will likely suffer, as a result. Accordingly, Namecheap is not a proper “Claimant” under ICANN’s Bylaws

because it has not identified, much less suffered, “an injury or harm that is directly and causally connected to the alleged violation.”¹

4. Second, and relatedly, Namecheap has not identified any *irreparable* harm it would suffer in the absence of interim relief. Namecheap’s obligation in moving for emergency relief is to come forward with *evidence*, supported by an affidavit or declaration, of its impending irreparable harm; instead, Namecheap provides literally no evidence and simply offers vague, unsubstantiated, speculative claims of irreparable harm. Moreover, as to the price control provision, the relief Namecheap seeks is not even appropriate at this juncture. Disguised as a request to “preserve the *status quo*,” the relief Namecheap seeks is actually a *mandatory* injunction requiring ICANN to materially modify an existing registry agreement to impose a price control provision. The evidentiary hurdle to support a mandatory injunction is extremely high, yet Namecheap provides zero evidence of its harm.

5. Third, Namecheap has not carried its burden of demonstrating either a likelihood of success on the merits or sufficiently serious questions related to the merits. In fact, Namecheap has not raised *any* questions as to the merits. As to the price control provision, there is overwhelming evidence that ICANN made a reasoned, well-informed decision in consultation with the Internet community and the ICANN Board. That Namecheap disagrees with ICANN’s decision is not a basis for an IRP, the purpose of which is to evaluate whether ICANN acted consistent with its Articles and Bylaws. As to the proposed change of indirect control of PIR, Namecheap fails to identify how ICANN violated any of its policies, other than it should be more “transparent.” Such vague arguments do not raise serious questions related to the merits.

¹ Bylaws, Art. 4, § 4.3(b)(i), Reference Material (“RM”) 2.

6. Fourth, Namecheap has not and cannot demonstrate that the balance of hardships tips decidedly in its favor. As noted, Namecheap has not alleged, much less proven, any harm or hardship it would suffer in the absence of interim relief. ICANN, on the other hand, faces significant hardship if Namecheap's Emergency Request is granted. Indeed, imposing price control provisions would amount to a breach of the contract between ICANN and PIR. And stalling ICANN's evaluation of the proposed change of control of PIR would impede ICANN's processes, and prevent it from acting in the best interest of the Internet community as a whole.

7. Namecheap's Emergency Request should be denied.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

8. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN's Bylaws explain that its mission "is to ensure the stable and secure operation of the Internet's unique identifier systems."² ICANN is responsible for overseeing the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community.³

9. ICANN contracts with entities that operate gTLDs, which represent the portion of a domain name to the right of the final dot, such as ".ORG" or ".COM." These entities are known as registry operators. Registry operators separately contract with registrars— organizations through which individuals and entities (registrants) register domain names— referred to as a "Registry-Registrar Agreement." Registrars, such as Namecheap, are the

² Bylaws, Art. 1, § 1.1(a), RM 2.

³ *Id.*

intermediary between registrants and the registry operators that operate the gTLD. There are over 2,000 accredited registrars across the world.⁴

10. ICANN's Bylaws contain a number of "Core Values" to ensure that ICANN is carrying out its mission on behalf of the Internet community. The Core Values encourage ICANN to maintain a competitive DNS environment: (i) "[w]here feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market"; and (ii) "[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process."⁵

11. To ensure that ICANN remains accountable to the global Internet community, ICANN has established accountability mechanisms for review of ICANN actions and decisions. One such accountability mechanism is the IRP, in which aggrieved parties can seek independent, third-party review of ICANN Board or ICANN staff actions to determine if those actions are consistent with ICANN's Articles, Bylaws, and other internal policies and procedures.⁶ Only a "Claimant" can institute an IRP. A Claimant is defined under the Bylaws as an entity "that has been materially affected by a Dispute. 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."⁷

12. The Interim Supplementary Procedures, which, along with the Bylaws, govern the IRP, allow a Claimant to request interim relief "to maintain the status quo until such time as the

⁴ <https://www.icann.org/registrar-reports/accreditation-qualified-list.html>.

⁵ Bylaws, Art. 1, § 1.2(b)(iii) & (iv), RM 2.

⁶ Bylaws Art. 4, § 4.3.

⁷ Bylaws, Art. 4, § 4.3(b)(i) (emphasis added).

opinion of the IRP PANEL is considered by ICANN[.]”⁸ Again, only a Claimant may request interim relief.⁹

II. THE .ORG TLD AND REGISTRY AGREEMENT.

13. Since 2002, the registry operator for .ORG has been the Public Interest Registry, also known as PIR.¹⁰ On 2 December 2002, ICANN entered into a registry agreement with PIR regarding PIR’s operation of the .ORG gTLD; that agreement was renewed in 2006 and 2013 (the “.ORG Registry Agreement”).¹¹ These earlier agreements contained a price control provision “specif[ying] the maximum price PIR may charge for Registry Services.”¹²

14. In 2002, there were only fifteen TLDs in the DNS, including .COM, .EDU, and .GOV.¹³ In 2004 and 2005, ICANN added seven additional TLDs to the DNS, including .JOBS, .POST, and .TRAVEL.¹⁴ These early TLDs are often referred to in the Internet community as “legacy TLDs.” Many of the initial registry agreements between ICANN and the registry operators for these legacy TLDs contained price control provisions.¹⁵

III. ICANN’S NEW GTLD PROGRAM.

15. As part of its mission “to promote and sustain a competitive environment in the DNS market,”¹⁶ ICANN and its Generic Names Supporting Organization (“GNSO”) sought to introduce new competition into the DNS through new generic TLDs (“gTLD”).¹⁷ ICANN

⁸ Interim Supplementary Procedures (25 Oct. 2018) (“Interim Supp. Procedures”) § 10, RE-1.

⁹ *See id.*

¹⁰ 2002 .ORG Registry Agreement, RM 16.

¹¹ The .ORG Registry Agreement refers to the registry agreement as amended in 2013, RM 18.

¹² RM 16, Appendix G, at p. 1.

¹³ New gTLD Fact Sheet, RE-2.

¹⁴ *Id.*

¹⁵ *See, e.g.*, .COM Registry Agreement, § 7.3 (22 Sept. 2010), RE-3.

¹⁶ Bylaws, Art. 1, § 1.2, RM 2.

¹⁷ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 Aug. 2007), RE-4; ICANN Adopted Board Resolutions (26 June 2008), RE-5.

developed what it referred to as the New gTLD Program, through which any interested entity could apply for the opportunity to create and operate new gTLDs. The Program was designed to enhance diversity, creativity, and consumer choice in gTLDs, and to provide the benefits of innovation to consumers.¹⁸

16. Simultaneously, ICANN developed a Base Registry Agreement that would apply to all registry operators that secured the right to operate a new gTLD. A critical difference between the .ORG Registry Agreement and the Base Registry Agreement is that the Base Registry Agreement does not contain any price control provision.¹⁹ The Base Registry Agreement, however, “does contain requirements designed to protect registrants from a price perspective.”²⁰ Section 2.10 requires registry operators to provide registrars with thirty days’ advance notice of any price increase for initial registrations, and six months’ advance notice of price increases for “renewals of domain name registrations.”²¹ Registry operators must also provide “uniform pricing for renewals of domain name registrations,” and allow initial domain registrants to renew for up to ten years prior to any price changes.²²

17. The application window for the New gTLD Program officially launched in 2012.²³ ICANN received 1,930 applications for new gTLDs, each of which proceeded through, or are proceeding through, the evaluation process set forth in ICANN’s Applicant Guidebook.²⁴ Applications that successfully passed the evaluation process and contention set resolution (if

¹⁸ Applicant Guidebook, Preamble, RE-6.

¹⁹ *See, e.g.*, Base Registry Agreement (31 July 2017), § 2.10, RE-7. The Base Registry Agreement has been amended several times, but the pricing provision has remained unchanged since the first version.

²⁰ 26 July 2019 Letter from Cyrus Namazi to Zak Muscovitch, at p. 1, RE-8.

²¹ RE-8, at p. 1; RE-7, § 2.10.

²² RE-7, § 2.10.

²³ ICANN New gTLD Program Timeline, RE-9.

²⁴ ICANN New gTLD Program Statistics, RE-10.

applicable) proceeded to contracting with ICANN, during which the parties executed the Base Registry Agreement.²⁵

18. After contracting, ICANN took the necessary steps to delegate the gTLD into the DNS. ICANN delegated its first new gTLD to the DNS in October 2013 and, since then, has introduced over 1,200 new gTLDs into the DNS.²⁶ Just a few examples of new gTLDs that are now operational include .PHONE, .HBO, .INTEL, .MAP, .FOOD, and .NYC.²⁷

IV. ICANN REMOVES THE PRICE CONTROL PROVISIONS FOR SEVERAL LEGACY TLDS.

19. After finalizing the Base Registry Agreement, ICANN began working with legacy TLD registry operators to transition them to the Base Registry Agreement for consistency across all registry operators.²⁸ Pursuant to those negotiations, several legacy TLDs, including .PRO, .TEL, .TRAVEL, and .JOBS (among others) have adopted the Base Registry Agreement, which has no price control provision.²⁹

20. In anticipation of the expiration of the .ORG Registry Agreement on 30 June 2019, ICANN entered into bilateral negotiations with PIR to enter into a renewed registry agreement for .ORG (“2019 .ORG Registry Agreement”). ICANN staff consulted with the ICANN Board and concluded that, following the trend of other legacy TLDs and the negotiations between ICANN and PIR, the 2019 .ORG Registry Agreement should substantially mirror the Base Registry Agreement.³⁰ But before executing the 2019 .ORG Registry Agreement, ICANN

²⁵RE-7. There were some registry operators that had minor modifications to the Base Registry Agreement, but the majority of operators executed the Base Registry Agreement in full.

²⁶ RE-9; RE-10.

²⁷ ICANN New gTLDs, Delegated Strings, RE-11.

²⁸ RE-8, at p. 1.

²⁹ *Id.*

³⁰ *Id.*, at p. 2.

opened a public comment period, seeking input from the Internet community on the proposed 2019 .ORG Registry Agreement. As to the price control provision, ICANN explained:

In alignment with the base registry agreement, the price cap provisions in the current .org agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .org renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.³¹

21. ICANN received numerous public comments from the Internet community, some of which opposed removal of the price control provision,³² and some of which supported removal. As one public comment explained, moving to “market-based pricing makes sense with today’s healthy TLD market, which is populated with many choices for consumers to choose from.”³³

22. ICANN analyzed the public comments and published a Report of Public Comments (“Report”).³⁴ In that Report, ICANN explained:

Removing the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate,

³¹ Proposed Renewal of .org Registry Agreement, RE-12.

³² The number of unique public comments ICANN received is difficult to quantify. Namecheap argues that most of the public comments opposed the removal of the price controls, but the ICANN Ombudsman, a neutral dispute resolution practitioner provided for by ICANN’s Bylaws, concluded that many of the comments “seem clearly to be computer generated,” and equated them to “spam.” See Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2 at p. 3, RE-13.

³³ ICANN Staff Report of Public Comment Proceeding, Proposed Renewal of .org Registry Agreement (3 June 2019), at p. 6, Claimant’s Annex 5.

³⁴ *Id.*, at p. 1.

depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.³⁵

23. As always, ICANN 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.”³⁶

24. In June 2019, ICANN staff conferred again with the ICANN Board and decided to proceed with the 2019 .ORG Registry Agreement as proposed.³⁷ Executed on 30 June 2019, the 2019 .ORG Registry Agreement did not include a price control provision, 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.³⁸

25. Like the Base Registry Agreement, the 2019 .ORG Registry Agreement requires PIR to adhere to “Public Interest Commitments,” including that PIR “will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.”³⁹

V. PROPOSED CHANGE OF INDIRECT CONTROL OF PIR.

26. On 14 November 2019, PIR submitted a request for indirect change of control of PIR (“Change of Control Request”) and informed ICANN that PIR’s parent entity Internet Society (“ISOC”) had entered into an equity purchase agreement with Ethos Capital, in which

³⁵ Claimant’s Annex5, at p. 8.

³⁶ *Id.*, at pp. 1, 8.

³⁷ RE-8, at p.2.

³⁸ 2019 .ORG Registry Agreement, § 2.10, RM 29.

³⁹ *Id.*, Specification 11.

Ethos Capital would “acquire 100% of the equity interests of PIR.”⁴⁰ PIR would remain the registry operator, and it affirmed that Ethos Capital remains committed to maintaining PIR’s dedication to the Internet community and strong ethical standards:

Ethos Capital is committed to furthering PIR’s mission and values that have long distinguished it from other registries, including its ***deep commitment to community support*** and activities, high ethical standards, leadership in anti-abuse activities, and quality domain registrations. Ethos Capital also intends to create a PIR Stewardship Council, on which it will invite prominent and respected community members to serve, dedicated to upholding PIR’s core founding values and providing continued support through a variety of community programs.”⁴¹

27. Pursuant to the terms of the 2019 .ORG Registry Agreement, ICANN’s original deadline to consent or withhold consent to the Change of Control Request was 14 December 2019. ICANN asked PIR for additional time to review the request, and PIR granted ICANN an extension until 17 February 2020.⁴² In the course of its consideration of the Change of Control Request, ICANN has sought additional information from PIR.⁴³

28. On 23 January 2020, ICANN received a letter from the California Attorney General seeking information regarding the proposed change in control of PIR in “order for the Attorney General to analyze the impact to the nonprofit community, including to ICANN.”⁴⁴ ICANN is cooperating fully with the Attorney General’s investigation.⁴⁵ In light of the California Attorney General’s investigation, as well as ICANN’s own evaluation of the Change

⁴⁰ 14 November 2019 Letter from Brian Cimboric to ICANN, RE-14.

⁴¹ *Id.* (emphasis added).

⁴² 30 January 2020 Letter from John Jeffrey to Jon Nevett, Claimant’s Annex 19.

⁴³ 9 December 2019 Letter from John Jeffrey to Andrew Sullivan and Jon Nevett, RE-15.

⁴⁴ 23 January 2020 Letter from Sandra I. Barrientos to ICANN, at p. 1, Claimant’s Annex 17.

⁴⁵ ICANN Receives Letter from California Attorney General Regarding .ORG Change of Control, at p. 1, Claimant’s Annex 18 (ICANN publicly announces the investigation and that it “is fully cooperating with the Attorney General’s request for information.”).

of Control Request, ICANN sought additional extensions from PIR regarding the deadline to respond to the request.⁴⁶ To date, PIR has granted ICANN an extension until 20 March 2020.⁴⁷

29. Most importantly for these purposes, irrespective of whether Ethos Capital becomes the owner of PIR, the 2019 .ORG Registry Agreement will remain in effect. That agreement does not have price controls, and should Ethos Capital become the owner of PIR, PIR will continue to be obligated to comply with all of the covenants⁴⁸ in the 2019 .ORG Registry Agreement.⁴⁹

VI. NAMECHEAP'S RECONSIDERATION REQUESTS AND COOPERATIVE ENGAGEMENT PROCESS.

30. On 12 July 2019, Namecheap submitted a Reconsideration Request seeking review of ICANN's decision to not include price controls in the 2019 .ORG Registry Agreement.⁵⁰ (Namecheap also objected to the removal of the price controls in the .INFO registry agreement.) A Reconsideration Request is another accountability mechanism established by ICANN's Bylaws in which "any person or entity materially affected by an action or inaction" of the ICANN Board or ICANN staff may request review or reconsideration of that action or inaction.⁵¹ The Board Accountability Mechanisms Committee ("BAMC"), a

⁴⁶ Claimant's Annex 19.

⁴⁷ Originally, PIR only granted ICANN an extension until 29 February 2020, but later extended the deadline to 20 March 2020. ICANN requested a further extension until April 2020, but PIR has not yet responded.

⁴⁸ RM-29, at § 7.5 ("[A]ny agreement to assign or subcontract any portion of the operations of the TLD... must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder, and Registry Operator shall continue to be bound by such covenants, obligations and agreements.").

⁴⁹ PIR has also recently proposed to its community that PIR add a Public Interest Commitment amendment to the 2019 .ORG Registry Agreement limiting its ability to increase registration and renewal prices to no more than 10% per year on average for the next several years. *See* "PIR Public Engagement on PIC and Stewardship Counsel, RE-16; "How Our Public Interest Commitment Ensures a Bright Future for .ORG" (28 Feb. 2020), RE-17. The proposal is still under consideration.

⁵⁰ Namecheap filed another Reconsideration Request on 8 January 2020, challenging ICANN's consideration of the Change of Control Request; the Board has not taken action on that Reconsideration Request yet. *See* Reconsideration Request 20-1, Claimant's Annex 9.

⁵¹ Bylaws, Art. 4, § 4.2, RM 2.

committee of the ICANN Board, is empowered to hear and consider requests for reconsideration.⁵²

31. On 21 November 2019, the BAMC denied Namecheap’s Reconsideration Request, finding that Namecheap failed to establish that ICANN violated its Articles or Bylaws when it decided not to include price controls in the 2019 .ORG Registry Agreement.⁵³

32. Namecheap then engaged with ICANN via the Cooperative Engagement Process (“CEP”), which is provided for in the Bylaws. The CEP is a non-binding, voluntary process in which “*prior to* the filing of a Claim,” the parties “attempt[] to resolve and/or narrow the Dispute.”⁵⁴ The Bylaws “strongly encourage[]” parties to participate in the CEP before resorting to an IRP.⁵⁵ Namecheap initiated the CEP on 18 November 2019 and, while the parties were still in the midst of cooperatively engaging, Namecheap filed its IRP on 25 February 2020, including this Emergency Request.⁵⁶

STANDARD OF REVIEW

33. ICANN’s Bylaws and Supplementary Procedures allow for interim relief in the form of a stay to maintain the status quo.⁵⁷ Interim relief is warranted only if *all* of the following factors are met:

“(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or
(B) sufficiently serious questions related to the merits; and

⁵² *Id.*

⁵³ Final Determination of the ICANN Board of Directors Reconsideration Request 19-2 (21 Nov. 2019), Claimant’s Annex 11.

⁵⁴ Bylaws, Art. 4, § 4.3(e)(i), RM 2.

⁵⁵ *Id.*

⁵⁶ *See generally*, Namecheap’s Request for IRP.

⁵⁷ Bylaws Art. 4, § 4.3(p), RM 2; Interim Supp. Procedures § 10, RE-1.

(iii) A balance of hardships tipping decidedly toward the party seeking relief.”

34. Only a Claimant can institute an IRP or seek interim relief.⁵⁸ As noted above, 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.”⁵⁹

ARGUMENT

I. NAMECHEAP IS NOT A CLAIMANT UNDER THE BYLAWS AND THEREFORE HAS NO STANDING TO REQUEST INTERIM RELIEF.

35. Namecheap has not established, and cannot establish, that it is a Claimant under the Bylaws. As a result, Namecheap lacks standing to pursue this IRP, including its Emergency Request.

36. Namecheap claims that it is an “ICANN-accredited registrar that is directly impacted by” ICANN’s actions.⁶⁰ But it does not offer a *single piece of evidence* to support that assertion. Nor does Namecheap explain how it has been harmed at all, much less how it has been harmed “directly and causally” by ICANN’s conduct. Simply being a registrar that sells .ORG domain names does not establish that Namecheap has been “materially affected” by ICANN’s actions with respect to specific TLDs.

37. Further, one of the actions Namecheap challenges here is ICANN’s decision not to include price controls in the 2019 .ORG Registry Agreement between ICANN and PIR. Namecheap is not a party to the 2019 .ORG Registry Agreement and, explicitly, is not a third-party beneficiary of that agreement. Section 7.8 of the agreement provides that the agreement

⁵⁸ Bylaws, Art. 4, § 4.3(b), RM 2; InterimSupp. Procedures § 10, RE-1.

⁵⁹ Bylaws, Art. 4, § 4.3(b)(i), RM 2.

⁶⁰ Emergency Request, at p. 1.

“will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, *including any registrar* or registered name holder.”⁶¹

38. Thus, Namecheap does not meet the definition of a Claimant under the Bylaws. It has no standing to pursue this IRP and, thus, no standing to pursue its Emergency Request. Namecheap’s Emergency Request (and its request for IRP) should be denied on this basis alone.

II. NAMECHEAP WILL NOT SUFFER IMMEDIATE, IRREPARABLE HARM IN THE ABSENCE OF INTERIM RELIEF.

39. A critical aspect of an application for any interim relief in an IRP is that the applicant demonstrate it will suffer immediate, irreparable harm absent a stay.⁶² Namecheap claims that it will suffer irreparable harm because “[t]he *potential* of unrestricted price increases in combination with .org being run by a for-profit company will have a direct impact on Namecheap’s domain name registration business as well as additional services.”⁶³ But Namecheap does not explain how it will be impacted negatively, and it fails to identify any material harm that has occurred or might occur. Despite having months to prepare its IRP papers, and despite the fact that the price controls have not been in effect for the past eight months, Namecheap does not offer a single witness declaration, expert report, or other evidence to support its claim that it has suffered any harm or will suffer irreparable harm. The absence of such evidence demonstrating harm should, in and of itself, be outcome-determinative with respect to the Emergency Request.

40. Moreover, the purpose of interim relief is to “maintain the *status quo*.”⁶⁴ The status quo is, and has been for the last eight months, no price controls pursuant to the 2019 .ORG

⁶¹ RM 29, § 7.8.

⁶² See Interim Supp. Procedures § 10, RE-1.

⁶³ Emergency Request, at p. 11 (emphasis added).

⁶⁴ Interim Supp. Procedures § 10, RE-1.

Registry Agreement. As a result, Namecheap is actually seeking to require ICANN to unilaterally amend the 2019 .ORG Registry Agreement by adding a price control provision. This is *not* preserving the *status quo* but is, instead, tantamount to a mandatory injunction, where the standard is substantially higher.⁶⁵

41. Namecheap’s second assertion of irreparable injury—that ICANN might frustrate the California Attorney General’s investigation—is even more speculative and, frankly, offensive.⁶⁶ Claims of irreparable injury must be buttressed with evidence,⁶⁷ yet Namecheap offers literally no evidence that ICANN will do anything other than cooperate with the California Attorney General’s investigation. Indeed, Namecheap itself acknowledges that the manner of irreparable harm “is not even foreseeable.”⁶⁸ And, contrary to Namecheap’s speculation, ICANN has publicly stated that it will cooperate fully with the Attorney General’s investigation.⁶⁹

⁶⁵ *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994), RELA-10 (finding that a mandatory injunction is “subject to a higher degree of scrutiny because such relief is particularly disfavored under the law of this circuit”); *Ivt Gurney Holding v. Gurney*, 18 Cal. App. 5th 22, 29 (2017), RELA-7 (“A preliminary mandatory injunction is rarely granted, and is subject to stricter review on appeal.”) (Internal quotation marks and citation omitted).

⁶⁶ Namecheap claims that IRP Panels have “always granted the claimants’ requests” when they have sought to preserve the *status quo* and prevent ICANN from granting the operation of a registry to a third party. But in *each* of the prior IRP proceedings it cites, the Claimants were challenging ICANN’s decision to proceed to contracting and then delegation for a *new* gTLD (i.e., a gTLD that had not yet been delegated into the DNS), and sought interim relief to prevent the contracting/delegation of that gTLD until the IRP could be resolved. Thus, for example, DCA was successful in obtaining interim relief in an IRP to prevent ICANN from delegating .AFRICA into the DNS so that it could be operated by a competing registry, ZACR, that also applied to operate .AFRICA. Here, .ORG has already been delegated into the DNS, so the concerns about delegating never-before-used gTLDs are not present.

⁶⁷ *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988), RELA-3 (“Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.”) (emphasis in original) (internal citation omitted); *iFreedom Direct Corp. v. McCormick*, 662 F. App’x 550, 551 (9th Cir. 2016), RELA-6 (upholding district court decision denying motion for preliminary injunction in part because plaintiff’s evidence of a likelihood of irreparable harm “was too speculative”); *DotConnectAfrica Trust v. ICANN*, Case No. BC607494, Order (3 February 2017) at p. 4, RELA-4 (denying DCA’s motion for preliminary injunction because the harm was “highly speculative.”).

⁶⁸ Emergency Request, at p. 12.

⁶⁹ See Claimant’s Annex 18, at p. 1 (ICANN public announcement about the investigation and affirmation that it “is fully cooperating with the Attorney General’s request for information.”).

III. NAMECHEAP’S REQUEST FOR IRP DOES NOT COME CLOSE TO RAISING “SUFFICIENTLY SERIOUS QUESTIONS” THAT COULD JUSTIFY INTERIM RELIEF.

42. Namecheap must show either a likelihood of success on the merits or that it has raised “sufficiently serious questions related to the merits” of its IRP. Namecheap bases its request on the lesser showing that its request raises serious questions going to the merits of its claims. But Namecheap has not come anywhere close to raising the type of serious questions that justify interim relief.

A. Namecheap has not raised serious questions related to the evaluation process of the Change of Control Request.

43. Namecheap argues that PIR made commitments to the public interest when it secured the right to operate .ORG that are incompatible with operation by a private investment firm like Ethos Capital.⁷⁰ This argument, however, is not at issue in this Emergency Request (or the IRP). The Bylaws are clear that the purpose of an IRP is to consider whether ICANN complied with its Articles or the Bylaws; an IRP does *not* evaluate conduct by registry operators or other third parties.⁷¹

44. Further, even if an IRP was appropriate on this issue, and even if Namecheap had standing to complain (which it does not), Namecheap does not provide a single piece of evidence to support its assertion that a private investment firm should not be involved in the operation of .ORG.

45. Additionally, the 2019 .ORG Registry Agreement is clear that an agreement to assign any portion of TLD operation to a third party “must mandate compliance with all covenants, obligations, and agreements” by PIR under the 2019 .ORG Registry Agreement.⁷²

⁷⁰ Emergency Request, at p. 13.

⁷¹ Bylaws, Art. 4, § 4.3, RM 2.

⁷² RM 29, § 7.5.

The provisions in the 2019 .ORG Registry Agreement—including the Public Interest Commitments in Specification 11 and the absence of a price control provision—will remain in effect.⁷³

46. Namecheap’s only argument regarding ICANN’s conduct is that ICANN “is not as open and transparent as it should be about its evaluation of PIR’s request for change of control.”⁷⁴ But again, Namecheap fails to offer *any facts* as to how ICANN has not been “as transparent as it should be,” or how any such conduct amounts to a violation of ICANN’s Articles or Bylaws. And even a cursory review of ICANN’s website shows that ICANN has been extremely transparent, posting updates and numerous correspondence between the entities on an ongoing basis.⁷⁵

47. In sum, Namecheap has not raised *any* question, let alone serious questions, about the likelihood of its success on this claim.

B. Namecheap has not raised serious questions related to ICANN’s decision not to include a price control provision in the 2019 .ORG Registry Agreement.

48. Namecheap’s arguments regarding the lack of a price control provision in the 2019 .ORG Registry Agreement are similarly baseless. Namecheap claims that ICANN’s decision was made “without granting the Internet community and those entities most affected with a useful and meaningful opportunity to assist in the policy development process,” and without responding to concerns raised by the public comment process.⁷⁶ This is demonstrably false.

⁷³ PIR has also recently proposed to its community that PIR add a Public Interest Commitment amendment to the 2019 .ORG Registry Agreement limiting its ability to increase registration and renewal prices to no more than 10% per year on average for the next several years. *See* RE-16; RE-17. The proposal is still under consideration.

⁷⁴ Emergency Request, at p. 13.

⁷⁵ *See, e.g.*, Claimant’s Annex 18; 31 January 2020 Letter from Jeffrey Rabkin to Sandra I. Barrientos, RE-18.

⁷⁶ Emergency Request, at p. 14.

49. ICANN staff involved “the Internet community and those most affected” by posting the proposed registry agreement for public comment. ICANN then analyzed all public comments (some of which favored removal of the price controls)⁷⁷ and published a Report summarizing the comments and addressing the concerns of those who opposed the changes.⁷⁸ ICANN staff explained that lack of inclusion of a price control provision furthered its core value of “promot[ing] competition in the registration of domain names.”⁷⁹ ICANN also explained that the Base Registry Agreement “lays the framework for consistency for registries, registrars, and registrants,” and “affords protections to existing registrants.”⁸⁰ In that Report, ICANN also committed to consider “the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement,”⁸¹ which it did.

50. To be clear, ICANN is not under a duty to yield to the public comments, opinions, or arguments of any one entity or person, or to side with any one position (whether or not that position might appear to be the “majority” position of the ICANN community). Instead, the Articles and Bylaws require ICANN to make “decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”⁸² That is *exactly* what ICANN did here. That Namecheap disagrees with ICANN’s decision is not a basis for an IRP (much less emergency relief).⁸³

⁷⁷ Claimant’s Annex5, at p. 6 (moving to “market-based pricing makes sense with today’s healthy TLD market, which is populated with many choices for consumers to choose from”).

⁷⁸ Namecheap claims that ICANN received “an unprecedented number of public comments coming from an entire cross-section of the Internet community.” Upon review, however, the ICANN Ombudsman concluded that many of the comments “seem clearly to be computer generated,” and equated them to “spam.” See RE-13, at p. 3.

⁷⁹ Claimant’s Annex5, at p. 8.

⁸⁰ *Id.*

⁸¹ *Id.*, at pp. 1, 8.

⁸² Bylaws Art. 1, §§ 1.1, 1.2, RM 2.

⁸³ Namecheap also claims that ICANN’s decision not to include a price control provision in the 2019 .ORG Registry Agreement is “contrary to the policy requirement that the registry fee charged to accredited registrars be ‘as low as feasible consistent with the maintenance of good quality service.’” Emergency Request, at p. 16. But price control

51. Namecheap’s argument that ICANN should unilaterally reinsert a price control provision into the 2019 .ORG Registry Agreement because it “must treat like cases alike and unlike cases differently” is nonsensical because the absence of a price control provision—not the preservation of them—has resulted in ensuring consistency across most registry operators (and “treating like cases alike”); indeed, this was a clear motivation for aligning the 2019 .ORG Registry Agreement with the Base Registry Agreement. Further, numerous legacy TLDs have already made the transition to the Base Registry Agreement.⁸⁴ ICANN is treating .ORG no differently from these legacy TLDs and all other new gTLDs. In short, ICANN is furthering—not violating—the Bylaws provision requiring ICANN to apply its policies equitably.⁸⁵

52. Namecheap also claims that the absence of the price control provision in the 2019 .ORG Registry Agreement violates the renewal clause in Section 4.2 of the 2013 version of the .ORG Registry Agreement. To be clear, Namecheap is not a party to that contract and thus has no standing to enforce it.⁸⁶ In any event, Namecheap is wrong. First, the 2019 .ORG Registry Agreement supersedes the prior .ORG Registry Agreement; accordingly, Section 4.2 has no force or effect on the parties. Second, even if the prior .ORG Registry Agreement was still in effect, Section 8.6 specified that the parties can mutually agree to modify the agreement; the 2019 .ORG Registry Agreement reflects the parties’ intent to do so.⁸⁷

provisions are not necessary to constrain pricing in a market saturated with 1,200 other gTLDs that are not subject to price control provisions.

⁸⁴ RE-8, at p. 1.

⁸⁵ Namecheap also claims that ICANN’s only justification for removal of the price controls is its “after-the-fact justification” based on Dennis Carlton’s 2009 report. Emergency Request, at pp. 15–16. Presumably, Namecheap is referring to the BAMC’s decision to deny Namecheap’s Reconsideration Request 19-2. But the BAMC found that ICANN had numerous justifications for not including the price control provision, only one of which related to Dr. Carlton’s analysis.

⁸⁶ Section 7.8 of the Registry Agreement provides that the agreement “will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.” RM 29, § 7.8.

⁸⁷ See RM 18, § 8.6 (Amendments and Waivers).

53. Third, Section 4.3 of the prior .ORG Registry Agreement required ICANN and PIR to “engage in good faith negotiations at regular intervals. . . regarding possible changes to the terms of the Agreement.”⁸⁸ That is exactly what ICANN and PIR have done here.

54. In short, Namecheap has not raised any questions, much less serious questions, about the merits of its claim, and the Emergency Request should be denied on this basis.

IV. THE BALANCE OF HARDSHIPS DOES NOT TIP IN NAMECHEAP’S FAVOR.

55. The final requirement for interim relief is that Namecheap demonstrate a “balance of the hardships tipping decidedly towards the party seeking the relief.”⁸⁹ Where, as here, the party requesting interim relief fails to show a likelihood of success on the merits, the burden to demonstrate that the balance of hardships tips in its favor is higher. The party must establish that the balance of hardships “tips sharply” in its favor under the “sliding scale” approach to preliminary injunctions that courts employ.⁹⁰ Namecheap has not established that the balance of hardships tips in its favor, let alone “sharply tips” in its favor.

56. As discussed above, Namecheap will not “suffer severe and irreparable harm” if its Emergency Request is denied. In fact, Namecheap has not identified (much less with the requisite admissible evidence) *any* harm it will suffer or has suffered in the eight months since

⁸⁸ RM 18, at § 4.3 (Changes).

⁸⁹ Bylaws Art. 4, § 4.3(p), RM 2; Interim Supp. Procedures § 10, RE-1; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), RELA-11 (courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”) (citation omitted); *Burlington Resources Inc. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009) ¶ 81, RELA-2 (quoting *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on revocation of provisional measures of 13 May 2008, ¶ 72); UNCITRAL’s Model Law on Commercial Arbitration Art. 17(A)(1)(a), RE-19 (requiring that a party requesting relief demonstrate that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”); *Paushok v. Mongolia*, Order on Interim Measures (2 September 2008) ¶¶ 68-69, RELA-9.

⁹⁰ *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011), RELA-1; *see also Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F. 3d 848, 856 (9th Cir. 2017), RELA-5; *M.L. King v. Meese*, 43 Cal. 3d 1217, 1227 (1987), RELA-8 (“[T]he more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue.”).

the 2019 .ORG Registry Agreement was executed. And, as to the proposed change of control of PIR, it is unclear how Namecheap will be harmed at all. The proposed change of control has no impact on the 2019 .ORG Registry Agreement, which already does not include a price control provision.

57. ICANN, on the other hand, faces significant hardship if the Emergency Request is granted. Namecheap essentially asks ICANN to breach its contract with third-party PIR and unilaterally add a price control provision into the 2019 .ORG Registry Agreement, which could subject ICANN to litigation or other disputes with PIR. This disproves Namecheap's claim that ICANN will not face "any financial harm"⁹¹ if its Emergency Request (or IRP) is granted.

58. As to the Change of Control Request, interim relief would result in real harm to ICANN, its processes, and its mission. In fulfilling ICANN's mission of ensuring the "stable and secure operation" of the Internet's DNS, ICANN is committed to carrying out its mission "through open and transparent processes that enable competition and open entry in Internet-related markets"; making "decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment"; and "depending on market mechanisms to promote and sustain a competitive environment in the DNS market."⁹² The relief Namecheap requests would disrupt ICANN's processes, and stymie its ability to consider the Change of Control Request in accordance with those processes.

59. Namecheap's argument that ICANN faces no hardship because it has already asked for an extension from PIR to consider the Change of Control Request is nonsensical. IRPs last for months, even years, which is much longer than the short extensions ICANN has sought from PIR. Any imposition of interim measures would cause ICANN to face significant and

⁹¹ Emergency Request, at p. 17.

⁹² Bylaws Art. 1, §§ 1.1, 1.2, RM 2.

lasting hardship if its decision on the Change of Control Request is stalled for the duration of this IRP proceeding.

60. Finally, the Emergency Panelist must also balance the hardships on all other interested parties, including PIR, Ethos Capital, and PIR's parent ISOC.⁹³ Namecheap's Emergency Request, if granted, threatens significant hardship on these entities by proposing to substantially delay ICANN's consideration of the proposed change of control of PIR, and such delay could negatively impact the proposed sale of PIR by ISOC to Ethos Capital and/or the availability for funding for that proposed transaction, among other potential harms.

61. Given the harm to ICANN, PIR, Ethos Capital, ISOC and the Internet community as a whole, there is no conceivable way that the balance of the hardships tips decidedly in Namecheap's favor.

CONCLUSION

62. In sum, Namecheap has not demonstrated that it is a Claimant under the Bylaws and therefore has no standing to pursue this Emergency Request (or the IRP). Further, Namecheap has not met the standard for interim relief: it has provided no evidence of any irreparable harm it will suffer; has not raised any questions, let alone serious questions, as to the merits of its claims; and has not established that the balance of hardships tips decidedly in its favor. Accordingly, ICANN respectfully requests that Namecheap's Emergency Request be denied.

Respectfully submitted,

JONES DAY

By:  _____
Jeffrey A. LeVee

Counsel for Respondent ICANN

Dated: March 11, 2020

⁹³ See Interim Supp. Procedures § 10, RE-1.